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EVALUATION REPORT ON THE
FOURTH ROUND OF MUTUAL EVALUATIONS
"THE PRACTICAL APPLICATION OF THE EUROPEAN ARREST WARRANT AND
CORRESPONDING SURRENDER PROCEDURES BETWEEN MEMBER STATES"

REPORT ON ITALY

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1. INTRODUCTION

- 1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.
- 1.2. Following the discussion of a proposal introduced by the Luxembourg Presidency concerning the topic of the fourth round of mutual evaluations ¹, the MDG of 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG of 11 July that the evaluation questionnaire was to be prepared by the UK Presidency.
- 1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG on 9 September 2005.²
- 1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.
- 1.5. At its meeting on 28 October 2005 the MDG also discussed and approved 13824/05, containing the revised sequence for the mutual evaluation visits. Italy is the 23rd Member State to be evaluated during the fourth round of evaluations.

¹ 9602/05 - Orientation debate on a proposed Mutual Evaluation exercise.

² 6206/1/06 REV 1 - Timetable for 2006 and designation of experts.

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- 1.6. The experts assigned to undertake this evaluation were: Ms Irini PANTAZI-MELISTA (Public Prosecutor, Court of Appeal, Athens, Greece), Mr Philippe FAISANDIER (Public Prosecutor, Court of Appeal, Pau, France) and Mr Peter Paul ZAMMIT (Police Superintendent, Prosecutions Unit, Police General Headquarters, Floriana, Malta). Two observers were also present: Ms Katerina LOIZOU (Eurojust) and Mr Peter KORTENHORST (European Commission), together with the General Secretariat of the Council.
- 1.7. This report was prepared by the expert team with the assistance of the Council Secretariat, based upon their findings arising from the evaluation visit to Italy, and upon Italy's detailed and helpful responses to the evaluation questionnaire and to some requests for further information.
- 1.8. The report makes reference to differing processes in respect of conviction and prosecution cases only insofar as there is a divergence of practice between the two procedures.
- 1.9. The expert team's overarching objective was to evaluate the distinct practical processes operated and encountered by Italy both as issuing and as executing Member State, to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as it felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

2. THE AUTHORITIES AND THE LEGAL BASIS

2.1 THE AUTHORITIES

Courts. In the Italian judicial system, the administration of ordinary criminal justice is provided by several courts/judges.¹

The 165 *Tribunali ordinari* (Trial Courts, judging in first instance), which are often referred to as *Tribunali*, and the 26 *Corti di Appello* (Courts of Appeal) are in practice the competent judicial authorities to issue an EAW in prosecution cases in respect of matters falling within their territorial jurisdiction.²

The Courts of Appeal are also competent as regards the execution of EAWs. Jurisdiction to execute an EAW lies with the Court of Appeal of the district in which the person concerned is resident, has his place of abode or is domiciled at the time the EAW is received by the judicial authority.³ If jurisdiction cannot be so determined, the Court of Appeal of Rome is competent.⁴

¹ The following courts/judges are responsible for the administration of criminal (and civil) justice:

- *Giudice di pace* (Justice of the peace);
- *Tribunale ordinario* (Trial Court);
- *Tribunale di sorveglianza* (Court responsible for the enforcement of sentences);
- *Tribunale per i minorenni* (Juvenile Court);
- *Corte di Appello* (Court of Appeal);
- *Corte di Cassazione* (Court of Cassation).

There are also other special bodies: the *Corte di Assise* (Court of Assize), composed of 2 professional judges and 6 lay judges, competent for very serious crimes; the *Tribunale Regionale delle Acque Pubbliche* (Regional Court of Waters) and the *Tribunale Superiore delle Acque Pubbliche* (High Court of Waters), competent for controversies concerning water which is State property.

The size of the criminal sections in the Italian courts varies between 60 judges in big courts to 1 judge in small courts.

² The Juvenile Court could also issue an EAW, although this is in practice unlikely since this court rarely issues a domestic arrest warrant which could form the basis for a EAW.

³ Article 5(2) of Law 69/2005.

⁴ Article 5(3) of Law 69/2005.

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In the frequent event that a person has been arrested by the police further to a SIS alert, jurisdiction to rule on surrender lies with the Court of Appeal of the district in which the arrest was made.¹

There is a possibility of a single and final appeal against EAW surrender decisions to the *Corte Suprema di Cassazione* (Court of Cassation), which has competence in respect of the entire Italian territory.²

Prosecutors. The *Pubblico Ministero* (public prosecution service) is an organ of the State which forms part of the judiciary. It is an autonomous, independent body.³

Prosecutors can be divided up as follows:

- Public Prosecutors at the *Tribunali*⁴ ("*Procura della Repubblica presso il Tribunale*");
- General Public Prosecutors at the Courts of Appeal ("*Procura Generale della Repubblica presso la Corte di Appello*");
- The General Public Prosecutor at the Court of Cassation ("*Procura Generale della Repubblica presso la Corte di Cassazione*")

In each public prosecution office in district capitals where a Court of Appeal has its seat, a *Direzione Distrettuale Antimafia* (District Anti-Mafia Division) has been set up. These divisions are made up of prosecutors specialized in investigating organized crime. Within the Office of the General Public Prosecutor attached to the Court of Cassation there is the *Direzione Nazionale Antimafia* (State Anti-Mafia Division), which co-ordinates the investigations carried out by the District Divisions.

¹ Article 5(4) *juncto* 11(1) of Law 69/2005.

² The Court of Cassation is divided into 6 Sections (or Chambers). In particular the 6th Section deals with EAW matters. This Section is composed of a President, a Vice-President and 17 magistrates (*consiglieri*). Cases are tried and decided by a panel of 4 *consiglieri* and the President or the Vice-President. Where appropriate, a case may be forwarded to the *Sezioni Unite* (United Sections or United Chambers) with a view to preventing or resolving conflicting interpretations.

³ Article 104(1) of the Italian Constitution provides that the judiciary (judges and prosecutors) is autonomous and independent of any other body.

⁴ There are also public prosecutors at the Juvenile Courts.

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The offices of the public prosecution service are held by career magistrates. Their task is to ensure that the laws are observed, that justice is administered promptly and regularly, that the repression of crime is promoted (they are entitled to start a criminal action) and that security measures are enforced.

Public prosecutors have competence to issue EAWs in conviction cases.

MoJ - Italy has designated the Minister for Justice as the central authority to assist its competent judicial authorities in EAW matters.¹ The Minister for Justice has delegated this task to the Director General for Criminal Justice and to the Director of "*Ufficio II*" (the Directorate for International cooperation) at the Ministry of Justice ("MoJ").²

The MoJ transmits and receives EAWs and all other official correspondence relating thereto.³ The MoJ keeps files of all incoming and outgoing EAW's.

The MoJ ensures the translation of EAWs. For the completion of this task the MoJ has several internal translators for the foreign languages that are most frequently used (English, French, German, Spanish), while for other languages it makes use of the services of external translators.⁴

The MoJ functions as a "helpdesk" for judicial authorities who may contact the MoJ (by phone, e-mail) for assistance in carrying out their EAW functions.

The MoJ is also a "mediator" in arrangements that are made between the Italian authorities and the authorities of other Member States with a view to carrying out surrenders (i.a. arranging time and modalities).⁵

¹ Article 4(1) of Law 69/2005.

² *Ufficio II* employs 60 persons, including 5 magistrates; two Interpol officers are also attached to it. *Ufficio II* is composed of 4 units: "EAW", "rogatory assistance", "extradition and transfer of prisoners" and "bilateral negotiations".

³ Article 4(2) of Law 69/2005.

⁴ Eight translators work within the *Ufficio II*; 35 translators work in the entire MoJ.

⁵ Article 23(1) of Law 69/2005.

Finally, the MoJ is responsible for sending the General Secretariat of the Council and the European Commission any information, including statistics, on the operation of the surrender procedure in dealings with other Member States.¹

INTERPOL/SIRENE. The International Police Cooperation Office within the Central Criminal Police Directorate at the Ministry of Interior is responsible for international law enforcement cooperation. The SIRENE and INTERPOL divisions have particular tasks in the context of the EAW procedure: they carry out searches for requested persons (in national databases and through the SIS and INTERPOL channels) and inform the MoJ once a requested person has been located and arrested. The INTERPOL division is also responsible for the effective surrender of a person under the EAW procedure.

2.2 THE LEGAL BASIS

- The Constitution provides *inter alia* that the judiciary (judges and prosecutors) is autonomous and independent of any other body²; that judges are subject only to the law³; and that a self-governing, independent body (Superior Council of the Judiciary - *Consiglio Superiore della Magistratura*) is competent for taking decisions regarding the career of members of the judiciary.⁴
- Law No 69 of 22 April 2005 sets out the provisions adapting domestic law to the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). This "Law 69/2005" or "Italian implementing law" was passed on 22 April 2005 and published in the *Gazzetta Ufficiale* No 98 of 29 April 2005. It entered into force on 14 May 2005.⁵

¹ See also 8687/05 COPEN 84 EJM 28 EUROJUST 28 + ADD1.

² Article 104(1) of the Italian Constitution.

³ Article 101(2) of the Italian Constitution.

⁴ Article 105 of the Italian Constitution.

⁵ See also the information supplied by the Italian authorities to the Council General Secretariat in conformity with the Framework Decision (8687/05 + ADD 1).

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- Code of criminal procedure. This code contains provisions on the handling of criminal procedures by and before the Italian judicial authorities. Various provisions are of relevance for the EAW surrender procedures. Law 69/2005 contains a number of references to the Code of criminal procedure.¹

3. ORGANISATION AND PRACTICES - ISSUING MEMBER STATE ROLE

In 2006 the Italian judicial authorities issued 33 EAWs, 25 of which resulted in the effective surrender of the requested person. In 2007 the Italian judicial authorities issued 349 EAWs, 100 of which resulted in the effective surrender of the requested person. In the first semester of 2008 (1 January - 30 June 2008), the Italian judicial authorities issued 347 EAWs, 64 of which resulted in the effective surrender of the requested person.

3.1. THE DECISION TO ISSUE

Competent authorities. In prosecution cases the competent authority to issue an EAW is the (investigating) judge at the *Tribunale* or at the Court of Appeal who issued the domestic arrest warrant (precautionary measure of provisional detention or an order for house arrest²) in respect of the person concerned.³

In practice, the expert team was told, it is often the prosecutor at the *Tribunale* or at the Court of Appeal who proposes to issue an EAW, and it is often the same prosecutor who submits a draft EAW form to the judge for his or her consideration, signature and issue.

In conviction cases the competent authority to issue an EAW is the public prosecutor attached to the court that issued the order to enforce the sentence of imprisonment contained in the judgment.⁴

¹ In Law 69/2005 references to the Code of criminal procedure are e.g. made in Articles 9, 10, 12, 15, 22, 25, 28, 33 and 35.

² "*Misura cautelare della custodia in carcere o degli arresti domiciliari*".

³ Article 28(1) under a) of Law 69/2005.

⁴ Article 28(1) under b) and c) of Law 69/2005.

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Criteria for issuing an EAW. The criteria for deciding whether it is appropriate to issue an EAW can be summarised as follows:

- a) in prosecution cases, the issue of an EAW requires the existence of a domestic arrest warrant¹ and circumstantial evidence of an offence punishable by a sentence of imprisonment of not less than maximum four years;
- b) in conviction cases an EAW can be issued when there is a sentence of at least one year *effective* imprisonment.

Furthermore, in both prosecution and conviction cases there should be evidence that the requested person resides, is domiciled or stays outside Italy in the territory of one of the Member States of the European Union. If the said information is not known, it should in any case be possible for the person to be in the territory of a Member State of the European Union.² In practice, the expert team was told, this means that there should be "solid indications" that the person is in such territory.

As regards the "four years" mentioned above in respect of prosecution cases, this period derives from Article 280 of the Code of criminal procedure, relating to the conditions for the application of coercive measures. Paragraph 2 of this Article provides that a domestic arrest warrant can only be imposed for offences which are punishable with imprisonment of not less than maximum four years. Since the existence of a domestic arrest warrant is a requirement for the issue of an EAW, the requirement of four years also applies to the possibility of issuing an EAW.

¹ Article 28(1) under a) of Law 69/2005.

² Article 29(1) and (2) of Law 69/2005.

As regards conviction cases, Article 28(1)(b) of the Italian implementing law states that an EAW can be issued for the execution of a custodial sentence of at least one year, "provided that its execution is not suspended". Reference is made in this respect to Article 656 of the Code of criminal procedure. According to paragraph 5 of this Article, custodial sentences of three (and sometimes four) years or less shall be suspended in certain conditions, e.g. in respect of first offenders. As a consequence, in certain conviction cases, e.g. in respect of first offenders, an EAW can only be issued when there is a sentence imposing imprisonment of *more* than three (or sometimes four) years.

Only very serious cases. The *vademecum* on how to issue an EAW (see further below) stimulates the judicial authorities to apply a proportionality test when they have to decide whether or not to issue an EAW.¹ The assumptions for issuing an EAW are, nevertheless, autonomously assessed by the competent judicial authorities, within their discretionary powers.

¹ Some extracts from the *vademecum* on this issue:
"3.5....the issue of the EAW is subject to limits of reasonableness and proportionality on which the common action of the European Union is based, in the sector of judicial cooperation (Treaty of the European Union, Art. 5).
3.6. This indicates that the Judge and the Public Prosecutor, when acting as the "issuing" authority of the EAW, must make a twofold assessment.
At internal level, they have to take into account the gravity of the crime, the personality of the perpetrator, the amount of the punishment and the duration of the preventive measure, also in consideration of the expiry of the terms of the phase.
Internationally, it must be considered that the issue of the EAW gives rise to a complex activity of international cooperation between Police organs and Judicial Authorities and that the enforcement of the arrest warrant entails arrest and detention, in another State, for a lengthy period of time (...)
3.7. In practical application, the assessment (...) may vary widely from one Member State to another and according to the authority proceeding.
For example, there have been cases in which the European Arrest Warrant has been issued on the basis of custodial measures adopted for the possession of 0.45 grams of cannabis; of 0.15 grams of heroin; of three ecstasy tablets; for the theft of two cars; for driving while under the influence of drink, even when the ascertained alcohol content (0.81 mg/l) has been only slightly higher than the minimum limits; and for stealing piglets.
These cases, while coming within the field of application of the European Arrest Warrant as they respect the minimum punishment levels fixed by the Framework Decision (Art. 2) and by the law of the issuing State, have cast doubts on the necessity of using the EAW, also in consideration of the fact that not issuing the arrest warrant does not stop the exercising of penal action, nor does it translate into impunity for the person convicted, given that the custodial measure is valid and enforceable in national territory."

Interviewed judges and prosecutors told the expert team that they only issue an EAW in very serious cases (organised crime, trafficking of humans beings, terrorism, murder). The Italian prosecutors informed the expert team that they had no knowledge of cases of unwillingness to issue an EAW.

It should be noted that an EAW can be issued for several offences at the same time, as long as they are covered by the same domestic arrest warrant or conviction.

3.2. VERIFYING THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

The judicial authorities themselves do not have the possibility of checking the possible existence of multiple EAW requests. The expert team was informed that there is no national register or data base in which the judicial authorities could verify, nationwide, the existence of outstanding arrest warrants.

However, in the context of its task to take care of sending (and receiving) EAWs, the MoJ also carries out the task of verifying the possible existence of multiple EAWs. If it discovers such a situation, the MoJ informs the judicial authorities concerned.

3.3. THE COMPLETION OF THE FORMS/COURT PAPERS

Completion of the forms. When an Italian issuing authority (judge or prosecutor) has decided to issue an EAW, it will draw up an EAW by completing the relevant form. Article 30 of the Italian implementing law describes the information which the EAW should contain. This Article largely follows Article 8 of the Framework Decision.

The authority will also fill in the A+M forms. The authority will send the EAW and the A+M forms to both the MoJ and INTERPOL/SIRENE. The latter will ensure that searches are made through the appropriate channels, either through INTERPOL (by diffusions or red notices) and/or through SIRENE by issuing an Article 95 alert.

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The Ministry will check the EAW, and, if it feels that the form has not been properly filled in, contact the judicial authority concerned and suggest making corrections. INTERPOL/SIRENE can do the same if it feels that the A+M forms have not been properly filled in (the expert team was told that the judicial authorities were sometimes advised to shorten a very long description of the offences committed). Both the MoJ and INTERPOL/SIRENE informed the expert team that while in the beginning they often had to suggest corrections, such interventions have become fewer in the course of time, most probably because the Italian issuing authorities have obtained more experience in filling out the forms.

If Italian authorities have issued more than one EAW in respect of the same person, INTERPOL/SIRENE will only introduce an alert in relation to the most important EAW. Once the person has been apprehended, the executing authority will be informed of the other outstanding EAWs. The existence of the other EAWs is not mentioned on the M form.

Written guidance. The MoJ has distributed several circular letters with a view to assisting the competent authorities on how to fill in the EAW form.¹

Recently, the MoJ has also prepared a *vademecum* with guidelines on how to issue an EAW and how to fill in the form. This *vademecum* has been distributed to all courts and prosecution offices. It is also available through the MoJ intranet (but not all courts are connected to that intranet). The expert team has been given an English translation of this *vademecum*.

The circular letters and the *vademecum* are the major sources of interpretation as to the pre-established elements of the EAW form. However, under the Italian legal system, a judicial authority is only subject to the law. Consequently, the said interpretations, although largely shared, are not legally binding.

¹ The circular letters and other useful information relating to EAW matters (including the EAW form, A+M forms, Italian translations of the implementing laws of almost all EU Member States) can be found on the website of the Court of Appeal of Rome (district of Lazio), www.giustizia.lazio.it.

3.4. TRANSLATION OF THE EAW

The translation of the EAW is a task for the MoJ.

Article 28(2) of the Italian implementing law provides in fact that "*the Minister of Justice ...shall have the text translated into the language of the executing Member State*". The MoJ normally makes the translation after the requested person has been located and arrested.

In order to prepare the translations, the MoJ has internal translators for the foreign languages that are most frequently used (English, French, German, Spanish), while for other languages it makes use of the services of external translators. The expert team was told that the increasing number of EAWs has caused some difficulties as regards translations, but that these difficulties have been resolved by hiring more translators. There are now 8 internal translators within *Ufficio II* of the MoJ; in total there are 35 internal translators within the entire MoJ.

3.5. TRANSMISSION OF THE EAW

As soon as the person requested is located or arrested, INTERPOL/SIRENE will inform the MoJ. The MoJ will then send the EAW to the executing authority, if necessary after having it translated.

It is also possible that the EAW is transmitted directly, via the SISNET mail, by the Italian issuing authority to the competent authority in the executing State.¹ The MoJ however discourages this practice and advises Italian judicial authorities to leave the task of transmitting the EAW to the MoJ, since the MoJ is in the end responsible for the transmission process and since it wants to keep an overview of all EAW procedures.²

Italy rarely uses Europol or Eurojust for transmission of the EAW.

¹ See also Article 4(4) of Law 69/2005, which states that "*Direct correspondence [transmission of EAWs] between judicial authorities shall be allowed under conditions of reciprocity. In this case the Italian judicial authorities shall inform the Minister of Justice immediately of the receipt and the issue of a European Arrest Warrant. Responsibility still lies with the Minister of Justice.*"

² This policy of the MoJ has led to concrete results: whereas in 2007 there were still 35 EAWs transmitted through SIS, in the first half of 2008 this number had decreased to only one EAW.

3.6. ISSUES RAISED BY EXECUTING MEMBER STATES AND COMMUNICATION CHANNELS RELIED UPON

The expert team was informed that sometimes the execution of an EAW which had been issued by an Italian judicial authority encountered problems because it was not properly filled in. It was normally possible to resolve the problem by rewording the EAW or by providing complementary information in accordance with Article 15(2) of the Framework Decision.

It was also observed that delays in the translation of the EAW in the language indicated by the executing State have sometimes given rise to difficulties. The Italian authorities observed that some Member States apply very strict deadlines for obtaining the translated EAW. The release of the requested person could however generally be avoided by promptly transmitting the EAW in Italian and indicating that the translated EAW would follow as soon as possible.

Communication normally proceeds through the services of the MoJ. There is not much direct contact between Italian issuing authorities and the executing authorities in other Member States.

Liaison magistrates deployed by other Member States also play an important role in the communication process, and they provide useful assistance in solving practical problems. In Rome there are currently liaison magistrates from France, Romania, Spain and the United Kingdom. Representatives of the judiciary in Naples were also very positive about cooperation with police liaison officers of other Member States.

3.7. REQUESTS FOR FURTHER INFORMATION MADE BY EXECUTING MEMBER STATES

The expert team was informed that, following an EAW issued by Italy, sometimes additional information/documentation is requested by the executing judicial authority, either through the central authority or through INTERPOL/SIRENE. Such requests are often related to personal details of the requested person, to factual information (e.g. more details on the criminal conduct of the requested person), to provisions of Italian law or to orders issued against the requested person.

When the request is addressed to the MoJ, the MoJ usually forwards the request to the judicial authority that issued the EAW with a view to providing the relevant additional information. If necessary, the MoJ assists the judicial authority by translating any documents.

The Italian issuing authorities indicated that it can be problematic to cope with strict deadlines imposed by the executing authorities for providing the requested information in the language indicated by the latter. In order to address this problem, the habit has developed of sending the documents firstly in Italian, and subsequently, as soon as possible, translated into the language indicated by the executing authority.

3.8. LEGAL REGIME GOVERNING THE RETURN OF OWN NATIONALS FOR THE ENFORCEMENT OF A SENTENCE

There is no specific legal regime for the return of own nationals.

The expert team was informed that the only difficulties encountered related to the costs of transport. The relevant expenses were generally assumed by Italy, as the issuing State, in compliance with Article 30 of the Framework Decision.

3.9. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

The expert team was informed that there were no cases of EAWs issued by Italian authorities with regard to minors. The Italian authorities observed however that, in any case, no specific difficulties should be expected. They referred in this context to Articles 97 and 98 of the Criminal Code, which limit criminal liability (the so-called "liability to indictment") to a person who is at least 14 years old at the time when the offence is committed. According to the same provisions there is a reduction in the penalty for a person who is between 14 and 18 years old when he/she commits the offence. Consequently, a person can only be fully held criminally liable when he or she is 18 years or older.

3.10. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

The expert team was informed that, after receiving notification of the location or the arrest of the requested person, the information provided by the executing authorities to the Italian issuing authority and to the MoJ was not particularly detailed. The Italian authorities felt that there would be room for improvement in this regard.

3.11. THE MECHANICS OF THE SURRENDER (INCLUDING TEMPORARY SURRENDER) OF REQUESTED PERSONS/TIME LIMITS/GUARANTEES

The physical surrender process is a task entrusted to (the Italian office of) INTERPOL.

With a view to arranging the physical surrender, INTERPOL (Italy) gets in contact with its corresponding authority in the executing State to obtain precise indications as to the date and place of surrender. Once this information has been obtained, if surrender does not take place at the Italian borders, INTERPOL asks the MoJ to authorise it to buy an air ticket for the requested person. The MoJ determines the prison where the surrendered person has to be brought, and places the person at the disposal of the competent issuing authority. According to the Italian authorities this procedure, which is systematically followed, enables specific difficulties to be avoided and does not differ in cases of temporary or conditional surrender.

The Italian authorities were not aware of cases where it was not possible for the foreign executing authority to arrange surrender within the 10-day deadline referred to in Article 23(2) of the Framework Decision, or at least within the extended deadline under Article 23(3) and (4) thereof.

The expert team was informed that when executing four EAWs issued by Italian judicial authorities against four Tunisians, the UK authorities, prior to deciding on surrender, asked for and obtained information on extraditions granted by Italy to Tunisia. In particular, they requested formal assurance that Italy would fully comply with Article 28(4) of the Framework Decision, according to which a person who has been surrendered pursuant to an EAW shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. The expert team was told that the Italian judicial authority and the MoJ had no difficulty in providing the requested information and assurance, but nonetheless the procedure lasted nearly one year.

The Italian authorities informed the expert team that Italy does not generally inform Eurojust that surrender time-limits and conditions laid down in the Framework Decision have been exceeded by the executing State.

3.12. THE MECHANICS OF THE SURRENDER IN RESPECT OF REQUESTED PROPERTY/TIME LIMITS/GUARANTEES

Article 34 of Law 69/2005 provides that, together with the EAW, the general prosecutor at the Court of Appeal shall request the judicial authority of the executing Member State to hand over any property subject to an enforceable seizure or confiscation order issued by a competent judge, at the same time transmitting a copy of the seizure orders.

The expert team was informed that this provision has been applied several times by the Italian judicial authorities without any problem. Moreover, no difficulties would have arisen as to the later use of such material in an ongoing criminal prosecution.

3.13. CONFLICT OF EAWS/EXTRADITION REQUESTS/ONWARD SURRENDER

The conflict between a request for the execution of an EAW and a request for the execution of an extradition-request is governed by Article 20(3) of Law 69/2005, which is basically in compliance with the requirements laid down in Article 16(3) of the Framework Decision.

In this context, the Italian authorities stated that the nature of relations with the United Kingdom is very particular. If a person has been extradited by the United Kingdom to Italy on the basis of a request for extradition before the entry into force of the Italian implementing law on the EAW, then any subsequent extension of the extradition has to be effected through the extradition procedure, and not by sending an EAW to the UK, although the Italian implementing law has already entered into force.

The issue of subsequent onward surrender/extradition of a requested person to a third Member State has not given rise to any particular difficulties.

3.14. EXPENSES

Article 37(1) of the Italian implementing law regarding "expenses" literally transposes Article 30 of the Framework Decision.

In its paragraph 2, the Article states however that "*the implementation of the present Article must not entail new or greater costs to the State budget*". No details are provided on the consequences if this obligation is not respected.

3.15. MISCELLANEOUS COMMENTS

Replacing old alerts. The team was informed that only some Italian issuing judicial authorities have replaced alerts that existed before the entry into force of the Italian implementing law with new SIS alerts. Where the old alerts have been updated, the A form has been replaced by the A+M forms, leaving the Interpol alert unaltered. Where the old alerts have not been updated, the competent Italian authority will issue the EAW, together with the A+M forms, once the requested person has been located.

Use of SIS alerts. The expert team understood from practitioners that Italy makes limited use of Article 95 alerts. In fact, as long as there are no "solid indications" that the defendant or convicted person is present in one of the (other) Member States of the European Union¹, an EAW will not be issued. In such circumstances, other types of alerts, such as Article 98 or 99 alerts, are often inserted in the SIS with a view to asking the competent authorities in the Member States to notify the Italian authorities when there is a hit on a specific person. However, when this happens, these authorities have, in the absence of an EAW or of an Article 95 alert – which is equivalent to an EAW in conformity with Article 9(3) of the Framework Decision – no legal basis to arrest the person concerned. This may result in ineffective procedures.

Lack of feedback. The expert team was informed at SIRENE that its work is sometimes complicated as a result of lack of feedback by the Italian competent authorities. It happens that EAWs issued by the Italian authorities are reviewed or retracted by those authorities without proper notice being given to SIRENE. Thus, the notification as originally inserted in the SIS appears as being *in vigore*. This may give rise to substantial practical difficulties. For example, a person who has been apprehended in Italy and who is subsequently put on trial, without this being communicated to SIRENE, may after his or her release again be detained in a different locality or in a different Member State. Police and/or judicial time is thus wasted, and it could also give rise to possible allegations of breaches of the law by the executing authority with regard to incorrect data being inserted in the SIS.

Maximum period of provisional detention. Under Italian law a person can be held in provisional detention for a limited period, which in most cases is three months, up to a maximum of one year.² Periods spent in provisional detention abroad also count for calculating the maximum period of provisional detention under Italian law.

¹ Cf Article 29(1) of Law 69/2005; the expression "solid indications" was used by the practitioners interviewed, see above under point 3.1.

² Article 303 of the Code of criminal procedure ("*Termini di durata massima della custodia cautelare*" - "*Maximum periods of provisional detention*", which in pre-trial cases range from three months to one year).

Hence, when in the executing State the period of provisional detention exceeds one year, the Italian domestic arrest warrant, which is the basis for the EAW issued by the Italian competent authority, becomes null and void. This has as a consequence that the EAW is also no longer valid (it loses its "legal effect"), in view of Article 31 of the Italian implementing law.¹

This situation has happened in a case with the United Kingdom, in which the provisional detention in the United Kingdom of the person requested by the Italian issuing authority exceeded the time limit of one year. Under those circumstances the Italian issuing authority was obliged to withdraw the EAW.

Surrendering own nationals. The Italian authorities indicated that it has not always been possible to overcome the obstacles laid down by the executing State for the surrender of its own nationals. Reference was made to Germany, whose authorities deny the surrender of an own national when the EAW is issued after a final judgment of conviction and the requested person does not consent to his surrender. The Italian authorities regretted that in such cases the person is released, unless the German authorities undertake to immediately impose the sentence in Germany.

Guarantees for in absentia judgments. The judicial authorities interviewed mentioned that some problems have occurred in respect of the guarantees that are to be provided in accordance with Article 5 of the Framework Decision. Such guarantees are directly provided by the Italian judicial authorities and, if appropriate, confirmed by the MoJ. In particular, it was observed that in respect of "in absentia" judgments, it sometimes appeared impossible to provide a tangible guarantee of a "retrial" in accordance with Article 5(1) of the Framework Decision. Also, it would be difficult for the prosecutor to give a firm guarantee, since it would be for the judge to decide whether the right to a retrial exists.

¹ Article 31 of Law 69/2005 reads as follows: "*The European arrest warrant shall lose its legal effect when the restrictive measure on the basis of which it was issued has been revoked or cancelled or has lost its legal effect. The public prosecutor at the court of appeal shall immediately notify the Minister of Justice for the purpose of the subsequent notification of the executing Member State.*"

In this context, the Italian authorities observed that if the legal situation as it formerly stood in respect of Italian "in absentia" judgments might have given rise to concerns, the basis for such concerns should in any case have been taken away by the new Law 60/2005 on this issue.¹ They referred in this respect to case law of the European Court of Human Rights, although without giving further details.²

4. ORGANISATION AND PRACTICES - EXECUTING MEMBER STATE ROLE

In 2006, Italy received 91 EAWs; in 2007 it received 453 EAWs, and in 2008 (1 January - 30 June) 201 EAWs. In 2006, 26 persons were surrendered (of whom 12 had consented); in 2007, 162 persons were surrendered (of whom 66 had consented) and in 2008 (1 January - 30 June) 47 persons were surrendered (of whom 22 had consented). Romania is by far Italy's biggest "client".

4.1. RECEIPT PROCEDURES

In application of Article 10(4) of the Framework Decision, the MoJ – which, as set out above, is the authority responsible for the receipt of EAWs³ – accepts EAWs sent by courier, ordinary mail, fax (if accompanied by a transmission note) and through the Italian representative at Eurojust. Normally, uncertified electronic transmissions (e-mails), which lack elements that support the origin, are not accepted.

The expert team was informed that the reception of EAWs through e-mail gives rise to difficulties. According to the Italian authorities, this problem could probably be solved through a certification mechanism.

¹ Law 60 of 22 April 2005, "*Conversione in legge, con modificazioni, del decreto-legge 21 febbraio 2005, n. 17, recante disposizioni urgenti in materia di impugnazione delle sentenze contumaciali e dei decreti di condanna*", published in the *Gazzetta Ufficiale* n. 94 of 23 April 2005.

² It should be noted that during the discussions reference was made to the Sejodovic case (application of 56581/00, Sejodovic v. Italy, Judgment of 1 March 2006). See however paragraph 123 of that judgment.

³ Article 4(2) of Law 69/2005.

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Moreover, EAWs are sometimes delivered by hand, in view of the presence of several foreign liaison magistrates in Italy (currently from France, Romania, Spain and the United Kingdom).

In most cases, the requested person has been arrested by the police following a SIS alert. In these cases, the police make the person immediately (within 24 hours) available to the President of the Court of Appeal in whose district the arrest has been made. The police also immediately inform the MoJ. The MoJ, in turn, immediately notifies the issuing Member State of the arrest of the person concerned for the purpose of transmitting an EAW (and requests the additional documentation, see below under point 4.4).¹

4.2. INVESTIGATIONS CONCERNING THE LOCATION OF THE REQUESTED PERSON/CIRCULATION PROCEDURES

Following a SIS alert which indicates that the person concerned may be in Italy, SIRENE and other members of the police force carry out searches for the presence of the person in Italy. To that effect, SIRENE browses various databanks (relating i.a. to license plates, insurance, prison population, telephone, etc.). If the person has a domicile in Italy the police can also carry out a house search.

On the basis of a SIS alert the police are competent to arrest a person in both prosecution and conviction cases.² Such arrest has to be validated by the President of the Court of Appeal or by a judge delegated by him, within 72 hours of the arrest.³ The validation is carried out through an order on the basis of which coercive precautionary measures can be imposed⁴; such measures can consist of provisional detention, but can also take other forms, e.g. weekly reporting to the police; however, "bail" (paying a deposit as a guarantee) is not possible.

¹ Article 11(1) of Law 69/2005. The procedure is slightly different if the arrest has been carried out at the request of the President of the Court of Appeal, in the situation where the issuing authority has sent the EAW directly for execution to the MoJ (or to the Court of Appeal), see Articles 9 and 10 of Law 69/2005.

² Article 11(1) of Law 69/2005.

³ Within 24 hours of the arrest, the arrested person is placed at the disposal of the President of the Court of Appeal (Article 11(1) of Law 69/2005), and the President has to validate the arrest within 48 hours (Article 13(1) of Law 69/2005).

⁴ Article 13(2) *juncto* 9 and 10 of Law 69/2005.

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4.3. THE FORM OF THE WARRANT AND REVIEW PROCEDURES

Italy only accepts EAWs in Italian¹, although in cases of urgency the MoJ also accepts EAWs in languages other than Italian. In emergency cases, the MoJ may ask its internal translators to translate the EAW into Italian.

A formal certification is not required. The competent issuing authority has to send the EAW (or the SIS alert) to the MoJ within ten days of the validation of the arrest by the President of the Court of Appeal. Should the translated EAW not arrive within this period, then the order imposing coercive measures, if any, becomes null and void.² No extension of the time limits is foreseen, but the coercive measures can be newly ordered if the EAW in Italian is delivered and the danger persists that the person might flee from justice.

The MoJ, upon reception of the EAW, makes a first evaluation as to the authenticity of the EAW. In case of obvious problems of a formal nature (e.g. the EAW has not been translated into Italian) the MoJ will, where appropriate, contact the issuing authority in order to allow it to make the appropriate corrections. If the EAW does not present any such obvious problems, the MoJ will forward it to the President of the Court of Appeal.³

A second authenticity check is made by the Court of Appeal. In case of problems in establishing the authenticity of the documents transmitted by the issuing judicial authority, the President of the Court of Appeal can make direct contact with the said authority in order to resolve these problems.⁴ In practice, however, the contacts between Italian executing authorities and the issuing authorities are mostly carried out through the intermediary of the MoJ.

¹ Article 6(7) of Law 69/2005.

² Article 13(3) of Law 69/2005.

³ In case of doubts regarding the authenticity of the EAW, the MoJ will forward the EAW to the President of the Court of Appeal with a note alerting the President to the possible problems spotted by the MoJ.

⁴ Article 9(2) of Law 69/2005.

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The expert team was informed that the most frequently applied reasons for rejecting the execution of an EAW on formal grounds are the lack of translation of the EAW into Italian (even after this has been expressly requested), and the lack of indication as to the time when the offence was committed. The latter indication is very important, since the Italian implementing law provides that the EAW surrender procedure does not apply to offences committed before 7 August 2002.¹

4.4. REQUESTS AND RESPONSES TO REQUESTS FOR FURTHER INFORMATION/ CLARIFICATION

Under the Italian implementing law there are two types of requests for additional information / documentation. One is obligatory, the other is optional.

a) The obligatory request for additional documentation

When the MoJ informs the issuing State of the arrest and requests the transmission of the EAW, it also requests the transmission of "additional documentation".² The MoJ is obliged to make such a request.³

The obligatory request relates to two sorts of documentation referred to in Article 6(3) and (4) of the Italian implementing law.

Under Article 6(3) the issuing authority must provide a copy of the domestic arrest warrant or custodial sentence which gave rise to the EAW.

¹ Article 40(2) of Law 69/2005, which applies Article 32 of the Framework Decision.

² Article 11(2) of Law 69/2005.

³ The MoJ acts on the instruction of the Court of Appeal, which in turn is obliged to give the instruction to the MoJ, see Article 6(5) of Law 69/2005, the first and second sentences of which read as follows: *"If the issuing Member State does not provide the judicial provision, the president of the court of appeal or the magistrate delegated by him shall ask ("richiede") the Minister of Justice to obtain the provision on the basis of which the European arrest warrant has been issued, as well as the documents referred to in paragraph 4, and shall inform him of the date of the hearing in camera. The Minister of Justice shall inform ("informa") the judicial authority of the issuing Member State that receipt of the provision and relative documentation is a necessary condition for the consideration of the enforcement request by the court of appeal."*

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Under Article 6(4) the issuing authority must provide the following additional documentation :

- a) a report on the offences of which the requested person is accused, with evidence of the sources of proof, the time and place in which the offences were committed and their legal classification;
- b) the text of the applicable legal provisions of the issuing State, with an indication of the type and duration of the penalty;
- c) any physical description or any other information that could help ascertain the identity and nationality of the requested person.¹

Under the terms of Law 69/2005, the MoJ informs the issuing authority that the receipt of the above documentation, as referred to in Article 6(3) and (4), is a necessary condition to allow the Court of Appeal to consider the execution of the EAW.² If the issuing authority does not comply with the request for the transmission of the documentation, Article 6(6) of Law 69/2005 provides that the Court of Appeal "*shall*" reject the request for execution of the EAW.³

The requirement relating to additional documentation can lead to curious situations. The expert team was informed of a case with a Hungarian EAW, in respect of which the MoJ had requested the underlying domestic arrest warrant in application of Article 6(3) of the Italian implementing law. The answer from the Hungarian prosecutor was simply that he did not need a domestic arrest warrant before issuing an EAW, since the EAW in Hungary has the same value as a domestic warrant.

¹ Article 6(4) of Law 69/2005.

² Article 6(5) of Law 69/2005.

³ Article 6(6) of Law 69/2005. "*If the judicial authority of the issuing state does not comply with the Justice Minister's request as referred to in paragraph 5, the court of appeal shall reject ["respinge"] the request.*"

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The expert team was informed that the application of the provisions relating to the obligatory transmission of additional documentation has been mitigated by the case law of the Court of Cassation. According to this case law, the absence of the documentation above under a) (report on the offences) does not impede the surrender of the person, if the information in the EAW is sufficient to conclude that there is serious guilt on the part of the person concerned in respect of the alleged offence(s).¹ Also, as regards the documentation under b) (text of the applicable legal provisions), the Court of Cassation has ruled that such documentation is only necessary if there are specific problems of interpretation, which require knowledge of the scope of the law of the issuing State, e.g. in order to verify the existence of double criminality.² In the same vein, the Court of Cassation has ruled that the absence of the information referred to under c) (relating to the identity and nationality of the requested person) should not impede the surrender of the person concerned if the identity and nationality of the requested person can be ascertained through other information provided by the issuing authority.³

This being the case, in application of Article 6(6)⁴, the execution of an EAW was rejected in 2006 in 6 cases; in 2007 in 31 cases; in the first semester of 2008 (1 January - 30 June) in 8 cases.⁵

b) The optional request for additional information

The Court of Appeal (sometimes the Court of Cassation) exercises discretionary control as regards the contents of the EAW. In particular, the Court of Appeal verifies whether the EAW contains all information listed under Article 6(1) of the Italian implementing law.⁶

¹ Court of Cassation, Sez. 6, judgment of 28 April 2006 in case 14993, Arioua (France).

² Court of Cassation, Sez. 6, judgment of 10 April 2008 in case 17650, Avram (Romania).

³ Court of Cassation, Sez. 6, judgment of 28 June 2007 in case 25421, Iannuzzi (Germany).

⁴ NB: Article 6(6) is also applied in respect of the optional request for additional information, see Article 16(1). The numbers provided relate to rejection of a request for execution of an EAW for failure to comply either with an obligatory request or with an optional request.

⁵ Reference is made to the statistics in Annex D, in particular to the attachment thereto.

⁶ Article 6(1) of Law 69/2005 is an almost literal copy of Article 8(1) of the Framework Decision.

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Should the Court of Appeal detect in the EAW the absence of the elements indicated in letters a), c), d) and f) of Article 6(1) ¹, then it *may* request the issuing authority, directly or through the MoJ, to provide the necessary additional information.²

The MoJ transmits the request in the language of the issuing State, indicating the deadline determined by the Court of Appeal for the receipt of the information. This deadline may not be longer than 30 days.³ Should the issuing authority fail to comply with this request, then the Italian implementing law provides that the request for execution of the EAW "shall" be rejected.⁴

Again, the expert team was advised that the Court of Cassation has mitigated the law, by providing that the Court of Appeal, when it does not (in due time) receive the documentation requested, does not *have* to reject the request for execution of the EAW, but *may* decide to take a decision on the surrender on the basis of the elements that are already at its disposal.⁵

This being the case, the expert team was informed that there are numerous cases in which surrender was not authorised because the issuing authority did not comply with a request for additional information within the time frame set. Reference is made to the figures set out above in respect of the obligatory request.

¹ a): the identity and nationality of the requested person; c): evidence of an enforceable judgement, a preventive remedy or any other enforceable judicial decision having the same effect and coming within the scope of Articles 7 and 8 of the Italian implementing law; d): the nature and legal classification of the offence; f): the penalty imposed, if there is a final judgment, or in other cases the minimum and maximum penalty established under the law of the issuing Member State.

² Article 6(1) *juncto* 16(1) of Law 69/2005.

³ The Court of Cassation has clarified that the period of 30 days starts to run when the issuing authority has received the request: Court of Cassation, Sez. 6, judgment of 28 March 2008 in case 13463, Arnoldas (Lithuania).

⁴ Article 16(1) *juncto* Article 6(6) of Law 69/2005.

⁵ Court of Cassation, Sez. 6, judgment of 26 October 2007 in case 40412, Aquilano (France). In this case, the Court of Cassation considered that the Court of Appeal had not infringed the law when it had taken a positive surrender decision, despite the fact that the additional information that it had requested from the French authorities had not been sent within the prescribed period.

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In respect of the obligatory and the optional requests, the Italian authorities informed the expert team that the MoJ, in order to be sure that the request arrives and is understood, sends the request directly both to the issuing authority, with an indication of the expiry date for receiving the information and the (possible) consequences of failure to answer, and to INTERPOL/SIRENE, asking it to inform the corresponding service in the issuing Member State.

4.5. ARREST PROCEDURES/FIRST EXAMINATION

Any of the forces of the Italian judicial police (*Arma dei Carabinieri, Polizia di Stato, Corpo della Guardia di Finanza, Corpo Forestale dello Stato, Polizia Municipale*) may effect the arrest for the purposes of executing a EAW.

The basis for the arrest can either be an EAW or an Article 95 SIS alert. The police can also effect the arrest on the basis of an Interpol alert (diffusion or red notice).¹

When the police have arrested the requested person, the police officer carrying out the arrest shall inform the person concerned, in a language which he or she understands, of the EAW and its content. The police officer shall also inform the person of the possibility of consenting to his or her surrender, and shall inform the person of the right to legal counsel and to be assisted by an interpreter.²

The police shall make the person immediately available, at the latest within 24 hours of the arrest, to the President of the Court of Appeal in whose district the arrest was made.

Within 48 hours after receiving the report of arrest, the President of the Court of Appeal (or another magistrate of the court delegated by him) shall, after informing the Public Prosecutor, proceed to a first examination of the person concerned in the (compulsory) presence of the legal counsel chosen by the person or else nominated *ex officio* by the court. If necessary, the hearing shall be conducted in the presence of an interpreter.³

¹ Cf. Article 716 of the Code of criminal procedure.

² Article 12(1) of Law 69/2005.

³ Article 13(1), first sentence, of Law 69/2005. If the requested person is detained in a location different from that in which the arrest was executed, the President of the Court of Appeal may delegate the task of hearing the person to the President of the territorially competent court, see Article 13(1), second sentence, of Law 69/2005.

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If it is evident that the wrong person was arrested, or if the person was arrested on grounds other than those pursuant to the law, the President of the Court of Appeal shall immediately order the person detained to be released.

Otherwise, as observed above, the arrest shall be validated within 72 hours of the arrest.¹

4.6 THE SURRENDER DECISION/ GUARANTEES - REQUIREMENTS AND GUARANTEES PROVIDED

Decision in case of consent. During the first examination, the President of the Court of Appeal (or a magistrate delegated by him/her) asks the person concerned if he or she consents to being surrendered. This is done in the (compulsory) presence of legal counsel and, if necessary, an interpreter. A transcript is produced of the consent and how it was given.²

Consent may also be given after the first examination:

- either through a written statement addressed to the director of the detention institution and immediately transmitted to the President of the Court of Appeal;
- or through an oral statement made during the hearing before the Court of Appeal, up to the end of the trial.³

Consent is irrevocable. The person concerned is informed beforehand of the irrevocability of his or her consent.⁴

If the consent is validly given, the Court of Appeal decides without delay, and in any case within ten days following the consent, on the execution of the EAW. The Court will act by issuing an order, after hearing the opinion of the prosecutor, the legal counsel and, if present, the requested person.⁵ The Court of Appeal will check the grounds for refusal of its own motion.

¹ Article 13(1) of Law 69/2005.

² Article 14(1) of Law 69/2005.

³ Article 14(2) of Law 69/2005.

⁴ Article 14(3) of Law 69/2005.

⁵ Article 14(4) of Law 69/2005.

It should be noted that in almost 50 % of the EAWs which resulted in a positive surrender decision, the person concerned had consented to being surrendered.¹

Surrender decision in cases without consent. After the arrest has been validated during the first examination, the Court of Appeal holds a hearing in the presence of the general prosecutor, the legal counsel of the requested person (the presence of legal counsel is obligatory) and the requested person (if he or she wants to be present).² Subsequent to the hearing the Court of Appeal discusses "in camera" the decision regarding the execution of the EAW. At the conclusion of this discussion, the decision is read out immediately. The reading is considered as notification to the parties, whether present or not, who are entitled to receive a copy of the decision.³

The decision is transmitted immediately to the MoJ, who informs the competent authorities of the issuing Member State. In the case of a positive surrender decision, INTERPOL is also informed with a view to giving effect to the surrender of the person concerned.

If the Court of Appeal is of the opinion that the surrender should be refused, it immediately revokes the arrest (precautionary measure) and releases the person concerned⁴.

It is noted that Article 17(4) of the Italian implementing law provides that the Court of Appeal can only arrive at a positive surrender decision in respect of the person concerned if "*there exist serious indications of his or her guilt or when an irrevocable sentence has been passed*".

In respect of this provision, which appears to introduce the requirement of "probable cause", the expert team was advised that the Court of Cassation has given an interpretation according to which the Italian executing authority, when verifying whether there exist serious indications of "guilt", merely "*has to check that the EAW, for its inherent content or for other elements collected during the investigations, is grounded on evidence which, according to the issuing judicial authority, refers to a criminal act committed by the requested person*".⁵

¹ Reference is made to the statistics in Annex D, in particular questions 5.3 and 7.1.

² A representative of the issuing Member State may also be present, and if this is the case, he/she shall be heard as well, see Article 17(1) of Law 69/2005.

³ Article 17(6) of Law 69/2005.

⁴ Article 17(5) of Law 69/2005.

⁵ Court of Cassation, Sez. 6, n. 34355 of 23 September 2005, Ilie (Belgium).

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Appeal to Court of Cassation. The decision of the Court of Appeal may be challenged before the Court of Cassation, where there is a possibility of a single and final appeal. An appeal is possible both against a surrender decision in a case without consent, and following an order on surrender in a case where the person concerned has given his or her consent to the surrender.¹

The appeal may be lodged by the person concerned or by his or her legal counsel. The prosecutor general can also lodge an appeal in the interest of the law. The appeal must be lodged within 10 days of notification of the decision of the Court of Appeal. The appeal suspends the execution of the surrender decision.²

With a view to deciding on the case the Court of Cassation holds a hearing, of which the prosecutor and the legal counsel are notified at least five days in advance.³ Contrary to "normal" procedures in cassation, the person concerned may in EAW appeal procedures be present and he or she may speak. In practice, however, the person concerned rarely turns up.

At the conclusion of the hearing the Court of Cassation reads out its decision. It should be noted that the Court of Cassation does not decide only on points of law, as it usually does in other cassation procedures, but also on substance. The oral decision of the Court of Cassation is accompanied by a written statement of the underlying grounds. If it is not possible to immediately deliver this written statement, the Court of Cassation deposits the statement within five days of reaching the decision.⁴ A copy of the decision is immediately transmitted to the MoJ.⁵

The expert team was informed of the existence at the Court of Cassation of a contact point for EAW matters. The aim of the contact point is, on the one hand, to function as a centre of expertise for the benefit of the members of the Court of Cassation (and, as appropriate, for members of Courts of Appeal that may need information or assistance in EAW matters), and on the other hand to facilitate contacts with issuing authorities in the other Member States.

¹ Article 22(1) of Law 69/2005.

² Article 22(2) of Law 69/2005.

³ Article 22(3) of Law 69/2005.

⁴ Article 22(4) of Law 69/2005.

⁵ Article 22(5) of Law 69/2005.

Period of time needed for arriving at decisions. In cases with consent, the average period of time between the arrest and the decision on the surrender is relatively short and (almost) in line with Article 17(2) of the Framework Decision: in 2006 the average period was 15 days, in 2007 it was 18 days and in 2008 (first semester, 1 January - 30 June) it was 13 days.

In cases without consent, the Italian implementing law provides, in line with the Framework Decision, that the decision on surrender be issued within 60 days of the validation of the arrest. Should it prove impossible for reasons of *force majeure* to respect the said period then the time limit may be extended by 30 days. Special rules apply in case of immunity.¹

The implementing law provides that the Court of Cassation shall deliver its decision within fifteen days after having received the cassation documents in the form prescribed by the law.² However, no details are provided on the situation where the Court of Cassation does not comply with this deadline.

In practice, the Court of Cassation takes a decision within 20-25 days of lodging the appeal, although extremes of 11 and 53 days have also occurred. According to the Court of Cassation, the notification of the hearing to the parties and the need to request additional information are the two most important causes for longer delays. In order to reduce the time period for taking a decision, the Court of Cassation is resorting to more frequent use of transmission by fax for notification of the hearing to the parties.

¹ In line with Article 20(1) of the Framework Decision, Article 17(3) of Law 69/2005 provides that "*If the requested person has been granted immunity under the Italian legal system, than the time limit for taking the decision shall begin, starting from the day on which the Court of Appeal has been notified that the immunity has been waived. If the decision regarding the waiving of immunity is the responsibility of an authority of the Italian State, then the court shall make the necessary request*". The expert team was advised that this provision has not to date been applied. The team was however informed that the provision may gain greater importance in view of draft legislation that has recently been proposed by the Italian government and which would enlarge the scope of people benefiting from immunity. See also, in point 4.7 of this report, the observations in respect of the ground for refusal under u).

² Article 22(3) of Law 69/2005. In this Article, reference is made to Article 127 of the Code of criminal procedure.

The statistics provided by the Italian authorities indicate that the average period of time for taking a final decision on an EAW in a case without consent was around 80 days in both 2006 and 2007. In the first semester of 2008, however, the average time period decreased to 56 days. According to the Italian authorities, this can be explained in view of the fact that the Italian executing authorities have become better acquainted with the specificities of the EAW procedure.

This being the case, the Italian authorities acknowledged that it was often not possible to comply with the time limit of (60+30=) 90 days for taking a decision. In fact, in 2006 this happened on 26 occasions, in 2007 on 82 occasions and in 2008 (1 January-30 June) on 3 occasions. The Italian authorities are in the process of examining the reasons for these delayed decisions (requests for additional documentation, appeal to the Court of Cassation, etc.).

Article 21 of the Italian implementing law provides that the requested person shall be immediately released if the decision is not rendered within the 90-day time limit (or 10 days in case of consent). The competent judge of the Court of Appeal decides on the application of this provision, which has no corresponding provision in the Framework Decision.

It is to be noted finally that the Italian implementing law provides that in case of a breach of the 60-day limit, the MoJ notifies the requesting State, "also through Eurojust".¹ In practice, the issuing State is directly notified and Eurojust is never involved.

Guarantees. In respect of guarantees to be given by the issuing Member State, the Italian implementing law basically provides that in the cases referred to in Article 5 of the Framework Decision, the Italian judicial authority shall, if appropriate, make the execution of an EAW subject to certain (conditions and) guarantees.² These guarantees are the same as those set out in Article 5 of the Framework Decision.

¹ Article 17(2) of Law 69/2005.

² Article 19 of Law 69/2005.

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The Italian authorities observed that the guarantees are ascertained as follows:

- a) As to the possibility of applying for a retrial in the case of an "in absentia" judgment, the guarantee is in general accepted if there is a specific provision in force in the issuing Member State on the possibility of granting a retrial. Hence, no specific ascertainment is required;
- b) As to offences for which a custodial life sentence or life-time detention order can be imposed, the guarantee is in general accepted if the issuing Member State has provisions in its legal system for a review of the penalty imposed. Hence, as in the case under a), no further ascertainment is required once the existence of this kind of provision is established before the person sought is surrendered;
- c) With regard to an Italian national or resident in the Italian State, whose surrender is subject to the condition that he or she be returned in order to serve in Italy the sentence imposed in the issuing Member State, the guarantee is ascertained by the MoJ through a request for information to the issuing authority, as well as through the cooperation of the person concerned in coming back, and of his defence counsel.

The expert team was informed that the issuing authorities generally respond positively to requests for guarantees from the Italian executing authority. In certain cases, however, the Italian executing authority refused the execution of a EAW, because the requested guarantees were not satisfactory (not given at all, not given in due form or not given in time).

As regards the guarantees for "in absentia" judgments ¹, the execution was refused in 8 cases in 2007, and in 6 cases in 2008 (1 January - 30 June).

As regards the guarantees for custodial life sentences ², the execution was refused in 1 case in 2007, and in 2 cases in 2008 (1 January - 30 June).

¹ Article 19(1)(a) of Law 69/2005 - compare Article 5(1) of the Framework Decision.

² Article 19(1)(b) of Law 69/2005 - compare Article 5(2) of the Framework Decision.

As regards the guarantees for return of own nationals ¹, the execution was refused in 2 cases in 2006, 10 cases in 2007, and in 6 cases in 2008 (1 January - 30 June).

4.7 VERIFICATION OF DOUBLE CRIMINALITY/REFUSALS TO SURRENDER

Verification of double criminality. The Italian implementing law contains in Articles 7 and 8 provisions on the verification of double criminality.

Article 7 provides the standard rule, according to which Italy shall enforce an EAW only in cases where the act is also considered to be an offence under Italian law. An exception is made for matters concerning taxes and duties, customs and foreign exchange.²

The same Article provides that in prosecution cases, the offence must be punishable under the law of the issuing Member State by a penalty or period of detention of a maximum of at least twelve months. Article 7(3), second sentence, specifies that "*Aggravating circumstances shall not be taken into account in calculating the length of the penalty or period of detention*".

Article 8(1) provides a list of 32 categories of offences for which the surrender on the basis of an EAW shall take place independently of the verification of double criminality, provided that the maximum custodial sentence or detention is of three or more years, again "*excluding any aggravating circumstances*". According to Article 8(2), the "*The Italian judicial authority shall decide on the definition of the offences for which surrender has been requested in accordance with the law of the issuing state, and whether this definition corresponds to those listed in paragraph 1.*"

The categories of offences set out in Article 8(1) resemble those set out in Article 2(2) of the Framework Decision. However, the categories in the Italian implementing law are described in much more detail than in the Framework Decision.

¹ Article 19(1)(c) of Law 69/2005 - compare Article 5(3) of the Framework Decision.

² This is only partially in line with Article 4(1) of the Framework Decision, since an extra condition has been added, see below e.g. under point 7.3.11(b).

Three examples:

- the category of offences referred to in Article 2(2), fifth indent, of the Framework Decision ("*illicit trafficking in narcotic drugs and psychotropic substances*"), has been transposed in Article 8(1)(e) of the Italian implementing law as "*selling, offering, ceding, distributing, trading, purchasing, transporting, exporting, importing or procuring for others substances which, according to the legislation in force in European countries, are considered to be narcotic drugs or psychotropic substances*";
- the category of offences referred to in Article 2(2), eleventh indent, of the Framework Decision ("*computer-related crime*") has been transposed in Article 8(1)(m) of the Italian implementing law as "*committing, for personal gain or for the profit of others or to cause harm to others, a direct action to access or remain without authorisation in a security-protected computer or telematic system or damaging or destroying computer or telematic systems, data, information or programs contained in or pertinent to them*";
- the category of offences referred to in Article 2(2), sixteenth indent, of the Framework Decision ("*kidnapping, illegal restraint and hostage-taking*") has been transposed in Article 8(1)(r) of the Italian implementing law as "*depriving individuals of their personal freedom or restraining or holding them by threatening to kill, injure or continue to restrain them in order to force a third party, whether this be a state, an intergovernmental international organisation, a natural or corporate person or a community of natural persons, to commit or refrain from committing any action, subordinating the release of the kidnapped person to this action or omission*".

The practitioners interviewed explained that the provisions in the Italian implementing law had been made so detailed in view of the requirement of *tassatività*.¹ They also observed that so far there had not been any problems with the issue of double criminality. In particular, the detailed character of the list in Article 8 would in practice never have given rise to any difficulties.²

Grounds for refusal.³ Article 18 of the Italian implementing law sets out the "official" grounds for refusal⁴. These grounds are reproduced in Annex C to this report.

Article 18 contains 20 grounds for refusal.⁵ All are mandatory. The Italian legislator has incorporated in the Italian implementing law the 3 mandatory grounds for refusal set out in Article 3 of the Framework Decision, as well as, equally as mandatory grounds, 6 of the 7 optional grounds for refusal set out in Article 4 of the Framework Decision.⁶

The Italian legislator has also introduced 12 new grounds for refusal. Some of these new grounds have been inspired by the Framework Decision, such as the grounds under a) and d), which refer to recital 12 of the Framework Decision, and the ground under h), which refers to recital 13 of the Framework Decision.

¹ The principle of *tassatività* ("sufficient certainty") requires that offence descriptions, including all subjective and objective elements, are worded in such a (detailed) way so as to enable the court to identify exactly whether the facts committed are included within the description of the offence allegedly committed.

² The expert team was informed of one case in which surrender was refused for lack of double criminality. This case concerned the issuing of a "bad cheque" (issuing a bank cheque knowing that there is no possibility of payment, or withdrawing the funds or refusing the payment before the deadline for presentation of the cheque). According to the Court of Appeal, this behaviour does not fall within the categories of offences listed in Article 8(1) of Law 69/2005, notably under v), and is moreover depenalised in Italy. Court of Appeal of Venice, judgment of 11 March 2008, Toderasc (Romania).

³ Although the term "ground for non-recognition" or "ground for non-execution" is more adequate in the context of mutual recognition instruments such as the Framework Decision, the term "ground for refusal" has, for practical reasons, been used in this report.

⁴ "Official", because the Italian implementing law contains various other "hidden" grounds of refusal, as described in this Chapter 4. See also the conclusions in Chapter 7.

⁵ The optional ground referred to in Article 4(1) of the Framework Decision has been transposed as a mandatory ground through Article 7(1) and (2).

⁶ The optional ground referred to in Article 4(5) of the Framework Decision has not been transposed. The optional ground referred to in Article 4(3) of the Framework Decision has only partially been transposed.

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The other 9 grounds, however, are completely new. They read as follows:

- b) *if an infringement of rights has occurred with the consent of a person or persons who, in accordance with Italian law, has or have the power to exercise a right of consent*

At the time of the evaluation visit, this ground had so far never been applied by the Italian executing authorities.

- c) *if under Italian law the fact represents the exercise of a right, the fulfilment of a duty or has been determined by chance or by force majeure*

At the time of the evaluation visit, this ground had so far never been applied by the Italian executing authorities.

- e) *if the legislation of the issuing Member State does not set any maximum limit to provisional detention*

At the time of the evaluation visit, this ground had been applied three times by the Italian executing authorities. One case concerned German legislation¹, and two cases related to Belgian legislation.² In all three cases the competent Court of Appeal observed that the national legislation concerned, although providing for a regular examination of the necessity of prolonging the provisional detention, did not set a maximum limit to such provisional detention. In view of the clear terms of the ground for refusal under e), and given the case law of the ECJ according to which conforming interpretation cannot lead to an interpretation *contra-legem*, the Courts of Appeal refused the surrender of the person concerned.³

¹ Court of Appeal of Venezia (Venice), judgment of 13 June 2006, Volanti (Germany)

² Court of Appeal of Ancona, judgment of 26 October 2006, Maoloni (Belgium)
Court of Appeal of Firenze (Florence), judgment of 14 December 2006, Roata (Belgium)

³ The Courts of Appeal clearly had difficulties in applying this ground for refusal. The Court of Appeal of Venice felt obliged to apply the ground for refusal under e), "*although the result is alarming as regards criminal policy and disappointing in view of cooperation within the Community. It leads to the paradox that the surrender, which would have been allowed under the usual extradition practice, cannot be allowed under the legal framework relating to the EAW, although the latter aims at speeding up the procedure on the basis of mutual trust*".

It should however be noted that the ground for refusal under e) has not been applied again since the Court of Cassation has mitigated its scope of application by ruling that the ground does not concern the situation where the law of the issuing State, while not setting a strict maximum period of provisional detention, provides nevertheless for a regular examination of the necessity of prolonging such provisional detention.¹

- f) *if the object of the European arrest warrant is a political offence, with the exceptions mentioned in article 11 of the International Convention for the Suppression of Terrorist Bombing adopted by the General Assembly of the United Nations in New York on 15 December 1997, incorporated into law no. 34 of 14 February 2003; by article 1 of the European Convention on the Suppression of Terrorism, adopted in Strasbourg on 27 January 1977, incorporated into law no. 719 of 26 November 1985; by the single act of constitutional law no. 1 of 21 June 1967*

The expert team was informed that this ground for refusal has been inserted in view of Article 10(4) of the Italian Constitution, which precludes the extradition of a foreigner for political offences.

At the time of the evaluation visit, this ground had so far never been applied by the Italian executing authorities.

¹ Court of Cassation, Sezioni Unite, n. 4614 of 30 January 2007, Ramoci (Germany). In this 25-page judgment, the Court of Cassation, after a detailed examination of Law 69/2005, of the Framework Decision on the EAW and of the case law of the European Court of Human Rights, concluded by laying down the following principle of law:
"Concerning the European Arrest Warrant, and in reference to Article 18(e) of Law No 69 of 22 April 2005, which provides for the possibility of refusing surrender "where the legislation of the issuing Member State does not lay down the maximum limits for provisional detention", the Italian judicial authority must verify, for the purposes of the surrender, whether the legislation of the issuing Member State explicitly lays down a duration for provisional detention until an initial conviction is handed down; or in the absence of this, whether a time limit may in any case be inferred from other mechanisms of the proceedings which, compulsorily and at predetermined times, institute an effective judicial verification of proper execution of the provisional detention or, alternatively, its termination."

- g) *if there is any reason to suppose that the final sentence forming the object of the European arrest warrant is not the result of a due and fair process carried out in respect of the minimum rights of the defendant provided for in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, incorporated into law no. 848 of 4 August 1955, as well as into article 2 of Protocol no. 7 to the same Convention adopted in Strasbourg on 22 November 1984, as incorporated into law no. 98 of 9 April 1990 establishing the right to a two-level degree of jurisdiction in criminal matters*

At the time of the evaluation visit, this ground had so far never been applied by the Italian executing authorities.¹

- s) *if the requested person is a pregnant woman or mother of children under the age of three years and living with her, unless, in the case of a European arrest warrant issued as part of a proceeding, the precautionary measures underlying the restrictive order issued by the judicial authority prove to be exceptionally serious*

¹ In one case before the Court of Cassation, a violation of Article 18(1)(g) was invoked in order to obtain the annulment of a decision of the Court of Appeal of Campobasso. According to the defence, this ground for refusal prevented the surrender of the requested woman to Romania, since the Romanian authorities, whilst being aware of her domicile and precise address in Italy, had not informed her of the fact that criminal proceedings had been instituted against her, nor had they sent her a copy of the judgment rendered subsequently *in absentia*. As a result of this, she would have been unable to oppose the *in absentia* judgment within the applicable time limit. The Court of Cassation did not rule on this plea, but observed that the Romanian woman later succeeded in having the *in absentia* judgment of the Romanian Court quashed and the EAW withdrawn. In view of this withdrawal, the Court of Cassation annulled the decision of the Court of Appeal. See Court of Cassation, Sez. 6, judgment of 16 October 2007 in case 31346, Pascu (Romania).

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At the time of the evaluation visit, this ground had been applied four times by the Italian executing authorities in 2007, and once in 2008. Three cases came from Germany,¹ one case from France² and one case from the Netherlands.³

In the judgments concerned, the Courts of Appeal sometimes examined in great detail the question whether the detention order at the basis of the EAW was “*exceptionally serious*”, since a positive reply to that question would give rise to surrender despite the requested woman being pregnant or being the mother of a child of less than three years old. However, it was observed that in conviction cases such examination was redundant.⁴

- t) *if the precautionary measure on which the European arrest warrant is based was issued lacking the required justification*

This ground of refusal is linked to Article 6(3), which obliges issuing authorities to attach a copy of the domestic arrest warrant to an EAW submitted for execution to the Italian judicial authority.

¹ Court of Appeal of Genova, judgment of 24 May 2007 and 7 June 2007, Had (Germany). The requested woman was 5 months pregnant.
Court of Appeal of Milano, judgment of 20 June 2007, Sarov/Horvat (Germany). The requested woman was the mother of a child aged two years.
Court of Appeal of Trento, judgment of 25 July 2007, Comberlato (Germany). The requested woman was the mother of a child aged 6 months.

² Court of Appeal of Firenze, judgment of 21 August 2007, Jovanovic (France). The requested woman was the mother of one child aged 2 years and one child aged 9 months.

³ Court of Appeal of Milano, judgment of 5 March 2008, Iyamu (Netherlands). The requested woman was the mother of one child aged 2 years and one child aged 4 months.

⁴ Court of Appeal of Firenze, judgment of 21 August 2007, Jovanovic (France). “*The exception to the general principle in the first part of the [ground for refusal under s)] concerns exclusively the case in which surrender is requested on the basis of a domestic arrest warrant. In any case, the surrender of a mother with children of less than three years is excluded if it is requested for the execution of an irrevocable sentence.*”

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The expert team was informed that the Court of Cassation has narrowed the scope of application of this ground of refusal, by stating that it is actually sufficient that the issuing judicial authority accounts for the detention order (precautionary measure) on which the EAW is based, "*which can also occur by a detailed exhibition of the factual evidence against the person whose surrender is sought*".¹

At the time of the evaluation visit, this ground had been applied once by the Italian executing authorities in 2006, and four times in 2007. Two cases came from Poland,² one from Belgium,³ one from France⁴ and one from Spain.⁵

- u) *if the requested person enjoys immunity under Italian law that limits the execution or continuation of criminal prosecution*

One could think that this new ground for refusal aims at transposing Article 20 of the Framework Decision, but it is actually Article 17(3) of the Italian implementing law that transposes almost literally the said Article of the Framework Decision in the Italian implementing law. The expert team remains a little puzzled by the interrelationship between this mandatory ground for refusal and the said Article 17(3).

At the time of the evaluation visit, this ground had so far never been applied by the Italian executing authorities.

¹ Court of Cassation, Sez. 6, judgment of 23 September 2005 in case 34355, Ilie (Belgium).

² Court of Appeal of Catanzaro, judgment of 18 February 2006, Bonano (Poland). Domestic arrest warrant lacked required justification (other grounds also invoked).
Court of Appeal of Potenza, judgment of 20 February 2007, Jasisnka (Poland). Domestic detention order was not received and the required justification could therefore not be verified.

³ Court of Appeal of Torino, judgment of 5 February 2007, Tessore (Belgium). Domestic detention order was not received and the required justification could therefore not be verified.

⁴ Court of Appeal of Bologna, judgment of 8 May 2007, Formaro (France). Surrender was refused on the basis of Articles 6(4), 17(4) and 18(1) under t) of Law 69/2005. The Court observed that it did not receive the additional documentation relating to the facts of the case and that it was therefore not in a position to verify the existence of serious indications of guilt.

⁵ Court of Appeal of Torino, judgment of 10 December 2007, Rizzo (Spain). The facts of the case were not sufficiently clear either from the EAW, or from the domestic arrest warrant.

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- v) *if the sentence for the execution of which surrender is requested contains provisions contrary to the fundamental principles of the Italian legal system*

At the time of the evaluation visit, this ground had so far never been applied by the Italian executing authorities.

The following table sets out the provisions of the Italian implementing law through which the grounds for refusal in the Framework Decision have been transposed (NB: it is recalled that all grounds in the Italian implementing law have a mandatory nature):

Ground for refusal in FD :	Transposition in Law 69/2005:
Article 3(1) Framework Decision	Article 18(1)(l)
Article 3(2) Framework Decision	Article 18(1)(m)
Article 3(3) Framework Decision	Article 18(1)(i)
Article 4(1) Framework Decision	Article 7(1) and (2)
Article 4(2) Framework Decision	Article 18(1)(o)
Article 4(3) Framework Decision	Article 18(1)(q) (partially)
Article 4(4) Framework Decision	Article 18(1)(n)
Article 4(5) Framework Decision	Not transposed
Article 4(6) Framework Decision	Article 18(1)(r)
Article 4(7) Framework Decision	Article 18(1)(p)

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The following scheme shows the basis in the Framework Decision for the grounds for refusal contained in the Italian implementing law:

Ground for refusal in Law 69/2005:	Basis in Framework Decision:
a) Human rights (discrimination sex, race, etc.)	Recital 12, first part, Framework Decision
b) Infringements of rights	? - New
c) Exercise of a right, duty, force majeure	? - New
d) Freedom of association, press	Recital 12, second part, Framework Decision
e) Maximum limit preventive detention	? - New
f) Political offence	? - New
g) Due and fair process (Article 6 ECHR)	? - New
h) Death penalty, torture	Recital 13 Framework Decision
i) Minors	Article 3(3) Framework Decision
j), k) (-) ¹	
l) Amnesty	Article 3(1) Framework Decision
m) Final sentence for same offence	Article 3(2) Framework Decision
n) Statute barred	Article 4(4) Framework Decision
o) Criminal proceedings in Italy	Article 4(2) Framework Decision
p) Territoriality	Article 4(7) Framework Decision
q) Decision not to prosecute in Italy ²	Article 4(3) Framework Decision
r) Italian citizen, sentence executed in Italy	Article 4(6) Framework Decision
s) Pregnant mother or mother young child	? - New
t) Domestic warrant lacks justification	? - New
u) Immunity under Italian law	? - New
v) Contrary to fundamental principles Italian law	? - New

¹ Grounds "j" and "k" do not exist, since these letters do not form part of the Italian alphabet.

² "When in Italy a 'no case' has been handed down" ("*sentenza di non luogo a procedere*").

In some cases the Italian legislator, when transposing a ground for refusal, has modified that ground or made it subject to an extra condition. Two examples:

- when transposing the exception relating to taxes and duties, as referred to in Article 4(1) of the Framework Decision, the Italian legislator has made it subject to the condition that *"the taxes and duties must be comparable, by analogy, to taxes or duties whose non-observance under Italian law gives rise to a penalty of a period of detention for a maximum duration, excluding any aggravating circumstances, of three or more years."*;
- when transposing the ground for refusal referred to in Article 4(6) of the Framework Decision, which allows the possibility to refuse the execution of an EAW in conviction cases *"where the requested person is staying in, or is a national or resident of the executing State"*, the Italian legislator has made reference to the concept of *"Italian citizen"* (*"cittadino italiano"*).

4.8. OWN NATIONAL AND YOUTH ARREST AND SURRENDER ISSUES

No particular rules apply in respect of the surrender of own nationals, except Article 8(3), relating to the issue of double criminality. This provision states that *"If the act is not envisaged as a crime under Italian law, an Italian citizen shall not be surrendered if it emerges that he or she, without any personal fault, was not aware of the legislative provision of the issuing Member State on the basis of which the European arrest warrant has been issued."*

The expert team was however informed that this provision has never been applied so far in order to refuse the execution of an EAW.

4.9 SPECIALITY

Article 27 of the Framework Decision on "Possible prosecution for other offences" has been transposed, without any significant changes, in Article 26 of Law 69/2005 regarding the "Principle of Speciality".

According to the Italian authorities, the application of this Article has not raised any difficulties.

4.10 ONWARD SURRENDER/EXTRADITION

Article 25 of Law 69/2005 provides for a prohibition on subsequent surrender or extradition in line with Article 28 of the Framework Decision. Italy has not had recourse to the possibility provided for by Article 28(1) of the Framework Decision.

The expert team was not informed of any problems in this context.

4.11 ARTICLE 32 EXPERIENCES

In application of Article 32 of the Framework Decision, the Italian legislator has limited the application of the Italian implementing law in three ways.

Firstly, under Article 40(1), the provisions of the Italian implementing law only apply to requests for execution of an EAW which were issued by the issuing authority – and consequently received by the Italian executing authority – after 14 May 2005, the date of entry into force of Law 69/2005.

This excludes all EAWs issued before 15 May 2005. As a consequence of this provision, which is not in line with Article 32(1) of the Framework Decision, issuing authorities which have issued an EAW before 15 May 2005 have to issue a new EAW if they want to obtain the surrender of a person who is (likely to be) in Italy.

Secondly, under Article 40(2), the provisions of the Italian implementing law apply only to requests for execution referring to offences committed on or later than 7 August 2002. As a consequence of this provision, which is in line with Article 32(1) of the Framework Decision, the provisions regarding extradition in force prior to 14 May 2005 continue to apply in relation to such requests.

The Court of Cassation has however ruled that in the case of a "*reato continuato*", in which an EAW refers both to offences that were committed prior to 7 August 2002 and, and at least equally, to offences committed after that date, execution of the EAW is permissible for all offences together.

Thirdly, under Article 40(3), a further exception has been made to the rule in Article 40(1), in the sense that the provisions contained in Article 8 of the Italian implementing law, regarding the absence of verification of double criminality, shall apply only to offences committed after 14 May 2005. This restriction is not provided by the Framework Decision.

The provisions of Article 40 of the Italian implementing law constitute an important reason for refusal of execution of EAWs by Italian judicial authorities. In particular Article 40(2) of the Italian implementing law has proved to be an obstacle to execution of EAWs: in 2006, the execution of 4 EAWs was refused on this ground, and in 2007 the execution of 30 EAWs was refused.

4.12 TEMPORARY/CONDITIONAL SURRENDER

The issue of postponement of surrender or temporary surrender has been dealt with in the Italian implementing law in Article 24, in line with Article 24 of the Framework Decision.

The Italian authorities indicated that in general no particular problems had arisen as regards the implementation of this provision.

4.13 THE MECHANICS OF SURRENDER (INCLUDING TEMPORARY AND CONDITIONAL SURRENDER) OF REQUESTED PERSONS

According to the Italian implementing law, the person requested is surrendered to the issuing Member State within ten days, calculated either after the final decision on the execution of the EAW in cases without consent, or after the order by the Court of Appeal in cases with consent.¹

Article 23(5) of the Italian implementing law provides that, at the end of the ten-day time limit, the start of which can be "renegotiated" once, the person arrested may no longer be held in custody and should be released, "*provided that the [person] him- or herself is not responsible for the non-execution of the surrender*".

In application of this Article 23(5), on 6 occasions the person concerned was released in 2007. There is no data for 2006; in 2008 (1 January-30 June) there has not yet been a case of release for this reason.

The MoJ is responsible for organising the surrender. The physical surrender process is a task of INTERPOL. Reference is made to point 3.11 for further details.

4.14 CONFLICT OF EAWS/EXTRADITION REQUESTS

Article 20 of the Italian implementing law regarding "multiple surrender requests" is entirely in line with Article 16 of the Framework Decision.

No particularities in this respect were brought to the attention of the expert team. As already observed above, the Italian executing authorities rarely involve Eurojust.

¹ Article 23(1) of Law 69/2005.

4.15 EXPENSES

Article 37(1) of the Italian implementing law regarding "expenses" literally transposes Article 30 of the Framework Decision.

See further the comments under point 3.14.

4.16 MISCELLANEOUS COMMENTS

Validity flags. The Italian authorities indicated that the practice of placing prohibitive "validity flags" is still in force. It is run by SIRENE. According to the said authorities, validity flags are notably used when, following a directly received EAW, a precautionary measure has been imposed in respect of the person concerned which is not a measure of remand in custody (for instance, the person has been obliged to reside in his abode, or is free without any restriction). Such person could then run the risk of being newly arrested following a SIS alert. The solution to the problem was found in enhanced cooperation between the Courts of Appeal (competent for the issue of the precautionary measure) and SIRENE, with a view to enabling SIRENE to obtain precise indications on the issue of "validity flags", so as to avoid groundless arrests.

Modification of the law. The Italian authorities indicated that in view of the experience gained so far with the application of Law 69/2005, several changes to that law were being considered. A first set of proposals has already been submitted to the Minister of Justice.

5. TRAINING PROVISION

Courses on the EAW. Following the entry into force of the Italian implementing law, a number of training activities have been organised in Italy with a view to making the relevant practitioners acquainted with the theoretical and practical implications of the new instrument. The activities were organised by the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*), by academic institutions and, at local level, by the competent issuing and executing authorities themselves. The activities addressed administrative, judicial and police staff.

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Since then, refresher courses and follow-up activities have taken place more or less regularly in Italy, either at national or at local level. These activities aim to facilitate learning about the practical aspects, both administrative and judicial, of the application of the Italian implementing law. They also aim at disseminating relevant case law, particularly of the Court of Cassation.

The Superior Council of the Judiciary takes a leading role in organising EAW-related meetings, both at national and international level. These meetings are either directly organised by the Superior Council of the Judiciary, or by the European Judicial Training Network. Funding comes often, at least partly, from the European Commission.

The expert team was informed of the organisation by the Superior Council of the Judiciary of the following courses, which deal entirely or partially with EAW matters:¹

Courses in the year 2008:

"Judicial cooperation, European arrest warrant and instruments of criminal justice of the European Union" (Rome, 7–9 July 2008: 85 participants);

"Extradition, European arrest warrant" (Naples, 14 May 2008: 16 participants);

Courses in the year 2007:

"Interstate cooperation, letters of request and European arrest warrant" (Rome, 7–9 May 2007; 87 participants);

"Personal precautionary measures" (Rome, 20–22 June 2007: 97 participants);

"Terrorism and transnational crime: legal aspects and social analysis of the phenomenon" (Rome, 5–7 March 2007: 90 participants);

"European arrest warrant" (Catania, 24 September 2007: 46 participants);

¹ In respect of each seminar the expert team has seen the names of the teachers and the list of participants.

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Course in the year 2006:

"Precautionary personal and real measures" (Rome, 20– 22 November 2006: 97 participants);

Courses in the year 2005:

"Transnational organised crime: measures to fight it and tools of judicial cooperation" (Rome, 6–8 June 2005; 88 participants).

Language courses. The MoJ periodically organises language courses in English and French for its staff involved in EAW procedures; participation is voluntary. Various courts also organise, or are planning to organise, languages courses in English and French in particular.

Written documentation. Information on the Italian implementing law is also spread through the circular letters of the MoJ, and through the *vademecum* on the issue of EAWs. This documentation also contains best practices. Furthermore, a complete and detailed collection of case law of the Court of Cassation ("*Orientamento di giurisprudenza*") is made available through the internet (see hereafter point 7.3.2.1.).

6. DEFENCE PERSPECTIVES

The evaluation team was received by senior members of the disciplinary board of the national bar association (*Consiglio nazionale forense*). It appeared however that these members were not involved themselves in EAW procedures. Despite requests by the expert team to meet experienced lawyers in EAW cases, such a meeting could not be arranged.

The expert team regrets that, for this reason, it was not possible either to evaluate whether, in practice, defence rights are guaranteed in Italy in EAW surrender procedures, or to obtain any comments from the point of view of defence lawyers in respect of these procedures.

7. CONCLUSIONS

7.1. GENERAL CONCLUSIONS

7.1.1. General

The expert team would above all like to thank the Italian authorities for their excellent hospitality. The expert team would also like to thank these authorities for their logistic and practical assistance during the evaluation visit. Ufficio II of the MoJ was moreover very efficient in providing some additional information after the visit on request of the expert team.

The expert team was very impressed by the knowledge, vision and craftsmanship of the judges and prosecutors interviewed, both in the courts and in the MoJ. It was a real privilege and pleasure to discuss with these practitioners. The expert team positively assessed the judicial culture that reigned in the jurisdictions, in particular as regards the status of the judiciary as a body independent of other parts of government.

The expert team experienced a great willingness among the practitioners interviewed to turn the EAW surrender procedure in Italy into a success. The team also noted that the practitioners themselves generally considered that the system of surrender as established by the Framework Decision was a substantial improvement compared to the situation under the extradition procedure. Shorter deadlines were in particular commended.

The expert team emphasises that it has only met with members of the judiciary in Rome and in Naples, two big cities with a lot of activity, and hence experience, in the field of international law cooperation, including as regards the handling of EAW procedures. The expert team has not obtained an insight into the handling of EAW procedures in areas with less activity and experience in EAW and other international procedures.

The expert team recalls that it has not had the opportunity to meet with defence lawyers who have experience in EAW matters. Hence, it was not possible either to evaluate whether, in practice, defence rights are guaranteed in Italy in EAW surrender procedures, or to obtain any comments from the point of view of defence lawyers in respect of these procedures.

7.1.2. Issues

7.1.2.1. Italian implementing law not in line with Framework Decision

Whilst the judges and prosecutors interviewed, including those working within the MoJ, try hard to make the EAW procedure successful, the expert team observed that they have to cope with an implementing law that on many points is not in conformity with the letter and/or spirit of the Framework Decision.

After Italy had agreed to the Framework Decision, the Italian legislator, when drafting the Italian implementing law, took substantial freedom and introduced a much more restrictive regime for surrender than the Framework Decision intended to establish. Where the Framework Decision introduced the application of the principle of mutual recognition to judicial decisions, the Italian implementing law has in large parts introduced a test that is more intrusive than the system that was established in 1957 by the Council of Europe Convention on Extradition.¹

According to the case law of the European Court of Justice, the binding character of Framework Decisions places on national authorities, and particularly national courts, an obligation to interpret national law in conformity with European Law.² Under this "principle of conforming interpretation", national courts must, so far as possible, interpret national legislation which aims at implementing a Framework Decision in the light of the wording and purpose of that Framework Decision.³

¹ Paris, 13 December 1957.

² ECJ, judgment of 16 June 2005 in case C-105/03, Pupino, point 34.

³ ECJ in Pupino, previous footnote, point 43. "*When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.*"

The expert team considers that the Italian legislator has put the Italian judiciary in the position that on many points of Law 69/2005, it is *obliged* to give an interpretation of the Italian implementing law in order to bring it in conformity with the Framework Decision.

This is in fact what has happened. As described in chapter 4 above, the Italian courts, in particular the Court of Cassation, have on several occasions interpreted the Italian implementing law in such a way as to mitigate its restrictive character and to give it a meaning in line with the Framework Decision. The expert team commends this very positive practice of the Italian courts.

However, the ECJ has also established that the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*.¹ The Italian judges acknowledge that their margin of manoeuvre is limited and that in some cases it is impossible for them to construe the Italian implementing law in the light of the Framework Decision, since the law does not leave any room for interpretation in respect of the issue concerned.

When there is no possibility of interpretation, or when there is not yet a clear conforming interpretation by the Court of Cassation, the lower courts, notably the Courts of Appeal, have to work with the legislation as it stands. In view of the substantial differences between the Italian implementing law and the text and spirit of the Framework Decision, this creates the risk of differing practices between the various courts. The expert team considers incidentally that a conforming interpretation by the Court of Cassation is still "second best" to a situation in which the Italian implementing law would be fully in line with the Framework Decision.

Moreover, it appears that even the Court of Cassation is obliged to follow the letter of the Italian implementing law when there is no possibility at all for a conforming interpretation.

Furthermore, foreign issuing authorities also bear the consequences of the shortcomings in the Italian implementing law, since this law gives rise to a multitude of requests for additional documentation and information which is not foreseen in the Framework Decision and therefore not included in the EAW form.

¹ ECJ in Pupino, point 47.

The *circolari* and the *vademecum* can only to a certain extent help to bridge the differences between the Italian implementing law and the Framework Decision, since they do not have binding effect: Italian judges are subject only to the law.¹

In view of the above, the expert team strongly urges Italy to modify Law 69/2005. Specific conclusions and recommendations in this respect are set out below, notably under points 7.3. and 8.1. ("Conclusions in respect of Italy's activities as an executing Member State" and "Recommendations to Italy").

7.1.2.2. Languages

The expert team was informed – and observed – that only few Italian judges and prosecutors who carry out tasks as issuing and executing authorities master a second or third (more commonly spoken) language. This has as a consequence that it is more difficult for them to make direct contact with competent authorities in other Member States. It also restricts the possibilities for a larger group of practitioners e.g. to attend seminars in other Member States, or to participate in exchange programmes, such as those organised by the European Judicial Training Network (EJTN). The expert team was however happy to note that the Superior Council of the Judiciary, the MoJ as well as some judicial offices offer or are planning to offer their members language courses in English and French.²

¹ Article 101(2) of the Italian Constitution.

² See also chapter 5 above.

7.1.2.3. Correction or deletion of an alert under Article 111 of the Schengen Convention

There is a procedure under Italian law which enables citizens to correct, delete or obtain information, or to obtain compensation in connection with an alert involving them, as provided in Article 111 of the Schengen Convention.¹ This procedure, however, only applies to alerts that have been introduced in the SIS by Italy. There is no possibility (power) for the Italian authorities to rectify alerts that have been introduced in the SIS by other Member States. There might however be good reason to do so, e.g. in case of conflicting EAWs or if there are serious objections to such a SIS alert (or to the maintenance of such alert in the SIS).

7.1.3. Good practices

7.1.3.1. Centres of expertise

Training, creating awareness and gathering experience are very important in the situation in which virtually every judge and prosecutor can be confronted with an EAW. The expert team noted with satisfaction that a "centre of expertise" on EAW matters has been created within the MoJ. The expert team also observed that in Italy several such informal "centres of expertise" have developed, for example within the Court of Cassation ("contact point") and within competent units of *Tribunali* and Courts of Appeal (e.g. the Court of Appeal of the district of Lazio). The expert team commends the interaction between these different "centres of expertise".

¹ Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Article 111 of this Convention reads as follows:

- "1. Any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them.
2. The Contracting Parties undertake mutually to enforce final decisions taken by the courts or authorities referred to in paragraph 1, without prejudice to the provisions of Article 116."

7.2. CONCLUSIONS IN RESPECT OF ITALY'S ACTIVITIES AS AN ISSUING MEMBER STATE

7.2.1. Issues

7.2.1.1. Thresholds for use of EAW's

As set out in point 3.1 above, in prosecution cases the issue of an EAW requires circumstantial evidence of an offence punishable by a sentence of imprisonment of not less than maximum four years. In conviction cases an EAW can be issued when there is a sentence of at least one year of effective imprisonment; however, in certain cases, such as in respect of first offenders, a custodial sentence of more than three years (or four years in exceptional cases) is actually required.

These requirements of four years and one-three years in prosecution and conviction cases respectively, are substantially higher than foreseen in the Framework Decision, where the thresholds are set at one year and at four months, see Article 2(1) of the Framework Decision.

This limits the scope of application for issuing an EAW in Italy. The substantially higher thresholds in the Italian law preclude the issuing of EAW's in cases where the Framework Decision would allow such use. The expert team, although favouring a proportional use of EAW's¹, has doubts on the advisability of these Italian thresholds, which are higher than those set out in Article 2 of the Framework Decision.² The expert team notes however that these thresholds are also applicable in purely domestic cases in Italy.

¹ See the "European Handbook on how to issue a European Arrest Warrant", 8216/2/08 REV 2, in particular section 3.

² The team observes incidentally that this situation could work against Italy, in the sense that (potential) criminals would consider this Member State as a sort of "safe heaven" which provides immunity from execution of sentences for criminal offences committed in Italy.

7.2.1.2. Proportionality

During the interviews, Italian issuing authorities informed the expert team that, inspired by the *vademecum*, they apply a strict proportionality test before issuing an EAW. In fact, as observed above (point 3.1), the team was told by these authorities that only in very serious cases (organised crime, trafficking of human beings, terrorism, murder) a prosecutor will ask the judge to issue an EAW.

The expert team in general commends the application by Italy of a proportionality test and would recommend other Member States to apply such a test.¹ However, the team has concerns that some Italian issuing authorities apply this test in a too restrictive manner, having as a consequence that too little use is made of EAWs.

7.2.1.3. Use of SIS alerts

When the whereabouts of the requested person are unknown, the Italian implementing law reserves the use of EAW's, and consequently of Article 95 alerts, to those cases where it is "possible" that the requested person is present in one of the other Member States of the European Union². In practice, the expert team was told by practitioners, this means that there should be "solid indications" that the requested person is in another Member State. In the absence of such "solid indications", an EAW will not be issued. SIRENE in such a situation often inserts alerts in the SIS of a type other than Article 95 alerts, such as Article 98 and 99 alerts (see in particular point 3.15 above), to verify whether a person can be located in another Member States. When there is a hit on a person on the basis of such "other type" of alert, the authorities in the other Member States have, in the absence of an EAW from Italy or an Article 95 alert – which is equivalent to an EAW in conformity with Article 9(3) of the Framework Decision – no legal basis to arrest the person concerned. They first have to inform the Italian authorities and obtain an EAW, and hence power for apprehension. This can result in ineffective and lengthy procedures.

¹ See also the "European Handbook on how to issue a European Arrest Warrant", cited before.
² Cf. Article 29(1) of Law 69/2005; as indicated above, the expression "solid indications" was used by the practitioners interviewed.

7.2.1.4. Mentioning other outstanding EAWs on M form

Where the Italian issuing authorities have issued more than one EAW in respect of the same person, only an alert for the most important EAW will be introduced in the SIS. Once the person concerned has been apprehended, the executing authority will be informed of the other outstanding EAWs. The existence of the other outstanding EAWs is not mentioned on the M form.

The expert team can understand that an alert is only introduced in relation to the most important EAW, but regrets that other outstanding EAWs in respect of the same person are not mentioned on the M form. This could indeed provide useful information to the other Member States, in particular if a short description is provided of the offences that are at stake in the other EAWs. Although it is currently already possible to indicate the existence of other EAW's on the M form¹, it would be helpful if that form contained a specific box to this effect.

7.2.1.5. Possibility in prosecution cases of EAWs issued by prosecutor

The requirement that in prosecution cases the EAW should be issued by the judge who issued the domestic arrest warrant ² sometimes leads to practical difficulties, since the case may have "moved on" after the domestic arrest warrant was issued. The case may in fact be with another judge or court at the time when it is felt appropriate to issue an EAW.

Some practitioners observed that it could be helpful if the possibility were created for the prosecutor in charge of the case to draft an EAW, and for such EAW to be signed and issued by the judge before whom the case is pending at the time when it is appears necessary to issue the EAW.

In this context it is recalled that in practice it is already often the prosecutor at the *Tribunale* or at the Court of Appeal who proposes to issue an EAW, and it is often the same prosecutor who completes the EAW form and submits it to the judge for signature.

¹ Notably in box 083, "Particular information concerning the alert".

² Article 28(1)(a) of Law 69/2005.

7.2.1.6. Register for EAWs

There is no national registration of domestic, EAW and other international arrest warrants in Italy in a single central database, neither is there the possibility for prosecutors and judges to check whether there are arrest warrants outstanding in respect of the person sought. It is only at the level of the MoJ that a verification takes place of the parallel existence of two or more arrest warrants in respect of the same person. By that time, however, the competent authority needs already to have issued an EAW.

It could be beneficial if there was a national register of arrest warrants in which the prosecutor or judge could check in advance whether other EAWs exist in respect of the same person and hence handle the proceedings more efficiently.

7.2.1.7. Lack of feedback

As mentioned before under point 3.15, the expert team was informed at SIRENE that its work is sometimes complicated as a result of lack of feedback from the Italian competent authorities. It happens that EAWs issued by Italian authorities are reviewed or retracted by those authorities without proper notice being given to SIRENE. This may cause difficulties in practice. Police and/or judicial time could thus be wasted, and it could also give rise to possible allegations of breaches of the law by the executing authority with regard to incorrect data being inserted in the SIS. The establishment of a register for EAW's, as proposed in the previous point, may be helpful in this context too.

7.2.1.8. Guarantees for "in absentia" judgments

The interviewed practitioners observed that, at least in the past, there have been problems with the execution by competent authorities in other Member States of EAW's that were issued by Italian authorities on the basis of judgments rendered "in absentia". The timely provision of effective guarantees by the Italian competent authorities under Article 5(1) of the Framework Decision was not always possible.

The Italian authorities at the MoJ stressed that the problems would have been solved with the new Law 60/2005 on this issue.¹ The expert team appreciates the effort made by the Italian legislator, but nevertheless remains concerned as to whether the Italian competent authorities can effectively provide the requested guarantees in good time and in good order.

7.2.1.9. Maximum period of provisional detention

Under Italian law a person can be held in provisional detention for a limited period, from three months to one year. Periods spent in provisional detention abroad also count when calculating the maximum period of provisional detention under Italian law. When in the executing State the period of provisional detention exceeds the period of Italian precautionary detention, the Italian domestic arrest warrant, which is the basis for the EAW issued by the Italian competent authority, becomes null and void. This has as a consequence that the EAW is also no longer valid and has to be withdrawn; it is not possible to issue a new EAW for the prosecution of the same (alleged) offences. Italy has experienced this situation with the lengthy duration of EAW proceedings in the United Kingdom, see point 3.15. above.

¹ C.f. Article 175 of the Code of criminal procedure, notably paragraphs 2 and 2a; see also point 3.15 above.

7.2.1.10. Clearly indicate the length of provisional detention

During the interviews, several practitioners indicated that upon surrender of a requested person, the executing authorities had not clearly indicated the length of time during which the person concerned had stayed in provisional detention. It is however important to have precise knowledge of this length of time in view of the calculation of the obligatory deduction to be applied when executing the final sentence to be imposed (if any).¹

7.2.1.11 Replacement of pre-existing SIS alerts

As observed under point 3.15, the team was informed that only some Italian issuing authorities have replaced the Interpol alerts that existed before the entry into force of the Italian implementing law with new SIS alerts. Where the old alerts have been updated, the A form has been replaced by the A+M forms, leaving the Interpol alert unaltered. Where the old alerts have not been updated, the competent Italian authority will issue the EAW, together with the A+M forms, once the requested person has been located.

The expert team notes that, although the Italian authorities have reported no issue in this connection to date, the practice of leaving old alerts untouched might cause problems in relation to some SIS Member States that no longer accept International Arrest Warrants from another SIS Member State as a ground for starting to search for a person.

7.2.2. Good practices

7.2.2.1 Vademecum

The Italian authorities have issued a *vademecum*, which explains the practicalities of the procedure to be followed for issuing an EAW. The expert team expresses the wish that the *vademecum* will be regularly updated and will also keep track of good practices.

¹ See Article 26 of the Framework Decision.

7.3. CONCLUSIONS IN RESPECT OF ITALY'S ACTIVITIES AS AN EXECUTING MEMBER STATE

7.3.1 General

As announced under point 7.1.2.1. above, the expert team is of the opinion that the Italian implementing law is on various points not in conformity with the letter and/or spirit of the Framework Decision. It strongly urges Italy to bring the implementing law in line with the Framework Decision.

The expert team underlines that the fact that some provisions in the Italian implementing law, which are not in conformity with the Framework Decision, have not yet been applied by the Italian executing authorities, is not a reason to consider them as "harmless", since these provisions could very well find an application in the future. They should therefore be deleted or, where appropriate, put in line with the Framework Decision.

Provisions which are not in conformity with the Framework Decision, but which have been mitigated by the Court of Cassation, should also be deleted or, where appropriate, put in line with the Framework Decision. In fact, a conforming interpretation by the Court of Cassation, although certainly welcomed, is still "second best" to a situation in which the Italian implementing law would be fully in line with the Framework Decision.

According to the expert team, both the Italian competent authorities and the competent authorities in other Member States would be adequately served by a revised text of the Italian implementing law that is clear, precise and fully in line with the Framework Decision.

7.3.2. Issues

7.3.2.1. Grounds for refusal

a) Completely new grounds for refusal

The Italian legislator has introduced 9 completely new grounds for refusal in the Italian implementing law. It concerns the grounds in Article 18(1)(b), (c), (e), (f), (g), (s), (t), (u) and (v) of Law 69/2005. Although the Court of Cassation has limited the scope of some of these grounds, the expert team is of the opinion that the insertion of these grounds in the Italian implementing law – some of which, such as the "political offence" exception, reinstate a situation that is even more restrictive than under the 1957 Extradition Convention – is contrary to the text and spirit of the Framework Decision, which stipulates an exhaustive number of grounds for refusal in Articles 3 and 4.

Some of the new grounds for refusal require a factual examination of the case which is not in conformity with the principle of mutual recognition on which the Framework Decision is based. Other grounds imply that additional documentation or information has to be requested from the issuing Member State, since it is not provided in the standard form. This takes additional time and is contrary to the idea that the EAW is a "simplified system of surrender" which does away with the "complexity and potential for delay inherent in the present extradition procedures" (see recital 5 of the Framework Decision).

The expert team considers incidentally that the fact that several of the new grounds for refusal have already been applied in practice underlines the urgency of the need to delete these new grounds for refusal.

b) Additional condition in relation to taxes and duties

When transposing through Article 7(1) and (2) the ground for refusal referred to in Article 4(1) of the Framework Decision, the Italian legislator has in Article 7(2), second sentence, made the exception relating to taxes and duties subject to the condition that *"the taxes and duties must be comparable, by analogy, to taxes or duties whose non-observance under Italian law gives rise to a penalty of a period of detention for a maximum duration, excluding any aggravating circumstances, of three or more years."*

This is a restriction which is contrary to the Framework Decision¹ and which should hence be deleted.

c) New grounds for refusal relating to human rights / death penalty

The Italian legislator has converted recitals 12 and 13 of the Framework Decision into three mandatory grounds for refusal; see Article 18(1)(a) and (d) and Article 18(1)(h) of the Italian implementing law. The expert team is aware that legislators in other Member States have acted in a similar way and that the "human rights issue" occupies an important place in the Italian Constitution. The team considers nevertheless that the insertion of these grounds for refusal in the Italian implementing law is contrary to the text and spirit of the Framework Decision, which stipulates an exhaustive number of grounds for refusal in Articles 3 and 4. Moreover, the expert team is of the opinion that the said grounds for refusal, which could be interpreted as an expression of mistrust in the legal and judicial systems of (certain) other Member States, are redundant particularly in the light of the European Convention on Human Rights and Fundamental Freedoms, to which all Member States are signatories.

¹ Article 4(2) of the Framework Decision provides indeed that, *"in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State"*.

d) Conversion of optional grounds into mandatory grounds

The Italian legislator has transposed six optional grounds referred to in Article 4 of the Framework Decision as mandatory grounds for refusal in the Italian implementing law.¹ Although the expert team recognises that Italy is not the only Member State that has converted optional grounds into mandatory grounds, the team is of the opinion that such conversion is contrary to the letter and spirit of the Framework Decision, which in Article 4 clearly refers to “executing judicial authority” as the competent body having discretion to apply the optional grounds for refusal. By converting optional grounds into mandatory grounds, the Italian legislator has deprived the Italian executing authorities of their discretionary power to apply these grounds of refusal.

This is particularly worrying in respect of the ground for refusal relating to territoriality, as laid down in Article 4(7) of the Framework Decision. This ground has been transposed in the Italian implementing law in Article 18(1)(p). By obliging the Italian executing authority to refuse the execution of a EAW in case the offence has been committed in whole or in part in the territory of Italy, the Italian legislator has made it impossible for the Italian executing authority to decide on a case-by-case basis where the person concerned could best be prosecuted, taking into account all relevant elements of the particular case at hand. This can jeopardise the effectiveness of the fight against transnational organised crime, where in some circumstances another jurisdiction may be better placed to initiate and conclude proceedings.

7.3.2.2. Requirement to provide additional documentation

In application of Article 6(3) of the Italian implementing law, the issuing authority must provide a copy of the domestic arrest warrant or custodial sentence which gave rise to the EAW.

¹ The optional ground referred to in Article 4(5) of the Framework Decision has not been transposed.

In application of Article 6(4) of the Italian implementing law, the issuing authority must provide certain additional documentation, including a report on the offences of which the requested person is accused (with evidence of the sources of proof), the text of the applicable legal provisions of the issuing State, and any physical description or any other information that could help ascertain the identity and nationality of the requested person.

Articles 6(5) and 6(6) provide rules which allow the Italian executing authorities to impose the obligations under Articles 6(3) and 6(4). Where the issuing authorities do not provide the information requested, the request for execution of the EAW shall be rejected.

Although the application of Article 6(4) in particular has been mitigated by the case law of the Court of Cassation,¹ the expert team considers that these provisions, which *inter alia* introduce the requirement of evidence of the sources of proof and under which issuing authorities are systematically required to provide documentation that is not referred to in the EAW form, are fundamentally contrary to the principle of mutual recognition and therefore not in conformity with the Framework Decision.

7.3.2.3. Serious indications of guilt

According to Article 17(4) of the Italian implementing law, in prosecution cases the Court of Appeal shall hand down a decision providing for the surrender of the requested person "*if there are serious indications of his or her guilt*"². This condition, which inserts the requirement of "probable cause", is clearly in contradiction with the principle of mutual recognition and hence with the Framework Decision. In respect of guilt, the Italian executing authority should rely on the assessment made by the competent issuing authority; it is not for the Italian executing authority to verify this.

¹ See above under point 4.4 for the case law and for a more detailed explanation.

² For conviction cases it is stipulated that "*an irrevocable sentence*" must have been passed.

The expert team is aware that the application of this provision has been mitigated by the Court of Cassation, but considers it a serious infringement of the text and spirit of the Framework Decision. The team therefore recommends the Italian legislator to bring Law 69/2005 on this point in line with the Framework Decision.

7.3.2.4. Double criminality

a) *De facto* verification of double criminality in all cases

As set out above under point 4.7, the list of the 32 offences set out in Article 8(1) of the Italian implementing law is much more detailed than the list of 32 offences enumerated in Article 2(2) of the Framework Decision. In view of Article 8(2) of the Italian implementing law, this has as a consequence that in almost all cases relating to the offences listed in Article 2(2) of the Framework Decision, the Italian judge has to verify the existence of double criminality. Some practitioners even indicated that there is the risk of a triple criminality test, since some of the descriptions in Article 8(1) of the Italian implementing law would be even more restrictive than in the Italian Criminal Code.

Although the practitioners interviewed have indicated that this Article has not led to difficulties, the expert team is of the opinion that the Article may potentially give rise to substantial problems. It should hence be aligned with the text of the Framework Decision.

b) Exception for Italian citizens who do not know the law of the issuing State

Article 8(3) provides that "*if the act is not envisaged as a crime under Italian law, Italian citizens shall not be surrendered if it emerges that they, without any personal fault, were not aware of the legislative provision of the issuing Member State on the basis of which the EAW has been issued*".

The expert team was informed that this curious exception was inserted further to a 1988 judgment of the Italian Constitutional Court, according to which in certain cases an exception should be made to the general principle *ignorantia legis non excusat* (or *ignorantia legis neminem excusat*).

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The expert team observes that this provision, which resembles a ground for refusal, is not contained in the Framework Decision. The expert team considers further that this provision may require the Italian executing authority to carry out a factual examination of the case. This is contrary to the principle of mutual recognition and hence not in line with the Framework Decision.

7.3.2.5. Not taking account of aggravating circumstances

Articles 7(3), second sentence, as well as four words¹ in the heading of Article 8(1) of the Italian implementing law, provide that aggravating circumstances should not be taken into account in calculating the (minimum) penalty for which surrender is possible. These provisions, whilst having the merit of being clear and easy to apply, have as a consequence that the Italian legislator requires a higher degree of "punishability" than provided for under the Framework Decision, which is in fact completely silent on this point. The requirement may cause problems in respect of issuing Member States where the legislation provides for only a small penalty for the basic offence, but where the applicable penalty imposed may be more severe because of aggravating circumstances (e.g. theft, which can be aggravated by a number of parameters, such as the value of the goods stolen, use of violence and/or arms, etc.).

7.3.2.6. Requirement that national arrest warrant be signed by judge

Under Article 1(3) of the Italian implementing law, *"Italy shall implement the EAW ... as long as the preventive remedy on the basis of which the warrant has been issued has been signed by a judge and is adequately motivated"*.

The expert team notes that this provision gave rise to at least two difficulties:

- a) the requirement that the domestic arrest warrant must be signed by a "judge" could wrongly be interpreted in the sense that the Italian executing authority should refuse the execution of an EAW if the domestic arrest warrant on which it was based is issued by a judicial authority other than a judge, in particular by a prosecutor;

¹ "escluse le eventuali aggravanti" ("excluding any aggravating circumstances").

- b) the requirement that the domestic arrest warrant must be adequately motivated could be interpreted in the sense that the Italian executing authority should proceed to a factual verification of the case which it is not supposed to do. On this point, the requirement seems in contradiction with the principle of mutual recognition on which the Framework Decision is based.

However, the Court of Cassation has given an interpretation of this provision in line with the Framework Decision.¹

7.3.2.7. Constitutional guarantees

Article 2(2) of the Italian implementing law states that "guarantees" may be requested from the issuing State related to principles established by international treaties and the Italian constitution. According to the expert team, this provision is rather vague and seems to enlarge the guarantees that may be requested under Article 19 of the Italian implementing law, which transposes Article 5 of the Framework Decision. Article 2(2) could result in refusal of surrender for a reason not set out in the Framework Decision.

7.3.2.8. Procedure in consent cases could be abbreviated

The Italian implementing law has a special procedure in cases of consent, see Article 14 of the Italian implementing law. Under this procedure, the Court of Appeal rules much quicker on surrender than in no-consent cases. However, after the Court of Appeal has delivered an order in a case in which the person concerned has consented to being surrendered, this person still has the possibility of challenging the order before the Court of Cassation within 10 days.²

¹ e.g. Court of Cassation, Sez. 6, judgment of 14 February 2007, Piaggio (Germany).

² The Italian implementing law is not entirely clear on the consequences of the appeal in relation to the execution of the order. Article 22(1) of the implementing law states that "*The appeal suspends the execution of the sentence*", without apparently making a distinction between judgments and orders. Article 23(1) provides however that "*The person requested shall be surrendered ...no later than 10 days after the final decision or after the order referred to in Article 14(4) [that is the original order on consent, before appeal]*".

The expert team is of the opinion that the possibility of appeal in consent cases is redundant, even more so since consent, once given, is irrevocable.

7.3.2.9. Proportionality of incoming EAWs

The expert team was told by various practitioners that a lot of time and effort have to be deployed for EAWs that only concern very small cases. In particular cases from Romania would be problematic in this respect. According to the practitioners, this problem could be addressed by a greater approximation of the laws of the Member States concerning the penalties to be imposed for the most frequent categories of offences.

7.3.2.10. Quality of EAWs and of translations

The Italian executing authorities, as well as the MoJ, observed that the quality of EAWs coming from certain Member States was sometimes very poor. The form is not completed in full, descriptions are vague, and the wording imprecise. Also, the translations sometimes seem to be of poor quality. This can be detrimental to an effective execution of a EAW.

7.3.2.11. Involvement of Eurojust

Eurojust is mentioned twice in the Italian implementing law. Article 17(2) states that if the 60-day time limit for deciding on the execution of an EAW cannot be complied with, the MoJ shall notify the issuing Member State, "*also via Eurojust*". This is not in line with Article 17(7) of the Framework Decision, which provides that the executing authority has to inform the issuing authority and, *distinctively*, has to notify Eurojust when the period of 90 days has not been complied with. Article 20(2) of the Italian implementing law provides, in line with Article 16(2) of the Framework Decision, that the Italian executing authority may seek the advice of Eurojust in case of multiple surrender requests.

The expert team learned that the Italian authorities, while acknowledging the importance of Eurojust, in practice rarely involve this body when handling EAW procedures. Eurojust is not informed when time limits cannot be observed, nor is it involved in case of multiple surrender requests, or in any other way.

7.3.2.12 Transitional arrangements

As observed under 4.11 above, the Italian legislator has limited the application of the Italian implementing law in three ways.¹ It leads the expert team to making two observations.

Firstly, Article 40(1) provides that the provisions of the Italian implementing law only apply to requests for execution of an EAW which were issued by the issuing authority – and consequently received by the Italian executing authority – after 14 May 2005, the date of entry into force of Law 69/2005.

This excludes all EAWs issued before 15 May 2005. As a consequence of this provision, which is not in line with Article 32(1) of the Framework Decision, issuing authorities which issued an EAW before 15 May 2005 have to issue a new EAW if they want to obtain the surrender of a person who is (likely to be) in Italy.

The expert team observes that Italy adopted its implementing law in April 2005, almost a year and a half later than the deadline provided in Article 34 of the Framework Decision. In fact, of the 25 Member States which in 2002 had agreed to the Framework Decision, Italy was the latest to adopt its domestic implementing legislation. In these circumstances, the expert team finds it regrettable that Italy might in some cases have obliged other Member States, which adopted their implementing legislation in time and which had already issued EAWs in 2004 and in early 2005, to issue a new EAW if such an EAW was issued before 15 May 2005.

¹ Article 40 of Law 69/2005.

Secondly, under Article 40(3), an exception has been made to the rule in Article 40(1), in the sense that the provisions contained in Article 8 of the Italian implementing law, regarding the absence of verification of double criminality, shall apply only to offences committed after 14 May 2005.

The expert team observes that this provision is not in line with the spirit of mutual recognition which is the basis of the Framework Decision, although the expert team notes that, according to practitioners, the provisions on double criminality have never caused any difficulty.

7.3.3. Good practices

7.3.3.1 Collection of case law

A special service of the Court of Cassation ("*Ufficio del Massimario*") has prepared an excellent and very practical collection of case law by the Court of Cassation in respect of Law 69/2005. The collection, which has a volume of around 90 pages, illustrates the application of the Italian implementing law by describing in a very readable way the case law of the Court of Cassation in respect of each Article of Law 69/2005, and it also includes some pages with information on EAW case law by Supreme Courts of other Member States and by the ECJ. The collection, under the name "*orientamento di giurisprudenza*" ("*directions in case law*"), is regularly updated and available on the internet via the website of the Court of Cassation.¹

7.3.3.2 Flexibility for receipt of EAWs in other languages

Although Italy according to the law only accepts EAWs in Italian, in cases of urgency the MoJ also accepts EAWs in languages other than Italian. In emergency cases, the MoJ may even ask its internal translators to translate the EAW into Italian.

¹ <http://www.cortedicassazione.it/Notizie/Notizie.asp#>

8. RECOMMENDATIONS

8.1. RECOMMENDATIONS TO ITALY

GENERAL

Recommendation 1 – Examine the possibility of increasing measures to promote training, for judges, prosecutors and judicial staff, in languages other than Italian, in particular in those languages that can assist in making direct contact with competent authorities in other Member States and that can facilitate the members of the judiciary and of the MoJ to attend seminars in other Member States and participate in exchanges [see 7.1.2.2.]

RECOMMENDATIONS TO ITALY AS ISSUING MEMBER STATE

Recommendation 2 – Examine the possibility of bringing the thresholds for issuing an EAW closer to those set out in Article 2 of the Framework Decision, in particular as regards conviction cases [see 7.2.1.1.]

Recommendation 3 – Envisage making more use of Article 95 alerts when the whereabouts of the requested person are unknown and there are not yet "solid indications" that the requested person is in one of the (other) Member States [see 7.2.1.3.]

Recommendation 4 – Consider, in the situation where more than one EAW has been issued in respect of the same person, mentioning the existence of the other EAWs on the M form [see 7.2.1.4.]

Recommendation 5 – Envisage installing a national register of EAWs on which, if possible, national arrest warrants and other international arrest warrants are also entered [see 7.2.1.6.]

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Recommendation 6 – Ensure that the competent authorities keep SIRENE informed of any changes (revision, withdrawal, etc.) regarding EAWs that have been issued by Italian issuing authorities [7.2.1.7.]

Recommendation 7 – Monitor the situation of providing guarantees in respect of "in absentia" judgments; make sure that appropriate guarantees can be provided in good time [see 7.2.1.8.].

Recommendation 8 – Ensure that existing SIS alerts based on International Arrest Warrants and (where appropriate) Interpol alerts based on EAW's are replaced with (Article 95) SIS alerts based on EAW's [see 7.2.1.11.]

RECOMMENDATIONS TO ITALY AS EXECUTING MEMBER STATE

Recommendation 9 – Limit the grounds for refusal to those set out in the Framework Decision, and hence delete Article 18(1)(b), (c), (e), (f), (g), (s), (t), (u) and (v) of Law 69/2005 [see 7.3.2.1. (a)]

Recommendation 10 – Consider deleting Article 7(2), second sentence, of Law 69/2005 [see 7.3.2.1.(b)]

Recommendation 11 – Consider deleting Article 18(1)(a) and (d) and Article 18(1)(h) of Law 69/2005 [see 7.3.2.1.(c)]

Recommendation 12 – In Law 69/2005, consider the conversion into *optional* grounds for refusal of those grounds for refusal that are based on Article 4 of the Framework Decision [see 7.3.2.1.(d)]

Recommendation 13 – Delete Article 6(3), (4), (5) and (6) of Law 69/2005 [see 7.3.2.2.]

Recommendation 14 – In conformity with the developments in the case-law of the Court of Cassation, bring Article 17(4) of Law 69/2005, regarding the verification of guilt, in line with the Framework Decision [see 7.3.2.3.]

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Recommendation 15 – Align the wording of the list of offences in Article 8(1) of Law 69/2005 with the description of the categories of offences set out in Article 2(2) of the Framework Decision [see 7.3.2.4.(a)]

Recommendation 16 – Consider deleting Article 8(3) of Law 69/2005 [see 7.3.2.4.(b)]

Recommendation 17 – Consider the deletion of Article 7(3), second sentence, as well as of 4 words in the heading of Article 8(1) of Law 69/2005 ("*escluse le eventuali aggravanti*" – "*excluding any aggravating circumstances*") [see 7.3.2.5.]

Recommendation 18 – In conformity with developments in the case law of the Court of Cassation, consider modifying Article 1(3) of Law 69/2005 in order to bring it in line with the Framework Decision [see 7.3.2.6.]

Recommendation 19 – Bring Article 2(2) in line with the Framework Decision, so that it only refers to the guarantees that can be requested by Italian executing authorities under the Framework Decision [see 7.3.2.7.]

Recommendation 20 – Consider the deletion of the possibility of appeal in consent cases in Law 69/2005 [see 7.3.2.8.]

Recommendation 21 – Inform Eurojust in a case of a breach of the 90-day period for execution of an EAW, in conformity with Article 17(7) of the Framework Decision; consider involving Eurojust more to facilitate contacts with competent authorities in other Member States [see 7.3.2.11.]

Recommendation 22 – Consider bringing Article 40 of Law 69/2005 in line with Articles 31 and 32 of the Framework Decision [see 7.3.2.12.]

8.2. RECOMMENDATIONS TO CERTAIN OTHER MEMBER STATES

Recommendation 23 – Where appropriate, create "centres of expertise" on EAW matters which practitioners could contact with questions and for assistance [see 7.1.3.1.]

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Recommendation 24 – Where appropriate, consider – in the situation where more than one EAW has been issued in respect of the same person – mentioning the existence of the other EAWs on the M form [see 7.2.1.4.]

Recommendation 25 – Respect the time limits for execution of an EAW, taking into account the fact that in the issuing State the period of provisional detention may be set at a maximum [see 7.2.1.9.]

Recommendation 26 – Upon surrender of the person concerned, clearly indicate the length of time during which the person concerned has stayed in provisional detention in the executing State [see 7.2.1.10.]

Recommendation 27 – Apply a proportionality test in respect of the issue of EAWs. Take account of the time and effort that have to be deployed by the executing Member State in fulfilling a request for execution of an EAW [see 7.3.2.9.]

Recommendation 28 – Ensure a high quality of EAWs and of the translations thereof [see 7.3.2.10]

Recommendation 29 – Consider establishing a collection of case law on the application of national implementing law and disseminate it to practitioners in EAW matters [see 7.3.3.1.]

8.3. RECOMMENDATIONS TO THE EUROPEAN UNION

Recommendation 30 – Envisage holding a debate at EU level on the practical application of Article 111 of the Schengen Convention, including the possibility of introducing a mediation mechanism in case of conflicting jurisdiction [see 7.1.2.3.]

Recommendation 31 – Consider modifying the M form for use in the SIS, so that this form contains a specific box where the existence of other EAW's, which have been issued in respect of the same person, can be mentioned [see 7.2.1.4.]

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Recommendation 32 – Consider establishing a Europe-wide collection of case law on the application of national laws implementing the Framework Decision and disseminate it as appropriate [see 7.3.3.1.]



PROGRAMME OF VISITS

Monday 14 July 2008

14.30 - 17.30 MINISTRY OF JUSTICE

Brief introduction to the Italian judicial system; Information on the Italian law n. 69 /2005 transposing the Framework Decision on the European Arrest Warrant; Foremost decisions of the Corte di Cassazione; Introduction to the Office II of the General Directorate for Criminal Justice; Statistics

Tuesday 15 July 2008

10.00 Consiglio Nazionale Forense
11.15 General Attorney Office to Corte di Cassazione
12.15 Corte di Cassazione (VI Division)
14.00 Lunch
15.00 Possible extension of the meetings
18.00 Departure for Naples

Wednesday 16 July 2008 (in Naples)

10.00 General Public Prosecution Office to the Court of Appeal
12.00 Court of Appeal¹
14.00 Lunch
15.00 Possible extension of the meetings
17.00 Departure for Rome

Thursday 17 July 2008 (back in Rome)

10.00 General Public Prosecutor Office to the Court of Appeal
12.00 Court of Appeal¹
14.00 Lunch
16.00 INTERPOL/SIRENE

Friday 18 July 2008

10.30 Ministry of Justice: Final Meeting

¹ NB: Both in Naples and Rome, the meetings with the General Public Prosecution Office and with the Court of Appeal in fact took place as a single, combined meeting.

LIST OF PERSONS MET

Ministry of Justice, Rome

Dott. Antonio Laudati, Direttore Generale della Giustizia Penale
Dott. Alberto Pioletti, Direttore Ufficio II della Direzione generale della Giustizia Penale
Dott. Alessandro Di Taranto, Magistrato dell'Ufficio II della Direzione Generale della Giustizia Penale

Dott.ssa Claudia Frezza, Esperto linguistico
Dott.ssa Cristina Gaggiani, Esperto linguistico
Dott.ssa Cinzia Giaccaja, Funzionario Ufficio Coordinamento Attività Internazionale

Consiglio Nazionale Forense, Rome

Avv. Luigi Cardone, Consigliere del Consiglio nazionale Forense;
Avv. Bruno Grimaldi, Consigliere del Consiglio nazionale Forense.

Corte di Cassazione, Rome

Dott. Torquato Gemelli, Presidente Aggiunto;
Dott. Giovanni Conti, Consigliere;
Dott. Domenico Carcano, Consigliere;
Dott.ssa Ersilia Calvanese, Magistrato di Tribunale destinato alla Corte di Cassazione;

General Prosecutor Office to the Corte di Cassazione, Rome

Dott. Mario Delli Priscoli, Procuratore Generale;
Dott. Vitaliano Esposito, Avvocato Generale;
Dott. Antonio Mura, Sostituto Procuratore Generale;
Dott. Eugenio Selvaggi, Sostituto Procuratore Generale.

Court of Appeal, Naples

Mr Federico Cassano, Presiding Judge of 8th Criminal Section

Prosecutor's Office at Court of Appeal, Naples

Mr Vincenzo Galgano, Court of Appeal, Head Prosecutor
Mr Roberto d'Ajello, Court of Appeal, Deputy Head Prosecutor
Mr Gerardo Arcese, Court of Appeal, Deputy Prosecutor

Tribunale, Naples

Mr Aldo Policastro, Judge for Preliminary Investigations
Mr Luigi Giordano, Judge for Preliminary Investigations

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Prosecutor's Office at Court, Naples

Mr Giovandomenico Lepore, Court, Head Prosecutor
Mr Franco Roberti, Court, Deputy Head Prosecutor, anti-mafia district direction co-ordinator
Mr Francesco Greco, Court, Deputy Head Prosecutor

Court of Appeal, Rome

Dott. Giorgio Santacroce, Presidente
Dott. Guido Catenacci, Presidente della IV Sezione
Dott. Domenico Massimo Miceli, Consigliere

Prosecutor's Office at Court of Appeal, Rome

Dott. Salvatore Vecchione, Court of Appeal, Head Prosecutor
Dott. Alberto Cozzella, Court of Appeal, Deputy Prosecutor
Dott. Giovanni Malerba, Court of Appeal, Deputy Prosecutor
Dott. Vittorio Paraggio, Court of Appeal, Deputy Prosecutor

Tribunale, Rome

Dott. Carlo Figliolia, Head of Section of Judges for Preliminary Investigation;
Dott. Pierfrancesco De Angelis, Judge for Preliminary Investigation;
Dott. Osvaldo Villoni, Judge for Preliminary Investigation;

Prosecutor's Office at Court, Rome

Dott. Francesco Verusio, Deputy Prosecutor
Dott. Alberto Caperna, Deputy Prosecutor

INTERPOL/SIRENE, Rome

SIRENE

Col. Giuseppe Lanzillotta, Head of Division;
Ten. Col. Andrea Lieve, Deputy Head of Division;
Isp. Capo. Alfredo Merlino, Assistant
Sost. Comm. Isabella Petruzzelli, Assistant.

INTERPOL

Vice Quest. Agg. Dott.ssa Cinthia Petralito, Official II division Interpol;
Ten. Col. Antimo Piccirillo, Official II division Interpol.



LIST OF GROUNDS OF REFUSAL

(as set out in Article 18(1) of Law 69/2005)

"The Court of Appeal shall refuse surrender in the following cases:

- a) if, on the basis of objective elements, there is reason to believe that the European arrest warrant was issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that the position of that person may be prejudiced for any of these reasons;*
- b) if an infringement of rights has occurred with the consent of a person or persons who, in accordance with Italian law, has or have the power to exercise a right of consent;*
- c) if under Italian law the fact represents the exercise of a right, the fulfillment of a duty or has been determined by chance or by force majeure;*
- d) if the alleged offence is an expression of freedom of association, freedom of press or of other means of communication;*
- e) if the legislation of the issuing Member State does not set any maximum limit to provisional detention;*
- f) if the object of the European arrest warrant is a political offence, with the exceptions mentioned in article 11 of the International Convention for the Suppression of Terrorist Bombing adopted by the General Assembly of the United Nations in New York on 15 December 1977, incorporated into law no. 34 of 14 February 2003; by article 1 of the European Convention on the Suppression of Terrorism, adopted in Strasbourg on 27 January 1977, incorporated into law no. 719 of 26 November 1985; by the single act of constitutional law no. 1 of 21 June 1967;*

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- g) *if there is any reason to suppose that the final sentence forming the object of the European arrest warrant is not the result of a due and fair process carried out in respect of the minimum rights of the defendant provided for in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, incorporated into law no. 848 of 4 August 1955, as well as into article 2 of Protocol no. 7 to the same Convention adopted in Strasbourg on 22 November 1984, as incorporated into law no. 98 of 9 April 1990 establishing the right to a two-level degree of jurisdiction in criminal matters;*
- h) *if there is a serious risk of the requested person being liable to the death penalty, torture or other inhuman or degrading punishments or treatment;*
- i) *if the person requested in the European arrest warrant was under the age of 14 at the time the offence was committed, or if the person requested in the European arrest warrant was under the age of 18 when the offence for which he or she is being prosecuted is punished by a custodial sentence of a maximum of 9 years or when the restriction of personal liberty is incompatible with ongoing educational processes, or when the legal system of the issuing Member State makes no provision for differential prison treatments for minors under the age of 18 and adults over the age of 18 or when, having gathered the necessary information, the subject is found in any case not to be liable or, lastly, when no provision is made in the legal system of the issuing Member State for ascertaining whether the individual is actually sound of mind;*
- l) *if the offence charged in the European arrest warrant has been extinguished by amnesty in accordance with Italian law, whenever the offence comes within the jurisdiction of the Italian state;*
- m) *if it is found that the requested person has received a final sentence for the same offences in one of the Member States of the European Union provided that, in the case of conviction, the custodial sentence has already been executed or is in the course of execution, or cannot be executed on the basis of the laws of the Member State that issued the sentence;*

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- n) *if the offences for which the European arrest warrant was issued could have been judged in Italy and if the offence or the custodial sentence has already been proscribed;*
- o) *if, for the same offence as that forming the object of the European arrest warrant, a criminal proceeding in Italy is under way against the requested person, excluding the hypothesis in which the European arrest warrant involves the execution of a definitive sentence of conviction emitted by a Member State of the European Union;*
- p) *if the European arrest warrant refers to offences considered under Italian law as offences committed in all or part of its territory, or in a place that may be equated with its territory; or offences committed outside the territory of the issuing Member State, if Italian law does not admit criminal prosecution for the same offences committed outside its own territory;*
- q) *if in Italy a 'no case' sentence has been handed down, unless the premises mentioned in article 434 of the code of criminal procedure for quashing the sentence exist;*
- r) *if the European arrest warrant has been issued for the purposes of executing a custodial sentence or a detention order, should the requested person be an Italian citizen, provided that the court of appeal order the custodial sentence or detention order be executed in Italy in accordance with its internal legislation;*
- s) *if the requested person is a pregnant woman or mother of children under the age of three years and living with her, unless, in the case of a European arrest warrant issued as part of a proceeding, the precautionary measures underlying the restrictive order issued by the judicial authority prove to be exceptionally serious;*
- t) *if the precautionary measure on which the European arrest warrant is based was issued lacking the required justification;*
- u) *if the requested person enjoys immunity under Italian law that limits the execution or continuation of criminal prosecution;*

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- v) *if the sentence for the execution of which surrender is requested contains provisions contrary to the fundamental principles of the Italian legal system."*



STATISTICS

(as provided by the Italian authorities during the evaluation visit)

NB: The statistics relate to the questions which are put annually to Member States by the Council General Secretariat. The statistics for the year 2008 concern the period 1 January - 30 June 2008; this situation is indicated by (*).

Italy as issuing State:

1. How many European arrest warrants have been issued ?

2006	32
2007	349
2008 *	347

2.1. How many of these European arrest warrants were transmitted via Interpol?

2006	2
2007	11
2008 *	—

2.2. How many of these European arrest warrants were transmitted via the SIS?

2006	—
2007	35
2008 *	1

2.3. How many of these European arrest warrants were transmitted via the VPN of the EJM?

2006	—
2007	—
2008 *	—

3. How many of these arrest warrants resulted in the effective surrender of the person sought?

2006	25
2007	100
2008 *	64

Italy as executing State:

4. How many European arrest warrants have been received by the judicial authorities of your Member State?

2006	91
2007	453
2008 *	201

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5.1. How many persons have been arrested under a European arrest warrant in your country?

2006	76
2007	345
2008 *	149

5.2. How many have been effectively surrendered?

2006	26
2007	162
2008 *	47

5.3. Of those surrendered, how many consented to the surrender?

2006	12
2007	66
2008 *	22

5.4. Of those surrendered, how many did not consent to the surrender?

2006	14
2007	96
2008 *	25

6.1. In how many cases have the judicial authorities of your Member State refused the execution of a European arrest warrant?

2006	25
2007	151
2008 *	37

NB: The reasons for the refusals are set out in the attachment below.

7.1. How long does a surrender procedure take on average where the person agreed to the surrender (time between the arrest and the decision on the surrender of the person sought)?

2006	15 days
2007	18 days
2008 *	13 days

7.2. How long does a surrender procedure take on average where the person did not consent to the surrender (time between the arrest and the decision on the surrender of the person sought)?

2006	81 days
2007	85 days
2008 *	56 days



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8.1. In how many cases were the judicial authorities of your Member State not able to respect the 90-day time limit for the decision on the execution of the European arrest warrant according to Article 17(4) of the Framework Decision?

2006	26
2007	82
2008 *	3

8.2. In how many of those cases was Eurojust informed?

2006	—
2007	—
2008 *	—

9.1. In how many cases were the judicial authorities of your Member State not able to respect the 10-day time limit for surrender according to Article 23(2) of the Framework Decision?

2006	11
2007	70
2008 *	35

9.2. In how many of those cases was the person released, according to Article 23(5) of the Framework Decision?

2006	(not available; probably less than 10)
2007	(not available; probably less than 10)
2008 *	0

10.1 In how many cases did the judicial authorities of your Member State execute an arrest warrant with regard to a national or resident of your Member State?

2006	17
2007	30
2008 *	16

10.2. In how many of those cases did the judicial authorities of your Member State request a guarantee under Article 5(3) of the Framework Decision?

2006	17
2007	30
2008 *	16

11. In how many cases have the judicial authorities of your Member State requested additional guarantees under Article 5(1) or Article 5(2) of the Framework Decision?

2006	6
2007	20
2008 *	11

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Annex to the ANNEX D

REASONS FOR REFUSAL

Number of EAWs	Ground for refusal that was invoked (with short description)
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2006:

5	Article 6(6) – additional documentation not received (on time)
3	Article 18(1) under E – no maximum limit provisional detention
2	Article 18(1) under O – criminal proceedings taking place in Italy
2	Article 18(1) under P – territoriality
1	Article 18(1) under T – no motivation domestic arrest warrant
2	Article 19(1) under C – return guarantees Italian nationals / residents
4	Article 40(2) – offences committed prior to 7 August 2002
4	Withdrawn
2	Other reason

2007:

31	Article 6(6) – additional documentation not received (on time)
2	Article 18(1) under I – minors
3	Article 18(1) under M – ne bis in idem
1	Article 18(1) under N – statutory limitation
1	Article 18(1) under O – criminal proceedings taking place in Italy
12	Article 18(1) under P – territoriality
6	Article 18(1) under R – sentence Italian citizen executed in Italy
4	Article 18(1) under S – pregnant women / woman with young child
4	Article 18(1) under T – no justification domestic arrest warrant
8	Article 19(1) under A – guarantees for in absentia judgments
1	Article 19(1) under B – guarantees revision custodial life sentence
10	Article 19(1) under C – return guarantees Italian nationals / residents
6	Article 23(5) – release if 10-day period for surrender not complied with
30	Article 40(2) – offences committed prior to 7 August 2002
4	Withdrawn
28	Other reason

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2008 (1 January - 30 June) :

8	Article 6(6) – additional documentation not received (on time)
1	Article 7(1) – Double criminality
1	Article 18(1) under I – minors
2	Article 18(1) under L – amnesty
1	Article 18(1) under O – criminal proceedings taking place in Italy
3	Article 18(1) under P – territoriality
1	Article 18(1) under R – sentence Italian citizen executed in Italy
1	Article 18(1) under S – pregnant women / woman with young child
6	Article 19(1) under A – guarantees for in absentia judgments
2	Article 19(1) under B – guarantees revision custodial life sentence
6	Article 19(1) under C – return guarantees Italian nationals / residents
5	Other reason

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ANNEX E

LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYM ABBREVIATION TERM	ENGLISH EXPLANATION
EAW	European Arrest Warrant
ECJ	European Court of Justice
SIS	Schengen Information System
MoJ	Ministry of Justice (in particular <i>Ufficio II</i>)

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