

European arrest warrant: individual's rights and implementation of the framework decision in the Italian legal system.

ANGELO MAMBRIANI
Judge in the Court of Milan
Member Jura Homini's – Italian Section ICJ

1. Information about the procedure of enforcement of the framework decision on the European arrest warrant in the Italian legal system.

2. Enforcement of the framework decision on the European arrest warrant in the Italian legal system: true and false problems on the constitutional plane and on the individual's rights plane.

2.1 The European arrest warrant and preservation of state's punishment authority.

2.2 The problem regarding the principle of exact description of the act on which the European warrant arrest is based.

2.3. Downsizing of the principle of double criminality. Protection of the principle of legality as individual right.

2.4. The principles of saving clause, jurisdiction guarantee and statement of grounds regarding the restriction of personal freedom and the European arrest warrant.

2.5 Conclusion.

3. Possible solutions.

3.1 Execution of the warrant.

3.2 Decision on keeping in detention (art.12 F.D.); Consent to surrender (art.13 F.D.); Hearing of the requested person (art.14 F.D.); Surrender decision (art.15 F.D.); Time limits and procedures for the decision (art. 17 d.q.); Situation pending the decision (art. 18 d.q.); Hearing the person pending the decision (art. 19 d.q.); Notification of the decision (art. 22 d.q.); Time limit for surrender the person (art. 23).

3.3 The surrender.

1. Information about the procedure of enforcement of the framework decision on the European arrest warrant in the Italian legal system.

The framework decision's Article 34 provides that member states take the necessary measures to comply with the decision itself by 31 December 2003. The Italian Government instituted some months ago a commission at the Ministry of Justice with the task of preparing a draft law to enforce the Framework decision in our legal system. The commission has been completing its work in these days, but the draft law cannot be made public until it is adopted by the Government and lodged in the Parliament. Then the Parliament shall decide about the Government's draft law and will take it as it is or will amend it. Therefore it is at this stage impossible to assess the contents of the Government's project and there is nothing left to do but presenting the terms of the discussion – very animate in Italy – about the implementation of the framework decision.

2. Enforcement of the framework decision on the European arrest warrant in the Italian legal system: true and false problems on the constitutional plane and on the individual's rights plane.

The framework decision concerning the European arrest warrant has become the object, especially during its drafting, of a lot of criticism formulated by influential jurists ⁽¹⁾.

Contrarily many experts of international judicial procedure and extradition, replying to that criticism, have illustrated different interpretations in order to provide the appropriate assumptions to make the conformity of the national system to the European legislation possible ⁽²⁾.

¹⁾ CAIANIELLO-VASSALLI, *Parere sulla proposta di decisione-quadro sul mandato di arresto europeo*, in *Cassazione Penale*, 2002, 462 s. VASSALLI, *Mandato d'arresto e principio di uguaglianza*, in *Il Giusto Processo*, 2002, 129.

2.1 *The European arrest warrant and preservation of State's punishment authority.*

The first critic concerns whether the judge of a member state can issue a European arrest warrant for a crime that does not constitute an offence under the law of the issuing State, but just under the law of the executing state. That could be seen as an attack of the punishment authority of the issuing state – Italy, especially -, as this could partially remove the possibility of the state to classify acts as crimes and, in the same way, our legal system could become unable to prevent or to determine for the Italian penal jurisdiction concerning particular behaviours⁽³⁾. This interpretation is openly disclaimed by art. 2.1 F.D.: “A European arrest warrant may be issued for offences punishable *by law of the issuing Member State* by a custodial sentence or detention order ...” These fears therefore have no grounds, so that we can say that the state's punishment authority is not hurt by this point of view⁽⁴⁾.

In the same way some jurists are concerned with an eventual expansion of the member state's penal jurisdiction relating to offences committed by foreigners abroad⁽⁵⁾. Also this kind of attack to the sovereignty of a state can be excluded when the member state avail itself of the provision laid down in Art. 4.7 of the framework decision (Grounds for optional non execution of the European arrest warrant) whereby “The executing judicial authority may refuse to execute the European arrest warrant” 7) where the European arrest warrant envisages offences which: A) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State; B) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State”. So, without condition of reciprocity, the recognition of the universal penal jurisdiction that the issuing state would give to itself is excluded. Therefore the European arrest warrant – as clarified by Art. 1 and Art. 31 F.D. and by the “whereas n. 5” - is just a procedure directed to replace the extradition with a system of surrender between judicial authorities. The new procedure is distinguished by excluding the executive power from deciding on surrender, through the direct connection between judicial authorities of the member states, and through the attenuation of the principles of double criminality of the act (Articles 2, 3, 4 F.D.) and speciality rule (art. 27 F.D.).

2.2 *The problem regarding the principle of exact description of the act on which the European warrant arrest is based.*

Some jurist objected that the list, which describes 32 typologies of different offences as laid down in Article 2.2 of the framework decision, does not comply with the principle of exact description of offences⁽⁶⁾. Someone has replied that this objection is based on a faulty knowledge concerning the real purpose of the list. In fact this list deals not with a core of European criminal law or with an enumeration of particular offences. The rule, as laid down in Art. 2 F.D., provides for a new system for barring the power of the executing member state to check the double criminality of the acts.

²⁾ SELVAGGI-VILLONI, *Questioni reali e non sul mandato europeo d'arresto*, in *Cassazione Penale*, 2002, 446; SALAZAR, *Commento alla decisione quadro sul mandato di arresto europeo*, in *Diritto Penale e Processo*, 2002, 1041; SELVAGGI, *Il mandato europeo e il rispetto del sistema di arresto*, in *Il Giusto Processo*, 2002, 147; Id., *Il mandato di arresto europeo alla prova dei fatti*, in *Cassazione Penale*, 2002, 2978; BRUTI LIBERATI – PATRONE, *Il mandato d'arresto europeo*, in *Questione Giustizia*, 2002, n. 1, 70. In general about the framework decision: CALVANESE – DE AMICIS, *Dalla Convenzione di Parigi al vertice di Laeken. La lunga strada del mandato d'arresto europeo*, in *Guida al Diritto*, 2002, 106; CHIAVARIO, *Giustizia: il mandato di cattura europeo mette a nudo le contraddizioni italiane*, in *Guida al Diritto*, 2001, n. 49, p. 10.

³⁾ CAIANIELLO-VASSALLI, *op. cit.*

⁴⁾ CAIANIELLO-VASSALLI, *op. cit.*, 463.

⁵⁾ CAIANIELLO-VASSALLI, *op. cit.*, 463.

⁶⁾ CAIANIELLO-VASSALLI, *op. cit.*, 464.

This is the procedure: the issuing member state has to identify the natural and legal classification of the offence, particularly in respect of Art. 8 (d) and (e) and Art. 2. The executing member states' power of investigation on double criminality is eliminated on condition that the fact, punishable by the issuing member state, may be covered by the list as laid down in Art. 2.2 F.D. It results that, leaving out of consideration if and how the executing member state may subsume the crime under the categories laid down in art. 2.2 F.D., the mentioned categories of offences are not directed to indicate facts as offence or to determine the acts of an offence, but they only identify classes each one including many offences, which are and remain described by domestic criminal law. Therefore it derives the impossibility to apply the principle of exact description of the acts to these classes of offences. It must also be considered that the principle of exact description of the offences – according to the rule as laid down in Art. 25.2 of the Italian Constitution – is operative in all member state as laid down in Art. 7 CEDU, formulated in the same form of the article just mentioned.

2.3. Downsizing of the principle of double criminality. Protection of the principle of legality as individual right.

Many doubts were expressed about renouncing the principle of double criminality, considering that this principle still remains in other European Conventions like that regarding the international judicial assistance adopted in 2000 (⁷). We have to take into consideration three aspects, one of a general character, the other two more specific.

First of all, the principle of double criminality, as laid down in Art 13.2 of the Italian penal code, without constitutional cover, protects national sovereignty and only in particular and limited cases also individual rights (⁸). The principle protects national sovereignty, because the requested State may decide not to collaborate in exercising the punishment power of the requesting State, if does not recognize the acts as offence. On the application of the foreign criminal law the statement between the executing member state with its own judiciary and the presence of the requested person on its territory prevails.

On the contrary the right of the individual receives reflected and bigger protection than that which would have been due: indeed an individual can escape a punishment for a fact considered as an offence under the law of the State where it is committed, if he/she can take shelter in a State where that fact is not considered in the same way. Obviously it is a failure of the principle of legality caused by the interfering sovereignty of the State offering a shelter. In this situation, the relativity of the principle of legality is to be observed because of the diversification that can be large, between the legal systems of the states. We have the refusal of extradition concerning the political offence or when the executing state has reasons to believe, based on objective elements, that the requested person would be subjected to death penalty or discriminated, as laid down in point n. 12 and 13 of the general principles of the framework decision. The principle of double criminality, considered as an impediment relating to the surrender of a person, maintains an important role between inhomogeneous and considerably different judiciary, but it loses importance between judiciary strictly homogenous and integrated.

However, the executing member state can reduce the protection level of its sovereignty collaborating with the issuing member state, allowing that state to exercise its punishment power with the surrender of the requested person, without examination of the double criminality of the act, but just at the condition that it belongs to one of the fixed classes of offences.

On the other hand, the personal warranties are not reduced, but in that case the relativity of the principle of legality induced by the interfering sovereignty of a different State is just removed. Nowadays Europe is in this situation, expressly recognized in the preface of the framework decision. Points 6 and 8 declare that “The European arrest warrant provided for in the framework decision is the first concrete measure in the field of criminal law to implement the *principle of mutual recognition* which the European Council termed as “cornerstone” of judicial corporation”. “The mechanism of the European arrest warrant is based on a *high level of confidence between Member States*”. So the crisis of the principle of double criminality – together with the exclusion

⁷) GALANTINI, *Paper at the conference “Il mandato di arresto europeo”* (Cernobbio il 18 maggio 2002).

⁸) BARAZZETTA, *Paper at the conference “Il mandato di arresto europeo”* (Cernobbio il 18 maggio 2002).

from the procedure of arrest warrant of every decisive role of the “Central Authorities” (preface point n. 9 and Art. 7 F.D.) and the restriction referring to the speciality rule (art. 27 F.D.) -, directly derives from the creation of a common area of freedom, security and justice based on the high level of confidence between the member states. These are not abstract statements, but on the contrary, they are the result of a course of action based on a series of Conventions, that on one side set up a substratum of European common criminal law, only in few parts harmonized, and, on the other side, reduce the worries concerning the principle of double criminality ⁹⁾. Also the European evolution of conventional law in the matter of extradition can be easily seen as characterized by the trend which looks forward a progressive attenuation of the principle of double criminality ¹⁰⁾. For example, the Dublin Convention adopted in 1966, eliminated the check regarding the double criminality in the matter of criminal conspiracy; the bilateral convention Italy – Spain adopted in 2001 removed the condition of double criminality in the matter of terrorism, participation in a criminal organization, racketeering, illicit trafficking in narcotic drugs, trafficking in human beings, illicit trafficking in weapons, child sexual abuse, when the punishment established by the law for these offences is four years of imprisonment or more.

Also about the strict provisions, is raised an interpretation of the Articles. 2.2 and 8 F.D. that, if practicable, should later circumscribe the reshuffle, even undoubted, of the principle of double criminality. It was argued that these provisions have to be understood in a way that the executing member state maintains the power to verify if the offence, so as defined by the law of the issuing member state, is included or not in one of the categories mentioned in the list as laid down in Art 2.2 F.D. If the executing member state agrees, it shall surrender the requested person; if not it could consider if there is or not the double criminality of the act, according to Articles 2.4 and 4.1 F.D. This should allow, for example, the Italian judge to obtain from an English judge the surrender of a person requested by a European arrest warrant for illicit trafficking of cultural goods or antiques (cfr. L n. 1089/39), while it should permit the Dutch judge to deny the execution of a European arrest warrant for an offence qualified as homicide, if he was to recognize a case of euthanasia ¹¹⁾. It is not an uncontroversial interpretation, because it is necessary to overcome the difficulty, though not insurmountable, deriving from the literal meaning of the expression “The following offences ... as they are defined by the law of the issuing Member State ...” (Art. 2.2 F.D.). In fact this phrase should be interpreted as referring to the offence provided for in the arrest warrant and not to the supposition of the offence itself as provided for in the list of Art. 2.2 d.q.

The framework decision, although it adopts the mechanism referring to the list of the typologies of offences that excludes the possibility to enquire about double criminality (Art. 2.2 F.D.), allows its application for those offences not included in this list (Articles 2.4-4 n.1 F.D.), as well as the examination of all those cases for which the executing member state can refuse the execution of the European arrest warrant. These are the cases of mandatory refusal or optional non-execution of the warrant as laid down in Articles 3 and 4 F.D, whose application presupposes the control by the executing member state, if the act is defined as an offence by its law. All the above mentioned considerations refute, in my opinion, every doubt concerning the observance of the principle of legality as an individual guarantee. Indeed after the framework decision, the European citizen loses the possibility of not being prosecuted in relation to a fact considered as an offence by the law of the place where he committed the crime and included in the list as laid down in Art. 2.2 F.D. In other words the citizen loses an advantage that is not a right but only the reflex of the sovereignty of each State. However he maintains the right not be punished for a fact that is not considered an offence by law at the moment when and in the place where it was committed (cfr. Art. 25.2 Constitution, Art.7 CEDU).

No longer restricted within the borders of each member state, the principle of legality expands to the territory of the fifteen member states, without losing its own authentic dimension of individuals’ protection. It is an expression of the construction of a common area of freedom, justice, and security.

With regard to the Italian constitutional system, it may be correctly affirmed that the removal of the obstacle concerning the wider enforcement of the principle of legality belongs completely to the

⁹⁾ SALAZAR, *Commento alla decisione quadro sul mandato di arresto europeo*, cit.

¹⁰⁾ BARAZZETTA, *Paper at the conference “Il mandato di arresto europeo”* (Cernobbio il 18 maggio 2002).

¹¹⁾ BARAZZETTA, *op. cit.*, 53

discretionary power of the Italian State itself, according with the rule as laid down in Art. 11 of the Constitution (“Italy ... consents, conditions being equal with other States, to the restrictions of sovereignty necessary for an order that ensures peace and justice between the Nations...”).

2.4. The principles of saving clause, jurisdiction guarantee and statement of grounds regarding the restriction of personal freedom and the European arrest warrant.

Many doubts were expressed about the conformability of the Framework Decision relating to the text laid down in Articles 13 and art. 111 of the Italian Constitution whereby nobody can be deprived of his/her personal freedom unless in definite cases provided for by law and in an act of the judicial authority based on specified grounds. This reference seems hazardous, when we consider that, conceived in absolute way; it would have precluded every form of passive extradition. On the contrary two aspects are to be considered. The first aspect regards the text laid down in Articles 10 and art. 26 of the Italian Constitution that allow and permit the extradition. Furthermore it is obvious to affirm that extradition, as laid down in Art. 26 of the Constitution is a matter widely disciplined by international conventions.

On the other hand, it is necessary to underline that the framework decision needs, for its effective implementation, a national law that determines the insertion in our judicial system of rules corresponding to its provisions. These cannot operate without the conformation of our internal rules.

The law to implement the framework decision will consider the European arrest warrant as one of the cases that allows the restriction of personal freedom, and will state the measures, the limits and the judicial proceedings able to carry it into effect. So it is difficult to assume a violation of Art. 13 of the Italian Constitution.

Regarding the guarantee about the statement of grounds of the arrest warrant strictly connected to the existence of serious circumstantial evidence of guilt (cfr. art. 273 c.p.p.)⁽¹²⁾, it must be considered that Art. 9.1 points e) and g) - although they do not require a true statement of the grounds on which the warrant is issued - imposes the indication of “... a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person; ... if it is possible, other consequences of the offence”. These requirements are the same as those laid down in Art. 700 let. a) C.P.P. (Criminal Procedure Code), relating to the procedure for the extradition without a convention.

Above all, it is necessary to underline that the guarantee relating to the European arrest warrant, although it aims at an effective control of the existence of grounds that entitled its issue, is not even required even by the European Convention on Extradition, 1957 (Art. 12). This is because, and even more so now, the surrendered person will be able to defend himself/herself about the events in which he/she has been involved in accordance to the legal procedure of the state requiring the extradition⁽¹³⁾.

If we argue today that every State has to verify the merits of the European arrest warrant issued by another state, it can be considered a return to many years ago and a refusal of the principles of mutual recognition and high level of confidence between member states on which the framework decision is based. Therefore it seems impossible to subject the European arrest warrant to the procedure of review of the merits laid down in Art. 309 C.P.P. Another reason that prevents the review is its length which is incompatible with the time limits given in Art. 17 F.D. We have also to consider that the requests for extradition based on the 1957 Convention never asked for similar requirements.

2.5 Conclusion.

The framework decision offers some chances of different implementation in our system, especially regarding the grounds of non-execution of the European arrest warrant (Articles 3, 4 F.D.). This can be exploited to protect as best as possible both individuals’ rights and state sovereignty. Therefore it would be advisable to opt for the ground of non-execution laid down in Articles 2.4 and 4.1 F.D.,

¹²⁾ C.p.p. means penal proceedings code.

¹³⁾ SELVAGGI, *Il mandato di arresto europeo alla prova dei fatti*, in *Cassazione penale*, 2002, 2981.

concerning the control of the double criminality for offences other than those covered by Art. 2.2 F.D. So it would be possible to understand those rules whereby the executing member state maintains the power to verify if the offence, so as defined by the law of the issuing member state, is included or not in one of the categories mentioned in the list as laid down in Art 2.2 F.D., and, if not, to check if the acts for which the warrant was issued constitute an offence under its own law. Furthermore it would be possible, of course, to opt for other grounds of non-execution as laid down in Art. 4 F.D. – particularly that provided by Art. 4.7 F.D. - and add non-discrimination clauses provided by point n. 12) F.D in the preface.

* The above comment, very briefly developed but by now mostly accepted, brings to retain that no particular adjustment of the Italian Constitution – specially regarding the Judicature - will be necessary to enforce the framework decision in our legal system. The reservation expressed by the Italian Government at the moment of the formal agreement, justified by temporary perplexity, did not find any support analysing the problems of this implementation. For enforcing in our system the provisions provided for by the framework decision, it will be sufficient an ordinary law, possibly to include the new rules in Part IX of the Criminal Procedure Code concerning judicial relationship with foreign authorities. Obviously, enforcing the Framework decision, Italy will take the most accuracy for the safeguard of human rights, exploring every margin admitted by a faithful interpretation of it. Some realistic ideas for implementation are explained in the following paragraph.

3. Possible solutions.

The procedural restrictions that characterize the European arrest warrant are well described in Chapter 2 of the framework decision, and the rights of the arrested person are considered in point n. 12 of the preface and in Articles 11, 14 and 19 F.D. We have also to remind ourselves that the European arrest warrant is nothing but a new kind of extradition procedure. To establish general terms for a possible way of enforcement, it is necessary to cross the most important procedural obstacles like those described in the framework decision. The procedure drawn by the framework decision specifies four main procedural points: the execution of warrant; the decision on whether the requested person should remain in detention; surrender decision; the surrender.

3.1 Execution of the warrant.

The procedure begins with forwarding the warrant for execution in a member state, or its introduction in the Schengen System (SIS), or, if this is not possible, its transmission to INTERPOL. The following step is directly executive ⁽¹⁴⁾: the requested person is arrested in accordance with the European arrest warrant. From this moment all rights as laid down in Art. 11 F.D. must be implemented such as, for example, the right to information about the contents of the warrant; the possibility of consenting to surrender; the right to be assisted by a legal counsel and an interpreter. At the outset these guarantees were put in practice, like those written in Art. 293 C.P.P., for the execution of precautionary coercive measures. In this way, the police officer gives to the arrested person a copy of the European arrest warrant and must inform him/her of his/her right to appoint a legal counsel. In case of refusal, the police officer nominates a legal counsel in the way provided for in Art. 97 C.P.P. and informs the counsel about his/her nomination and the arrest. After the police officer has compiled the arrest report, this must be transmitted to the Attorney-General of the place where the arrest took place. The European arrest warrant must be translated in the language of the arrested person.

3.2 Decision about keeping in detention (Art.12 F.D.); Consent to surrender (Art.13 F.D.); Hearing of the requested person (Art.14 F.D.); Surrender decision (Art.15 F.D.); Time limits and procedures for the decision (Art. 17 d.q.); Situation pending the decision (Art. 18 d.q.); Hearing the person pending the decision (Art. 19 d.q.); Notification of the decision (Art. 22 d.q.); Time limit for surrender the person (Art. 23).

¹⁴⁾ GALANTINI, *Paper at the conference “Il mandato di arresto europeo”* (Cernobbio il 18 maggio 2002).

To establish an internal procedure for the execution of the arrest warrant, all provisions better described in this paragraph headline must be considered. The competent judicial authorities for the execution of the European arrest warrant in Italy should be the Attorney-General at the Court of Appeal and the Court of Appeal, because of the traditional competence of those authorities in matters of extradition (cfr. Art. 701 C.P.P.). From Art. 701 C.P.P. it is possible to induce also the criteria for territorial competence such as the place of arrest or the place of domicile or residence of the arrested person. From the procedure of extradition, it is also possible to derive, from Articles 715 e 716 C.P.P., indications concerning temporary arrests requested in anticipation of extradition. According to those rules, the President of the Court of Appeal where the person is arrested, immediately informed of the arrest, and in any case within 48 hours, shall release the person (for example in case of mistaken identification, or for lack of title) or validate the arrest and apply coercive measures to prevent the escape of the arrested. This regulation enables to immediately trigger the judicial authority and excludes possible constitutional problems concerning the provisions of Art 13.2 of the Constitution. The decision of the President of the Court of Appeal should only be provisional. To enforce the provisions laid down in Articles 12-19 F.D. in full observance with the rights of the individual, it is possible to think about a hearing in chamber before the Court of Appeal and with the necessary presence of the Attorney-General of the Court, of the concerned person's legal counsel and where possible the person concerned. This hearing should be preceded by the lodgement of the legal proceedings, should be held before the competent Court of Appeal within reasonable time, according to the right of the arrested person to prepare his/her defence and to the short time periods fixed by Art. 17 F.D. The arrested person should be informed, in his/her language that he/she can consent to his/her surrender and renounce to the entitlement of the speciality rule defined in Art. 27 F.D. During this hearing, these conditions should be fulfilled such as the expression of the arrested person's consent to his/her surrender and, if appropriate, the renunciation of the entitlement of the speciality rule. In the absence of consent, the arrested person should be allowed to give a statement.

In this hearing and in the absence of consent, the legal counsel should be allowed to dispute the applied coercive measure and present all possible grounds for non execution of the European arrest warrant (cfr. Articles 3, 4, 20, 21 d.q.). The Court of Appeal, if it is necessary to decide on the surrender, should request supplementary information to the issuing judicial authority pursuant to Art. 15.2 F.D. At the end of the hearing the Court of Appeal could confirm or modify the applied coercive measure and decide on the surrender of the requested person. The decision based on the requested person's consent should not be appealed. In any case the decision should not be appealed on the grounds of merits, but only on legality grounds as pursuant to Art. 111.7 of the Constitution. This appeal procedure to the Supreme Court should be organized in a special way in order to respect the time limits laid down in Articles 17.3 and 17.4 F.D. Once the decision on the execution of the European arrest warrant is definitive, the issuing judicial authority must be immediately notified of (Art. 22 d.q.).

3.3 The surrender.

After the final decision to execute the European arrest warrant is made, the Court of Appeal will have to arrange with the issuing judicial authority the surrender of the requested person. The surrender will have to be done within the time-limits laid down in Art. 23 F.D. It is necessary to underline that the time-limits (Articles 17 and 23 F.D.) are first of all a guarantee for the requested person in order to spare him/her a long period of custody pending the extradition request.