

**Speech for the panel “Protecting Individual rights in different member states”.**

**1. Information about the procedure of enforcement of the Framework Decision on the European arrest warrant in the Italian legal system.**

The Italian Government instituted some months ago a commission in the Ministry of Justice with the task of preparing a draft law to enforce the Framework Decision in our legal system. The commission completed its work a few days ago, but the draft text is not the official one as the Government has not adopted it yet. I have also to remember that, after the Government's assent, the bill shall be lodged by the Parliament for discussion and final approval, with amendments if needed. However, just last Thursday I could speak to a member of the commission and had precise information about the content of this draft. I am allowed to publish it in this conference and am going to do so having regard to the solutions given to the main problems raised by the implementation of the framework decision and the protection of individual rights.

**2. Introductory rules.**

The draft opens with a definition of the European Arrest Warrant (EAW) duplicated from Art. 1.1 F.D. Then it provides solemnly that, in the execution of the EAW, the principles and rights established in the Treaty on European Union, in the Charter of Fundamental Rights of the European Union, in the Italian Constitution, especially those relating the due process of law must be upheld. The competent authority to issue the EAW shall be the Attorney-General at the Court of Appeal (Chief Appeal Court Prosecutor) of the place where the procedure is ongoing or where the sentence was passed. The competent authority for the execution of the warrant shall be the Court of Appeal of the place of arrest, or the place of the arrested person's domicile or residence. The Ministry of Justice is the central authority responsible, according to Art. 7 F.D., for the transmission and administrative reception of the EAW and for assisting the competent judicial authority.

**3. Double criminality.**

The choice of the ministerial commission is to opt for the ground of non-execution laid down in Articles 4 (1) and 2.4 F.D. As a result the EAW will be executed without verification of the double criminality of the acts but just with reference to the offences mentioned in Article 2.2 F.D.

For offences other than those covered by the aforesaid article, the requested person will be surrendered just if the acts for which the EAW was issued constitute an offence also under Italian law. In accordance with these cases, Italy shall not execute the EAW issued for acts that, as defined by the law of the issuing State, are, according to the competent Court of Appeal, not covered by art. 2.2 and are not offences under our law. This rule, if generalized, could solve problems such as the different provisions, among member states, relating to the punishment of euthanasia, abortion and offences concerning freedom of expression.

### **3. Other grounds for non-execution of the European arrest warrant.**

The aforesaid draft adopts all the grounds for non execution of the EAW stated in Articles 3, 4 and 20 F.D. I underline the ground provided for in Art. 4.7 that limits the so called “universal jurisdiction” of the individual state.

However, the draft also provides for cases of refusal not directly provided for in the framework decision. These are:

- 1) refusal to surrender a pregnant woman or the mother of a child less than three years old who live together;
- 2) refusal to execute the EAW when this may violate with human rights, or fundamental principles as laid down in the Italian Constitution or in the aforesaid international conventions. This ground for non-execution derives from the “whereas” n. 12 and n. 13 of the F.D.;
- 3) refusal to execute the EAW when it completely lacks the statement of grounds for issuing it. This is because the Italian Constitution (Art. 13.2) provides that, every judicial act which restricts personal freedom must indicate the grounds on which it is based. However the judicial control provided for by the draft concerns only the existence of the statement and does not allow for judgements on the arguments or the evidence on which the warrant is based.
- 4) Refusal to execute the EAW, if it is issued for reasons different from precautionary necessity. This is because the Italian system provides only for cases of restrictions to personal freedom if there is a precautionary purpose.

### **4. Speciality rule.**

Concerning the speciality rule, the project of the ministerial commission is based on the idea that Italy shall not give the notification provided for in Art. 27.1 F.D. related to the presumption of consent for prosecution, sentencing or detention for offences committed prior to the surrendering of

the requested person. So the rule of speciality is maintained from the active and passive aspects, according to the limitations provided for by Articles 27.3 and 27.4 F.D.

## **5. The procedure.**

\* Competent for issuing the EAW shall be – according to the aforesaid draft - the Attorney-General at the Court of Appeal (Chief Appeal Court Prosecutor), upon request of the District Attorney (Chief Prosecutor) of the place where the judge issuing the (Italian) arrest warrant or the judge who passed the sentence sits. It is always a judge who issues the acts on which the EAW is based.

The Attorney-General forwards the EAW to the Ministry of Justice for translation in the language of the executing state and transmission to the judicial authority competent for executing it. When the Attorney-General decides to issue an alert for the requested person to the Schengen Information System, he/she will submit this request to the Ministry of Justice.

\* In the draft there are no provisions concerning the guarantees to be given by the issuing State in particular cases, pursuant to Art. 5 F.D. This is probably a mere oversight that should be remedied in the procedure to enact the bill.

\* On the side of execution, the aforesaid draft divides when the EAW is forwarded by transmission to our Ministry of Justice – when it is known that the requested person lives in Italy – and when is forwarded by alert in SIS.

The main difference is that in the first case the President of the Court of Appeal, upon request by the Attorney-General – to whom the Ministry of Justice transmits the EAW -, will issue a precautionary warrant on the basis of which the requested person will be arrested by the police. In the second case the requested person is arrested by the police and the President of the Court of Appeal shall validate (or not) the arrest within 48 hours.

In any case, after the arrest of the person, the procedure carries on the same essentially.

At first there is a hearing, within short time limits (5 days and, as said, 48 hours respectively), before the President of the Court of Appeal with the necessary presence of the arrested person and his/her legal counsel. During that hearing the President identifies the arrested person and informs him/her on the content of the EAW, the possibility of consenting to the surrender to the issuing judicial authority, and the possibility to renounce to the rule of speciality. The person has the right to be assisted by an interpreter, if necessary. At the end of the hearing, if the arrest was accomplished by the police, the President will not validate the arrest in case of mistaken identification or lack of title. In any other case the President will validate the arrest and apply a

coercive measure to prevent the escape of the arrested person. In this case the EAW must be acquired within 10 days as from the arrest. The coercive measures applied by the President of the Court of Appeal are provisional (120 days as from the arrest).

When the requested person consents to his surrender, the President must decide about the surrender with an act pronounced within 10 days. The consent can be expressed also in the following stages of the procedure.

Furthermore, at the end of the hearing, in absence of the arrested person's consent to his/her surrender the President must fix another hearing before the Court of Appeal for the surrender decision.

This hearing must be held within 20 days from the date of the arrest and is preceded by the lodgement of the legal proceedings, especially the EAW. Before the hearing, the act of the issuing judicial authority on which the EAW is based must also be lodged. Without this lodgement the request of surrender cannot be discussed. The hearing is held with the necessary presence of the Court's Attorney-General and the person's legal counsel; the requested person is allowed to be present. Moreover a representative of the issuing State is allowed to be present. If present, the requested person is allowed to give a statement. When the requested person consents to his/her surrender, the Court shall decide the surrender with an act pronounced within 10 days.

If the requested person does not consent, the Court hears those presents. At this stage the requested person's legal counsel shall be allowed to represent all possible grounds for non execution of the EAW (Articles 3, 4, 20 F.D.). The Court of Appeal, if necessary, requests supplementary information to the issuing judicial authority. At the end of the hearing the Court of Appeal decides on the surrender of the requested person, within 30 days from the date of the arrest. The issuing judicial authority is notified of the decision.

The decision cannot be appealed with regard to the merits of the case. However the appeal to the Supreme Court with regard to legal grounds is provided for according to Art. 111.7 of the Constitution. The appeal to the Supreme Court is regulated in a special way, in order to respect the time limits laid down in Articles 17.3 and 17.4 F.D.