

THE EUROPEAN ARREST WARRANT

by Eugenio Selvaggi, Deputy, Prosecutor General – Italian Supreme Court

Few words to introduce myself. According to the Italian technical language I am a “*magistrato*”, a magistrate. I was judge first and then I moved to the Prosecuting office at a District level first and then at the Court of Cassation, which is the centralized national Supreme Court.

I was the director of the office for extradition and MLA in the Ministry of Justice, Chair of the European Committee for Crime Problems of the Council of Europe and Chair of the G8 sub-group on judicial co-operation.

I quoted my previous experiences in order to underline that I had the privilege to testify how judicial co-operation changed in the last twenty years or so.

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Judicial co-operation is essential because Jurisdictions are limited by reason of borders and exercising jurisdiction is an expression of sovereignty.

The reasons for such a change are numerous and it would be a long exercise to describe them in details. However, in few words one may say that JC at large has changed because individuals and money move very quickly and freely nowadays (globalization) and many forms of criminality are transnational in character.

The European arrest warrant – EAW represents the most impressive change among others. Such new instrument is based on two pillars: a. borders have been abolished within the EU; b. the principle of mutual recognition was introduced. These two factors are tied each other: because of borders disappearing then a common judicial space was created; and because of this common space judicial decisions, no matter which country or system they come from, will circulate within the EU at the same way in which goods, services and individuals would freely circulate. Changes in the EU were already introduced by the Schengen Agreement and by the EU MLA convention of May 2000 (which contain provisions on transborder observation, transborder hot pursuit and joint investigation teams). Relevant provisions are also contained in the Palermo Convention of 2000 on Transnational Organized Crime.

The EAW aims at substituting the extradition regime among Member States of the EU. The reason is self evident: because of the common judicial space and the common cultural heritage it appeared a nonsense regulating the surrender of fugitives in the same manner States would treat such surrender with States outside the EU.

The cornerstone (as indicated in official documents in the EU) of this new trend is mutual recognition, i.e. any MS would accept a judicial decision rendered by one other State in the EU. A strong practical advantage of MR instruments is that courts have no longer to search for the law to be applied according to the different and various provisions existing at the international level (conventions, bilateral and multilateral treaties). As a consequence proceedings in JC have become easier and faster.

The new system of surrender of fugitives was introduced by framework decision (FD) no. 584/2002, which all MS implemented (Italy was the last one, together with the Czech Republic). The terrorist attacks in the US on September 11, 2001 gave great impetus to its finalization.

Unlike the extradition system (which is based on relationships among States, i.e. Governments, surrender is now a matter for judicial authorities: the competent judicial authority will issue the EAW (issuing authority-State) and the competent judicial authority in the receiving

State will execute it. Grounds for refusal are provided for by the FD, which provides also for basic guarantees for the person sought. As a consequence, extradition does not exist anymore in the EU (some States though still apply extradition in case of crimes committed before an established date).

The point of the FD which deserves some consideration is the abolition of double criminality in relation to crimes listed therein (actually categories rather than specific crimes, for instance cybercrime). To be precise it is not a real abolition of dual criminality; what has been abolished is the check on double incrimination, on the presumption that all crimes that can be included in those categories are considered as criminal offences in all MS.

One other crucial provision provides for the refusal of the surrender where the person sought is a citizen of the executing State (or even a resident, depending on whether the EAW is for prosecution purposes or for the execution of a sentence). In such a case the requested authorities will refuse surrender and the sentence will be served at home (in order to facilitate rehabilitation); that is a simpler solution than the ordinary one under the extradition regime, where the surrender of the fugitive could be refused, with the subsequent obligation for the requested State to start prosecution under its law (*aut dedere aut iudicare principle*).

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The latest point brings to a further issue which I want now to briefly elaborate on. In fact the European Court of Justice, in the Wolzenburg case, Grand Chamber, 6 October, 2009 (C-123/08) decided that, at least to a certain extent, citizens of one other State than the executing State but still citizens of a MS enjoy the same right of a citizen of that State as far as refusal on such ground is concerned.

The said decision is strictly connected with a previous decision of the same ECJ, the Kozłowski case, Grand Chamber, 17 July, 2008 (C-66/08) which stated that concepts contained in FD provisions are to be interpreted in an uniform way within the all EU, because community law does not permit different interpretation of the same law within the common judicial space.

So, the further point I want to examine is that national judges are bound to the interpretation of provisions of community law as it is given by the ECJ. That was already well accepted as to civil and commercial law but it is a new achievement in criminal law. Judges are not any more free and autonomous in interpreting laws as they are in general at a domestic level when interpreting national laws.

So, it is now widely accepted in the EU that domestic legal systems are of a multilevel nature: not only are provisions that have originated elsewhere than in one's own country to be applied but the case law and jurisprudence other than one's own and even those of other European countries are also to be taken into account¹. The overall system has to be uniform.

One other decision rendered by the ECJ is to be taken into consideration, i.e. the Pupino case, Grand Chamber, 16 June 2005 (C-105/03), which stated that national courts must interpret domestic provisions in conformity with community law and in particular with EU FD.

While interpreting domestic provision which implemented the EAW-FD, some national courts followed that ruling. I will give two examples of that.

According to the Italian law no. 69/2005 (which implemented the EAW) surrender should have been refused for evidential requirements (in case of lack of evidence, to be ascertained by the Italian court). That was clearly inconsistent with FD no. 584; indeed evidential requirements were

¹ To that extent two decisions of the Dutch court (Rechtbank-Internationale Rechtshulp-kamer) of 10 and 21 March, 2006 appear to be interesting; in the instant cases two EAW had been issued by Italian authorities based on sentences rendered *in absentia*. Later on the EU made a new FD on *trial in absentia* (FD no. 299/2009).

not foreseen in the 1957 European convention on extradition; as a consequence Italy appeared to go backwards in respect of the ancient system the EAW had intended to improve upon. The Italian Court of cassation delivered several judgements stating that the domestic provision should have been interpreted in such a way not to be inconsistent with the FD (i.e. the Italian court could only assess whether the foreign judicial authority issued the warrant of arrest on the basis of evidence, but it cannot re-evaluate such evidentiary ground². Other decisions were given aiming at ensuring that domestic provision on EAW be consistent with the FD³.

The same occurred in UK, where domestic provisions implementing the EAW-FD introduced a number of prerequisites which were clearly inconsistent with the European act⁴.

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The legal framework in the EU shows now a new scenario, which will further change and improve (see for instance the initiatives in introducing MR in the area of evidence gaining).

We know where do we come from and where are we now. We can only imagine possible future developments.

But one thing is quite clear: any new law, any new provision will walk on human legs. Which means that at the end of the day everything will depend on us.

Thank you for your attention.

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² See decisions of 13 and 23 September, 2005 (respectively Hussain case and case). This point was elaborated in more details: see SELVAGGI, *Eurosepticism versus Building a Common System for the Surrender of Fugitives*, Eucrium, issue no. 1.2/2007, page 61.

³ See decision rendered in Grand Chamber, 30 January, 2007 in relation to the provision contained in the Italian law no. 69/2005 providing for the refusal of the surrender where the foreign legislation does not provide for fixed terms for pre-trial custody (as the Italian law does).

⁴ House of Lords, 11 February, 2007.