# FACILITATING JUDICIAL COOPERATION IN THE EU

*A Computable Approach to Mutual Recognition in Criminal Matters*

*Edited by*
Giulia Lasagni
Giuseppe Contissa
Michele Caianiello

BRILL | NIJHOFF

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CHAPTER 8

# Italy: the EU Criminal Cooperation Instruments at the Test in Italy – Procedures and Critical Profiles

*Isadora Neroni Rezende, Antonio Pugliese, Nicolò Gibelli and Anna Piovan*

## 1 Introduction*

The implementation into the Italian legal system of the EU instruments of judicial cooperation – namely, the European Arrest Warrant (EAW), the European Investigation Order (EIO), and the Regulation 1805/2018 on the Mutual Recognition on Freezing and Confiscation Orders – followed very different paths, depending on the margin of discretion allowed by each EU legislative instrument and the entity of discrepancies with the national procedural law.

The present Chapter aims to illustrate the process of implementation of these EU cooperation instruments in Italian procedural law, carefully analysing the most noteworthy issues that emerged over the years. To this end, relevant pieces of legislation, related amendments, and salient case law will be considered. Before delving into the critical issues affecting the implementation of each specific instrument, we provide an overview of their transposition in the Italian system.

### 1.1 *Overview of the Implementation Roadmap*

The European Arrest Warrant has been established by the "Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA" (EAW FD). In the Italian context, the instrument has been transposed – with a significant delay – in Law no. 69 of 22 April 2005 (Law no. 69/2005), establishing requirements, procedures, and safeguards for the issuance and execution of EAWs involving Italy.

* Although the Chapter is a joint reflection of all the authors, its drafting is broken down as follows: Isadora Neroni Rezende (§2), Antonio Pugliese (§4), Nicolò Gibelli (§3), Anna Piovan (§§1, 5).

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The transposition process has been long and highly debated,[1] as several perplexities have emerged on the compatibility of the EAW FD with principles and guarantees provided in the Italian Constitution.[2] At the time of the adoption of the EAW FD, the Italian Government published a declaration suggesting a reversal of the adaptation process, *i.e.* the EAW to the national system, and not *viceversa*.[3] This emblematically represents the controversial approach adopted by Italy at the first stage of the transposition process and outlines the ideological mindset grounding the first version of the implementation law.[4]

From a formal perspective, the initial text of Law no. 69/2005 presented serious issues of consistency, due to, *inter alia*, exceeding the list of grounds for refusal that hampered the smooth operability of the instrument. Indeed, the Italian legislator took advantage of the room for manoeuvre typically left by framework decisions, and transposed the original text at times creatively, at times *verbatim*.

The lack of correspondence of certain provisions of Law no. 69/2005 in the EAW FD fostered the necessity for more conformity. Eventually, on the 2nd of February 2021, Legislative Decree no. 10 (Legislative Decree no. 10/2021)[5] brought substantial changes to Law no. 69/2005 through the amendment of

1 On the topic, see Lorenzo Salazar, 'La decisione quadro sul mandato d'arresto europeo: genesi, contenuto e finalità del nuovo sistema normativo' (Programma "Grotius penale" della Commissione europea. Incontro di studio sul tema "Cooperazione Giudiziaria Europea: dall'estradizione al mandato d'arresto europeo", Rome, 10–12 November 2003) 13–17; Vincenzo Caianiello and Giuliano Vassalli, 'Parere sulla proposta di decisione-quadro sul mandato di arresto europeo' (2002) Cassazione Penale 462.

2 For instance, considering the constitutional principle of legality of criminal offences, criticisms were moved against the exemption from the double criminality check of the categories of offences listed in Art 2(2) EAW FD, as their wording did not correspond to the formulation of their national equivalents; likewise, concern was manifested for the infringement of the constitutional principle of equality due to the potentially lower guarantees for the suspect or accused than those provided for in the Italian system.

3 In the press release issued by the Italian government on 11 December 2001, the text of the declaration was as follows: "In order to implement the Framework Decision on the European arrest warrant, the Italian Government will have to initiate the internal procedures to make the Framework Decision itself compatible with the supreme principles of the constitutional order about fundamental rights". The declaration was of non-binding nature.

4 Vincenzo Picciotti, 'La riforma del mandato d'arresto europeo. Note di sintesi a margine del D.Lgs. 2 febbraio 2021, n. 10' (2021) Cassazione Penale 2.

5 Legislative Decree no. 10 of 2 February 2021, "Provisions for the full alignment of national legislation with the provisions of Framework Decision 2002/584/JHA, on the European arrest warrant and surrender procedures between Member States, implementing the delegations provided for in Article 6 of Law no. 117 of 4 October 2019. (21G00013)" (*Disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni della decisione quadro 2002/584/GAI, relativa al mandato d'arresto europeo e alle procedure di consegna tra stati*

several Articles. The core purpose of the reform was to circumvent the criticalities that hindered the principle of mutual recognition underpinning the EAW and to enhance the consistency of the transposition with the EAW Framework Decision.

Among all modifications, Legislative Decree no. 10/2021 has intervened on Art 1 of Law no. 69/2005, deleting the clause that limited the execution in the event of incompatibility with the supreme principles of the Italian constitutional order in terms of fundamental rights, freedom, and due process. Thus, paragraph 1 of Art 2 has been reformulated so that the execution of the EAW may not, under any circumstances, entail the violation of the supreme principles of the constitutional order of the State, the inalienable rights recognised by the Constitution, and the fundamental rights and principles enshrined in Art 6 of the Treaty on European Union (TEU) and the European Convention of Human Rights (ECHR). This change aimed to narrow the grounds for non-execution of a EAW, limiting the circumstances for refusal to those enlisted in the EAW FD, in order to enhance the effectiveness of the instrument.

By the same token, paragraph 1-*bis* has been added to Art 6 of Law no. 69/2005, following the amendment of the EAW FD that introduced Art 4(a), in order to regulate the conditions for refusal in case of a trial held *in absentia*, as introduced by the Framework Decision 2009/299/GAI. Furthermore, the last paragraphs of Art 6 have been repealed, as they aimed at controlling the merits of the warrant, thus restricting, and even inhibiting, the execution in a way deemed incompatible with the principle of mutual trust.

The reform also touched on the double criminality clause, reviewing the list of cases for which surrender is mandatory, contained in Art 8 of Law no. 69/2005. That list has been extensively criticized for being more demanding than the EAW FD, thus mandating a double criminality check that was contrary to the rationale of mutual trust.[6] In its new shape, the list transposes Art 2(2) of the EAW FD more consistently.

Similarly, the list of grounds for non-execution contained in Arts 18 and 18-*bis* has been reduced, deleting those circumstances not directly provided for by Arts 3 and 4 of the EAW FD.[7] Furthermore, Art 18-*ter* has been added to implement the new Art 4-*bis* of the EAW FD on *in absentia* trials. In this new

*membri, in attuazione delle delega di cui all'articolo 6 della legge 4 ottobre 2019, n. 117*), GU no. 30 of 05/02/2021.

6 Picciotti (n 4) 17.

7 In Article 18 of Law no. 69/2005, those pertaining to the *ne bis in idem*, the minor age of the surrendee, and the amnesty remain. In Art 18-*bis* the optional ground for non-execution in case of a decision involving an Italian citizen or a person residing in Italy, applies when the period of residence or stay in Italy is at least of five years.

version of Art 18-*bis*, not all optional grounds for refusal provided in the EAW FD are recognized. It is curious that the Italian law first exceeded in formulating grounds for refusal while, later on, made the possibility of not executing a EAW even narrower than what was provided by the EU standards.

The European Investigation Order, introduced with the "Directive 2014/41/UE of 3 April 2014 regarding the European Investigation Order in criminal matters" (EIO D), has been transposed into the Italian legal framework by means of Legislative Decree n. 108 of 21 June 2017 (Legislative Decree no. 108/2017). The instrument has been enacted in Italy after two years of legislative interventions for the adaptation of the Italian procedural law to the existing EU legislation.[8] Thus, differently from what happened with the EAW FD, the EIO D has been implemented in the context of a general effort to align the Italian system with the EU procedures for judicial cooperation and create an organic and long-lasting framework.[9] So far, Legislative Decree no. 108/2017 has been affected by a sole reform, broadening the circumstances requiring the involvement and coordination with the Anti-terrorism and Anti-mafia Prosecutor in the execution of a EIO.[10]

As will be illustrated in this Chapter, the Italian Government has preserved a certain degree of autonomy in the implementation process. Some provisions of Legislative Decree no. 108/2017 mirror the EIO D thoroughly, sometimes even *verbatim*, while other provisions are overabundant. For instance, concerning the grounds for refusal, Arts 10(1)(a) and 10(3) of the Legislative Decree no. 108/2017 are not based on any provision of the EIO D. At the same time, certain paragraphs of the EIO D about the grounds for non-recognition or execution lack an explicit or even indirect transposition, such as Arts 11(1)(a), 11(1)(b), 11(1)(c), 11(1)(h), 11(1)(e), 11(5).

The great innovation brought by the EIO – as transposed in the Italian system – is the central role of the district prosecutor,[11] both in the passive and active procedure. This marks a turning point, since the protagonist of the

8 On this topic, see Gaetano De Amicis, 'Dalle rogatorie all'ordine europeo d'indagine: verso un nuovo diritto della cooperazione giudiziaria penale' (2019) 1 Cassazione Penale, 22 et seq.; Luigi Kalb, 'Cooperazione Giudiziaria: le novità del recepimento delle fonti sovranazionali' (2016) Diritto Penale e Processo, 989 et seq.; Michele Caianiello, 'L'OEI dalla Direttiva al Decreto N. 108 del 2017' in R. Kostoris and M. Daniele (eds), *L'Ordine Europeo D'Indagine Penale. Il nuovo volto della raccolta transnazionale delle prove nel d.lgs. n. 108 del 2017* (Giappichelli 2018) 18.

9 Caianiello (n 8) 19.

10 Art 2-bis(6) of Legislative Decree no. 105 of 10 August 2023 amended to a small extent Art 4(1) Legislative Decree no. 108/2017.

11 Art 51 of the Italian Code of Criminal Procedure (CCP).

judicial cooperation used to be the General prosecutor of the Court of Appeal. Furthermore, the EIO D fosters direct contact between judicial authorities: compared to Law no. 69/2005, in Legislative Decree no. 108/2017 the role of the Ministry of Justice throughout the process is reduced, as it is not involved in the transmission procedures – it must only be provided with a copy of the EIO.

From a formal point of view, the active and the passive procedures of recognition and execution have been almost correctly transposed in the Italian legislation – even though a few inconsistencies can still be detected.

"Regulation 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders" is self-executing by nature; therefore, it applies to the Italian system directly. Before delving into the detailed analysis of the implementation process, some considerations on the Italian procedural regime must be pointed out. According to the Italian Code of Criminal Procedure (CCP), the seizure of assets is twofold: it can be "conservative" or "preventive".[12] The "conservative" seizure may be activated, as provided by Art 316 CCP, when there can be a lack or dispersal of guarantees for the payment of the costs of the process or damages (the so-called "*periculum in mora*"). Differently, the "preventive" seizure was conceived in Art 321 CCP for protection purposes: it may be requested in case of risk that the free availability of an asset pertaining to the offence aggravates or prolongs its consequences or facilitates the commission of other offences or, lastly, it may be ordered in case of property for which confiscation is possible. As it will be further illustrated in the present Chapter, reading the Regulation in line with the Italian CCP suggests that the kind of seizure targeted by the EU legislator is likely to be the "preventive" one.

The Italian perspective on the matter of freezing and confiscation of assets had a significant impact on the negotiation process for the drafting of a unified EU instrument. With respect to the original version of the Regulation proposed by the European Commission, which established the mutual recognition of freezing and confiscation orders issued in the context of "criminal proceedings", the final text has been extended on the Italian initiative to include the mutual recognition of orders issued in the context of "proceedings in criminal matters". Accordingly, the scope of application has been broadened to orders adopted in the context of the Italian prevention proceedings (Legislative Decree no. 159/2011), which are non-conviction-based. Even though such adjustment allowed the Regulation to encompass also anti-mafia proceedings, it was not welcomed by States like Germany, which do not provide for similar

12 On this topic, see § 4.

measures in their systems and thus flagged a potential violation of fundamental rights.[13]

The entry of this instrument into the Italian legislative framework has been followed in 2021 by an internal informative act (so-called "Circular") of the Minister of Justice[14] and one of the Minister of the Interior,[15] indicating the measures of patrimonial prevention falling within the scope of the Regulation. However, at the initial stage, the Italian legislator has not intervened through a proper normative act to adapt the Italian system by smoothing potential contrasts and allowing a thorough implementation. Therefore, the enactment of EU freezing and confiscation orders has been initially conducted through the direct application of the Regulation and an analogical interpretation of existing instruments on the matter (namely, the Legislative Decree 137/2015 on the recognition of confiscation orders,[16] and the Legislative Decree 35/2016 on the recognition of seizure orders),[17] combined with the abovementioned Circulars. Eventually, in 2023, Legislative Decree no. 203 (Legislative Decree no. 203/2023)[18] has been approved to regulate comprehensively all procedural

13 For a more in-depth reading on the issue, see: Ciro Grandi, 'Il Mutuo Riconoscimento dei Provvedimenti di Confisca alla luce del Regolamento (UE) 2018/1805' (2021) La Legislazione Penale <A://www.lalegislazionepenale.eu/wp-content/uploads/2021/05/Grandi-App-edit.2021.5.25.pdf> accessed 14 August 2024.

14 Minister of Justice, Circular of 18 February 2021, "Implementation of Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders" (*Attuazione del Regolamento (UE) 2018/1805 relativo al riconoscimento reciproco dei provvedimenti di congelamento e di confisca*).

15 Minister of Interior, Department of Public Security, Circular of 12 January 2021 on the "Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders" (*Regolamento (UE) 2018/1805 del Parlamento Europeo e del Consiglio del 14 Novembre 2018, relativo al riconoscimento reciproco dei provvedimenti di congelamento e confisca*).

16 Legislative Decree no. 137 of 15 August 2015, "Implementation of Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders (15G00152)", (*Attuazione della decisione quadro 2006/783/GAI relativa all'applicazione del principio del reciproco riconoscimento delle decisioni di confisca*), GU no. 203 of 02/09/2015.

17 Legislative Decree no. 35 of 15 February 2016, "Implementation of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence" (*Attuazione della decisione quadro 2003/577/GAI del Consiglio, del 22 luglio 2003, relativa all'esecuzione nell'Unione europea dei provvedimenti di blocco dei beni o di sequestro probatorio*), GU no. 59 of 11/03/2016.

18 Legislative Decree no. 203 of 7 December 2023, "Provisions for the full adaptation of national legislation to the provisions of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on mutual recognition of freezing and confiscation orders. (23G00213)" (*Disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni del Regolamento (UE) 2018/1805 del Parlamento europeo*

issues for implementation, such as the grounds for refusal, and align the Italian procedural law with the EU provisions.

The present Chapter will deal with the most noteworthy issues that have arisen in the implementation of the EAW, the EIO, and Regulation 1805/2018 in the Italian system, dwelling on those interpretative and concrete aspects that have marked the way towards the compliant transposition of EU legislation and the effective application of the principle of mutual recognition enshrined therein.

## 2 European Arrest Warrant: Critical Profiles in Legislation and Case Law

As indicated in the introduction, the EAW FD was transposed in the Italian system with Law no. 69/2005, which was amended multiple times over the years to align the domestic provisions with the EU text. After providing a general overview of domestic provisions for executing and issuing EAWs, some of the inconsistencies still affecting the national transposition law, as well as the improvements made so far, will be highlighted. In particular, the analysis will focus on the transposition of the grounds for refusal – including that inspired by the risk of serious fundamental rights violations – and on the procedural safeguards afforded to the surrendee in the execution procedure.

### 2.1 *Overview of EAW Proceedings in the National System*

Law no. 69/2005, transposing the EAW FD, foresees an active and a passive procedure for executing a EAW.[19] The active procedure takes place when the Italian authorities issue a warrant to obtain the surrender of a person located in the territory of another EU Member State (Arts 28–33, Law no. 69/2005). Conversely, the passive procedure occurs when the Italian authorities are requested to surrender someone in the national territory (Arts 5–27, Law no. 69/2005).

The passive proceedings can be articulated in a twofold way, according to how the Italian authorities receive the EAW. On the one hand, the ordinary procedure begins when the EAW is directly transmitted to the competent judicial authority (Arts 9–10, Law no. 69/2005). On the other hand, the

*e del Consiglio, del 14 novembre 2018, relativo al riconoscimento reciproco dei provvedimenti di congelamento e di confisca*), GU no. 298 of 22/12/2023.

19 For a more detailed overview of EAW proceedings in Italy, see the Italian FACILEX report, available at <https://site.unibo.it/facilex/en> accessed 14 August 2024.

passive procedure can be initiated by the police if they receive an alert for the requested person through the Schengen Information System (SIS) (Arts 11–12, Law no. 69/2005), and proceed with the arrest. In both cases, the competent authority to execute the EAW is the Court of Appeal (Art 5, Law no. 69/2005), which falls within the concept of "judicial authority" of Art 6(2) EAW FD. Specific competence rules, however, apply when the EAW concerns a person who is underage at the time of the facts. In such cases, the jurisprudence has clarified that a twofold competence exists for issuing the precautionary measures – preventing absconding – and deciding on the final surrender of the person. First, the President of the Court of Appeal remains competent to validate the arrest made by the judicial police and, if requested, to issue the precautionary measure before the surrender. Then, the juvenile section of the Court of Appeal is responsible for ascertaining whether the conditions for surrender exist. For this purpose, once the precautionary measure is adopted, the case file must be forwarded by the President of the Court of Appeal to the juvenile section for the final decision on surrender.[20]

When the issuing authority intends to transmit a EAW directly to the Italian judicial authorities, it must do so with the intermediation of the designated central authority, the Minister of Justice (Art 4, Law no. 69/2005). Upon reception of the warrant, the President of the territorially competent Court of Appeal proceeds with the urgent acts and gathers the whole Court, composed of a panel of three judges. The Court hears the general public prosecutor on the matter and, if necessary, applies a precautionary measure by reasoned order, paying special attention to the need to prevent that requested person absconds (Art 9(4), Law no. 69/2005). If the Court orders a measure, the judicial police shall proceed with its execution, informing the person concerned that s/he may appoint a lawyer in the issuing State (Art 9(5-*bis*), Law no. 69/2005). Within five days of the execution of the precautionary measure, the President of the Court of Appeal (or a delegated magistrate) shall proceed to hear the person subject to the measure, informing in a language known to him or her, of the procedural right (Art 10(1), Law no. 69/2005)[21] to be heard "if present" (Art 17(1), Law no. 69/2005). While this wording may raise issues concerning the right to be present in the case of detained persons, whose participation at the hearing is subject to the availability of services for accompanying him or her to court, the case law seems to avert this risk. In fact, the Court of Cassation has established that the hearing for the decision on the execution of

20 Cass. pen., sez. VI, no. 23259 of 19/05/2016.

21 For a more detailed overview of this provision and related compliance issues, see *infra*, §2.3.

the EAW must be postponed when the surrendering person, having indicated the wish to be heard, is legitimately prevented from appearing (such as in the case of administrative detention).[22] On this occasion, the person concerned may give consent to the surrender (Art 14, Law no. 69/2005). The national provision does not include any specifics on the voluntary nature of the consent, as required by Art 13(2) EAW FD, but the necessary presence of the lawyer and an interpreter could be considered a sufficient guarantee for the voluntariness of the statements.

The final decision on the execution of the warrant is made at the outcome of another hearing that shall take place within fifteen days from the execution of the precautionary measure (Art 9(4), Law no. 69/2005) or from the decision of the Court not to apply one (Art 9(4-*bis*), Law no. 69/2005).

When the judicial police execute a EAW transmitted through the SIS, a validation hearing shall take place within forty-eight hours from the arrest of the person. In this hearing, the President of the territorially competent Court of Appeal (or a delegated magistrate) must hear the arrested person in the presence of a retained or court-appointed lawyer and, if necessary, of an interpreter (Art 13, Law no. 69/2005).[23] If the arrest is validated,[24] the Court proceeds with issuing a precautionary measure according to the rules established for the ordinary procedure (Arts 9 and 10(4), Law no. 69/2005), except when there are reasons to believe that grounds for refusal may apply. When the measure is applied, the hearing for the final decision shall take place within fifteen days from its execution (Arts 13(3) and 10(4), Law no. 69/2005).

Against the surrender decision, the surrendering person has the right to appeal to the Court of Cassation, only on the grounds of violation of the law (Art 606(1)(a)-(b)-(c) of the Italian Code of Criminal Procedure, CCP), within five days of having acquired knowledge of the ruling. The Court of Cassation must decide within ten days of receipt of the file, which shall occur the next day of the appeal's filing at the latest (Art 22, Law no. 69/2005). Pending the decision, the surrender is suspended. The same remedy is provided against an

22 Cass. pen., sez. F, no. 36397 of 29/08/2023.

23 The jurisprudence (see Cass. pen., sez. VI, no. 27357 of 19/06/2013) has cleared up that the time limit of forty-eight hours laid down for validating the arrest also extends to the adoption of the precautionary measure, meaning that the two decisions shall be made within the same timeframe.

24 The case law has clarified the scope of the control exercised by the judge when validating the arrest. Specifically, the Court of Cassation (see Cass. pen., sez. VI, no. 5547 of 19/01/2016) explained that the validation of an arrest of a person whose data has been entered in the SIS is limited to a paper verification that does not affect the outcome of the surrender proceedings.

order consenting to surrender upon the person's consent, within three days (Art 22(5-*bis*)). Despite having a suspensive effect, this remedy may not be considered "effective" by European standards. First, the Court of Cassation does not have the power to intervene on the merits of the case, as required by the case law of the ECtHR.[25] This shortcoming could be critical when the surrender poses a risk of inhuman and degrading treatment: in this regard, national case law has specified that such grievances can be raised before the Cassation, for the first time, only when the risk of violation of fundamental rights is notorious or recently established by other judgments of the Court.[26] In this sense, the Cassation appeal on the grounds of risk of inhuman and degrading treatment seems "mediated" *de facto*, that is, effective only in relation to the existence of other decisions on the merits of the possible fundamental rights violation. Second, the remedy cannot always be considered effective for the defendant who does not understand Italian. The Supreme Court has established that there is no right to the translation of the surrender judgment and that the person requested may be assisted by a trusted interpreter, possibly paid by legal aid; in this case, a postponement of the deadline for filing the appeal is also possible to allow for translation.[27] The possibility of access to legal aid is not, however, always assured in EAW proceedings. Indeed, while in the ordinary procedure the arrested person receives all the information on procedural rights provided for in domestic law, including information on the right to legal aid, this is not the case in the (more frequent) procedure at the initiative of the judicial police.[28] Without this support, the right to the translation of the judgement – and consequently, to challenge it – may be jeopardized.

In the active procedure, the competence to issue a EAW belongs to different authorities, depending on the phase which the domestic proceedings are at. Art 28, Law no. 69/2005 provides that the warrant is issued: (a) when the proceedings are ongoing, by the judge who adopted the precautionary measure

25 cf *Glas Nadezhda Eood and Elenkov v. Bulgaria* App no 14134/02 (ECHR, 11 October 2007), para. 69. For example, the Court of Cassation declared inadmissible an appeal in which the individualising information provided by the issuing State had already been assessed and found to be adequate by the Court of Appeal. See Cass. pen., sez. F, no. 32465 of 9/08/2024.

26 Cass. pen., sez. VI, no. 10119 of 7/03/2024.

27 Cass. pen., sez. VI, no. 17535 of 30/04/2024.

28 In fact, Art 9(5), concerning the ordinary procedure, includes a general reference to the rules relating to precautionary measures, among which there is Art 293 CCP, providing for all the information rights to be given to the person arrested at the moment of the execution of a precautionary measure. The same reference is not provided, however, in Art 12, concerning the arrest made at the initiative of the judicial police.

of pre-trial detention or house arrest; (b) when the judgement has become final, by the public prosecutor competent for its enforcement (Arts 656 and 665 CCP), if the custodial penalty is at least of one year of imprisonment and there is no suspension of the enforcement;[29] (c) when a security measure is applied, by the public prosecutor competent under Art 658 CCP.[30] The Minister of Justice is the central authority competent for assisting the national bodies in forwarding (and translating) EAWs (Art 28(2), Law no. 69/2005). When the whereabouts of the suspect or accused are not known, an alert shall be entered in the SIS (Art 29, Law no. 69/2005). Such an alert is equivalent to a EAW when it includes all the information provided by Art 30, Law no. 69/2005 (correctly implementing Art 8 EAW FD).

Having presented an overview of the passive and active EAW proceedings in Italy, some critical issues stemming from the national legislation are examined, focusing on the implementation of the grounds of refusal, including those based on fundamental rights risks, and the procedural rights of the people involved in such proceedings.

### 2.2 *Grounds for Refusal and Fundamental Rights Issues*

The regulation of grounds for refusal has been one of the most troubled areas in Italy's transposition of the EAW FD. While at first Art 18, Law no. 69/2005 listed twenty grounds for refusal, to which other hypotheses were added throughout the text, today the catalogue has been greatly reduced, especially regarding optional grounds for refusal. The evolution of the regime of grounds for refusal has also been affected by the gradual introduction of fundamental rights considerations into the EU system of mutual recognition in criminal matters.

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29 Under Art 665(5) CCP, there is suspension of the enforcement of a custodial penalty when the "imprisonment does not exceed three or four years in the cases provided for in Article 47-*ter*, paragraph 1, of Law No 354 of 26 July 1975, or six years in the cases referred to in Articles 90 and 94 of the Consolidated Text approved by Decree No 309 of the President of the Republic of 9 October 1990, as amended".

30 In the Italian system, security measures (Art 199 of the Criminal Code) are aimed at keeping the person away from the opportunity of committing further crimes. They are applied to offenders, regardless of whether they can be punished, after ascertaining their social dangerousness, in order to prevent the risk of reoffending. They differ from punishment because they do not have a retributive function but only and exclusively a function of re-educating the offender. Therefore, they are also applied to non-chargeable offenders, and their application presupposes the concrete ascertainment of the social dangerousness of the subject. For a general overview of security measures in the Italian system, see Giorgio Marinucci, Emilio Dolcini and Gian Luigi Gatta, *Manuale di diritto penale* (12th edn., Giuffrè) 897 ff.

The mandatory grounds for refusal are implemented in Art 18, Law no. 69/2005, with minor issues. For instance, Art 18(1)(b) transposes the ground of refusal based on the *ne bis in idem* principle. The national provision clarifies the meaning of "finally judged", provided in Art 3(2) EAW FD, by listing the types of decisions satisfying this requirement in the domestic system: irrevocable judgements, criminal decrees of conviction,[31] judgements of no grounds to proceed[32] which are no longer subject to an appeal, and final judgments of other EU Member States. Among these, the reference to judgements of no grounds to proceed raises some issues. In fact, these decisions do not become "final" under national law even when they are no longer subject to appeal, meaning that the case can always be reopened if new evidence comes to light (Art 434 CCP). It should be borne in mind, however, that the CJEU has considered judgements of no ground to proceed as "final judgements" barring further prosecution in the EU under Art 54 of the Schengen Convention.[33] Considering this case law, which however creates ambiguity between national and EU law, judgements of no grounds to proceed appear more in line with the concept of a "final" judgement that has been passed upon the requested person in a Member State and that prevents further proceedings. Under Art 4(3) EAW FD, such decisions can only serve as a basis for a *non-mandatory* refusal. Therefore, the Italian law does not seem to correctly implement the EAW FD in this respect.

The interpretation of this ground of refusal is also contradictory in the case law. Specifically, it is not clear whether the final decision triggering the application of Art 18(1)(b) shall include an assessment of the merits of the case (as required by the CJEU)[34] or may dispose of it on procedural grounds only. Two judgements of the Court of Cassation have dealt with this issue in relation to judgements that had finally closed previous EAW proceedings, refusing surrender. Firstly, in a 2014 judgement, the Court of Cassation excluded the applicability of the *ne bis in idem* principle regarding a judgement based on procedural

31 The proceedings by decree (Arts 459 ff. of the Criminal Procedural Code, CCP) are a special form of proceedings where the prosecutor, if s/he considers that only a financial penalty shall be applied, submits a reasoned request for issuing a criminal decree of conviction to the judge for preliminary investigations. The judge, where s/he agrees with the prosecutor's request, issues the criminal decree of conviction (Art 460 CCP).

32 The judgements of no grounds to proceed is the decision of dismissal issued by the judge of the preliminary hearing at the end of such hearing (Art 425 CCP). Judgements of no grounds to proceed have been introduced in Art 18(1) of the transposition law only in the last 2021 reform.

33 Case C-398/12 *M* [2014] ECLI:EU:C:2014:1057.

34 Case C-469/03 *Miraglia* [2005] ECLI:EU:C:2005:156.

grounds only.[35] The case involved a EAW issued by the Romanian authorities to Italy. Previously, the French authorities had refused to surrender the person concerned to Romania for procedural issues. In line with the CJEU case law, the Italian Court of Cassation decided not to consider this circumstance for refusing the surrender, given that the European *ne bis in idem* principle applies only to substantive assessments of liability for criminal acts, and not also to purely procedural ones. A more recent judgement, however, apparently contradicts this approach. In particular, the Court of Cassation has established that an irrevocable judgement refusing the execution of a EAW for the lack of supplementary documentation could trigger the applicability of the *ne bis in idem* under Art 3(2) EAW FD.[36] In this case, Poland had transmitted a EAW to the Italian authorities, which had requested further documentation to decide on the request, with no answer from the issuing authorities. Consequently, the EAW proceedings had been closed with a decision refusing surrender, which became final. The Polish authorities later reiterated the request with all the necessary documentation. However, the Court of Cassation excluded that the competent Court of Appeal could rule again on the same request, modifying the previous decision of refusal. This last decision seems to embrace a more extensive interpretation of the *ne bis in idem* principle, acknowledging that also final decisions relying on procedural grounds (e.g., the lack of documentation) can serve as grounds for mandatory refusal. Arguably, this approach is not in line with the interpretation of the CJEU but the judgement seems to be an isolated case, so it might be too soon to state that the national provision's practical implementation raises compliance issues with EU law.

As mentioned above, the regime of the non-mandatory grounds for refusal has undergone significant changes in the transposition law.[37] This development shows a path of progressive adherence to the principle of mutual recognition, considering that at present not even all optional grounds for refusal are transposed into the Italian system.[38] Because of their non-mandatory nature,

35 Cass. pen., sez. VI, no. 1695 of 14/01/2014.

36 Cass. pen., sez. VI, no. 35290 of 19/07/2018.

37 For an overview of the evolution, see Guido Colaicovo, 'La nuova disciplina del mandato di arresto europeo tra esigenze di semplificazione della procedura e tutela del diritto di difesa' (2021) 7 Dir Pen Proc 872 ff.

38 The grounds of refusal provided at Art 4(3), (4), and (5) are not implemented in the national system. To be true, as explained above, Art 4(3) is a case of bad transposition because the judgements of no grounds to proceed have been included in the list of decisions grounding a mandatory refusal of the EAW, rather than an optional one.

the lack of transposition of some grounds does not raise criticism in relation to EU law.[39]

For instance, important changes have concerned Art 18-*bis*(2-2-*bis*), Law no. 69/2005, which transposes Art 4(6) EAW FD and allows to refuse the surrender of the Italian citizen or a person who lawfully and effectively resides or has resided continuously for at least five years on the Italian territory, provided that it orders that such penalty or security measure be executed in Italy by its domestic law. The Italian Constitutional Court has scrutinized this regime several times, also by dialoguing with the CJEU. In the first transposition of the EAW FD, this ground for refusal protected only Italian citizens and was later extended to EU citizens by a 2010 ruling of the Constitutional Court.[40] Because the regime still excluded third-country citizens legally residing in Italy, it was again subject to constitutional review. When asked about the issue, the Constitutional Court referred a question to the CJEU for a preliminary ruling. In *O.G.*, the Luxembourg Court indicated that the principle of non-discrimination in EU law precludes legislation such as Italy's, which excludes absolutely and automatically from the optional refusal provided for in Art 4(6) EAW FD, any third-country national who is staying or residing in the territory of the State of execution of the warrant, without the judicial authority being able to assess that national's links with that Member State.[41] Following this judgement, the Constitutional Court has settled the question in the national system,[42] extending the scope of Art 18-*bis*(2) also to third-country citizens, residing for at least five consecutive years in Italy. Following the indications of the Constitutional Court, a Law Decree[43] inserted a paragraph 2-*bis* in Art 18-*bis*, obliging the Court of Appeal to ascertain – for the purpose of verifying the lawful and effective residence or abode on the Italian territory of the person requested to be surrendered – whether the execution of the punishment

39 Case C-700/21 *O.G.* [2023] ECLI:EU:C:2023:444, para. 35.

40 Italian Constitutional Court, no. 227 of 21/06/2010.

41 *O.G.* (n 39).

42 Italian Constitutional court, no. 178 of 6-28/07/2023.

43 Law Decree No. 69 of 13 June 2023, Urgent provisions for the implementation of obligations arising from acts of the European Union and from pending infringement and pre-infringement proceedings against the Italian state (*Disposizioni urgenti per l'attuazione di obblighi derivanti da atti dell'Unione europea e da procedure di infrazione e pre-infrazione pendenti nei confronti dello Stato Italiano*), in Official Gazette No. 136 of June 13, 2023, provided (by Art 18-bis, paragraph 1, letter a)) for the amendment of Art 18-bis, paragraph 2 and the introduction of paragraph 2-bis to Art 18-bis. The Law Decree was converted with amendments by Law No. 103 of 10 August 2023, Urgent provisions related to severe acute respiratory syndrome (SARS) (*Disposizioni urgenti relative alla sindrome respiratoria acuta severa* (*SARS*)). (in Official Gazette No. 186 of August 10, 2023).

or security measure on the territory is in practice suitable to enhance the opportunities for social reintegration, considering: the duration, nature and manner of residence or abode, specifically, the time elapsed between the commission of the crime on the basis of which the EAW was issued and the beginning of the period of residence or abode; the commission of offenses and the regular fulfilment of social security and tax obligations during that period; compliance with national rules on the entry and residence of foreigners; family, linguistic, cultural, social, economic or other ties that the person has on Italian territory; and any other relevant factors. The judgment is null and void if it does not contain a specific indication of the elements referred to in the first sentence and the criteria for their evaluation. Despite this positive development, jurisprudence is divided on the assessment of the five-year residence requirement referred to in Article 18-bis(2) of Law no. 69/2005. While some judgments of the Court of Cassation consider that this period should be counted both before and after the commission of the offence for which surrender is sought,[44] others take a more restrictive view, requiring the person concerned to have resided legally in Italy for five consecutive years *after* the facts in question.[45] However, this latter interpretation does not seem to have any basis in the text of Article 4(6) EAW FD, in the case law of the CJEU,[46] or in the rationale of the provision, which aims to ensure the social reintegration of the person concerned. Additionally, part of the case law considers that the lack of knowledge of Italian on the part of the person concerned is in itself an obstacle to the recognition of the ground for refusal.[47] This approach may conflict with the wording of Art 18-*bis*(2-*bis*), which refers to linguistic competencies as only one of the factors (among others) that may be assessed to refuse surrender. Nonetheless, given the margin of discretion left to Member States in implementing this ground for refusal, it is doubtful that this line of interpretation would raise problems of compliance with EU law.

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44 Cass. pen., sez. VI, no. 5013 of 25/06/2024. The same decision, however, states that the evidence to prove the period of legal residence cannot be presented for the first time before the Court of Cassation, which, as explained above, can only review the decision on grounds of violation of law (Art 606(1)(a)-(b)-(c) CCP) and cannot make any assessment on the merits of the case (a task that is delegated only to the Court of Appeal).

45 Cass. pen., sez. VI, no. 10929 of 13/03/2024.

46 In *Wolzenburg*, the CJEU examined the five-year residence requirement in 4(6) EAW FD but made no distinction according to whether the offence covered by the EAW was committed before or within that period. See Case C-123/08 *Dominic Wolzenburg* [2009] ECLI:EU:C:2009:616.

47 Cass. pen., sez. VI, no. 17317 of 24/04/2024.

Although not explicitly configured as a ground for refusal,[48] also the violation of fundamental rights can lead to the failure to surrender the requested person.

Art 2 Law no. 69/2005, as amended by the Legislative Decree no. 10/2021, provides indeed for a general clause that excludes the execution of a EAW when this may entail a violation either of the supreme principles of the Italian constitutional order or the inalienable rights of the person recognised by the Constitution, or of the fundamental rights and principles enshrined by Art 6 of the Treaty on European Union (TEU), as well as the fundamental rights guaranteed by the European Convention on Human Rights. Furthermore, the EAW execution is to be refused whether the issuing State has been suspended by the EU Council due to serious and persistent violation of Art 6(1) TEU.

The domestic case law arguably pays much attention to fundamental rights considerations in passive EAW proceedings. For instance, the Court of Cassation has underscored the need to apply the two-step approach developed by the CJEU in *Aranyosi and Căldăraru* and later developed in *LM* and *EDL*. The "real" risk of inhuman or degrading treatment shall be inferred by the supplementary information provided by the issuing State and refusals can only be decided on a case-by-case basis, thus avoiding mere general assessments on that Member State[49] or the conditions of the surrendee.[50] If the Court of Appeal complies with the obligation to request additional information, but the issuing State avoids providing detailed information that excludes the risk of inhuman and degrading treatment, case law has considered that the surrender may be refused.[51]

Lastly, the Constitutional Court has recently included the protection of health among the fundamental rights considerations that may lead to a

48 As clarified by the *Relazione illustrativa*, in *Senato della repubblica, XVIII legislatura, Atto del governo sottoposto a parere parlamentare N. 201, Schema di decreto legislativo recante disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni della decisione quadro 2002/584/GAI, relativa al mandato di arresto europeo e alle procedure di consegna tra Stati membri*, 8. In the first transposition of the EAW FD, this ground was explicitly provided for in Art 18(1)(h), Law no. 69/2005.

49 Cass. pen., sez. VI, no. 44015 of 16/11/2022; Cass. pen., sez. II, no. 6633 of 17/02/2021; Cass. pen., sez. VI, no. 18352 of 11/06/2020; Cass. pen., sez. VI, no. 44397 of 29/10/2019; Cass. pen., sez. VI, no. 52541 of 09/11/2018; Cass. pen., sez. VI, no. 47891 of 11/10/2017; Cass. pen., sez. VI, no. 22249 of 03/05/2017; Cass. pen., sez. II, no. 3679 of 24/02/2017; Cass. pen., sez. VI, no. 5472 of 01/02/2017; Cass. pen., sez. VI, no. 23277 of 01/06/2016.

50 Cass. pen., sez. VI, no. 51798 of 28/12/2023 (concerning a pregnant surrendee).

51 Court of Appeal of Milan, no. 155 of 28/03/2024 (rejecting the surrender of an Italian citizen following the refusal of the Hungarian authorities of providing individualized information on detention facilities).

refusal – *rectius*, a postponement for (indefinite) time – of a EAW. Following a preliminary ruling to the CJEU,[52] the Constitutional Court has established that, under Arts 4 CFREU and 2 and 32 of the Italian Constitution – the national executing authority may temporarily postpone the surrender of the requested person, provided that there are serious reasons for believing, on objective grounds such as medical certificates or expert reports, that the execution of the EAW manifestly risks endangering the health of that person. In these circumstances, a direct dialogue shall be established between the judicial authorities to find a solution that avoids serious risks to the person's health. When such a solution cannot be found, a final decision refusing surrender may be issued.[53]

### 2.3 *Issues for the Rights of the Suspect or Accused in EAW Proceedings*

Art 11 EAW FD, which provides for the rights of the requested person, is transposed by Arts 10(1), 9(5-*bis*), and 12(1), Law no. 69/2005. While the implementation of the rights to information and access to a lawyer can be considered satisfactory overall, the case law has interpreted these prerogatives in a rather flexible fashion, possibly raising issues in practice. The right to interpretation and translation, instead, has not been fully transposed by the national legislator, as outlined below.

Concerning the right to information, in the ordinary passive procedure it is provided that the person concerned is informed of the right to appoint a lawyer in the issuing state at the moment of execution of precautionary measure ordered by the Court of Appeal (Art 9(5-*bis*), Law 69/2005). In the subsequent hearing before the Court, the President informs the subject, in a language known to him or her, of the content of the EAW and the procedure for its execution, of the right to consent to the surrender and waive the application of the speciality rule (Art 10(1), Law 69/2005). When the procedure is initiated by the police, instead, the officer making the arrest shall provide the same warnings in a language the arrested person understands (Art 12(1), Law 69/2005). Under Art 12(1-*bis*), the police must also inform the person concerned of the right to appoint a lawyer in the issuing State. To ensure the effectiveness of these rights, Art 12(3) foresees that the arrest report shall, under penalty of nullity of the act, indicate that the information of Art 12(1) has been provided. The same is not required for the information on the right to appoint a lawyer in the issuing state: this gap may be explained by the fact that Art 12(1-*bis*) was introduced into the text of the transposition law only at a later stage and was

52 Case C-699/21 *E.D.L.* [2023] ECLI:EU:C:2023:295.

53 Italian Constitutional Court, no. 177 of 28/07/2023; cf, also, Cass. pen., sez. F., no. 34816 of 8/08/2023.

not coordinated with the reporting obligation of Art 12(3), although the Court of Cassation has argued otherwise.[54]

The case law, however, has interpreted these provisions in quite an anti-formalistic fashion. In relation to the duty to inform the subject of the right to appoint a defence counsel in the issuing State, the Court of Cassation has clarified that no nullity arises where this notice is given to the person concerned by the judge at the time of validation of the arrest, rather than by the judicial police immediately upon arrest.[55] Despite this approach not being entirely satisfactory, it does not raise any compliance issues. Art 11 EAW FD only foresees that the information is delivered to the person concerned "in accordance with its national law" but does not set any specific requirements or limits to the provision of such information. Given this, any implementation gap can only be discerned considering the effectiveness of such information rights: if, for example, the notice is given too late in the procedure, the requested person might be deprived of an effective right to legal assistance before the issuing and executing authorities. This risk does not, however, seem to rise in the national procedure. Art 13(1), Law no. 69/2005 provides indeed that the judge presiding the arrest validation hearing must give to the requested person all the information on procedural rights. Considering that such a hearing takes place within forty-eight hours of the arrest, this timeframe seems short enough to ensure the fairness of the procedure.

Jurisprudence shows similar flexibility in the interpretation of the right to access a lawyer. Concerning the right to be assisted by a retained lawyer, the Court of Cassation has established that there is no provision to observe a period of notice for notifying the defence counsel of the validation hearing.[56] The need to facilitate the participation of the defence counsel must be balanced

54 cf Cass. pen., sez. VI, no. 52013 of 16/10/2018, which has argued that the lack of any sanctions for the failure to inform the arrested person of the right to appoint a lawyer in the issuing State corresponds to an intentional choice of the legislator, considering that no sanctions are also provided for the same failure in the ordinary procedure (Art 9(5-*bis*), Law no. 69/2005).

55 Cass. pen., sez. VI, no. 52013 of 16/10/2018; Cass. pen., sez. VI, no. 51289 of 6/11/2017. In such cases, the Court considered the supplementary notices given by the judge at the validation hearing to be sufficient, according to the general rules of Arts 294(1-bis) and 391(2) CCP. Previously, however, the case law had established that the absence of the notice gave rise to an intermediate nullity, that had to be flagged by the defence at the latest at the hearing to validate the arrest, see Cass. pen., sez. VI, no. 51289 of 06/11/2017; Cass. pen., sez. VI, no. 24301 of 9/05/2017.

56 Cass. pen., sez. VI, no. 7025 of 08/01/2021; Cass. pen., sez. VI, no. 28/04/17918 of 2009. This applies also where the court-appointed lawyer was not notified of the validation hearing, cf Cass. pen., sez. F, no. 34958 of 04/09/2008.

against the urgency of the procedure, so that no nullity can be found where the defence counsel is not able to participate in the hearing or, at least, to appoint a substitute. This approach does not raise issues when the requested person was informed of the right to appoint a retained lawyer when arrested and exercised this right before the validation hearing. Nonetheless, problems may arise when the person concerned was not placed, from the moment of the arrest, in a position to exercise this prerogative. In fact, the Court of Cassation considers that the failure to record the delivery of information about procedural rights in the arrest report constitutes only a relative nullity, whose effects can be remedied according to the general rules of Art 183 CCP.[57] Besides, in this case, the nullity is merely linked to the arrest report, and not the defendant, meaning that no check is made on the fact that the arrestee has been effectively informed of his or her right.[58]

Moreover, the approach applied in EAW proceedings seems to contradict that adopted in domestic cases, where courts tend to interpret the right to be assisted by a lawyer to a high standard. Generally, suspects or accused persons have a right to be assisted not by any lawyer, but by the lawyer of their choice.[59] Specifically, in a decision not on the EAW, the Court of Cassation has acknowledged that the failure to give notice of the hearing to the retained lawyer promptly appointed by the person concerned constitutes an absolute nullity when his or her presence is mandatory, although the notification was made to another lawyer and that a substitute was present at the hearing.[60] Following this line of reasoning, one could wonder whether an absolute nullity occurs at the validation hearing, where the presence of the lawyer is mandatory, when

57 Cass. pen., sez. VI, no. 48127 of 29/11/2013. From the point of view of sanctions, there are three types of nullities in the Italian criminal procedural system: absolute nullities (*nullità assolute*), intermediate nullities (*nullità intermedie*), and relative nullities (*nullità relative*). Relative nullities have the least serious consequences on the procedure, as they can be raised only by the parties (and not *ex officio* by the judge), within the strict time limits of Art 181 CCP, and the with the general limitations of Arts 182–183 CCP.

58 Marianna Biral and others 'The Italian implementation of the EU Directives on Procedural Safeguards for Accused Persons in Criminal Proceedings' (*SP*, 22 November 2023), 51 <https://www.sistemapenale.it/pdf_contenuti/1669131660_report-italiano-cross justice.pdf> last accessed 14 August 2024.

59 ibid 57–58.

60 Cass. pen., sez. V, no. 181 of 26/11/2020. Art 13 EAW FD does not specify whether the presence of the lawyer at the validation hearing is necessary. However, the case law has already admitted to the possibility of extending the general rules of the Italian CCP on arrest validation hearings (Art 391) to the police-initiated procedure (Art 13). According to this line of reasoning, the presence of the lawyer at the validation hearing in the EAW should be considered mandatory.

the requested person was not informed of the right to be assisted by a retained lawyer. The Court of Cassation would likely exclude such a possibility, given the urgency underlying EAW proceedings. It is also unsure whether such an issue would raise actual compliance problems with the EAW FD. In this case as well, Art 11(2) establishes the right to be assisted by a legal counsel "in accordance with the national law of the executing Member State" and does not set any specific standards in terms of being assisted by a retained or court-appointed lawyer. Given this, the impossibility of being assisted by a retained lawyer at the validation hearing does not raise compliance issues. Nonetheless, from a purely domestic perspective, more coherence on the contents of the right to be assisted by a lawyer would be welcomed.

Lastly, there are reasons to argue that the right to translation of essential documents is not fully implemented in the national system. Art 11 EAW FD establishes that the person concerned has a right to be informed of the EAW and its contents and should be assisted by an interpreter.[61] While such prerogatives should be ensured "in accordance with the national law of the executing Member State", the standards of protection granted in the national system should also be aligned with those foreseen in Directive 2010/64/EU.[62] Art 3(6) of the Directive provides that "[i]n proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document". Therefore, *as a rule*, the person arrested for the execution of a EAW should be handed a written translation of the warrant. Such a prerogative is aimed at ensuring the effectiveness of the participation in the proceedings of the defence: it is certainly better for the person requested to have a written document, which can be later analyzed

61 The right to be assisted by an interpreter is instead guaranteed to a high standard. The Court of Cassation has clarified that, if the person requested to be surrendered who does not know the Italian language, he or she has the right to be assisted by an interpreter for the purpose of signing the declaration of waiver of participation in the hearing, otherwise determining an absolute nullity pursuant to Art 178(1)(c) CCP, which is irremediable and extends to the sentence pronounced at said hearing. cf Cass. pen., sez. VI, no. 3726 of 25/01/2024.

62 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings OJ L 280, 26.10.2010, p. 1–7.

with the interpreter and the defence counsel.[63] When the transposition law for the Directive was adopted,[64] the Italian legislator did not intervene on Art 12, Law no. 69/2005, which enshrines the rights of the person arrested for the execution of a EAW. The current version of the text only foresees an oral summary of the warrant's contents. This situation is seen as an exception according to the Directive, while the written translation of the document should be the rule. Given this, the implementation of the right to translation in the EAW procedure cannot be considered fully satisfactory.[65]

## 3 European Investigation Order: Critical Profiles in Legislation and Case Law

The EIO D has been implemented in Italy by Legislative Decree no. 108 of 21/06/2017.[66] The transposition law consists of three parts: the first contains some general provisions (Arts 1–3 and 47); the second regulates the passive procedure, with Italy acting as executing authority (Arts 4–26); the third regulates the active procedure, with Italy acting as issuing authority (Arts 27–46). It is remarkable that the very first provision of Legislative Decree no. 108/2017 establishes that the implementation respects the principles of the Italian constitutional order and the Charter of Fundamental Rights of the European Union regarding fundamental rights, freedoms, and fair trial. This general provision should serve as a guide in the interpretation of the entire text of the law of implementation.

63 Marta Bargis, 'Il mandato di arresto europeo dalla decisione quadro del 2002 alle odierne prospettive' (2015) 4 Dir Pen Cont 61, 65.

64 The Directive was transposed with the Legislative Decree 4 March 2014, no. 32, *Implementation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings* (Attuazione della direttiva 2010/64/UE sul diritto all'interpretazione e alla traduzione nei procedimenti penali) in Official Gazette no. 64 of 18-03-2014.

65 Marta Bargis (n 63) 66. The case law has not provided a useful response to this gap. The Court of Cassation acknowledges that the EAW constitutes an essential act of the proceedings, which the accused has a right to have translated according to Art 143 CCP. However, it recognises this prerogative *only if* the requested person presents a reasoned request, while the Directive provides for this right to be implemented automatically. See Cass. pen., sez. VI, no. 50814 of 24/11/2016.

66 Legislative Decree no. 108/2017 has been recently amended by Law no. 137 of 9 October 2023. The amendment only concerns Art 4 Legislative Decree no. 108/2017, which deals with the powers of the public prosecutor in EIO matters. The amendment is relatively minor and will be reported when appropriate.

The following sections will first consider the procedures for executing and issuing a EIO in Italy in general. The focus will then turn to the specific provisions for certain types of investigations.

### 3.1 *Scope and Types of Proceedings for Which a EIO Can Be Issued*

The broad material scope of the EIO D is confirmed, at the national level, by Art 2 Legislative Decree no. 108/2017, according to which a EIO can be issued and executed in Italy for carrying out virtually every investigative act, with some minor exceptions.[67] At the outset, it is important to highlight two key aspects of the procedures in which an EIO can be issued in Italy.

First, Italian authorities can issue EIOs "in criminal proceedings or proceedings for the application of a measure of asset prevention" (Art 27 Legislative Decree no. 108/2017). This definition arguably transposes Arts 4(a) and (c) of EIO D, while the Italian legislator does not appear to have conferred the competence to issue a EIO on administrative authorities, as is the case under Art 4(b) EIO D. It is beyond question that this constitutes a significant distinction.[68]

Second, the national system also provides for the possibility to issue a EIO in criminal proceedings where a legal person is involved as a defendant. That is possible in criminal proceedings relating to offences committed by a natural person in the interest or advantage of a legal person (i.e., in most cases, a company).[69]

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67 These exceptions depend on the overlap of Legislative Decree no. 108/2017 with other pieces of legislation, notably the European Convention on Mutual Assistance in Criminal Matters adopted by the Council of Europe on 20/04/1959; the Convention implementing the Schengen Agreement of 14/06/1985, ratified by Italy by Law no. 388 of 30/09/1993; the Brussels Convention of 29/05/2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, implemented in Italy through Legislative Decree no. 52 of 5 April 2017.

68 On the possibility of including administrative authorities such as OLAF within the category of Art 4(c) EIO D, cf Salvatore Tesoriero, 'La cooperazione transnazionale nelle indagini in materia di frodi IVA e doganali: strumenti tradizionali e nuove opportunità' in A. Di Pietro and M. Caianiello (eds), *Indagini penali e amministrative in materia di frodi IVA e doganali. L'impatto dell'European Investigation Order sulla Cooperazione Transnazionale* (2016) 68.

69 In such cases, the liability of the company, although formally administrative in nature, is ascertained through a criminal proceeding. Consequently, Art 27 Legislative Decree no. 108/2017 is applicable. The matter is regulated by the Legislative Decree no. 231 of 8 June 2001. For further details, please refer to the Italian FACILEX Report, available at <www.site.unibo.it/facilex/en>.

### 3.2 *Execution Procedure*

When Italy acts as the executing Member State, the EIO is transmitted – compulsorily in Italian – to the public prosecutor of the district where the investigative acts must be conducted (Art 4 Legislative Decree no. 108/2017), who must inform the issuing authority of the reception (Art 6 Legislative Decree no. 108/2017).[70] The prosecutor then assesses the occurrence of reasons preventing recognition, which include not only grounds for non-recognition but also serious proportionality issues.[71]

Once the evaluation is complete and no later than 30 days after receiving the EIO, the prosecutor decides whether to issue a EIO recognition decree or to refuse recognition (Art 4 Legislative Decree no. 108/2017). Before refusing recognition, however, s/he must inform the issuing authority of the reasons for denial, in order to initiate the appropriate discussions to remove them (Art 6(2) and (3) Legislative Decree no. 108/2017). If, on the other hand, there are no grounds for refusing recognition, the prosecutor issues a reasoned decree of recognition,[72] which is notified to the lawyer of the accused only if, under Italian law, the defence counsel would have the right to take part in the act of investigation.[73] Within 5 days of notification, the decree may be challenged by the defendant before the judge for preliminary investigations, who may set it aside (Art 13 Legislative Decree no. 108/2017).

After recognition, the EIO must be executed observing the specific requests indicated by the issuing authority, provided that such compliance does not contravene the supreme principles of Italian law (Art 4(2) Legislative Decree no. 108/2017). For the execution of the EIO either the general rules or those dictated for specific acts (Arts 16–25 Legislative Decree no. 108/2017) are followed.

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70 The Ministry of Justice, on the one hand, and the National Anti-Mafia Prosecutor, on the other, must also be informed (Art 4 Legislative Decree no. 108/2017), but the latter only if the EIO is issued in the context of proceedings for offences covered by Arts 51 (3-bis), (3-quater) and 371-bis (4-bis) CCP. The list of offences has been extended by an amendment to Legislative Decree no. 108/2017.

71 Cass. pen., sez. VI, no. 14413 of 7/02/2019.

72 Under the sanction of nullity of the act, the decree must state why there is no obstacle to recognition and the proportionality principle is respected, cf Cass. pen., sez. VI, n. 14413 of 7/2/2019.

73 No communication is due if the recognized EIO relates to an investigative act for which Italian law does not provide for the right of the defendant to be present (e.g., the interception of communications), cf Ministry of Justice, Operational Manual of 26/10/2017 on the Implementation of Directive 2014/41/EU on the European Investigation Order in Criminal Matters ('*Attuazione della direttiva 2014/41/UE relativa all'ordine europeo di indagine penale – Manuale operativo*'), *sub* para 4.1.

After execution, the evidence collected is transmitted without delay to the issuing authority, together with the reports of the acts performed (Arts 12 and 14 Legislative Decree no. 108/2017). The time limits for the execution of the EIO prescribed throughout the whole procedure by the Directive (Art 12 EIO D) are, in general, correctly implemented.

#### 3.2.1 Grounds for Non-recognition and Non-execution

Although overall accurate, the transposition of grounds for non-recognition and non-execution in Italian law (Art 10 Legislative Decree no. 108/2017), presents some gaps and inconsistencies with respect to the EIO D.

As to immunities (Art 11(1)(a) EIO D), Italian law does not explicitly prevent recognition in case of crimes relating to freedom of the press and expression. Nonetheless, the latter deficiency can be covered by Art 10(1)(e) Legislative Decree no. 108/2017, which allows to refuse execution when it would be incompatible with CFREU. National case law has specified the conditions for exclusion of criminal liability when an act is carried out in the exercise of freedom of speech.[74]

Similarly, with regard to the ground for refusal based on national security (Art 11(1)(b) EIO D), the Italian transposition is too synthetic, as it does not refer specifically to cases where execution would involve the use of classified information relating to specific intelligence activities (Art 10(1)(c) Legislative Decree no. 108/2017). Anyway, by only mentioning "national security reasons" as a possible reason for refusal, the wording of the law of implementation seems capable of including all the specific cases mentioned in the Directive.

Art 11(1)(c) EIO D – the investigative measure would not be authorized in a similar domestic case in proceedings referred to in Arts 4(b) and (c) – and (h) – restrictions to some offences – are not explicitly implemented in the list of Art 10 Legislative Decree no. 108/2017. Nonetheless, the implementing law explicitly states that if the Italian prosecutor cannot perform the requested investigative act because the Italian requirements are not met, they must carry out those acts available under Italian law that achieve the same objectives (Art 9(1) Legislative Decree no. 108/2017). If that is impossible, the prosecutor must refuse execution (Art 9(3) Legislative Decree no. 108/2017). The latter provisions, by directly implementing Arts 10(1) and 10(5) EIO D, would seem to provide an indirect implementation also of the grounds for refusal at hand. Their application, however, remains subject to the impossibility of

74 See, *ex multissimis*, Cass. pen., sez. un., no. 37140 of 30/05/2001 and Cass. pen., sez. II, no. 51439 of 19/12/2013. For further references, please refer to the Italian FACILEX Report, available at <www.site.unibo.it/facilex/en>.

having recourse to another type of investigative measure that would be available under Italian law.

The *ne bis in idem* principle as a ground for refusal, the respect of fundamental rights, and double criminality (Arts 11(1)(d), (f), (g) EIO D) are fully implemented and pose no issues (Arts 10(1)(d), (e)(f) Legislative Decree no. 108/2017).

Despite the generally appropriate implementation of the above-mentioned grounds for refusal, three significant inconsistencies between the Directive and Italian legislation have been identified. One is the direct omission of an essential ground for non-recognition, while the other two can be characterized as 'undue additions' to the national legislation.

First, Art 11(1)(e) EIO D, on the territoriality of the offence, is completely omitted and cannot find any equivalent in the transposition law. Anyway, considering that the EIO D explicitly states that execution 'may' be refused in those cases listed in its Art 11, the lack of the territoriality ground does not amount to a case of non-compliance with the EIO D. Indeed, the absence of a ground for refusal in national legislation appears to reinforce the principle of mutual trust. Second, Art 10(1)(a) Legislative Decree no. 108/2017 establishes that a EIO may be non-recognized or non-executed if it contains manifestly wrong or mismatched information. Although the case law has mitigated this ground for non-recognition,[75] this remains a major discrepancy with the EIO D, which reflects the intention of the legislator to strictly enforce Art 5 EIO D on the content and form of the EIO. Lastly, according to Art 10(3) Legislative Decree no. 108/2017, a EIO issued by an authority other than a judicial one, or not validated by it, must not be recognized and must be returned to the issuing authority. This enforces, by way of a specific ground for non-recognition, Art 2(c) EIO D, which notoriously defines 'issuing authorities' as either judges, courts, investigating magistrates, and public prosecutors (Art 2(c)(i) EIO D) or any other competent authority, subject to validation by one of the latter.

The latter two cases can be regarded as situations of formal non-compliance, as the content and origin of the EIO are not formally included by the European legislator among the possible grounds for non-recognition.

75 The Court of Cassation has specified that it is the responsibility of the prosecutor to assess the completeness and precision of the EIO. Furthermore, the court has stated that mere formal flaws cannot be grounds for the annulment of a decree that recognizes a EIO (respectively, decision no. 14412 of 2/2/2019 and no. 30885 of 15/9/2020).

### 3.2.2 Proportionality and Fundamental Rights

During recognition and execution, Italian authorities must verify the proportionality between the rights of the suspect (or any other person involved in the proceedings) and the needs of the investigation (Art 7 Legislative Decree no. 108/2017). The latter provision is far more precise than the corresponding Art 6(1)(a) EIO D, as it specifically states the parameters according to which proportionality must be assessed: the respect of rights and liberties of the suspect or third parties, the investigative or evidentiary needs, the seriousness of the offences for which proceedings are being conducted and the penalty established for these offences (Art 7 Legislative Decree no. 108/2017). However, Italian law does not prescribe how compliance with such standards should be assessed (as done in Art 6(1)(b) EIO D); it merely leaves the agreement on how to overcome any possible disproportionality to communications between authorities. This results in the principle of proportionality being well integrated within the national system as a whole.[76]

As for fundamental rights, on the other hand, the Italian implementation proves particularly effective (at least formally), considering that Art 10(1)(e) Legislative Decree no. 108/2017 reproduces *verbatim* the ground for refusal of Art 11(1)(f) EIO D for violation of Art 6 TEU and the CFREU. The national provision is interpreted as meaning that, when Italy is the executing Member State, the decree by which the prosecutor recognises the EIO can only be challenged when its defects significantly affect the fundamental rights of the person concerned.[77]

A crucial point for the rights of the defendant in the proceedings is that of the communication to the defence counsel of the execution of investigative acts relating to the EIO (see *supra*, §3.2). The Supreme Court has established that the failure to timely communicate the decree recognising the EIO to the defence counsel constitutes a violation of the suspect's right to a fair trial, as it prevents the suspect and the defence counsel from lodging a timely appeal. However, in such a case, the execution of the EIO is not halted (Art 13(4) and

76 See also Arts 6(3) and 9(2) Legislative Decree no. 108/2017. Indeed, when the investigative measure indicated in the EIO is deemed to be disproportionate, Italian authorities should contact the issuing authority in order to agree on how to proceed with a less intrusive act, cf Cass. pen., sez. VI, no. 8320 of 31/01/2019. Extensively on this topic, see Cosimo Emanuele Gatto, 'Il principio di proporzionalità nell'ordine europeo di indagine penale' (2019) 2 Dir pen cont 69 ff. <www.archiviodpc.dirittopenaleuomo.org/d/6482-il-principio-di-proprzionalita-nell-ordine-europeo-di-indagine-penale> last accessed 14 August 2024.

77 Cass. pen., sez. VI, no. 30885 of 15/09/2020. Therefore, the Italian judge is not obliged to ascertain the correctness of the acts of execution and is entitled to presume it.

(7) Legislative Decree no. 108/2017), but the transfer of the results of the activities conducted may be postponed if the prosecutor deems it necessary.[78]

3.2.3 Issues for Cooperation between Executing and Issuing Authorities

When Italy is the executing Member State, potential issues of cooperation may emerge as a result of discrepancies between the EIO D and its transposition in Italian law. Three categories of potential problems were identified.

First, communications with the issuing Member State may be hampered by the fact that, according to the Italian law of implementation, not every delay in the execution procedure must be communicated to the issuing Member State. In particular, contrary to what is prescribed by Art 12(5) EIO D, a notice about delays in the procedure is only due if such delays concern the execution, and not also the recognition of the EIO (Art 6 Legislative Decree no. 108/2017).[79]

The second issue concerns costs. When Italy is the executing Member State and the execution of the order turns out to be particularly costly, the public prosecutor must indeed consult with the issuing authority on cost-sharing (Art 15 Legislative Decree no. 108/2017). But there is no reference in the Italian implementation to the fact that Italy should notify the issuing authority in advance of cost specifications (Art 21(2), second subparagraph EIO D).

The last issue relates to the possibility of recurring to an investigative measure other than the one requested as an alternative to refusing the execution of the EIO (Art 10 EIO D and Art 9 Legislative Decree no. 108/2017). Art 10(2) EIO D lists a number of investigative acts that must always be available in the executing Member State. In such exceptional cases, the EIO could not be refused and the investigative act should be executed. Although the list of Art 10(2) EIO D is generally correctly implemented, sub-paragraph (a)[80] is only partially: Art 9(5) Legislative Decree no. 108/2017 states that "the execution of the investigation order concerning the obtaining of evidence gathered in other proceedings shall be carried out in any event". It is clear that Art 9(5) Legislative Decree no. 108/2017 outlines a narrower exception compared to that of the EIO D, and this

78 In particular, the prosecutor suspends the execution if "serious and irreparable harm" may be caused to the suspect, the accused or other affected parties (cf. Cass. pen., sez. VI, no. 8320 of 31/01/2019).

79 Moreover, no consultation obligation is imposed on the Italian authorities when delays in enforcement occur. It can thus be concluded that Arts 12(5) and (6) EIO D have not been fully implemented in Italian law.

80 This refers to the investigative measure of "obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing State in the framework of criminal proceedings or for the purposes of the EIO".

could hinder cooperation, allowing Italian authorities to avoid direct execution in a wider range of cases.

Anyway, in general, these imperfections in the implementation of the EIO D can be considered minor and not likely to prevent effective cooperation between Italy and the other Member States, as they can easily be solved through informal contacts.

### 3.3 *Active Procedure*

The EIO can be issued in Italy in the context of a criminal proceeding or in that of preventive measures, by the prosecutor or by the judge according to their respective competence (Art 27 Legislative Decree no. 108/2017).[81] The judge issues the investigation order after hearing the parties. The accused, through his defence counsel, may request a EIO to be issued by the prosecutor,[82] who may refuse by means of a reasoned act of refusal (Art 31 Legislative Decree no. 108/2017).

The order is then transmitted directly to the executing authority in the official language of the executing Member State, or in the other language indicated by the latter (Art 32 Legislative Decree no. 108/2017).[83] Upon receipt of the EIO, the Italian authorities will agree with the executing Member State on the modalities for carrying out the requested investigative acts, stating rights and faculties recognized by Italian law to the defendant and other parties (Art 33 Legislative Decree no. 108/2017). After execution, once they receive documentation of the investigative acts conducted in the executing MS, Italian authorities shall make it available to the parties of the Italian proceeding (Art 35 Legislative Decree no. 108/2017).

Due to the prevailingly adversarial nature of the Italian criminal procedural system, the documentation of investigative acts conducted abroad cannot be directly known by the trial judge, unless it is considered by Italian law to be a mere "document" or the counsel of the defendant has participated to the act (Art 36 Legislative Decree no. 108/2017).[84] With regard to possible

81 The competence to issue a EIO therefore lies with authorities that are certainly judicial in nature and independent of the executive. Issues such as the one in Case C-16/22 *Staatsanwaltschaft Graz* [2023] ECLI:EU:C:2023:148 do not therefore arise in relation to Italy.

82 The defendant must indicate, under penalty of inadmissibility of the request, the investigative act whose execution is requested and the reasons justifying the request (Art 31(2) Legislative Decree no. 108/2017).

83 In accordance with the provisions of the Directive, transmission may take place via the European Judicial Network (Art 7 EIO D and 32 Legislative Decree no. 108/2017).

84 Therefore, documentation from abroad should in principle be placed in a file that is not accessible to the trial judge. If during the trial it turns out that it is impossible to

consequences of the violation of fundamental rights by the executing Member State, the Court of Cassation has repeatedly stated that concrete evidence of non-conformity with fundamental rights enshrined in the CFREU or the principle of proportionality is needed to overcome the presumption of compliance by the executing authority.[85]

The active procedure does not pose significant issues for the implementation of the EIO D.

### 3.4 *Special Investigative Acts*

Let us now examine the status of implementation of the specific investigative acts mentioned in Chapter 4 of the EIO D.

#### 3.4.1 Temporary Transfer of Persons Held in Custody

Both the procedure for transferring persons held in custody to the issuing (Art 22 EIO D) and to the executing Member State (Art 23 EIO D) are, in general, correctly implemented in Italian law. In particular, as imposed by the EIO D, the temporary transfer of an inmate is only granted upon their free consent, provided that the person has had the opportunity to confer with their lawyer. According to Art 16(1) Legislative Decree no. 108/2017, the transfer is, in any case, subject to the clearance of the judge.

As for the passive procedure itself, there are some implementation flaws that can, however, be overcome through a broad reading of Legislative Decree no. 108/2017. Indeed, Art 16(2) Legislative Decree no. 108/2017 provides that, for executing the EIO, the authorizing judge shall take into account the age of the person and their physical or mental health condition but does not explicitly foresee that the legal representative of the person in custody may express his or her opinion on the temporary transfer (as requested by Art 22(3) EIO D). This seems to be a major defect that can only be remedied by taking into account the age, as well as the physical and mental health, of the person to be transferred.[86]

Art 22(5) EIO D, regarding the practical arrangements of the transfer, is not fully implemented. In fact, the corresponding Art 16(3) Legislative Decree

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cross-examine the person whose testimony was obtained abroad (e.g., because s/he has died), the documents will then be transferred to a file that can be accessed by the judge (Art 36 Legislative Decree no. 108/2017, recalling Art 512-bis CCP).

85 cf e.g., Cass pen., sez. VI, no. 48330 of 25/10/2022. Therefore, the Italian judge is not obliged to ascertain the correctness of the acts of execution and is entitled to presume it.

86 See the Italian FACILEX Report, available at <www.site.unibo.it/facilex/en> for further details.

no. 108/2017 does not explicitly consider custody conditions, safeguards for the person's physical and mental conditions, and the level of security required in the issuing State as terms of the agreement. Therefore, national authorities are under no obligation to specifically agree on such conditions to ensure the well-being of the person concerned.

Instead, the active procedure is fully implemented by Art 37 Legislative Decree no. 108/2017.

#### 3.4.2 Hearing by Videoconference and Phone Conference

Hearing by videoconference (Art 24 EIO D)[87] seems to run smoothly both when Italy is the executing and the issuing Member State.

In the passive procedure, Art 18(1) Legislative Decree no. 108/2017 allows for the execution of the request for the hearing by videoconference of the accused, the defendant, witnesses, and expert witnesses, after prior agreement with the issuing authority on the modalities of the hearing. Consent is mandatory in the case of suspects and accused persons (Art 18(2) Legislative Decree no. 108/2017). It must be noted that Legislative Decree no. 108/2017 does not prescribe that execution must be refused if contrary to the fundamental principles of Italian law (as does Art 24(2)(b) EIO D). Nonetheless, it is provided that during the execution of the act, the Italian prosecutor or the judge must ensure the respect of the fundamental principles of Italian law (Art 18(6) Legislative Decree no. 108/2017).[88] This can be classified as defective implementation. In contrast, the rules of Art 24(5) EIO D are correctly transposed.

In the active procedure, Art 39(3) Legislative Decree no. 108/2017 specifies the conditions that allow a EIO for the hearing by videoconference to be issued.[89] Consistently with the Directive (Art 24(3) EIO D), the modalities of execution shall be agreed upon by the Italian and the executing authorities (Art 39(4) Legislative Decree no. 108/2017).

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87 The same rules apply also with regard to the hearing by means of a telephone conference (Art 25 EIO D, correctly transposed by Art 19 Legislative Decree no. 108/2017).

88 The hearing is conducted directly by the issuing authority or under its direction (Art 24(5)(c) EIO D and Art 18(6) Legislative Decree no. 108/2017). This is why the prosecutor or the judge have, in principle, only a supervisory role.

89 These are: (a) when for the listed persons there are justified reasons rendering their presence on the national territory inappropriate; (b) when the person to be questioned or examined is in any capacity detained in the Member State; (c) in cases of need to examine undercover operators, state witnesses and accused of crimes connected with the main proceedings.

### 3.4.3 Information on Bank and Financial Accounts

With regard to the execution of EIOs requesting information on bank and financial accounts, Art 20 Legislative Decree no. 108/2017, which describes the passive procedure, is largely based on the regime for the seizure of documents held by banks provided for in the CCP.[90]

This would seem to limit the execution of such EIOs to the cases and modalities in which the seizure of documents held by banks would be authorised under national law. However, the latter is so undemanding that this reference can hardly be seen as posing obstacles to cooperation.

The active procedure is briefly described and presents no issues of implementation.[91]

### 3.4.4 Real-Time Monitoring and Controlled Deliveries

The procedure established by Legislative Decree no. 108/2017 for real-time monitoring (Art 28(1)(a) EIO D) is particularly noteworthy, as this investigative act is formally unknown in Italian law.

Faced with this absence on the domestic scene, the choice of the Italian legislator was to remain silent on the possibility for the prosecutor to send a EIO addressed to another country to perform such an investigative act (i.e., in the active procedure). Nonetheless, it may be that real-time monitoring activities could be ordered by national prosecutors as 'atypical investigative acts', i.e., the category that includes all investigative acts not specifically regulated by law. Such acts are subject to very limited safeguards in the Italian system.[92]

On the contrary, the Italian legislator has chosen to regulate real-time monitoring when Italy is the executing State by referring to the rules on interceptions (for which see *infra*, §3.4.6), given the similarities between the two instruments. Accordingly, the prosecutor, after receiving the EIO shall proceed, if necessary, by means of a request to the judge for preliminary investigations (Art 20(2) Legislative Decree no. 108/2017).[93]

It is evident that there is a significant discrepancy between the guarantees provided in the active and passive procedures: in essence, the authorisation of the judge is solely necessary in the passive procedure. This difference does not

90 In particular, Art 20 Legislative Decree no. 108/2017 prescribes to execute the order according to the rules of Arts 255 and 266 CCP.

91 Art 40 Legislative Decree no. 108/2017 only prescribes to use the model of Annex A, subsection H4 for the request and its content.

92 On the qualification of real-time monitoring activities as 'atypical investigative acts', see Cass. pen., sez. V, no. 48370 of 20/05/2017. It is the jurisprudence that basically dictates the framework for the execution of these investigative acts.

93 See Arts 266 et seq. CCP.

represent an implementation defect but rather an evident disparity in treatment that necessitates intervention from the Italian legislature.

Controlled deliveries (Art 28(1)(b) EIO D) are also no longer directly envisaged by Italian law. In particular, the law explicitly provided for controlled deliveries with regard to drug-related offences, but the relevant rules were then replaced by a general regulation included in Art 9, Law no. 146 of 16 March 2006 on undercover operations. The latter establishes that, for a limited number of crimes, police officers may omit or delay acts within their jurisdiction, thus for instance allowing a controlled delivery.[94] Yet, Legislative Decree no. 108/2017 does not mention controlled deliveries, but cites Art 9 Law no. 146 of 16 March 2006 with respect to covert investigations and to a specific procedure called 'delay or omission of acts of arrest or seizure' (Art 22 and 42 Legislative Decree no. 108/2017).

It is therefore reasonable to assume that EIOs relating to controlled deliveries are issued in accordance with Art 9 Law no. 146 of 16 March 2006 and therefore follow national regulations. Since controlled deliveries are not mentioned in Legislative Decree no. 108/2017, neither are the conditions of Art 28 EIO D, so one cannot speak of explicit implementation into Italian law. However, the result obtainable through the possible application of Art 9 Law no. 146 of 16 March 2006 could lead to a satisfactory indirect implementation, considering that the Directive itself widely refers to the applicable national law.[95]

### 3.4.5 Covert Investigations

With regard to covert investigations, Legislative Decree no. 108/2017 expressly refers, for both active and passive proceedings, to the Italian law regulating these activities in domestic proceedings, i.e., Art 9, Law no. 146 of 16 March 2006 (cited by Arts 21 and 41 Legislative Decree no. 108/2017). The latter law establishes the procedural framework for covert investigations and provides police officers with immunity from criminal prosecution for their actions undertaken in the course of such investigations, in relation to a wide range of criminal offences. Overall, the combination of the two laws the Italian implementation

94 The police shall however give immediate notice to the prosecutor and transmit a reasoned report within forty-eight hours. When it is necessary for the acquisition of relevant evidence, the public prosecutor may request that assets, money or other utility be used for the execution of controlled transactions (e.g., for the payment of the ransom), and the judge shall issue a reasoned decree. See Art 9 (6), (6-bis) (7), Law no. 146 of 16 March 2006.

95 E.g.: the execution may be refused if the investigative measure would not be authorised in a similar domestic case (Art 28(1) EIO D); the right to act, direct and control operations related to the execution shall lie with the competent authorities of the executing Member State (Art 28 (4) EIO D).

of EIO D satisfactory, as the latter largely relies on the legal framework of covert investigations (including the grounds for refusal) existing in the executing Member State.[96]

The only flaw in the Legislative Decree no. 108/2017 seems that it does not expressly state the ground for refusal arising from the lack of agreement between issuing and executing authorities on the modalities of execution of covert investigations. But the defect could be overcome via contacts between authorities.

### 3.4.6 Interception of Telecommunications

Overall, the rules established by the EIO D on interception of telecommunications are correctly implemented.

Some deviations from the general EIO execution procedure are highlighted here, which largely depend on the fact that, in the Italian system, only a judge can authorise wiretapping, except in cases of absolute urgency.

Thus, in the passive procedure, the public prosecutor must forward the received EIO to the judge for the preliminary investigation (Art 23(2) Legislative Decree no. 108/2017). If no technical assistance from Italy is required, the prosecutor will send the notification of the beginning of operations to the same judge (Art 24(1) Legislative Decree no. 108/2017).

The range of control of the judge seems to vary depending on whether the operations require technical assistance from the Italian authorities.[97] In case of interceptions that require technical assistance, the judge may deny execution according to Art 10 Legislative Decree no. 108/2017 (ordinary grounds for refusal) and "if the conditions of admissibility provided for by domestic law are not met". Italy has therefore used the possibility provided for in paragraph 5 of Art 30 EIO D.[98]

On the other hand, where the assistance of Italy is not required, the judge should verify solely whether the offence being prosecuted by the issuing authority is one for which Italian law permits interceptions. The latter check is undoubtedly milder than both that imposed by Art 31(3) EIO D ("where

96 See Art 29(3)(a) and (4) EIO D, which largely rely on the rules existing in the executing Member State.

97 This results from a comprehensive reading of Legislative Decree no. 108/2017 and of the Operational Manual issued by the Ministry of Justice on the execution of the EIOs. See Ministry of Justice, Operational Manual of 26/10/2017 on the Implementation of Directive 2014/41/EU on the European Investigation Order in Criminal Matters ('*Attuazione della direttiva 2014/41/UE relativa all'ordine europeo di indagine penale – Manuale operativo*') *sub* para 17.3.

98 Paragraph 5 of Art 30 EIO D allows Member States to deny execution "where the investigative measure would not have been authorised in a similar domestic case".

the interception would not be authorized in a similar domestic case") and that requested in case of interceptions that require the technical assistance of Italy.[99]

As regards the active procedure (Arts 43 ff. Legislative Decree no. 108/2017), there are no implementation issues to be highlighted. However, similarly to other European countries, a heated debate has sparked concerning the legal classification of the encrypted messages from the SKY-ECC platform (or similar ones) obtained through EIOs issued by Italian authorities. The hubbub stemming from the issue[100] ended with the decision no. 23755 of the Supreme Court of Cassation of 29/02/2024. According to the Court, the transfer to the Italian judicial authority of the content of communications made through 'cryptophones' and already acquired and decrypted by a foreign judicial authority does not necessarily have to be subject to the authorisation of the judge in Italy to be used as evidence at trial. The transmission of such evidence is only subject to control concerning the respect of fundamental rights and the rights of defence.[101]

Also, with regard to traffic and location data associated with telecommunications, Legislative Decree no. 108/2017 correctly implements the EIO D, stipulating that the normal procedure of the European Investigation Order – together with Art 256 CCP on the duty of disclosure and confidentiality – be followed in the passive procedure.[102]

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99 Also, in case the judge decides to interrupt the interception, Legislative Decree no. 108/2017 does not provide the possibility to subject the use of intercepted material to conditions, as does Art 31(3)(b) EIO D.

100 According to a dominant line of case law of the Supreme Court, such conversations, once transmitted to Italy, were admissible in the form of documents (See, e.g., Cass. pen., sez. I, no. 6364 of 13/10/2023 and previously Cass. pen., sez. IV, no. 16347 of 18/04/23). But tables have turned with decision no. 44154 of 02/11/2023, with which the sixth chamber of the Supreme Court outlined a distinction: if the activity of the executing authority consists in the covert apprehension or seizure of the content of a server, then the rules on seizures should apply; if, on the other hand, the executing authority carries out actual interceptions, then rules on interceptions are to be followed (including the authorisation of the judge). On 3/11/2023, the matter was referred to the *Grand Chambre* of the Supreme Court of Cassation, the body appointed to settle these contrasts.

101 This principle is actually expressed in two so-called 'twin' judgments of the Court of Cassation: no. 23755 and 23756 of 29/02/2024. For further details, see also Marcello Daniele 'Le sentenze "gemelle" delle Sezioni Unite sui criptofonini' (2024) SP <www.sistemapenale.it/it/scheda/daniele-le-sentenze-gemelle-delle-sezioni-unite-sui-criptofonini> last accessed 14 August 2024. The author relates the two judgments to that of the Court of Justice of the European Union in Case C-670/22 *M.N.* [2024] ECLI:EU:C:2024:372.

102 According to Recital 30 EIO D, "Possibilities to cooperate under this Directive on the interception of telecommunications should not be limited to the content of the telecommunications, but could also cover collection of traffic and location data associated with such

### 3.5 *Remedies*

Art 14 EIO D requires the Member States to ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO. Also, the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State (Art 14(2) EIO D). At the national level, such provisions must be confronted with the almost total absence of direct legal remedies against the investigative acts carried out by the prosecution. Indeed, also in national proceedings, most investigative acts cannot be challenged directly, but only on a later stage, with regard to the admission or use of such evidence at trial, and subject to the specific rules applicable.

As a result, the remedies available against the issuance of EIOs in Italy in the active procedure are extremely limited and are essentially confined to seizure to secure a source of evidence. Against such measure Art 28 Legislative Decree no. 108/2017 entitles the person from whom the evidence or property has been seized (and the person who would be entitled to their return) to submit a request for review to the competent court.[103] As for the other investigative acts, the only way the defendant can challenge the evidence collected through a EIO in the active procedure is by contesting its admissibility in court *ex post facto*, i.e., after the collection of the evidence.[104] In general, considering the equivalence clause in Art 14 EIO D, the Italian implementation cannot be considered non-compliant. However, it must also be said that an increase in the guarantees provided for in the issuing Member State would be desirable, in line with what the CJEU has established in the *Gavanozov II* decision.[105] In Italy, the latter judgment has not yet had the hoped-for effect of raising the level of protection of the defendant's rights.

In the passive procedure, Art 13 Legislative Decree no. 108/2017 allows the defendant to appeal the decree by which the prosecutor has recognized the EIO within five days of its notification.[106] The problem is that communication of the decree of recognition to the defendant is not always mandatory for the prosecution, but only for those investigative acts in which the defence counsel of the defendant has the right to participate. It follows that only the execution

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telecommunications, allowing competent authorities to issue a EIO for the purpose of obtaining less intrusive data on telecommunications".

103 The procedure mirrors that of Art 324 CCP.

104 Cass. pen., sez. VI, no. 44154 of 26/10/2023.

105 Case C-852/19 *Ivan Gavanozov* [2021] ECLI:EU:C:2021:346.

106 If the competent judge upholds the appeal of the defendant, the decree of recognition is annulled and the execution of the EIO is blocked (Art 13(3) Legislative Decree no. 108/2017).

of some investigative acts must be timely communicated to the lawyer of the defendant (see *supra*, §§3.2 and 3.2.2).

## 4 Regulation 1805/2018: Critical Profiles in Legislation and Case Law

### 4.1 *Legal Basis in the National System and Scope*

As illustrated in the introduction, Italy has recently adopted the Legislative Decree no. 203/2023,[107] in force since 6 January 2024, "for the complete adaptation of national legislation to the provisions of Regulation (EU) 2018/1805".[108] Nevertheless, the recent legislative decree has not fully resolved all coordination problems between the Regulation and national legislation, requiring the interpreter to make a coordinated approach between various sources: Regulation 1805/2018, the recent Legislative Decree 203/2023, but also the previous legislation, Legislative Decrees no. 137/2015,[109] 35/2016[110] and, no less important, the Ministry of Justice Circular of 18 February 2021 and that of the Ministry of the Interior, Department of Public Security, of 12 January 2021.

Italy, therefore, has not adapted to the Regulation for a long time, in the sense, it should be pointed out, that it did not make the small changes necessary to allow its broader application. Before Legislative Decree no. 203/2023, in fact, in Italy the application of the Regulation was made through: (i) direct application of the Regulation, as an immediately applicable legal act; (ii) analogical procedural interpretation, using as a term of comparison Legislative Decree no. 137/2015, on the recognition of confiscation orders and Legislative Decree no. 35/2016, on the recognition of seizure orders; (iii) reference to the Circulars of the Ministry of Justice and the Interior already mentioned and that, with a pragmatic approach, address quite a few application issues.

As is well known, the Regulation was immediately applicable in Italy even before the Legislative Decree no. 203/2023, which adapted the domestic

107 Legislative Decree No. 203 of 7 December 2023, in force since 6 January 2024, Official Gazette No. 298 of 22 December 2023.

108 For a more detailed overview of Regulation 1805 in Italy, see the Italian FACILEX report, available at <https://site.unibo.it/facilex/en>.

109 Legislative Decree No 137 of 7 August 2015 '*on the implementation of Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders*', in force since 17/09/2015 (Official Journal No 203 of 2 September 2015).

110 Legislative Decree No. 35 of 15 February 2016, *'implementing Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of freezing orders'*, in force since March 26, 2016 (Official Journal No. 59 of March 11, 2016).

procedural system to the EU instrument.[111] And yet, it must be underlined that, especially at this initial phase, there are several interpretative issues unresolved by Legislative Decree no. 203/2023, and for which one must still refer to the other sources already mentioned above, or to the interpretative role of the case law.[112] Among these, the Circulars of the Ministry of Justice and of the Ministry of the Interior maintain centrality, as they have taken care, since the beginning, for example, of expressly indicating which measures of patrimonial prevention fall within the scope of the Regulation (thus, for example, the same Circulars, to be read together, already clarified that the Regulation must also be applied to the cases of the so-called seizure of prevention, i.e. issued in the ambit of the anti-mafia legislation, regulated by Legislative Decree no. 159/2011).[113]

With this brief overview of the recent legislative evolution, it should be immediately appreciated that with Regulation 1805/2018 the European Union intended to bring judicial cooperation between Member States to a new level for at least two reasons: 1) the legislative instrument used; 2) the breadth and specificity of the regulatory intervention.

Under the first profile, it must be considered that with the Regulation, the EU attempted to overcome the fragmentary nature of the instruments that existed until then, specifically, Directive 2014/42/EU. By comparing the two opening articles of the two legislative acts (Directive 2014/42 and Regulation 1805/2018), the direction that the Regulation intended to give to the cooperation between

111 Especially from the perspective of recognition and execution procedures, i.e. where Italy is the executing State. For active procedures, therefore, the Regulation operates directly, and it continues to be useful to refer, insofar as they are compatible, to other and pre-existing national legislation as well. E.g., Arts 11 and 12 of Legislative Decree 35/2016 provide some useful directive for requests to execute a freezing order in the territory of another Member State.

112 It's sufficient to read this judgment issued before the Legislative Decree 203/2023 to appreciate this issue. Court of Cassation, 06/10/2023, no. 47141 stated: "on the subject of recognition and execution of freezing orders of assets functional to confiscation issued by the authority of an EU member state, the "self-executing" provisions of the Regulation apply – pending the approval of the implementing legislation of the EU Regulation 2018/1805 – and, for matters not fully regulated therein, the provisions of Legislative Decree No. 35 of 15 February 2016, and Legislative Decree No. 137 of 7 August 2015".

113 The Ministry of the Interior Circular, specifically, states that "*the expression 'proceedings in criminal matters,' used by the European legislator, is also suitable to include the measures governed by the Code of Anti-Mafia Laws and Measures of Prevention* (*Legislative Decree 159/2011*)*, since they presuppose an assessment of social dangerousness, based on the existence of indicia of the commission of crimes, and an ascertainment of the illicit origin of assets*".

States is clear. The Directive set out a series of "minimum rules"[114] on freezing property with a view to possible subsequent confiscation. The Regulation, for its part, aspires more simply and widely to regulate (all) the procedures for the recognition and execution of freezing and confiscation orders within the EU Member States.[115]

Regarding the object of the regulatory intervention, from an Italian perspective, it is necessary to define what can and should be understood by "freezing"[116] at the level of domestic procedural law. There is no processual instrument going by the same name in the Italian Code of Criminal Procedure (CCP). The most closely related instruments are seizures ("*sequestri*" in Italian).

In Italy, there are two types of seizures understood as real precautionary measures: preventive (*sequestro preventivo*) and conservative (*sequestro conservativo*). Without claiming to be exhaustive, consider that, in a nutshell, the preventive seizure is that measure requested by the prosecutor to prevent that property, in the availability of the defendant, may lead to more serious consequences of the crime. This seizure may also be ordered on things for which confiscation would be possible.[117] This instrument, therefore, has purely public purposes. On the other hand, the *conservative seizure* is that measure requested to protect credit,[118] that is, in order to prevent the defendant from dissipating

114 Art 1 Directive 2014/42/EU states "[t]his Directive establishes *minimum rules* on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters". Differently, the Regulation states "This Regulation *lays down the rules* under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters".

115 Art 1, § 1, states "This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters".

116 Confiscation, for its part, does not generate too many problems of interpretation, as it corresponds to the Italian institution of "*confisca*". Reference should be made to Article 240 and ff. of the Criminal Code. Simplifying, the measure's purpose is to deprive the subject of the assets seized within the confiscation order, which become part of the public assets.

117 Art 321 CCP, Preventive Seizure, states that "when there is a risk that the free availability of an asset relating to the offence may aggravate the consequences of the offence or facilitate the commission of other offences, at the request of the public prosecutor, the judge (…) shall order its [preventive] seizure (…). *The judge may also order the seizure of the objects whose confiscation is allowed*".

118 For our purposes, we consider in particular the claim arising from damages. For exhaustiveness, Art 316 CCP states that "If there are reasonable grounds to believe that the securities for the payment of a financial penalty, costs of proceedings and any other sum owed to the Treasury of the State are lacking or will be dispersed, the Public Prosecutor, at any stage and instance of the proceedings, after the initiation of criminal prosecution, shall request the conservative seizure of the accused person's movable or immovable property

the economic guarantees aimed to safeguard, for example, compensation for damages. Although the conservative seizure can also be requested by the prosecutor, it must be said that there is another procedural party particularly interested in this measure, and that is the *civil party*, i.e. who acts in the criminal trial for the sole purpose of claiming compensation for damages suffered and arising from the crime.[119] It is well understood, therefore, how this measure is mostly of a private nature, that is, to protect the private interests of the creditor.

Among these types of seizure, therefore, for the purposes of the Regulation, prevalence should be given to preventive one (*sequestro preventivo*), in the Italian CCP. Such preventive seizure can, presumably, be assimilated to the freezing order foreseen in the Regulation 1805/2018, as deduced from the finality of the freezing order indicated by Art 2 of the Regulation, which describes the "freezing order means a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof". Considering that these are freezing orders aimed at confiscation, also Art 321 CCP comes to mind, which has a similar approach and states that a *preventive seizure* may be requested in cases where there is a risk of aggravating the consequences of the offence or facilitating the commission of other offences and, not least, the preventive seizure of assets for which confiscation would then be allowed.

If this is true in general, the absence of a clear statement by the European and national legislators, brings the interpreter face to face with a complex legal question, if seen from an Italian perspective: *can the freezing order under the Regulation be issued only in cases where a preventive seizure would be possible in Italy? And then, can the victim request it directly*?

This brings us to one of the *critical profiles* on the matter, which is the role of the victim according to the Regulation. After looking at this aspect in depth in the following paragraph, it will be necessary to focus on the meaning of the concept of "criminal matter", when viewed from the perspective of Italian law. Finally, the procedural aspects will be analysed in order to understand the concrete functioning of the instrument, including the reference to the "double criminality" requirement and whether it operates in the Regulation. Finally,

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or the sums or objects owed to him, within the limits set by law for their distress. If there are reasonable grounds to believe that the securities for civil obligations deriving from the offence are lacking or will be dispersed, the civil party may request the conservative seizure of the property of the accused or of the person with civil liability for damages as provided for in paragraph 1. The seizure ordered upon the request of the Public Prosecutor shall also be in favour of the civil party".

119 See previous footnote on the reasons why the civil party may apply for a conservative seizure.

attention will be devoted to the freezing and confiscation certificates, through which the Regulation "comes to life".

### 4.2 *The Role of the Victim*

The role of the victim is one of the issues that raises most of the difficulties in the interpretation and application of the Regulation. To properly understand the problem, it is necessary to briefly frame the opportunities recognized to the victim in Italian criminal proceedings. The victim of a crime can choose whether to exercise his or her right to damages directly in a criminal trial (or not). If s/he makes this decision, then s/he will have to formalize it through the so-called act of "constitution as a civil party" (assuming this name as a party in the proceedings). This act must comply with strict formalities that make it clear that only civil interests are at stake. Indeed, it must be considered that under Art 78 CCP, "The declaration of constitution as civil party (…) *must contain, under penalty of inadmissibility*: (…) a statement of the reasons justifying the claim for *civil purposes*".[120] As is evident, the civil party acts in a criminal trial to have compensation for the damages suffered. If follows that the civil party may also have an interest in taking precautionary action in order to prevent, having reasonable grounds, the defendant from dissipating the guarantees protecting the civil claim (e.g., if the defendant disposed of his or her assets to avoid payment of damages). As mentioned in the previous paragraph, the procedural tool exists, and it is the *conservative seizure*. With this instrument, the civil party requests (and aspires to obtain) a restriction on the defendant's property, which becomes unavailable to him or her, as a guarantee for the civil party's claims. At this point, the Regulation comes into relevance for the civil party's interests. As it can easily be imagined, the possibility to apply for a freezing order under the Regulation, i.e., being able to rely on an EU-wide instrument, would be a huge procedural advantage for the

120 This is particularly true after the so-called "Cartabia" Reform, the wide-ranging reform introduced by Legislative Decree 150/2022 to reorganize criminal justice in Italy. The Cartabia Reform also intervened on Article 78 of the Italian Code of Criminal Procedure, making it even clearer that the civil party exercises purely civil claims in criminal proceedings. This was also expressed by the Cass. Pen., sez. un., no. 38481 of 25/05/2023, which states that "*a precise indication of the* causa petendi *will be necessary similarly to the forms prescribed for the claim brought in civil proceedings* (…) *for the purposes of the admissibility of the constitution, it will no longer be sufficient to refer to the commission of an offence but it will be necessary to refer to the reasons on the basis of which it is claimed that prejudicial consequences have arisen from the offence, as well as the title legitimating the claim*".

civil party.[121] Indeed, the civil party would be able to freeze assets held in other EU countries, and, for the practical application of the instrument, it could also count on the human and logistical resources of the States involved in the mutual recognition instrument (the issuing and executing Member States).

To answer the theoretical question,[122] it is necessary to see what the Regulation says on this subject. It must be observed that it is a bit cryptic and, likewise, the Italian legislation does not help to immediately understand the solution to the question. According to the Regulation (Art 1), it is called to operate "in criminal matters" and not "(...) in civil or administrative matters". In Italy, a civil action in a criminal trial, although formally instituted in criminal proceedings, must nevertheless be considered as a civil action. The formalities of a civil action make this assumption clear (Art 78 CCP). The doctrine on this point also specifies that "[the *civil action* can be] exercised in the criminal trial, attributing to the latter a further part (...) qualified as "possible/eventual" (...) because its presence in the trial depends on a free and unquestionable option – in this sense uncertain and, therefore, eventual: that of deciding whether to apply to the criminal judge and not to the civil one to find satisfaction of his

121 *Fair* or *unfair*? That's the question.

A few examples may help to understand the issue.

Imagine that the victim (and civil party in the proceeding) of one of the offences included in the list of those covered by the Regulation request a conservative seizure. The civil party, having seen the investigation documents, discovers, based on investigations by the judicial authority, that there have been numerous money transfers to another Member State in order to prevent the victim from recovering his or her loss in Italy. At that point, the victim would have to embark on a long road to recover the sums that he or she believes are owed to him or her. S/he would then have to obtain a condemnation to reimbursement of damage and then take the difficult road to recovery.

And instead, if s/he could take advantage of the Regulation s/he would have, in order:
1. information derived from the judicial police that it could immediately exploit for the purpose of applying for a seizure;
2. if requested and obtained, the public authorities, the State, within the framework of this judicial cooperation, would take charge of executing the freezing order; in doing so, the victim would not only be able to rely on the human resources of Italy (which is assumed here as the issuing State), which would actually prepare the file to be sent to the executing State, but also on the human resources of the executing country. There, in fact, public security officers would seize the assets to meet the request for cooperation.

Whether this was the intention of the European legislator, or, on the contrary, such an approach could be considered a stretch, however, remains uncertain. The considerations that follow are intended to outline a guideline of possible interpretation that is in agreement with both the literal datum emerging from the Regulation and the *ratio legis*.

122 It is useful to repeat the interpretative question that is being researched: *can the freezing order under the Regulation be issued only in cases where a preventive seizure would be possible in Italy? And then, can the victim request it directly?*

or her claim deriving from a crime (…). The relationship between [the two actions, civil and criminal] is governed (…) on the basis of the principle of the autonomy of the respective [ascertainment]: the tendency to separate the civil trial from the criminal trial, in fact, testifies to the pre-eminence of the requirements of celerity (…) of the criminal proceedings with respect to the interest of the victim in exercising his or her [civil] action before the same judge who also ascertains the conditions for punishment".[123] In addition to this, it is worth recalling Art 2 of the Regulation, which, on the subject of Definitions, states that "[f]or the purpose of this Regulation, the following definitions apply: (1) 'freezing order' means a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof". As can easily be seen, there is no mention of the possibility of immediately satisfying civil interests through the Regulation, nor the possibility for the victim to apply for the freezing order to protect civil reasons directly.

Lastly, it is necessary to point out a clue that can be deduced from the Legislative Decree no. 203/2023 and that seems to point definitively towards the hermeneutic option proposed here, namely the lack of legitimacy of the civil party to be able to directly apply for a freezing order under the Regulation. Art 2 of Legislative Decree no. 203/2023, in fact, states that for the execution of freezing orders issued pursuant to the Regulation "the provisions of the Code of Criminal Procedure concerning the execution, revocation, and appeal of the *preventive seizure* decree shall be observed, insofar as they are compatible". Here, too, therefore, albeit seen from the Italian perspective, no mention of the conservative seizure is to be found, which further supports the validity of the interpretative choice advanced here.[124]

Finally, it must be admitted that the Regulation is concerned with the victim, recognising the latter as a sort of right of priority over the sums which the issuing State has obtained through the Regulation procedure. In these terms, however, it would seem that, in the vision of the European legislator, the victim would not be allowed to apply directly for a freezing order under the Regulation, but s/he would come back into play at the end of the procedure and, at that point, his or her right to restitution would be particularly valued, recognising him or her as the beneficiary of the assets which the executing State will have succeeded in recovering. This appears to be the solution most in

123 Maria Lucia Di Bitonto, 'I Soggetti', in Alberto Camon, Marcello Daniele, Daniele Negri and others (eds), Fondamenti di procedura penale (Cedam, 2023), p 200 ff.

124 Namely the lack of legitimacy of the civil party to be able to directly apply for a freezing order under the Regulation.

line with the *ratio* of the discipline. Therefore, granting the victim the possibility to apply directly for a freezing order for civil purposes (i.e. for cases where in Italy it would be possible to apply for a so-called *conservative seizure*) may lead to a distortion of the implementation, with significant practical repercussions. This obliges the interpreter to wonder, finally, about possible friction with the rights of the defendant if this were to become the prevailing interpretation. Allowing the civil party to directly leverage the tools of the Regulation may raise an issue of legal basis and a doubt as to whether the victim has direct legal capacity to apply directly for a freezing order under the Regulation. This may also pose a question as to whether the right to an effective remedy and the right of defence of the person affected by the freezing order has been violated.

On the first aspect, recalling the arguments presented above, it should be added that even a glance at the freezing certificate, in the section on 'restitutions', provides further arguments in favour of the interpretative approach proposed here (namely the lack of legitimacy of the civil party to be able to directly apply for a freezing order under the Regulation.). Section "K" of the freezing certificate is entitled "possible restitution to the victim" and asks whether there is, in accordance with domestic law, a decision (which, therefore, already appears to be a decision additional and different from the freezing order) that has recognized the victim's right to restitution. In addition, the last part of section "K" specifically asks the issuing State to indicate whether, on the contrary, a procedure is pending which will establish the right of the victim to the possible return of "frozen" goods (to be understood, therefore, as *already frozen* for reasons falling within the Regulation's reasons of public interest).[125]

No less important is Art 29 of the Regulation, which regulates precisely the 'restitution of frozen property to the victim' which again refers to the restitution of (already) frozen property and identifies the cases in which it is possible, i.e. "(a) the victim's title to the property is not disputed; (b) the property is not sought as evidence in criminal proceedings in the executing State; and (c) the rights of the persons concerned are not affected".[126] The verbal tense ("frozen") and the listing of cases in which assets are returned to the victim suggest that

125 Art 29 of Regulation also expresses in similar terms, stating that "Where the issuing authority or another competent authority of the issuing State has issued a decision, in accordance with its national law, to return frozen property to the victim, the issuing authority shall include information on that decision in the freezing certificate or communicate information on that decision to the executing authority at a later stage".

126 There are also other useful references in the Regulation to explore the issue in depth, but they cannot all be cited in the space of this paper. Consider, however, recitals NN. 45 and 46.

s/he cannot directly request a seizure under Regulation. "*Frozen*" seems to refer to assets already blocked and, therefore, for another reason[127] and the listing represents a *numerus clausus* in which the victim's direct action to request a seizure is *not* included.

Still on the role of the victim, it is also useful to look at the issue from the perspective of the provisions about remedies. Art 33 Regulation 1805/2018, titled "[l]egal remedies in the executing State against the recognition and execution of a freezing order or confiscation order", states that "[a]ffected persons shall have the right to effective legal remedies in the executing State against the decision on the recognition and execution of freezing orders (…). The right to a legal remedy shall be invoked before a court in the executing State in accordance with its law (…). 2. The substantive reasons for issuing the freezing order or confiscation order shall not be challenged before a court in the executing State". The rule provides that the person affected by the order should be able to appeal in the executing State the decision to recognize and execute the freezing order. Questions of merit, however, can only be appealed in the issuing State. However, *what remedies if the freezing order could also be issued for purely civil purposes? What remedies could the person affected by the freezing have and in which State? What grounds could he or she assert in the executing State? And what remedies could he or she exercise in the issuing State?* Here, theoretically, the defendant will have to assert issues on the merits, but these will concern the merits of the victim's claim for damages, not the merits of the criminal charge, and will likely be raised in the very early stages of criminal proceedings. In addition to the grounds on the merits, *can the lack of a legal basis for the civil party also be invoked in the issuing State?*

Questions such as these, which are not resolved *per tabulas* by the European legislator (nor by the Italian one) attract the interest of the interpreter, whose efforts must be aimed to prevent the Regulation from becoming responsible for a deprivation of the rights of defendants. The reading advanced here also shows that these hurdles can be solved by linking the application of the Regulation both to the strict literal interpretation of its provisions and to the overall *ratio* of this mutual recognition instrument.

### 4.3 *Like Wildfire: about the Alleged Elasticity of the Criminal Matter*

The scope of application of the Regulation is ambiguous if seen from the Italian perspective in relation to the definition of "criminal matters".

127 Those referred to in Arts 1 and 2 of Regulation and this because it is already clear from the title of Art 29 that these are operations of restitution to the victim of already frozen assets.

Art 1 Regulation 1805/2018, indeed, states that it applies in the field of proceedings "in criminal matters". Moreover, its Recital 13 states that "[p]roceedings in criminal matters is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights. The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence (…) It also covers other types of orders issued without a final conviction. While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State (…)".

The issue is relevant in Italy, especially concerning the anti-mafia prevention legislation and proceedings. In the national system, there exists a structured para-sanctioning system (or, at any rate, a preventive one, simplifying as much as possible) aimed at striking the assets of mafia-type criminal associations. Within this mechanism, the instruments of seizure and confiscation are of the utmost importance.

Therefore, *can the scope of the Regulation cover also anti-mafia prevention proceedings?* To reconstruct the answer to the question, two ministerial Circulars on the subject are worth mentioning: the Ministry of Justice Circular of 18 February 2021 and that of the Ministry of the Interior, Department of Public Security, of 12 January 2021. The latter considers that the Regulation can also be applied in so-called "anti-mafia prevention proceedings", i.e. proceedings based on the deemed "social dangerousness" inferred from "indications of commission of offences" (in Italy governed by Legislative Decree no. 159/2011). The Ministry's interpretation should be underlined because it extends to the possibility of applying the Regulation.

As it can be read in the Circular of the Ministry of Justice, this was one of the goals of the Italian authorities on the road that led to the Regulation. In fact, the legislator intended to facilitate the mutual recognition of freezing orders even if issued, in Italy, under anti-mafia legislation, i.e. as preventive measures. On this point, therefore, it is convenient to mention, in excerpts, the salient parts of the Circular that concern this theme. "On December 21, 2016, the European Commission therefore presented a proposal for a Regulation on the mutual recognition of freezing and confiscation orders issued in the context of 'criminal proceedings', a proposal (…) was then extended during the negotiations (…) to include the mutual recognition of orders issued in the context of 'proceedings in criminal matters', so as to broaden the scope of application also to orders adopted in the context of Italian prevention proceedings (…). It can be said that a correct interpretation of the Regulation can today extend its applicative perimeter to the Italian measures of patrimonial prevention

(which must, therefore, be recognized and executed also in the Member States whose national legislation does not provide for such measures)".[128] This considered, however, it must be admitted that the resolution of the issue is not so straightforward and has long interested scholars. The concept of criminal matter to which the Italian Circular also refers concerns the jurisprudence of the European Court of Human Rights (ECHR)[129] for the benefit of defendants, namely to reiterate the principle that even where, formally, a sanction is not described as criminal in a legal system, it is necessary to observe whether, in substance, it should be considered so. If the answer to this question is positive, then the measure is in substance criminal and the person subjected must be accorded some rights, including respect for the principle of legality or due process. The application advocated by the Ministry intends to resume that long debate but leveraging it "against the accused", that is, favouring the enforcement extension of measures with a sure sanctioning character (in this case: freezing and confiscation orders).[130]

128 In the Report on Eurojust's Casework in Asset Recovery, published in February 2019, the following was noted: "difficulties caused due to different styles of preventive measures utilised in some national legislation in the pursuit of criminal assets, such as unexplained wealth, non-conviction-based orders or civil confiscation orders. The difficulty becomes acute if national legislation in the requesting/issuing State is not reflected in the requested/executing State" (footnote also mentioned in the Ministry of Justice Circular of 18 February 2021).

129 *De Tommaso v. Italy*, App no. 43395/09 (ECHR, 23 February 2017). In doctrine on this point, see, among others Francesco Menditto, 'La sentenza De Tommaso c. Italia: verso la piena modernizzazione e la compatibilità convenzionale del sistema della prevenzione' (2017), on Dir Pen Cont 4; Anna Maria Maugeri, 'Misure di prevenzione e fattispecie a pericolosità generica: la Corte europea condanna l'Italia per la mancanza di qualità della "legge", ma una rondine non fa primavera. Nota a Corte EDU, Grande Camera, sent. 23 febbraio 2017, de Tommaso c. Italia' (2017), on Dir Pen Cont3. The author, already in 2017, moreover, acutely noted that "If the approach of the European Court expressed in the De Tommaso judgment were to be consolidated in future rulings, it could represent a vital stimulus to rethink the personal and patrimonial prevention measures, perhaps together with the future Regulation on the mutual recognition of confiscation orders issued in criminal proceedings, – should the Commission's proposal of 21 December 2016 be approved –, a regulation that will require the consideration of the possibility of bringing the patrimonial prevention proceedings back to the criminal matter and the related guarantees". See also *Case of G.I.E.M. S.R.L. and others v. Italy*, App no. 1828/06 and 2 others (ECHR, 28 June 2018). See also Vittorio Manes and Michele Caianiello, 'Introduzione al diritto penale europeo' (Giappichelli 2020).

130 If on the efficacy and incidence of the interpretative option endorsed by the Ministry, one cannot doubt, on the procedural guarantees, some doubt can arise, due to the particularly expeditious procedure that is that of prevention, with fewer guarantees compared to the "purer" criminal trial.

The recently adopted Legislative Decree no. 203/2023 does not mention the type of proceedings to which the Regulation applies. So, pending to see how the case law will orient itself, the practice proposed in the Circulars must still be considered.

### 4.4 *Procedure*

A quick overview of the procedure may help to understand the functioning of the Regulation in the Italian system.

The instrument is obviously based on mutual recognition between Member States and this aspect characterises several provisions of the Regulation. Through this cooperation, a 'double criminality' check for the facts being prosecuted is also overcome (in some cases). Specifically, for the purpose of Art 3 Regulation 1805/2018, the double criminality check is not carried out if the facts are punishable in the issuing State with a penalty of not less than three years and constitute one or more of the offences listed in Art 3, according to the issuing State legal system. It is, therefore, a requirement to be fulfilled jointly and not separately. Outside such cases, double criminality may be verified by the executing State before adopting the requested measure, and Legislative Decree no. 203/2023 (Art 1) provides for such a control in the passive procedure (that is when Italy is the executing State).[131]

As for the dynamic part of the procedure, i.e. the request for cooperation, this takes place through the issuance and transmission of the freezing[132] and confiscation certificate and the related order. Regarding this, it should be noted that once the freezing or confiscation order is compiled in the issuing State, this will have to be transmitted to the authority of the executing State. At the same time, the issuing State must transmit the freezing or confiscation certificate, which is attached to the Regulation. When Italy is the executing State, the

131 This aspect may also come to the fore as a ground for refusal under Arts 8 (1(e)) and 19 (1(f)). In order to properly apply this ground for refusal, it is possible to interpret the double criminality principle in light of the case law of the Italian Supreme Court of Cassation. The Cass. Pen., sez. VI, judgment no. 35818 of 14/12/2020, when referring to the double criminality principle as a possible ground for refusal of the European Arrest Warrant, stated that it is not strictly necessary for the abstract scheme of the incriminating rule of the foreign legal system to have an exact correspondence in a rule of the Italian legal system. It is instead sufficient for the concrete case to be punishable as a crime in both legal systems, regardless of any differences in the penalty treatment or in title or other elements required.

132 Art 4 of Regulation states "A freezing order shall be transmitted by means of a freezing certificate". Similarly, Art 14 provides for confiscation: "A confiscation order shall be transmitted by means of a confiscation certificate".

order must be transmitted to the competent national authorities in a certified copy, as required, most recently, by Art 1(3), Legislative Decree no. 203/2023.

Scrolling quickly through the freezing certificate (or confiscation one, both of them annexed to the Regulation), a not-at-all marginal set of information is indicated, which may be useful for the executing State to carry out the issuing State's request for execution correctly. The general rule would be that the certificate, i.e. the request for execution of the order on the territory of another State, is addressed to only one State at a time.[133] Only exceptionally, when, for example, there are reasons for considering that the enforcement requires continuous actions in more than one member State, may it be transmitted to more than one State.[134]

The executing authority, upon receipt of the order, executes it in the manner it would have done in a domestic procedure. The passage is not irrelevant because it touches on the essence of the mutual recognition of measures between States. Recalling the modalities that would have been proper in the execution State also means referring to an ambitious "principle of equivalence" of the foreign measure with respect to the domestic one, perhaps the highest point of mutual recognition instruments.[135] For freezing orders, where Italy is executing State, "on the request for recognition and execution of the freezing order the judge for preliminary investigations decides by reasoned decree, having acquired the opinion of the public prosecutor and having taken (…) all necessary information. The prosecutor shall render the opinion within ten days (…). Once these time limits have expired, the judge (…) shall also take action in the absence of the prosecutor's opinion" (Art 2 Legislative Decree n. 2023/2023). For confiscation, when Italy is the executing State, the competent authority is the Court of Appeal where the assets to be confiscated are located, or, if credits are involved, the Court of Appeal where the debtor resides (Art 3 Legislative Decree no. 203/2023). The Court of Appeal must set a hearing within twenty days of receiving the certificate and confiscation order. The notice of the hearing is communicated to the Prosecutor General at the Court of Appeal, the authority that requested the confiscation order, the person against whom the order is issued, and those who have rights to the property for

133 See Arts 5 and 15 of the Regulation.

134 On this point, Legislative Decree no. 203/2023 does not add anything further, the aforementioned and related provisions of the Regulation therefore apply directly.

135 Some practical aspects of the execution of preventive seizure (i.e. those to be followed in the case of execution of a freezing order under the Regulation) can be found in Arts 104 ff of the implementing rules of the Code of Criminal Procedure.

which confiscation is claimed. The Court decides (by sentence) on the request for recognition and execution of the confiscation.

If that is true in general terms, it must also be acknowledged that there are some grounds for refusal which are briefly mentioned below. The cases are enumerated in Art 8 Regulation 1805/2018 for freezing orders (Art 19 for confiscation ones) and, while not mentioning all of them, they may refer to: cases of *ne bis in idem*; formal and/or procedural flaws, such as incompleteness of the certificate; or in the event that – when there are serious grounds and with specific and objective elements – fundamental rights may be affected. However, a special duty of cooperation is also prescribed in these circumstances. In fact, the executing State, before proceeding with non-execution, is called upon to enter an adversarial process with the issuing Member State. The aim is evidently to save the enforcement of the order, by means of any additional information that the issuing State may be able to send because of the executing State's rejection notice. It may be argued that this "cross-examination" is indeed somewhat informal. Indeed, consider also that beyond the formal procedure of the instrument under consideration, there are also eminently political logics that at least in part support this freer approach in form. Legislative Decree 203/2023 does not specifically deal with grounds for refusal, either with reference to freezing or confiscation. The Regulation, therefore, remains the standard of reference[136] and it becomes interesting to add a few quick considerations on how the practice has intended to relate to these grounds for refusal in Italy. Since it is not possible to mention all of it, it seems useful here, given the eminently practical slant to the paragraph, to focus just on the cases of the incompleteness of the certificate. In fact, the Regulation lays down a safeguard clause for cases where the certificate (of freezing or confiscation orders) is incomplete. Instead of immediately refusing execution, the executing State should initiate an exchange of information with the issuing State to allow the latter to remedy any errors detected. The Italian approach, when Italy is the executing State, can be considered in line, as it appears clear even in the Circular of the Ministry of Justice of 18 February 2021: the "recognition may be refused when the certificate of freezing or confiscation is incomplete or manifestly inaccurate, provided that the issuing authority has not completed or amended the same certificate following consultations that the executing authority is required to initiate".

136 Insofar as they are compatible, it may also be useful to refer to the relevant pre-existing national legislation (e.g. Art 6, Legislative Decree no. 35/2016 and Art 6, Legislative Decree no. 137/2015).

Art 9 Regulation 1805/2018 specifies that the executing State should enforce the order as quickly as possible, in the same way it would do, again, in a similar domestic case. This type of act is characterized by the need to be executed within a certain timeframe. This applies even more to freezing orders, which by their nature are characterized by a higher need for celerity. In this respect, however, it is necessary to point out a difference between the provisions of the Regulation and those of the Code of Criminal Procedure. The Italian legislation has a mechanism for the urgent execution of preventive seizure orders. In cases of urgency, in fact, either the public prosecutor or the police may provide for preventive seizure, subject to validation by the judge for preliminary investigations within 48 hours. Well, in the case of the Regulation, Art 9 (3) operates as a special norm (derogating the general one and provided for by Art 321 CCP), requiring Italy, when it is the executing State, to comply with it. Specifically, the issuing Member State also can request the urgent performance of the freezing order from the executing State, which, in these circumstances, must decide within 48 hours on recognition and then within the following 48 hours provide for the execution. The aforesaid time limits are not stated to be peremptory – not least because they would otherwise reverberate against the issuing State itself – and therefore, even if the executing State should fail to comply in time, the expiry of the time limits does not exempt it from compliance in any event. This procedure is regulated in Italy by Art 2(4) of Legislative Decree no. 203/2023, which reiterates the provision of the Regulation (Art 9). Specifically, it imposes the prosecutor to give an opinion on the request for cooperation within 24 hours of receipt of the request for execution, after which the judge may proceed even without the prosecutor's opinion, precisely in order to ensure compliance with the reasons for urgency.

## 5 Concluding Remarks

This Chapter has explored the implementation of the three instruments of judicial cooperation into the Italian framework, recalling the process of adaptation of national legislation to the EU laws and the reforms adopted over the years, while highlighting inconsistencies in the transposition of provisions and troubles in the compliant interpretation by the case law.

Concerning the EAW, the analysis has illustrated two aspects of the national implementation that have raised the most concerns in terms of compliance with the original text of the instrument, namely the grounds for refusal and the rights of the suspect or accused.

The Italian transposition of the mandatory grounds for refusal, and the related case law, cannot be considered fully compliant with EU law. Nonetheless, the inconsistencies are minor, such as the definition of judgements of no grounds to proceed as a "final judgment" for the purposes of *ne bis in idem* under Art 3(2) EAW FD, or the application of the *ne bis in idem* clause for procedural flaws. As for the non-mandatory grounds for refusal, the Italian transposition still does not encompass all the optional grounds provided in the EU law; however, their absence does not cause concrete concerns, as they are optional by nature.

Considering the rights of the suspect or accused, the Chapter has shown that the formal transposition of the rights to information and access to a lawyer conforms to EU law, even though the jurisprudential interpretation of the relevant safeguards appears less rigorous than in domestic circumstances. On the contrary, the right to translation cannot be considered fully implemented since the transposition does not mirror the original text of the instrument.

The analysis conducted has evinced that, after a quite tortuous process of implementation, the Italian text is now mostly compliant with the EAW FD. Nevertheless, certain aspects would still require further legislative or judicial intervention to allow for a smoother issuance and execution of EAWs. As emerged in this Chapter, it would be advisable to enhance conformity in the transposition of the grounds for refusal and the provisions on the right to translation, and to increase consistency in the interpretation of the right to be assisted by a lawyer compared to domestic standards.

Concerning the EIO, this Chapter has shown that the transposition into the Italian system is overall compliant with the EIO D, even though some inconsistencies have been detected. Regarding the grounds for non-recognition or execution, the EIO D can be considered correctly implemented, except for the deliberate elevation of two formal requirements as grounds for non-recognition or execution (Arts 2(c) and 5 EIO D). Some minor inconsistencies have also been flagged in the cooperation procedure and in the implementation of the principle of proportionality, but they may be easy to overcome in practice through communication between authorities.

With regard to the special investigatory acts, apart from slight discrepancies that can be solved through a broad interpretation of the legislation – as for the temporary transfer of persons held in custody – or through the contact between authorities – as for covert investigations, the spotlight has been on real-time monitoring and controlled deliveries, which are not formally provided by Italian law. The former has been regulated by the legislator for the sole

execution phase, generating significant discrepancy between the guarantees provided in the active and passive procedures; the latter have been omitted from the transposition law. In light of this, a legislative intervention to bridge the gap left in the Italian transposition of these special investigatory acts is highly recommended.

The last noteworthy issue concerning the EIO is related to the transposed provisions on remedies. While no remedy is provided for the active procedure (except for seizures for evidentiary purposes), in the passive one remedy is linked to the notification of recognition by the prosecutor, which is not always mandatory. The Italian legislation is therefore not fully in line with the Directive as interpreted in the *Gavanozov II* case, and a legislative intervention to fix such deficiency is highly recommended.

Concerning Regulation 1805/2018, the implementation process has been less linear. The Italian legislator has adopted the necessary changes for the smooth application of the Regulation only in 2023, with the enactment of Legislative Decree no. 203. Nevertheless, as emerged in this Chapter, even after the recent legislative intervention, serious uncertainties remain at the interpretative level.

In the first place, the question of whether victims are entitled to request a freezing order under the Regulation has been left unsolved in both national and European legislations. The reasoning conducted in this Chapter combined both the literal interpretation of the Regulation and the Italian legislation – emblematically, Art 1 Regulation 1805/2018 and Art 78 CCP – and the *ratio* underpinning the instrument. Considering that such a prerogative in the hands of the victim might impair the balance towards the accused and contravene express legal provisions, the most suitable conclusion proposed at the end of the analysis is that the victim should not be considered attributed the right to request a freezing order under the Regulation.

Second, the ambiguity surrounding the definition of "criminal matter" casts doubts on the scope of application of the Regulation and questions the possibility of applying this instrument to anti-mafia prevention proceedings when such measure is not envisaged by the law of the executing Member State. Considering that ministerial Circulars have confirmed the application of the Regulation to anti-mafia prevention proceedings and that Recital 13 of the Regulation affirms that Member States should recognise and issue an order even though such an order does not exist in its legal system, it could be suggested that the Regulation does cover anti-mafia prevention proceedings. However, the recent Legislative Decree no. 203/2023 does not rule this aspect.

Therefore, since the Regulation has still not been so frequently deployed in Italy, upcoming case law must be awaited in order to infer the judicial orientation on the matter.

Third, the procedural aspects illustrated so far, as implemented in the Italian system, can be classified as compliant with EU law.

To conclude, notwithstanding the often-debated process of transposition, the implementation in the Italian system of the three instruments is overall consistent, in the sense that it does not present serious hampers for the smooth functioning of cooperation procedures between Member States. Still, some inconsistencies have emerged throughout the analysis conducted in the present Chapter and have been carefully examined to highlight concrete effects in the cooperation practice. Therefore, aiming for a more compliant implementation into the national system, the authors have flagged those provisions where a harmonizing intervention by the Italian legislation would be advisable.