



Press release of 18 November 2021

EUROPEAN ARREST WARRANT: THE CONSTITUTIONAL COURT MAKES TWO REFERENCES FOR A PRELIMINARY RULING TO THE CJEU

It is in principle for the Court of Justice of the European Union to establish when – in addition to the circumstances envisaged under national law and Framework Decision 2002/584/JHA – Italian judicial authorities can refuse to execute a European arrest warrant.

Based on this principle, the Constitutional Court has submitted two separate requests for preliminary rulings to the Court of Justice of the European Union, by means of Orders [No. 216](#) and [217](#), filed today (Author of the Decisions – Francesco Viganò).

In the first proceeding, the Court of Appeal of Milan had been called upon to decide whether to execute a European arrest warrant issued by the Court of Zadar against an Italian citizen, so that he could be tried in Croatia for the crime of possession and sale of narcotics. According to an expert medical report ordered by the Court of Appeal, the accused person suffers from a chronic psychological illness of indefinite duration, which would be incompatible with his detention under Italian law. As the Italian transposition law on the European arrest warrant does not allow Italian judicial authorities to refuse surrender in such cases, the Court of Appeal had asked the Constitutional Court to declare the relevant Italian legislation incompatible with the right to health protected under Articles 2 and 32 of the Constitution.

The Constitutional Court observed that the Framework Decision on the European arrest warrant likewise does not envisage the possibility to refuse surrender in such circumstances. Therefore, the doubts as to the compatibility of the national legislation with the fundamental rights of the accused person must also extend to the provisions of the Framework Decision.

However, the Court noted that in those fields of the law that are fully harmonised at EU level, including the European arrest warrant, it is primarily for EU law to

“establish standards for the protection of fundamental rights that must be fulfilled by the law on the European arrest warrant and its execution at the national level”. Indeed, as stated on several occasions by the Court of Justice, any other solution would impair the primacy, unity and effectiveness of EU law.

Therefore, the Constitutional Court deemed it necessary to refer the matter to the Court of Justice. In particular, the Luxembourg judges have been asked to clarify if, and to what extent, the principles and procedures governing grounds for refusing surrender that are not expressly set out in the Framework Decision (such as systemic prison overcrowding, or serious problems related to lack of independence of the Judiciary in the requesting state) also apply when surrender may expose the person in question to the risk of serious harm to his or her health.

In the case giving rise to the second order (No. 217), Romanian judicial authorities had sought the surrender of a third-country national who has resided in Italy for over ten years and is now settled here on a stable basis, so that he could serve a prison term of five years in Romania. In this case too, the Court of Appeal had asked the Constitutional Court to declare the national legislation on the European arrest warrant unconstitutional, insofar as it does not allow for refusing to surrender a third-country national who legitimately and actually resides in our country, subject to the Italian State’s commitment to execute the sentence in question.

The Constitutional Court noted that the European Framework Decision is phrased in such a way as to leave member states free to refuse surrender of third-country nationals who have settled in the national territory. At the same time, the Court acknowledged that the Italian legislation transposing the Framework Decision establishes that surrender may be refused only in the case of Italian citizens or citizens of another member state who have been legally and actually residing in Italy for at least five years, while it makes no such provision for third-country nationals.

Thus, the question arises as to whether the unconditional duty to surrender third-country nationals who reside in our country on a stable and legitimate basis breaches their right to private and family life, which is protected by both Article 2 of the Constitution and Article 8 of the European Convention on Human Rights, as well as by Article 7 of the Charter of Fundamental Rights of the European Union.

In this case too, however, the Court considered that the question fell to be resolved, in principle, on the level of Union law.

Therefore, the Court asked the CJEU whether legal provisions such as those issued in Italy, which automatically and absolutely preclude refusal to surrender third-

country nationals who live or reside within its territory, are compatible with the fundamental right to private and family life of the individual concerned. Should they be deemed incompatible, the Court asked the CJEU to specify the criteria and grounds for considering the personal ties of the person in the Italian territory to be so significant as to require surrender to be refused.

Rome, 18 November 2021

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