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ANALYSING ITALIAN CONSTITUTIONAL COURT JUDGMENTS NO. 177 AND 178 OF 2023: THE PREDICTABLE HAPPY ENDING OF THE JUDICIAL SAGA ON THE PROTECTION OF FUNDAMENTAL RIGHTS IN EAW CASES

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The Italian Constitutional Court's judgments No. 177 and 178 in 2023 marked the conclusion of a lengthy judicial saga, which began with the questions of constitutional lawfulness raised by the Milan and Bologna Courts of Appeal in 2020, involved preliminary references of the Constitutional Court to the Court of Justice of the European Union (CJEU) in 2021 (decisions No. 216 and 217), and culminated with the CJEU's rulings on cases C-699/21 and C-700/21 in 2023.

The legal dispute revolved around the compatibility of the (Italian) discipline of the European Arrest Warrant (EAW) with fundamental rights protected by both the Italian Constitution and the Charter of Fundamental Rights of the European Union (CFREU).

From the point of view of the protection of the fundamental rights of suspected or sentenced individuals, the ending is – so to speak – happy. The judgments of the Constitutional Court effectively ensure the protection of these rights. And the ending is also predictable since the Constitutional Court adopted from the outset an open and cooperative

approach, which was then fully embraced by the CJEU.
This judicial saga also illuminates the framework established by the Constitutional Court's judgment No. 269 of 2017, and sheds light on the power relations within the European multilevel criminal legal order. These relations, like all power relations, are not without underlying silent tensions. The Constitutional Court is currently the master of this institutional judicial framework. However, as Thucydides already argued, all human institutions tend to compete to increase their own power. I therefore fear that it will not be long before the CJEU challenges the primacy of the Constitutional Court. But that is not what happened in this legal saga: there was a happy ending with no surprises.
In judgment No. 177 of 2023, the Italian Constitutional Court declares that Articles 18 and 18-bis Law 69/2005 are constitutionally lawful since it is possible to interpret the EAW discipline in a way that ensures the safeguard of fundamental rights, and in particular of the right to health (Articles 2 and 32 of the Italian Constitution) and of the prohibition of inhuman and degrading treatment (Article 4 CFREU).
The problem arose because the European Framework Decision 2002/584/GAI and the transposing Law No. 69 of 2005 do not include the situation of a person suffering from a serious chronic and potentially irreversible illness that poses a risk of serious harm to her health if surrendered as a ground for refusing the execution of the EAW. This lack is due to the presumption - based on the principle of mutual trust - that the care and treatment provided in other Member States for the management of such conditions will be adequate.
However, Article 23(4) of the Framework Decision already establishes that the surrender may be temporarily postponed if there are substantial grounds for believing that it would endanger the requested person's life or health. Nevertheless, the Constitutional Court, in its decision No. 216 of 2021, expressed some doubts about this remedy since a temporary postponement is not suitable to address a chronic and potentially irreversible illness. According to the Court, there was the need to extend to this case the dialogic mechanisms outlined in the Aranyosi and Căldăraru CJEU decision. However, since this procedure was developed to

address “systemic and generalized deficiencies” of the issuing Member State, and not individual situations (such as in this case), the Court clarified that national judges cannot extend its scope of application: only the CJEU had the competence to do that.

In its ruling on case C-699/21, the CJEU did exactly what the Italian Constitutional Court had suggested. Indeed, the CJEU established that Article 23(4) of the Framework Decision should be interpreted as requiring a dialogue procedure in which the executing judicial authority should assess whether there is a real risk that the execution of an EAW would endanger the requested person’s life or health. If there is such a risk, the judge should postpone the surrender and request the issuing judicial authority to provide all the information necessary to ensure that the manner in which the EAW will be executed rules out that risk. If such safeguards are provided, the EAW must be executed. Otherwise, in accordance with Article 1(3) of the Framework Decision interpreted in light of Article 4 CFREU, the executing judicial authority cannot give effect to the EAW.

In judgment No. 177 of 2023, the Italian Constitutional Court accepts the solution designed by the CJEU and thus rejects the questions of constitutional lawfulness raised by the national judge. However, differently from the CJEU, the Constitutional Court emphasizes the role of the right to health in its reasoning, while leaving the prohibition of inhuman and degrading treatment in the background. Also, the Constitutional Court explains how the mechanism developed by the CJEU should be applied in the Italian legal system. The dialogue procedure should be realised by the same Court that has competence on the surrender of the requested person and the execution of the EAW, *i.e.* by the Court of Appeal. This clarification is needed because Article 23(3) Law 69/2005 refers to a monocratic judge (the President of the Court of Appeal). However, the Constitutional Court believes that only the decision of the Court of Appeal, which can be appealed to the *Corte di Cassazione*, respects the right to due process. The dialogue mechanism must therefore be included in the procedure for deciding on the request for execution of EAW (Articles 17 and following Law 69/2005).

Instead, in judgment No. 178 of 2023, the Italian Constitutional Court declares the constitutional unlawfulness of Article 18-bis(1) letter C) and, consequently, Article 18-bis(2) Law 69/2005 (as amended by Legislative Decree 10/2021) because they do not provide that the Court of Appeal may refuse to surrender a requested third-country national who has been lawfully and effectively resident in Italy for at least five years and who is sufficiently integrated. As such, these provisions violate the EU law as interpreted by the CJEU (and therefore Articles 11 and 117 of the Italian Constitution) as well as Article 27 of the Constitution.

Already in its preliminary reference (decision No. 217 of 2021), the Constitutional Court made it clear the EAW Italian discipline, by inadmissibly differentiating the treatment of EU citizens and third-country nationals, was in contrast with the principle of the rehabilitating function of the criminal sentence which also underlies Article 4(6) of the Framework Decision. While this latter makes no distinction between EU citizens and third-country nationals, the Italian law makes this distinction and automatically prevents executing Italian judicial authorities from refusing to surrender third-country nationals, even if they are staying or residing on Italian territory and regardless of their links with it. According to the Constitutional Court, this differentiated treatment also violated the right to respect for private and family life (Article 7 CFREU and Article 8 ECHR).

The CJEU recognized in its 2023 ruling on C-700/21 that the restriction made by the Italian transposing Law was in contrast with the EU law. Indeed, recalling the Wolzenburg decision, the CJEU acknowledged that Member States, while implementing Article 4(6) of the Framework Decision, may restrict the situations in which they can refuse to surrender a person falling within its scope. However, this discretion is constrained by the need to uphold the fundamental rights of the requested person, particularly the principle of equality before the law (Article 20 CFREU), which also applies to third-country nationals. The situation of a third-country national who is staying or residing in the executing Member State is not necessarily different from that of a national of a Member State. For this reason, the Italian transposing discipline violates the EU law and,

especially, Article 20 CFREU.
The CJEU also clarified on which grounds national judges could refuse the surrender of a third-country national. Considering the objective of the provision, which is to facilitate the social rehabilitation of the sentenced person, the CJEU stated that these grounds "include, in essence, the attachment of that person to the executing Member State, and whether that Member State is the centre of his or her family life and his or her interests".
In its final judgment, the Italian Constitutional Court thus recognizes that Article 18-bis Law 69/2005 is constitutionally unlawful because it violates EU law and, especially, the principle of equality (Article 20 CFREU). At the same time, it also emphasizes the contrast with the rehabilitative function of criminal punishment established by Article 27 of the Italian Constitution. This principle was mentioned also by the CJEU in its legal reasoning, but only as the objective of Article 4(6) of the Framework Decision. Instead, by mentioning it as an autonomous ground for the constitutional unlawfulness of the Italian discipline, the Constitutional Court wants to underline its importance and dignity not only in the case at stake but more generally in the Italian constitutional framework.
The Constitutional Court clarifies that also new Article 18-bis(2) Law 69/2005, incorporating the content of the former Article 18-bis(1) letter. C) after the amendment of 2021, is constitutionally unlawful for the same reasons. However, Article 18(2) also establishes for EU citizens of other Member States the requirement of 5 years of residence or abode in Italy. In its previous ruling, the CJEU affirmed the compatibility of this requirement with EU law, aiming to guarantee a minimum level of integration within the executing Member State. To ensure equal treatment between EU citizens and third-country nationals, the Constitutional Court states the necessity of applying the 5-year residence requirement also to the latter group. Thus, if the third-country national has resided in Italy for less than 5 years, the Italian judge cannot refuse its surrender.
In summary, these two judgments enhance the protection for individuals subject to EAW in both the Italian and EU legal systems, striking a crucial

balance between the EAW's objective to fight impunity and the imperative to uphold human rights and core principles of criminal law. The cooperation between the Italian Constitutional Court and the CJEU has therefore led to progress in the European multilevel criminal legal system. Given the trend towards the Europeanisation of criminal law, this result should not be underestimated. Leveraging preliminary references to foster dialogue between the CJEU and Member State Supreme Courts is key to ensuring EU law's compliance with the fundamental rights of suspected or convicted persons. This framework is essential to make the development of a comprehensive European criminal law acceptable.

In terms of institutional power dynamics among European supreme courts, this analysis reveals a nuanced perspective. Under the framework established by Judgment No. 269 of 2017, the Italian Constitutional Court holds both the first and last word. In cases of "dual preliminarity", Italian common judges should first turn to the Constitutional Court, which can then decide whether there is a need to open a dialogue with the CJEU. However, even if a dialogue is initiated, the Constitutional Court has the ultimate say in assessing the adequacy of the CJEU's proposed solutions, deciding whether they need integration or outright rejection. For instance, the judgments commented emphasize the importance of certain rights and principles overlooked by the CJEU and provide guidance on how to apply the CJEU's solutions within the Italian legal system.

As I have argued elsewhere, this institutional framework can function adequately as long as all the Courts involved show a strong "inter-legal" and human rights sensitivity.

But the power to have the first and the last word is inherently contested and there is an underlying tension about which judicial actor is entitled to it. Indeed, as Thucydides explained with the concept of *αὔξησις*, all human beings and institutions compete to increase their power. For this reason, I believe that, sooner or later, there could be a new conflict in which the CJEU will try to reassert its primacy.

But for now, instead of acting as prophets of doom, let's enjoy the irenic "oasis of human rights" that the supreme courts of the European multilevel legal order are capable of creating when they act in a

cooperative and dialogical way. A happy ending, for once.