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OVERVIEW OF ITALIAN LEGISLATION AND CASE LAW ON JUDICIAL COOPERATION

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Abstract. *Italian domestic legislation until 31 October 2017 provided a role of primacy to the International binding instruments such as the European Convention on Mutual Legal Assistance in Criminal Matters, its 1978 first additional protocol, with respect to the rules of the criminal procedural code. The 149/2017 law, amending the rules of the criminal procedural code on extradition and judicial cooperation, while recognizing such role of primacy to International binding instruments, introduced into the criminal procedural code also the principle of mutual recognition of EU judicial authorities decisions and orders, providing that mutual recognition is ruled by the aforementioned law 149/2017 and by the relevant EU legislation as well as by the domestic legislation transposing the relevant EU Framework Decisions and Directives on cooperation in criminal matters.*

National Courts issued the own decisions by balancing the obligation falling on national authorities to implement the relevant rules on mutual legal assistance and timely execute letters rogatory and as well as orders and decisions issued by EU Member States judicial authorities, with the need to ensure the effective exploitation of the evidence correctly collected through proper cooperation channels and the respect of the fundamental principles and rights as enshrined in the national Constitution and the European Convention on Human Rights. In fact, the decisions issued the Supreme Court led to a solid case law on the legitimate use before domestic courts of the evidence collected in or provided with by foreign Countries and to the identification of further grounds of refusal of legal assistance and extradition other than those provided by the relevant international instruments, so confirming the paramount value of judicial cooperation, but within the respect of such values.

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1. Foreword.

National rules on Judicial cooperation are contemplated:

a) by the criminal procedural code (that entered into force in October 1989),

b) by legislation

- ratifying the bi- and multilateral International binding instruments on mutual legal assistance,
- transposing into the national system framework decisions and directives adopted by the European Union (hereinafter EU),
- ensuring legal assistance to International Courts.

Italy is a Party of bilateral agreements on Judicial cooperation in Criminal Matters signed with several Countries including: Algeria, Argentina, Australia, Austria, Bolivia, Brasil, Canada, Chile, El Salvador, Germany, Japan, Hong Kong, Lebanon, Monaco, Morocco, Montenegro, Paraguay, Perù, China, San Marino, Mexico, U.S.A., Switzerland, Tunisia, Venezuela[1].

The most relevant International Multilateral binding Instruments on mutual legal assistance ratified by Italy are

- the 1957 Council of Europe Convention on Extradition (ETS 24);
- the Second Additional Protocol to the European Convention on Extradition (ETS 98),
- the 1959 European Convention on Mutual Legal Assistance in Criminal Matters (ETS 20) and the 1978 Additional Protocol (ETS 099);

[1] See here.

- the 2000 European Union Convention on Judicial Assistance in Criminal Matters;
- the 2000 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders;

- EU Council Framework Decision 2002/465/JHA on joint investigation teams,
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member State;
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence;
- Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders - of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters.

2. The rules on judicial cooperation in the criminal procedural code.

The National legislation until 31 October 2017 provided a role of primacy to the International binding instruments such as the European Convention on Mutual Legal Assistance in Criminal Matters[2] (that was ratified in Italy pursuant to law 215/1961), its 1978 first additional protocol[3] (that was ratified in Italy by the law 436/1985), with respect to the rules of the criminal procedural code.

The 149/2017 law, amending the rules of the criminal procedural code on extradition and judicial cooperation, while recognizing such role of primacy to International binding instruments, introduced into the criminal procedural code also

- the principle of mutual recognition of EU judicial authorities' decisions and orders, providing that mutual recognition is ruled by the aforementioned law 149/2017 and by the relevant EU legislation;

[2] Under this Convention, Parties agree to afford each other the widest measure of mutual assistance with a view to gathering evidence, hearing witnesses, experts and prosecuted persons, etc.
The Convention sets out rules for the enforcement of letters rogatory by the authorities of a Party ("requested Party") which aim to procure evidence (audition of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings undertaken by the judicial authorities of another Party ("requesting Party").
The Convention also specifies the requirements that requests for mutual assistance and letters rogatory have to meet (transmitting authorities, languages, refusal of mutual assistance): see here.

[3] The Protocol completes provisions contained in the Convention. It withdraws the possibility offered by the Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence. It extends international co-operation to the service of documents concerning the enforcement of a sentence and similar measures (suspension of pronouncement of a sentence, conditional release, deferment of commencement of enforcement of a sentence or interruption of such enforcement). Finally, it adds provisions relating to the exchange of information on judicial records (see here).

- the consequent principle of reciprocity within EU Countries in the application of the principle of mutual recognition of Judicial decisions and orders.

3. The law 149/2017.

New rules in the national criminal procedural code on judicial cooperation (articles from 696 to 746) as amended by 149/2017 law entered into force on 31 October 2017. Law 149/2017 included in the criminal procedural code duties related to judicial cooperation falling on Italy in its position of Member of European Union and extended the mutual legal assistance to investigations and cases being run against legal entities (law 231/2001 establishes in fact the liability of legal entities for a number of felonies- including corruption, fraud, tax evasion, organized crime and terrorism crimes committed in their own interests).

The new article 696 of the criminal procedural code as amended by the aforementioned law mentions EU Treaties and attributes to them, as well as to the International binding instruments on judicial cooperation and extradition ratified by Italy, a role of primacy in mutual legal assistance between Italy and other Countries.

When dealing with Countries not being EU Member States on

- extradition,
- mutual cooperation in criminal matters (aimed at acquiring evidence as well as at freezing assets with the view to confiscate them),
- enforcement of sentences issued by foreign authorities, as well as the
- enforcement in foreign Countries of sentences issued by Italian Courts

Italy is bound by International binding Instruments (such as the 1959 European Convention on Mutual Legal Assistance in Criminal Matters (ETS 20) and 1957 European Convention on Extradition (ETS 24).

When dealing with EU Member States on the same topics, Italy is thus bound by EU Treaties and by the principle of mutual recognition of judicial decisions.

Pursuant to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), judicial cooperation in criminal matters in the EU is to be based on the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council of 15 and 16 October 1999, commonly referred to as a cornerstone of judicial cooperation in Criminal Matters within the Union.

Such principle can be defined as a process by which a decision usually taken by a judicial authority in one EU Member State (so called requesting Country) is recognized, and, where necessary, enforced by other EU countries (requested countries) as if it was a decision taken by the judicial authorities of the latter countries.

It means that each national judicial authority must recognize decisions made by the judicial authority of another EU Member State with a minimum of formalities, and with very few exceptions.

This is a key concept in the sphere of judicial cooperation, as it helps to expedite the acquisition of evidence by overcoming the difficulties stemming from the diversity of judicial systems throughout the EU.

The principle of mutual recognition of judicial decisions and orders therefore replaces and improves the previous system of letters rogatory, through the direct implementation within a EU Member State (executing Country) of a decision/order issued by the Authorities of another EU Member State (requesting Country).

Pursuant to article 696-*bis* of the criminal procedural code, as introduced by 149/2017 law,

1) decisions and orders issued by the competent judicial authorities of EU Member States (related either to individuals or legal entities) are
    a. recognized by the competent domestic judicial authorities (to be identified – as far as the acquisition of evidence in the national territory is concerned – in the District Prosecution Offices and judges of preliminary investigations at Courts of first instance) and
    b. timely executed in Italy (unless, pursuant article 696 ter of the Procedural criminal code, as introduced by 149/2017 law, solid grounds are found that the accused and/or the sentenced person will be subject to serious violations of the own fundamental rights as enshrined in article 6 of The Treaty on European Union and in EU Charter of Fundamental Rights);
2) domestic competent judicial authorities are thus entitled to have the own decisions and orders (related either to individuals or legal entities) recognized and executed within EU Countries.

Pursuant to article 696-*quater* of the Procedural criminal law**,** as introduced by 149/2017 law,

- the competent domestic judicial authority receives directly from the requesting EU judicial authority the decisions and orders to be recognized and executed in the National territory,
- the competent National judicial authority transmits directly to the relevant EU Member State authority the decisions and orders to be recognized and executed in the requested Country. The Minister of Justice is entitled to be informed of such transmission.

Pursuant to article 696-*quinquies* of the criminal procedural code, as introduced by 149/2017 law, the recognition of decisions and orders issued by EU Member States judicial authorities does not imply any duty falling on domestic authorities on the (re)evaluation on the evidence and the grounds supporting such decisions and orders.

The Minister of Justice guarantees also, pursuant to article 696-*sexies* of the criminal procedural rule, as introduced by 149/2017 law, the observance of the conditions indicated

- by the requesting country and related to the execution of their decisions and orders in Italy, unless such indications infringe the national fundamental legal principles,

- by the competent national judicial authority and related to the execution of their decisions and orders in the relevant EU Member State

Pursuant to article 696-*nonies* of the criminal procedural code, decisions and orders issued by the competent national judicial authorities on recognition and execution of decisions and orders issued by EU judicial authorities can be challenged by the concerned accused. Decisions of the executions of orders of arrest can be challenged before the Supreme Court (*Corte di Cassazione*).

3.1. Mutual legal assistance pursuant to law 149/2017.

As well as it was provided with by the previous legislation, the Ministry of justice can still be considered the Central Authority (as it was provided in the National legislation before law 149/2017) and is entitled to forward the requests of mutual legal assistance within 30 days since it has been received to the competent National judicial authority.

Articles 723 and 724 of the procedural criminal code, as amended by 149/2017 law, provide a number of grounds of refusal (by the Ministry of Justice and by the judge of preliminary investigations at the District Court or by the district public prosecutor[4]) of the letter rogatory addressed by a foreign law enforcement agency such as:

- jeopardy of the National security and/or of the fundamental interests of the Country (in case of request of mutual legal assistance issued by a non-EU Member State);
- infringement, through the acquisition of the requested evidence and investigation, of the law or of the National fundamental legal principles (as enshrined in the Constitution and in the Council of Europe Convention on Human Rights);
- the investigation against the accused being run in the requesting Country due to his/her race, religion, sex, nationality, language, political opinions, social status and
- lack of evidence, in the abovementioned case, that the accused has communicated the own consent to the execution of letter rogatory;
- lack of the principle of double criminality, since the misconduct prosecuted in the requesting country is not criminalized in Italy and the accused has not expressed the own consent to the execution of the letter rogatory.

Pursuant to article 724 of criminal procedural code, as amended by 149/2017 law, the judicial authority receiving and executing the letter rogatory is the District Prosecutor Office.

The execution of the letter rogatory could be suspended or delayed if it could jeopardize other investigations being run by domestic law enforcement agencies.

[4] Public district Prosecutor Offices operate in towns where Courts of Appeal are established. Pursuant to article 51 of the criminal procedural code, they have jurisdiction on organized crime and terrorism cases.

In this case the District Prosecution Offices are currently in a better position than Prosecutor General Offices were in the previous legislation before 31 October 2017 in evaluating the impact that requests of mutual legal assistance from foreign judicial authorities might have on ongoing investigations being run by National law enforcement agencies. It must be also highlighted that the duty to execute the requests of mutual legal assistance falls on District Prosecution Offices and not on all Prosecution Offices.

Despite it is not contemplated by the law,

- effective communications and consultations between District Prosecution Offices being addressed of requests of mutual legal assistance and local Prosecution Offices running investigations that could be interested and/or affected by the letter rogatory addressed to the domestic authorities are necessary;
- members of District Public Prosecution Offices should replace members of Prosecutor General Offices as national contact points within European Judicial Network[5].

Many heads of District Prosecution Offices are currently issuing directives establishing specialized units dealing with mutual legal assistance;

The relevant District Prosecutor Office, once the requests of mutual legal assistance are directly delivered by the requesting Foreign judicial authority or is forwarded by the Ministry of Justice,

- executes the request of mutual legal assistance

or if the requested evidence must be acquired following an order by the competent Court pursuant the relevant rules of the national criminal procedural code (such as intercepts of communications),

- files a reasoned request to the judge of preliminary investigations at the District Court (hopefully taking into account, where appropriate, the indications and recommendations of local Prosecution Offices).

Pursuant to the law 149/2017, in fact, any decision on the execution of any investigation/acquisition of evidence that pursuant to domestic legislation falls within the competence of the Court must be taken by the Judge for preliminary investigations at the relevant District Court, following the non binding arguments filed by the District Prosecution Offices.

The acquisition of the requested evidence/investigations must be run pursuant to the National criminal law unless the way of acquisition of the requested evidence

[5] The European Judicial Network in Criminal Matters (EJN) is a network of national contact points for the facilitation of judicial cooperation in Criminal Matters. The EJN was created by Joint Action 98/428 JHA of 29 June 1998 to fulfill recommendation n°21 of the Action Plan to Combat Organized Crime adopted by the E.U. Council on 28 April 1997 (EJN Welcome Package).
The EJN is composed of Contact Points in the Member States designated by each Member State among central authorities in charge of international judicial cooperation and the judicial authorities or other competent authorities with specific responsibilities in the field of international judicial cooperation.

indicated by the requesting authority is compatible with the National legal principles and rules.

In case of evidence to be acquired in more than one district, the competence to execute the request of mutual legal assistance falls on the district prosecutor or the judge of preliminary investigation within the district where the most relevant and/or the biggest number of pieces of evidence have to be collected.

The National executing authority may also authorize the participation to the acquisition of the requested evidence of the requesting judicial authority (in case the participating requesting Authority is from a non-EU Member State, the Minister of Justice must be informed)

3.2. Requests of mutual legal assistance addressed to foreign authorities.

After the entry into force of law 149/2017, the Minister of Justice is still the central Authority for the requests of Mutual assistance addressed to Foreign Authorities.

The request of mutual legal assistance filed by the domestic judicial authority is forwarded by the Minister of Justice to the requested foreign authority within thirty days.

The Minister of Justice may decide not to forward such requests in all cases the International binding instruments so provide.

Pursuant to article 727 of the criminal procedural code (as amended by law 149/2017), if the request of mutual legal assistance is addressed to non-EU Member States, the Minister of Justice may decide not to transmit it if such request or its execution may harm the essential national security interests.

If within thirty days the Minister of Justice decides not to forward the request of mutual legal assistance and does not communicate such decision to the domestic requesting judicial authority, such authority is entitled to address the letter rogatory to the relevant foreign law enforcement agency.

In urgent cases the request of mutual legal assistance can be directly addressed to the foreign requested authority (as provided by article 15 of the 1959 European Convention on Mutual Legal Assistance in Criminal Matters). Copy of that request has to be sent to the Minister of Justice

If the acquisition of the evidence in a foreign country is subject to restrictions or preconditions, the requesting national authority has to obey such preconditions and restrictions.

If the requested foreign authority executes the request of mutual assistance without respecting the indications and instructions provided with by the domestic requesting authority, the evidence acquired cannot be tendered to domestic Courts if the domestic law so provides.

The evidence properly acquired is inserted in the prosecution file as well as any piece of evidence spontaneously provided with by foreign law enforcement agencies.

In the framework of the procedures related to requests of judicial assistance, the accused must be legally assisted pursuant to the relevant rules of the requesting and requested Country.

Pursuant to article 729-*quinquies* of the criminal procedural rule, as introduced by law 149/2017, if the relevant binding International instruments ratified/transposed into the national systems and national systems so provide, the domestic Prosecutor can always promote the establishment of a joint investigation team[6]. If the establishment of such joint investigation teams involves law enforcement agencies of non-EU Member States, the Minister of Justice must be noticed.

3.3. Extradition pursuant to the 149/2017 law.

After 31.10.2017, the Ministry of Justice, Prosecutor General Offices and Courts of Appeal are still involved in extradition procedures (whereas the national law 69/2005 transposing the revenant EU Framework Decision on European arrest warrant does not apply).

The Minister of Justice is still competent to decide on the admissibility of the extradition request by foreign Authorities.

The request of extradition may be declared inadmissible

- in case it may jeopardize the National sovereignty, the National Security or any other National fundamental interests,
- when the accused, if extradited to the requesting Country, may be subject to death penalty and/or inhuman treatment, unless the requesting Country ensures not to apply and or execute the death penalty.

When such request concerns an Italian National and the relevant International instruments so provide, the Minister of Justice rejects the extradition request taking into account

- the seriousness of the crime the National is charged with,
- the relevance of the interests that have been jeopardized by the perpetration of the crime and
- the personal conditions of the concerned accused.

If deemed admissible by the Minister of justice, the request of extradition is forwarded to the District Prosecutor General Office. The Prosecutor General proceeds to question the accused also in order to ascertain whether he/she accepts to be extradited and then files the own arguments to the Court of Appeal. The acceptance of the extradition is not deemed valid if the accused is not assisted by the own defence counsel.

The extradited accused cannot be subject to any other restriction falling within the execution of a sentence and/or an arrest warrant issued by a foreign authority and

[6] A joint investigation team is an international cooperation tool based on an agreement between competent authorities – both judicial (judges, prosecutors, investigative judges…) and law enforcement – of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the involved States (see among others here).

related to a crime committed before the extradition or the crime for which the extradition was accepted.

3.4. Transfer of criminal proceedings pursuant to the 149/2017 law.

Pursuant to articles 746 ff. of the criminal procedural code, as amended by 149/2017 law, criminal proceedings can be transferred to foreign judicial authorities.

The foreign judicial authority having jurisdiction is identified by taking into account:

a) the place where the biggest part of the criminal action has been run and/or the following event has occurred;
b) the place where most of witnesses, victims and other sources of evidence are located;
c) the impossibility to obtain the extradition of the accused from the requested Country,
d) the place where the accused resides.

When a domestic Public Prosecutor takes notice that a foreign law enforcement agency is running a case based on the same facts/charges of a domestic case, consultations must be run with the relevant foreign law enforcement agency in view to decide which Authority must proceed, in order to avoid *ne bis in idem* cases.

The decision on the transfer of the proceeding must be communicated to the Ministry of Justice. The Minister of Justice may, within thirty days after receiving the prosecution files to be transferred, forbid the transfer, if such transfer may jeopardize the public security, the sovereignty of the State or other relevant national interests.

No case can be transferred to a foreign law enforcement agency if solid grounds are found that

- the concerned foreign law enforcement agency would not ensure to the accused the respect of his/her fundamental rights and the respect of the fundamental principles (as enshrined in the National Constitution and/or the European Convention on human rights),
- the accused will be subject to persecutory and/or discriminatory acts due to his/her race, religion, sex, nationality, language, political ideas, personal/social conditions and/or to cruel, inhuman, degrading treatments, or to any violation of the fundamental rights.

After the transfer of the proceeding, the national case is dismissed.

A case can be re-opened by the National Prosecution Offices if the same case has been dismissed by the foreign law enforcement agency. The reopening of the case is communicated to the foreign law enforcement agency.

Cases can also be transferred to National Prosecution Offices by foreign law enforcement agencies, following a request addressed to the Ministry of Justice or to the relevant domestic Prosecution Offices.

The decision on the acquisition of the proceeding is communicated by the relevant domestic Prosecution Offices to the victim.

The arrest warrants issued by the competent foreign Court must be renewed by the domestic Court at the request of the domestic Public Prosecution Offices.

The evidence collected by the foreign law enforcement agency is deemed valid unless they infringe the National fundamental principles.

3.5. Other relevant provisions in law 149/2017.

The new rules on mutual legal assistance as introduced by law 149/2017 include also

a) testimony through audio/video conference,
b) the temporary transfer abroad for investigation purposes of individuals detained in Italy (to be executed by the Ministry of Justice after consultation with the competent National judicial authority, unless the detainee to be temporarily transferred refuses to be transferred or the transfer abroad may prolong the restriction of the concerned person),

Pursuant to a decision issued by the national Constitutional Court (n. 143/08), that should currently bind the domestic executing authorities also in the implementation of law 149/2017, in case of extradition to Italy, the custody in a foreign country is equivalent to custody in Italy and must be deducted from the period of detention which the person concerned is or will be obliged to undergo. The aforementioned decision applies also in case of transfer and mutual recognition of orders and decisions.

4. The procedural framework until 31st October 2017.

4.1. Letters rogatory addressed by foreign authorities.

The Minister of Justice was the Central Authority to assist the competent judicial authorities in mutual legal assistance, unless bilateral/multilateral binding instrument ratified by Italy differently provided. Decision on the *exequatur* of the request of mutual legal assistance used to fall within the competence of the Court of Appeal.

The designated executing authority of requests of mutual legal assistance (including acquisition of evidence, extradition, freezing/confiscation of assets) until 31st Oct. 2017, after a former evaluation by the Minister of Justice of the admissibility of the request of judicial cooperation, was in fact the Court of Appeal within the district where the requested evidence had to be collected and the concerned person to extradite and/or the assets to be frozen/confiscated were located.

If the letter rogatory requested evidence to be collected in more than one judicial district, pursuant to article 724 of the criminal procedural code, the Supreme Court (*Corte di Cassazione*) had to designate one District Court of Appeal to be tasked to execute the letter rogatory. The designation of the competent Court of Appeal depended on the place where the requested evidence or investigation had to be collected or run.

Once the Minister of Justice had, on the basis of a political evaluation, decided that the letter rogatory was admissible, that letter rogatory was forwarded to the Office of the Prosecutor General. The Prosecutor General had then to submit the own arguments to the Court of Appeal about the legal admissibility of such letter.

Upon decision of the Court of Appeal on the admissibility of the letter rogatory, the requested evidence was collected, following a specific designation, by a judge of the Court of Appeal or by the Judge of Preliminary Investigations at the Court of first instance. The Office of Public Prosecutor had in this case no role, unless it was delegated by the Judge of first instance to execute the letter rogatory.

Such rule made the procedures on the admissibility and execution of requests of mutual legal assistance coming from foreign countries more lengthy and complex than in other European Countries.

Despite such length and complexity of those procedures, the Supreme Court in 2001 stated that articles of 15 of the European Convention on Mutual Legal Assistance and 53 of the 2000 Convention implementing the Schengen Agreement of 14 June 1985, allowing direct communications on judicial cooperation between requesting and requested law enforcement agencies, do not either overlap or conflict with the relevant rules of domestic criminal procedural code, designating Courts of Appeal as competent national Authorities on the "*exequatur*" of letter rogatory coming from foreign judicial authorities and Prosecutor General Offices as national Competent Authorities in submitting the own arguments to the Court of Appeal (*Corte di Cassazione*, Sez. 1, sent. n. 43950 del 18/10/2001 (dep. 06/12/2001) CED Rv. 220337).

The preeminent role of the Prosecutor General Offices in judicial cooperation led the National Authorities to designate magistrates of the domestic Prosecutor General Offices (and not of Public Prosecutor Offices) as national contact points within European Union Institutions facilitating mutual legal assistance such as the European Judicial Network[7].

Articles 723 and 724 of the procedural criminal code as well as article 737 bis (with reference to freezing and confiscation of assets) provided a number of grounds of refusal of the letter rogatory (by the Minister of Justice and by the Court of Appeal) such as:

- jeopardy of the National security and/or of the fundamental interests of the Country (letter rogatory whose execution would infringe state secrecy as defined by 124/2007 law and/or national security would thus be declared inadmissible by the Ministry of justice),
- infringement due the requested acquisition of evidence, of the National legislation or of the National fundamental legal principles (as enshrined in the Constitution and in the Council of Europe Convention on Human Rights),

[7] In December 2008, a new legal basis entered into force, Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (hereinafter the "EJN Decision"), which reinforced the legal status of the EJN, while maintaining the spirit of 1998.

- lack of double criminality, since the misconduct prosecuted in the requesting Country was not criminalized in Italy and the accused has not expressed the own consent to the execution of the letter rogatory,
- the investigation against the accused being run due to his/her race, religion, sex, nationality, language, political opinions, social status and
- lack evidence that the accused has communicated the own consent to the letter rogatory.

Pursuant to article 2 of the European Convention on Mutual Legal Assistance in Criminal Matters and the first Additional Protocol, assistance may be also refused if the request concerns

- an offence which the requested Party considers a political offence,
- an offence connected with a political offence. Pursuant to article 8 of the Domestic Penal code, political offence is
    a) an offence violating
        i. a political interest of the Country,
        ii. a political right of the Nationals and
    b) any violation of the law for political rather than private reasons.

Pursuant to the national case law (National Courts have obeyed to the principle enshrined in article 26 of the Constitution and in the abovementioned article 2 of the European Convention on Mutual Legal Assistance not allowing extradition if there are concrete risks that the rights of the accused to a fair trial may be jeopardized) an offence is political in case it

- jeopardizes political interests of the State and/or
- has been committed for political reasons,
- there are grounds to predict that due to the nature of the alleged misconduct the accused might not be subject to a fair trial (*Corte di Cassazione*, Sez. 1, sent. n. 23181 del 28/04/2004 (dep. 17/05/2004) CED Rv. 228663).

Pursuant to law 436/1985 ratifying the First Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters,

- Italy is no more entitled to refuse Judicial cooperation solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence;
- the principle of double criminality is fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the Italian law.

Italy (as well as any requested Country bound by the 1959 European Convention on Mutual Legal Assistance and the first Additional Protocol) cannot therefore refuse a request of legal assistance on the ground that the own National law does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Party.

Pursuant to article 724 of criminal procedural code, the execution of the letter rogatory could be suspended or delayed if it could jeopardize other investigations being run by national Authorities.

Considering this article, despite it was not contemplated by the law, it was necessary to set up effective communications and consultations between Prosecutor General Offices and law enforcement agencies running investigations that could be impacted by the letter rogatory addressed to the National Authorities.

4.2. Letters rogatory addressed to foreign authorities.

Until 31st October 2017, The Ministry of Justice, being the Central Authority having the political power to decide on the admissibility of letters rogatory, was entitled to receive and eventually forward to the correspondent Central Authority of the requested Country the letter rogatory issued by the National Public Prosecutors (during the preliminary investigations) and by National Courts (when cases needing judicial assistance by foreign Authorities were pending before the Courts). The Minister of Justice had the power, within thirty days after receiving the letter rogatory, to deny the transmission to the foreign Central Authority if it was deemed that the National security and any other relevant interests of the Country could be jeopardized. No judicial remedy was possible against the decision taken by the Minister of justice. If, within thirty days after receiving the letter rogatory, the Ministry of justice had not issued any decision on the transmission of the letter rogatory, such letter could be transmitted to the requested Country through diplomatic channels.

In urgent cases the requesting Public Prosecutor or the Court was entitled to the direct transmission of the letter rogatory to the requested Country (pursuant to article 15 of the European Convention in mutual legal assistance). The Ministry of justice was entitled to receive a copy of it.

Articles 727 and 729 of the criminal procedural code provided the following duties for the requesting National Authority:

- to ask the requested authorities to run the investigations indicated in the letter rogatory pursuant the Italian procedural rules,
- to ask the requested authorities to run the investigations indicated in the letter rogatory pursuant to the existing binding International Instruments such as European Convention on Mutual Legal Assistance in Criminal Matters.

Any infringement of these rules was a legal obstacle to a valid tendering to the national Courts of the evidence that had been collected abroad through letter rogatory.

5. The recommendations issued by the ministry of justice in 2015.

The Ministry of Justice issued in 2015 a circular incentivizing Public Prosecutors, in order to expedite the procedures on the execution of requests of mutual legal assistance, to address letter rogatory:

- straight to the requested foreign law enforcement agencies or

- to the requested foreign law enforcement agencies through the European Judicial Network or Eurojust[8] and not through the Ministry of justice (that should be simply informed on the relevant requests of mutual legal assistance by being mailed copy of the letter rogatory) or diplomatic channels.

Legal basis for such direct transmission are article 15 of The Council of Europe Convention on mutual legal assistance, article 53 of the the 2000 Convention implementing the Schengen Agreement of 14 June 1985 and bilateral treaties.

Taking into consideration such legal basis, pursuant to above mentioned circular issued by the Ministry of Justice, letter rogatory can be addressed directly to law enforcement agencies of 49 Countries (Including Russian Federation, Turkey, Ukraine, Chile).

6. National case law before law 149/2017.

The National case law of the Supreme Court has been inspired by the balance between

- the obligation falling on national authorities to implement the relevant rules on mutual legal assistance and execute letter rogatory and
- the respect the fundamental principles as enshrined in the Constitution and the European Convention on human rights,
- the legitimate use before national courts of evidence legally acquired and handed over by foreign law enforcement agencies either according to requests of mutual legal assistance, either spontaneously, no matter whether that evidence was not acquired pursuant to the relevant rules of the domestic criminal procedural code.

Several issues have been dealt with by the Supreme Court. The case law listed below can be (in part) applicable also to the amendments to the criminal procedural code as introduced by law 149/2017.

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[8] To reinforce the fight against serious organized crime, the European Council, in a Meeting in Tampere, Finland, on 15 and 16 October 1999, agreed in its Conclusion 46 that a Judicial cooperation unit (Eurojust) should be set up, composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to their own legal systems. Eurojust stimulates and improves the coordination of investigations and prosecutions between the competent authorities in the Member States and improves the cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust supports in any way possible the competent authorities of the Member States to render their investigations and prosecutions more effective when dealing with cross-border crime At the request of a Member State, Eurojust may assist investigations and prosecutions concerning that particular Member State and a non-Member State if a cooperation agreement has been concluded or if an essential interest in providing such assistance is demonstrated (see here).
Eurojust's core business is to assist the competent authorities of Member States, when they deal with serious cross-border and organized crime, such as: terrorism; trafficking in human beings; illegal immigrant smuggling; drugs and arms; the sexual exploitation of women and children; cybercrime; online child abuse; various kinds of fraud and money laundering; counterfeiting; environmental crime.

6.1. National case law in case of requests of mutual legal assistance addressed to national authorities.

6.1.1. Jurisdiction of the Constitutional Court.

Pursuant to the Supreme Court, only National laws ratifying International binding instruments on mutual legal assistance and judicial cooperation can be challenged before the Constitutional Court, not the International binding Instruments themselves (*Corte di Cassazione*, sent. n. 2082/1996).

6.1.2. Challenges against decisions on admissibility of requests of mutual legal assistance.

Pursuant to the National case law, the decision of the Minister of Justice as well as of the Court of Appeal on the admissibility of a letter rogatory cannot not be challenged. Appeals, on the contrary, can be filed against any order (such as searches, forfeiture orders) issued while executing a letter rogatory, following the (not challengeable) decision issued by the Court of Appeal (*Corte di Cassazione*, sent. n. 3812/1993).

6.1.3. Double criminality.

Double criminality is ensured not only in case of perfect correspondence of the relevant penal laws, but when similar misconduct is criminalized in both the requesting and requested Country (Corte di Cassazione, sent. n. 42777/2014).

6.1.4. Execution of requests of mutual legal assistance.

There is no violation of fundamental rights and of International binding instruments on judicial cooperation if the judge of the Court of Appeal, after having been designated for the acquisition of the evidence requested by the foreign law enforcement agency (such as the interview of a witness), instead of designating the judge of preliminary investigations, orders directly the police to acquire that piece of evidence (*Corte di Cassazione*, Sez. 6, sent. n. 5743 del 09/01/2014 (dep. 05/02/2014)).

6.2. Execution of requests of mutual legal assistance in case of requests of mutual legal assistance addressed to foreign authorities.

6.2.1. Copies of documents acquired abroad and/or transmitted by the requested country.

The 1959 European Convention on legal mutual legal assistance in Criminal Matters (as well as National law) does not bind judicial authorities to acquire the originals or certified copies of the requested documents (*Corte di Cassazione*, Sez. 6, sent. n. 1768 del 07/10/2002 (dep. 16/01/2003) CED Rv. 223180).

Unless the Italian Prosecutor/Court expressly asks the requested country the transmission of the originals of the relevant documents, the relevant authority of the requested country is fully entitled to hand over to the requesting national authorities copies of the relevant documents. These copies, if provided with by the requested authorities through the official channels can be tendered as valid evidence to the National Courts since they are deemed to have the same legal value of the originals and certified copies (*Corte di Cassazione*, Sez. 2, sent. n. 30062 del 16/06/2003 (dep. 17/07/2003) CED Rv. 226568).

6.2.2. Participation of the accused and of his/her defence counsel

No infringement of the rights of the accused can be envisaged and the testimony acquired in a foreign country is thus deemed as valid evidence if the accused was assisted by a defence counsel who was given the chance to cross examine the witness and verify his/her credibility, no matter if the testimony was acquired in the absence of the accused (*Corte di Cassazione*, sent. n. 11109 del 13/07/1999 (dep. 28/09/1999) CED Rv. 214338).

The testimony given by the witness in a foreign country pursuant a letter rogatory filed by the domestic judicial authorities without being cross examined by the defence counsel of the accused (since the date of that testimony had not been previously notified to the defence counsel of the accused) can be tendered as valid evidence to the Italian Court, in all cases when

- the testimony was given pursuant to the procedural rules of the requested country and
- those rules do not infringe the Italian National fundamental legal principles (Corte di Cassazione, Sez. 3, sent. n. 17379 del 16/12/2014 (dep. 27/04/2015) CED Rv. 263347).

The validity of the evidence collected abroad is thus jeopardized only if in the requested Country the rights of the accused are not safeguarded due a lack of proper legislation (*Corte di Cassazione*, Sez. 6, sent. n. 43534 del 24/04/2012 (dep. 09/11/2012) CED Rv. 25379).

No infringement of the rights of accused leading to a total jeopardy of the evidence collected abroad can be envisaged when the requested country, in executing the letter rogatory,

- does not fully respect the Italian procedural rules and, at the same time,
- does not infringe the fundamental rights of the accused (Corte di Cassazione, Sez. 1, sent. n. 21673 del 22/01/2009 (dep. 26/05/2009)).

The missed mentioning to the accused the right not to answer the questions does not jeopardize the questioning run in a foreign country in the framework of a request of mutual legal assistance (*Corte di Cassazione*, Sez. 6, sent. n. 43534 del 24/04/2012 (dep. 09/11/2012) CED Rv. 253797).

The allegations made against other co perpetrators by an accused being questioned by the requested judicial authority, without the assistance of a defence counsel are valid if

- the accused waived the right to be assisted and
- the questioning was run abroad pursuant to the procedural rules of the requested country (*Corte di Cassazione*, Corte di Cassazione Sez. 5, sent. n. 39020 del 21/09/2007 (dep. 23/10/2007) CED Rv. 238207).

6.2.3. Evidence collected abroad.

Requests of mutual legal assistance addressed to foreign Authorities must be executed pursuant to "*lex loci*" and the relevant outcomes can be used as valid evidence in domestic proceedings, unless the relevant rules of the requested Country infringe the Italian fundamental principles and the rule of law (Corte di Cassazione, n. Sez. 2, sent. n. 2173 del 22/12/2016 (dep. 17/01/2017) CED Rv. 269000).

The evidence collected abroad directly by the Italian law enforcement authorities, pursuant to a letter rogatory and a decision issued by the foreign judge, following the procedure allowed by the foreign judge, can be legally tendered before National Courts (*Corte di Cassazione*, sent. n. 11109/1999; *Corte di Cassazione*, n. Sez. 6, sent. n. 53435 del 06/11/2014 (dep. 22/12/2014) CED Rv. 261859).

6.2.4. Interceptions of communications.

6.2.4.1. Use in different proceedings.

Interceptions of communications run in a foreign Country and acquired pursuant to a letter rogatory can be tendered as valid evidence not only in the criminal proceeding where the letter rogatory was filed but also in different proceedings, unless the requested Country sets up restrictions to such use. Article 50 of the 2000 Convention implementing the Schengen Agreement of 14 June 1985, binding the requesting Authority to use the interception of communications only in the relevant case where the request of mutual legal assistance has been filed has been abrogated by article 8 of the 2001 Protocol to the

European Convention on Mutual legal Assistance (*Corte di Cassazione*, Sez. 2, sent. n. 1926 del 13/12/2016 (dep. 16/01/2017) CED Rv. 268760).

6.2.4.2. Intercepted mobile phones, cars and other electronic devices.

Items than can be moved to another Country, such as mobile phones, cars, can be subject to electronic surveillance.

Pursuant to the general principle set up by the Supreme Court, letters rogatory are not necessary if the interceptions of communications of mobile phones as well as e mail correspondence are run only in the national territory through proper routing procedures (*Corte di Cassazione*, Sez. 4, sent. n. 40903 del 28/06/2016 (dep. 30/09/2016) CED Rv. 268230).

The interceptions of phone calls made in Italy and addressed to fixed/mobile phones located in a foreign Country do not thus need any letter rogatory from the Italian Prosecution Offices, since the whole activity of interception and recording of phone calls is carried on in Italy.

Pursuant to the national case law, if a bugged car moves to a foreign country, there is no need to request judicial cooperation (*Corte di Cassazione*, Sez. 2, sent. n. 51034 del 04/11/2016 (dep. 30/11/2016) CED Rv. 268514).

There is no need to request judicial cooperation if a mobile phone being intercepted is carried abroad and

- the electronic surveillance focuses only on national telephone numbers being contacted or
- the telephone communications involving that telephone device are channeled to a domestic operator (*Corte di Cassazione*, Sez. 3, sent. n. 25833 del 03/03/2016 (dep. 22/06/2016) CED Rv. 267090).

This happens when a national sim card located in a foreign country communicates with other sim cards of its same nationality. If it is deemed necessary to intercept the communications of a non national mobile phone located abroad with other foreign mobile phones, in that case the request of judicial cooperation is necessary (*Corte di Cassazion*e, Sez. 4, sent. n. 35229 del 07/06/2005 (dep. 30/09/2005) CED Rv. 232080).

6.2.5. Evidence spontaneously tendered by foreign authorities.

Pieces of evidence spontaneously tendered by foreign Authorities to Italian Law enforcement agencies in a framework of an Exchange of information among law enforcement agencies can be tendered as valid evidence to Italian Courts.

In particular, the outcomes of interceptions of communications, if

- legally run by Foreign authorities and
- transmitted to the Italian law enforcement agencies pursuant to Articles 3 of the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and 46 of the 2000 Convention implementing the Schengen

Agreement of 14 June 1985, without any restriction on their use imposed by the transmitting foreign Authorities.

can be legally acquired by the National Public Prosecutor and tendered as valid evidence to the National Courts (*Corte di Cassazione*, Sez. 1, sent. n. 42478 del 31/10/2002 (dep. 17/12/2002) CED Rv. 222984).

Police reports and documents spontaneously transmitted to the Italian Authorities outside any procedure of mutual legal assistance can be used as valid evidence, before the Italian Courts, since that transmission does not infringe any fundamental national legal system (*Corte di Cassazione*, Sez. 2, sent. n. 51127 del 28/11/2013 (dep. 18/12/2013) CED Rv. 258221).

Any information/piece of evidence spontaneously transmitted to the Italian law enforcement Agencies by a correspondent foreign law enforcement agency is not subject to the national procedural rules on letter rogatory (*Corte di Cassazione*, n. 6346/2013).

6.2.6. Appeals.

Letters rogatory requesting a forfeiture in a foreign country can be challenged before the Italian National Courts, since such request implies a forfeiture order issued by the Italian Authorities to be implemented abroad through an order issued by the relevant foreign Authority (*Corte di Cassazione, Sezioni Unite*, sent. n. 21420/2003).

A freezing order issued by the Court of requested Country cannot be challenged before the Italian Courts, but only before the relevant Authorities of the requested Country (*Corte di Cassazione*, sent. n. 23112/2004)

The outcomes of a letter rogatory executed only in part by the Foreign Authority are deemed as valid evidence, since the validity of these outcomes are affected only in case of unjustified execution of a letter rogatory by the Foreign Authorities through the infringement of the Italian procedural rules or through different procedures than those indicated by the Italian judicial authority (*Corte di Cassazione*, sent. n. 3375/2003).

7. Joint investigation teams.

The abovementioned article 729-*quinquies* of the criminal procedural code currently entitles all domestic Public Prosecution Offices to promote the establishment of joint investigation teams.

The establishment of such teams is provided by among others by,

- the 2000 United Nations Convention on transnational Organized crime, article 19 (ratified by Italy with law 146/2006),
- EU Council Framework Decision 2002/465/JHA on joint investigation teams,
- 2003 UN Convention against corruption – article 49 (ratified by Italy with law 116/2009),
- bilateral agreements with Albania, Switzerland, U.S.A.

7.1. EU Council Framework Decision 2002/465/JHA.

Italy transposed the Framework Decision of joint investigation teams only in 2016, by passing the law 36/2016

Pursuant to that law, any Public Prosecutor (not only District Prosecutors), in all cases when dealing with investigations on

- crimes committed for terrorism purposes or
- crimes falling within the programs of a criminal associations, or
- crimes punished with life imprisonment o with more than five years imprisonment,

or when dealing with investigations to be carried on in one or more EU Member States may require the setting up of one or more Joint investigation teams.

The relevant request is addressed to the EU Member States the Prosecutor deems necessary should be involved in the establishment of a joint investigation team.

The initiative to set up a joint investigation team may be undertaken by any EU Member State judicial authority.

In that case the National prosecutor dealing with investigations that need to be coordinated with an enquiry carried on in another EU Member State may refuse the request to set up a joint investigation team only if the establishment of the investigation team contemplates investigations infringing

- the domestic law,
- the fundamental principles as enshrined in the National Constitution and/or the Council of Europe Convention on Human Rights.

The members of Joint investigation teams operating in Italy

- have the position (and consequent duties) of public officers,
- must obey the domestic criminal procedural rules.

The evidence acquired by the joint investigation teams can be used as valid evidence

- before a National Court in charge of the case that led to the establishment of the joint investigation team and
- in other cases, under authorization of the EU judicial authorities of the Member States involved in the investigation teams.

7.2. Bilateral instruments.

The Joint investigation teams are contemplated in bilateral treaties with:

- Albania (article X of the Agreement between Italy and Albania, Additional to the 1959 European Convention on Mutual Legal Assistance in Criminal Matters),
- Switzerland (article XXI of the 1988 bilateral treaty on mutual assistance),
- U.S.A. (article 18-*ter* of the 2006 bilateral treaty on mutual assistance).

Article 18-*ter* of the 2006 bilateral treaty on mutual assistance between U.S.A. and Italy

- mirrors article 5 of The Agreement on Mutual Legal Assistance in Criminal Matters between EU and U.S.A. signed in Washington on 25 June 2003,
- provides the establishment of joint investigation teams in case of enquiries to be run in U.S.A., Italy and any other EU Country,
- does not specify the investigated crimes entitling the relevant Authorities to set up a joint investigation team.

8. Italian legislation transposing relevant European Union instruments on mutual recognition of judicial decisions and orders.

As it was highlighted above, mutual legal assistance in criminal matters among EU Member States is currently inspired and regulated by the principle of mutual recognition of judicial decisions.

Italy has since 2005 transposed the following main relevant EU Framework decisions and directives applying the principle of mutual recognition of judicial decisions:

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member State,
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence,
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders,
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters,

All those instruments bind EU Member States to derogate to the principle of double jeopardy in mutual recognition of judicial orders and decisions and in complying with a warrant/order issued by a EU Member State with reference to a number of serious crimes such as

- participation in a criminal organization,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crimes,

- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorized entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organized or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage

Following a similar rule provided by the 1978 First Additional Protocol to the 1959 European Convention on Mutual Legal Assistance in Criminal Matters in relation to taxes, customs, duties and exchange activities, pursuant to the abovementioned Framework Decisions and Directives, execution of orders/warrants subject to mutual recognition may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain the same types of rules concerning taxes, duties, customs duties and exchange activities as the law of the issuing State.

Pursuant to all the laws transposing the abovementioned EU instruments, The Minister of Justice is the designated central authority to assist the competent judicial authorities.

The duty to recognize and execute Judicial decisions and orders issued by an EU judicial authority falls on

- the Court of Appeal in case of EAW and confiscation order,
- the Public Prosecutor in case of orders freezing property or evidence,
- the District Public Prosecutor in case of European Investigation Order (hereinafter EIO),

All the mentioned instruments provide with grounds of refusal of warrants issued by a Member State.

8.1. Law 69/2005 transposing into the national legislation the Framework Decision on European Arrest Warrant.

Italy transposed into the National legislation the Framework Decision on European Arrest Warrant (hereinafter EAW) by adopting law 69/2005 that entered into force on 14 May 2005.

Pursuant to that law, only EAWs issued after 14 May 2005 can be executed in Italy.

The law 69/2005 binds the national courts to execute EAWs issued by foreign courts only if such enforcement does not infringe the fundamental rights of the accused (as enshrined in the National Constitution and in the European Convention of Human Rights).

The execution can be ordered only if the principle of double jeopardy is respected, unless the EAW is issued for one of the serious crimes listed in article 2 of 2002 Framework Decision.

Grounds of refusal are set up by article 18 of 69/2005 law and they concern cases when it is ascertained that

a) an EAW was issued
- for discriminatory aims,
- for a crime which cannot be prosecuted or punished pursuant to the National legislation,
- following a sentence violating the rules of fair trial as envisaged by the European Convention of Human rights,
- for a crime under amnesty,
- for a crime having been already prosecuted in Italy,
- for a crime having been committed also in part in the national territory,

b) in case of transfer to the issuing Country of an EAW, the person concerned may be subject to inhuman and degrading treatment,

c) at the time of the commission of the crime the person concerned was less than 14.

The case law identified another ground of refusal of a EAW (although not mentioned in the relevant Framework Decision): mothers of children less than three years old at the time of enforcement of the EAW cannot be transferred (*Corte di Cassazione*, Sez. 6, sent. n. 8555 del 24/02/2015 (dep. 25/02/2015) CED Rv. 262504).

8.1.1. Execution of EAW.

An EAW can be enforced pursuant to an order issued by the Court of Appeal within the district where the accused resides.

In all other cases the transfer is executed pursuant to an order issued by the Court of Appeal of Roma.

An EAW can be executed by the police also by initiative, if it is loaded in the Schengen Information System (SIS) database[9].

Within five days from the arrest of the accused, the competent Court of Appeal proceeds to question the arrested person in order to ascertain whether he/she consents to be transferred to the EAW issuing Country.

The Court of Appeal issues a decision on the transfer of the accused to the issuing country within twenty days from the execution of the arrest.

The Court of Appeal may postpone the transfer of the accused to the issuing Member State in order to allow the accused to be prosecuted/tried in Italy for a crime other than the felony for which the EAW was issued. It is a discretionary decision depending on comparison between the seriousness of the crime falling under the Italian Jurisdiction and of the crime prosecuted by the Issuing Country.

The Italian Court of Appeal may also, at the request of the issuing country, or ex officio, order the forfeiture/confiscation of any kind of relevant evidence and or the proceeds of the crimes committed by the accused.

When ordering the transfer of the accused to the issuing Member State, the Court of Appeal is entitled to request some specific safeguards in the interest of the person arrested:

- that, if sentenced in absentia without being properly informed of the case against him/her, the person arrested is granted the right to be retried,
- that the sentenced person is entitled to a review of the case against him/her,
- that the sentenced/arrested person, in case he/she is in Italian national, is given the possibility, if sentenced to serve that sentence in Italy, at his request

8.1.2. Domestic judicial authority issuing an EAW.

The EAW is issued

- by the same Court that issued the arrest warrant (at a request by the Public Prosecutor) or
- by the Public Prosecutor when a sentence to more than one year imprisonment has to be enforced.

The decision on issuance of an EAW falls within the competence and the discretion of the Court or of the Public Prosecutor, taking into account the seriousness of the crime related to the arrest warrant and to the sentence to be executed in another EU Member State.

[9] The Schengen Information System (SIS) is a large-scale information system that supports external border control and law enforcement cooperation in the Schengen States. The SIS enables competent authorities, such as police and border guards, to enter and consult alerts on certain categories of wanted or missing persons and objects. An SIS alert not only contains information about a particular person or object but also clear instructions on what to do when the person or object has been found. Specialized SIRENE Bureaux serve as single points of contact for any supplementary information exchange and coordination of activities related to SIS alerts (see also here).

Once it is issued, the EAW is transmitted to the Ministry of Justice, in order to be translated into the language of the executing Country and forwarded to it.

In case the person to be arrested must be tracked down, the EAW is inserted in the SIS database and Interpol is charged to carry on the researches.

The EAW is revoked once the arrest warrant issued by the National Authority is revoked.

Since arrest warrants issued by the domestic Courts may provide confinement into detention facilities or house arrests, in case of issuance of a EAW related to house arrests, the executing country is not bound to confine the person concerned into house arrests if the own legislation does not contemplate such measure. The person concerned can thus be confined into a detention facility until he/she is transferred to Italy.

The Prosecutor General may file a request to the executing Country to implement also a forfeiture or a confiscation order issued by the Italian Court.

8.2. Case law.

8.2.1. Duties of the Court of Appeal in the execution of an EAW.

The domestic Courts of Appeal cannot execute in Italy an EAW issued before the entry into force of the relevant national legislation, but such restriction does not apply to EAW issued by domestic Courts (*Corte di Cassazione*, Sez. 6, sent. n. 27098 del 30/03/2017 (dep. 30/05/2017) CED Rv. 270401).

An EAW can be executed to enforce an arrest warrant also when it is issued to ensure that the person arrested is questioned or appears before the Court (*Corte di Cassazione*, Sez. 6, sent. n. 43386 del 11/10/2016 (dep. 13/10/2016) CED Rv. 268305).

The EAW can be executed when the Court of Appeal has ascertained that it is grounded on indicia collected by the issuing State leading to the conclusion that the person to be transferred has committed the crime (*Corte di Cassazione*, Sez. 6, sent. n. 28281 del 06/06/2017 (dep. 07/06/2017) CED Rv. 270415).

The issuing State has therefore to indicate the indicia collected against the accused and make them available to the domestic Courts of Appeal. The only Authority entitled to evaluate the indicia is the issuing Country judicial authority (*Corte di Cassazione*, Sez. 6, sent. n. 44911 del 06/11/2013 (dep. 07/11/2013) CED Rv. 257466).

8.2.2. Double criminality.

The prerequisite of the double criminality can be considered satisfied when a misconduct is criminalized in both the concerned systems, no matter if the elements of the concerned crime are different in the issuing and executing country (*Corte di Cassazione*, sez. 6, sent. n. 27483 del 29/05/2017 (dep. 01/06/2017) CED Rv. 270405).

The principle of double criminality is satisfied when the misconduct is criminalized in the executing country at the time when the EAW was issued, not at the time when the crime was perpetrated in the issuing country (*Corte di Cassazione*, sent. 6, n. 42042 del 04/10/2016 (dep. 05/10/2016) CED Rv. 268072).

8.2.3. Safeguard of human rights.

Domestic Courts of Appeal are called to order the transfer or the person arrested pursuant to an EAW unless following the transfer, on the basis of information provided with by the issuing Country the concerned accused would be subject in the issuing Country to inhuman and degrading treatment**.** The same principle has been set up By the Court of Justice of EU (*Corte di Cassazione*, Sez. 2, sent. n. 3679 del 24/01/2017 (dep. 25/01/2017) CED Rv. 269211).

The transfer of the person arrested pursuant an EAW cannot be ordered if the legislation of the issuing Country does not provide with a periodical judicial supervision and review of the pre-trial detention (*Corte di Cassazione*, Sez. 6, sent. n. 34439 del 11/07/2017 (dep. 13/07/2017) CED Rv. 270761).

8.2.4. Grounds of refusal.

One of the grounds for refusal of the transfer (although not mentioned in the relevant Framework decision) is the age of the children of the woman arrested and to be transferred to the issuing Country. Mothers of children less than three years old at the time of enforcement of the EAW cannot be transferred. The supreme Court has identified the interest of children of the person arrested as a further ground for refusal (*Corte di Cassazione*, Sez. 6, sent. n. 8555 del 24/02/2015 (dep. 25/02/2015) CED Rv. 262504).

If the crime prosecuted in the issuing Country is criminalized as such in Italy and the punishable misconduct has been partly committed in Italy, the National Authorities may refuse the transfer of the accused (*Corte di Cassazione*, Sez. 6, sent. n. 13446 del 01/04/2016 (dep. 04/04/2016) CED Rv. 267167).

When an EAW has been issued for a crime barred by statute limitations pursuant to domestic laws, the domestic Court of Appeal can refuse the transfer only if the relevant crime can be prosecuted in Italy (*Corte di Cassazione*, Sez. 6, sent. n. 51 del 30/12/2014 (dep. 05/01/2015) CED Rv. 261574).

A sentenced person can be transferred to the issuing country also when the status of *res iudicata* is not certified by the issuing country (*Corte di Cassazione*, Sez. 6, sent. n. 23695 del 11/05/2017 (dep. 12/05/2017) CED Rv. 269980).

Once the person arrested in Italy has given the own consent to be transferred to the issuing country, that consent cannot be revoked and that revocation cannot be deemed as a ground of refusal (*Corte di Cassazione*, Sez. 2, sent. n. 4864 del 04/02/2016 (dep. 05/02/2016) CED Rv. 266378).

The lack of translation into Italian of the EAW cannot deemed as an infringement of the rights of the accused. Such rights are safeguarded if the accused is informed in a language he/she understands about the EAW and the charges against him/her (*Corte di Cassazione*, Sez. 6, sent. n. 19025 del 05/04/2017 (dep. 20/04/2017) CED Rv. 269838).

8.2.5. Transfer of nationals.

The domestic Court of Appeal that refuses the transfer of a sentenced person (be him/her a national or a resident in Italy) and orders that the sentence issued by the concerned EU Member State be enforced in Italy, must recognize that sentence (*Corte di Cassazione*, Sez. 6, sent. n. 21912 del 27/05/2014 (dep. 28/05/2014) CED Rv. 262269).

8.2.6. Appeals.

The person arrested in Italy in execution of an EAW issued by another EU judicial authority cannot ask the EAW to be reviewed by an Italian Court.

The only judicial remedy against the execution in Italy of an EAW is a motion to the Supreme Court grounded on alleged infringement of the law (*Corte di Cassazione*, Sez. 6, sent. n. 24891 del 11/06/2015 (dep. 12/06/2015) CED Rv. 263816).

8.3. Law 35/2016 transposing EU Framework Decision 2003/577/JHA.

Law 35/2016 transposed into the domestic legislation EU framework decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence**.**

It must be taken into account that EU Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, as far as freezing of evidence is concerned, has been replaced by Directive 2014/41/JHA on European Investigation Order (article 34 of the Directive).

8.3.1. Legislation of Italy as Executing Member State.

Pursuant to article 4 of the 35/2016 law, the domestic recognizing and executing Authority of a freezing order concerning property that could be subject to evidence issued by an EU judicial authority is the Public Prosecutor.

If the freezing order concerns property that could be subject to confiscation, the domestic executing Authority is the Court. The Public Prosecutor in this case submits the own arguments to the Court.

The executing order can be challenged by the accused and/or third bona fide parties.

Article 6 of the 35/2016 law lists the grounds of refusal to the execution of the freezing order (among them the violation fundamental Constitutional principles and of "*ne bis in idem*" principle are mentioned).

Pursuant to article 7 of the 35/2016 the execution of the freezing order can be postponed if

- it can jeopardize a domestic investigation,
- the evidence/property to be frozen has already been frozen pursuant to an order issued by a domestic law enforcement agency.

8.3.2. Legislation of Italy as Issuing Member State

A freezing order concerning evidence or property may be transmitted to the executing EU judicial authority directly or through the European Judicial network.

8.4. Law 137/2015 transposing EU Framework Decision 2006/783/JHA.

Law 137/2015 transposed into the domestic legislation EU framework decision 2006/783/JHA and included, among the targets of confiscation orders to be implemented, assets belonging to individuals and legal entities.

8.4.1. Legislation of Italy as Executing Member State.

Pursuant to article 1 of the law 137/2015, the National recognizing and executing Authority is the Court of Appeal of the district area where the assets to be confiscated are located. The decisions of the Court of Appeal on the execution of a confiscation order can be challenged before the Supreme Court.

Pursuant to Article 6, the confiscation order issued by an EU judicial authority cannot be executed if

a) the individual whose assets are subject to confiscation is granted immunity,
b) the rights of any interested party, including bona fide third parties, under the domestic law make it impossible to execute the confiscation order,
c) the person concerned did not appear personally and was not represented by a legal counselor in the proceedings resulting in the confiscation order, unless the same concerned person
   - was informed personally, or via his defence counsel of the proceedings in accordance with the law of the issuing State, or
   - has indicated that he/she does not contest the confiscation order;
d) the confiscation order is based on criminal proceedings in respect of criminal offences which
   - under the domestic law are regarded as having been committed wholly or partly within the National territory, or in a place equivalent to its territory, or

- were committed outside the territory of the issuing State, and the domestic law does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory;

e) the execution of the confiscation order cannot be executed since the predicate offense is barred by domestic statutory time limitations;

f) outside the cases of derogation to the principle of double criminality, the confiscation order has been issued for a misconduct which is not criminalized in the country (in relation to taxes, duties, customs duties and exchange activities, pursuant to law 137, execution of orders/warrants subject to mutual recognition may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain the same types of rules concerning taxes, duties, customs duties and exchange activities as the law of the issuing State);

g) it is impossible to execute the confiscation order for the reason that the property to be confiscated has already been confiscated, has disappeared, has been destroyed, cannot be found in the location indicated by the issuing Authority

The execution of the confiscation order may be suspended and/or postponed if:

- in case of a confiscation order concerning an amount of money, there is a risk that the total value derived from its execution may exceed the amount specified in the confiscation order
- the execution of the confiscation order might damage an ongoing criminal investigation or proceedings, until such time as it deems reasonable
- it is considered necessary to have the confiscation order or parts thereof translated at the expense of the executing State, for the time necessary to obtain its translation, or
- the property is already subject to confiscation proceedings in Italy (including the forfeiture/confiscation procedures, pursuant to the relevant law 159/2011 on preventive measures).

Pursuant to the Italian legislation (law 159/2011, as amended by law 161/2017), preventive measures are legal remedies not aimed at investigating or prosecuting a crime, but

a) at preventing that persons that are considered a danger to the public from committing crimes and

b) at depriving them of assets
- whose value is disproportionate to the value of their legal incomes and
- having therefore an illegal source.

The prerequisite for these proceedings is not the perpetration of a crime but the alleged current dangerousness to the public of individuals, due to their tendency to commit crimes or their addiction to misconduct and to attend other criminals.

The dangerousness of these individuals can be deducted from suspicions.

Within these proceedings, the Public Prosecutor can coordinate investigations (and/or use the outcomes of investigations in criminal proceedings) aimed at detecting assets deriving from the perpetration of crimes belonging to persons deemed as

dangerous to the public, no matter if the person deemed as dangerous has been sentenced.

These assets can be confiscated pursuant to a decision issued by the Court within a proceeding where the rights of defence, pursuant to articles 6 ff. of the European Convention on human rights, are safeguarded.

8.4.2. Legislation of Italy as Issuing Member State.

Law 137/2015 has designated Public Prosecutors (not only the District Public Prosecutors) as the judicial authority entitled to request the executing EU Member State the recognition and execution of confiscation orders issued pursuant to

- a sentence,
- a decision of confiscation of assets being deemed as deriving from criminal activities and/or disproportionate to the legal incomes of the suspect, issued pursuant law 159/2011 on preventive measures.

8.4.3. Confiscation orders issued pursuant to law 159/2011 on preventive measures.

Pursuant to paragraph 8 of the EU Framework decision 2006/783/JHA: "This Framework Decision is linked to Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

The purpose of that Framework Decision is to ensure that all Member States have effective rules governing the confiscation of proceeds of crimes in relation, inter alia, to the onus of proof regarding the source of assets held by a person convicted of an offence related to organized crime.

The possibility that the domestic issuing Authorities may have a confiscation order recognized and executed in E.U., pursuant to a Court decision on the application of a financial preventive measures (and not to a sentence issued in a criminal proceeding) has been provided by 2014/42/EU Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (that has been transposed into the law 212/2016).

Pursuant to EU Directive 2014/42/JHA on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union - paragraphs 19-21, in order to effectively tackle organized criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes.

This approach is referred to extended confiscations. Framework Decision 2005/212/JHA provides for three different sets of minimum requirements that Member States can choose from in order to apply extended confiscation.

Pursuant to EU Directive 2014/42/JHA, extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.

It has to be taken into account that Pursuant to the case law of the Supreme Court, the rules on confiscations provided by EU Framework Decision 2005/212/JHA do not contemplate the possibility to confiscate assets having an equivalent value of the proceeds directly derived from the perpetration of a crime (*Corte di Cassazione*, n. 38691/2009).

8.4.4. Other cases of enforcement abroad of confiscation orders issued by domestic Courts in proceedings on preventive measures.

The enforcement abroad of Confiscation orders issued by domestic Courts in proceedings on preventive measures has been either

- ensured by National Courts, such the French Supreme Court (in 2003)[10] and the Swiss Federal Court (in 2011)[11] or
- provided also by bilateral instruments, such as the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Italian Republic concerning Mutual Assistance in Relation to Traffic in Narcotic Drugs or Psychotropic Substances and the Restraint and Confiscation of the Proceeds of Crime, signed in Rome, 16 May 1990.

Pursuant to article 11 of the Agreement, the Enforcement of Confiscation Orders applies to an order, made by a court of the requesting Party, for the purpose of confiscating the proceeds of crime, including: (a) in relation to the United Kingdom, a confiscation order made as a result of a conviction for an offence; (b) in relation to Italy, a confiscation order made as a result of a conviction for an offence, or as a preventive measure ("*misura di prevenzione*") in respect of a person involved in criminal activity.

[10] Arrêt n° 5848 du 13 novembre 2003 (see here).
[11] Sentenza del 21 gennaio 2011 – II Corte dei reclami penali (see here).

8.5. Directive 2014/41/EU of the European Parliament and of the Council of 3rd April 2014 regarding the European Investigation Order in criminal matters.

The Directive 2014/41 replaces, as from 22 May 2017, the corresponding provisions of the following conventions applicable between the EU Member State:

a) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols, and the bilateral agreements concluded pursuant to Article 26 thereof,
b) 2000 Convention implementing the Schengen Agreement of 14 June 1985,
c) 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol (that was ratified by Italy with law 52/2017),
d) Framework Decision 2003/577/JHA (in particular provisions concerning freezing of evidence),
e) Framework Decision 2008/978/JHA.

The European Investigation Order (hereinafter EIO) is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the State executing the EIO ('the executing State') with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority.

The issuing State of the Investigation order is the one entitled to decide which investigative measure is to be used.

The investigation order can concern the temporary

- transfer to the issuing and/or the executing member State of persons held in custody for the purpose of carrying out an investigative measure,
- hearing by videoconference or other audiovisual transmission,
- hearing by telephone conference,
- information on bank and other financial accounts,
- information on banking and other financial operations,
- investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time,
- covert investigations, interception of telecommunications.

Pursuant to 2014/41 Directive, EIO does not contemplate

- spontaneous exchange of information among law enforcement agencies of EU Member States (provided by 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol),
- freezing of assets for confiscation purposes,
- restitution to victims of assets and properties they have been deprived with,
- establishment of joint investigation teams,
- trans border observations.

8.5.1. Law 108/2017 transposing Directive 2014/41/EU.

Italy transposed Directive 2014/41/EU into law 108/2017. Until 1st February 2018, eighteen other EU Member States have transposed the directive into National legislation[12].

Law 108/017 was passed after law 52/2017 that ratified 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

Law 52/2017 provides that

- requests of mutual legal assistance can be submitted directly to the requested Authority,
- the Domestic executing Authority is the District Prosecution Offices,
- the requested domestic judicial authority can execute a request of acquisition of evidence following the indications provided by the requesting Authority, unless such acquisition infringes the national fundamental legal principles,
- spontaneous exchange of information among Member States can be used for investigative purposes.

Despite such transposition and despite directive 2014/41/EU replaced the above mentioned 2000 Convention on Mutual Assistance, Italy is in any case bound

- by that Convention and its protocol when dealing with mutual assistance with Denmark and Ireland (these countries did not in fact adhere to the 2014/41 Directive) and with the other EU Member States not having implemented yet directive 2014/41/EU as well as
- by European Convention on Mutual Assistance in Criminal Matters when dealing with non-EU Countries.

8.5.2. Italy as Executing Country of an EIO.

The 108/2017 law mirrors the Directive. Pursuant to article 4 of 108/2017 law, the executing authority of the EIO in Italy is The District Public Prosecutor (as well in law 52/2017). The District Public Prosecutor has to deal with the recognition and execution of EIO, unless

- the issuing Country specifically requests the order to be executed by the Court,
- the domestic legislation provides that the requested investigation activity be run by the Court (such in case of intercepts of communications).

In these cases the judge of preliminary investigations at the relevant District Court has been designated by the law as the authority entitled for the execution of EIO

[12] Belgium, Croatia, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Malta, The Netherlands, Poland Portugal, Romania, Sweden, Slovak Republic, United Kingdom.

(after the recognition of EIO and the request of execution filed by the District prosecutor).

In case of EIO is related to acquisition of documents concerning bank accounts, pursuant to article 20 of law 108/2017, the acquisition of bank material must be executed by the District Public Prosecutor.

The electronic monitoring of bank transactions, as well as any other electronic surveillance, must be executed by the district judge of preliminary investigations.

Pursuant article 4 of law 108/2017, recognition and execution of the EIO coming from a EU Member State should be provided within 90 days from the receipt of the EIO, unless the Issuing Country indicates matters of urgency. The defence counsel of the accused, if the National Legislation so provide, is entitled

- to be informed about the recognition and execution of the EIO and
- to take part to the investigation (such as questioning, searches, inspections) ordered by the issuing Country,
- to have made available to him/her the records of the investigations run within the execution of the EIO.

The decision on recognition and execution of an EIO issued by the District Public Prosecutor can be challenged by the defendant before the Judge for preliminary investigations. The challenge does not suspend the recognition and the execution of EIO. The Decision issued by the Court can be challenged before the Supreme Court.

The execution or the refusal of EIO are immediately communicated to the issuing EU Member State

The EIO is executed following the indications provided with by the issuing EU Authority, unless such indications infringe the domestic laws. In this case, the EIO is executed pursuant the domestic procedural rules.

Article 7 of 108/2017 law provides the principle of proportionality in the execution of EIO. Pursuant to article 7, the EIO is not proportionate if the restriction of the rights and freedoms of the accused and/or of third persons involved in the investigations contemplated in the EIO is not justified, taking into account the seriousness of the investigated/prosecuted crimes.

Pursuant to a circular issued on 26 October 2017 by the Ministry of justice on the enforcement of law 108/2017, proportionality is ensured, taking into account article 52 of the Charter of Fundamental Rights of the European Union (2000/C 364/01), limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others[13].

Pursuant to article 9 of law 108/2017 the domestic executing judicial authority, wherever possible, recourse to an investigative measure other than that provided for in the EIO when the measure indicated in the EIO

- does not exist under its national law or

[13] Ministero della Giustizia-Circolare in tema di attuazione della direttiva 2014/41/UE relativa all'ordine europeo di indagine penale – Manuale operativo (see here).

- would not be available in a similar domestic case, or
- lacks the abovementioned principle or proportionality and
- the investigative measure selected by the executing authority would achieve the same result through less intrusive means than the investigative measure indicated in the EIO (in order to avoid disproportionate restrictions of individual rights, such as the right to privacy in case of investigations of minor offences).

In any case the Prosecutor/Judge, in their position of executing National Authority must execute the EIO when it concerns

- the acquisition of information stored in databases accessible to the Judiciary,
- the questioning of the accused,
- the interview of victims, witnesses,
- the acquisition of evidence records from other domestic criminal proceedings,
- the identification of individuals through a phone number or IP address,
- any other investigation of non-intrusive nature.

Article 9 of law 108/2017 provides grounds of refusal and non execution of an EIO if

a) the accused is granted immunity, preventing the criminal action pursuant to the National legislation,
b) the misconduct prosecuted in the requesting Country is not criminalized in Italy (since for example it was committed in the exercise of rights – such as the right of expression – provided by the law) and no derogation of the principle of double criminality is contemplated,[14]
c) it is impossible to execute an EIO, due to the nature of the investigation activity to be run,
d) the execution of the relevant EIO
   - infringes the *ne bis in idem* principle (including judgements issued by National and EU Member States Courts),

[14] On 26 October 2017 The Ministry Of Justice issued the above mentioned circular on law 108/2017 (Ministero della Giustizia-Circolare in tema di attuazione della direttiva 2014/41/UE relativa all'ordine europeo di indagine penale – Manuale operativo), recommending to the District Public Prosecutor Offices, when dealing with the issue of double criminality,

- to obey the (mentioned in this paper) relevant decisions adopted by the Supreme Court concerning double criminality in the execution of EAWs (The prerequisite of the double criminality can be considered satisfied when a misconduct is criminalized in both the concerned systems, no matter if the elements of the concerned crime are different in the issuing and executing country),
- to derogate to that principle all the times the EIO to be executed concerns

a) information stored in databases accessible to the Judiciary,
b) the questioning of the accused,
c) the interview of victims, witnesses,
d) the acquisition of evidence records from other domestic criminal proceedings,
e) the identification of individuals through a phone number or IP address, any other investigation of non-intrusive nature.

- infringes the fundamental legal principles (as enshrined in article 6 of the EU Treaty and in the EU Chart on fundamental rights),
- jeopardizes the National security and/or
- jeopardizes the fundamental interests of the Country (EIO whose execution would infringe state secrecy as defined by 124/2007 law and/or national security would thus be refused)[15].

Pursuant to article 23 of 108/2017, in case of investigations of intrusive nature, such interception of communications, the Judge of preliminary investigations may refuse the execution if the EIO does not match the prerequisites allowing intercepts of communications contemplated by the Italian national legislation (articles 266 ff of the criminal procedural code, as amended by law 216/2017).

Pursuant to article 24 of law 108/2017 (mirroring article 21 of law 52/2017, ratifying the 2000 Convention on Mutual Legal Assistance between EU member States), in case of interception by a EU member State of a car/device located in the National territory, non requiring the technical assistance of domestic Authorities, the competent District Public Prosecutor must

- be noticed and notified by the relevant EU Authority about the beginning of such interceptions and then
- inform the Judge of preliminary investigation.

The Judge orders

- the execution of the interceptions or
- the immediate cessation of such interceptions if they were ordered for a crime which cannot be investigated with interceptions, pursuant to the domestic legislation.

The EU Authority having ordered the interceptions must be timely informed about the decisions issued by the judge of preliminary investigations.

Pursuant to article 14 of the 108/2017 law, recognition and execution on an EIO can be delayed if

- its execution jeopardizes a domestic ongoing investigation (in this case the execution of the EIO can be postponed until the end investigation and the disclosure of the relevant material),
- the evidence/material to be acquired has been seized within a domestic criminal proceeding.

In this case the issuing judicial authority must be timely informed about the delay.

The issuing EU judicial authority may request to participate to the execution of the EIO. In this case the District Public Prosecutor may

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[15] Pursuant to the abovementioned circular by the Ministry of Justice, In case of interception of relevant communications among Officers of national intelligence agencies, before the transmission of such communications to the issuing Authority, the Public Prosecutor must, as well as it is provided by national law (article 270-*bis* of the criminal procedural code) before such communications are used as evidence before domestic Courts request the Prime Minister a specific authorization. In this case the Prime Minister may oppose the State secrecy and prevent any use of the concerned interceptions.

- promote, pursuant to the abovementioned law 34/2016, the establishment of a joint investigation team (such establishment is not provided by the law if the executing Authority is the judge for preliminary investigations) or
- set up and stipulate with the issuing Authority the way of participation to the investigations executing the EIO.

The Officer of the issuing EU Member State participating to the investigations executing the EIO has the position and duties of a national public officer.

In case of execution of an EIO, the evidence acquired has to be handed over directly to the Issuing Authority of the EU Member State.

When EIO concerns covert investigations, these investigations are run pursuant law 146/2006 that ratified the 2000 UN Convention of Organized Transnational Crime and the domestic executing Authority can promote the establishment of a joint investigation team.

8.5.3. Italy as Issuing Country of EIO.

All Public Prosecutors (not only District Prosecutors) as well as Judges of preliminary investigations may issue an EIO, pursuant to the National legislation.

Public Prosecutors may request to participate to the execution of the EIO and promote the establishment of a joint investigation team.

Pursuant to article 31 of law 108/2017, EIO may be issued also at the request of the defence counsel of the accused and/or of the person being subject to a preventive measure. Victims are not explicitly mentioned as private parties being entitled to request the relevant Public Prosecutor to issue an EIO.

Before 31 October 2017, pursuant to the case law of the Supreme Court, the defence counsel was not entitled to run in foreign countries the own enquiries in the interest of the accused and the relevant outcomes could be tendered as evidence to the Court, but had to submit a specific request to the Public Prosecutor to acquire exculpatory evidence abroad (*Corte di Cassazione*, Sez. 1, sent. n. 23967 del 29/05/2007 (dep. 19/06/2007) CED Rv. 236594).

If the Public Prosecutor assumes that the request of an EIO filed by the accused has to be rejected, submits the own arguments to the domestic competent Court for the relevant decision.

Both the Directive and 108/2017 law do not mention legal entities as involved in the recognition and execution of an EIO.

If it is needed to carry on intercepts of communications in another EU member States when the apparatus to be intercepted is not located in the National territory, pursuant to article 43 of law. 108/2017, the Public Prosecutor issues the relevant EIO. Pursuant to the National legislation, however intercepts of communications can be carried on pursuant to a reasoned order issued by the Court. It can be therefore assumed that an EIO can be issued by the Prosecutor on the bases of an order issued by the relevant Italian Court. In absence of that order, the outcomes of intercepts carried on in

a EU member States pursuant an EIO issued by the Public Prosecutor without a previous order by the Judge cannot be tendered as valid evidence to a National Court.

Pursuant to article 44 of the 108/2017 law, in case of interception of

- mobile phones as well as of
- e-mail correspondence being run only in the national territory through proper routing procedures, as well
- of communications within cars.

If such items move to a EU Member State and no assistance by the relevant Authority of the concerned Member State is needed to carry on such interception, the domestic Public Prosecutor running such interceptions must inform the relevant Authority of the concerned EU Member State.

If the relevant Authority of the concerned EU Member State communicates that such interceptions cannot be carried on pursuant to the relevant legislation of the concerned EU member State, the domestic Public Prosecutor must order the immediate termination of the interceptions. The outcomes of terminated interceptions can be used before domestic Courts only within the conditions set up by the Authority of the concerned EU Member State.

Pursuant to the national case law before law 108/2017, if a bugged car moved to a foreign country, there was no need to request judicial cooperation, as well as there was no need to request judicial cooperation if a mobile phone being intercepted was carried abroad and

- if the electronic surveillance focused only on national telephone numbers being contacted or
- if the telephone communications involving that telephone device were channeled to a domestic operator.

A formal request of judicial cooperation was necessary in case domestic law enforcement agencies had to intercept the communications of a non-national mobile phone located abroad with other foreign mobile phones.

The EIO issued by the Public Prosecutor concerning freezing of evidence can be challenged before a domestic Court.

Pursuant to article 36 of the 108/2017 law,

- documents acquired abroad pursuant to an EIO;
- the records of investigative acts such as searches, forfeitures;
- the outcomes of investigations run with the participation of the defense counsel of the accused in a EU Member State pursuant to an EIO issued in Italy
- records of Statements given during the investigations by witnesses residing in a EU Member State who for whatever reason, cannot be examined before an Italian Court

are deemed as valid evidence and can be inserted in the case file immediately available to the Court.

Article 36 mirrors the provisions of article 431 of the national criminal procedural code, related to the use in Court of evidence collected in a Foreign Country, other than EU Countries bound by the 2014 EU Directive

Pursuant to the case law on article 431 of the criminal procedural rules, in case of request of mutual legal assistance, any piece of evidence collected in a foreign country pursuant to the relevant national law can be tendered as evidence before the Italian Court, unless the national law of the relevant requested Country infringes the fundamental principles of the Italian legal system.

9. Cooperation with the International Criminal Court.

Pursuant to laws 237/2012 (on cooperation with the International Criminal Court – hereinafter ICC)

- the Central Authority to assist the competent judicial authorities is the Minister of Justice,

- the judicial authorities entitled to execute the requests of cooperation are the Office of the Prosecutor General in Roma the Court of Appeal in Roma,

- when the cooperation requested by the abovementioned Courts concerns investigations and/or acquisition of evidence, the Prosecutor General Office in Roma files a request to the Court of Appeal in Roma to execute such request,

- upon decision of the Court of Appeal the requested evidence is collected, following a specific designation, by a Judge of the Court of Appeal of Roma or by the Judge of Preliminary Investigation at the Court of first instance,

- upon request, members of the Office of the Prosecutor at ICC and ICTY, as well as Judges of the Courts can participate to the requested investigation and/or acquisition of evidence.

Pursuant to article 4 law 237/2012, the Office of the Prosecutor General is empowered to assist the Office of the Prosecutor at ICC pursuant to article 99 para 4 of the Statute of ICC, "*where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place…*".

Laws 237/2012, as far as execution of requests of legal assistance, enforcement of ICC sentences and transfer of accused are concerned, refers to the relevant rules of the criminal procedural rules.

These rules, as it was highlighted above, were recently amended by law 149/2017. It will be up to the Court of Appeal of Roma and to the Supreme Court to decide whether such amendments impact also on the judicial authority that will have to execute the requests from ICC (since 31 October 2017 the District Public Prosecutor of Roma and the Judge of preliminary Investigations at the District Court in Roma).

10. Conclusions.

The overview on the national system and case law on judicial cooperation that has been elaborated leads to highlight the following items.

10.1. The change of approach to judicial cooperation in criminal matters.

The National approach to judicial cooperation changed significantly in the last two years.

Pursuant to the criminal procedural code, before law 149/2017, the execution of requests of mutual legal assistance filed by foreign law enforcement agencies fell within the duties and powers of Courts of Appeals and Prosecutor General Offices.

Before the entry into force of law 35/2016 that transposed into the domestic legislation EU framework decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, the execution of orders and decisions issued by EU Member States (such as EAWs) fell also Courts of Appeals and Prosecutor General Offices.

Public Prosecutor Offices and judges of preliminary investigations at first instance Courts were actively involved only as requesting authorities of mutual legal assistance addressed to foreign Authorities as well as issuing authorities of decisions and orders to be recognized and executed in EU Member States.

Despite the efforts and dedication that must be recognized to Courts of Appeals and Prosecutor General Offices when dealing on decisions and executions on requests of mutual legal assistance, the relevant procedures resulted lengthy, especially when after the designation by Courts of Appeal, other authorities such as judges of preliminary investigations and public prosecutors (when the latter were delegated by the judges of preliminary investigations) were called to execute such requests and then transmit the acquired evidence to the Courts of Appeal that forwarded such evidence to the requesting foreign law enforcement agencies.

The Supreme Court (see the abovementioned decision n. 43950/2001) stated that such procedures were compatible with the obligations falling on the domestic judicial authorities pursuant to articles 15 of the European Convention on Mutual Legal Assistance and 53 of the 2000 Convention implementing the Schengen Agreement of 14 June 1985, allowing direct communications on judicial cooperation between requesting and requested law enforcement agencies.

The Ministry of Justice recommended, by issuing in 2015 the abovementioned recommendation (see Chapter 4), to expedite the procedures related to judicial cooperation. Such recommendations, however, called on domestic judicial authorities to transmit the own requests straight to the relevant foreign law enforcement agencies directly or through the European Judicial Network or Eurojust and focused therefore only on requests of judicial cooperation issued by domestic judicial authorities.

After

a) the transposition into the National Legislation of the following EU framework Decisions and Directives
b) the ratification of the 2000 European Union Convention on Judicial Assistance in Criminal Matters
c) the entry into force, on 31 October 2017, of law 149/2017,

the judicial authorities being entitled to request mutual legal assistance and issue decisions and orders to be executed in EU Member States are all Public Prosecutors and judges of preliminary investigations (consistently with the rules of the criminal procedural rules before 31.10.2017).

The duty to recognize and execute judicial decisions and orders issued by an EU Member State judicial authority as well as to execute requests of mutual legal assistance falls on

- the Court of Appeal (after the arguments file by the General Prosecution Offices) in case of EAW and confiscation order,
- the Public Prosecutor in case of orders freezing property or evidence,
- the District Public Prosecutor and the judge of preliminary investigations in case of European Investigation Order (EIO) issued by a EU Member State judicial authority and requests of mutual legal assistance filed by foreign (including EU) law enforcement agencies.

There is therefore no perfect identity between

- the domestic authorities requesting judicial cooperation and issuing orders and decisions to be executed in EU Member States,
- the domestic authorities called to execute requests, decisions and orders issued by foreign (including EU Member States) law enforcement agencies.

This lack of identity between requesting/issuing and executing judicial authorities might raise difficulties in the implementation of the current national legislation and for the requesting/issuing foreign authorities.

The assistance that Institutions such as the European Judicial Network, Eurojust, the Ministry of Justice, liaison magistrates[16] are going to be asked to provide will be significant.

[16] Joint Action 96/277/JHA of 22 April 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union established a framework for the posting or the exchange of magistrates or officials with special expertise in judicial cooperation procedures, referred to as 'liaison magistrates', between Member States, on the basis of bilateral or multilateral arrangements (see here).
The tasks of liaison magistrates shall normally include any activity designed to encourage and accelerate all forms of judicial cooperation in criminal and, where appropriate, civil matters, in particular by establishing direct links with the relevant departments and judicial authorities in the host State (see here).

10.2. Extension of judicial coopeeration to confiscation orders on crime-related proceeds, instrumentalities and property.

The current legal framework (EU Directive 2014/42/JHA and article 27 of law 108/2017) entitles domestic judicial authorities to issue EIO and confiscation orders within national proceedings on the application of preventive measures. Such framework provides an extended legal basis to investigate, trace and confiscate crime related assets and deprive therefore transnational criminal organizations of significant financial sources.

10.3. The role of suspects, accused and other private parties within the legal framework of EIOs and law 149/2017.

Pursuant to article 31 of law 108/2017, the defence counsels of the accused and of the suspect being subject to a proceeding for the application of preventive measures are entitled to file a motion to the domestic Public Prosecutor in order to have an EIO issued aimed at acquiring exculpatory evidence or in any case evidence favorable to them.

Such right has not yet explicitly provided for the victims (whose rights in criminal proceedings are in any case safeguarded pursuant to Directive 2012/29/EU of the European Parliament and of the Council of 25th October 2012 establishing minimum standards on the rights, support and protection of victims of crime) as well as for legal entities.

Article 696-*septies* of law 149/2017 provides legal basis for the mutual recognition of judicial decisions concerning the liability of legal entities for offences committed to their benefit.

10.4. The added value of case law.

Due to the recent entry into force of above mentioned laws 137/2015, 35/2016, 52/2017, 108/2017, 149/2017, it will take some time to have a consolidated case law by the Supreme Court.

The abovementioned case law on the relevant articles of the criminal procedural code before law 149/2017 and on bilateral agreements on extradition and mutual legal assistance, law 69/2005 (that transposed into the National legislation the Framework Decision on European Arrest Warrant) leads to the conclusion that the Supreme Court issued the own decisions by balancing

- the obligation falling on national authorities to implement the relevant rules on mutual legal assistance and timely execute letters rogatory and as well as orders and decisions issued by EU Member States judicial authorities,
- the respect the fundamental principles as enshrined in the Constitution and the European Convention on Human Rights,

- the exploitation before national Courts of evidence legally acquired and handed over by foreign law enforcement agencies either according to requests of mutual legal assistance, either spontaneously, no matter whether that evidence was not acquired pursuant to the relevant rules of the domestic criminal procedural code.

The Supreme Court stated in fact that domestic Courts can be addressed appeals and challenges only related to requests, orders and decisions issued by domestic judicial authorities and cannot be tasked to decide on appeals against decision issued by foreign authorities.

The evidence legally collected and handed over by foreign law enforcement agencies, pursuant to the relevant laws of the concerned country either according to a request of mutual legal assistance, either spontaneously, can be legally tendered before domestic courts, no matter if the relevant rules of the domestic criminal procedural codes are not fully observed.

Consistently with such principle, copies of documents handed over by foreign law enforcement agencies as well as any piece of evidence acquired in the absence of the accused if his/her legal assistance was ensured can be tendered to and/or used as valid evidence before domestic courts.

Finally, no judicial cooperation can be provided to foreign law enforcement agencies if there are grounds to believe that due to such cooperation the accused will be subject to an unfair trial, and/or inhuman or degrading treatment.

The respect of fundamental rights of the accused and of national security must therefore be given priority over mutual legal assistance as well as over recognition and execution of decisions and orders.

Such prioritization of the fundamental human rights led the Supreme Courts to identify further grounds of refusal other than those provided by the relevant international instruments and to confirm and ensure the paramount value of judicial cooperation, but within the respect of such values.