

Italy, Constitutional Court, order 216/2021, constitutional instance, 18 November 2021, published in the Italian Official Journal on 24/11/2021

Member State

 Italy

Topic

Mutual trust

Sector

Judicial Interaction Techniques; European Arrest Warrant; role of national higher courts; use of the Preliminary Reference Procedure

Deciding Court Original Language

Corte Costituzionale

Deciding Court English translation

Constitutional Court

Registration N

216/2021

Date Decision

18 November 2021

ECLI (if available)

IT:COST:2021:216

National Follow Up Of (when relevant)

Case originating the CJEU decision in C-699/21, EDL

EU legal sources and CJEU jurisprudence

Sources referred directly: Articles 6 and 19(1) TEU; Articles 1(3) and 23(4) EAW Framework Decision (584/2002); Articles 3, 4, 35, 47, 51 and 52(4) of the EU Charter;

C-617/10, Fransson; C-399/11, Melloni; C-404/15 e C-659/15 PPU, Aranyosi e Csabai; C-

220/18 PPU, ML; C-128/18, Dorobantu; C-216/18 PPU, LM; C-354/20 PPU and C-412/20 PPU, L and P; C-578/16 PPU, C. K.

ECtHR Jurisprudence

Articles 2 and 3 ECHR and ECtHR judgments in *Aswat v United Kingdom* (2013); *Savran v Denmark* (2019); *Paposhvili v Belgium* (2013); *Romeo Castaño v Belgium* (2019)

Subject Matter

Judicial review for the constitutionality of Articles 18 and 18-bis of Italian Law 69/2005 transposing the EAW in relation to Articles 2, 3, 32 and 111 of the Italian Constitution. The Constitutional Court considers that the matter concerns the interpretation of Article 1(3) EAW Decision and Articles 3, 4 and 35 CFR and refers a preliminary request to the CJEU.

Legal issue(s)

Interpretation of the EAW Decision in light of fundamental rights under the Charter; possibility to suspend or refuse surrender under the EAW for health grounds; test to be performed by the judicial authority executing the EAW.

Request for expedited/PPU procedures

The national court requested the CJEU to review the case under the expedited procedure because, even though the applicant was not deprived of liberty, the question referred concerned essential aspects of the functioning of the EAW, and it was likely to have general consequences. The President of the Court refused the request finding that such reasons were not enough to establish the exceptional urgency necessary to justify an expedited procedure. Yet, the President decided to give the case priority treatment in accordance with Article 53(3) of the Rules of Procedure.

Interim Relief

No interim relief asked

National Law Sources

Articles 2, 3, 32 and 111 of the Italian Constitution; Articles 18, 18-bis and 23(3) of Law N. 69 of 2005; Article 705(2)(c-bis) of the Code of Criminal Procedure

Facts of the case

Constitutional Court seized with a question on the constitutionality of Articles 18 and 18-bis of Italian Law 69/2005 which transposes the EAW. Those questions were raised by the Court of Appeal of Milan, which was called upon to decide whether to execute an EAW issued by the Court of Zadar against EDL, an Italian resident suspected of having committed in Croatia the offence of possession and sale of narcotics. According to the psychiatric examination ordered by the Court of Appeal, EDL suffers from a chronic psychiatric disorder of indefinite duration. The report also identified a high suicide risk in case of imprisonment and concluded that EDL was not suitable for prison life. The Court of Appeal was thus of the view that the surrender of EDL would not only interrupt his treatment but also expose him to the risk of suffering exceptionally severe harm to his health. Since Law 69/2005 does not include a ground allowing Italian judicial authorities to refuse

surrender based on chronic and indefinite illness, the Court of Appeal asked the Constitutional Court to declare that legislation incompatible with the fundamental right to health protected under Articles 2 and 32 of the Constitution, the principle of equality under Article 3 of the Constitution, and the principle of the reasonable time of proceedings laid down in Article 111 of the Constitution.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Constitutional Court noted that the questions referred by the Court of Appeal of Milan not only concern the constitutionality of Articles 18 and 18-bis of Italian Law No 69 of 2005 but also involved the interpretation of the EU act specifically implemented by the national legislation, that is, the EAW Framework Decision. Indeed, Articles 3, 4 and 4(a) of the EAW Decision do not include among the grounds to refuse surrender the risks connected to a severe harm to the health of the person to surrender. The Constitutional Court also noted that EU law could not tolerate that the execution of an EAW results in a breach of the fundamental rights recognized by the Charter. Since in the present case the surrender could expose the person to a serious risk of severe harmful consequences for his or her health, this would breach the right to health under Articles 3, and 35 of the Charter. The same is true for the right not to be subjected to inhuman or degrading treatment under Article 4 of the Charter. In this respect, the Constitutional Court refers to the case law of the ECtHR, according to which extraditing/expelling a person with a severe mental illness to a State where that person would likely be held in pre-trial custody without access to appropriate medical treatment constitutes a violation of Article 3 ECHR (which correspond to Article 4 of the Charter). It also stresses that the same principle was affirmed by the CJEU in the CK judgment which however concerned EU asylum policy and not the EAW/extradition. The Constitutional Court recognized that the recent case-law of the Court of Justice has established exceptions capable of reconciling the requirements of mutual recognition with respect for fundamental rights. This is the case of the possibility to deny surrender in case it might expose the person concerned to inhuman and degrading detention conditions in the issuing Member State as a result of systemic or generalized deficiencies (quotation of the CJEU judgments in Aranyosi, ML and Dorubantu) or being subject to proceedings which do not respect the guarantees of fair trial on account of systemic or generalized deficiencies concerning the independence of the judiciary in the issuing Member State (quotation of the CJEU judgments in LM and L and P). The Constitutional Court thus considered that the principles laid down by the CJEU in those judgments could (and should) be extended to the present case. Accordingly, when the person to be surrendered suffers from a severe disease, a dialogue between the executing and issuing judicial authorities could allow solutions that would make it possible to put the person concerned on trial in the issuing State without the risk of serious damage to his or her health. Only if that dialogue fails within a reasonable period of time should the executing judicial authority be allowed to refuse surrender. In the end, the Constitutional Court decided to stay proceedings and refer a question for a preliminary ruling to the Court of Justice. It asked whether Article 1(3) of the EAW Decision, read in the light of Articles 3, 4 and 35 of the Charter, must be interpreted as requiring the executing judicial authority, where it considers that the surrender of a person suffering from a serious chronic and potentially irreversible disease may expose that person to serious harm to his or her health, to request from the issuing judicial authority the information ruling out such a risk, and, if it does not obtain such assurance within a reasonable period of time, to refuse surrender.

Relation of the case to the EU Charter

Articles 2,3 and 35 of the Charter were invoked by the Constitutional Court as a parameter for interpreting the EAW decision. According to the Constitutional Court the EAW should be interpreted in light of those Charter provisions as requiring the executing judicial authority to request that the issuing judicial authority information ruling out the risk that a severely ill person

would, if surrendered, risk suffering serious harm to his or her health. Only if it does not obtain assurances to that effect within a reasonable period of time, should it refuse to surrender the person in question. The CJEU in its judgment interprets Article 1(3) of Framework Decision 2002/584 only in the light of Article 4 of the Charter.

Relation between the EU Charter and ECHR

The Constitutional Court cites Article 3 ECHR as it corresponds to Article 4 of the Charter and quotes the case law of the Strasbourg Court to support the idea that the surrender of the seriously ill person would represent an infringement of his/her right not to be subjected to inhuman or degrading treatment (judgments *Aswat v. United Kingdom*; *Savran v. Denmark*; and *Paposhvili v. Belgium*). It also quotes Article 2 ECHR and the ECtHR judgment in *Romeo Castaño v Belgium* to stress that the need to protect fundamental rights of the person to surrender must be reconciled with the interest in prosecuting suspected offenders, and, if guilty, ensuring that they are punished.

Use of Judicial Interaction technique(s)

Preliminary reference, mutual recognition.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The Constitutional Court only engages with an assessment of the order of the Court of Appeal of Milan which was at the origin of the constitutionality review. It also mentions a case of the Italian Court of Cassation about the impossibility for a person subject to surrender proceedings to invoke his/her state of health during surrender proceedings (Italian Court of Cassation, Sixth Criminal Division, Judgment No. 19389 of 25-26 June 2020, and No. 5933 of 12-14 February 2020).

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Constitutional Court engages with an assessment of case law of both the CJEU and the ECtHR, judgments. In particular, it refers to the CJEU judgments in *Fransson* (C-617/10) and *Melloni* (C-399/11) in relation to the principle precluding Member States from making the implementation of EU law in areas subject to full harmonisation conditional on compliance with purely national standards of protection of fundamental rights, where this could compromise the primacy, unity and effectiveness of EU law. It refers three times to the CJEU judgment in *Aranyosi e Căldăraru* (C-404/15 e C-659/15 PPU) in relation to the ratio behind the enumeration in the EAW Framework Decision of the mandatory or optional grounds for refusal, the possibility to deny surrender in case of risk of inhumane and degrading detention in the issuing State due to systemic and generalised flaws (here it also refers to the CJEU judgments in *ML* (C-220/18 PPU) and *Dorobantu* (C-128/18)) and the absolute nature of Article 4 of the Charter. The Constitutional Court refers to the CJEU judgment in *LM* (C-216/18 PPU) and *L and P* (C-354/20 PPU and C-412/20 PPU) in relation to the possibility to deny surrender under EAW in case the person concerned may face trial without the protection guaranteed by Article 47 of the Charter due to systemic and generalised flaws concerning the independence of the judiciary in the issuing State. Finally, the Constitutional Court quotes the CJEU judgment in *C.K.* (C-578/16 PPU) in relation to the possibility not to make a Dublin transfer where that transfer would result in the asylum seeker's suicidal tendencies being exacerbated with the consequential risk that he or she will be subjected to inhuman or degrading treatment. For the quotation of the judgments of the ECtHR see point 5.4.

Strategic use of judicial interaction technique (purpose aimed by the national court)

The scope pursued by the Constitutional Court when using judicial interaction techniques was to solve conflicts of judicial interpretation involving fundamental rights enshrined in the EU Charter. In particular, the Constitutional Court sought an interpretative solution that would reconcile the duty to surrender under the EAW with Charter rights that would avoid a conflict between the national legislation transposing the EAW with the individual rights protected by the Italian Constitution. It indeed argues in favour of extending the principles enshrined by the CJEU judgments in Aranyosy and LM to the case of health risk and it states that it does so "in a framework of constructive and loyal cooperation between the different systems of protection". In this respect, it mentions its orders n. 182 of 2020 and n.117 of 2019 and its judgment No. 269 of 2017.

Impact on Legislation / Policy

N/A

Notes on the national implementation of the preliminary ruling by the referring court

Not yet applicable

Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The Constitutional court quotes case law of both the CJEU and ECtHR. See points 4.3, 4.4 and 6.3.

Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

No reference to soft law

Did the national court take into account national case law on fundamental rights?

The Constitutional Court refers to its own case law on the fundamental right to health under Articles 32 and 2 of the Italian Constitution (Judgment No. 245 of 2020) and its exclusive power to assess the compatibility of EU law, or national law implementing it, with the highest principles of the Constitution or the inviolable rights of the individual (Order No. 24 of 2017).

If the court that issued the preliminary reference is not a last instance court, and the "follow up" was appealed before a higher court, include the information

The court that issued the preliminary reference is a last instance court

Impact on national case law from the same Member State or other Member States

N/A

Connected national caselaw / templates

Question for constitutionality of the Court of Appeal of Milan (Order of 17 September 2020 n 194); Judgment of the Italian Constitutional Court of 2023 n 177 (follow up of the CJEU judgment in EDL)

[\(Link to\) full text](#)

Order of the Constitutional Court requesting a preliminary reference to the CJEU:

<https://www.cortecostituzionale.it/actionPronuncia.do> (Italian)

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=252182&pageIndex=0&doclang=EN&mode=req&dir>
(English translation)

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