

THE EUROPEAN ARREST WARRANT AND DOMESTIC LEGAL ORDERS. TENSIONS BETWEEN MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS: THE ITALIAN CASE

LUISA MARIN*

ABSTRACT

This article presents and discusses some recent decisions on the European Arrest Warrant by the Italian higher courts, the Constitutional Court and the Court of Cassation. Though not as challenging to the EAW as the 'first round' of European judgments of 2005, they bring however some interesting developments on aspects concerning the enforcement of EAW and domestic provisions related to fundamental rights protection. Secondly, these cases allow analysis of mutual recognition, the principle underlying the whole EAW system. A first element stressed here is the importance of dialogue among European actors on third pillar instruments and more generally subjects involving criminal law and justice administration. Secondly, it is suggested here that there are several views on the EAW and mutual recognition. Analysis of Italian case law reveals that domestic courts are faced with the issue of enforcing EAW and securing fundamental rights protection; in so doing, they remain anchored in the domestic system of legal guarantees, which could lead to divergent solutions across European states. The suggestion made is that mutual recognition requires an active role to be played by courts, that it has systemic implications, and that it requires domestic courts to be able to exercise some political discretion, not so different as under extradition schemes.

Keywords: European Arrest Warrant; Mandat d'arrêt européen; Mutual recognition; Reconnaissance mutuelle; Fundamental Rights; Droits fondamentaux; Individual guarantees; Garanties de l'individu

* Lecturer in European Law, Centre for European Studies, Twente University; l.marin@utwente.nl.

§1. INTRODUCTION

After the first round of ‘constitutional challenges’ to the European Arrest Warrant¹ (hereinafter EAW) of 2005 in Poland, Germany and Cyprus,² the Italian Constitutional Court has now handed down its first decisions on the issue. As recognized in European constitutional doctrine, the Italian ‘*giudice delle leggi*’ is an authoritative actor within the constitutional dialogue in Europe.³ Beyond the specific Italian dimension, this article will suggest that the analysis of higher domestic courts’ decisions is especially significant and relevant in the domain of justice and home affairs. The current institutional structure of the Third Pillar and the topics in that area of integration are such that the enforcement of European rules here depends more on the contribution of domestic legal orders than it does in Community matters.⁴ Therefore the domestic implementation of the EAW, and thus acceptance of the contested principle of mutual recognition, is even more interesting for the light it casts on the dialogical or negotiated construction of the principle itself and the legal developments it has introduced.⁵

The aim of the EAW is to bypass extradition proceedings between European Member States; it is the first instrument of judicial cooperation implementing the principle of mutual recognition of judicial decisions in criminal matters. At the Tampere European Council (1999), Member States agreed to endorse mutual recognition as the cornerstone of policy in this area of cooperation, accepting a previous proposal by the British Government.⁶ In copying the principle of mutual recognition from the internal market and inserting it into criminal law cooperation – part of the construction of an Area of Freedom, Security and Justice – Member States showed themselves willing to take

¹ Council Framework Decision 2002/584/JHA, [2002] O.J. L 190/1.

² This phrase is of course borrowed from E. Guild (ed.), *Constitutional challenges to the European Arrest Warrant* (Wolf Legal Publishers, 2006). In 2006, the Czech Constitutional Court also handed down a decision on EAW, but relied on consistent interpretation. See J. Komárek, ‘European Constitutionalism and the European Arrest Warrant: in Search of the Limits of “Contrapunctual Principles”’, 44 *C.M.L. Rev.* 9 (2007). On consistent interpretation as a tool to avoid constitutional conflicts, see also L. Marin, ‘Il mandato di arresto europeo al vaglio delle corti nazionali: divergenze e convergenze nell’interpretazione di uno strumento transnazionale europeo’, in N. Zanon (ed.), *Le Corti dell’integrazione europea e la Corte costituzionale italiana* (Edizioni Scientifiche Italiane, 2006), 217–238.

³ M. Cartabia, “‘Taking Dialogue Seriously’”. The Renewed Need for a Judicial Dialogue at the Time of a Constitutional Activism in the European Union’, Jean Monnet Working Paper 12/07, ELINIS – European Legal Integration: The New Italian Scholarship, available at jeanmonnetprogram.org/papers/07/071201.pdf.

⁴ For several reasons, e.g., the lack of ‘regulation’, but especially the lack of an infringement proceeding through which domestic legislation that diverges from European instrument can be sanctioned and the different legal provisions concerning preliminary references. Therefore, the only tool at the disposal of the Commission, namely evaluations under Art. 34 of the EAW Framework Decision, appear as nothing more than a harmless weapon.

⁵ An exchange of opinions with Advocate General Poiares Maduro was useful in developing these reflections.

⁶ See, for this purpose, the Cardiff European Council of 15–16 June 1998, para. 39.

a shortcut and thus avoid embarking on the more legally demanding and politically complicated method of harmonizing criminal law systems.⁷

This contribution focuses on some recent and relevant judgments of Italian higher courts. It is worth highlighting, for the scope of this article, that the Constitutional Court decides on questions concerning the constitutionality of the EAW domestic implementing act,⁸ upon the request of lower courts, whereas the Court of Cassation rules on the basis of challenges brought by those individuals affected by an EAW i.e. suspects against whom an EAW has been issued. The last remedy for these individuals is a '*ricorso per cassazione*' ('*recours en cassation*') established by Article 22 of the domestic EAW Act. The first court controls the conformity of domestic legislation with the constitution; the second performs the function of securing the correctness of law enforcement and the uniformity of interpretation (*funzione nomofilattica*). This article will begin by presenting two decisions of the Italian Constitutional Court, explaining the domestic provisions under scrutiny. It is interesting to note that the referrals of the Constitutional Court focus on (the constitutionality of) two different provisions of EAW Act No. 69, both concerning *grosso modo* guarantees against the deprivation of liberty. Another judgment of the *Corte di Cassazione* is also analyzed for its connection with a constitutional case of relevance to this article, in which the Constitutional Court referred to the judgment. Secondly, I develop some reflections on this case law. In this context I will analyze the connections between mutual recognition and fundamental rights (as legal guarantees to individuals against state powers), through the case law of high Italian jurisdictions. Furthermore, I will elaborate the principle of mutual recognition *per se* by looking at its substantive implications.

§2. TWO DECISIONS OF THE ITALIAN CONSTITUTIONAL COURT ON THE EAW

Order (*ordinanza*) No. 109/2008 and Judgment (*sentenza*) No. 143/2008 are the first decisions delivered by the Italian Constitutional Court on the Italian Act implementing the EAW. The implementing Act was passed with some delay after the transposition

⁷ The European Court of Justice's Judgment in case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, the Communicative Interpretation of the Commission of 1980, and last but not least, the White Paper on completing the Internal Market (COM/85/310) of 1985 are the main steps in the move toward mutual recognition in the legal construction of economic integration. On harmonization of criminal law see A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur des ses tensions* (Editions de l'Université de Bruxelles, 2004).

⁸ Act 22 April 2005, No. 69 'Provisions to implement framework decision 2002/584/JHA ... on EAW and surrender procedures between Member States.' ['Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri'], published in the *Gazzetta Ufficiale* [2005] No. 98, 29.4.2005.

deadline. Notwithstanding a long gestation, the statute was criticized for diverging from the European Framework Decision in a number of areas, thus revealing some (political) reluctance about the instrument itself. Since the entry into force of the implementing act, the *Corte di Cassazione* has received a number of challenges to decisions by courts of appeal to surrender individuals under the EAW (according to Article 22 Act No. 69, providing the right to a judicial remedy against a decision of surrender). With these challenges, the *Cassazione* also began its work of interpreting the implementing legislation.⁹

A. THE LEGAL BACKGROUND: DOMESTIC PROVISIONS UNDER SCRUTINY AND ISSUES AT STAKE

The first question of constitutionality (that leading to Order No. 109/2008) was referred to the Constitutional Court by the Venice Court of Appeal,¹⁰ and it concerned a provision of the implementing Act that was potentially a serious obstacle to the operation of EAW in Italy. Article 18(1)(e) of Act No. 69 constitutes a ground for refusal to surrender additional to those listed in the Framework Decision. This provision requires Italian judges to refuse to execute an Arrest Warrant because of the lack of maximum terms for preventive detention in the legislation of the issuing state. The provision on maximum terms is typical of the Italian legal system, as will be shown in relation to the second question of constitutionality.¹¹

This ground for refusal is designed to protect the right to personal liberty and the presumption of innocence, balancing these individual rights with society's interest in justice and security. It takes its inspiration from a core provision of the Italian Constitution.¹² The issue is a sensitive one because constitutional norms on fundamental rights are recognized by the Constitutional Court as limits to accepted limitations of sovereignty stemming from European integration (*controlimiti*, literally translated as counter-limits).¹³ If the EU system required implementation of a rule that breaches a fundamental right of the individual or a core value of the Italian State, a systemic conflict would occur.

⁹ For a survey of this case law see L. Marin, 'The European Arrest Warrant in the Italian Republic', 4 *Eur. Const. L. Rev.* 251 (2008).

¹⁰ It was brought before the Constitutional Court by Order (*Ordinanza*) of the Venice Court of Appeal of 24.10.2006, dep. 25.10.2006, published in the Official Journal of the Italian Republic, No. 10 of 7.3.2007 (Constitutional Court series), at www.gazzettaufficiale.it.

¹¹ So states Art. 18 of Act 22 April 2005, No. 69, namely under letter (e): 'The court of appeal refuses surrender in the following situations: ... e) if the legislation of the issuing member State does not provide for maximum terms of preventive detention.' (My translation).

¹² Section 13(5) of the Constitution states: 'The law establishes the maximum period of preventive detention.'

¹³ See especially judgments No. 183 of 1973 (Frontini), No. 170 of 1984 (Granital) and No. 232 of 1989 (Fragd) of the Constitutional Court.

The wording of Article 18(1)(e) of the Italian EAW Act is such that a literal interpretation would have implied the existence of a ground for refusal without a direct legal basis in the European Framework Decision; more importantly, that ground for refusal was based on the disparity in legislation governing mechanisms for controlling custodial detention, as well as different means for the protection of personal liberty. The existence of Article 18(1)(e) therefore implied a breach of the mutual recognition principle, as well as of mutual trust as conceived from a European perspective. This would have caused a substantial malfunctioning within the EAW system.

The second referral to the Constitutional Court concerned a provision pertaining to the method of calculating the maximum terms of preventive detention undergone abroad. The Italian law (code of criminal procedure) is constructed so as to protect individual liberty against (abuse of) preventive detention through a complex system of maximum terms. This system of terms refers both to the entirety of the criminal proceeding and to every single stage within it. Referring to the former, there is a *termine massimo complessivo* (maximum final term), while in the latter case we have *termini di fase* (or stage terms within the trial: terms that are ‘internal’, i.e. related to every stage of the proceedings). The domestic system provides that preventive detention must be limited by this double system of internal and final terms.

The Italian implementation of the EAW, in particular Article 33 of Act No. 69, does not provide for pre-trial custody abroad to be taken into account for the purposes of trial stage terms (*termini di fase*); instead, pre-trial custody can only be taken into account when calculating the maximum final term. The reason for this ‘omission’ was that detention or similar occurrences abroad are not under the control of the Italian State. The consequences are a difference in legal treatment between the Italian Code of Criminal Procedure and Act No. 69, and thus a potential breach of the equality principle.

B. THE DECISIONS OF THE CONSTITUTIONAL COURT

In its first decision of 18 April 2008,¹⁴ the Constitutional Court declared inadmissible the question of constitutionality on the additional ground for refusal of Article 18(e) of the Italian EAW Act. This is more interesting than it might seem at first glance, bearing in mind the system of constitutional adjudication in Italy. What follows is an attempt to illustrate this point.

For the purpose of the present contribution, it is sufficient to note that, by law, the referring court must explain in its order why the response of the Constitutional Court is relevant to the resolution of its case and also that the question is not patently without foundation. The role of the referring judge is thus that of a ‘filter’ in the referral of questions

¹⁴ Order No. 109/2008. It concerned a preliminary question on Article 18(1)(e) of the implementing act (maximum term for detention on remand pending trial).

to the Constitutional Court. The non-fulfilment of one of these two requirements renders the question inadmissible.

Furthermore, the Court requires, even for the purposes of admissibility, that the referring courts provide reasons in the 'order' stating why an interpretation of the provision consistent with the Constitution is not possible.¹⁵ Indeed, the Italian Constitutional Court has developed a method of interpretation consistent with the Constitution (*interpretazione conforme a Costituzione* or *adeguatrice*) to such an extent that it strikes down a statutory provision only if *no* interpretation consistent with the Constitution is viable, not only because *one* of the possible interpretations breaches the Constitution. In the analysis of the *giudice delle leggi*, the Venice Court of Appeal had not demonstrated that an interpretation of the provision consistent with the Constitution was impossible.

How was this outcome reached? The question of constitutionality was presented by the Venice Court of Appeal following a decision by the *Corte di Cassazione* to quash a decision of surrender given by the same Venetian Court.¹⁶ The *Corte di Cassazione*, following a literal interpretation of Article 18 and the ground for refusal therein, quashed a decision of surrender to Belgium because there are no maximum time limits for pre-trial detention in the Belgian legal system. Unhappy with the (outcome and) interpretation, the Venice regional court took the first useful chance to raise the question of constitutionality before the Constitutional Court in October 2006.

The *Corte di Cassazione's* literal interpretation was highly contested, even within the same section of the *Cassazione*, because it presented a major obstacle to the execution of the EAW by Italian courts, and thus a barrier to the functioning of the whole EAW system. After a number of conflicting judgments,¹⁷ the issue was 'resolved' by a pronouncement of the authoritative United Chambers (*Sezioni Unite*) of the *Cassazione* – a special articulation of the court whose specific task is to resolve interpretative conflicts – in

¹⁵ See R. Romboli, 'La natura della Corte costituzionale alla luce della sua giurisprudenza più recente', paper available at www.associazionedeicostituzionalisti.it/dottrina/giustizia_costituzionale/romboli.html. Cf. the 'Report on the Constitutional case law of 2006', 22–24. Furthermore, this issue was problematic because the provision of the Italian implementing act is an expression of a constitutional fundamental right. I wish to stress once again that here we are in the sensitive area of *controlimiti*.

¹⁶ *Corte di Cassazione*, Section VI, judgment 8.5.2006–15.5.2006, No. 16542, *Cusini*. That interpretation would have impeded surrender toward several European countries with controls on preventive detention based on maximum time limits. In that case surrender to Belgium decided by the Venice Court of Appeal was quashed by the *Corte di Cassazione*.

¹⁷ In some judgments the literal interpretation was used and in others a teleological and systematic one was preferred. See *Corte di Cassazione*, Section VI, judgment 8.5.2006–15.5.2006, No. 16542, *Cusini*: this decision accepts a literal interpretation of the provision. In a different pronouncement (*ordinanza* 2.10.2006–23.11.2006, *Ramoci Vllaznim*) the same Section (VI) opted for an 'extensive' reading of the same provision. In a previous judgment, No. 24705, of 12.7.2006–1.9.2006, *Charaf*, the Court rejected the claim of maximum time limits for detention on remand pending trial, deciding on a European arrest warrant issued by a French judge.

early 2007.¹⁸ In its first decision, No. 109/2008, the Constitutional Court pointed to this decision of the *Sezioni Unite*, thus embracing the interpretation given by the *Cassazione*. The main points of that decision will be presented here, as the judgment of the United Chambers represents the resolution of a major problem of the 'Italian' EAW.

The *Sezioni Unite* decided that with regard to the EAW, Article 18(e) of the Act No. 69 – establishing refusal of surrender 'if the legislation of the issuing member State does not provide for maximum limits of preventive detention' – Italian judges must verify whether the legislation of the issuing member State provides for a maximum term of preventive detention until the end of the first stage of a criminal proceeding. In the absence thereof, the Italian judge must verify whether a time limit is implied in other procedural control mechanisms, establishing in a compulsory manner and at regular intervals judicial scrutiny of the legality and necessity of detention. Furthermore, the court should have the authority to release the suspect. The latter possibility is also known as a continuous review mechanism.

The *Sezioni Unite* chose to interpret Italian law consistently with the European Framework Decision. In doing so, the *Corte di Cassazione* could retain the domestic provision, and make it compatible with both a constitutional fundamental right¹⁹ as well as with the EAW Framework Decision. As a result of systematic and teleological interpretation, the *Corte di Cassazione* could fix a provision diverging from the EAW, both in its implementing and guiding principles. This interpretation of the United Chambers of the *Corte di Cassazione* has a number of advantages: it meant that implementing legislation did not have to be declared void. Moreover, the domestic legislation can be 'made' consistent and adjusted to fit both the European Framework Decision and the Constitution. The first legal instrument, based on the principle of mutual recognition, did not permit surrender to be refused because of different legislations and instruments for the protection of personal liberty between Member States. The second one, the Constitution, asks for guarantees protecting the individual against state powers (personal liberty and the presumption of innocence are different legal manifestations of this value).

This pronouncement of the United Chambers of early 2007 explains the decision of inadmissibility of the Constitutional Court in 2008 to the question of constitutionality raised by the Venice Court of Appeal. The issue had been resolved by the authoritative decision of the *Corte di Cassazione* of early 2007, and any different interpretation would have meant triggering a conflict between European and domestic norms, as well as a conflict between constitutional norms on European integration²⁰ and (an implementing

¹⁸ *Corte di Cassazione*, 'Sezioni Unite', judgment 30.1.2007–5.2.2007, No. 4614, *Ramoci Vllaznim*; see G. Negri, 'Salvo il mandato d'arresto Ue', *Il Sole-24 Ore*, 31 January 2007, who stresses how the *Corte di Cassazione* extensively interprets the Italian implementing act, achieving a more 'European' interpretation.

¹⁹ Or rather two: the right to personal liberty and the presumption of innocence.

²⁰ Namely, Articles 11 and 117 of the Constitution. Art. 11 of the Constitution states: 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of

rule inspired by) other constitutional norms on guarantees for the individual. The chosen resolution maintains harmony between legal orders, avoiding free-riding and evasion, as well as respect for national fundamental values. This is a perfect example of contrapunctual discourse being resolved harmoniously.²¹

Turning to the second decision of the Constitutional Court, Judgment No. 143 of 16 May 2008, the referral²² related to a more technical and procedural aspect concerning the manner of calculating maximum terms of preventive detention. The Court declared the implementing provision partially unconstitutional, because, very briefly, the Court equates detention abroad with detention in Italy. A difference in treatment depending on the place where preventive detention occurs therefore breaches the equality principle enshrined in Article 3 of the Constitution. Thus, the Court declared Article 33 of the implementing Act to be (partially) unconstitutional because it does not provide that pre-trial custody undergone abroad pursuant to an EAW is to be counted for the purposes of determining the maximum terms of detention in the analogous phase of the proceedings in Italy ('trial stage terms'). If detention abroad were to be taken into account only for the purposes of the final maximum terms, those detained under the EAW surrender scheme would be comparatively worse off than those arrested under an alternative mechanism. What the Court did was not to strike down the legislation; rather, it supplied the missing norm necessary for the statute to be constitutional, according to the indication of the referring Judge (in this case, the District Court in Bari). That is why this type of judgment is called 'additive'.

The decision of the Constitutional Court could not have gone another way. Indeed, in 2004 the Court had already ruled on a very similar question in the context of traditional extradition law.²³ That decision declared Article 722 of the Code of Criminal Procedure, concerning detention on remand pending trial in cases in which Italy is the requesting state, unconstitutional. Much like Article 33 of the EAW Act, Article 722 did not provide that the preventive detention abroad as a consequence of the request for extradition be taken into account in determining the maximum trial stage terms for detention on remand pending trial (*ex* Article 303, co. 1, 2, 3, of the Code of Criminal Procedure), and not only the maximum term (*termine massimo*).

international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.' Art. 117 states: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.'

²¹ See M. Poiães Maduro, 'Contrapunctual law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing, 2003), 530. J. Komárek, *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, Jean Monnet Working Papers, 2005, No. 10/05, at <http://www.jeanmonnetprogram.org/papers/papers05.html>.

²² The second question has been presented by the 'G.U.P.' (*giudice per l'udienza preliminare*) of the *Tribunale di Bari* (Order 27.12.2006, published in the Italian Official Journal No. 21, 30.5.2007).

²³ Judgment No. 253/2004.

The main element of both judgments is that detention abroad is comparable with detention undergone in Italy insofar as the scope of the guarantee of personal liberty is concerned. Moreover, the Constitutional Court does not deem an interpretative solution viable; this is not only because the literal wording of the text is very clear, but also because the *Cassazione* had already given its interpretation. In these cases, the Constitutional Court prefers to accept the interpretation of the *Cassazione* (*diritto vivente*) instead of beginning a turf war with the *Corte di Cassazione* on the interpretation of the law.

At first reading these decisions do not seem as groundbreaking as those of 2005; we could say they look like ‘maintenance work’ on the text of the Italian implementing Act. There has been no declaration from the Constitutional Court requiring a revision of the implementing Act or of the Constitution, as happened in Germany and Poland. However, a deeper analysis reveals interesting insights into the principle of mutual recognition (and its conceptual framework) as interpreted by the Italian highest courts.

§3. TENSIONS CONCERNING THE FOUNDATION OF THE EAW: DIFFERENT VIEWS ON THE PRINCIPLE OF MUTUAL RECOGNITION

As anticipated above, both decisions focus on the implementing legislation concerning the (domestic) instrument for protecting fundamental rights, namely personal freedom and presumption of innocence. This is the consequence of what appears to this author to be a specific choice of the Council of Ministers, i.e., to leave to the discretion of Member States the issue of how to protect human rights in the application of this cross-border instrument. This led to an unsatisfactory concern for human rights and procedural guarantees in the text of the Framework Decision, a much contested aspect and one perceived unanimously as a weak point of the instrument itself.²⁴ This article suggests that this is the consequence of a broader conceptual confusion – perhaps even recklessness – about the principle of mutual recognition and its ‘smooth’ transplantation to criminal co-operation policies. The first point is to some extent a consequence of the second.

In the next section, I quickly sketch some observations regarding the European institutional perspective on mutual recognition. Then I analyze the relationship between mutual recognition and fundamental rights. Thirdly, I focus on mutual recognition in its systemic implications, and the tensions it implies between divergence and convergence among domestic legal orders.

²⁴ Cf. E. Paciotti, ‘L’espace de liberté, de sécurité et de justice: au-delà de Tampere et de La Haye’, in G. Amato, H. Bribosia, B. De Witte (eds.), *Genèse et destinée de la Constitution européenne* (Bruylant, 2007), 1129 ff. See especially 1131, where the author states that with the EAW the Member States sought to ‘mettre en commun les moyens de répression sans vouloir partager les garanties juridictionnelles’.

A. THE VISION OF BRUSSELS (AND LUXEMBOURG): MUTUAL RECOGNITION IN A (LEGAL) VACUUM? THE FUNCTIONING OF MUTUAL TRUST

The following part is an attempt to sketch the position of European institutions on mutual recognition. It will serve as a starting point to the development of some arguments on the dynamics of the principle itself.

European institutions have implemented the mutual recognition principle in the EAW as a quasi-automatic process, according to which some state authorities execute an act of another state's authorities after minimal checks and controls.²⁵ Mutual recognition is thus a tool to give extraterritorial effects to judicial decisions. This is made possible because of the allegedly high level of mutual trust among European legal systems, which legitimizes the principle of mutual recognition whilst steering clear of harmonization. Though one might find it acceptable in principle, there are a number of unresolved issues involving the relationship between European Union and its Member States, ultimately touching upon the issue of sovereignty. The discussion over the presence of 'human rights clauses' in the text of domestic implementing acts is a good example.

From my understanding of the reports on the implementation of the EAW, the Commission assumes that once Member States have declared (some political) trust in each other's legal systems, as the EAW presupposes, there should be little room for putting the breaks on this process, and certainly not beyond the checks provided for in the European Framework Decision.²⁶ The 2006 report states the following:

*Lastly, the introduction of grounds not provided for in the Framework Decision is disturbing. The additional ground of refusal based on *ne bis in idem* in relation to the International Criminal Court, which enables certain Member States to fill a gap in the Framework Decision, is not an issue here. The same applies to the explicit grounds of refusal for violation of fundamental rights (Article 1(3)) or discrimination (recitals 12 and 13), which two thirds of the Member States have chosen to introduce expressly in various forms. However legitimate they may be, even if they do exceed the Framework Decision (EL, IE, IT, CY), these grounds should only be invoked in exceptional circumstances within the Union. It is even more important to emphasize the introduction of other reasons for refusal, which are contrary to the Framework Decision (Article 3: DK, IT, MT, NL, PT, UK), such as political reasons, reasons of national security or ones involving examination of the merits of a case, e.g. of its special circumstances or the personal or family situation of the individual in question.²⁷*

²⁵ Cf. Recital 8 of the preamble of Framework Decision 2002/584/JHA on the EAW, published in *OJ* [2002] L 190/1, 18.7.2002.

²⁶ See the Report from the Commission on the EAW, COM(2006) 8 final, 24 January 2006. It does indeed seem that the Commission 'tolerates' domestic provisions on protection of fundamental rights.

²⁷ Italics mine. In the same report (6) one can also read the following: 'Although more efficient and faster than the extradition procedure, the arrest warrant is still subject to full compliance with the guarantees for the individual. Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights

The reader has the impression that the Commission perceives as ‘disturbing’ the introduction of grounds not provided for in the Framework Decision, and that despite not calling their legitimacy into question, the Commission still argues that ‘these grounds should only be invoked in exceptional circumstances within the Union’. It is not clear to this author whether the last statement is intended as a normative prescription; if so, the question arises as to from where the authority for such a statement stems. If it is merely intended as a polite request, its meaning is different. One has the impression that, though not questioning their legitimacy, the Commission still finds the presence of fundamental rights guarantees disturbing. According to the Commission, mutual recognition entails a smoother enforcement of fellow European measures limiting personal freedom, with judicial control being based on the information and the legislation of another member state with limited invocation of fundamental rights clauses. To this extent, mutual recognition in the Commission’s perspective presents some degree of automatism.

Moreover, mutual recognition as interpreted in Brussels is set down in formal terms.²⁸ By this it is meant that the Commission (but also the Council) conceives mutual recognition in the absence of any evaluation of possible functional equivalence between the underlying different legislations to be recognized (through a judicial decision).²⁹ Policy lines translated into legislation should be totally irrelevant in the functioning of instruments based on mutual recognition. Instead, the mere political assertion of mutual trust among Member States should be enough for co-operation in the enforcement of foreign decisions.

This position seems to be shared by the European Court of Justice (hereinafter ECJ). Indeed it has recognized and accepted mutual recognition, unrelated to the harmonization of domestic laws, in the case *Advocaten voor de Wereld*, which challenged the legality of the EAW Framework Decision.³⁰ Moreover, the case law on *ne bis in idem* in criminal matters supports this thesis. The ECJ took this position whilst stressing the legitimating function of mutual trust. Mutual trust is thus endorsed as a panacea for a lack of convergence among domestic legislations.³¹ The Commission even sees it as the remedy for the weak safeguards laid down in the EAW.

an explicit ground for refusal in the event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the *proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union* and the constitutional principles common to the Member States; in a system based on mutual trust, such a situation should remain exceptional.’

²⁸ See L. Marin, *Il principio di mutuo riconoscimento nello spazio penale europeo* (Napoli, Editoriale Scientifica, 2006), 195–196.

²⁹ This is certainly true because the introduction of mutual recognition implies the dropping of double jeopardy criteria. Though limited to final decisions, see the Communication on mutual recognition of the Commission COM (2000) 495, of 26 July 2000, para. 3.

³⁰ Cf. ECJ’s judgment in case C-303/05, *Advocaten voor de wereld*, paras. 32 ff.

³¹ On this principle, applied to the area of European civil law cooperation, see the interesting article by F. Blobel and P. Späth, ‘The tale of multilateral trust and the European law of civil procedure’, 30 *Eur. L. Rev.* 528 (2005).

Though not exhaustive, the above analysis shows that, according to European institutions, mutual recognition should ensure 'blind' acceptance and thus recognition and enforcement of a foreign decision on the basis of mutual trust. The relevant legal order should remain in the background, and mutual recognition mechanisms should apply beyond the specific values of the legal order. European institutions view mutual recognition as a principle enabling a 'political choice for equivalence' without any examination of the existence of such functional equivalence. This specific issue is problematic, above all in the field of justice and in the arena of fundamental rights.

B. THE EAW AND ITS LACK OF GUARANTEES

Following this brief portrait of mutual recognition as viewed by European enforcement institutions, it is necessary to consider whether core domestic actors within the Member States share this European approach. Domestic provisions concerning fundamental rights are the best example for the case made here. The following observations are mainly drawn from the Italian situation, but perhaps other legal orders are also experiencing a similar journey.

Higher courts are faced with the issue of applying the EAW (and the mutual recognition it entails) in the context of protecting fundamental rights. This issue has been deliberately left by the Council of Ministers to national legislative bodies. It is now up to the courts to interpret fundamental rights provisions through domestic acts. As the analysis of the Italian response revealed, the two decisions of the Constitutional Court focus on legal protection against preventive custody, both as an additional ground for rejecting the implementing act and on the modality for calculating the maximum time limits for preventive custody, which is the specific domestic tool used to protect personal liberty during criminal proceedings.

In this context, the main question curiously left to national legislatures first of all, and to a lesser extent to domestic courts, is indeed to define the frame establishing a systematic protection of fundamental rights: what is the 'correct' benchmark to which to anchor the level of protection of EAW guarantees in domestic or international situations? To answer this question, it is necessary to look at the core functioning of the EAW. The EAW is meant to replace the normal process of extradition by the autonomous working of two separate legal systems. It goes instead beyond extradition, granting extraterritorial effects of a judicial decision of one legal system, and thus allows the cross-border surrender of an individual.

The level of guarantees to which the EAW should be linked is the first unresolved dilemma of the EAW, and also of mutual recognition. Extradition is its predecessor, but in many respects the EAW represents a change in the practice of extradition: for example, the partial abolition of double criminality. For this reason, the lack of 'European' guarantees is disturbing. Secondly, the lack of European guarantees can presumably lead to divergent solutions across Member States at the expense of the coherence of the EAW system.

Thirdly, one would expect the EU to take a pro-active role in setting protective rules, the more so since judicial control is the only available filter. Nevertheless, the question has been left entirely to the Member States. In my view, Member States can therefore legitimately hinder smooth cooperation in the defence of these core legal interests of the constitutional state, crucial also for the legitimacy of criminal law intervention.

It is exactly on this issue that the Constitutional Court took an interesting step with Judgment No. 143 of 2008. As explained above, the main point the Constitutional Court scrutinized was the disparity of legal treatment between custodial detention abroad and custodial detention in Italy. The legal background was very similar to a previous case decided in 2004,³² and the *ratio decidendi* was thus the same, as stated by the Constitutional Court. As far as guarantees on personal liberty are concerned, custodial detention abroad under extradition has been equated to custodial detention in Italy; there is no reason to differentiate from this reasoning in relation to the EAW. Interestingly, the Constitutional Court goes even further: if extradition has been compared to domestic detention, the same applies *a fortiori* to the EAW, which is based on the principle of immediate and reciprocal recognition of a judicial decision. Reasoning on this principle, the Constitutional Court observes that the EAW does not create an intergovernmental relationship but instead implies direct contacts between judicial authorities of different Member States. Once this equivalence between pre-trial detention in Italy and custody abroad is established, the Constitutional Court cannot accept a different level of guarantees on the length of custodial detention as an effect of the country of detention. Furthermore, developing this argument, the Court observes that arrest and surrender proceedings are legally a unitary act. Surrender is no longer an issue between states, but between judicial authorities. Therefore the regulation of the length of custodial detention must be subsumed into a unitary regulation, i.e., within the framework of domestic criminal proceedings. Thus, for the Constitutional Court, the EAW cannot imply a lower standard of legal protection than extradition. Furthermore, the Court held that the EAW must be linked to the domestic system of guarantees, in this case a specific procedural guarantee.

The lack of guarantees that accompanied the adoption of the EAW at the European level means that here, more than in other areas of European integration, the contribution of domestic actors is crucial in the actual implementation of European principles and instruments in domestic legal orders. This is also a consequence of the specificity of criminal law in comparison with economic integration. In that context, Community primacy was, first of all, *politically* acceptable. Criminal law co-operation is not part of the internal market. A different set of systematic interactions between EU and Member States, and between their judges, recognizing the importance of the contribution of domestic actors, is understandable within the current constitutional structure of the EU.

³² As mentioned above, Judgment No. 253 of 2004.

In its decision No. 143 of 2008, the Constitutional Court implicitly unveils this inherent, unresolved political contradiction of the EAW.

Interestingly, among the *dicta* of the judgment, the Constitutional Court stressed that the condition of the person addressed by an EAW cannot be worse than those of the domestic suspect, in relation to guarantees on maximum terms of detention. It is therefore clear that the EAW itself is missing a solid link to an adequate and clear set of guarantees. Every legal order should therefore link the instrument with a set of rules and principles, in both domestic and international law, referring to the European Convention on Human Rights as a minimum standard of European constitutional law.³³ That this may lead to a divergence in the implementation of the instrument is a necessary risk to avoid a lacuna in legal protection.³⁴ The Council of Ministers, while approving the EAW without proper guarantees, simply chose not to provide an answer to a politically demanding question. Failure to address this issue did not mean that the question disappeared.

In the perspective of a broader European analysis, the first constitutional challenge(s) to the EAW, pointed in the same direction. In a moment of drama, the *Bundesverfassungsgericht* asked the legislator to rewrite its EAW Act. More calmly, in its decision No. 143 of this year, the Italian Constitutional Court itself 'pointed' to a 'missing norm', as is possible in the Italian legal system. This illustrates the European constitutional dialogue at work.

C. MUTUAL RECOGNITION AND DIVERGENCE BETWEEN LEGAL ORDERS: THE ITALIAN SOLUTION

Turning attention to the conceptual construction of the principle of mutual recognition, the case law on the implementation (or rather addition) of some provisions related to refusal grounds and fundamental guarantees reveals an interesting aspect of the principle of mutual recognition, namely in its dynamic dimension. The following analysis is based on the case law of the *Corte di Cassazione*, as the Constitutional Court took account of their interpretation in its first decision on the EAW.³⁵

The interpretative question resolved by the United Chambers of the *Corte di Cassazione* is emblematic in this respect. In this case the domestic provision was blocking implementation of a European provision: indeed there is no ground for refusal in the Framework Decision based on the length of preventive detention. However, the length of preventive detention belongs to the domestic system of guarantees on the protection of personal liberty, as well as protection of the presumption of innocence.

³³ Cf. Art. 6 EU.

³⁴ See, *mutatis mutandis*, the Opinion of Advocate General Poiares Maduro of 16 January 2008, *Y.A. Kadi v. Council and Commission*, case C-402/05.

³⁵ Decision No. 109 of 2008.

The special interest of this judgment lies in the fact that the domestic provision established an (additional) ground for refusal based mainly on the national standard of a constitutional guarantee: we are in a field where divergence among Member States' legislation is a given point. The question arises here as to whether mutual recognition can be stopped by divergent legislation or not. This was the main issue underlying the case before the *Cassazione*.

If the starting point is recognition of the diversity of legal guarantees,³⁶ the *Sezioni Unite* indicated that courts have the duty to look for and to consider different legal instruments that can protect the same legal value. The Court took this path because it was not possible to sidestep easily the domestic provision without partially breaching the spirit of cooperation enshrined in the EAW. What the *Cassazione* stated is that, when faced with diverging legal orders, a Court should look for functional equivalences in the other legal systems: the reasoning is certainly familiar to internal market scholars.³⁷ Functional equivalence can be defined as a process through which a regulation of one legal order can be deemed equivalent to the legislation of another legal order because it expresses the same line of policy or, better, it protects the same values through different instruments.³⁸

As studies on the internal market show, the principle of equivalence is nothing other than the obverse of mutual recognition. This article suggests that the same applies with respect to legal guarantees, as in the case of Italian provisions on refusal of surrender because of lack of a specific instrument (maximum terms) to control pre-trial detention in the issuing state. If this test of functional equivalence is positive, courts cannot refuse to surrender a suspect and must thus recognize a foreign decision; were this to

³⁶ The solution starts with an analysis of the *ratio* of the Italian provision, which is to limit and control pre-trial detention, balancing it with the presumption of innocence. As a second step, the *Sezioni Unite* recognizes that other European legal orders protect the same value through different legal instruments. The Italian approach relies on maximum terms of detention. Other countries adopted 'continuous review' mechanisms, i.e., judicial controls at regular intervals on the legality of preventive detention. Furthermore the *Higher Court* points out that the case law of the European Court of Human Rights seems to indicate that these last instruments better respect Art. 5 of the ECHR.

³⁷ The principle formulated by the *Corte di Cassazione* is that of 'equivalence' among different legal orders. It is natural to find a parallel here with the economic integration of Europe. Scholars dealing with the functioning of the internal market have argued that the mutual recognition principle implies and is strictly related to the equivalence principle. See A. Bernel, *Le principe d'équivalence ou de 'reconnaissance mutuelle' en droit communautaire* (Schulthess Polygraphischer Verl., 1996); more recently, L. Torchia, *Il governo delle differenze* (Il Mulino 2006), has argued that mutual recognition is one of the 'techniques' giving shape to the equivalence principle (68, n. 31). *Contra* see V. Hatzopoulos, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation des services* (Bruylant/Sakkoulas, 1999), 66 ff. According to this author, 'il s'agit de deux principes distincts, dont la spécificité se manifeste tant sur le plan des conditions de leur application que sur celui de leurs objets respectifs'.

³⁸ Cf. J.H.H. Weiler, 'Mutual recognition, functional equivalence and harmonization in the evolution of the European common market and the WTO', in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan, 2005), 25–84; J. Pelkmans, 'Mutual recognition in goods. On promises and disillusion', 14 *J. of Eur. Pub. Pol.* 699 (2007).

be otherwise, the divergence of legislation between Member States would hinder this process of recognition. Moreover, this is further complicated because here we are dealing with a provision aimed at protecting a fundamental right.³⁹

Without going here into the details of this interpretative operation, which goes far beyond (if not clearly against) the wording of the Italian statute, it is clear that the impact of a literal interpretation of the legal provision of Article 18(1)(e) would have entailed a withdrawal from the Framework Decision, hindering the collaboration of Italy with a significant group of European partners (Belgium, Germany, the United Kingdom, to name just three).⁴⁰

Instead, the case law shows that the Italian *Cassazione* conceives mutual recognition as a principle that implies the need to search for functional equivalences among provisions of fellow European legal orders. Beyond the duty of consistent interpretation of domestic provisions on the EAW, and the duty to avoid specific aspects of the domestic procedural legal order undermining the functioning of European rules, the path taken by the Italian *Corte di Cassazione* shows that the enforcement of mutual recognition mechanisms can only be ensured by an active research of functional equivalences between the different procedural guarantees.

This principle has been stated in arguments for an interpretation ‘rationalizing’ a domestic provision that adds a refusal ground not present in the European framework legislation. The aim of this interpretation is to clarify and restrict the possibility of refusing the execution of an arrest warrant, thus giving real meaning to mutual recognition in this new European cross-border context of application. Searching for functional equivalences is also an expression of the duty of loyal cooperation arising from Article 10 of the EC Treaty, to the extent that it can be applied to the Third Pillar and to domestic actors when enforcing European instruments.

Furthermore, the *Corte di Cassazione* recognized that the ground of refusal was based on the obligation to control the deprivation of liberty implied by custodial detention, which is an expression of a fundamental right of the individual. The *rationale* of the domestic provision is not contested by the Court: thus it is not under dispute that fundamental rights can (legitimately) stop the functioning of mutual recognition.

³⁹ In doing so, according to the Court, courts have to pay attention to both legal rules and the actual practice of the legal system in which the requesting authority operates. This makes it clear that mutual recognition in judicial cooperation goes beyond the acceptance of a single judgment or decision: mutual recognition is systemic because it embraces the entire judicial system. Cf. M. Poiars Maduro, ‘So Close and Yet So Far: the Paradoxes of Mutual Recognition’, 14 *J. of Eur. Pub. Pol.* 814 (2007), 823. The Italian implementing Act does not allow the recognition (thus, enforcement) of a request of surrender if the issuing country does not protect personal liberty, balancing it with the administration of justice. At the same time, it must be possible to find some functional equivalences, otherwise diverging legislation can hinder the smooth operation of the mutual recognition mechanism. This has been stated with special reference to guarantees on fundamental rights, i.e., an area that Member States consider is outside the scope of the Framework Decision.

⁴⁰ Moreover, Italy would have run a specific risk of becoming a ‘haven’ or refuge-state for criminals wanting to escape the prosecuting justice of other European countries.

However, the choice of the legislator to elect the solution chosen by the Italian system as the unique parameter applicable to cooperation in Europe has been perceived by the *Cassazione* as a particularistic choice,⁴¹ which could not work in a context of transnational co-operation based on mutual recognition intended to transcend different legal orders.

The solution given by the *Cassazione* strikes a happy balance: moreover it represents an interesting contribution concerning the role of judges in the functioning of mutual recognition instruments. If the legal order of the issuing state does not provide for the same guarantee required by the executing state, the *Corte di Cassazione* stated that the Italian judge has the duty to investigate whether that legal order can provide for equivalent guarantees, i.e., guarantees aimed at controlling the length of pre-trial detention, thus accepting and also recognizing other, different mechanisms, such as the rules and practices of other countries. In this specific case, the choice is mainly between legal orders with maximum limits on preventive detention and continuous review systems. This operation is made possible thanks to mutual trust, a principle lying at the core of mutual recognition. European Member States do indeed share legal values, such as the protection of human rights and the rule of law. The *Cassazione* endorses the legitimating role of mutual trust, as suggested by the European Court of Justice.

This authoritative interpretation of the domestic implementing rule requires an active role on the part of the executing judge, so that co-operation is not hindered as readily as the Italian legislator might have anticipated. However the executing judge has to be proactive in his or her task of looking for functional equivalences among the rules of different legal orders.⁴² A similarly active exercise of 'discretion' can also be found in mutual recognition mechanisms of the internal market.⁴³ The assessment of equivalence can be rooted in empirical parameters and statistical data, and thus go beyond the mere comparison of legal provisions. It is here argued that something similar happened under the traditional extradition proceedings, via the political 'filter': it used to be that the judicial decision was completed by a ministerial decision. It is suggested here that, though rooted in a judicial procedure, language and logic, this active dimension of mutual recognition implies the exercise by judges of discretionary power: for this reason the EAW, as a mutual recognition instrument, does not completely 'erase' the political dimension of interstate cooperation. Perhaps it cannot. The main change is the

⁴¹ See Poiars Maduro, 'Contrapunctual law: Europe's Constitutional Pluralism in Action', 530.

⁴² See *Corte di Cassazione*, 'Sezioni Unite', judgment 30.1.2007–5.2.2007, No. 4614, Ramoci Vllaznim, paragr. 8, 'in diritto'.

⁴³ Cf. Pelkmans, 'Mutual recognition in goods. On promises and disillusion'; moreover, paraphrasing Armstrong's analysis of internal market mutual recognition, Curtin has also argued that criminal law mutual recognition is active, in the sense that it requires enforcement agencies to look for and to find functional equivalences between different legal and procedural systems. In D.M. Curtin, 'European Legal Integration: Paradise Lost?', in D.M. Curtin *et al* (eds.), *European Integration and Law* (Intersentia, 2006), 1–54.

completely judicial nature of surrender, bringing to the fore the political dimension of the actions of judges.⁴⁴

Finally, another interesting aspect of this ruling concerns the scope of mutual recognition. The functioning of the principle of mutual recognition of judicial decisions shows that the principle has systemic implications. The ‘real life’ of mutual recognition goes beyond the single judgment to be enforced; instead it requires that legal systems be sufficiently compatible, also in other aspects:⁴⁵ guarantees provide a good example, as they are recognized as legitimate reasons that can hinder mutual recognition. It is thus suggested that mutual recognition cannot be considered in a legal vacuum, but must always be understood within the legal system in which it is operating. Lastly, although mutual recognition can be supported by mutual trust and thus operate also in the absence of harmonization of legislation, it nonetheless presupposes research into functional equivalences, particularly where divergence could legitimately hinder the process of recognition.

§4. CONCLUDING REMARKS

The analysis of domestic case law on the EAW is important because it allows us to study its conceptual premise, the principle of mutual recognition. That principle could be defined as a ‘legal transplant’⁴⁶ given its praetorian origins in the integration of the internal market and its later implementation through legislation in the area of criminal law co-operation. The judicial developments within Member States are especially interesting considering the haste with which it was first implemented in the EAW.

Thus the analysis of domestic actors’ reactions can tell us something about their views on the implementation of this principle within domestic legal orders. The ECJ therefore needs to take domestic legal systems into account, both in order to preserve the richness of European legal pluralism and to strengthen its legitimacy. Furthermore, the institutional architecture of the Third Pillar is such that mutual recognition and legal developments of judicial co-operation in criminal matters are the result of a dialogue between legal orders, much more than is in the case in the EC pillar. This is true today but will presumably also be so for the near future: the obstacles still facing the Lisbon Treaty will allow us to rehearse on the same ‘institutional stage’ for some time yet.

At first sight, the Constitutional Court’s decisions are not as groundbreaking as those of 2005. There is no *Darkazanli* ruling in Italy.⁴⁷ It should be stressed once again that

⁴⁴ See Poiares Maduro, ‘So Close and Yet So Far: the Paradoxes of Mutual Recognition’, 814–825.

⁴⁵ Cf. S.K. Schmidt, ‘Mutual recognition as a new mode of governance’, 14 *J. of Eur. Pub. Pol.* 667 (2007); S. Lavanex, ‘Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy’, 14 *J. of Eur. Pub. Pol.* 773 (2007).

⁴⁶ The reference is to A. Watson, *Legal Transplants* (UP Virginia, 1974).

⁴⁷ Judgment of the German Constitutional Court (BVG) of 18.7.2005, on the *Europäischer Haftbefehl*, 113 BVerfGE 273 (2005), available in English at www.bverfg.de.

in its Judgment declaring the domestic provision unconstitutional, the Constitutional Court instead 'added' the missing norm, fixing in this way the incoherence within the Italian legal system of guarantees. This looks like maintenance work, rather than a profound restructuring in the house of the Italian EAW. At the same time the Court of Cassation intervened more significantly in the domestic Act, in an attempt to fix the many domestic provisions that diverge from the European Framework Decision. Consistent interpretation is generously employed, in line with the European Court of Justice's judgment in *Pupino*.⁴⁸

The judgments discussed here focus on the tensions between mutual recognition and (its implications in respect of) fundamental rights: the former is an engine for further integration and a protector of domestic sovereignty, while the latter represent legitimate obstacles to European cross-border co-operation.

The lesson learned is that the mutual recognition principle, in the criminal co-operation context as well as in that of market integration, is not an absolute value. While still awaiting serious consideration by the European Union, fundamental rights, including where employed in cross-border cases, are still somehow a prerogative of the state that must protect both the individuals affected and the norms themselves. In this context, states cannot provide a lower level of protection to individuals than that guaranteed under existent extradition schemes.⁴⁹ Instead the nature of the co-operation established under the EAW scheme is such that the level of guarantees it presupposes should be as high as or linked to the domestic ones; this is the principle emerging from the statements of the Italian Constitutional Court in the relevant parts of its reasoning.

The *status quo* is however characterised by some divergence across Member States' legal orders and this could potentially lead to evasion and free-riding at the expense of integration. The risk has been so far avoided in Italy, in part because of the work of the *Corte di Cassazione*. The case concerning the Italian provisions refusing extradition based on a lack of maximum terms of pre-trial detention illustrates this point. As it emerged from the analysis carried out above, the *Cassazione* defused a mine by its interpretation of a domestic additional refusal ground that is inspired by the wording of a constitutional provision. Thus the *Corte di Cassazione* overcame an obstacle to co-operation resulting from the divergence between legal orders, which is an especially sensitive issue in the field of individual guarantees. The active search for functional equivalences among domestic legislations is the chosen remedy. This solution certainly

⁴⁸ It is useful to recall here that, referring to EEC law, the Constitutional Court recognized the primacy of EC law over domestic law. This implies a hermeneutical perspective, a presumption of conformity of domestic law with regard to regulation: among the possible interpretations of domestic legislation, the one consistent with community law must be followed. This was already stated in the familiar *Granital* judgment, No. 170 of 1984, but also in 1981 (No. 176 and 177).

⁴⁹ The whole issue is linked to the debate on the level of protection of fundamental rights in the European Union. See L.F.M. Besselink, 'Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union', 35 *C.M.L. Rev.* 629 (1998).

echoes the principle of equivalence of the internal market, but also the *Solange* case law of the German Constitutional Court, and the European Court of Human Right's *Bosphorus* decision. In the first case presented, the major risk, i.e., the activation of a counter-limit was averted. The Court 'saved' the domestic provision, interpreting it consistently with the domestic value. Therefore, one could say that contrapunctual principles still create harmony (in Italy).