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# The Fight against Terrorism in the EU: Judicial Cooperation in Criminal Matters and Procedural Rights

This document was funded by the European Union's Justice Program (2014-2020)

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# PREFACE

The present report has been realized in the framework of the European project "Lawyers for the protection of fundamental rights" GA n° 806974) and specifically within the work package on the review of the European legal framework on fundamental rights. Against this background, the beneficiaries of the said project chose to focus the analysis on two specific topics:

1) Family law and rights of the child, and in particular the right to family reunification;
2) Criminal law, and in particular fight against terrorism and the relevant rights of defendants, of pre-trial detainees and persons under investigation.

The present report explores the second topic on "The Fight against Terrorism in the European Union: Judicial Cooperation in Criminal Matters and Procedural Rights", realized by Mar Jimeno Bulnes, Julio Pérez Gil and Félix Valbuena González with the support of Cristina Ruiz López. Professors of Procedural Law. University of Burgos. Translation and review by Alba Fernández Alonso.

Abbreviations ..... 5
1. INTRODUCTION ..... 6
2. EUROPEAN ARREST WARRANT ..... 9
2.1 General background ..... 9
2.2 EAW issuance ..... 13
2.3 EAW execution ..... 17
2.4 Surrender procedure ..... 21
2.5 CJEU case law and statistics ..... 24
3. EUROPEAN INVESTIGATION ORDER ..... 26
3.1 General background ..... 26
3.2 Scope of the DEIO. Art. 34 DEIO ..... 28
3.3 Subjects ..... 30
3.3.1 Competent authorities ..... 30
3.3.2 The role of defence ..... 31
3.4 EIO issuing and transmission ..... 32
3.5 EIO recognition and execution ..... 34
3.6 Specific provisions for certain investigative measures ..... 37
3.7 CJEU case-law ..... 38
4. PROCEDURAL RIGHTS OF SUSPECTS IN CRIMINAL PROCEEDINGS ..... 42
4.1 Introduction ..... 42
4.2 The Green Paper of the Commission (2003) ..... 43
4.3 The failed proposal for a Council framework Decision (2004) ..... 45
4.4 The Directives arising from Roadmap strengthen the procedural rights of suspects and accused in criminal proceedings (2009) ..... 49
4.4.1 Directive on the right to interpretation and translation in criminal proceedings (2010) ..... 51
4.4.2 Directive on the right to information in criminal proceedings (2012) ..... 53
4.4.3 Directive on the right of access to a lawyer in criminal proceedings (2013) ..... 55
4.4.4 Directive on the presumption of innocence and of the right to be present at the trial in criminal proceedings (2016) ..... 59
4.4.5 Directive on procedural safeguards for children who are suspects or accused in criminal proceedings (2016) ..... 60
4.4.6 Directive on legal aid (2016) ..... 62
REFERENCES ..... 64

ABBREVIATIONS

| | |
|---|---|
| AAN | Order by National Court in Spain |
| AFSJ | Area of Freedom, Security and Justice |
| AN | *Audiencia Nacional* (National Court in Spain) |
| AP | *Audiencia Provincial* (Provincial Court in Spain) |
| appl./appls. | application/applications |
| Art./Arts. | Article/Articles |
| BOE | *Boletín Oficial del Estado* (Spanish Official Journal) |
| BOCG | *Boletín Oficial de las Cortes Generales* (Official Journal of the Spanish Parliament) |
| Cass. | *Corte di Cassazione* (Italian Supreme Court) |
| CE | *Constitución Española* (Spanish Constitution) |
| CFREU | Charter of Fundamental Rights of the European Union |
| CISA | Convention implementing the Schengen Agreement of 14 June 1985 |
| CJEU | Court of Justice of European Union |
| CPC | Criminal Procedure Code |
| EAW | European Arrest Warrant |
| EAW FWD | Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States |
| ECHR | European Convention Human Rights |
| ECtHR | European Court on Human Rights |
| ed./eds. | editor/editors |
| eg | *exempli gratia* |
| esp. | especially |
| *et al.* | *et altera* |
| ex | according to |
| EEW | European Evidence Warrant |
| EIO | European Investigation Order, DEIO (Directive European Investigation Order) |
| EJN | European Judicial Network |
| EU | European Union |

| | |
|---|---|
| ff/*et seq.* | and the following |
| FGE | *Fiscalía General del Estado* (General Public Prosecutor's Office) |
| FWD | Framework Decision |
| GU | *Gazetta Ufficiale* (Official Journal in Italy) |
| ie | *id est* |
| JIT | Joint Investigation Team |
| LD | Italian Legislative Decree |
| LO | *Ley Orgánica* (Organic Law in Spain) |
| LOEDE | Law 3/2003, of March 14th, on European Arrest Warrant and Surrender |
| LOPJ | *Ley Orgánica del Poder Judicial* (Act on the Judiciary in Spain) |
| LRM | Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters criminal in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea* ) |
| n./No. | number |
| OJ | Official Journal of the European Union |
| op. cit. | *opus citatum* |
| para. | paragraph (*fundamento jurídico* ) |
| SAN | Judgement by National Court (Spain) |
| SAP | Judgement by Provincial Court (Spain) |
| STC | Judgement by Constitutional Court (Spain) |
| STS | Judgement by Supreme Court (Spain) |
| TC | *Tribunal Constitucional* (Constitutional Court ) |
| p./pp. | p./pp |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| TS | *Tribunal Supremo* (Supreme Court in Spain) |
| vol. | volume |

## 1. INTRODUCTION

Chapter VI of the Charter of Fundamental Rights of the European Union (henceforth CFREU) is dedicated to Justice rights (Arts. 47-50) that provide fundamental procedural rights, whose origin must be essentially found in Art. 6 of the European Convention of Human Rights (ECHR) regulating the right to a 'fair trial' in general terms with consequent case law delivered by the European Court of Human Rights (ECtHR)[1]. This essential background must be balanced with the general policy proposed by the European Union on the field of judicial cooperation in criminal matters and the principles supporting it in order to combat terrorism and organized crime in all Member States[2].

As known, judicial cooperation in criminal matters is contemplated in Art. 82 (1) of the TFEU which provides 'the principle of mutual recognition of judgements and judicial decisions' as legal basis together with the principle of 'approximation of the laws and regulations of the Member States' in order to ensure 'recognition throughout the Union of all forms of judgements and judicial decisions'[3]. Both principles justify today's enactment of different procedural instruments related to criminal proceedings in order to make judicial cooperation between Member States possible for the purposes of fighting criminality and delinquency on the one hand as well as guaranteeing procedural safeguards of individuals (suspects and victims) in criminal proceedings on the other hand[4].

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[1] See generally TRECHSEL, S. *Human rights in criminal proceedings,* Oxford University Press, Oxford, 2005. Also, in relation with confluence between ECHR and CFREU see KOKOTT, J. and SOBOTA, C. (eds.) "Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and national standards of protection", *Yearbook of European Law* 2015, vol. 34, n. 1, pp. 60-73. In concrete relation with EU and AFSJ see BANACH-GUTIÉRREZ, J. and HARDING, C. "Fundamental rights in European Criminal Justice: an axiological perspective", *European Journal of Crime, Criminal Law and Criminal Justice* 2012, vol. 20, n. 3, pp. 239-264, analysing fundamental rights included in the Justice chapter. For an approach to fair trial's right as contemplated in Art. 47 CFREU, see GALERA RODRIGO, S. "The right to a fair trial in the European Union: lights and shadows", *Revista de Investigaçoes Constitucionais* 2015, vol. 2, n. 2, pp. 7-29; also DOOBAY, A. "The right to a fair trial in light of the recent ECtHR and CJEU case law", *ERA Forum* 2013, vol. 14, n. 2, pp. 251-262 with comments to specific case law.

[2] See specifically DOUGLAS-SCOTT, S. "The rule of law in the European Union – putting the security into the area of freedom, security and justice", *European Law Review* 2004, vol. 29, n. 4, pp. 219-242. Also MITSILEGAS, V. "Transnational Criminal Law and the global rule of law", in G. Ziccardi Capaldo (ed.), *The global community yearbook of International Law and jurisprudence,* Oxford University Press, Oxford, 2017, pp. 47-80.

[3] On conjunction of both principles for the functioning of AFSJ see JIMENO-BULNES, M. *Un proceso europeo para el siglo XXI*, Civitas & Thomson Reuters, Madrid, 2011, pp. 33 ff. On mutual recognition principle specifically OUWERKERK, J. *Quid pro quo. A comparative laws perspective on the mutual recognition of judicial decisions in criminal matters,* Intersentia, Antwerpen, 2011.

[4] See specifically SPRONKEN, T., VERMEULEN, G., DE VOCHT, D. and VAN PUYENBROECK, L. (eds.) *EU procedural rights in criminal proceedings*, Maklu, Antwerpen, Apeldoorn, Portland, 2009, also resulting from European project funded by European Commission (Directorate General of Justice and Home Affairs). In terms of conjunction of both policies on mutual recognition instruments and protection of procedural rights see HODGSON, J. "EU criminal justice: the challenge of due process rights within a

At the time, before the enforcement of the Treaty of Lisbon[5] in 2009 and the creation of the Area of Freedom, Security and Justice (AFSJ) currently contemplated in Title V, Arts. 67-89 of the TFEU, no legal regulation on principle of mutual recognition existed, and judicial cooperation in criminal matters was part of the so-called prior Third Pillar of the Treaty on European Union joint with the police cooperation[6]. Nevertheless, the principle of mutual recognition of judicial decisions was established by the Tampere European Council held on 15 and 16 October 1999 as 'the cornerstone of judicial co-operation in both civil and criminal matters within the Union'[7]. Also, the previous Cardiff European Council, held on 15 and 16 June 1998, pointed 'the importance of effective judicial protection in the fight against cross-border crime' asking the Council 'to identify the scope for greater mutual recognition of decisions of each other's courts'[8].

On the other side, the Stockholm Programme[9] launched at the time by the European Council for the 2010-2014 period contemplated the possibility to extend mutual recognition to 'all types of judgements and decisions of a judicial nature, which may, depending on the legal system, be either criminal or administrative'. Obvious to say as resulting of same programme that 'mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area'. Mutual trust works as an essential tool in this area, as shown by the application of instruments of mutual recognition, particularly the European Arrest Warrant application as the case law delivered by the Court of Justice of European Union (henceforth, CJEU) and national courts show[10].

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framework of mutual recognition", *North Carolina Journal of International Law and Commercial Regulation* 2011, vol. 37, n. 2, pp. 307-320.

[5] OJ, n. C 306, 17 December 2007; consolidated version in OJ, n. C 115, 9 May 2008 and OJ, n. C 83, 30 March 2010, including the Charter of Fundamental Rights of the European Union (henceforth CFREU). See for example at the time PEERS, S. "EU Criminal Law and the Treaty of Lisbon", *European Law Review* 2008, vol. 33, n. 4, pp. 507-511.

[6] For a general approach then JIMENO-BULNES, M. "European judicial cooperation in criminal matters", *European Law Journal* 2003, vol. 9, n. 5, pp. 614-630.

[7] Presidency Conclusions available at http://www.europarl.europa.eu/summits/tam_en.htm, conclusion n. 33. See ELSEN, C. "L'esprit et les ambitions de Tampere: une ère nouvelle pour la cooperation dans le domaine de la justice et des affaires intérieures?", *Revue du Marché commun et de l'Union européenne* 1999, n. 433, pp. 659-663.

[8] Presidency Conclusions available at http://www.europarl.europa.eu/summits/car1_en.htm, conclusion n. 39.

[9] European Council, "An open and secure Europe serving and protecting citizens", OJ, n. C 115, 4 May 2010, pp 1-38. See BARROT, J. "Le Programme de Stockholm 2010-2014: en march vers une communauté de citoyéns conscients de leurs droits et de leurs devoirs", *Revue du Droit de l'Union Européenne* 2009, n. 4, pp. 627-631; also Editorial Comment, "The EU as an area of freedom, security and justice: implementing the Stockholm programme", *Common Market Law Review* 2010, vol. 47, n. 5, pp. 1307-1316.

[10] See HERLIN-KARNELL, E. "From mutual trust to the full effectiveness of EU Law: 10 years of the European Arrest Warrant", *European Current Law* 2013, n. 4, pp. 373.388; more recently EFRAT, A.

Especially on the field of judicial cooperation in criminal matters, the simultaneity in the regulation of procedural instruments under the employment of mutual recognition of judicial decisions between Member States has been proved as essential, together with the enactment of procedural safeguards in criminal proceedings for suspects and accused as well as victims, if such was the case. As it would certainly be impossible to analyse all of them, we have made a selection of those considered to be the most important instruments of mutual recognition of judicial decisions in criminal matters, namely: the European Arrest Warrant and the European Investigation Order on the one hand[11]; and on the other, from the perspective of procedural safeguards of individuals, the analysis of Directives on procedural rights of suspects in criminal proceedings together with the general framework on the topic, considering that regulation on protection of victims of crime is likewise generally provided in the EU[12].

## 2. EUROPEAN ARREST WARRANT

### 2.1 General background

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States (henceforth EAW or EAW

"Assessing mutual trust among EU members: evidence from the European Arrest Warrant", *Journal of European Public Policy* 2019, vol. 26, n. 5, pp. 656-675.

[11] About new perspectives on judicial cooperation in criminal matters along EU Member States see for example COSTA RAMOS, V. "Notas sobre novos desafios da cooperaçao judiciaira internacional em matéria penal", *Revista de Estudios Europeos* 2019, n. 1, pp 184-205. In Spain recent and generally, for an overview of mutual recognition instruments, procedural rights of suspects and protection of victims in criminal procedure see JIMENO BULNES, M. (dir.) and MIGUEL BARRIO, R. (ed.), *Espacio judicial europeo y proceso penal*, Tecnos, Madrid, 2018.

[12] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ, n. L 315, 14 November 2012, pp. 57-73. Precisely, in relation with the balancing of rights of suspects and victims in criminal proceedings see KLIP, A. "On victim's rights and its impact on the rights of the accused", *European Journal of Crime, Criminal Law and Criminal Justice* 2015, vol. 23, n.3, p. 177-189; also, by same author recently "Fair trial rights in the European Union: reconciling accused and victims' rights" in T. Rafaraci and R. Belfiore (eds.), *EU Criminal Justice: fundamental rights, transnational proceedings and the European Public Prosecutor's Office,* Springer, Cham (Switzerland), 2019, pp 3-25.

FWD, also known as 'euro-warrant')[13], further amended by Council Framework Decision 2009/299/JHA of 26 February 2009[14], was the first instrument enacted on the field of judicial cooperation in criminal matters in EU under the basis of the mutual recognition principle[15]. As defined in its first article, 'the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal proceeding or executing a custodial sentence or detention order'. Therefore, the EAW FWD creates compelling obligations to all Member States as long as all of them 'shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision' (Art. 1 (2) EAW). Only, *ab initio,* the observance of fundamental rights and principles ex Art. 6 TFEU appears to be

[13] OJ, n. L 190, 18 July 2002, pp. 1-18. In the literature see specifically comments by author, eg in English language as most recent contributions, JIMENO-BULNES, M. "The application of the European Arrest Warrant in the European Union: a general assessment", in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, Martinus Nijhoff Publishers, Leiden/Boston, 2010, pp. 285-333; also, a literature review existing at the time on the topic is included.

[14] OJ, n. L 81, 27 March 2009, pp. 24-36, amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. On the topic see specifically *In absentiEAW – Research project on European Arrest Warrants issued for the enforcement of sentences after in absentia trials* at https://www.inabsentieaw.eu/, also funded by the European Union's Justice Programme (2014-2020). In the literature BÖSE, M. "Harmonizing procedural rights indirectly: the Framework Decision on trials *in absentia*", *North Carolina Journal of International Law and Commercial Regulation* 2011, vol. 37, n. 2, pp. 489-510; also SIRACUSANO, F. "Reciproco riconoscimento elle decisione giudiziarie, procedura di consegna e processo *in absentia*", *Rivista italiana di Diritto e procedura penale* 2010, n. 1, pp. 116-144.

[15] See some criticism by PEERS, S. "Mutual recognition and criminal law in the European Union: has the Council got it wrong?", *Common Market Law Review* 2004, vol. 41, n. 1, pp. 5-36 as well as THOMAS, J. "The principle of mutual recognition – success or failure?", *ERA Forum* 2013, vol. 13, n. 4, pp 585-588; also in relation with its practice and EU proposals at the time MORGAN, C. "The potential on mutual recognition as a leading policy principle" and VERMEULEN, G. "How far can we go in applying the principle of mutual recognition?", in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, op. cit., pp. 231-239 and pp. 241-257. Also critical perspective in Spain by DE HOYOS SANCHO, M. "El principio de reconocimiento mutuo de resoluciones penales en la Unión Europea: ¿asimilación automática o corresponsabilidad?", *Revista de Derecho Comunitario Europeo* 2005, vol. 9, n. 22, pp. 807-843 and "El principio de reconocimiento mutuo como principio rector de la cooperación judicial europea", in M. Jimeno Bulnes (ed.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales,* Bosch, Barcelona, 2007, pp. 67-90.

an exception to such EAW execution according to Art. 1 (3) EAW provisions[16]; this is not a simply issue to handle as it has been shown by CJEU case law[17].

Particularly, EAW presents itself as a juridical and procedural instrument of exclusive judicial nature by contrast to an extradition procedure, which entails administrative/political and judicial stages. In this context, the EAW supplanted the old system of extradition between Member States, whose Conventions[18] had in any case not been very successful because of the few ratifications produced at the time. The same

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[16] See specifically FICHERA, M. "EU fundamental rights and the European Arrest Warrant", in S. Douglas-Scott & N. Hatzis (eds.), *Research handbook on EU Human Rights Law,* Edwar Elgar, Cheltenham, pp. 418-438; also SCHALLMOSER, N.M. "The European Arrest Warrant and fundamental rights. Risks of violation of fundamental rights through the EU Framework Decision in light of the ECHR", *European Journal of Crime, Criminal Law and Criminal Justice* 2014, vol. 22, n. 2, pp. 135-165. Also at the time GARLICK, P. "The European Arrest Warrant and the ECHR", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, TMC Asser Press, The Hague, 2004, pp. 167-182. In general on the topic MACKAREL, M. "Human rights as a barrier to surrender", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, TMC Asser Press, Amsterdam, 2009, pp. 139-156.

[17] For example CJEU, 5 April 2016, *Aranyosi and Caldararu,* C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, available at official website form http://curia.europa.eu/juris/recherche; here it takes place a preliminary reference by the *Hanseatisches Oberlandesgericht* in Bremen (Higher Regional Court of Bremen, Germany) in relation with several EAWs issued by Hungarian and Rumanian authorities against both suspect persons, who challenged the detention conditions in their respective countries and, because of that, possible violation of Art. 4 CFREU prohibiting inhuman and degrading treatment. The case provoked a great discussion in academia, e.g., comments by OUWERKERK, J. "Balancing mutual trust and fundamental rights protection in the context of the European Arrest Warrant. What role for the gravity of the underlying offence in CJEU case law?", *European Journal of Crime, Criminal Law and Criminal Justice* 2018, vol. 26, n. 2, pp 103-109; also MARGUERY, T.P. "Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners frameworks decisions", *Maastricht Journal of European and Comparative Law* 2018, vol. 25, n. 6, pp. 704-717 as well as GÁSPÁR-SZILÁGYI, S. "Joined cases Aranyosi and Caldararu: converging human rights standards, mutual trust and a new ground for postponing a European Arrest Warrant", *European Journal of Crime, Criminal Law and Criminal Justice* 2016, vol. 24, n. 2-3, pp. 197-216. Also in other countries, eg, WILDNER ZAMBIASI, V. and CAVOL KLEE, P.M. "A (possibilidade de) nao execuçao do mandado de detençao europeu fundamentada no tratamento ou pena cruel ou degradante", *Revista Brasileira de Direito Processual Penal* 2018, vol. 4, n. 2, pp. 845-886; in Spain for example BUSTOS GISBERT, R. "¿un insuficiente paso en la dirección correcta? Comentario a la sentencia del TJUE (Gran Sala), de 5 de abril de 2016, en los casos acumulados Pal Aranyosi (C-404/15) y Robert Caldararu (C-659/15 PPU)", *Revista General de Derecho Europeo* 2016, n. 40, http://wwwiustel.com and MARTÍN RODRIGUEZ, P.J. "La emergencia de los límites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Caldararu", *Revista de Derecho Comunitario Europeo* 2016, vol. 20, n. 55, pp. 859-900. In general, on the topic BRIBOSIA, E. and WEYEMBERGH, A. "Confiance mutuelle et droits fondamentaux: 'back to the future'", *Cahiers de droit européen,* 2016, vol. 52, n. 2, pp. 469-521 as well as CLASSEN, H.D. "Schwiriegkeiten eines harmonishen Miteinanders von nationalerem und europäischem Grundrechtsschutz", *Europarecht* 2017, vol. 52, n. 3, pp. 347-366.

[18] Convention on simplified extradition procedure between the Member States of the European Union, signed on 10 March 1995, OJ, n. C 78, 30 March 1995, pp 2-10 and Convention on extradition between Member States of European Union, 27 September 1996, OJ, n. C 313, 23 October 1996, pp. 12-23. On the evolution to classic mutual assistance model to mutual recognition model see LAGODNY, O. "The European Arrest Warrant. Better than a chaos of Conventions?", in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, op. cit., pp. 335-345 as well as VIDAL FERNÁNDEZ, B. "De la 'asistencia' judicial penal en Europa a un 'espacio común de justiciar europeo'", in C. Arangüena Fanego (ed.), *Cooperación judicial penal en la Unión Europea: la orden europea de detención y entrega*, Lex Nova, Valladolid, 2005, pp. 19-73.

explanatory memorandum of the EAW FWD deems the extradition mechanism obsolete and establishes, as an objective of AFSJ, to abolish extradition[19] between Member States and replace it 'by a system of surrender between judicial authorities'; explicitly, 'the introduction of a new simplified system of surrender of sentenced or suspected persons for the purpose of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedure' (Recital 5). For this reason, several Member States had already started bilateral discussions to prepare treaties of simple surrender of arrested persons to judicial authorities, as for example Italy and Spain, and Spain and the United Kingdom[20].

The EAW popularity as a measure to fight international terrorism fully increased because of the deplorable attacks in the United States of America on 11 September 2001[21]. Moreover, the proposal of such Council Framework Decision was presented exactly eight days after,[22] and the political negotiation to reach the necessary agreement among all Member States only needed three months[23]. Its implementation in all Member States should be done before 31 December 2003 according to Art. 34 (1) of the EAW FWD and further evaluation by EU institutions (Commission and Council) shall also have to take place. At the moment, several instruments in support of the EAW's application by

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[19] At the time PLACHTA, M. "European Arrest Warrant: revolution in extradition?", *European Journal of Crime, Criminal Law and Criminal Justice* 2003, vol. 11, n. 2, pp. 178-194. Also about the discussion of the EAW's nature LAGODNY, O. "Extradition' without a granting procedure: the concept of 'surrender'", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant,* op. cit., pp. 39-45 reviewing similarities and differences between extradition and surrender. Nevertheless, still some national laws implementing EAW as well as literature nominates extradition to the EAW, e.g., PÉREZ CEBADERA, M.A. *La nueva extradición europea: la orden de detención y entrega*, Tirant lo Blanch, Valencia, 2008.

[20] Protocol on Extradition signed in Rome on 28 November 2000 and Bilateral Treaty between Spain and UK signed in Madrid on 23 November 2001.

[21] In this context specifically JIMENO-BULNES, M. "After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples", *European Law Journal* 2004, vol. 10, n. 2, pp. 235-253. Also, at the time, WOUTERS, J. and NAERTS, F. "Of arrest warrants, terrorist offences and extradition deals. An appraisal of the EU's main Criminal Law measures against terrorism after '11th September'", *Common Market Law Review* 2004, vol. 41, n. 4, pp. 904-935.

[22] Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States submitted by the Commission on 19 September 2001, COM 2001 (522) final; also published in OJ, n. C 332E, 27 November 2001, pp. 335-319. On the birth of EAW see KEIJZER, N. "Origins of the EAW Framework Decision", in E. Guild and L. Marín (eds.), *Still not resolved? Constitutional issues of the European Arrest Warrant*, Wolf Legal Publishers, Nijmegen, 2009, pp. 13-30 on p. 19 ff.

[23] JHA Council meeting on 6 and 7 December 2001 in Brussels, previous to European Council in Laeken on 14 and 15 December 2001. See ALEGRE, S. and LEAF, M. "Mutual recognition in European judicial co-operation: a step too far too soon? Case Study- the European Arrest Warrant", *European Law Journal* 2004, vol. 10, n. 4, pp 200-2017, on p. 202.

national judicial authorities exist, such as a Handbook on EAW[24] elaborated by the Council and Commission with the collaboration of several stakeholders including Eurojust and the European Judicial Network (EJN), whose websites also provided information on the topic[25]. Indeed, the idea to create a form translated into all the official languages of the Member States, which functions as certificate, enormously facilitates the task to the involved judicial authorities.

## 2.2 EAW issuance

In order to observe the principle of proportionality,[26] a minimum punishment threshold is required according to Art. 2 (1) EAW, being this different for the purposes of an EAW issuance existing prior sentence or not in the issuing Member State; in particular, 'a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months'. As specified in the EAW Handbook, reference is made exclusively to the maximum possible punishment in the national law of the issuing Member State without any consideration to the law of the executing Member State according to the principle of mutual recognition; also, consideration of these imprisonment's thresholds takes place with regard to the punishment in abstract.

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[24] *Commission Notice - Handbook on how to issue and execute a European arrest warrant*, OJ, n. C 335, 6 October 2017, pp. 1-83, also available at ULR https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (last access on 23 May 2019) with short explanation and statistics on EAW practice.

[25] See for example in EJN website https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 23 May 2019) including EAW forms as amended by FWD 2009/299/JHA in all official languages in pdf and word format as well as practical information in all Member States, e.g., in relation to competent judicial authorities in each location; also reports by EU institutions, national legislation on EAW as well as case law by CJEU and national courts are provided. About expertise by EU actors see specifically MÉGIE, A. "The origin of EU authority in criminal matters: a sociology of legal experts in European policy-making", *Journal of European Public Policy* 2014, vol. 21, n. 2, pp. 230-247.

[26] See specifically on the topic VAN BALLEGOOIJ, W. "The EAW: between the free movement of judicial decisions, proportionality and the rule of law", in E. Guild and L. Marín (eds.), *Still not resolved?*..., op. cit., pp. 75-95 as well as VOGEL, J. and SPENCER, J.R. "Proportionality and European Arrest Warrant", *Criminal Law Review* 2010, n. 6, pp. 474-482; also HAGGENMÜLLER, S. "The principle of proportionality and the European Arrest Warrant", *Oñati Socio-Legal Series* 2013, vol. 3, n. 1, pp. 95-106. More recently MANCANO, L. "Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality", *Maastricht Journal of European and Comparative Law* 2018, vol. 25, n. 6, pp. 718-732; also JANUARIO, T.F.X. "Do princípio da proporcionalidade e sua aplicaçao no mandado de detençao europeu", *Revista Brasileira de Direito Processual Penal* 2018, vol. 4, n. 1, pp. 435-472. Last, proposing EAW's substitution, SOTTO MAIOR, M. "The principle of proportionality: alternative measures to the European Arrest Warrant", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 213-228.

Therefore, as said and also mentioned in the EAW Handbook, the principle of proportionality must always be observed, taking into account specific circumstances of the case[27].

Nevertheless, the main and most revolutionary feature of the new legal instrument is the suppression of the double criminality requirement for a list of 32 crimes with the condition imposed by Art. 2 (2) EAW, that is a punishment 'for a maximum period of at least three years'. Initially, this is a *numerus clausus* list that includes those crimes that are supposed to be the most serious ones with a cross-border profile[28]; in fact, a possible extension to other offences or even amendment is contemplated in further Art. 2 (3) EAW by Council according to specific proceeding there considered, which at the moment has not taken place. The proper exemption of this double criminality principle has also been strongly criticized by some literature[29] as a kind of violation of the principle *nullum crime sine lege,* but it is one of the most important developments introduced by the EAW regulation in comparison with the classical extradition procedures and one of the

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[27] As proposed in EAW Handbook, following factor can be taken into account: "a) the seriousness of the offence (for example, the harm or danger it has caused); b) the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence); c) the likelihood of detention of the person in the issuing Member State after surrender; d) the interests of the victims of the offence" (p. 14, par. 2.4). Also it is indicated in general terms that "issuing judicial authorities should consider whether other judicial cooperation measures could be used instead of issuing an EAW" (p. 15, par. 2.4).

[28] Particularly, "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; laundering of the proceeds of crime; counterfeiting currency; including the euro; computer-related crime; 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; organised 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 aircrafts/ships; sabotage".

[29] See, for example, ALEGRE, S. and LEAF, M., "Mutual recognition in European judicial co-operation…", op. cit. on pp. 208-209 in their comment to Art 7 ECHR, double criminality and retrospective application. Also ANDREU-GUZMÁN, F. *Terrorism and Human Rights No.2: New challenges and old dangers*, Occasional papers n.3, International Commission of Jurists, March 2003, on p. 45 ff. See analysis of 32 crimes' list by KEIJZER, N. "The double criminality requirement", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant,* op. cit., pp 137-163, on p. 152 ff and "The fate of the dual incrimination requirement", in E. Guild and L. Marín (eds.), *Still not resolved?...,* op. cit., pp. 61-75 at p. 69 ff; also VAN SLIEDREGT, E. "The dual criminality requirement", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 51-70 as well as BARBE, E. "El principio de doble incriminación", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea,* Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2006, pp. 195-205.

outcomes of the mutual reliance on criminal legislation between Member States[30]. Furthermore, the objection as to the difficulty of making the legal typification contained within the different Member State legislations coincide with regard to the offences enumerated in this precept, has been solved by the jurisprudence of some national constitutional courts in relation to extradition proceedings[31].

For the effective transmission of a European arrest warrant, and pursuant to Art. 6 (1) of the EAW, it shall be assured that both, issuing and executing judicial authorities, are competent in their territories to issue/execute the EAW 'by virtue of the law of that State'.

It means that, by contrast to other topics in the EU[32], there is not initially a European notion of judicial authority, but this is attached to domestic Law; proof of it are the notifications addressed to General Secretariat of the Council ex Art. 6 (3) EAW by Member States determining competent judicial authorities in order to issue and execute an EAW[33]. Moreover, designation of central authority takes place in order to assist the competent judicial authorities according to Art. 7 EAW, usually the Minister of Justice.

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[30] That implies the new 'out of state' character of principle of criminal legality (*nullum crime sine legge et nulla poena sine legge*). By the way, to be remembered that principle of legality is provided joint with the principle of proportionality in Art. 49 CFREU, textually, "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed" looking more for a temporal than space or geographic dimension.

[31] See, for example, in Spain ATC n. 23, 27 January 1997, ECLI: ES: TC: 1997:23A, and STC n. 102, 20 May 1997, ECLI: ES: TC: 1997:102, both available at https://hj.tribunalconstitucional.es arguing the supreme Court that the double criminality principle "does not mind an identity of the criminal rules between both states" and "does not require neither the same juridical qualification in both legislations nor an identical punishment. The significance of this principle consists of the fact is criminal and has a certain punishment in the criminal legislations of requesting state and requested state (Art 2.1 European Convention on Extradition)" (ATC 23/1997, FJ 2). In relation to EAW specifically, see literature specialized in Criminal Law as SANZ MORÁN, A. "La orden europea de detención y entrega: algunas consideraciones de carácter jurídico-material", in C. Arangüena Fanego (ed.), *Cooperación judicial penal en la Unión Europea…*, op. cit., pp. 75-125, on p. 95 ff and SÁNCHEZ DOMINGO, M.B. "Problemática penal de la orden de detención y entrega europea", in M. Jimeno Bulnes (ed.), *Justicia versus seguridad en el espacio judicial europeo. Orden de detención europea y garantías procesales,* Tirant lo Blanch, Valencia, 2011, pp. 61-107, on p. 85 ff.

[32] In concrete, promotion of preliminary ruling according to CJEU case law, which first example was *Vaasen-Göbbels* judgment on June 30th, 1966, 61/65, ECLI:EU:C:1966:39; here the reference proposed by the *Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf Heerlen* was 'considered a court or tribunal within the meaning of Article 177' and 'therefore the request for interpretation was admissible' although it was not considered an ordinary court of law under Dutch law. See in favor of such European concept of judicial body JIMENO BULNES, M. *La cuestión prejudicial del artículo 177 TCE*, Bosch, Barcelona, 1996, on p. 184 ff; also specifically SOCA TORRES, I. *La cuestión prejudicial europea. Planteamiento y competencia del Tribunal de Justicia*, Bosch, Barcelona, 2016, on p. 122 ff in relation to *Vaasen-Göbbels*.

[33] All of them contained in prior EJN website in relation to EAW at https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 23 May 2019). These judicial authorities can be not only judges but also public prosecutor and even police in some countries, e.g., Sweden where the National Police Board (*Rikspolisstyrelssen* ) can be issuing judicial authority when the purpose of a

As for the form in which to issue a European arrest warrant, the European rule provides an annex including same concepts numerated in Art. 8 of the EAW,[34] and the EAW Handbook includes specific guidelines on how to fill the EAW form (Annex III). Furthermore, the translation 'into the official language or one of the official languages of the executing Member State' is requested, according to Art. 8 (2) of the EAW; each country chooses which language shall be required, usually the official one/s and an additional common one, usually English[35]. With regard to the transmission procedure of the EAW, the rule makes a substantial difference if the location of the requested person is known or unknown; in this last case there is the possibility for the judicial authority to issue an alert for the requested person in the Schengen Information System or SIS[36] ex Art. 9 of the EAW. Nevertheless, and in practice, SIS is extensively employed in most of the Member States[37] even when the location of the requested person is known, something that is not prohibited according to Art. 9 (2) of the EAW.

Finally, Art. 18 of the EAW FWD also regulates the possibility for the issuing judicial authority to ask for 'temporary surrenders' while a procedure of definitive

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EAW is to enforce 'a custodial sentence or other form of detention' according to cover note received on April 3rd, 2009, COPEN 101, EJN 31, EUROJUST 33.

[34] Textually, "a) the identity and nationality of the requested person; b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority; c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect; d) the nature and legal classification of the offence; e) a description of the circumstances in which the offence was committed including the time, place and degree of participation in the offence by the requested person; f) the penalty imposed, if there is a final judgment or the prescribed scale of penalties for the offence under the law of the issuing Member State; g) if possible, other consequences of the offence". Besides EAW Handbook prior mentioned see in literature GINTER, J. "The content of a European Arrest Warrant", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 1-17.

[35] Such information usually is included in prior notifications or notes, eg, according to prior Swedish cover note "Sweden will accept a European arrest warrant written in Swedish, Danish, Norwegian or English" (p. 4).

[36] According to Art. 26 Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ n. L 205, 7 August 2007, pp. 63-84, which explicitly contemplates that "data on persons wanted for arrest for surrender purposes on the basis of a European Arrest Warrant or wanted for arrest for extradition shall be entered at the request of the judicial authority of the issuing Member State". Definition of alert is included in Art. 3 (1) (a) SIS II as "set of data entered in SIS II allowing the competent judicial authorities to identify a person or an object with a view to taking specific action". In this case transmission takes place through national SIRENE Bureau as indicated in EAW Handbook. See at the time with prior regulation JIMENO BULNES, M. "Las nuevas tecnologías en el ámbito de la cooperación judicial y policial europea", *Revista de Estudios Europeos,* 2002, n. 31, pp. 97-124, on p. 117 ff and more specifically DE FRUTOS, J.L.M. "Transmisión de la euroorden. Aspectos policiales desde una perspectiva práctica", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea,* op. cit., pp. 175-185.

[37] With the only exception of Ireland and Cyprus according to information provided in EAW Handbook at p. 22 (par. 3.3.3); in these countries the EAW is sent either directly or through Interpol National Office, which is provided according to Art. 10 (3) EAW. This is known as "red notice alert"; see on the topic KÜHNE, H.H. "Der mangelhafte Rechtschutz gegen einen internationalen Hftbefehl", *Europarecht* 2018, vol. 165, n. 3, pp. 121-126.

surrender is being carried forward in the executing Member State, or even a national criminal proceeding in order 'to avoid lengthy delays'[38]. According to Art. 18 (2) of the EAW, 'the conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities'; the EAW Handbook recommends to express such agreement 'by writing and in clear terms'. Also, a provision establishing the possibility for the transferred person 'to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure' is also included in Art. 18 (3) of the EAW. In fact, such temporary surrenders could be substituted by the possibility of using another kind of resource instead, such as a videoconference initially provided in the first draft of the EAW Framework Decision[39] as well as in other European and national texts; particularly, such measure is now specifically contemplated in the European Investigation Order[40].

2.3 EAW execution

According to the general rule provided in Art. 1 (2) of the EAW and confirmed by CJEU case law,[41] 'Member States shall execute any European arrest warrant on the

[38] EAW Handbook, cit., p. 36, par. 5.9.3. On temporary urrenders see specifically DELGADO MARTÍN, J. "Entregas temporales", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) y M. Muñoz de Morales (ed.), *La orden de detención y entrega europea*, op. cit., pp. 431-451.

[39] Art 34 Proposal EAW Framework Decision, cit.

[40] Art. 24 (1) Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ, n. L 130, 1 May 2014, pp. 1-36 replacing prior Art. 10 (9) Convention on mutual assistance in criminal matters established by Council Act of 29 May 2000, OJ, n. C 197, 12 July 2000, pp. 1-23. See specifically on this topic VALBUENA GONZÁLEZ, F. "La intervención a distancia de sujetos en el proceso penal", *Revista del Poder Judicial* 2007, n. 85, pp. 545-565 and "Una perspectiva de Derecho Comparado en la Unión Europea acerca de la utilización de la videoconferencia en el proceso penal: los ordenamientos español, italiano y francés", *Revista de Estudios Europeos* 2009, n. 53, pp. 117-127.

[41] See recent case *LM* (also known as *Celmer*), 25 July 2018, C-216/18, ECLI:EU:C:2015:586, where is pointed that, "while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see to that effect, judgement of 10 August 2017, *Tupikas* C-270/17 PPU, EU:C:2017:628, paragraphs 49 and 50 and the case law cited)" (par. 41). Here the CJEU answers the request for a preliminary ruling promoted by the High Court of Ireland challenging the execution of several EAWs issued by Poland on the basis of Art. 1 (3) EAW due to the impact of legislative changes related to the judiciary in this country and the possible breach of the fundamental right to a fair trial guaranteed by Art. 47 (2) CFREU. The case has caused great discussion in literature like prior *Aranyosi and Caldararu* case due to the breach of mutual trust between Member States on the basis of such possible violation of fundamental rights; see recent comments on consequences by WENDEL, M. "Mutual trust, essence and federalism – Between consolidating and fragmenting the Area of Freedom, Security and Justice", *European Constitutional Review* 2019, vol. 15, n. 1, pp. 17-47. Also about same discussion DE AMICIS, G. "Esecuzione del mandato di arresto europeo e tutela dei diritti fondamentali in presenza di gravi carenze nel sistema giudiziario dello stato di emmissione: Corte di Giustizia dell'Unione Europea, Grande Sezione, 25 luglio 2018, C-216/18", *Cassazione Penale* 2018, vol. 58, n. 11, pp 3907-3913 and VERHEYEN, L. "The principle of mutual trust between the Member States in the context of an European Arrest Warrant at risk again? – the case of M. Artur Celmer (LM)", available at https://www.academia.edu/37996015/THE_PRINCIPLE_OF_MUTUAL_TRUST_BETWEEN_THE_M

basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'. As stated, this is the general rule but also exceptions to this one are contemplated in the same EAW regulation as Art. 1 (3) of the EAW provision which requires the 'obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union', which has been argued in relevant CJEU case law as in the mentioned *Aranyosi and Caldararu* and *Celmer* cases. In both of them, the CJEU understood that refusal to execute an EAW should be an exception to be strictly interpreted requiring the executing judicial authority to ask for supplementary information to the issuing judicial authority in order to determine 'specifically and precisely' if there is a real risk of breach of fundamental rights of the concerned individual, in which case a postponement of the EAW execution should take place[42]; nevertheless this decision must consider personal circumstances of concerned individuals in a case-by-case basis and not argued in a general context accordingly[43].

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EMBER_STATES_IN_THE_CONTEXT_OF_A_EUROPEAN_ARREST_WARRANT_AT_RISK_AGAIN_The_case_of_Mr._Artur_Celmer_LM_ (last access on 25 May 2019).

[42] In concrete, the CJEU ruled in *Aranyosi and Caldararu* that "Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information to be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end." Such case law is also introduced in the EAW Handbook providing concrete guidelines in relation to fundamental rights considerations on p. 33 ff (par. 5.6); in sum, some procedural steps are numerated to guide the executing judicial authority in order to verify the risk of violation of fundamental rights if the requested person is surrendered.

[43] As it was ruled in *Celmer* case by CEU, "Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States… must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalized deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest

The EAW rule likewise regulates specific grounds for non-execution in a double category classification, as it is mandatory and of optional nature. The first ones are numerated in Art. 3 EAW and are the same in all Member States as a consequence of such compulsory nature; they contemplate, specifically and briefly, 'if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State', 'if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided' (*ne/non bis in idem* )[44] and 'if the person who is subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State'. The second ones are compiled in a broader list, and are differently implemented by the Member States as a consequence of its facultative nature[45].

Art. 2 Council FWD 2009/299/JHA of 26 February 2009 added a new Art. 4a EAW contemplating an additional optional ground for the refusal of a EAW by an

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warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State".

[44] "Where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State", otherwise it will fall under the following grounds for optional non-execution of the EAW according to Art. 4 EAW. See on the topic VAN DER WILT, H. "The European Arrest Warrant and the principle *ne bis in idem*", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant,* op. cit., pp. 99-117 as well as CIMAMONTI. S. "European Arrest Warrant in practice and ne bis in ídem ", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice,* op. cit., pp 111-129; also in Spain DE HOYOS SANCHO, M. "Eficacia transnacional del *non bis in ídem* y denegación de la euroorden", *Diario La Ley* 2005, n. 6330, pp. 1-6 and JIMENO BULNES, M. "El principio de *non bis in idem* en la orden de detención europea: régimen legal y tratamiento jurisprudencial", in A. de la Oliva Santos (dir.), M. Aguilera Morales and I. Cubillo López (eds.)*, La justicia y la Carta de Derechos Fundamentales de la Unión Europea,* Colex, Madrid, 2008, pp. 275-294. In general on the grounds for refusal, DE HOYOS SANCHO, M. "Euro-orden y causas de denegación de la entrega", in C. Arangüena Fanego (ed.), *Cooperación judicial penal en la Unión Europea,* op. cit., pp. 207-312 as well as, specifically, EAW Handbook on p. 29 ff (par. 5.4 ff).

[45] Literally and briefly, "1. If, in one of the cases referred to Article 2 (4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; 2. Where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based; 3. Where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings…; 4. Where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law; 5. If the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts…; 6. If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law; 7. Where the European arrest warrant relates to offences which: a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory".

executing judicial authority 'if the person did not appear in person at the trial resulting in the decision' unless the European arrest warrant states the fulfilment of any of following requirements in favour of the requested person: 'a) either was summoned in person… or by other means… received official information of the scheduled date and place of that trial… and was informed that a decision may be handed down if he or she does not appear; or, b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial'; or 'c) after being served with the decision and being expressly informed about the rights of a retrial, or an appeal … i) expressly stated that he or she does not contest the decision; or ii) did not request a retrial or appeal..; or d) was not personally served with the decision but: i) will personally be served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, o an appeal… and ii) will be informed of the time frame within which he or she has to request such a retrial or appeal'. This amendment on the EAW is aimed at solving prior problems with the EAWs issued on the basis of judgments rendered in *absentia,* although, as stated in the Preamble, its aim is not to prohibit execution of such EAW but to guarantee the observance of the requested person's defence rights[46].

In fact, prior ground for refusal was included till then as specific guarantee and/or condition to be given by the issuing Member State, in particular cases in Art. 5 of the EAW together with the following ones: the review of the penalty or measure imposed in the case that the EAW is based on a custodial life sentence or a life-time detention order as well as the returning of the requested person to the executing Member State in order to serve there the custodial sentence or detention order if he or she is a national or resident of the executing Member State; here it must be remembered that the EAW, by contrast to the classic extradition affects both nationals and residents of the executing Member

[46] According to Recital 4 FWD 2009/299/JHA "it is therefore necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute this decision despite the absence of the person at the trial, while fully respecting the person's right of defence". See on the topic with comments to specific cases carried out by Fair Trials International organisation MANSELL, D. "The European Arrest Warrant and defence rights", *European Criminal Law Review* 2012, vol. 2, n. 1, pp. 36-46. Also generally KRAPAC, D. "Verdicts in absentia ", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant,* op. cit., pp. 119-135 as well as RODRIGUEZ SOL, L. "Sentencia dictada en rebeldía", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea,* op. cit., pp. 283-294.

States[47]. The new provision has already given place to relevant CJEU case law such as *Melloni*[48], resulting from a preliminary reference promoted for the first time by the Spanish Constitutional Court and on which Luxembourg made a strict interpretation of the new optional ground for EAW refusal, because of that it was criticized in academia[49]; particularly the Court of Justice ruled the prohibition for the executing judicial authority 'to make the surrender of a person convicted *in absentia* conditional upon to conviction being open to review in the issuing Member State', considering that no violation of Arts. 47, 48 and 53 of the CFREU takes place because of that.

2.4 Surrender procedure

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[47] See on the topic LENSING, H. "The European Arrest Warrant and transferring execution of prison sentences", in R. Blekxtoon and W. van Ballegooij (eds.), Handbook on the European Arrest Warrant, op. cit., pp. 209-216 as well as GLERUM, V. and ROZEMOND, K. "Surrender of nationals", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 71-87; also FLORÉ, D. "La entrega de nacionales del Estado miembro de ejecución de la orden de detención", en L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea,* op. cit., pp. 207-227. In relation with this last issue and some of the prior ones see DE AMICIS, G. "Initial views of the Court of Justice on the European Arrest Warrant: towards a uniform Pan-European interpretation?", *European Criminal Law Review* 2012, vol. 2, n. 1, pp. 47-60.

[48] Judgement of 26 February 2013, C-399/11 in relation with EAW issued by the *Tribunale di Ferrara* (District court, Ferrara, Italy) to be executed by *Audiencia Nacional* (Criminal Division of the High Court, Spain) against Stefano Melloni, who was sentenced *in absentia* to 10 years imprisonment for bankruptcy fraud. He filed in Spain a defence appeal (*recurso de amparo* ) before the Spanish Constitutional Court (*Tribunal Constitucional* ), who referred the respective preliminary ruling before the CJEU; interesting to point as said it was the first time that the Spanish Constitutional Court promoted a preliminary reference. See especially BACHMAIER WINTER, L. "Dealing with European Legal diversity and the Luxembourg Court: *Melloni* and the limits of European pluralism", in R. Colson and S. Field (eds.), *EU Criminal Justice and the challenge of diversity,* Cambridge University Press, Cambridge, 2016, pp. 160-178 and "Más reflexiones sobre la sentencia Melloni: primacía, diálogo y protección de los derechos fundamentals en juicios *in absentia* en el Derecho europeo", *Civitas. Revista Española de Derecho europeo* 2015, n. 56, pp. 153-180; also same author "Diálogo entre tribunales cinco años después de Melloni. Reacciones a nivel nacional", *Revista General de Derecho Europeo* 2018, n. 15, http://www.iustel.com, analyzing further consequences of *Melloni* case especially in Spain.

[49] See TINSLEY, A. "Note on the reference in case C-399/11 *Melloni*", *New Journal of European Criminal Law* 2012, vol. 3, n. 1, pp. 19-30, who concludes that "the reference evokes a more fundamental problem with the area of freedom, security and justice: that wherever cooperation and fundamental rights standards conflict, the lowest common denominator (the ECHR) prevails" (p. 30). Also, for example, criticism by DUBOUT, E. "Le niveau de protection des droits fondamentaux dans l'Union européenne: unitarisme constitutive versus pluraisme constitutionnel – Réflexions autour de l'arrêt Melloni", *Cahiers de droit européen* 2013, vol. 49, n. 2, pp. 293-317 as well as PLIAKOS, A. and ANAGNOSTARAS, G. "Fundamental rights and the new battle over legal and judicial supremacy: lessons from *Melloni*", *Yearbook of European Law* 2015, vol. 34, n. 1, pp. 97-126. In contrast, GARCÍA SÁNCHEZ, B. "TJUE – Sentencia de 26.03.2013, C-399/11- Cooperación policial y judicial en materia penal – Orden de detención europea – Procedimientos de entrega entre Estados miembros – Resoluciones dictadas a raíz de un juicio en que el interesado no ha comparecido – Ejecución de una pena impuesta en rebeldía – Posibilidad de revisión de la sentencia. ¿Homogeneidad o standard mínimo de protección de los derechos fundamentales en la euroorden europea?", *Revista de Derecho Comunitario Europeo* 2013, vol. 17, n. 46, pp. 1137-1156, considering that the CJEU does not establish mínimum standards but "homogeneous rules on fundamental rights" (p. 1152).

The following rules included in the EAW deal with the concrete surrender procedure to be carried out by the executing judicial authority. As specified in Art. 11 of the EAW, the first aspect to bear in mind to proceed is the arrest of the requested person as a sort of preventive measure of personal character[50], which usually takes place in national criminal proceedings but in this case is attached to the European context; such arrest, as a provisional measure with interim character, must give later place to other preventive measure, either preventive detention/custody or provisional release according to national law (Art. 12 of the EAW). For the same reason, this provision also contemplates common procedural rights [51] established in national rules for such preventive measures and national criminal proceedings in general, as the right to a legal counsel and interpreter if necessary, both part of the right of defence; the right to information of the EAW's content as well as of the right to consent to surrender[52]. In all cases, the remission to national rules is done and currently it must be companied with the reference to appropriate Directives on procedural rights of suspects in criminal proceedings later analysed[53].

An important rule is enshrined in Art. 13 EAW in relation with the prior consent to surrender by the requested person joint, 'if appropriate' to the 'renunciation of the entitlement to the 'specialty rule'', which must be expressed before the executing judicial authority, again, according to national rules. The specialty rule is regulated in further Art. 27 EAW requiring specific notification by Member States[54] if the requested person may or 'may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was

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[50] See specifically JIMENO BULNES, M. "Medidas cautelares de carácter personal", in Arroyo Zapatero, Nieto Martín and Muñoz de Morales, *La orden de detención y entrega europea*, op. cit., pp. 363-382 and "La adopción de medidas cautelares de carácter personal con motivo de la ejecución de una orden europea de detención y entrega", *Revista Penal* 2005, n. 16, pp. 106-122. Also ARANGÜENA FANEGO, C. "Las medidas cautelares en el procedimiento de euro-orden", en C. Arangüena Fanego (ed.), Cooperación judicial penal en la Unión Europea…, op. cit., pp. 127-205.

[51] See specifically MORGAN, C. "The European Arrest Warrant and defendants' rights: an overview", in R. Blekxtoon and W. van Ballegooij, *Handbook on the European Arrrest Warrant,* op. cit., pp. 195-216. Also BERNARD, D. "El derecho fundamental a ser informado acerca del contenido de la orden de detención y entrega europea" and JIMÉNEZ-VILLAREJO FERNÁNDEZ, F. "El derecho fundamental a ser asistido por abogado e intérprete", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea*, op. cit., pp. 319-324 and pp. 325-354.

[52] In this sense JIMENO BULNES, M. "Medidas cautelares de carácter personal", op. cit., on p. 372 ff. Also specifically in the same book ARANGÜENA FANEGO, C. "Las medidas cautelares en regulación de la orden de detención y entrega: especial consideración de la prisión provisional y sus alternativas y de la intervención de objetos y efectos del delito", pp. 383-429.

[53] See also EAW Handbook on p. 42 ff (par. 11).

[54] See specifically countries notifications at EJN website https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 26 May 2016).

surrendered' (Art. 27 (2) EAW)[55]; also, exceptions and conditions for the application of such specialty rule are foreseen in this same precept, i.e., the fulfilment of the EAW requirements also in relation to the prior offence. Consent and renunciation can be revoked if it is explicitly provided by the Member State in question and in accordance to its national rules.

As a matter of fact, the same consent determines the further proceeding to deal under the EAW execution as well as time limits in surrender of the requested person. Specifically, Art. 14 of the EAW points that 'where the arrested person does not consent to his or her surrender… he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member States'; the same right to be heard by the requested person is guaranteed in further Art. 19 of the EAW[56]. Usually, according to national implementation on EAW in each Member State, a hearing shall take place before the executing judicial authority observes specific procedural rules in the domestic criminal proceeding, especially those concerned to the protection of the right of the defence of the requested person[57]. Moreover, as anticipated, the time limits of the surrender decision are different according to the existence or nonexistence of consent to

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[55] See comments by LAGODNY, O. and ROSBAUD, C. "Specialty rule", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 265-295 at pp. 273 ff; also MUÑOZ CUESTA, F.J. "Orden europea de detención y entrega: el principio de especialidad y el derecho de defensa", *Revista Aranzadi Doctrinal*, 2013, n. 5, pp. 41-50. In general to consent and specialty rule DE PRADA SOLAESA, J.R. "Consentimiento a la entrega. Renuncia al principio de especialidad", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea,* op. cit., pp. 355-359. Also interpretation by CJEU case law has been provided, eg, 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669.

[56] Textually, "1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court. 2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities. 3. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down." In fact, this whole article has been qualified since the enactment of the EAW as a 'riddle' because of the vagueness of its content, especially one referring to the first provision and the person nominated according to the issuing state without mentioning its character (judge, public prosecutor, court clerk, lawyer…); see comments on this article by BLEXTOON, R. "Commentary on an article by article basis", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant,* op. cit., pp. 217-269, on p.256.

[57] For example, in Spain Art. 51 (1) Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union, which textually indicates: "Hearing the person arrested shall take place with the maximum term of seventy-two hours from him being handed over, attended by the Public Prosecutor, by the legal counsel to the arrested person and, when appropriate, in interpreter, and must be performed pursuant to the provisions foreseen for detainees to declare under the Criminal Procedure Act. The right of defence shall also be guaranteed and, where legally appropriate, free legal aid shall be provided". English version of this and other Spanish legislation is provided at official Ministry of Justice website https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on 26 May 2019).

the surrender by the arrested person, whose provision is contained in Art. 17 of the EAW. First, if there is consent, the surrender decision will be adopted by the executing judicial authority in a time limit of ten days after the hearing; second, if there is not consent to the surrender, the surrender decision extends to a time limit of sixty days from the issuance of the arrest warrant (Article 19.3). In both cases, time limits may be extended by a further thirty days period if reasonable grounds are presented.

Finally[58], the definitive surrender will be done by the executing Member State to the specific authority designated by the issuing judicial authority, being the place and date of such surrender previously indicated, in any case no later than ten days after the final decision on the execution of the European arrest warrant according to Art. 23 (2) of the EAW. Nevertheless, there is a possibility to arrange a new surrender date between both judicial authorities as well as the exceptional and provisional postponement of the surrender due to serious humanitarian reasons[59] and the obligation to release the arrested person upon expiry of the time limits. But although short time limits to proceed to the surrender are legally provided, surprisingly, in the case of non-fulfilment, no kind of juridical sanction or penalties are contemplated; according to Art. 17 (7) EAW, only the information to Eurojust is required 'giving the reasons for the delay', besides the information supplied to the Council by the Member State 'which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants'.

## 2.5 CJEU case law and statistics

[58] Others legal provisions contemplate different issues such as privileges and immunities (Art. 20 EAW), postponed or conditional surrenders (Art. 24 EAW), transit (Art. 25 EAW), deduction of the period of detention served in the executing Member State (art. 28 EAW), handing over of property (Art. 29 EAW), concurrence of surrender and/or extradition requests (Art. 28 EAW). See prior literature on each topic.

[59] "For example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health' with the condition that "the execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist" according to Art. 23 (4) EAW. In the case that such humanitarian reasons are "indefinite or permanent" the EAW Handbook recommends consultation between both issuing and executing judicial authorities in order to discuss the possibility to employ alternative measures to EAW "for example, possibilities to transfer proceedings or the custodial sentence to the executing Member State or to withdraw the EAW", especially in the case of serious permanent illness; see EAW Handbook on p. 35 (par. 5.9.1.). Also, in literature about this topic PANZAVOLTA, M. "Humanitarian concerns within the EAW system", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice,* op. cit., pp. 179-212, on p. 197 ff.

Currently, there is extensive case law in relation with the EAW provided by the CJEU since the first judgment on 3 May 2007, *Advocaten voor de Wereld*[60], untile the last one at the time of writing this paper, just yesterday, all of them available on the EJN website[61] together with the pending cases, although some delay in the updating of the website has been observed. Topics have been very different in all these judgments on EAW interpreting several provisions contained in the EAW FWD, some of them very controversial in national context as previously mentioned, e.g., *Melloni*. The case law deals with several questions related to the application of general procedural principles as *in absentia* and *non bis idem*, principles of legality and non-discrimination, specialty rule, time-limits, fundamental rights, judicial authority and other specific questions as shown in the specific report elaborated by Eurojust and posted in the above- mentioned website[62].

Particularly in relation with this last issue, the most recent judgment up to now is *PI (Parquet de Zwickau)*, was delivered on 27 May 2019[63]. On this occasion, the Court of Justice interprets the concept of 'issuing judicial authority' differentiating the public prosecutor's offices in Germany, who cannot issue an EAW as far as they are not independent authorities and the Prosecutor General of Lithuania, who, by contrast, must be considered an issuing judicial authority according to the EAW provisions as institutionally independent of the judiciary. The argument employed for the denial of such character in the first case is that the public prosecutor in Germany is 'exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from

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[60] C-303/2005, ECLI:EU:C:2007/261 resulting of preliminary reference promoted by the *Arbitragehof* (Belgium) in relation with nature of FWD EAW as well as the double criminality requirement ruling the Court of Justice that "examination of the questions submitted has revealed no factor capable of affecting the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States". See for example comments by CLOOTS, E. "Germs of pluralist judicial adjudication: *Advocaten voor Wereld* and other references from the Belgian Constitutional Court", *Common Market Law Review* 2010, vol. 47, n. 3, pp. 645-672; also HERLIN-KARNELL, E. "In the wake of *Pupino: Advocaaten voor der Wereld* and *Dell'Orto", German Law Journal*, 2007, vol. 8, n. 12, pp. 1147-1160, on p. 1153 ff.

[61] ULR https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last Access on 28 May 2019) including 26 cases on EAW at the moment. In relation with recent CJEU case law see for example SATZGER, H. "Mutual recognition in times of crisis. Mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant", *European Criminal Law Review* 2018, n. 3, pp. 317-331.

[62] 'CJEU Case Law Overviews', January 2017, available at https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=2063 (last access on 28 May 2019), providing an overview by CJEU with regard to the application of EAW according to different topics summarized as keywords in index.

[63] CJEU, 27 May 2019, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=214466&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2136689 (last access on 28 May 2019).

the executive'. This judgment, which is presumed to be controversial, seems not to be the only one in the matter[64].

In relation to the general statistics, replies to the last questionnaire submitted by Member States to the Commission that date back to the year 2015, provide some figures, taking into account that not all Member States sent answers to such questionnaire. This one was published on 28 September 2017[65] and the Commission analyses different quantitative as well as some qualitative information provided by the Member States, who answered the standard questionnaire elaborated by the Council at the time[66]. Furthermore, a general background resulting from prior replies by Member States to this questionnaire is included in e-justice portal[67] with total figures from different years. As an example, it can be mentioned that 16.144 EAWs were issued in 2015 and 5.304 EAWs were executed, on average 50% surrenders with the consent of the requested person. This fact also affects to time-limits on surrender because if the consent takes place, the average time is fourteen days and less than two months without consent.

## 3. EUROPEAN INVESTIGATION ORDER

### 3.1 General background

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters[68] (hereinafter

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[64] See application C-685/18, Minister for Justice and Equality, referred by the High Court of Ireland, where also it is requested if the public prosecutor of this country, who is considered to be independent from the executive and participates in the administration of justice, is an issuing judicial authority according to Art. 6 (1) EAW. Nevertheless, the referring court decided to withdraw the request for preliminary ruling on 14 December 2018 and, subsequently, Order of the President of the Court on 21 December 2018, ECLI:EU:C:2018:1050, rules the removal of the case from the Register of the Court.

[65] Commission Staff Working Document – Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015, SWD (2017) 320 final.

[66] Council document 11356/13 of 24 June 2013, COPEN 97, EJN 40, EUROJUST 47, available at It contains specific questions such as how many EAWs have been issued and for which category of offence, how many persons have been arrested, how many surrender proceedings have been initiated, how many requested persons consented the surrender, how many days did the surrender procedure take, in how many cases the executing judicial authority refused the EAW's execution and for which grounds,…

[67] In concrete at https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (last access on 28 May 2019).

[68] OJ, n. L 130, 1 May 2014, p. 1-36.

DEIO) is a new and comprehensive instrument aimed at the gathering of evidence located in another EU country[69].

The Directive is based on the principle of mutual recognition, according to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU). This principle was declared at the Tampere European Council of 15 and 16 October 1999[70] as the cornerstone of judicial cooperation in criminal matters. However, at the same time it takes into account the flexibility of the traditional mutual legal assistance mechanisms.

DEIO is divided into 46 Recitals, seven Chapters and 39 Articles. Chapter I "The European Investigation Order", Chapter II "Procedures and safeguards for the issuing State", Chapter III "Procedures and safeguards for the executing State", Chapter IV "Specific provisions for certain investigative measures", Chapter V "Interception of Telecommunications", Chapter VI "Provisional measures" and Chapter VII "Final provisions".

According to article 1(1) of the DEIO, an EIO is a 'judicial decision' issued or validated by the competent judicial authority of a Member State (the issuing State) to have one or several specific investigative measure(s) carried out in another Member State (the executing State) to obtain evidence.

The deadline for its transposition expired on the 22 May 2017 and the process of implementation is concluded[71].

Luxembourg was the last country which implemented the Directive on 11 September 2018, while Denmark and Ireland are not bound by the Directive (Recital 44 and 45).

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[69] As an initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain and the Republic of Austria on 2010.

[70] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, available at http://www.europarl.europa.eu/summits/tam_en.htm (last access on 30 May 2019).

[71] On the status of implementation of Directive see: https://www.ejn-crimjust.europa.eu/ejn/EJN_StaticPage.aspx?Bread=10001 (last access on 28 May 2019).

3.2 Scope of the DEIO. Art. 34 DEIO

The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing Member State (Art. 1(1)). It does not cover the setting up of joint investigation teams and the gathering of evidence within such teams (Art. 3), a matter still regulated by the FD 2002/465/JHA of 13 June 2002, on joint investigation teams. Moreover, the DEIO should not apply to cross-border surveillance as referred to in Article 40 of the Convention implementing the Schengen Agreement of 14 June 1985 (hereinafter: CISA).

One of the first and most pragmatic issues posed by the entry into force of DEIO was related to the interpretation of Art. 34(1) of the DEIO, according to which from 22 May 2017 the Directive 'replaces' several instruments of judicial cooperation in criminal matters, applicable between Member States bound by this Directive. European conventions as listed under Art. 34 (1) DEIO are the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959[72] as well as its two protocols[73]; CISA[74] and Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (henceforth MLA)[75] and its protocol[76]. Prior the European Convention of 20 April 1959 signed within the framework of the Council of Europe (MLA Convention 1959) operated as essential rule regarding the gathering of evidence in criminal matters in another Member State till the enforcement of MLA 2000 on August 23rd 2005[77].

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[72] ETS n. 030, available at http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030 (last access on 28 May 2019).
[73] Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS n. 099, and Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS n. 182, available at http://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/en_GB/7763526 (last access on 28 May 2019).
[74] Signed on 19 June 1990, OJ, n. L 239, 22 September 2000, p. 19, today considered Schengen *acquis* integrated into the framework of the European Union according to Protocol (No) 19 to Treaties on the European Union and on the Functioning of the European Union, OJ, n. C 115, 9 May 2008, p. 290.
[75] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01), OJ, n. C 197, 12 July 2000, p. 1.
[76] Protocol established by the Council in accordance with Article 34 of the Treaty on the European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ, n. C 326, 21 November 2001, p. 2.
[77] MORÁN MARTÍNEZ, R.A. "La orden Europea de Investigación", in M. Jimeno Bulnes (dir.) and R. Miguel Barrio (ed.), *Espacio judicial europeo y proceso penal*, op. cit., pp.163-186; JIMENO BULNES,

Moreover, the DEIO replaces, for Member States bound by the Directive, FD 2008/978/JHA on the European Evidence Warrant (hereinafter EEW), for obtaining objects, documents and data for use in proceedings in criminal matters of 18 December 2008, and has been annulled by Regulation 2016/95 of the Parliament and Council of 20 January 2016 and also the provisions of FD 2003/577/JHA concerning orders freezing property or evidence of 22 July 2003, as far as freezing of evidence is concerned. This matter is now regulated by Article 32 DEIO, named "Provisional measures". Therefore, the FD 2003/577/JHA is still in force for freezing orders for the purpose of subsequent confiscation, a matter that is not covered by the DEIO. It shall be noted that the DEIO does not either apply to confiscation regulated at European level by FD 2006/783/JHA, on the application of the principle of mutual recognition to confiscation orders and by Directive 2014/42/EU [78], on the freezing and confiscation of instrumentalities and proceeds of crime.

It should be mentioned that following the teleological/pragmatic interpretation provided by the Italian desk of Eurojust and by the European Judicial Network (EJN), the word 'replaces' has been interpreted in the sense that does not entail the automatic abolition of all the previous normative instruments adopted in the field of judicial assistance: they will still be applied in situations where the DEIO is not applicable, such as for instance in relation to Denmark and Ireland, which are not bound by the Directive, and also in relation to Member States that have not completely transposed the DEIO[79].

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M. 'Orden europea de investigación en materia penal', in M. Jimeno Bulnes (ed.), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, Bosch, 2016, pp. 151-208; BACHMAIER WINTER, L. 'European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European directive', *Zeitschrift für Internationale Strafrechtsdogmatik* 2010,n.9, pp. 580-589, at p. 581; also ALLEGREZZA, S. "Critical remarks on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility", *Zeitschrift für Internationale Strafrechtsdogmatik* 2010, n.9, p. 569-579. More extensively BELFIORE, R. "The European Investigation Order in criminal matters: developments in evidence-gathering across the EU", *European Criminal Law Review* 2015, vol. 5, n. 3, pp. 312-324 and, specifically, MANGIARACINA, A. "A new and controversial scenario in the gathering of evidence at the European level. The Proposal for a Directive on the European Investigation Order", *Utrecht Law Review* 2014, n. 1, vol. 10, pp.113-133, at p. 115.

[78] Spain has transposed Directive in Arts. 803 *ter* a – 803 *ter* Spanish Act on Criminal Procedure (*Ley de Enjuiciamiento Criminal*, henceforth LECrim) by Law 41/2015, of 5 October, on amendment of Act on Criminal Procedure for the speeding of criminal justice and the strengthening of procedural safeguards;

[79] Eurojust, *Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive*, p. 5, affirm that a majority of national authorities consulted were in favour of a pragmatic/teleological approach. A few national draft EIO laws prescribe the continued use of EU CMACM in relation to Member State that did not implement in time (draft laws in HU, RO and

Such an interpretation would be in line with the aim of the Directive and with the application of the principle of interpretation in accordance with the contents of Directives, as developed by the CJEU[80].

## 3.3 Subjects

### 3.3.1 Competent authorities

In relation to the subjects who can issue an EIO, following its definition as *'a judicial decision which has been issued or validated by a judicial authority of a Member State'* (Art. 1), the issuing authority it is a judicial authority. However, the meaning of the concept "judicial authority" depends on the structure of each normative procedural system[81].

It is important to emphasize the useful and practical work by the EJN helping to use the EIO across Member States since following article 2(c) the concept issuing authority can be defined as "*a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or, any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law (...).* In this last case, before an EIO is transmitted to the executing State, it shall be validated by a judge, investigating judge or a public prosecutor.

The document "*Competent authorities, languages accepted, urgent matters and scope of the EIO Directive1of the instrument in the EU Member States"*[82] synthetizes the

SK). French law which transposed EIO legislation prescribes the treatment of incoming MLA requests from Member States that have not yet transposed DEIO as if they were EIO (Article 5 of the Ordonnance of 1 December 2016).

[80] CJEU, 16 June 2005, *Pupino*, C-105/03, ECLI:EU:C:2005:386.

[81] See JIMENO BULNES, M., "Orden europea de investigación en materia penal: una perspectiva europea y española, in T. Bene (ed.), *l'Ordine europeo di indagine*, G. Giappichelli, Torino, 2016, pp. 23-26; SAYERS D., *The European Investigation Order. Travelling without a 'roadmap',* Centre for European Policy Studies (CEPS), 2011, available at http://www.ceps.eu, at p.9.

[82] European Judicial Network, "Competent authorities, languages accepted, urgent matters and scope of the EIO Directive1of the instrument in the EU Member States", available at https://www.ejnforum.eu/cp/registry-files/3339/Competent-authorities-languages-accepted-scope-290419f.pdf (last access on 30 May 2019).

different and varied competent authorities depending on each Member State. It should be highlighted that five different authorities in the legal procedure can be found:

1. Issuing authorities
2. Validating authorities
3. Receiving authorities
4. Executing authorities
5. Central/specific authorities

Each Member State has pointed these different authorities according to their own national legislation.[83] In this point, it is important to note that as it was indicated in the framework of the "*Eurojust meeting on the European investigation order"*[84] despite the direct contact among the different national authorities, the characteristic of the EIO is essential, the role of Eurojust facilitating communication between the authorities involved in case the communication or relation is triggered and improving the coordination.

### 3.3.2 The role of defence

Regarding the exercise of defence rights, the text of the Directive expressly grants the possibility to request the issuing of an EIO '*within the framework of applicable defence rights in conformity with national criminal procedure*' (Art. 1(3) of the DEIO) to the suspected, the accused and their lawyers. As underlined by scholars, although this provision is aimed at realizing the principle of equality of arms, it does not recognise an autonomous direct request of legal assistance to a foreign judicial authority. In this regard, Article 4(1) of the DEIO stressed the obligation to respect the fundamental rights and legal principles declared in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings. This necessity to respect human rights can affect one of the most important principles in the area of freedom, security and justice within

[83] See KOSTORIS, R. E. (ed.), *Handbook of European Criminal Procedure*, Springer, Netherlands, 2018; MITSILEGAS, V. "European Criminal Law After Brexit", *Criminal Law Forum* 2017, vol. 28, n. 2, pp. 219–250; European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs*, Study. Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation*, PE 604.977, 2018.
[84] Report *Eurojust meeting on the European investigation order. The Hague, 19-20 September* 2018*,* n.11 December 2018, p.16.

the EU: mutual trust based in the confidence and presumption that Member States respect Union law, especially, human rights. Nevertheless, following Recital 19 of the DEIO, this principle of mutual trust can be affected by the destruction of the previous presumption of compliance. In this last scenario, the execution of the EIO can be refused.

### 3.4 EIO issuing and transmission

The principle of proportionality has been specifically addressed in the text of the DEIO among the conditions for issuing and transmitting an EIO. Indeed, Art. 6 provides that "*The issuing authority may only issue an EIO where (...): (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person (...)*". It also specifies that in each case the condition shall be assessed by the issuing authority (Article 6(2)).[85]

In the framework of the meetings organised by EJN, some problems were mentioned in the practical application of an EIO. The limit applying EIO only in cause of minor offences provokes the problem in finding a common understanding of "minor offences"[86]. Both the issuing authority and the executing authority will assess whether it is proportionate to issue or to execute an EOI or not. It may possible that they have different valuation.

DEIO incorporates an Annex A, the format to fill in issuing an EIO. This format contains the essential data related to:

*(a) data about the issuing authority and, where applicable, the validating authority;*

*(b) the object of and reasons for the EIO;*

*(c) the necessary information available on the person(s) concerned;*

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[85] See specifically BACHMAIER WINTER, L., "Remote computer searches under Spanish Law: The proportionality principle and the protection of privacy", *Zeitschrift für die gesamte Strafrechtswissenschaft* 2017, vol. 129 n. 1, pp. 205-231, esp. p. 206; BACHMAIER WINTER, L. 'The role of the proportionality principle in cross-border investigations involving fundamental rights' in S. Ruggeri, (ed.) Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings, Springer, Heidelberg, New York, 2013, pp. 85-110; also same author especially addressed to EIO, BACHMAIER WINTER, L. 'La orden europea de investigación y el principio de proporcionalidad', *Revista General de Derecho Europeo* 2011, n.25 http://www.iustel.com

[86] European Judicial Network, Conclusions 2018 On the European Investigation Order (EIO), Brussels, 7 December 2018, p. 6, available at https://www.ejnforum.eu/cp/registry-files/3456/ST-14755-2018-INIT-EN.pdf (last access on 30 May 2019).

*(d) a description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal law of the issuing State;*

*(e) a description of the investigative measures(s) requested and the evidence to be obtained.*

EJN identifies some best practices related to Annex A[87]. Such as issuing only one EIO in cases of several measures addressed to the same competent executing authority, mentioning the suspect, indicating "urgency" only in case of a real need, identifying person(s) concerned, presenting the summary with short sentences or being precise.

In relation to the language that can be used, a common opinion suggested that Article 5(2) of the EIO Directive is *"obliging the executing Member State to accept other EU languages than their own"* according to "Extracts from Conclusions of Plenary meetings of the EJN concerning the practical application of the EIO" by the General Secretariat of the Council[88].

To the transmission of the EIO, "*any means capable of producing a written record under conditions allowing the executing State to stablish authenticity"* can be used according to Article 7(1) DEIO. In this phase, the national central authority/ies can play an essential role assisting the competent authorities[89].

An e-evidence platform is on-going according to the information provided by the Commission[90]. This platform would improve the secure transmission of an EIO.

Regarding the types of proceedings for which the EIO can be issued, according to Article 4 DEIO, an EIO can be issued in the framework of criminal proceedings, administrative proceedings and judicial proceedings by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having

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[87] EJN, Conclusions 2018, op. cit. p. 8.

[88] Council of the European Union, *Extracts from Conclusions of Plenary meetings of the EJN concerning the practical application of the EIO,* Brussels, 8 December 2017, available at https://www.ejnforum.eu/cp/registry-files/3373/ST-15210-2017-INIT-EN-COR-1.pdf (last access on 30 May 2019).

[89] See generally on Spanish criminal procedure GASCÓN INCHAUSTI, F. and VILLAMARÍN LÓPEZ, M.L 'Criminal procedure in Spain', in R. Vogler and B. Huber (eds.), *Criminal procedure in Europe*, Duncker & Humblot, 2008, pp. 541-653. Also specifically BACHMAIER WINTER, L. and DEL MORAL GARCÍA, A. *Criminal Law in Spain,* Wolters Kluwer, Alphen aan den Rijn, 2012, p. 205 ff.; PÉREZ GIL, J. "Medidas de investigación tecnológica en el proceso penal español: privacidad vs. eficacia en la persecución", in R. Brighi (ed. lit.), M. Palmirani (ed. lit.), M. E. Sánchez Jordán (ed. lit.), *Informatica giuridica e informatica forense al servizio della società della conoscenza: scritti in onore di Cesare Maioli,* Aracne Editrice, Italia, 2018, pp. 187-198.

[90] Report *Eurojust meeting on the European investigation order,* op. cit. p. 15.

jurisdiction, in particular, in criminal matters; and proceedings related to the previous one in which the offences or infringements may imply to be held liable or punished in the issuing State.

### 3.5 EIO recognition and execution

As an instrument based on the principle of mutual recognition, an EIO transmitted according to the DEIO should be executed without any further formality (Article 9(1) of the DEIO) and with the same celerity and priority as for a similar domestic case or in a shorter deadline in case of urgent circumstances (Article 12 DEIO)[91].

However, it is possible that the executing authority recourses to a different investigative measure if the measure indicated in the EIO does not exist or if this particular measure would not be available in a similar domestic case following Article 10 of the DEIO).

On the other hand, general grounds for non-recognition or non-execution are listed in Article 11 of the DEIO as optional. Other specific grounds for non-recognition are listed with regard to specific investigative measures.

According to Article 11 DEIO, an EIO may be refused in the executing State in case of (a) *immunity or a privilege under the law of the executing State;* whether the execution (b) *would harm essential national security interests, jeopardise the source of the information or involve the use of classified information;*(c) whether the *investigative measure would not be authorised under the law of the executing State in a similar domestic case;* (d) in case of violation of the principle *of ne bis in idem;* (e) according to the principle of territoriality; (f) in case of incompatibility with Article 6 TEU and the Charter; (g) whether the offence(s) is not a crime in the national criminal law of the executing State (except in case of the 32 offences listed in Annex D to which the principle of double criminality do not apply); (h) in case of certain restriction of the measures according to certain type of crimes.

[91] Without the prejudice of Article 15 DEIO which allow to the executing authority to postpone the recognition or execution in certain circumstances.

Art. 11 (1) (d) of the DEIO provides as a ground for optional refusal of recognition or execution of the EIO the fact that it is contrary to the *ne bis in idem* principle. Such a narrow forecast should be interpreted in accordance with the explanations given in Recital 17 of the own DEIO. Explanations, which, as doctrine has emphasized[92], should not go unnoticed by the national legal operator. Recital 17 in the DEIO Preamble states, on the one hand, '*The principle of ne bis in idem is a fundamental principle of law in the Union, as recognized by the Charter and developed by the case-law of the Court of Justice of the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to that principle*'; on the other hand, due '*to the preliminary nature of the procedures underlying an EIO, its execution should not be subject to refusal where it is aimed to establish whether a possible conflict with the ne bis in idem principle exists, or where the issuing authority has provided assurances that the evidence transferred as a result of the execution of the EIO would not be used to prosecute or impose a sanction on a person whose case has been finally disposed of in another Member State for the same facts*.' In relation to the previous idea, it is clear that DEIO establishes two exceptions to the refusal of recognition and enforcement of an EIO based on *ne bis in idem*. The first of these exceptions is supported by the necessity to ensure the practical effectiveness of this right by the issuing authority. The second one presupposes the non-infringement of *ne bis in idem* (although only in respect of proceedings and/or final decisions in the Member States), since the transfer of evidence is subject to the undertaking or guarantee provided in such meaning by the issuing authority.

In relation to the principle of territoriality, in case of an EIO issued for an offence committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, judicial authorities will apply the general condition based on the principle of double criminality, with its exceptions where the EIO has been issued for

[92] See specifically AGUILERA MORALES, M. "El ne bis in idem: un derecho fundamental en el ámbito de la Unión Europea", *Civitas: Revista española de Derecho europeo* 2006, vol. 20, pp. 479-531. Also, in general VERVAELE, J. A. E. "The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights", *Utrecht Law Review* 2005, vol. 1, n. 2, pp. 100-118.

offences listed in Article 11 of the DEIO or for investigative acts mentioned in Article 10 (2) of the DEIO[93].

Once an EIO is transmitted, the authority of execution shall take a decision on recognition of execution in no later than 30 days after the receipt of the EIO (Article 12(3) DEIO). Since that moment, the execution shall carry out in no more than 90 days.

This deadline is shorter in case of issuing an EIO to take provisional measures in order to prevent the destruction, transformation, removal, transfer or disposal of an item used as evidence. According to Article 32, the executing authority shall communicate the decision within 24 hours.

According to Article 13 DEIO, the transference of the evidence shall take place without undue delay. Objects, documents or data transferred can be temporally transferred again in case that is relevant for other proceedings.

It should be noted that the execution on an EIO can be suspended while resolving a legal remedy whether it is provided in similar domestic cases. Following Article 14 DEIO, an EIO can be challenged in the issuing State in relation to the substantive reasons for issuing an EIO. An EIO may be challenged in the executing State by reasons related to fundamental rights. These situations shall be informed by the respective authority to the other one involved (Article 16 of the DEIO).

During the execution of an EIO, all the authorities shall respect the principle of confidentiality (Article 19 of the DEIO), and the protection of personal data shall be

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[93] See MARTÍN GARCÍA, A.L and BUJOSA VADELL, L. *La obtención de prueba en materia penal en la Unión Europea*, Atelier, Barcelona, 2016, at p. 118. See BELFIORE, R. 'Riflessioni a margine della Direttiva sull'ordine europeo d'indagine penale', *Cassazione penale* 2015, n. 9, pp. 3288-3296, at p. 3294. See TINOCO PASTRANA, A. "L'ordine europeo d'indagine penale", *Processo penale e giustizia* 2017, n.2, pp. 346-358, at p. 349. See BACHMAIER WINTER, L. "Transnational evidence. Towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters", *Eucrim* 2015, n. 2, p. 47-60 at p. 50. MORÁN MARTINEZ, R. A. "Obtención y utilización de la prueba transnacional", *Revista de Derecho Penal* 2010, n.30, pp. 79-102, at pp. 92 ff; also GRANDE MARLASKA-GÓMEZ, F. and DEL POZO PÉREZ, M. "La obtención de Fuentes de prueba en la Unión Europea y su validez en el proceso penal español", *Revista General de Derecho Europeo* 2011, n. 24 htto://www.iustel.com, at p. 16 ff. In international panorama see VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?,* IRPC series, 2010, vol. 37, Maklu, pp. 51 ff.

ensured by Council Framework Decision 2008/977/JHA (17) and the principles of the Council of Europe Convention for the protection of Individuals with regard to the Automatic Processing of Personal Data of 28 January 1981 and its Additional Protocol (Article 20 DEIO).

The costs caused by the execution of an EIO shall be borne by the executing State according to 21 DEIO. In case of exceptionally high costs on the executing State, both States have to agree which costs can be considered on that classification. The issuing authority can decide to withdraw the EIO or, on the contrary, to pay the part of the costs considered exceptionally high (Recital 23 and Article 21).

### 3.6 Specific provisions for certain investigative measures

The Directive has provided that Member States shall ensure legal remedies equivalent to those available in a similar domestic case, and has specified that the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, '*without prejudice to the guarantees of fundamental rights in the executing State*' (Art. 14(1) (2)).

Chapter IV of the DEIO under the heading '*Specific Provisions for certain investigative measures*' (Arts. 22-30 of the DEIO) provides for certain investigative measures that are aimed at favouring admissibility and the use of evidence in the criminal proceedings in the issuing Member State. Some of these measures resemble the ones already provided for under the EU CMLACM, such as interception of communications.

In particular, the Directive has included rules on the temporary transfer of persons held in custody (to the issuing and the executing State (Arts. 22 and 23 of the DEIO); on the hearing by videoconference, other audiovisual transmission and telephone (Articles 24 and 25 of the DEIO); measures aimed at obtaining information on banking and financial accounts and operations (Articles. 26 and 27), as well as certain measures implying the gathering of evidence in real time (Article 28); covert investigations (Article 29) and interception of communications (Article 30 and 31 of the DEIO)[94].

[94] On the topic, PÉREZ GIL, J. "Medidas de investigación tecnológica en el proceso penal español: privacidad vs. eficacia en la persecución", in R. Brighi (ed.), *Informatica giuridica e informatica forense*

3.7 CJEU case-law

DEIO is a quite current cooperation instrument implemented into the national legal system in a recent period of the time.

The first preliminary ruling was presented from the *Spetsializiran nakazatelen sad* (Bulgaria) on 31 May 2017 Criminal proceedings against Ivan Gavanozov[95]. Opinion by General Advocate Mr. Yves Bot was delivered on 11 April 2019.

The questions asked by the Bulgarian court were:

- *1. Are national legislation and case-law consistent with Article 14* DEIO*, in so far as they preclude a challenge, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing a European investigation order for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness?*
- *2. Does Article 14(2) of the directive grant, in an immediate and direct manner, to a concerned party the right to challenge a court decision issuing a European investigation order, even where such a procedural step is not provided for by national law?*
- *3. Is the person against whom a criminal charge was brought, in the light of Article 14(2) in connection with Article 6(1)(a) and Article 1(4) of the directive, a*

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*al servizio della società della conoscenza,* Aracne, Roma, 2018, pp. 187-198, p. 188. GARCIMARTÍN MONTERO, R. 'The European Investigation Order and the respect of fundamental rights in criminal investigations', *Eucrim* 2017, n.1, p. 45-50. Also MARTINEZ GARCÍA, E. "La orden de investigación europea. Las futuras complejidades previsibles en la implementación de la Directiva en España", *La Ley Penal* 2014*,* n. 106, available at http://revistas.laley.es, at p. 5. In general on the AFSJ see AGUILERA MORALES, M. "Justicia penal y Unión Europea: un breve balance en clave de derechos", *Diario La Ley* 2016*,* n. 8883, http://diariolaley.laley.es. See JIMENO BULNES, M. "La Directiva 2013/48/UE del Parlamento europeo y del Consejo de 22 de octubre de 2013 sobre los derechos de asistencia letrada y comunicación en el proceso penal: ¿realidad al fin?", *Revista de Derecho Comunitario Europeo* 2014, vol.18, n.48, pp. 443-489, at p. 461; also BACHMAIER WINTER, L. 'The EU Directive on the right to access to a lawyer: a critical assessment', in S. Ruggeri (ed.), *Human rights in European Criminal Law*, Springer, 2015, pp. 111-131, p.119.

[95] OJ, 7 August 2017, C-324/17, available at https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2017.256.01.0016.01.ENG (last access on 31 May 2019).

*concerned party, within the meaning of Article 14(4), if the measures for collection of evidence are directed at third party?*

- *4. Is the person who occupies the property in which the search and seizure was carried out or the person who is to be examined as a witness a concerned party within the meaning of Article 14(4) in connection with Article 14(2) of the directive?*

According to the Conclusions by Advocate General:

*1) Article 14* DEIO *must be interpreted as meaning that it is contrary to the Member State' legal system, such as Bulgarian legislation, which in no way establishes the possibility of challenging the substantive grounds of an investigation measure subject to a European Investigation Order, as well as an authority of that Member State can issue an European Investigation Order .*

*2) Article 14 of Directive 2014/41 cannot be invoked by an individual before a national court to challenge the substantive grounds for which a European Investigation Order has been issued when national law does not provide for remedies in the framework of similar national procedures.*

*3) The concept of 'interested party' within the meaning of Directive 2014/41 includes both the witness who is the subject of the investigative measures requested in a European Investigation Order and the person against whom the criminal charge has been brought, even if the research measures established in a European research order are not addressed to it*[96].

This provisional resolution at a European Judicial level represent an important first step into highlighting the requirement imposed by the DEIO regarding the prevision of legal remedies at a national level. The transcendence of this prevision provokes the impossibility to invoke Article 14 DEIO by an individual in case of not prevision in the national legal system.

On the other hand, the Opinion by the General Advocate in relation to the concept of "interested party" would finish with the doubts regarding whether a witness or a third part can be defined as "interested party" as an undetermined concept used by DEIO.

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[96] Conclusions of the General Advocate Mr. Y. Bot, presented on 11 April, 2019, ECLI: EU: C: 2019: 312, available at http://curia.europa.eu/juris/celex.jsf?celex=62017CC0324&lang1=en&type=TXT&ancre= (last access on 31 May 2019).

With an indirect connection to EIO, other case law can be found assessing other measures or principles. For instance, the prohibition of incurring *bis in idem* is configured as a right whose scope and meaning have been outlined by the Court of Justice of the EU in a progressive manner at Union level, and unlike in other supranational fields, the recognition of *non bis ídem* as an inherent right came only with the wording of Article 50 of the CEDF. This Article states that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. However, prior to its proclamation in the Charter, the prohibition of *non bis in idem* entitled the Court of Justice of the European Union to consider it a general principle of Community Law, under Articles 54 to 58 of the CISA. It is thus explained that this Convention -which, by the way, the DEOI is replacing *ex* art. 34 (1) (b), except for Ireland and Denmark as prior said- constitutes the normative basis for a good part of the ECJ rulings on *non bis in idem,*[97] although there is no shortage of decisions on the application of this right in the context of mutual recognition instruments.

At a European level, the principle is stated by both Art. 4 of the 7th Protocol to the ECHR and Art. 50 of the CFREU. According to the former, "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*"; according to the latter, "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*".

As far as its scope is concerned, one of the peculiarities of the banning of *bis in idem* at Union level is that it covers both the material or substantive dimension of this principle (duplicity of sanctions) and its procedural dimension (duplicity of processes), but this last dimension -and this is the peculiarity compared to the way in which proscription acts internally -only in cases where the duality of processes derives from an

[97] It is important to bear in mind at least the wording of such Art. 54: '*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'*.

earlier process terminated by firm resolution on the crux of the matter. This means that *non bis in idem* does not cover situations of international *lis pendens,* but it does not mean either that a second procedure cannot be ruled out even if there is an ongoing enforcement process either in the executing state itself or in another state of the Union. In view of it, therefore, *non bis in idem* does not reach international *lis pendens* cases and that, unlike other instruments of mutual recognition,[98] DOEI says nothing about *lis pendens* as ground for refusing recognition or execution of an OEI. For this reason, it is clear that this cannot be based on the fact that, on the same facts and with respect to the same subject, there is an ongoing criminal proceeding either in our country or in another state of the Union.

*Non bis in idem* is not confined to the criminal sphere but extends to the broader sanctioning area. It covers both the double procedure (administrative and criminal) and the double sanction (administrative and criminal) interdiction, but only in those cases where the administrative procedure and/or penalty is 'criminal in nature'. This categorization requires compliance with three parameters: (1) the legal classification of the offense in accordance with the domestic law of the state where it is envisaged; (2) the very nature of the infringement; and (3) the nature and severity of the sanction that may be imposed on the interested party[99]. It is therefore understood that, from Luxembourg, it has been held that Art. 50 CFREU does not preclude a Member State from imposing on the same person and for the same facts a failure to comply with declaratory obligations in the field of VAT, which is at the same time tax surcharge and a criminal penalty[100]. Or whether the penalty is to be taken into account in respect of the sanction is to deprive the farmer who makes certain false declarations in order to obtain such aid and the criminal conviction of that farmer for subsidization fraud.

This legal doctrine from the Court of Justice of the European Union seems to fit in its formulation with that coined by the Spanish courts as to when the concurrence of

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[98] See Arts. 4 (2) EAW FWD and 32 (1) (a) LRM.

[99] This list corresponds to the criteria which, according to the ECHR, must be examined in order to determine whether the duplication of administrative and criminal sanctions infringes the *non bis in idem* enshrined in Protocol No 7 to the ECHR. At this point, however, attention should be drawn to the judgement pronounced by ECtHR, GC, 15 November 2016, *A and B c. Norway*, appls. n. 24130/11 and 29758/11, available at http://hudoc.echr.coe.int/eng?i=001-168972 (last access on 28 July 2017). As the CJEU points out in Order on 25 January 2017, *Menci*, C 524/15, available as further ECJ judgements at official website https://curia.europa.eu/jcms/jcms/j_6/en/ it is possible that this ruling may radiate its influence at Union level and that it is therefore not permissible to refuse a request for judicial cooperation in proceedings on the basis of *non bis in idem*, despite the existence of a duplication of sanctions and the possibility of being criminalized.

[100] CJEU, 26 February 2013, *Fransson*, C-617/10, ECLI:EU:C:2013:105.

criminal and administrative sanctions violates the constitutional prohibition of *non bis in idem*. The fact is that when this guarantee is linked to the so-called triple identity requirement –i.e., identity of subject, identity of fact and identity of foundation-, it is assumed that where the latter is lacking (that is, where protected and the sanction, criminal and administrative, is proportionate) the successive exercise of *ius puniendi* and the sanctioning power of the Administration does not harm *non bis in idem*[101].

## 4. PROCEDURAL RIGHTS OF SUSPECTS IN CRIMINAL PROCEEDINGS

### 4.1 Introduction

For more than two decades, the European Union has been showing interest to guarantee territorial defence for all suspects of having commissioned a criminal offence.

As a matter of fact, on the occasion of the European Council celebrated in Nice on 7th December 2000, the Charter of Fundamental Rights of the European Union was signed and solemnly proclaimed. Its article 48.2, in the section on "justice", states that the rights of the defence of anyone who has been charged shall be guaranteed.

The Charter contains, for the first time in the history of the European Union in a single text, a compilation of all civil, political, economic and social rights of European

[101] Summarized case law in SSTC, 10 December 1991, n. 234 and 11 October 1999, n. 177, both available at http://hj.tribunalconstitucional.es/HJ/es/Busqueda/Index
[101] CJEU, 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683.

citizens and all people living in the territory of the European Union classified in six large sections: dignity, freedoms, equality, solidarity, citizens' rights and justice[102].

Since the year 2000 up to the present time, the European Union has come a long way towards the harmonization of the procedural safeguards in its territory. Throughout this period, three stages can be clearly distinguished; a first one that can be described as a study and is materialized with the Green Paper of the Commission (2003), a second and failed stage represented by the proposal for a council framework Decision (2004), and a third and last (simultaneous to the enforcement of the Treaty of Lisbon) that culminates the proposals and implements the Roadmap to strengthen the procedural rights of suspects and accused persons in criminal proceedings (2009).

In this last period, two different stages can be differentiated. On the one hand, in the period from the year 2010 to 2013, three directives on the right to interpretation and translation and on the right to legal representation are approved. On the other, a period driven by the introduction of a new series of measures by the Commission that gives green light in 2016 to the appearance of other three new directives regarding the presumption of innocence, rights of minors and legal aid.

This paper aims to show a general overview of the results arising from the legislative initiative of the European Union in matters of procedural rights of suspected and accused persons and the six directives in connection therewith published to date.

We will first analyse the history of those legal instruments by skimmingly examining the Green Paper and the failed proposal for a council framework Decision with regard to procedural rights in criminal proceedings throughout the European Union.

## 4.2 The Green Paper of the Commission (2003)

[102] The entire text of the Charter of Fundamental Rights of the European Union can be consulted on: https://www.europarl.europa.eu/charter/pdf/text_en.pdf

Two years after the promulgation of the Charter of Fundamental Rights of the European Union, the Commission adopted on 19 February 2003 the "Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union"[103].

Previous to the drafting of formal proposals, this document was aimed at closely analyzing the standards of procedural safeguards in the European Union.

To this effect, two kinds of measures were adopted. On the one hand, a document made available on the web. of the Official Directory of the European Union for Justice and Home Affairs allowed the interested people to leave comments and suggestions; on the other hand, a questionnaire on different aspects of the criminal proceedings was submitted to the Member States.

After that, a meeting of experts, authorities of the Member States, lawyers associations, and specialists in criminal law, law professionals and representatives of non-governmental organizations was held.

After having analysed and studied the online feedback and the answers to the questionnaires submitted by the Member States, the experts, fundamentally the representatives of non-governmental organizations and law professionals came to the conclusion that those rights needed to be protected[104].

It was then confirmed that the cited safeguards already enjoyed previous recognition at a legal level in most of the Member States, as these had already signed the European Convention on Human Rights. Nevertheless, its application in practice was dissimilar among the Member States, a fact that justified joint action.

However, the chief merit of the Green Paper was to identify the appropriate spheres to develop community action, spheres that were limited to five and coincided with those agreed on the proposal for a council framework Decision, namely: 1) access

[103] Document COM (2003) 75 final.
[104] For further clarification, read GALLEGO-CASILDA GRAU, Y. "El Libro Verde de la Comisión Europea sobre las garantías procesales para sospechosos e inculpados en procesos penales de la Unión Europea*", Cuadernos de Derecho Judicial XIII-2003* 2004, CGPJ, Madrid, pp. 235-256.

to legal representation, both before the trial and at trial; 2) access to interpretation and translation; 3) ensuring that vulnerable suspects and accused in particular are properly protected; 4) consular assistance to foreign detainees; 5) notifying suspects and defendants of their rights ("Letter of Rights")[105].

### 4.3 The failed proposal for a Council framework Decision (2004)

As a result from the Green Paper, the proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union[106] is formulated one year after and presented by the Commission on 28 April 2004.

Although the proposal failed to achieve its legislative *iter*, it implied an important starting point with a view to harmonizing the procedural safeguards.

As the regulatory scheme on criminal judicial cooperation was still of intergovernmental nature without implying "integration" in a strict sense (prior to the enforcement of the Treaty of Lisbon), the framework Decision is employed. On the contrary, the matters with regard to civil judicial cooperation had already been subjected to the community rules (following the Treaty of Amsterdam[107]) in the shape of regulations, directives and decisions.

The original drafting established the date 1 January 2006 as the deadline for the States to implement the necessary measures in order to abide by the proposal for a council framework Decision. However, that deadline was obviously not met due to the fact that the legislative procedure had not been concluded.

The main goal of this proposal was to set the minimum commons standards in matters of procedural safeguards, generally applicable to all suspects and accused in criminal proceedings throughout the European Union.

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[105] Aspects such as conditional release or impartiality on the taking of evidence were excluded for deserving separate further action.
[106] Document COM (2004) 0328 final.
[107] Signed on 2 October 1997 and in force since 1 May 1999 in the European area.

Article 6 of the European Convention on Human Rights[108] was taken as a reference, this article concerns the right to a fair trial to which all Member States are signatory parties.

It is important to bear in mind that article 6.3 of ECHR already includes a minimal series of the rights of the accused, which are: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of their defense; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against them; e) to have the free assistance of an interpreter if they cannot understand or speak the language used in court.

Nevertheless, the growing number of actions[109] brought before the European Court of Human Rights together with the conviction of some Member States for having infringed the right to a proceeding within a reasonable period of time, bring to light the fact that the enforcement of the European Convention on Human was neither absolute nor universal.

Although the legal level of safeguards is similar in the European Union, it would be foremost that its application in practice shall be as uniform, an aspect that shall be considered in the light of the case law of the European Court of Human Rights.

Having said that, the ultimate objective of the Proposal, apart from the legislative approach, was to achieve the validity of the principle of mutual recognition.

Mutual recognition essentially implies that a State shall consider orders of court from other Member States equivalent to its own, notwithstanding that the management of

[108] Signed in Rome, on 4 November 1950 in the Council of Europe.
[109] The number of actions increased in more than 500% between the years 1993 and 2000.

the matter itself can be different between them. Needless to say, the validity of this principle can only be effective in a spirit of trust in which the Member States have reservations about the foreign legal system and its enforcement.

The European Council in Tampere, held in October 1999, had agreed to consider the principle of mutual recognition the "cornerstone" of judicial cooperation in both criminal and civil matters[110]. The first measure adopted on mutual recognition was on the European arrest warrant and the surrender procedures[111].

The content of this proposal was restrained to five procedural rights: right to legal advice (articles 2-5), right to free interpretation and translation (articles 6-9), right to specific attention for vulnerable suspects and accused (articles 10-11) right to communicate, especially with consular authorities (articles 12-13), and duty to inform of rights (article 14).

Due to its failure, it is now not relevant to analyze the regulations of the proposal of the council framework Decision. Besides, those rights will be, to a large extent, subject of debate when examining further Directives that likewise refer to them.

Notwithstanding, we would like to make some minor remarks[112]. For instance, the right to legal advice is considered the fundamental and most important right of the accused, as it guarantees the effectiveness of the rest.

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[110] See conclusions 33, 35 and 36 of this Council.
[111] Framework Decision 2002/584/JAI, of 13 June 2002 (OJ, 18 July 2002, n. L 190, pp 1-20).
[112] For a more detailed analysis, see our previous studies: VALBUENA GONZÁLEZ, F. "La Propuesta de Decisión Marco del Consejo relativa a determinados derechos procesales en los procesos penales celebrados en la Unión Europea", *Diario La Ley* 2006, n. 6564, pp. 1-5; VALBUENA GONZÁLEZ, F. "Derechos procesales del imputado", en M. Jimeno Bulnes (ed.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales*, Bosch Editor, Barcelona, 2007, pp. 395-416; also, VALBUENA GONZÁLEZ, F. "Adaptación de la Propuesta de Decisión Marco sobre Garantías Procesales al ordenamiento jurídico español", in M. De Hoyos Sancho (ed.), *El proceso penal en la Unión Europea: garantías esenciales*, Lex Nova, Valladolid, 2008, pp. 169-177. Also, JIMENO BULNES, M., "The Proposal for Council a Framework Decision on certain procedural rights in criminal proceedings troughout the European Union", in E. Guild y F. Geyer (eds.), *Security versus Justice? Police and judicial cooperation in the EU: which future for EU's third pillar*, Ashgate, Aldershot (Hampshire) 2008, pp.171-202.

For its part, the right to free interpretation and translation is related to the rights of the suspects or accused to be informed of the case against them so that they are enabled to defend themselves[113].

With regard to the specific attention to vulnerable suspects and accused, it should be noted that this attention is also envisaged for those unable to understand the content or significance of the judicial proceedings for reasons of age, mental, physical or emotional condition[114].

Moreover, information about the whereabouts of the individuals deprived of liberty due to interim relief shall be provided (within the shortest time possible) to their relatives, entitled persons or working place. In the case of foreigners, the information can be provided to the consular authorities of the State of origin, with whom they had the right to communicate.

Finally, the last safeguard included in the Proposal deals with the information provided to the accused on his rights, in the shape of a new model of "Letter of Rights" that shall always be immediately delivered before the police questioning takes place.

As it was foreseen, the proposal for a council framework Decision was never fully developed. In a second attempt, in the middle of 2006, it was even agreed to continue working on a transactional proposal by the Presidency of the Council of the European Union [115] with the intention of overcoming the existing resistance and reaching a unanimous agreement.

In comparison with the original proposal, the former pursued to limit the number of rights and their scope, focusing on general rules and avoiding a detailed specification

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[113] For further clarification, read JIMENO BULNES, M. "El derecho a la interpretación y traducción gratuitas", *Diario La Ley* 2007, n. 6671, pp. 1-10.
[114] For further clarification, read DE HOYOS SANCHO, M. "Acerca de la necesidad de armonizar garantías procesales de los sospechosos en la Unión Europea: especial consideración de los grupos vulnerables", *Revista de Derecho y Proceso Penal* 2007, n. 18, pp. 117-142.
[115] According to the Agreement of the Council of Justice and Home Affairs, 2732 Council Meeting, held in Luxemburg, 1 and 2 June 2006. (Press release 9409/06, Presse 144, released on the occasion of the cited Council of Justice and Home Affairs, p. 14, available on https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/89875.pdf (last access on 31 May 2019).

on the way each Member State should exercise those rights, having considered the differences observed in the existing procedural systems.

The spheres in which the Presidency decided to keep minimum common standards were the following: right to information, right to legal aid, right to interpretation and right to the translation of all procedural documents for all the accused. Not even with this reduction of the rights addressed could the initiative succeed, being finally abandoned.

### 4.4 The Directives arising from Roadmap strengthen the procedural rights of suspects and accused in criminal proceedings (2009)

Having acknowledged the failure of the debates in the previous years, which did not lead to any particular result, a new course on the matter is initiated through the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[116].

The starting point of this new plan continues to be the expected safeguards in the European Convention on Human Rights, pursuant to the interpretation by the European Court of Human Rights, as a common basis for the systems of criminal law in the Member States.

The pursued goal is still to provide the principle of mutual recognition of the court's decisions through the achievement of minimum common standards on procedural aspects.

However, even when the premises of this Decision[117] do not differ from those expected in the proposal for a council framework Decision, a change of direction in the system of action is observed.

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[116] OJ, 4 December 2009, C 295, pp. 1-3.

[117] For further clarification, read JIMENO BULNES, M. "The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings", *Eucrim* 2009, n. 4, pp. 157-161; also, JIMENO BULNES, M. "Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?", *CEPS Liberty and Security in Europe* 2010, pp. 1-20.

The method of addressing a body of safeguards in a whole text is no longer employed, and it is now replaced with an approach that addresses them separately based on their importance and complexity with the pretext to grant each of them some added value

Monnet's "step by step" technique is here employed, a method that once enabled the creation of the European Communities and has provided advances in matters of integration[118].

The isolated management of the rights successively in time, entails the dangers of a lack of coherence on the whole, which is to be avoided by taking as a reference the minimum standards stipulated by the European Council of Human Rights according to the interpretation of the European Court of Human Rights.

However, the Roadmap prioritizes a series of procedural rights that that are considered essential, namely: a) translation and interpreting; b) information about rights and charges; c) legal advice and free justice; d) communication with relatives, employer and consular authorities; e) special safeguards for vulnerable suspects or accused; f) provisional arrest.

The Council invites the Commission to suggest measures for the first five rights and a Green Paper on the provisional arrest every time the situation of deprivation of liberty is considerably different in the Member States.

First and foremost, the Council commits to studying all proposals put forward as a priority and to subsequently act in cooperation with the European Parliament and the Council of Europe.

Nevertheless, the Council does not only extend the invitation to the Commission with a view to reaching compromises, but also dares to give instructions on the scope and

[118] This technique can be understood following Monnet's words: "Europe will not be made all at once, […] it will be built through concrete achievements".

content of those rights which show a decrease in the rights with regard to the proposal for a council framework Decision.

Independently of the assessment of the Commission, the measures have been taking shape in the form of six Directives, which we will be chronologically analysed in the following lines in order of publication.

### 4.4.1 Directive on the right to interpretation and translation in criminal proceedings (2010)

The first implemented initiative (following the order of the safeguards presented in the Roadmap) was Directive 2010/64/UE, of 20 October 2010, of the European Parliament and the Council on the on the right to interpretation and translation in criminal proceedings[119], promoted at the request of several Member States, including Spain.

The right to interpretation and translation is not only guaranteed in the criminal proceedings of the European Union, but also in proceedings for the execution of a European arrest warrant and surrender[120].

Temporarily, the acknowledgement of those rights starts the moment the competent authorities of a Member State inform about a suspect or an accused of having committed an offence and lasts until the end of the proceedings. That is, during the course of the criminal proceedings, widely speaking, and including the criminal investigations and the police interview, especially for the purposes of interpretation.

From a subjective perspective, both the suspect and the accused that do not speak the language of the proceedings or have hearing difficulties remain protected, and not only when communicating with the investigation and judicial authorities (police force, prosecutors or judges) but also with their legal counsel.

[119] OJ, n. L 280, 26 October 2010, pp. 1-7.
[120] Articles 1.1, 2.5 and 3.5.

Linguistic assistance by a professional sharing the mother tongue of the individuals or any other that they can understand and speak and allows them full competence to exercise their rights of defence cannot be waived.

The Directive particularly emphasizes the extent of this safeguard to the conversations with the suspect or accused with their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications in order to safeguard the fairness of the proceedings[121].

When it comes to translation, the right extends to all essential documents, such as any decision depriving a person of his liberty, any charge or indictment and, in the case of surrender procedures between the Member States, the European arrest warrant. Nevertheless, the suspect or accused or their legal counsel can demand upon request the translation of other documents that likewise safeguard the effective exercise of the defence.

Even when the Council Resolutions on the Roadmap omitted any reference to the cost-free status of the service, the Directive stipulates that the Member States shall defray the costs of interpretation and translation, irrespective of the outcome of the proceeding[122].

In comparison with the former proposal for a council framework Decision, the Directive positively addresses the possibility to challenge an adverse decision, either regarding the quality of the interpretation service or the quality of the translation of any given essential document[123].

On the contrary, a failure to meet the standards required with regard to the quality of the services of translation and interpreting is also observed.[124] Currently, the Member

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[121] Article 2.2 and Recitals 19 and 20. The CJEU has given a preliminary ruling with regard to this right in relation with the lawyer, limiting it to oral statements (CJEU, 15 October 2015, *Covaci*, C-2016/14, EU:C:2015:686)

[122] Article 4 and Recital 17.

[123] Articles 2.5 and 3.5.

[124] On this subject, read VIDAL FERNÁNDEZ, B. "El derecho a intérprete y a la traducción en los procesos penales en la Unión Europea", in, C. Arangüena Fanego (ed.), *Espacio europeo de libertad, seguridad y justicia: últimos avances en cooperación judicial penal*, Lex Nova, Valladolid, 2010, pp. 183-222, esp. pp. 203 ff.

States shall only provide the necessary means to guarantee these services. Formerly, professional and qualified translators and interpreters were required for this purpose and, in the event of mal praxis, were subject of substitution. Besides, their interventions could likewise be subject to be recorded in order to verify their accuracy.

### 4.4.2 Directive on the right to information in criminal proceedings (2012)

The second initiative of the Roadmap was Directive 2012/13/UE, of 22 May 2012, of the European Parliament and the Council on the right to information in criminal proceedings[125], and whose distinctive feature is that it is both a procedural right and a prerequisite for the effective exercise of the rest of the procedural rights acknowledged to suspects.

The minimum content of this right in this Directive distinguishes three aspects: firstly, the right to information on rights and procedural safeguards; secondly, information on the accusation; and finally, the right to free access to the materials of the case.

Concerning the first aspect, all suspects and or accused of having committed a crime shall be provided with the rights the Directive deems essential, namely: the right of access to a lawyer, free legal advice, information of the accusation, interpretation and translation and the right to remain silent[126].

Most of these rights are guaranteed by the Member States pursuant to the compliance of other Directives, which we will later examine, except for the right to be informed of the accusation, a right that has its own regulation in this same Directive.

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[125] OJ, n. L 142, 1 June 2012, pp. 1-10.

[126] Article 3.1 and Recital 19. To this list of essential rights, the presumption of innocence shall be added after the entry into force of Directive 2016/343 of 9 March, which strengthens specific aspects of the presumption of innocence in the criminal proceedings, together with the right to be present at a trial. On this subject, read SERRANO MASSIP, M. "Directiva relativa al derecho a la información en los procesos penales", in M. Jimeno Bulnes (dir.), R. Miguel Barrio (ed.), *Espacio Judicial Europeo y Proceso Penal*, op. cit., pp. 219-248, esp. pp. 232 ff.

The above-cited information shall be promptly provided, at the latest before the first official interview in a language that the individual understands and in plain language in accordance with the age and maturity condition of the suspect.

When dealing with suspects, the information must be, as a general rule, provided in writing, with the "Letter of Rights" in the language that the suspect can understand. In order to help with its transposition, the Directive provides the Member States different, optional models. The second model is aimed at persons arrested for the purpose of the execution of a European arrest warrant.

The individuals arrested or deprived of liberty shall generally be informed about their right of access to the materials of the case, the right to have consular authorities and one person informed, urgent medical assistance, the maximum number of hours or days they may be deprived of liberty before being brought before a judicial authority, and the right to challenge the lawfulness of the arrest, obtain a review of the detention, or make a request for provisional release[127].

With regard to the second aspect, the right to be informed of the accusation, three different situations in which the passive part of the criminal proceedings can stand are distinguished: suspect, arrested and accused individuals.

Suspects only have the right to be informed about the criminal act they have committed, whereas the arrested and deprived of liberty individuals have the right to be informed of the reasons for their arrest or deprivation of liberty including the criminal act they are suspected of having committed. For their part, the accused shall be given a detailed description of the offence, its nature, legal classification and the kind of their participation in them[128].

Accused persons shall be provided with the information on the accusation at the latest on submission of the merits of the accusation to a court (Art. 6.3), a fact that the CJEU understood in the sense that communication of the charges shall be provided before

[127] Articles 4.2 and 4.3.
[128] Article 6.

the court begins to examine the merits of the charges so that the accused has enough time to prepare an effective defence[129].

Finally, and with regard to the third aspect, the free access to the materials of the case, the legislator expects to reach two goals. On the one hand, the possibility to actually and legally motivate the challenge of the legality of the arrest and, on the other, the full exercise of the right to defence and validity of the *audi alteram partem rule*[130].

### 4.4.3 Directive on the right of access to a lawyer in criminal proceedings (2013)

In the third place in chronological order, among the tools to harmonize the procedural safeguards for suspects and accused, the European Parliament and the Council approved Directive 2013/48/UE, of 22 October 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.[131]

It is important to highlight that the proposal for a council framework Decision (2004) considered the access to a lawyer the first and most important right of the accused, as it guarantees the rest of the acknowledged safeguards. However, the Council Resolution of 30 November 2009 relegates this right to a third position in the chronology of action to the benefit of others such as translation and interpretation and the information on rights, as it was brought to light[132].

However, this Directive does not confine its scope of application to the right of access to a lawyer, but also extends it to other rights in connection with the possibility of

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[129] CJEU (Grand Chamber) of 6 June 2018, *Kolev*, C-612/15, EU:C:2018;392

[130] On this subject, read SERRANO MASSIP, M. "Directiva relativa al derecho a la información en los procesos penales", in M. Jimeno Bulnes (dir.), R. Miguel Barrio (ed.) *Espacio Judicial Europeo y Proceso Penal*, op. cit., esp. pp. 241 ff.

[131] OJ, n. L 294, 6 November 2013, pp. 1-2.

[132] Our previous work already approached this change of perspective: VALBUENA GONZÁLEZ, F., "Garantías procesales en la orden de detención europea", in M. Jimeno Bulnes (ed.), *Justicia versus seguridad en el espacio judicial europeo. Orden de detención europea y garantías procesales*, op. cit. pp. 201-229, esp. pp. 228 and 229.

communicating with the outside during the period of deprivation of liberty, such as informing a third party of the condition or communication with consular authorities.

The right of access to a lawyer is the first right that serves as the basis from which the minimum common standards are agreed, especially with regard to the moment this right shall be exercised, its content, the way it is exercised, its waiver or confidentiality[133].

Therefore, suspects and accused have the right to have access to a lawyer without undue delay, from the very first stages of the proceedings so that their rights of defence can be practically and effectively exercised. The access to a lawyer shall be provided before any of the following circumstances take place: police or judicial questioning, the carrying out of any investigative or other evidence-gathering act, deprivation of liberty or the moment they have been summoned to appear before a court with jurisdiction.

One of the most relevant aspects of the Directive is the moment when the right to have access to a lawyer shall start to be exercised, as it faces dissimilar procedural practices among the Member States[134].

With regard to the content of this right, the access to a lawyer entails, at least, these three aspects: the private meeting and communication with the lawyer representing the suspect or accused prior to the police or judicial questioning; secondly, the presence and active participation of the lawyer during the questioning and thirdly, the lawyer's attendance to any investigative or evidence-gathering acts such as identity parades, confrontations and reconstructions of the scene of the crime.

Even when not mentioned explicitly, we understand that the right of access to a lawyer starts in the pre-trial proceedings and extends to the conclusion of the proceedings, so that the accused shall likewise have access to a lawyer during the trial and, if

[133] Articles 3, 9 and 4, respectively.

[134] Depending on the State, the right to have Access to a lawyer does not start to be exercised the moment a police arrest takes place. On the contrary, it can be delayed for some time, as it has been observed in the case of la garde à vue in the French Law. Besides, arrests during the weekend or at certain hours can likewise pose problems in this same context. On this subject, read ARANGÜENA FANEGO, C. "El derecho a la asistencia letrada en la Directiva 2013/48/UE", *Revista General de Derecho Europeo* 2014, n. 32, pp. 1-3, esp. 20. Available on: http//:www.iustel.com.

applicable, when bringing an appeal against the final resolution, pursuant to the general scope and the application of the time frames of the rights in the Directive[135].

Special attention is paid to respecting the confidentiality of the communication between suspects or accused and their lawyers, not only on the occasion of their meetings but also in the exchange of correspondence, telephone conversations and other forms of communication allowed.

It shall be advised that, the access to a lawyer is considered an inalienable right for the suspect or accused. Having said that, the waiver is subject to the satisfaction of certain requirements; on the one hand, the individual should have been informed about the content and the possible consequences of waiving this right and; on the other hand, that the waiver is to be given voluntarily and unequivocally either in writing or orally and it shall always be noted[136].

Following the right to have access to a lawyer, the Directive deals with other rights exclusively applicable to suspects and accused deprived of liberty, such as informing a third party or communicating with third persons or consular authorities.

In this way, suspects or accused have the right to inform a third party about their deprivation of liberty without undue delay.[137] This information shall be provided to a relative or employer nominated by the interested party, or even to even to any other person, a friend or acquaintance. This right that can be waived by nature (except for people below the age of 18 years), as the individuals may prefer not to inform anybody about their condition.

The contact with the outside of the individual deprived of liberty does not end with the communication with another person about their condition but extends to their

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[135] Article 2.1 *in fine*: "The Directive […] applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
[136] On this matter, read VALBUENA GONZÁLEZ, F. "Directiva relativa al derecho a la asistencia letrada en los procesos penales", in M. Jimeno Bulnes (dir.), R. Miguel Barrio (ed.) *Espacio Judicial Europeo y Proceso Penal*, op. cit., pp. 249-261, esp. pp. 254 ff.
[137] Article 5.

right to communicate personally with other third parties, including the consular authorities[138].

Hence, suspects or accused deprived of liberty have the right to communicate without undue delay with, at least, a third party of their choice, for instance a relative. Under this same circumstance, non-nationals have the right to inform the consular authorities about their deprivation of liberty without undue delay and to communicate with them[139].

The contact with the consular authorities is not limited to providing information about the deprivation of liberty and possible communication, but it also extends to the right to receive visits, have conversations and keep correspondence with these authorities with a view to providing the individual legal representation, on the condition that both the authorities and the suspect or accused agree and wish to do so.

The Directive ultimately enshrines the right of access to a lawyer in European arrest warrant proceedings[140], which, strictly speaking, is not a different safeguard from the right to access to a lawyer, but its application in this specific case.

If appropriate, the rest of the rights included in the Directive, apart from the right to access a lawyer, which are the right to inform about the deprivation of liberty to a third person of the choice of the suspect or accused and the right to communicate with third parties, including the consular authorities, are also applicable to the proceedings of a European arrest warrant in the Member State of execution[141].

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[138] Articles 7 and 8.
[139] "The right of suspects and accused persons who are deprived of liberty to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals". (Recital 37)
[140] Article 10.
[141] For further clarification, read JIMENO BULNES, M. "La Directiva 2013/48/UE del Parlamento Europeo y del Consejo de 22 de octubre de 2013 sobre los derechos de asistencia letrada y comunicación en el proceso penal: ¿realidad al fin?", op. cit., pp. 443-489.

### 4.4.4 Directive on the presumption of innocence and of the right to be present at the trial in criminal proceedings (2016)

After the three previously examined Directives were approved in the period 2010-2013, a second working stage in the cited Roadmap is initiated with the publication in 2016 of three new Directives in connection with the procedural safeguards of suspects or accused in criminal proceedings.

Following a chronological order, the first Directive to be published was Directive 2016/343/EU, of 9 March 2016, of the European Parliament and Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[142].

Even from its proposal, this Directive has been the object of harsh criticism. On the one hand, because it is not limited to establishing rules on the presumption of innocence but also contemplates aspects on the right to be present at a trail, going beyond the Roadmap drawn by the Council back in 2009. On the other hand, its provisions formulate general law principles instead of providing the procedural framework to protect the rights of suspects and accused, a fact that complicates its own transposition[143].

With regard to its content, the provisions in connection with the presumption of innocence present a double approach: extra-procedural and procedural.[144] Concerning its extra-procedural side, the authorities are demanded to treat the accused pursuant to the safeguard, avoiding considering him guilty in public statements until the individual has been convicted in true form of law. Along these lines, the Member States are required to adopt measures to guarantee that the jurisdictional authorities abstain from presenting

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[142] OJ, n. L65, 11 March 2016, pp 1-11.

[143] On this matter, read ARANGÜENA FANEGO, C., "Las directivas europeas de armonización de garantías procesales de investigados y acusados. Su implementación en el Derecho español", *Revista de Estudios Europeos* 2019, n. 1, pp .5-40, esp. p. 24. Available on: http://www.ree-uva.es.

[144] On this matter, read the distinction addressed in GUERRERO PALOMARES, S. "Algunas cuestiones y propuestas sobre la construcción teórica del derecho a la presunción de inocencia, a la luz de la Directiva 2016/343, de 9 de marzo, del Parlamento Europeo y del Consejo, por la que se refuerzan en el proceso penal determinados aspectos de la presunción de inocencia y del derecho a estar presente en el juicio", in C. Arangüena Fanego y M. De Hoyos Sancho (eds.), *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea*, Tirant, Valencia, 2018, pp. 143-175, esp. pp. 150 ff.

suspects or accused as being guilty before the jurisdictional authorities and audience through the use of measures of physical restraint[145].

In connection with its procedural side, it shall be ensured that the burden of the proof for establishing the guilt of suspects and accused persons is on the prosecution; likewise, suspects and accused should be likewise given the benefit of the doubt. Suspects and accused shall have the right to remain silent and not to incriminate themselves. The exercise of this right shall not be evidence that they have committed a criminal offence[146].

The Directive also deals with the right to be present at the trial[147], requiring the Member States to ensure this safeguard. Nevertheless, this is not an absolute right, as the trial can take place without the presence of the accused as long as certain requirements are met, namely: informing the suspect or accused of date and place of the trial, of the consequences of the non-appearance and of the possibility of a mandate to a lawyer to represent him or her at the trial.

However, when suspects and accused have not been present at the trial, these shall have the right to effectively challenge the decision and the right to a new trial in their presence[148].

### 4.4.5 Directive on procedural safeguards for children who are suspects or accused in criminal proceedings (2016)

This new Directive 2016/800/EU, of 11 May 2016, on procedural safeguards for children who are suspects or accused in criminal proceedings is published in compliance with Measure E) of the Roadmap (special safeguards for suspected or accused persons who are vulnerable)[149].

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[145] Articles 4 and 5.
[146] Articles 6 and 7.
[147] The incorporation of this right to the Directive primarily arises from the conflicts on the application on the European arrest warrant of individuals imprisoned *in absentia*. See Judgment of CJEU (Grand Chamber) of 26 February 2016, case C-399, Melloni, EU:C:2013:107.
[148] Articles 8 and 9.
[149] OJ, n. L 132, 21 May 2016, pp 1-19.

The main goal of this Directive is to establish minimum common standards for certain children who are suspects or accused in a criminal proceeding or are subject to an arrest warrant so that they can understand and follow the proceedings in order to allow them to exercise their right to a fair trial, prevent their relapse and foster their social insertion[150].

To this effect, all persons under the age of eighteen years are considered minors at the moment of committing the punishable offence and are subject to criminal proceedings or requested in European arrest warrant proceedings.

Despite this fact, the Directive is not applicable until the final decision determines whether the suspect or accused has committed the criminal offence, including, when applicable, the sentencing and the resolution of any appeal.[151] Moreover, the Member States are requested to maintain the safeguards for minors when they become eighteen years before the criminal proceedings and until the moment they become twenty-one[152].

Particularly, the Directive incorporates a series of rights that strengthen the personal status of the investigated minor with respect to the adult, namely: the right to be accurately informed, which includes informing the holder of parental responsibility who can accompany the minor during the proceedings[153]; the right to a lawyer and to legal aid[154]; the right to an individual assessment[155] where the child's personality and maturity shall specially be taken into account, the child's economic, social and family background together with any specific vulnerability; the right to a medical examination[156] without any undue delay with a view, in particular, to assessing the child's mental and physical condition; the right to audiovisual recording of the questionings[157]; the limitation of deprivation of liberty limited to the shortest period of time and subject to periodical

[150] On this, read JIMÉNEZ MARTÍN, J. "Garantías procesales de los menores sospechosos o acusados en el proceso penal. Cuestiones derivadas de la Directiva 2016/800/UE, de 11 de mayo", en C. Arangüena Fanego y M. De Hoyos Sancho (eds.), *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea,* op. cit., pp. 177-200.
[151] Article 2.1.
[152] Article 3.1.
[153] Articles 4, 5 and 15.
[154] Articles 6 and 18.
[155] Article 7.
[156] Article 8.
[157] Article 9.

reviews[158]; the right to a timely and diligent treatment of the case[159]; the right to the protection of privacy[160] in court hearings involving children held in the absence of public; and finally, the right of the child to appear in person and to effectively participate in the trial[161], by being given the opportunity to be heard and to express his or her views.

### 4.4.6 Directive on legal aid (2016)

The last step towards the European harmonization of procedural safeguards has been Directive 2016/1919/UE, of 26 October 2016, of the European Parliament and the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[162].

Its publication constitutes a good example of the difficulties encountered until the Roadmap's culmination in 2009. Although its content was already included in Measure C of the cited Roadmap, the right to legal aid was not included in Directive 2013/48 on legal aid, it was published three years after[163].

'Legal aid' means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer[164].

The Directive includes minimum standards that apply to suspects and accused in criminal proceedings that are deprived of liberty, are required to be assisted by a lawyer in accordance with Union or national law, or are required or permitted to attend an investigative or evidence-gathering act. Likewise, the Directive is also applicable to individuals who are the subject of a European investigation order or suspects or accused that were not initially suspects or accused but become so in the course of questioning[165].

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[158] Articles 10, 11 and 12.
[159] Article 13.
[160] Article 14.
[161] Article 16.
[162] OJ, n. L 297, 4 November 2016, pp 1-8.
[163] For further clarification, read VIDAL FERNÁNDEZ, B. "La aplicación de la Directiva 2016/1919 sobre asistencia jurídica gratuita a los sospechosos y acusados y a las personas buscada por una OEyDE", in C. Arangüena Fanego y M. De Hoyos Sancho (eds.), *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea*, op. cit., pp. 201-234.
[164] Article 3.
[165] Article 2.

Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, without undue delay, by a competent authority. It shall also be ensured that, in the event their request for legal aid is refused in full or in part, suspects accused shall be informed in writing so that they can have an effective remedy[166].

The Member States shall apply a means test, a merits test, or both in order to determine, whether legal aid is to be granted.

With regard to the means test and in order to determine whether a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer, all pertinent factors such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State shall be taken into account.

On the other hand, when a merits test is applied and in order to determine whether the interests of justice require legal aid to be granted the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, shall be taken into account.

Attention shall likewise be paid to two significant aspects: appropriate funding from the Member States to ensure and effective legal aid system of an adequate quality and suitable training to the lawyers involved in the decision-making on legal aid, and their replacement when required[167].

[166] Articles 6 and 8.
[167] Article 7.

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