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THE FIGHT AGAINST TERRORISM IN SPAIN: JUDICIAL COOPERATION IN CRIMINAL MATTERS AND PROCEDURAL RIGHTS

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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 Spain: 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 AND ACRONYMS

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./Art.	Article/Articles
BOE	*Boletín Oficial del Estado* (Spanish Official Journal)
BOCG	*Boletín Oficial de las Cortes Generales* (Official Journal of the Spanish Parliament)
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
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
e.g.	*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
i.e.	*id est*
JIT	Joint Investigation Team
LOEDE	Act 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 in the European Union (*Ley de Reconocimiento Mutuo de Resoluciones Penales en la Unión Europea*)
no.	number
OJ	Official Journal of the European Union
op. cit.	*opus citatum*
para.	paragraph (*fundamento jurídico*)
SAN	Judgement by National Court (*Audiencia Nacional*)
SAP	Judgement by Provincial Court (*Audiencia Provincial*)
STC	Judgement by Constitutional Court (*Tribunal Constitucional*)
STS	Judgement by Supreme Court (*Tribunal Supremo*)
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

The implementation in Spain of mutual recognition instruments and Directives on procedural rights of suspected and accused persons in criminal proceedings enacted by the EU takes place in both different legislations according to which principle is applied. In the first case, with regard to the mutual recognition instruments, this policy is developed under the principle of mutual recognition as said; for this reason implementation in Spain employs specific law under this title as it is Act 23/2014, of 20 November, on mutual recognition of judicial decision in criminal matters in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea,* hereinafter LRM)[1], where provisions on European Arrest Warrant and European Investigation Order are contained. In the second case, related to the strengthening of procedural rights of suspected and accused persons in criminal proceedings provided under the application of the principle of approximation of legislation, implementation in Spain is carried out through ordinary criminal procedural legislation, as the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal, hereinafter* LECrim)[2], essentially in its new Article 118.

As known, both principles are contemplated in Art. 82 (1) of the TFEU as legal basis of judicial cooperation in criminal matters, explicitly, "the principle of mutual recognition of judgements and judicial decisions" 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] As also said in the prior report related to the European scenario, the conjunction of both principles justifies today's enactment of different procedural instruments related to

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[1] BOE no. 282, 21 November 2014, pp. 95437-95593, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-12029; English official translation is provided by Spanish Minister of Justice at https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on 25 September 2019). See specifically ARANGÜENA FANEGO, C., DE HOYOS SANCHO, M. and RODRIGUEZ-MEDEL NIETO, C. (eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea,* Thomson Reuters & Aranzadi, Cizur Menor, 2015.

[2] Royal Decree of 14 December 1882, BOE no. 260, 17 September 1882, consolidated version available at https://www.boe.es/eli/es/rd/1882/09/14/(1)/con; also English translation is provided at prior link https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on 25 September 2019).

[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. For a general overview of mutual recognition instruments, procedural rights of suspects and protection of victims in criminal procedure see JIMENO BULNES, M. (dr.) and MIGUEL BARRIO, R. (coord.), *Espacio judicial europeo y proceso penal*, Tecnos, Madrid, 2018.

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. Last, and also indicated in prior report, the implementation in Spain of those considered to be the most important instruments of mutual recognition of judicial decisions in criminal matters have been selected for the purposes of this work, those whose practice in first case is strongly demonstrated[4], i.e., the European Arrest Warrant and the European Investigation Order; by contrast, the analysis of the implementation in Spain of the Directives on procedural rights of suspects in criminal proceedings takes place of all of them in general.

It shall be noticed that the Spanish criminal procedure follows the civil law tradition according to a so-called inquisitorial pattern[5] or, at the moment, a mixed model between inquisitorial and accusatorial patterns as far as criminal proceeding is divided into two phases, each following the characteristics of the former inquisitorial and accusatorial models. The first phase, called the pre-trial investigation phase, is conducted by the Examining Magistrate (*Juzgado de Instrucción* in Spanish)[6] in accordance with the features of the inquisitorial model, including a written and secret proceeding[7]; its objective is to prepare a further trial and a dossier arising from the compilation of all investigative measures. The second trial is the trial itself, which takes place before the Criminal Court Judge or Provincial Court[8] according to the guidelines of the accusatorial

[4] See statistics on EAW use, available at https://e-justice.europa.eu/content_european_arrest_warrant-90-eno.do (last access on 25 September 2019). Last data are provided for 2017: a total of 17491 EAWs were issued and a total of 6317 executed, 618 issued by Spain according to Commission Staff Working Document "Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2017", Brussels, 30 August 2019, no. 11804/19, JAI 881, COPEN 336, EUROJUST 150, EJN 74, available at prior link.

[5] See criticism by JIMENO BULNES, M. "American criminal procedure in a European context", *Cardozo Journal of International and Comparative Law*, 2013, vol. 21, no. 2, pp. 409-459.

[6] According to official translation provided in the prior English version of Criminal Procedure Act, e.g., Arts. 14 (1) and (2). I personally prefer to employ the name of Judge of the Investigative or Investigating Judge as far as he or she is in charge of the investigation of the facts and suspect as well as being an unipersonal judge.

[7] See specifically JIMENO BULNES, M. "El principio de publicidad en el sumario", *Justicia* 1993, no. III-IV, pp. 645-717. 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, Berlin, 2008, p. 541 ff. Also specifically BACHMAIER WINTER, L. and DEL MORAL GARCÍA, A. *Criminal Law in Spain,* Wolters Kluwer International, Alphen aan den Rijn, The Netherlands, 2012, p. 205 ff.

[8] It depends on the amount of the imprisonment and penalty according to the Criminal Code. In concrete the competence is attributed to the Criminal Court Judge if the offence has a term of imprisonment no more of five years or the penalty has another character, whatever is the amount, otherwise the competence is attributed to Provincial Court according to Arts. 14 (3) and (4) LECrim.

model in application of the principles of orality and publicity as well as the confrontation of the parties. Usually, the issuance of EAW and EIO shall take place by such Examining Magistrates or Judges of the Investigative/Investigating Judges along this pre-trial investigation phase.

2. EUROPEAN ARREST WARRANT

2.1 General background and regime

Spain was the first Member State in EU to implement the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States (hereinafter EAW or EAW FWD, also known as 'Euro-warrant')[9], in the form of Law 3/2003 of 14 March on the European Arrest Warrant and Surrender (*Orden Europea de Detención y Entrega* or LOEDE).[10] Nevertheless, such implementation after several practice and case-law by national courts,[11] was substituted by prior Act 23/2014, of 20 November, on mutual recognition of judicial decision in criminal matters in the European Union or LRM. Particularly, Arts. 34-62 LRM provide specific regulation on the European Arrest Warrant[12] (or European and Surrender Warrant according to official translation) but also general provisions on common regime of

[9] OJ no. L 190, 18 July 2002, pp. 1-18. See status of EAW implementation at https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?l=EN&CategoryId=14 (last access on 26 September 2019).

[10] BOE no. 65, 17 March 2003, pp. 10244-10258, available at https://www.boe.es/eli/es/l/2003/03/14/3/con (last access on 26 September 2019); English version still available at prior link https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on 26 September 2019);. See at the time comments by author, e.g. JIMENO BULNES, M. "La orden europea de detención y entrega: aspectos procesales", *Diario La Ley* 2014, no. 5979, pp. 1-7 as well as JIMENO BULNES, M. "The enforcement of the European Arrest Warrant: a comparison between Spain and UK", *European Journal of Crime, Criminal Law and Criminal Justice,* 2007, vol. 15, no. 3-4, pp. 263-307.

[11] Again contributions by author, e.g., 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 JIMENO BULNES, M. "Régimen y experiencia práctica de la orden de detención europea", in M. Jimeno Bulnes (ed.), *Justicia versus seguridad en el espacio judicial europeo,* Tirant lo Blanch, Valencia, 2011, pp. 109-200.

[12] See specifically JIMENO BULNES, M. "La orden europea de detención y entrega: análisis normativo", in Arangüena Fanego *et al., Reconocimiento mutuo de resoluciones penales en la Unión Europea*, op. cit., pp. 35-76; also in same book practical perspective by RUZ GUTIÉRREZ, P.P. "Cuestiones prácticas relativas a la orden europea de detención y entrega", pp. 77-104. With a practical approach too RUIZ ALBERT, M.A. "La orden europea de detención y entrega", in Jimeno Bulnes and Miguel Barrio*, Espacio judicial europeo y proceso penal*, op. cit., pp. 81-114.

transmission, recognition and execution of mutual recognition instruments contemplated in Arts. 7-33 LRM must be taken into account.

Precisely, a new wording of some of these general provisions has taken place due to the enactment of Law 3/2018, of 11 June, amending the Act 23/2014, of 20 November, on mutual recognition of judicial decision in criminal matters in the European Union in order to regulate the European Investigation Order.[13] This reform is due to the implementation of further Directives of procedural rights of suspected and accused persons in criminal proceedings, which enforces a strengthening of guarantees along the execution of mutual recognition instruments,[14] as indicated in the Preamble of the new legislation.

Such general regime on transmission, recognition and execution of mutual recognition instruments by Member States regulate aspects such as the following ones. First, the issuance and documentation of requests providing the compulsory fulfilment of the appropriate form[15], which shall operate as a mandatory certificate without the need to forward the respective decision on criminal matters basis of such request in the case of the EAW but joint with the signature of competent judicial authority and translation into the official language of the executing Member State[16] (Art. 7 LRM). Precisely, further Art. 17 LRM establishes the compulsory translation into Spanish of the respective certificate when Spain acts as the executing Member State, otherwise it shall be returned to the issuing judicial authority. Meanwhile, Art. 19 (1) LRM contemplates the possibility

[13] BOE no. 142, 12 June 2018, pp. 60161-60206 available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-7831 (last access on 26 September 2019). See recent and generally GONZÁLEZ CANO, M.I. *Orden europea de investigación y prueba transfronteriza en la Unión Europea*, Tirant lo Blanch, Valencia, 2019.

[14] See LLORENTE SÁNCHEZ-ARJONA, M. "La orden europea de detención y entrega tras la Ley 3/2018, de 11 de junio: un avance en garantías procesales", *Revista General de Derecho Procesal* 2019, no. 47, http://www.iustel.com, at pp. 12 ff.

[15] See Annex I LRM, also available at the European Judicial Network webpage in all official languages https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 26 September 2019); all information and documents related to EAW are here included and even the possibility to create and simulate a EAW. Also interesting guidelines and handbooks have been edited by Spanish institutions such as the Minister of Justice and General Council of Judiciary Branch although, to my knowledge, they have not yet been updated to present regulation; also its access is now restricted as far as they are not anymore available at https://www.mjusticia.gob.es/cs/Satellite/es/1215197995954/Tematica_C/1215198003700/Detalle.html (last access on 26 September 2016).

[16] See language regime in Note from General Secretariat to Working Party on Cooperation in Criminal Matters (Experts of the European Arrest Warrant) on the subject of Practical application of the European Arrest Warrant – time limits established under national legislation and language regime, Council of the European Union, Brussels, 12 October 2004, no. 12736/1/04 REV 1, COPEN 111, EJN 61, EUROJUST 82, available at https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-12736-2004-REV-1 (last access on 26 September 2019). In the case of Spain only the Spanish is provided.

of correcting such form or certificate when it is insufficient, "missing or manifestly does not correspond to the judicial decision for which enforcement is transmitted"; in these cases "judicial authority shall notify the issuing authority, setting a term for the certificate to be submitted again or be completed or amended."

Second, the general provisions on mutual recognition instruments stipulates the mandatory description of the offence and of the penalty to be included in the appropriate form with specification "whether the offence forming the judicial decision lies within any of the categories that are exempt (of) double criminality verification of the conduct in the executing State, pursuant to Article 20, and if the penalty foreseen for the offense is, under abstract terms, at least three years of deprivation of liberty" (Art. 10 LRM). In fact, Art. 20 LRM enumerates the list of 32 offences excepted of double criminality test contemplated in Art. 32 (2) of the Council Framework Decision, of 13 June 2002, on the European Arrest Warrant and the surrender procedures between the Member States[17]; otherwise, "recognition and enforcement may be subject to fulfilment of the double criminality requisite" according to Art. 20 (4), whose decision is attributed to a Judge *a quo*.

Third, but not least important, is the general regime of appeals here contemplated for all mutual recognition instruments. In particular, Art. 13 (1) LRM only contemplates *stricto sensu* the appeal against decisions ordering transmission of a mutual recognition instrument to be filed according to ordinary Spanish procedural legislation, i.e., prior Act on Criminal Procedure. Initially, it seems there is no provision of appeal against decisions refusing the transmission of mutual recognition instruments but further Art. 24 LRM extends appeal to both types of decisions, positive and negative resolving requests on mutual recognition instruments by Spanish judicial authorities, again according to the Criminal Procedure Act. In this context, general rules regulated in Arts. 216 LECrim *et*

[17] OJ no. L 190, 18 July 2002, pp. 1-18. The offences are as follows: "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; organized or armed robbery; illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircrafts/ships; sabotage".

seq must be applied which foresee different types of legal remedies such as "the reform appeal, appeal and complaint appeal" (*recurso de reforma, de apelación y de queja* in Spanish).

Fourth, common regime is also established in relation to expenses in Arts. 14 and 25 LRM compelling the Spanish state to cover the general costs arising from the execution of mutual recognition requests "except those arising in the territory of the executing State" (Art. 14). Specific expenses caused by the transfer of sentenced persons "and those caused exclusively in the territory of the issuing State, shall be borne by the latter" according to further Art. 25 (1) LRM.

Finally, specific provisions related to refusal of recognition and execution of a mutual recognition instrument are also included in this common regulatory regime. In general, the rule of the compulsory mutual recognition of all requests issued by Member States is declared except "any of the established grounds foreseen in this Act concurs", according to Art. 29 LRM[18]. For this reason, the general rule in favour of correction or completion of the mutual recognition request by the issuing judicial authority when a request for complementary information takes place (Art. 30 LRM) is likewise included.

A first general regulation of such *numerus clausus* reasons for refusing the recognition or execution of the requested measure is foreseen in Art. 32 LRM, recently amended by prior Law 3/2018 of 11 June on EIO[19], i.e., the *non bis in idem cause,* the territoriality cause, formal defects on the EAW form as previously specified and the immunity cause joint with the double criminality test for offences other than those contemplated in prior Art. 20 LRM[20]; all of them shall be further mentioned when dealing with the execution of EAW and causes for refusal as far as most of them shall be repeated. Also, a further cause for refusal is contained in following Art. 33 (1) LRM in relation to

[18] See examples of such rule in case-law delivered by the Court of Justice of European Union (henceforth CJEU) such as *Wolzenburg,* 6 October 2009, C-123/08, ECLI:EU:C:2009:616; *Leymann and Pustarov,* 1 December 2008, C-388/08 PPU, ECLI:EU:C: 2008:669; *Mantello,* 16 November 2010, C-261/09, ECLI:EU:C:2010:683. See comments by RUIZ YAMUZA, F.G. "¿Réquiem por el principio de confianza mutua? Reconocimiento mutuo y tutela judicial de derechos fundamentales en la jurisprudencia del TJUE a propósito de la orden de detención europea", *Revista General de Derecho Europeo*, 2017, no. 43, http://www.iustel.com , at pp. 15 ff.

[19] Although after a careful reading of prior and today's regulation no differences have been appreciated except last sentence of Art. 32 (3) LRM providing the obligation to inform to the competent Spanish judicial authority that the acts are considered to be "fully or mainly or fundamentally committed in Spanish territory" according to Spanish law.

[20] See generally JIMENO BULNES, M. "Orden europea de detención y entrega: garantías esenciales", *Revista Aranzadi de Derecho y Proceso penal* 2008, no. 19, pp. 13-32, in reference to prior Spanish EAW legislation.

resolutions handed down in the absence of the accused with the exceptions there contemplated[21].

Together with such general provision of grounds for refusal the EAW execution, a rule contained in Preliminary Title, Arts. 1-6 LRM, related to general regime of mutual recognition of decisions on criminal matters in the EU under the title "respect for fundamental rights and liberties" shall be taken into account. To this point, Art. 3 LRM expressly declares that "this Act shall be applied respecting the fundamental rights and liberties and the principles set forth in the Spanish Constitution, in Article 6 of the European Union Treaty and the Charter of Fundamental Rights of the European Union, and in the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe of 4 November 1950." In contrast, this reference to fundamental rights was absent in the prior Spanish implementation on EAW; as known this is a big issue concerning the application of EAW jointly with the enforcement of the principle of proportionality as exposed in the Preamble of the LRM[22].

2.2. General provisions

By contrast to the prior general regime provided for all mutual recognition instruments (EAW included) here the reference must be made to such general provisions contemplated specifically for EAW as first mutual recognition instrument regulated by Act 23/2014, explicitly in Chapter I, Arts. 34-36 LRM. They are only three of them as far as many general aspects on EAW have been foreseen in prior common regime on of transmission, recognition and execution of mutual recognition instruments above exposed.

[21] Textually, "a) that, enough time in advance, the accused was summoned in person and informed of the date and place foreseen for the trial from which that decision arises, or received that official information by other moreover, he was informed that a decision might be handed down in absentia; b) that, having knowledge of the date and place foreseen for the trial, the accused appointed legal counsel for his defence on trial and was effectively defended by such at the trial held; c) that, after he was notified of the decision and specifically informed of his right to a new trial or to file an appeal with the possibility that, in such new proceedings, he would be entitled to appear, a decision contrary to the initial one is handed down, the accused specifically declared that he did not contest the decision, or did not apply for new trial, nor filed an appeal within the term foreseen for the purpose."

[22] Section VI relates the purpose of new Spanish implementation on EAW such as it is "the reinforcement of legal guarantees, especial with the introduction of the criteria of proportionality". See references to fundamental rights and proportionality concerning to EAW in prior report on EAW related to its European perspective quoting relevant literature.

The first one, Art. 34 LRM, provides definition of the EAW in a similar way to Art. 1 (1) EAW FWD, textually: "A European arrest and surrender warrant is a judicial decision handed down in a Member State of the European Union with a view to arrest and surrender by another Member State of a person who is claimed to take criminal actions against him or to enforce a custodial sentence or measure of deprivation of liberty, or a measure of internment in a centre for minors". In this case, both finalities of this mutual recognition instrument are contemplated, as they are the start of criminal proceeding or execution of custodial sentence or others. The judicial decision adopts in Spain the form of an order (*auto*) as far as grounded resolution according to appropriate provisions in Spanish procedural legislation[23].

The following precept, Art. 35 LRM, enumerates the competent Spanish judicial authorities[24] in order to issue and execute a EAW establishing different criteria for both activities. First one is a decentralized *criterium* allowing EAW issuance by "the Judge or Court hearing the case in which such orders are appropriate", in fact and usually the Examining Magistrate or Judge of the Investigative[25] as prior indicated. Second one is a centralized *criterium* for EAW's execution as far as the competence is exclusively attributed to the Central Judge of Criminal Investigation of the National High Court or the Central Judge for Minors when the order refers to a minor (up to 14 and under 18 years old in Spain).

The last general provision, Art. 36 LRM, refers to the content of the EAW, also similarly to Art. 8 EAW FWD, as far as same items are numerated in order to provide information on subjective and objective elements of the EAW, in particular: "a) the identity and nationality of the requested person; b) the name, address, telephone and fax numbers and e-mail address of the judicial authority issuing; c) indication of the existence of a final judgement, of an arrest warrant, or any other enforceable judicial decision

[23] According to Art. 245.1.b) Act 6/1985, of 1 July, on the Judiciary "1. Resolutions by courts and tribunals of jurisdictional nature will be referred to as: b) Writs when they resolve on appeals against court orders, incidents, procedural presumptions, nullity of proceedings or when by virtue of procedural laws they must be issued in that manner."

[24] See specific CJEU case-law in defence of an autonomous concept of judicial authority by EU Law such as *Poltorak,* 10 November 2016, C-452/16, ECLI:EU:C:2016:858 and *Kovalkovas*, 10 November 2016, C-477/16 PPU, ECLI:EU:C:2016:861. See comments by RODRIGUEZ-ÌÑERO Y BRAVO FERRER, M. "Resolución judicial y autoridad judicial en la orden de detención europea", *Diario La Ley* 2016, n. 8876, https://diariolaley.laley.es, at pp. 4 ff.

[25] With the exception of the Judge of Violence against Women, who only deals with the investigation of causes related to gender violence; see JIMENO BULNES, M. "Jurisdicción y competencia en material de violencia de género: los Juzgados de Violencia sobre la Mujer. Problemática a la luz de su experiencia", *Justicia* 2009, no. 1-2, pp. 157-206.

having the same effect as foreseen in this Title; 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 of the requested person; f) the penalty imposed, if there is a final judgement or the prescribed scale of penalties for the offence under the law; g) if possible, other consequences of the offence."

2.3 EAW issuance

Chapter II, Arts. 37-46 LRM, foresees the issuance and transmission of a EAW by Spanish judicial authorities, as said, commonly Investigating Judges. Also prior general regime on transmission, recognition and execution of mutual recognition instruments by Member States must be considered to this point, essentially some precepts as Art. 8 (1) LRM declaring the compulsory transmission of the EAW here to "the competent judicial authority of the executing State, by any means capable of producing a written record under conditions that allow their authenticity to be proven"; these are usually fax and express courier service under recommendation of the General Council of the Judiciary Branch's Practical Guide.[26] If the executing judicial authority is unknown, the issuing judicial authority shall address to the respective organic bodies supporting the judicial cooperation in EU such as the liaison magistrates, European judicial network and even Eurojust[27] when necessary according to Art. 8 (2) LRM.

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[26] As mentioned, not anymore free available but to disposal for practitioners in intranet. Also another useful telematic tool for practitioners is the so-called *Prontuario,* a sort of guide in order to proceed with judicial cooperation in civil and criminal matters elaborated jointly by Minister of Justice General Prosecutor's Office and the General Council of Judiciary Branch (International Relations Unit); see more information at http://www.prontuario.org and http://www.prontuario.org/prontuario/es/Penal/Consulta/ci.Decision-Marco-2002-584-JAI-del-Consejo--de-13-de-junio-de-2002--relativa-a-la-orden-de-detencion-europea-y-a-los-procedimientos-de-entrega-entre-Estados-miembros.formato (last access on 27 September 2019) specifically in relation with EAW.

[27] See specifically ESCALADA LÓPEZ, M.L. "Instrumentos orgánicos de cooperación judicial: magistrados de enlace, red judicial europea y Eurojust", in M. Jimeno Bulnes (ed.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales,* Bosch, Barcelona, 2007, pp. 95-126 and "Los instrumentos de cooperación judicial europea: hacia una futura Fiscalía europea", *Revista de Derecho Comunitario Europeo* 2014, vol. 18, no. 47, pp. 89-127; also ALONSO MOREDA, N. *La dimensión institucional de la cooperación judicial en materia penal en la Unión Europea: magistrados de enlace, Red Judicial Europea y Eurojust,* Servicio Editorial de la Universidad del País Vasco, Bilbao, 2010. Spain has as well a Spanish judicial network called *Red Judicial Española de Cooperación Judicial Internacional* (REJUE) nowadays regulated by Ruling 1/2018 approved by Agreement of 27 September 2018 of the Plenary of the General Council of the Judiciary Branch on international judicial assistance and international judicial cooperation networks, BOE no. 249, 15 October 2018, pp. 100017-100030, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-14035; more information is also provided at

First Art. 37 LRM prescribes both cases when Spanish judicial authority may hand down a EAW, exactly: "which Spanish Criminal Law establishes a custodial sentence or a measure of deprivation of liberty with a maximum duration of at least twelve months, or an internment measure under closed regime for a minor for the same term; b) in order to proceed to execute a sentence to a custodial sentence or measure of deprivation of liberty of not less than four months, or an internment measure under closed regime for a minor for the same term." It shall be remembered that such minimum penalty threshold is raised to a maximum of three years in order to enjoy the exemption of the double criminality requirement[28] for the list of 32 offenses set forth in general in Art. 20 (1) LRM previously described although provision in Spanish law is only foreseen for EAW execution in further Art. 47 (1) LRM.[29] Last, a new provision by comparison to the prior Spanish EAW legislation is included in following Art. 39 (1) LRM interpreting the meaning of such custodial sentences and measures of deprivation of liberty as it is the application of provisional detention of the requested person with remission to Spanish Criminal Procedure Act or the application of injunctive internment of the minor according to Organic Act 5/2000, of 12 January, on the criminal liability of minors.[30]

Also prior to the issuance by the judicial authority public prosecutor and, if it is the case, private prosecutor[31] shall deliver their report within the term of two days according to Art. 39 (2) LRM, which also establishes the compulsory character of their opinion as far as the EAW only can be issued if any of these prosecutors agrees. In relation to transmission of EAW, Art. 40 LRM reiterates the preference for direct communication between both judicial authorities, issuing and executing, according to prior Art. 8 (1)

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http://www.poderjudicial.es/cgpj/es/Temas/Redes-Judiciales/Red-Judicial-Espanola---REJUE-/ (last access on 26 September 2019).

[28] See specifically SÁNCHEZ DOMINGO, M.B. "Problemática penal de la orden de detención y entrega europea", in Jimeno Bulnes, *Justicia versus seguridad en el espacio judicial europeo,* pp. 61-107, at pp. 85 ff; also 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: la orden europea de detención y entrega,* Lex Nova, Valladolid, pp. 75-125, at pp. 95 ff. This was the thorny issue in the *Puigdemont* case later exposed.

[29] Textually: "When a European arrest and surrender warrant has been issued for an offence that belongs to one of the categories of offences listed in Section 1 of Article 20 and that offence is punishable in the issuing State with a custodial sentence or measure of deprivation of liberty, or with a measure of internment under closed regime for a minor, the maximum duration of which is at least three years, surrender of the requested person shall be ordered without control of double criminality of the acts."

[30] BOE no. 11, 13 January 2000, consolidated version available at https://www.boe.es/buscar/act.php?id=BOE-A-2000-641 (last access on 26 September 2019).

[31] In Spain, the private prosecution by victims and citizens is allowed according to Art. 125 Spanish Constitution of 6 December 1978 available at http:// www.congreso.es/Norm/const_espa_texto_ingles_0 (last access on 26 September 2019). See PÉREZ GIL, J. "Private interests seeking punishment: prosecution brought by private individuals and groups in Spain", *Law & Policy* 2003, vol. 25, no. 3, pp. 151-172.

LRM, of course when the whereabouts of the requested person is known. Otherwise it shall be necessary to introduce an alert for the requested person in the Schengen Information System (SIS)[32]; its effect is equivalent to EAW certificate according to Art. 40 (3) LRM although the General Council Judiciary Branch's Handbook recommends subsequent submission of the EAW form already translated into the official language of the executing Member State within the time limit set once the requested person's whereabouts are located.

The remaining provisions contemplate specific cases such are the following ones: the submission of complementary information "either *ex officio* or at the request of the public prosecutor or, where appropriate, of the private prosecutor, as well as at the request of the actual executing judicial authority if the latter so demands" (Art. 41 LRM). Also, it is regulated the possibility to include in same EAW form the request of delivery of "the objects that constitute the means of evidence, or the proceeds of the criminal offence, and that the relevant assurance measures (to) be adopted"[33], whose description may be recorded in the SIS system (Art. 42 LRM). Similarly, the Spanish rule contemplates further surrender methods, which are the temporary and conditional surrender according to Arts. 43 and 44 LRM respectively; the first one takes place in order "to carry out criminal proceedings or to hold an oral hearing"[34] according to Art. 43 (3) LRM, and the second foresees the returning of the requested person to the executing Member State "for serving of the custodial sentence or measure of deprivation of liberty or the measure to intern a minor that may be issued against him in Spain" (Art. 44 LRM)[35].

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[32] 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 no. 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, no. 31, pp. 97-124, at pp. 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 (drs.) and M. Muñoz de Morales (coord.), *La orden de detención y entrega europea,* Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2006, pp. 175-185.

[33] For this reason, the EAW form included in Annex I LRM foresees a specific section, which is section g).

[34] With the exception of such cases where the presence of the accused person is not compulsory according to conditions declared by Art. 786 (1) LECrim, i.e., "to be summoned personally, … the Judge or Court, at the request of the Public Prosecutor, or the prosecuting party, and having heard the defence, considers that there is sufficient evidence for the proceedings, where the punishment requested does not exceed two years imprisonment or, if of a different type, where it does not last more than six years".

[35] Here, specific proceeding in order to decide this conditional surrender is also regulated, in fact, "the Judge or Court shall hear the parties to the proceeding during three days and, after that, shall hand down an

Finally, Art. 45 LRM stipulates the procedure when the requested person is handed over to the issuing Spanish but prescription is different according to the objective of the EAW's issuance. If the EAW has been issued to exercise criminal proceedings, the issuing judicial authority shall celebrate a hearing in the terms and manner foreseen in the Spanish ordinary legislation, i.e., the Criminal Procedure Act or, "where appropriate, the Organic Act on the criminal liability of minors in order to decide on the personal situation of the arrested person".[36] The purpose of this hearing will be the request and adoption of a less interim precautionary measure, such as, either the provisional detention or the release on bail;[37] in the case of the minor, the hearing shall take place in order to adopt (or not) the precautionary internment measure. But if the EAW is issued for serving a custodial sentence, the Spanish issuing judicial authority shall decree the admittance to prison of the requested person as a sentenced person with the commitment to deduce such period of deprivation of liberty of the total amount of the imprisonment according to Art. 45 (2) LRM.

2.4 EAW execution

Chapter III –Arts. 47-59– regulates jointly execution and surrender proceedings by contrast to the difference made in the European rule. As previously stated, Art. 29 LRM a *sensu contrario* declares the general rule of execution, textually: "Recognition or execution of a mutual recognition instrument that has been correctly transmitted by the competent authority of another Member State of the European Union may only be

order accepting or rejection the condition". In relation with this point the CJEU case-law has matched the status of resident and national so that the former can enjoy the same benefits provided the link (establishment) with the executing Member State is proven; see for example judgments *Kozlowski*, 17 July 2008, C-66/08, ECLI:E:C:2008:437 with comments by FICHERA, M. in *Common Market Law Review*, 2009, vol. 46, n. 1, pp. 241-254 and *Lopes da Silva*, 5 September 2012, C-42/11, ECLI:E:C:2012:517.

[36]Arts. 505 (2) LECrim and 28 (2) Organic Act 5/2000 respectively, In the first case, the hearing shall be held "as soon as possible within 72 hours of the arrested individual appearing before the court" with summons of the requested person assisted by lawyer, public prosecutor and other accusing parties. In the second case, the hearing with attendance of minor's lawyer shall similarly take place, accusing parties included public prosecutor in addition to the representative of the socio-psycho-technical team and the representative of the public entity for the protection of minors.

[37] See specifically JIMENO BULNES, M. "Medidas cautelares de carácter personal", in Arroyo Zapatero *et al., La orden de detención 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, no. 16, pp. 106-122. Also ARANGÜENA FANEGO, C. "Las medidas cautelares en el procedimiento de la euro-orden", in Arangüena Fanego, *Cooperación judicial penal en la Unión Europea*…, op. cit., pp. 127-205, at pp. 248 ff in relation with the EAW issuance.

refused, explaining the reasons, when any of the established grounds foreseen in this Act concurs." In the same vein, further Art. 48 LRM contemplates the grounds on refusal to execute a EAW and distinguishes two types of grounds on refusal, such ones for a mandatory non-execution and those ones for an optional non-execution.[38] The general reasons to refuse execution numerated in prior Arts. 32 and 33 LRM as contained in general provisions shall be added to both of them. Nevertheless, some of the new grounds here specifically contemplated reproduce the general ones previously referred.

On the one hand, according to Art. 48 (1) LRM, the Spanish executing judicial authority **shall** refuse execution of a EAW in the following cases as mandatory non-execution:

> *1)Non bis in idem*: these are specific grounds regulated in Art. 48 (1) (a) LRM when "the requested person has been pardoned in Spain for the penalty imposed for same acts"; Art. 48 (1) (b) LRM "if final halting of the proceedings (*sobreseimiento libre* in Spanish)[39] has been ordered in Spain for the same act"; Art. 48 (1) (c) LRM; if the requested person "has had a final decision handed down in another Member State of the European Union for the same act"; and Art. 48 (1) (d) LRM when the requested person "has been finally judged for the same act in a third state"[40] and the penalty has been/is currently being served or cannot longer be served.

[38] See in general DE HOYOS SANCHO, M. "Euro-orden y causas de denegación de la entrega", en Arangüena Fanego (ed.), *Cooperación judicial penal en la Unión Europea*…, op. cit., pp. 207-312, at 136 ff in relation with prior Spanish EAW Law. Also generally CEDEÑO HERNÁN, M. *La orden de detención y entrega europea: los motivos de denegación y condicionamiento de la entrega*, Civitas & Thomson Reuters, Madrid 2010.

[39] Same effect that a final decision if there has been a knowledge on the merits of the prior case; see contradictory CJEU case-law in *Gozütok and Brugge*, 5 April 2003, C-187 and 385/01, ECLI:EU:2003:87 and *Miraglia,* 10 March 2005, 469/03, ECLI:EU:2005:156; in first case *non bis in idem* is applied because the prosecution is barred in prior case as far as the public prosecutor discontinues criminal proceedings brought in that state due to a transaction with the accused person but in the second case the public prosecutor had decided "not to pursue the prosecution on the sole ground that the proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case" (*Miraglia* ruling). See specifically 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 (dr.), Aguilera Morales e I. Cubillo López (coords.), *La justicia y la Carta de Derechos Fundamentales de la Unión Europea*, Colex, Madrid, 2008, pp. 275-294, at pp. 285 ff; also DE HOYOS SANCHO, M. "Eficacia transnacional del non bis in ídem y denegación de la euroorden", *Diario La Ley* 2005, 30 de septiembre, n. 6330, pp. 1-6.

[40] By contrast to the European rule and prior Spanish EAW legislation where the origin of the case which causes the *non bis in idem* effect makes difference between the mandatory character (first case is originated in a Member State) and the optional character (first case is originated in a third state), here both cases have mandatory character. See criticism at the time by CALAZA LÓPEZ, S. *El procedimiento europeo de detención y entrega*, Iustel, Madrid, 2005, at p. 150.

2) Minority of criminal age: Art. 48 (1) (e) LRM prescribes the non-execution of the EAW, textually, "when the person who is subject to a European Arrest and Surrender Warrant cannot yet be considered criminally responsible for the acts on which that order is based, under Spanish Law, due to his age." In this case, the requested person must be under the age of 14 due to the fact that this is the age from which the criminal responsibility of minors is established according to Art. 1 (1) 5/2000, of 12 January, on the criminal liability of minors.

On the other hand, and according to Art. 48 (2) LRM, the Spanish executing judicial authority **may** refuse execution of a EAW in the following cases, textually:

a) Litispendentia: "when the person subject to a European Arrest and surrender Warrant is under criminal prosecution in Spain for the same act that gave rise to the European Arrest and Surrender Warrant."
b) Spanish nationality or legal residence: "when a European arrest and surrender warrant has been handed down for the purposes of execution of a custodial sentence or measure of deprivation of liberty, the requested person being a Spanish national or with residence in Spain[41], except if he consents to serve the same in the issuing State. Otherwise, he must serve the sentence in Spain."
c) Exterritoriality: "when a European arrest and surrender warrant refers to acts committed outside the issuing State and Spanish Law does not allow prosecution of such offences when they are committed outside its territory."

As last ground for refusal the execution of a EAW also with an optional character, Art. 49 LRM foresees those cases where the issued EAW has basis of judgments rendered in *absentia,* i.e., "when the accused has not appeared in the trial giving rise to the decision" but some specific conditions are also required in a complex wording of the precept. Such specific conditions distinguish this optional ground to the mandatory one established in prior Art. 33 LRM; although it is also required that the requested person "was not personally notified of the decision", here this notification of judgement rendered *in absentia* shall take place "without delay after surrender, at which moment he shall be informed of his right to retrial or to file an appeal, stating the time limits foreseen for that purpose", according to Art. 49 (1) LRM. Although the whole precept with three sections

[41] This second circumstance has been added by Law 3/2018, 11 June on EIO. To be remembered here the CJEU case-law matching the status of resident and national such as judgements *Kozlowski* and *Lopes da Silva* prior exposed.

lacks of the necessary clarity and systematicity[42], at least has the merit to introduce *ex novo* this ground for refusal in the EAW Spanish legislation absent in the prior one. Morever, the CJEU case-law shall be taken into account, such as the controversial judgement *Melloni*[43] where the European Court rules that the executing judicial authority cannot impose the review of the case in the issuing Member State as a condition to surrender.

The following provisions of this same chapter deal with a detailed regulation of the specific procedure to be applied for the execution of a EAW with distinction of subsequent stages. Also some very useful information to this respect is contained in declaration by Spanish delegation to the Council of the European Union at the time[44] compiling information on the procedure of execution in Spain jointly with interpretation of prior grounds for refusal as well as other practical issues such as specific judicial authorities in charge of EAW execution with their telephone numbers and addresses; although the document was elaborated in relation to the prior Spanish EAW implementation, most of the information is still in force. It is as well convenient to manage the practical guide on issuing and executing the EAWs elaborated by the General Council of Judiciary Branch above mentioned, available for judges and magistrates through their intranet.

The first stage is the arrest itself foreseen in Art. 50 LRM, recently amended by Law 3/2018 on EIO in order to reinforce procedural guarantees according to enacted Directives on procedural rights, which is here very much appreciated; reference to Spanish Criminal Procedure Act[45] is made although a fixed maximum term is stipulated in order to bring the requested person before the Central Judge of Criminal Investigation at the National High Court, which is 72 hours after his or her arrest. According to the

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[42] There is not a full stop in 10 lines or 11 in the English version of Art. 49 (1) LRM.

[43] Judgement on 26 February 2013, C-399/11, ECLI:EU:C:2013:107, resulting of the first preliminary ruling promoted by the Spanish Constitutional Court (*Tribunal Constitucional*). Probably is the CJEU case with more comments by literature, practitioners and NGOs; as example see criticism by TINSLEY, A. "Note on the reference in the case C-399/11 Melloni", *New Journal of European Criminal Law,* 2012, vol. 3, no. 1, pp. 19-30; the author was at the time strategic caseworker at Fair Trials International (FTI). Also in Spanish literature, e.g., BACHMAIER WINTER, L. "Más reflexiones sobre la sentencia *Melloni*: primacía, diálogo y protección de los derechos fundamentales en *juicios in absentia* en el Derecho europeo", *Revista Española de Derecho Europeo* 2015, no. 56, pp. 153-180.

[44] Execution of a European arrest warrant in Spain: Practical information for the attention of the judicial authorities of other Member States in the European Union, Brussels, 19 December 2003, no. 16303/03, COPEN 133, EJN 18, EUROJUST 21, available at https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/81 (last access on 28 September 2019).

[45] Arts. 489 ff LECrim; in the case of minors remission must be done to Art. 17 Organic Act 5/2000 on the criminal liability of minors despite the silence of Art. 50 (1) LRM.

prior wording, which is now preserved, he or she shall be informed on "the existence of the EAW, of its content, of the possibility of consenting irrevocably in the hearing before the Judge and to its surrender to the issuing State, as well as the rights to which he is entitled".

Nevertheless, amendment by Law 3/2018 also introduces the information to be provided to the arrested person in order to nominate a lawyer in the issuing Member State, whose task shall be to assist the Spanish lawyer in order to deal with EAW, i.e., the so-called dual defence[46] promoted by Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings.[47] Jointly, as a new provision in further Art. 50 (4) LRM, "the arrested person shall be informed in writing in a clear and sufficient manner, and in a simple and understandable language, of his right to renounce to the lawyer in the issuing State, about the content of that right and its consequences as well as the possibility of its subsequent revocation", according to the right of information in criminal proceedings provided by Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012[48]. The same provision stipulates that such renounce to the lawyer in the issuing State "must be voluntary and unequivocal, in writing, and stating the circumstances of it"; also, it shall be possible to be revoked "at any time during the criminal proceedings and will take effect from the moment it is carried out".

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[46] 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, no. 48, pp. 443-489, at p. 476; also ARANGÜENA FANEGO, C. "El derecho a la asistencia letrada en la Directiva 2013/48/UE", *Revista General de Derecho Europeo* 2014, no. 32, http://www.iustel.com , at p. 22. Also, in general VALBUENA GONZÁLEZ, F. "Directiva relativa al derecho a la asistencia letrada en los procesos penales", in Jimeno Bulnes and Miguel Barrio, *Espacio judicial europeo y proceso penal,* op. cit., pp. 249-261.

[47] OJ n. L 294, 6 November 2013, pp. 1-12, which Art. 10 (4) regulates, textually: "The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA."

[48] OJ n. L 142, 1 June 2012, pp. 1-10, whose Art. 5 (1) explicitly declares that "Member States shall ensure that persons who are arrested for the purpose of the execution of a European Arrest Warrant are provided promptly with an appropriate Letter of Rights containing information on their rights (…)"; this Letter of Rights "shall be drafted in simple and accessible language" according to further Art. 5 (2) of same Directive. See SERRANO MASSIP, M. "Directiva relativa al derecho a la información en los procesos penales", in Jimeno Bulnes and Miguel Barrio, *Espacio judicial europeo y proceso penal,* op. cit., pp. 219-248. Also particularly in Spain it has been enacted by the Public Prosecutor's Office (*Fiscalía General del Estado* or FGE) the Ruling 3/2018, 1 June, on the right to information of suspects in criminal proceedings interpreting implementation of such Directive in the Spanish Criminal Procedure Act later exposed, available at FGE official website https://www.fiscal.es/documentacion

The following stage of the EAW execution proceeding is described in Art. 51 LRM under the title "hearing the arrested person and decision on surrender". Once again, a new term of 72 hours is provided in order to celebrate such hearing with attendance of the public prosecutor, the legal counsel to the arrested person and "when appropriate", an interpreter[49]; the right to "free legal aid" is also here contemplated.[50] The development of such hearing is described carefully in following sections of Art. 51 LRM taking place the hearing of the arrested person in relation to the following. First, his or her "irrevocable consent to surrender"; second, his or her wish (or "request" according to English version) "to be returned to Spain to serve the custodial sentence or measure of deprivation of liberty that may be handed down against him by the issuing State; third, about "the renunciation to resort to the specialty rule[51], if this concurs". According to the results

[49] According to Art. 2 (1) Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010, OJ no. L 280, 26 October 2010, pp. 1-7, which expressly provides that "Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings." See VIDAL FERNÁNDEZ, B. "Directiva relativa al derecho a interpretación y traducción en los procesos penales", in Jimeno Bulnes and Miguel Barrio, *Espacio judicial europeo y proceso penal,* op. cit., pp. 189-218; also generally at the time JIMENO BULNES, M. "El derecho a la interpretación y traducción gratuitas", *Diario La Ley* 14 March 2007, no. 6671, pp. 1-10. At the time, JIMÉNEZ-VILLAREJO FERNÁNDEZ, F.J. "El derecho fundamental a ser asistido por abogado e intérprete", in Arroyo Zapatero *et al., La orden de detención y entrega europea,* op. cit., pp. 325-354 according to prior Spanish implementation on EAW.

[50] According to Art. 5 (1) Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ n. L 297, 4 November 2016, pp. 1-8, *textually: "The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final."* In Spain, legal aid is regulated in specific legislation such as Law 1/1996, of 10 January, on free legal aid, BOE n. 11, 12 January 1996, consolidated version available at https://www.boe.es/eli/es/l/1996/01/10/1/con (last access on 28 September 2019).

[51] See explanation and regulation of specialty rule in further Art. 60 LRM, i.e., "consent or authorisation for trial, sentencing or arrest for the purposes of enforcing a custodial sentence or a security measure involving deprivation of liberty, for all offenses committed to surrender of a person, and that are different to which gave rise to such surrender"; consent "shall be presumed to exist whenever the State of the executing judicial authority has notified the Secretariat General of the Council of the European Union of its favorable disposition in that regard". Also, further Additional Provision Three establishes that "The Ministry of Justice, the General Council on the Judiciary and the Public Prosecutor General shall coordinate themselves so that, through their web sites, the declarations that Spain and the other Member States have made before the Secretariat General of the Council of the European Union, renouncing demanding their consent for certain actions related to recognition and execution of mutual recognition instruments can be ascertained."; for example, declarations on specialty rule can be found at https://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/area-internacional/cooperacion-juridica/orden-europea-detencion (last access on 27 September 2019). In fact, document compiles declarations published at OJ n. L 190, 18 July 2002, pp. 19-20; also these declarations are available with all information on EAW at EJN website specifically, countries notifications at EJN website https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 27 September 2019). In Spanish literature, references by MUÑOZ CUESTA, F.J. "Orden europea de detención y entrega: principio de especialidad y derecho de defensa", *Revista Aranzadi Doctrinal* 2015, no. 5, pp. 41-50.

produced in this hearing, further steps of EAW proceeding shall be different; in fact, the essential element is the consent provision to surrender by the arrested person.

According to Art. 51 (5) LRM, if he or she consents to surrender and the Central Judge of Criminal Investigation does not appreciate grounds for refusal, he or she shall issue immediate order of surrender to the issuing State without any chance of appeal; otherwise a new hearing shall take place within a maximum term of three days and attendance of the same parties or persons as above, where means of evidence can be presented in order to demonstrate "the concurrence of reasons to refuse or condition the surrender". Even the Spanish law provides the celebration of a third hearing if necessary in order to practise the admitted evidence according to Art. 51 (7) LRM together with a provision about the possibility to celebrate such hearings *in absentia.* The final decision by the Central Judge shall be adopted within ten days after the last hearing, which shall adopt the manner of an order (*auto* in Spanish); this one can be challenged before the Criminal Chamber of the National High Court according to the terms and proceedings established in the Criminal Procedure Act through the reference of Art. 51 (8) LRM. In the meantime, personal precautionary measures can be adopted against the requested person according to Art. 53 (1) LRM.[52]

Time-limits in order to execute the EAW are likewise different depending on the consent or not to the surrender by the requested person; both of them are included in further Art. 54 LRM. Nevertheless, the first rule here provided is a general rule reminding the urgency of the EAW proceeding; textually Art. 54 (1) LRM stipulates "A European arrest and surrender warrant shall be processed and executed urgently." According to Art. 54 (2) LRM, "if the requested person consents to surrender, the judicial decision must be handed down within ten days of the hearing being held." According to Art. 54 (3) LRM, "if no consent is given, the maximum term to adopt a final decision shall be sixty days from the arrest taking place." Eventually, a final rule contemplates the possibility of prorogation of prior delays for "justified reasons" to a further thirty-day period with notification of circumstances to the issuing judicial authority according to Art. 54 (4) LRM.

[52] Textually: "In the course of the hearing or session referred to in Article 51, the Central Judge of Criminal Investigation, having heard the Public Prosecutor in all cases, shall decree the arrested person being remanded in custody or being released, adopting the necessary injunctive measures that may be necessary and proportionate to prevent the requested from absconding, pursuant to the provisions of the Criminal Procedure Act." See again JIMENO BULNES, "La adopción de medidas cautelares de carácter personal con motivo de la ejecución de una orden europea de detención y entrega" and other literature above quoted.

The last stage of EAW proceeding is the physical surrender of the requested person itself according to Art. 58 LRM. As general rule, the first section states: "Surrender of the requested person shall be performed by a Spanish Police Officer, giving prior notice to the authority appointed for that purpose by the issuing judicial authority of the place and date set, but within the ten days following the judicial decision on surrender." Precisely, one of the greatest advantages of the EAW is this short time for surrender by contrast to ordinary extradition proceedings.[53] Exceptions to this general rule and usual time-limit are also contemplated in the following sections, and even provisional suspension of surrender is allowed for "severe humanitarian reasons" according to Art. 58 (3) LRM. Finally, an important consequence can derive from the unfulfillment of terms provided by law in order to proceed with surrender, as it is the release of the requested person after wording of Art. 58 (5) LRM.[54]

Finally, other provisions in this chapter related to EAW execution and following one Chapter IV, Arts. 60-62, under the title Other Provisions regulate different aspects of EAW execution such as the following ones: conditional surrender decision (Art. 55 LRM), suspended surrender decision (Art. 56 LRM)[55], decision in the case of multiple requests (Art. 57 LRM)[56], delivery of objects (Art. 59 LRM), application of specialty rule to execute a EAW (Art. 60 LRM) and subsequent surrender to extradition (Art. 61

[53] According to the information provided at the e-justice website, the average term for surrender in 2017 was 15 days with consent and 40 days without it; see also specific terms for each Member State in prior document "Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2017", cit., at pp. 24 and 25 respectively.

[54] Textually, "Once the maximum terms for surrender have elapsed without the requested person having been received by the issuing State, the requested person shall be released, or an application shall be made for the appropriate measures pursuant to the Criminal Procedure Act, if he has any case pending in Spain, without that being a ground for refusal of execution of a subsequent European arrest and surrender warrant based on the same acts."

[55] This is the case "when the requested person has criminal proceedings pending before the Spanish jurisdiction for acts other than giving rise to the European Arrest Warrant and Surrender"; in these cases, "the Spanish judicial authority, although if may have resolved to fulfil the order, may suspend surrender until the trial is held or until the sentence handed down is served". Same provision establishes the possibility to proceed with a temporary surrender to the issuing State "if so requested by the issuing judicial authority". See specifically ANDREU MIRALLES, F. "Entrega pospuesta o condicional. El Estado de tránsito", in Arroyo Zapatero *et al., La orden europea de detención y entrega*, op. cit., pp. 455-462, at p. 461 with reference to the difficulty to know if the requested person has pending criminal causes in other jurisdictions along Spain.

[56] Art. 57 LRM distinguishes between the concurrence of both or more EAWs and the concurrence between EAW and extradition request. In the first case, the resolution becomes judicial as far as attributed to the Central Judge of the Criminal Investigation after hearing the public prosecutor according proceeding described in Art. 57 (1) LRM; in the second, the resolution becomes governmental as far as it is attributed to the Minister of Justice with conditions regulated in Art. 57 (2) LRM. See specifically GÁLVEZ DÍEZ, M.T. "Decisión en caso de concurrencia de solicitudes: el dictamen de Eurojust", in Arroyo Zapatero *et al., La orden europea de detención y entrega*, op. cit., pp. 463-482, at pp. 473 ff according to prior Spanish EAW.

LRM)[57]. In relation to interferences between EAW and extradition proceedings, the law also contemplates the opposite case in the event that Spain is the issuing State and thus the possibility granted to Spain to extradite the delivered person but always with the appropriate consent of the executing judicial authority that resolved the surrender according to Art. 62 (1) LRM.

2.5 Spanish case-law: the *Puigdemont* case

Currently, there is extensive case-law in relation with the EAW execution provided by Spanish Judges and Courts since the enforcement of prior Law 3/2003 on EAW. The Spanish case-law deals with several questions related to the application of general procedural principles as they are, essentially, *in absentia* and *non bis idem* thorny issues. It shall be pointed out that Spain is one of the Member States with a higher number of EAW requests in both senses, i.e., as issuing and executing State; a fact arising only from the quantitative information reflected in statistics according to prior replies by Member States to the questionnaire elaborated by European institutions with total figures from 2017 shows that the Spanish judicial authorities issued a number of 618 EAWs and surrendered a number of 673 persons.[58]

Relevant judgements are pronounced by the National High Court and even the Constitutional Court in order to declare there is *non bis in idem* between prior decision on extradition and later EAW insofar the order refusing the prior extradition request has not *res iudicata* because no decision on the merits takes place, i.e., the guilt or innocence of the requested person is not declared; extradition and EAW decisions are, in short, procedures for international jurisdictional cooperation. This is the case for example of Order by the National High Court (*Audiencia Nacional*) no. 60/2004, of 3 June,[59] where

[57] This is the case when the requested person has been extradited to Spain from a third state; in this case Spain must request authorization to the respective state in order to proceed with surrender to the issuing state according to Art. 61 (1) LRM.

[58] Document "Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2017", cit., at pp. 9 and 23 respectively.

[59] AAN no. 60, 3 June 2004, ECLI: ES:AN:2004:271, available at http://www.poderjudicial.es/search/indexANO.jsp (last access on 2 October 2019). See specifically MARCOS GONZÁLEZ-LECUONA, M. "Jurisdicción ordinaria y jurisdicción constitucional en las primeras euroórdenes de ejecución en España", *La Ley Penal* 2006, n. 25, pp. 32-47, at p. 45; also generally JIMENO-BULNES, "The application of the European Arrest Warrant in the European Union…", op. cit., pp. 312 ff and JIMENO BULNES, "Régimen y experiencia práctica de la orden de detención europea", op. cit., pp. 154 ff.

Spain proceeds with the surrender of a Spanish citizen to France because of a crime committed in 2001 after a prior refusal of extradition request in 2003 due to the Spanish nationality of the requested person; by contrast, the EAW regulation now allows the surrender procedure of nationals as requested persons to go ahead. Same *criterium* has been defended by the Spanish Constitutional Court (*Tribunal Constitucional*), for example in following judgments such as SSTC n. 30/2006, of 30 January[60], 83/2006, of 13 March[61], 177/2006, of 5 June[62] and 293/2006, of 10 October[63].

Precisely, some of this constitutional case-law deals with the most controversial issue according to prior Spanish EAW regulation as it was at the time the *in absentia* guarantee contemplated in Art. 5 (1) EAW FWD, at the time absent in prior Law 3/2003. For this reason, some judgments pronounced by the High National Court as it is, for example, Order no. 35/2004, of 13 May[64], agreed the surrender of the requested person even convicted as result of a trial held *in absentia* insofar this specific ground for refusal or, more exactly, guarantee was not included at the time as said in the Spanish EAW legislation; the excuse was also here that a possible appeal against such conviction could take place according to the French legislation (France was the issuing State). Nevertheless, the Spanish Constitutional Court stated the question in prior STC no. 177/2006[65] with estimation of the concrete defence appeal in similar case with same reason of violation of *in absentia* guarantee established in Art. 5 (1) EAW FWD under the argument of violation of due process of law rule established in Art. 24 (2) of the Spanish Constitution.[66] In fact, the so-called *Pupino* doctrine is applied, a doctrine

[60] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5632 (last access on 2 October 2019).
[61] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5685 (last access on 2 October 2019).
[62] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5779 (last access on 2 October 2019).
[63] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5895 (last access on 2 October 2019).
[64] AAN no. 35, 13 May 2004, ECLI: ES:AN:2004:219, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=2053537&optimize=20040916&publicinterface=true&calledfrom=searchresults&statsQueryId=125049400&start=1&links=%2235%2F2004%22 (last access on 2 October 2019).
[65] See comments by DE LA QUADRA-SALCEDO JANINI, T. "El encaje constitucional del nuevo sistema europeo de detención y entrega (Reflexiones tras la STC 177/2006, de 5 de junio)", *Revista Española de Derecho Constitucional* 2006, n. 78, pp. 277-303; also IRURZUN MONTORO, F. and MAPELLI MARCHENA, C. "Orden europea de detención y constitución (comentario a la Sentencia del Tribunal Constitucional 177/2006, de 5 de junio", *Noticias de la Unión Europea* 2008, n. 282, pp. 15-29.
[66] Textually, "Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent. The law shall

derived of the famous judgment by CJEU in provision of the indirect effect of Framework Decisions establishing for the national judges and courts the mandatory interpretation of "its national Law in the light of the letter and the spirit of Community provisions".[67]

In relation to the most recent case-law, besides some various judgments along the last years[68], definitely the most conspicuous case at the moment is definitely the so-called *Puigdemont* case[69], due to its political character as related to the independence claimed by Catalunya in Spain. The facts are related to the presentation of a draft in the Register of the Catalonian Parlament on 31 July 2017 in order to promote a referendum in Catalonia despite prior decisions by the Spanish Constitutional Court in suspension of the self-determination process (*procès* in Catalan language).[70] Carles Puigdemont, at the time President of the Catalonian Government, and seven members of the same Catalonian Government (*consellers* in Catalan language) fled to Belgium on 29 October 2017. Consequently, the Central Judge of the Criminal Investigation no. 3 issued an International Arrest Warrant against Carles Puigdemont Casamajó on 3 November 2017[71]

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specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences."

[67] *Maria Pupino,* judgment of 16 June 2005, C-105/03, ECLI:EU:C:2005:386, ground 18. See specifically WEYEMBERGH, A., DE HERT, P. and PAEPE, P. "L'effectivité du troisième pilier de l'Union Européenne et l'exigence de l'interprétation conforme: la Cour de Justice pouse ses jalons (Note sous l'arrêt *Pupino*, du 16 Juin 2005, de la Cour de Justice des Communautés Européennes)", *Revue Trimestrielle des Droits de l'Homme* 2007, no. 69, pp. 270-292; in Spain SARMIENTO, D. "Un paso más en la constitucionalización del tercer pilar de la Unión Europea: la sentencia *María Pupino* y el efecto directo de las Decisiones Marco", *Revista Electrónica de Estudios Internacionales* 2005, no. 10, http://www.reei.org

[68] For example, AAN n. 22, 11 July 2019 ECLI: ES:AN:2019:1593 available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8864118&optimize=20190814&publicinterface=true&calledfrom=searchresults&statsQueryId=125049494&start=1&links=%2222%2F2019%22 (last access on 2 October 2019), STC n.3, 14 January 2019, ECLI:ES:TC:2019:3 available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/25835 (last access on 2 October 2019).

[69] For example, ATS special case 20907/2017 (Puigdemont), 10 July 2019 ECLI:ES:TS:2019:8351A available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8852146&optimize=20190801&publicinterface=true&calledfrom=searchresults&statsQueryId=125049713&start=2&links=%2220907%2F2017%20%22 (last access on 2 October 2019), ATS special case 20907/2017 (Puigdemont), 1 July 2019 ECLI: ES:TS:2019:7605A, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8837842&optimize=20190716&publicinterface=true&calledfrom=searchresults&statsQueryId=125050284&start=3&links=%2220907%2F2017%20%22 (last access on 2 October 2019), ATS special case 20907/2017 (Puigdemont), 21 June 2019 ECLI:ES:TS:2019:6999 available at http://www.poderjudicial.es/search/openCDocument/e5e0cf323aea82eb84b8072b28c6b92a188ddbf99e64272c , (last access on 2 October 2019),

[70] SSTC n. 259, 2 December 2015, ECLI:ES:TC:2015:259 available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/24722 (last access on 2 October 2019) and ATC 24/2017, of 14 February, available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/25268 (last access on 2 October 2019).

[71] Judge Carmen Lamela Díaz, case n. 000082/2017, ECLI:ES:AN:2017:1115A available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference

under the accusation of different crimes such as rebellion, insurrection, embezzlement, perversion of justice and disobedience; nevertheless due to the privilegium of forum (*aforamiento* in Spanish)[72] by the requested person the cause is transferred to the Criminal Chamber of the Supreme Court.

By contrast, the appropriate magistrate instructor of the case in the Supreme Court removes the EAW only extending the international arrest warrant against Carles Puigdemont and his *consellers* by Order pronounced on 5 December 2017.[73] The problem is that most of the mentioned causes are out of the list of the 32 offences where the exemption of double criminality requirement does not operate according to Art. 2 (2) EAW FWD; in this case each Member State decides if such double criminality is required or not and Art. 5 of the Belgian legislation implementing the EAW on 19 December 2003 precisely establishes such double criminality requirement as a general rule.[74] According to the Belgian Criminal Code, it looks strictly that surrender could only take place on the basis of the embezzlement crime as contained under the concept of corruption contained in the 32 offences list[75], which should be unjust in relation to those suspected politicians

=8218162&optimize=20171127&publicinterface=true&calledfrom=searchresults&statsQueryId=125048629&start=1&links= (last access on 2 October 2019).

[72] According to Art. 57 1(2) Organic Act 6/1985, of 1 July, on the Judiciary (*Ley Orgánica del Poder Judicial* or LOPJ), which attributes the competence to the Criminal Chamber of the Supreme Court for "The examination and trying of proceedings brought against the President of the Government, the Presidents of the Chamber of Deputies and of the Senate, the President of the Supreme Court and of the General Council of the Judiciary, the President of the Constitutional Court, Members of the Government, Deputies and Senators, Members of the General Council of the Judiciary, Magistrates of the Constitutional Court and of the Supreme Court, the President of the National High Court and of any of its Chambers and the Presidents of the High Courts of Justice, the State Prosecutor General, State Prosecutors attached to the Chambers of the Supreme Court, the President and Counsellors of the Court of Auditors, the President and Counsellors of the Council of State and the Ombudsman, along with any proceedings that might be determined by the Statutes of Autonomy."
At the time English version of this Act was available in prior link https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol but not anymore.

[73] Judge Pablo Llarena Conde, case n. 20907/2017, ECLI: ES:TS:2017:11325A available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8230925&optimize=20171212&publicinterface=true&calledfrom=searchresults&statsQueryId=125048271&start=1&links= (last access on 2 October 2019).

[74] Textually, "the execution is refused if the offense in the basis of which the arrest warrant was issued does not constitute under Belgian Law". See unofficial translation at EJN website, currently https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?l=EN&CategoryId=14 (last access on 30 September 2019).

[75] See specifically MUÑOZ DE MORALES, M. "¿Cómo funciona la orden de detención y entrega europea?: el caso del *expresident* y sus *consellers* como ejemplo", *Diario La Ley*, 11 December 2017, no. 9096, http://diariolaley.laley.net, at pp. 8 ff. There is varius literature in relation to *the Puigdemont* case, also out of Spain; see for example LABAYLE, H. "L'affaire Puigdemont et le mandat d'arrêt européen: chronique d'une faillité annoncée", *Revue des affaires européen* 2018, n. 3, pp. 417-429. Also interesting the special issue at *Europen Criminal Law Review* 2018, n. 2, collecting contributions by different Spanish scholars.

who did not escape from justice and have been judged for the total list of offenses previously mentioned (precisely final judgment is expected to be announce next October)[76].

Moving again Carles Puigdemont to Germany led the Supreme Court to reactivate the international and EAW on 23 March 2018, an action reinforced with an informal letter addressed to the prior magistrate instructor to German Prosecutor's Office in order to inform to the executing judicial authority about the background of the case.[77] Nevertheless, the resolution by the *Schleswig-Holsteinisches Oberlandesgericht* on 5 April 2018[78] declared again as only offence for surrender the embezzlement insofar the German implementation on EAW also contemplates as general rule the requirement of the double criminality in order to execute an European Arrest Warrant[79]. At the end, Supreme Court as issuing judicial authority removed once more by Order pronounced on 19 July 2018[80], not only the EAW but also this time the international arrest warrant against Carles Puigdemont and his *consellers* arguing the lack of mutual trust shown by the executing judicial authority and the State, in this case Germany.

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[76] See for example press news at https://www.elperiodico.com/es/politica/20190902/sentencia-juicio-proces-7616426 and https://www.publico.es/politica/juicio-1-supremo-busca-unanimidad-16-octubre-sentencia-proces.html (last access on 30 September 2019).

[77] Letter written by Pablo Llarena Conde to Mrs. Führer, *Oberstäatsanwältin in Generalstaatsanwaltschaft des Landes Schlewig-Holstein*, on 17 May 2018, available at https://www.ara.cat/2018/05/17/Carta_Alemania.pdf

[78] 1 Ausl (A) 18/18 (20/18) available for example at https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG Schleswig&Datum=05.04.2018&Aktenzeichen=1 Ausl (A) 18 (last access on 30 September 2019). See comments and Spanish translation by VALIÑO ARCOS, A. "A propósito de la Resolución del Oberlandesgericht del Estado de Schleswig-Holstein en el affaire Carles Puigdemont (traducción castellana con notas)", *Diario La Ley* 26 April 2018, no. 9186, http://diariolaley.laley.es

[79] Art. 81.4 *Europäisches Haftbefehlsgesetz* on 20 July 2006, available in German at prior link https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?l=EN&CategoryId=14 (last access on 30 September 2019). See specifically MUÑOZ DE MORALES, M. "Doble incriminación a examen. Sobre el caso Puigdemont y otros supuestos", *InDret* 2019, n. 1, http://www.indret.com; also JAVATO MARTÍN, A.M. "¿Existe el delito de sedición en Alemania, Suiza y Bélgica?", *Diario La Ley* 2018, 2 May, n. 9188, http://diariolaley.laley.es and NIEVA FENOLL, J. "El examen de la autoridad requerida en la Orden Europea de detención y entrega de políticos independentistas: entre la política y el derecho", *Diario La Ley* 2018, n. 9227, http://diariolaley.laley.es

[80] Judge Pablo Llarena Conde, case n. 20907/2017, 19 July 2018, ECLI: ES:TS:2018:8477A available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8464451&optimize=20180802&publicinterface=true&calledfrom=searchresults&statsQueryId=125048933&start=1&links=%2220907%2F2017%22 (last Access on 2 October 2019).

3. EUROPEAN INVESTIGATION ORDER[81]

3.1 Introduction

Directive 2014/41/EU of the European Parliament and of the Council, of 3 April 2014, regarding the European Investigation Order in Criminal Matters (hereinafter DEIO)[82] was implemented into the Spanish domestic legal order by Act 3/2018, of 11 June[83], published on June 12 2018 in the Spanish Official Journal (hereinafter BOE), amending the Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union (LRM).

The transposition of the DEIO into the Spanish legal system was concluded with one-year delay respect to the deadline established on Article 36 DEIO. Because of this lack of accomplishment, the Spanish General Public Prosecutor published a transitory regulation. According to the opinion provided by the General Public Prosecutor's Office (*Fiscalía General del Estado*)[84], all existing conventions have maintained their application till the entry into force of the Spanish legislation implementing DEIO and are being employed even after the entry into force in Spain of the EIO with those Member States which have not yet implemented the EIO.[85]

The first paragraph of First Transitory Disposition on Act 23/2014 establishes: "This Act shall be applicable to decisions transmitted by the Spanish competent authorities or those received by such authorities after it comes into force, regardless of whether they were handed down before it, or refer to acts prior to it". However, its second paragraph indicates: "Decisions whose application for recognition and execution had

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[81] See Final Report on the framework of the European Project "Best Practices for EUROpean COORDination on investigative measures and evidence gathering" (EUROCOORD), JUST/2015/JCOO/AG/CRIM Agreement: 723198, Official Website https://eurocoord.eu/ (last access on 9 October 2010).

[82] OJ n. L 130, 1 May 2014, pp. 1–36, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0041 (Last access on 25 September 2019).
On the status of implementation of Directive see https://www.ejn-crimjust.europa.eu/ejn/EJN_StaticPage.aspx?Bread=10001 (last access on 25 September 2019).

[83] BOE n. 142, 12 June 2018, pp. 60161-60206, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-7831 (Last access on 25 September 2019).

[84] Opinion 1/17 on May 19, 2017 by Prosecution Unit of International cooperation, available at official website https://www.fiscal.es/documents/20142/f89be943-7f1f-c594-adf7-34bb32376c87 (last access 25 September 2019).

[85] All Member States have implemented DEIO. Denmark and Ireland are not taking part of DEIO following Recitals 44 and 45. State of the transposition available at https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120 (last access on 25 September 2019).

been transmitted by the Spanish judicial authorities, or that had been received by those authorities at the time of this Act coming into force, shall continue to be processed until conclusion according to the regulations in force at that moment."

3.2 Legal framework

According to the derogation by Regulation (EU) 2016/95 of the European Parliament and of the Council, of 20 January 2016, repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters[86], Act 3/2018 modified Tittle X in its entirety –which regulated European Evidence Warrant (EEW)– in Act 23/2014. The new title X is called "European Investigation Order in criminal matters", which contains three chapters:

- Chapter I "General provisions" (Arts. 186-187),
- Chapter II "Issuing and transmitting a EIO"

  Section 1 "General rules for issuing and transmitting a EIO" (Arts. 188-194)

  Section 2 "Issuing a EIO with specific investigation measures" (Arts. 195-204),
- Chapter III "Recognition and execution of a EIO"

  Section 1 "General rules for the recognition and execution of EIO (Arts. 205-213),

  Section 2 "Recognition and execution of EIO under specific investigation measures" (Arts. 214-223).[87]

Moreover, the reform of general provisions on mutual recognition included in other rules of same Spanish Law on mutual recognition in criminal matters was necessary as they were the ones included in the Preliminary Title (Art. 1 - 6 LRM) and Title I (Art. 7 - 33 LRM). Besides, the Spanish Law implementing EIO amended other dispositions on LRM related to the implementation of further European legislation[88] and modified Annexes.

[86] OJ n. L 26, 2 February 2016, pp. 9-12.
[87] Own translation because of official translation is not updated to the entry into force the Directive on European Investigation Order.
[88] For example Directives on procedural rights such as Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused

3.3 EIO Concept and Scope of application

Article 186, paragraph 1 and 2, LRM transposed Article 1 and Article 4.b DEIO. Therefore, according to the Spanish implementation, a EIO is *a criminal resolution issued or validated by the competent authority of a Member State of the European Union, issued with a view to conducting one or more investigative measures in another Member State, whose objective is to obtain evidence to be used in criminal proceedings. A European investigation order may also be issued with a view to the submission of evidence or investigation proceedings already held by the competent authorities of the executing Member State* (own translation) and a EIO *may refer to procedures initiated by the competent authorities of other European Union member states, both administrative and judicial, for the commission of acts classified as administrative violations in their order, when the decision may give rise to a process before a court, in particular in the criminal order* (own translation). An administrative proceeding that can finish in a criminal proceeding in the described conditions is not possible in the Spanish legal system. Thus, Spanish authorities can only recognize and execute an OIE in the framework of an administrative proceeding in the issuing State, but are not entitled to issue nor transmit a EIO in an administrative matter.

It is important to highlight that issuing or executing a EIO by/in Spain is not limited to any minimum or maximum penalizing period, but double incriminatory check will be required in case of less than a three-year period of sanction.

In general terms, any kind of investigative measures in any phase of the proceeding can be issued and/or executed. In relation to the general investigative measures which can be issued, transmitted, recognized and executed by/in Spain the following are expressly regulated: temporary transfer of persons held in custody for the purpose of carrying out an investigative measure (Arts. 195 and 196 LRM), hearing by videoconference or other audio-visual transmission (Art. 197 LRM), hearing by telephone conference (Art. 197 LRM), information on bank and other financial accounts

persons in criminal proceedings and Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

(Art. 198 LRM), information on banking and other financial operations (Art. 199 LRM), investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (Art. 200 LRM), covert investigations (Art. 201 LRM), interception of telecommunications (Art. 202 LRM), provisional measures (Art. 203 LRM).[89] Although not being specifically mentioned, other measures such as search and seizure, controlled deliveries, electronic evidence, statement of defendant, testimony and expert evidence can be issued and executed[90].

Some measures are expressly excluded of DEIO application. In particular, the setting up of a joint investigation team and the gathering of evidence within such a team (Art. 3 DEIO), transborder surveillance (Recital 9 DEIO) or the transmission of criminal records (Art. 186.4 Act 23/2014)[91].

Moreover, according to the concept of "corresponding provisions" in Article 34 DEIO, Eurojust, the European Judicial Network and the Opinion 1/17 of Prosecuting Chamber of International Criminal Cooperation (*Fiscalía de Sala de Cooperación Penal Internacional)* have indicated other excluded measures such as the notification of procedural documents (Article 5 of the 2000 MLA Convention), spontaneous exchange of information (Art. 7 of the 2000 MLA Convention), report and transference of procedures (Art. 21 of the Convention of 1959 and Art. 6 of the 2000 MLA Convention), delivery of objects to the damaged person (Art. 8 of the 2000 MLA Convention and Article 12 of the Second Protocol to the 1959 Convention), police and customs cooperation and measures provided for in Art. 19 of the Budapest Convention[92].

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[89] Following the Guide by International Relations Service of the General Council of the Judiciary, this measure shall be used between Member States bounded by DEIO. Otherwise, the freezing property or evidence order, regulated by Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence shall be applied. International Relations Service of the General Council of the Judiciary, EIO Guide, 2019, p. 5, available at http://www.prontuario.org/prontuario/es/Penal/Consulta/ci.Directiva-2014-41-CE-del-Parlamento-Europeo-y-del-Consejo--de-3-de-abril-de-2014--relativa-a-la-orden-europea-de-investigacion-en-materia-penal.formato1 (last access on 25 September 2019).

[90] Ibid., p. 6. See PÉREZ GIL, J. "Medidas de investigación tecnológica en el proceso penal español: privacidad vs. eficacia en la persecución", in Raffaella Brighi (ed.), Monica Palmirani (ed.), María Elena Sánchez Jordán (ed. lit.), *Informatica giuridica e informatica forense al servizio della società della conoscenza: scritti in onore di Cesare Maioli,* Aracne Editrice, Roma, Italia, 2018, pp. 187-198; PÉREZ GIL, J. (coord.) *El proceso penal en la sociedad de la información las nuevas tecnologías para investigar probar el delito*, La Ley, Madrid, 2012.

[91] Not included in DEIO but done by the Spanish Parliament. International Relations Service of the General Council of the Judiciary, EIO Guide, op. cit. p. 7.

[92] Ibid.

3.4 Issuing and transmission of a EIO in Spain

3.4.1 Competent authority

The implementation of DEIO has changed the previous system regarding cooperation by the acknowledgment of a role also to the Public Prosecutor. Following the new Article 187 (1) 2nd paragraph LRM, it has provided that issuing judicial authorities, jointly with Judges and Courts with knowledge of criminal proceeding where the EIO shall be adopted or who have admitted the evidence in the trial phase, shall also be "the public prosecutors in the proceedings they direct, provided that the measure contained in the European investigation order is not a limitation of fundamental rights". Therefore, the competent authorities to issue a EIO in Spain are judges, courts and public prosecutors.

The consideration of public prosecutors as competent authorities in the framework of the judicial cooperation and the different mutual recognition instruments has been an important issue clarified by the Court of Justice of the European Union (hereinafter CJEU) case-law. Especially, with regard to the European Arrest Warrant (hereinafter EAW), the CJEU has interpreted the concept of "judicial authority" in a restrictive way. In the joined cases C-508/18 and C-82/19[93] and C-509/18[94], the autonomous interpretation of this concept by CJEU does not include the public prosecutor.

However, this case-law is specifically referred to the EAW. So, in the framework of the EIO, public prosecutor are competent authorities to issue a EIO in matters under their competence and just if the measure does not imply a limitation of fundamental rights.

Court Clerks (*Letrados de la Administración de la Justicia*) are not a competent authority to issue a EIO, although recognised as a competent authority by Spanish

[93] CJEU, 27 May 2019, joined Cases C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=628F136A5F154307FE12AEA696E54EF9?text=&docid=214466&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6063477 (last access on 25 September 2019).

[94] CJEU, 27 May 2019, C-509/18, ECLI:EU:C:2019:457, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=214465&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6064455 (last access on September 25, 2019). See also the Notes from Member States concerning the CJEU Judgments on the concept of an 'issuing judicial authority' on the EJN website: www.ejn-crimjust.europa.eu/ejn/NewsDetail/EN/652/H (last access on 25 September 2019)

ratification instrument to European Convention on Mutual Assistance in Criminal Matters of 20 April 1959[95].

3.4.2 Other subjects

The issuance of a EIO can be *ex officio* or by request. The Spanish Act has included not only the suspect and his/her lawyer, but also the other part of the process.

Regarding the exercise of defence rights, the text of DEIO expressly grants the possibility to request the issuing of a EIO "within the framework of applicable defence rights in conformity with national criminal procedure" (Art. 1.3 DEIO) to the suspected, the defendant 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. The issuance of a EIO can be requested "by a suspected or defendant person, or by a lawyer on his/her behalf", taking into account that according to the Spanish criminal procedure model such request means just a proposal but not a proper standing as far as the director of a pre-trial investigation is only the Judge of the Investigative. The main difference is that the resolution or order (*auto)* on the request of a defence can be appealed before the Superior Court (Court of Appeal or *Audiencia Provincial if it is delivered by a single judge, i.e., Judge of the Investigative) as any other according to Art. 217 and 236* Spanish Criminal Procedure Code (in Spanish *Ley de Enjuiciamiento Criminal*, hereinafter LECRim)[96].

3.4.3 Proceeding

According to Articles 188-204 LRM, issuing a EIO begins with the judicial decision *ex officio* or by a procedural part's request which in Spain can be the victim (private prosecution), the public prosecutor, any citizen who is participant in the procedure (popular prosecution) or the defendant person or his/her defender representation according to the LECrim.

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[95] International Relations Service of the General Council of the Judiciary, EIO Guide, 2019, esp. p. 10.
[96] See JIMENO BULNES, M. (dir.) and MIGUEL BARRIO, R. (ed.), *Espacio judicial europeo y proceso penal*, op. cit. and JIMENO BULNES 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.

The decision to issue a EIO must be reasoned. Therefore, the official resolution must be a judicial order (*auto*) or a resolution by public prosecutor (*decreto*). In this resolution, the competent authority must argument the accomplishment of the principle of necessity and proportionality. The European Judicial Network (hereinafter EJN) has highlighted the importance of the existence of a real nexus between the requested measure and the investigated facts and the relevance of that measure to clarify the investigation[97]. Moreover, in order to issue a EIO it is necessary *that the requested investigation measure or measures whose recognition and execution is intended have been agreed in the Spanish criminal process in which the European investigation order is issued and could have been ordered under the same conditions for a similar internal case* (Art. 189.1.b LRM) (Own translation)[98].

Following Article 188, the competent authority shall fulfil Annex XIII with the following information: "a) The data of the issuing authority. b) The purpose and motives of the European investigation order. c) The necessary information about the affected person or persons. d) The description of the criminal conduct that is the subject of the investigation or process and the applicable provisions of Spanish criminal law. e) The description of the investigation measure or measures requested and the evidence to be obtained. f) The formalities, procedures and guarantees whose observance requests that they be respected by the executing State."

Along with this information, the Spanish authority can ask for a short period of time to execute the EIO *based on the procedural deadlines, the seriousness of the crime or other particularly urgent circumstance* (Art. 189.2 LRM) (Own translation).

General Council of the Judiciary recommends signing the document both by hand and by electronic sign to avoid some problems with the electronic sign[99].

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[97] International Relations Service of the General Council of the Judiciary, EIO Guide, 2019, p.11. According to Article 189.1.a) LRM the EIO must be *"necessary and proportionate for the purposes of the procedure for which it is requested, taking into account the rights of the investigated or prosecuted.*

[98] See BACHMAIER WINTER, L. "La Orden Europea de Investigación", in Jimeno Bulnes y Miguel Barrio, *Espacio judicial europeo y proceso penal*, op. cit., pp.133-162, esp. p. 137.

[99] International Relations Service of the General Council of the Judiciary, EIO Guide, op. cit., p.11.

Following Article 5 DEIO, the issuing authority "shall translate the EIO set out in Annex A into an official language of the executing State or any other language indicated by the executing State". In this sense, from a Spanish perspective and following the information provided by EJN[100], the languages accepted by each Member State are: Austria (German), Belgium (French, Dutch, German or English), Bulgaria (Bulgarian or English), Croatia (Croatian), Cyprus (Greek and English), Czech Republic (Czech or Slovak), Estonia (English and Estonian), Finland (Finnish, Swedish or English), France (French), Germany (German), Greece (Greek and English), Hungary (Hungarian), Italy (Italian), Latvia (Latvian), Lithuania (Lithuanian or English), Malta (Maltese and English), The Netherlands (Dutch and English), Poland (Polish), Portugal (Portuguese), Romania (Romanian, English or French), Slovakia (Slovak and Czech to issue), Slovenia (Slovene or English), Spain (Spanish), Sweden (Swedish), United Kingdom of Great Britain and Northern Ireland (English). Nevertheless, the Guide by the Spanish General Council of Judiciary notes that some Member States have accepted an additional language. For instance, in Spain Portuguese is accepted; in Bulgaria, Croatia and Poland, English is also accepted for urgent cases; and the same happens in Portugal with Spanish[101].

In case the issued EIO does not include the translation, the executing authority, following Article 16.2.a DEIO[102], should inform the issuing authority that the EIO is "incomplete".

In order to help in both issuing and executing a EIO, according to Article 190 LRM, the issuing competent authority may ask for complementary information to the executing authority if other measures can be adopted or if it is not possible to accomplish with the formalities o procedures indicated (Article 190 LRM). Besides, the Spanish authority might be able to participate in the execution of the EIO requested in the required State (Art. 191 LRM). If it is admitted, the Spanish state worker shall receive directly the

[100]Available at https://www.ejnforum.eu/cp/registry-files/3339/Competent-authorities-languages-accepted-scope-290419f.pdf (last access 25 September 2019).
[101] International Relations Service of the General Council of the Judiciary, EIO Guide, op. cit., esp. pp.8-9.
[102] European Judicial Network (EJN), Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, June 2019, p. 6, available at https://www.ejn-crimjust.europa.eu/ejnupload/news/2019-06-Joint_Note_EJ-EJN_practical_application_EIO_last.pdf (last access on 25 September 2019).

result of the executed measures in case it has been requested in the EIO and it is possible in a national case.

Once the EIO is transmitted, the executing authority shall answer that the goal of the EIO can be achieved with a less invasive measure or that the indicated measure does not exist in its legal system or is not the indicated to a similar national case but other one can be applied. In both cases, the Spanish competent authority has ten days to confirm, withdraw, modify or complete the EIO (Art. 192 LRM).

According to Article 193 LRM, personal data obtained in the execution of a EIO *may only be used in the processes in which that resolution had been agreed, in those others directly related to it or exceptionally to prevent an immediate and serious security threat public* (Own translation). If the Spanish authority needs to use it for a different purpose, the affected person or the execution authority shall be asked for permission. It is interesting to mention that according to the EJN, the rule of speciality is not included in DEIO but can be interpreted as part of Article 19 DEIO referred to the principle of confidentiality[103].

3.4.4 Transmission

EJN Contact Points pointed out some different channels for transmitting a EIO such as "EJN secure telecommunication connection, Eurojust secure connection, COM secure online portal (e-evidence digital exchange system), eMLA (Interpol), Schengen Information System (SIS) or the use of modern techniques for encryption".[104]

As a mutual recognition instrument, the EIO will be directly transmitted to the judicial competent authority by post and e-mail. In fact, according to the data provided by the General Public Prosecutor's Office, the channel of transmission more frequently used was the direct communication (73%)[105]. There are only two exceptions: the EIO will be transmitted to the central authority in case of Gibraltar and in cases of request for

[103] EJN Conclusions 2018 on the European Investigation Order, 14755/18, p.5, available at https://www.ejnforum.eu/cp/registry-files/3456/ST-14755-2018-INIT-EN.pdf (last access on 25 September 2019) and General Public Prosecutor's Office, Annual Memory, 2018, esp. p. 720, available at https://www.fiscal.es/documents/20142/b1b10006-1758-734a-e3e5-2844bd9e5858 (last access on 25 September 2019).
[104] EJN Conclusions 2018 on the European Investigation Order, op. cit. p.7.
[105] General Public Prosecutor's Office, Annual Memory, esp. p. 711.

various investigative measures to different competent authorities. In this last case, it is recommended to send the EIO to the Central Authority indicated in the Judicial Atlas[106].

3.4.5 Statistics

It is not possible to know the exact number of EIO issued by the Spanish competent authorities since there is not data updated to 2018, year of the DEIO implementation in Spain[107].

3.5 Execution of a EIO in Spain

With regard to the execution of a EIO, it is important to note that –as it was previously stated– the Spanish legislator has admitted Spanish as official language and Portuguese as an additional one. It shall be noticed that this consideration is especially important when Spain is the State of execution because in this case the Spanish authority does not have to translate the EIO, a duty of the issuing authority.

3.5.1 Competent authorities

Art. 187 (2) LRM institutes the Prosecution Office as *the appropriate authority in Spain to receive the European investigation orders issued by the appropriate authorities of other Member States* (Own translation), therefore centralizing the reception of EIO in Spain. It should be noted that the Public Prosecutor may issue or execute the EIO in Spain only when the measure requested does not entail restriction of fundamental rights, i.e., when it does not deal with a coercive measure. If the Public Prosecutor receives a EIO that contains any coercive measure, and which cannot be replaced by another measure, this will be sent by the Public Prosecutor to the judicial body for its recognition and execution. The same proceedings apply when the issuing judicial authority "*expressly*

[106] Available at https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry.aspx (last access on 25 September 2019).

[107] Official Website of General Council of Judiciary http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Aspectos-internacionales/Cooperacion-con-organos-judiciales-extranjeros/Solicitudes-de-cooperacion-tramitadas-directamente-por-los-organos-judiciales/ . (Last access on 25 September 2019. Data updated until 2017).

indicates" that the measure must be enforced by a judicial body. Regarding authorities that can execute such coercive measures, Art. 187 (3) LRM, mentions the following: *Judges of the investigative or Minors of the place where the coercive measures must be carried out or subsidiary, where there is some other territorial connection with the crime, with the researched or with the victim; the Central Judge of the Investigative if the EIO was issued for a terrorist offense or another of the crimes, whose prosecution belongs to National Court; the Central Judges of the Criminal or of the Minors in the case of transfer to the issuing State of persons deprived of liberty in Spain.* (Own translation).

3.5.2 Recognition and execution

Art. 212.1 LRM responds to Art. 16.1 DEIO and establishes the obligation of the Public Prosecutor to acknowledge reception of the EIO to the issuing authority within a week of the reception of a EIO[108].

According to the general principle of Judicial Cooperation enshrined in Article 205 LRM, the Spanish authority shall recognise and execute a EIO (by *auto* –if it is a judicial authority–, or by *Decreto* –if it is the public prosecutor–). The deadline to recognise a EIO is the shortest possible period of time and a maximum deadline of thirty days. The maximum period of time to execute a EIO is ninety days. Both deadlines can be not accomplished because of some reasoned grounds that shall be notified to the issuing authority (Art. 208 LRM).

During the execution of a EIO in Spain, the issuing authority can ask for the participation of state workers. This participation shall be accepted if *these authorities are allowed to participate in the execution of the investigation measures required in the order in a similar internal case of their State and that such participation is not contrary to the fundamental legal principles or prejudice the essential interests of national security.* (Art. 210 LRM) (Own translation).

[108] This is an important procedural aspect according to MORÁN MARTÍNEZ, R. A. "La Orden Europea de Investigación", in Jimeno Bulnes y Miguel Barrio, *Espacio judicial europeo y proceso penal*, op. cit., pp.163-186, esp. p. 168

The EIO already foresees the appointment of a lawyer in the executing State, which will result in the aforementioned coordination between lawyers. In Spain, a specific panel should be made up by specialised lawyers, who also are able to communicate in foreign languages. If the secret of the investigations has not been settled, lawyers are informed in advance about the cross-border investigation diligence (Art. 4 of the 1959 Convention), and the possibility of moving to the execution stage in order to intervene.

Mobility of the defence lawyer to the executing state depends on various factors, including economic ones. The personal assistance of the defence lawyer is out of the ordinary, being this replaced either by the use of video conferencing or by the submission of a written questionnaire (defendants or witnesses statements).

Rights of defence and a fair trial with all guarantees are ensured in practice by carefully examining the way in which the cross examination has been carried out abroad, either at the request of the Public Prosecutor's Office or at the parties' involved in the trial.

However, in accordance with the general principle of mutual recognition, as it shall be analysed in the next section, a EIO can be returned, modified or not recognized.

3.5.3 Modification, postponement and return

In order to recognize and execute a EIO in Spain, the investigative measure requested must exist in the Spanish legal system and must be applied to a Spanish similar case (Art. 206.1 LRM).

According to Art. 206.2 and 3 LRM, a EIO can be modified *whether the result pursued by the EIO could be achieved through an investigation measure less restrictive of the fundamental rights than that requested in the European investigation order, the Spanish competent authority shall order the execution of the latter,* and *whether the requested investigation measure did not exist in Spanish law or was not provided for a similar internal case, the Spanish competent authority shall order the execution of an investigation measure other than that requested, if said measure is suitable for the purposes of the requested order.* (Own translation).

Moreover, according to Art. 209.1.a) and b) LRM, the execution of a EIO can be postponed *if execution could harm a criminal investigation or criminal proceedings in progress, until such time as it is deemed necessary* and *if the objects, documents or data in question are being used in other procedures, until they are no longer required for this purpose.* (Own translation).

In relation to the return of a EIO, instead of not being recognized, a EIO shall be returned if it was issued by a not competent authority or was not validated by any (Art. 205 LRM). If the issuing authority belongs to Gibraltar, it shall be returned if the data does not indicate in the "issuing state" label, *UNITED KINGDOM OVERSEAS TERRITORY-GIBRALTAR*[109].

An important matter is refered to the length of the proceeding. European official statistics show an average of approximately 200 days needed to solve the 1st instance of civil, commercial, administrative and other case in the Spanish Procedural System.[110]

The consequent delay of the instruction frequently causes the need to declare the case as complex. A clear weakness of the Spanish system is the need to translate all documents into Spanish. The delay of the proceedings varies: on average, it takes between three and six months, although it can reach up to ten or twelve months. The shortest cases reported to us are resolved instantly by electronic means or during the same day. The longest one lasted between three and seven years. Simple requests such as summons, statements of witnesses or defendants are processed faster, especially when carried out by videoconference. European Arrest Orders and European Protect Warrants are much faster. On the contrary, if it is about financial information, we can expect up to two years (although this period has considerably been reduced). In some cases, the rate of cooperation depends on the technical capacity of the required country.

Within the European Union, in countries such as France, Germany or Portugal, the request for judicial cooperation can be made in a week.

[109] International Relations Service of the General Council of the Judiciary, EIO Guide, op. cit., esp. p.40.
[110]The 2018 EU Justice scoreboard, European Union, 2018, Figure 7 available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf (last access on 25 September 2019).

The EIO would come to suppose an advantage in this respect, standardizing the procedures; that is one of the crucial points of the judicial cooperation based on mutual assistance Conventions.

With regard to costs, the General Council of the Judiciary always recommends to accept the request and, if necessary, try to reach an agreement with the requesting State to share the expenses. However, if no economic agreement is reached, the application will be executed being Spain the one bearing the expenses. Eventually, these are later claimed to the issuing authority.

3.5.4. Statistics

The Annual Memory of the Public Prosecutor's Office in 2018 shows a receipt of 186 EIO in Spain. The principal issuing States are France (66), The Netherlands (50) and Germany (45). Concerning the specific Public Prosecutor's Offices, the Public Prosecutor's Office in Madrid (29), the Public Prosecutor's Office in Barcelona (24) and Public Prosecutor's Office in Málaga (20) should be outlined. With regard to the specialized Public Prosecutor's Office, the Public Prosecutor against drugs with 59 EIO requested[111].

3.5.5 Grounds for non-recognition or non-execution

a) Mandatory or optional nature?

General grounds for non-recognition or non-execution are listed in Article 11 DEIO, as optional, and in Arts. 32.1 and 207 LRM. Other specific grounds for non-recognition are listed with regard to specific investigative measures such as the absence of consent of the person deprived of liberty for the purpose of a temporary transfer or the lack of this same consent, in case of the investigated or defendant, for the practice of a videoconference, Arts. 214, 215 and 216 LRM.

[111] Annual Memory by General Office's Public Prosecution, 2018, pp. 704-706, available at https://www.fiscal.es/documents/20142/b1b10006-1758-734a-e3e5-2844bd9e5858 (last access on 7 August 2019).

All the grounds for refusal are mandatory and, according to the inadmissibility of a EIO for administrative proceedings, a new Art. 207 (1) (g) foresees a specific ground for refusal not contemplated under Art. 11 (1) DEIO: *When the European investigation order refers to proceedings initiated by the competent authorities of other European Union Member States for the commission of acts classified as administrative infractions in their legal order if the decision may give rise to a proceeding before a jurisdictional body in the penal order and the measure is not authorized in accordance with the law of the executing State, for a similar internal case.* (Own translation).

In general terms, all the grounds for non-recognition/execution in Arts. 32.1 and 207 LRM can be summarized:

-Arts. 32.1: *Ne bis in idem*; Competence belongs Spanish authorities and timeline expired; Registration form incomplete, incorrect or does not exist; Immunity.

-Arts. 32.2: Not categorized by the Spanish law and not included in Article 20.1 or 2.

-Arts. 32.3: Facts committed partially or completely in Spain

-Arts 207.1: Procedural privilege; Spanish essentials securities interests; Facts not considered crimes in Spain and committed partially or completely in Spain; Article 6 TFEU and CFREU

b) Immunity or privilege

- General considerations

According to Recital 20 DEIO "there is no common definition of what constitutes an immunity or privilege in Union law' as far as 'the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions, but should not be interpreted in a way to counter the obligation to abolish certain grounds for refusal as set out in the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. This may also include, even though they are not necessarily considered as privilege or immunity, rules relating to freedom of the press and freedom of expression in other media*"*. It should be recalled that present ground for EIO refusal was not contained in EAW FWD and for this reason, no case-law in Spain can be found as far as it was neither contemplated in the previous Spanish EAW rule. On the contrary, it is now included in new Art. 32.1.d) LRM, not only in relation to EAW, but for all European instruments on mutual recognition of criminal decisions; this one textually provides that the Spanish

judicial authorities shall not recognise and/or execute orders on employing mutual recognition instruments "where there is immunity preventing the enforcement of the judgement". Moreover, a specific provision in Art. 31 LRM under the rubric of "Request for waiver of immunities" is included, which contemplates a specific proceeding in order to ask for the "lifting of said privilege*"* by the Spanish judicial authority to appropriate Spanish or foreign authority.

From the Spanish perspective, according to Art. 56(3) of the Spanish Constitution, only "the person of the King is inviolable and shall not be held accountable (…)". Also, there are some other persons who have a sort of privilege of jurisdiction because, either they are judged by a Superior Court (usually Supreme Court)[112] or because further requirements are necessary in order to prosecute them. The latter is the case of the Delegates and Senators because, besides the prosecution before the Supreme Court, the authorization of the respective House shall be necessary as a prior formal condition[113].

To clarify the concept, requirements and characteristics of immunity Organic Act 16/2015, October 27, on privileges and immunities of foreign states, international organizations with headquarters or office in Spain and the international conferences and meetings held in Spain shall be analysed.[114] This specific law addresses to harmonize the immunity institute as an instrument to improve the legal security principle according to a statement specifically provided in the Explanatory Memorandum[115].

Specifically, Organic Act 16/2015 regulates privileges and immunities of the Head of State, the Head of the Government and the Foreign Minister of the foreign State (Title II), the State's immunity from warships and State ships and aircrafts (Title III), statute of the visiting military (Title IV), privileges and immunities of international organizations with headquarters or office in Spain (Title V) and privileges and immunities applicable to international conferences and meetings (Title VI). Also, its Article 3 extends the scope to A) The diplomatic missions, consular offices and special missions of a State;

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[112] This is the case of deputies and senators according to Art. 71 (3) CE as well as the President and other members of the Government according to Art. 102 (1) CE. Further enumeration is provided in Art. Art. 57 (2) and (3) Act on Criminal Procedure, e.g., presidents of congress and senate, president of Supreme Court and General Council of Judiciary Branch, president of Constitutional Court, …

[113] In fact Art. 750 ff LECrim regulates a special criminal proceeding when it is prosecuted a senator or Member of the Congress; such authorization is necessary except they be arrested in the event of *'flagrante delicto'* according to Art. 71 (2) CE, although information to respective House must be provided within 24 hours.

[114] BOE n. 258, 28 October 2015, pp. 101299-101320, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-11545 (last access on 19 August 2019).

[115] See para 2.VII.

B) International organizations and persons affiliated to them; C) Aerospace and space objects owned or operated by a State.

The following definitions in relation with several kind immunities can be here stressed. More particularly, Art. 2 (a) and (b) distinguish between the immunity of jurisdiction as *the prerogative of a State, organization or person not to be sued or prosecuted by the courts of another State* (own translation) and the immunity of execution as *a prerogative by which a State, organization or person and its property cannot be subject to coercive measures or enforcement of decisions issued by the courts of another State* (own translation).

In this context, it is also necessary to mention the exceptions to the obligation to declare as witness by certain persons. Article 416 LECrim refers up to second-degree relatives of the defendant, the lawyer of the defendant with regard to the facts that he or she had entrusted to him or her in his or her capacity as defence lawyer, translators and interpreters of the conversations and communications between the defendant and the persons mentioned in the previous section, in relation to the facts to which their translation or interpretation refers. Nevertheless, this rule has an exception in "Cases where the crime is extremely serious as it undermines the security of the State, public peace or the sacrosanct person of the King or his successor are excepted" according to Art. 418 LECRim.

Moreover, Art. 417 LECRim states the prohibition of the coercion to declare as witness for "1. The clergy and ministers of breakaway cults, on facts that were revealed to them in the exercise of the duties of their ministry. 2. Public officials, whether civil or military, of whatever type, where they cannot testify without breaching the secrecy that, due to the positions they hold, they are under the obligation to keep, or when, acting by virtue of due obedience, they are not authorised by their hierarchical superior to make the statement requested of them. 3. The physically or morally disabled."

Also as further professionals involved in legal proceedings, the clause referred to the professional secret of mediators can be here added, which is provided by Art. 15 (2) Act 4/2015, April 27, on the standing of victims of crime[116]. This rule declares that "The

[116] BOE n. 101, 28 April 2015, pp. 27216-36598, available at https://www.boe.es/buscar/act.php?id=BOE-A-2015-4606 (last access on 19 August 2019). English version is also available under payment at

mediators and other professionals who take part in the mediation process shall be subject to the obligation of professional secrecy in relation to the facts and statements they become aware of in performing their function". Finally, Art.588 b.v (1) LECrim states "All providers of telecommunications services, of access to a telecommunications network or information society services, and any person who, in any way, contributes to facilitating communications via the telephone or by any other online, logic or virtual communication media or system, are under the obligation to provide the judge, the Public Prosecution Service and members of the Judiciary Police appointed to carry out the measure, with the assistance and cooperation necessary to facilitate performance of orders for telecommunications' interception".; in particular Art. 588 b.v.(2) LECrim compels all these "Individuals required to collaborate will be under the obligation to keep the activities requested by the authorities secret". The same rule is contained in Art. 588 f..ii LECrim as required in the regulation of the specific technological investigative measures[117].

In the same terms, Art.10 Organic Act 15/1999, of December 13, on the protection of personal data[118]establishes that, *the person responsible for the file and those who participate at any stage of the processing of personal data are bound to the professional secrecy and have the duty to keep it; such obligations will continue even after finalizing their relations with the owner of the file or, if appropriate, with the person in charge of* it (own translation).

In relation to state secrecy, Article 14 Act 19/2013, of December 9, on transparency, access to public information and good governance[119] provides different grounds in order to limit the access to information when it causes harm to the following: *a) national security, b) defence of state, c) external relations, d) public security, g) administrative functions of monitoring, inspection and control or h) economic and commercial interests*" (own translation).

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http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last access on 19 August 2019).

[117] More particularly, remote records in computer equipment.

[118] BOE n. 298, 14 December 1999, pp. 43088-43099, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1999-23750 (last access on 19 August 2019).

[119] BOE n. 295, 10 December 2013, pp. 97922-97952, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2013-12887 (last access on August 19, 2019).

Concerning bank secrecy, Article 6.1 Act 13/1994, of June 1, on the autonomy of the Bank of Spain[120] declares that *the members of its governing bodies and the personnel of the Bank of Spain shall keep secrecy, even after when the cessation of their functions, of all information of a confidential nature that they have known because of the exercise of their position* (own translation). However, further Article 6.2 of this same rule specifies that *the duty of secrecy is understood without prejudice to the monetary policy information obligations imposed on the Bank of Spain by Article 10 of this Law and of the specific provisions that, pursuant to the Directives of the European Community in the matter of credit institutions, regulate the obligation of secrecy of the supervisory authorities* (own translation).

More specifically, Article 24 Act 10/2010, April 28, on the prevention of money laundering and the financing of terrorism[121] contains an exception to the general prohibition of disclosure of bank information in relation with the communication of such information to *the competent authorities, including centralized prevention bodies, or disclosure for police reasons in the framework of a criminal investigation* (own translation). This exception turns into an obligation the collaboration with the Commission for the Prevention of Money Laundering and Monetary Offenses according to Art. 18 and 21 of the same law.

In order to preserve the defence rights of the defendant, defence lawyers are not included in this obligation of collaboration according to Art. 22 Act 10/2010. However, this current regulation in Spain should be amended after implementation of Directive (EU) 2015/849 of the European Parliament and of the Council, of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.[122] Recital 9 of the Preamble establishes an exception of such professional secrecy for defence lawyers when "the legal professional is taking part in money laundering or terrorist financing, the legal advice is provided for the purposes of

[120] BOE n. 131, 2 June 1994, pp. 17400-17408, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1994-12553 (last access on 19 August 2019).
[121] BOE n. 103, 29 April 2010, pp. 37458-37499, available at https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737 (last access on 19 August 2019). This law implements in Spain Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing joint with Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for prior Directive as regards the definition of "politically exposed person".
[122] OJ, n. L 141, 5 June 2015, pp. 73-117. By the way, according to Article 67.1 "*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 26 June 2017"*, in the case of Spain expired period without implementation.

money laundering or terrorist financing, or the legal professional knows that the client is seeking legal advice for the purposes of money laundering or terrorist financing".

- Case-law

Due to the still recent approval of the new law on mutual recognition of criminal decisions in the EU, the case-law on the topic related to the enforcement of European instruments on mutual recognition does not abound for the moment. As a reference, we can mention a Spanish case-law with regard to the definition of this immunity or privilege of jurisdiction according to case-law in relation to International Law. That is the case of the judgment of the Constitutional Court n. 107/1992, 1 July, in which the TC clarified that *the immunity regime of foreign states is not contrary to the right to effective judicial protection enshrined in Art. 24.1 C.E. (...) although there is no such incompatibility between absolute or relative immunity from execution of foreign States before our Courts with Art. 24.1 EC, an undue extension or extension by the ordinary courts of the area that can be attributed to the immunity of execution of foreign States in the current international law that entails a violation of the right to effective judicial protection of the performer because it involves restricting without reason, the possibilities of the individual to obtain the effectiveness of the judgment, without any rule imposing an exception to such effectiveness (...). At European level, mention should be made of the European Convention on State Immunity and its Additional Protocol, celebrated in Basel on 16 May 1972, at the initiative of the Council of Europe. Although few States are in force and although Spain is not part of it yet, it is also very indicative. In respect of enforcement immunity, the Convention distinguishes between a general regime and an optional regime for States parties. The general regime enshrines the rule of absolute immunity for the execution of the foreign State, without prejudice to the State having the obligation of a former agreement to give effect to the Sentence rendered. The voluntary regime to which States parties can voluntarily submit themselves, which provides for the relativity of enforcement immunity, by allowing, in a general manner, that judgments are executed on goods used exclusively for industrial or commercial activities carried on by the foreign State in the same way than a private person* (own translation)[123].

[123] STC, n. 107, 1 July 1992, para. 3.I and 4.II, ECLI:ES:TC:1992:107, (Own translation) available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/1994 (last access on 19 August 2019).

c) *Ne bis in idem* principle

- General considerations

Art. 11 (1) (d) DEIO provides as a ground for optional refusal of recognition or enforcement of the EIO the fact that it is contrary to the *ne bis in idem* (or *non bis in idem*) principle.[124] Such a narrow forecast should be interpreted in accordance with the explanations given in Recital 17 of the DOEI. These explanations should not go unnoticed by the national legal operator, as the most specialized opinion has emphasized[125]. 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 a EIO if its execution would be contrary to that principle"; and on the other hand, due "to the preliminary nature of the procedures underlying a 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 latter, it is clear that the DEIO establishes two exceptions to the refusal of recognition and enforcement of a EIO based on *non bis in idem*. The first of these exceptions is supported by the very need to ensure the practical effectiveness of this right by the issuing authority. The second presupposes the non-infringement of *non 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.

Less obvious is what underlies that reference to *non bis in idem* as a fundamental principle of Union Law,[126] as recognized by the Charter and developed by the CJEU case-

[124] See 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, M. Aguilera Morales and I. Cubillo López (eds.), *La Justicia y la Carta de Derechos Fundamentales de la Unión Europea,* Colex, 2008, pp. 275-294, at p. 275 in relation with etymological question.

[125] RODRÍGUEZ-MEDEL NIETO, C. *Obtención y admisibilidad en España de la prueba penal transfronteriza. De las comisiones rogatorias a la orden europea de investigación*, Aranzadi, 2016, at p. 425-426.

[126] 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, no.20, p. 479-531. Also, in

law. And this reference is, indeed, to the doctrine coined from Luxembourg on the scope and meaning of *non bis in idem*. Hence, with a view to specifying when –or when not– this ground for refusal, it is necessary to know this doctrine in detail.

Non bis in idem clause in Spain is provided in general rule contained in Article 32 (1) (a) LRM, which enounces that the Spanish judicial authorities shall not recognise and/or execute orders on employing mutual recognition instruments *when a definitive, condemnatory or acquittal decision, has been pronounced in Spain or in another state other than that of the issuance, against the same person and in respect of the same facts, and its execution violates the principle non bis in idem in the terms provided by the laws and in international conventions and treaties in which Spain is a party and even when the convicted person was subsequently pardoned* (own translation). As far as the *non bis in idem* principle is provided in prior general rule, no specific mention is foreseen in relation to EIO.

In Spain, most case-law related to *non bis in idem* principle is referred to the execution of a EAW according to Art. 48.1.c and d LRM depending on the fact whether prior judgement was delivered in a EU Member State of in a third country; such case-law is specifically delivered by National, Supreme and Constitutional Courts following the CJEU jurisprudence as well.[127] Likewise, the principle of *ne bis in idem* can be properly extended to the cases when the requested person has been pardoned or the case has been dismissed (*sobreseimiento*) for the same facts too, according to Art. 48 (1) (a) and (b) LRM in relation with the execution of a EAW.

Notwithstanding the mandatory wording of the Spanish Law, the judicial practice shows that the prohibition of *bis in idem* is not a ground on which the Spanish courts often resort to refusing recognition or enforcement of requests for cooperation from other Member States. Despite of the implementation in Spain of DEIO a change in this direction

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*,* no.2(1), pp. 100-118.

[127] Today contemplated in Art. 48.1.c) and d) See specifically JIMENO BULNES, M. "El principio de *non bis in idem* …", op. cit., at p. 287 ff; also, in English language 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 Publisher, 2010, pp. 285-333, esp.p. 308 ff. Other literature in Spain for instance DE HOYOS SANCHO, M. "Eficacia transnacional del *non bis in idem* y denegación de la euroorden", *Diario La Ley* 2005, n. 6330, December 30, http://diariolaley.laley.es

is unlikely to take place. On the contrary, few are the cases in which the Spanish courts presumably deny the execution of a EIO on the basis of *non bis in idem*. Such argument is based on the following two reasons:

1) The first reason is that Article 11.4 DEIO circumscribes the channel of query to the issuing authority when, in order to decide whether the refusal for this reason, the necessary information can reside in another state. For instance, if the administrative procedure or sanction has a *"*criminal character", if "same facts*"* are faced, if the decision has definitively extinguished public prosecution, or if the so-called *"enforcement condition" has been fulfilled.*

2) The second –although in order of importance may well be the first– is that it is extremely difficult for national courts to automatically identify *non bis in idem*. The assessment of this ground will depend, therefore, on the suspect *ex parte* to make it clear, which, in turn, will require him/her, either to appear in the issuing state and be aware of the referral of the EIO, or conditions contemplated in Art. 22.1 LRM[128] so that Spanish courts can notify the EIO. Only then, as some authors point out[129], will the way to the Spanish judicial authorities be paved in order to undertake the query referred to in Article 14 (4) DEIO and, therefore, to refuse recognition or execution of the EIO for this reason.

c) Principle of territoriality

This clause is foreseen also in Art. 4.7 EAW FWD in positive and negative direction and was provided in the same terms in prior Spanish EAW rule, Art. 12 (h) and (i) LOEDE. Now there is a general provision for all instruments on mutual recognition in Art. 32 (3) LRM as prior cause of immunity but only worded in positive terms. Also the draft implementing the DEIO into Spanish legal system contains a specific reference to the principle of territoriality in further Art. 207.1.c LRM. It literally reads "when the decision refers to facts that have been committed outside the issuing State and totally or partially in Spanish territory and the conduct in relation to which the European Investigation order is issued does not constitute a crime in Spain".

[128] Textually, "when the affected person has his domicile or residence in Spain and unless the foreign proceeding has been declared secret or his notification frustrates the purpose pursued, he will be notified the foreign orders, whose execution has been requested".

[129] BACHMAIER WINTER, L. ''The Proposal for a Directive on the European Investigation Order and the grounds for refusal: A Critical Assessment", in Stefano Ruggeri (Ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer International Publishing Switzerland, 2014, esp. pp. 83 and 84; also, in Spain C. Rodríguez-Medel, *Obtención y admisibilidad en España*, op. cit., at p. 437 and 438.

As highlighted by some specialised literature, this provision will emphasise the lack of harmonization in substantive criminal matter[130]. For instance, this can be the case of gender-based violence crimes, with a different, or even without any type of regulation, in the different Member States.

d) Human rights clause

As far as this specific ground for non-recognition and/or execution was absent of EAW grounds for refusal in European rule except the general provision in Recital 10 EAW FWD, no further regulation was contained in prior Spanish rule by contrast to other national legislations. On the contrary, this cause is now contemplated in Article 11.f DEIO[131] and also is expressly provided with identical content in Article 207.1.d) LRM. This Article is in consonance with Article 3 LRM as general provision indicating «"his Act shall be applied respecting the fundamental rights and liberties and the principles set forth in the Spanish Constitution, in Article 6 of the European Union Treaty and the Charter of Fundamental Rights of the European Union, and in the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe of 4 November 1950".

In the same vein, the Spanish Act contains indirect reference to the human rights clause as an important restriction of EIO issuance when human rights are concerned. As previously indicated, restriction of issuance Spanish judicial authority is contemplated when restriction of fundamental rights takes place as far as such possibility is then prohibited to public prosecutor according to further Article 187(1) 2nd paragraph LRM. Moreover, and likewise indicated, the public prosecutor will be the appropriate judicial authority to recognise and to execute a EIO provided to measures not limitative of fundamental rights according to further Article 187(2)a LRM. This paragraph follows the principle announced in later Article 207(2) LRM, trying to execute the less detrimental

[130] See MARTÍNEZ GARCÍA, E. *La orden europea de investigación*, Tirant lo Blanch, Valencia, 2016, esp. p. 75.

[131] Some authors believe that Art. 11 (f) DEIO supposes an indirect public order clause; see. BACHMAIER WINTER, L. "Transnational evidence. towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters", *Eucrim: the European Criminal Law Associations' form* 2015, n.2, pp.47-60, esp. p. 25. Also it could be relevant interconnect this Article with the text of further Art. 189 (3) LRM according to which "*the acts of investigation carried out by the executing state shall be considered valid in Spain, provided that they do not contradict the fundamental principles of the Spanish legal system"*; this regulation represents other side of the public order clause.

measures to fundamental rights. On the contrary, if measures affect fundamental rights, firstly, the prosecutor has to analyse the possibility to replace the measures with other measures not limitative of fundamental rights, and then, he/she will have to send the EIO to the judicial competent authority according to further Article 187 (2)b LRM.

In the famous case *Melloni*[132], the preliminary ruling first time promoted by the Spanish Constitutional by ATC 86/2011, June 9, introduces a significant reflection on the transcendence of the fundamental and/or human rights in the different instruments of mutual recognition even when there is not a specific reference to human rights' clause. It literally reads: "despite the fact that neither the Council Framework Decision 2002/584/JHA of 13 June nor Law 3/2003 of 14 March establishes such a requirement as a sine qua non for the executing state to proceed to the requested delivery does not mean that it can be ignored by the Spanish judicial bodies, as it is inherent in the essential content of a fundamental right recognized in our Constitution which is the right to a process with all the guarantees, to be respected –implicitly or explicitly– by any national law that is issued to that effect and satisfied by the judicial bodies"(own translation)[133]. Beside, in this judgement, the TC referred to Art. 10.1 and 2 CE; the first one refers to dignity as "foundation of political order and social peace" and the second one imposes the obligation to provide an interpretation of fundamental rights based on international treaties[134].

Precisely, according to the mentioned ATC n. 86/2011, the prior Article 10.2 CE refers us to Articles 6 TEU, 47.2, 48.2, 52.3 and 53 CFREU. In this sense, the Court of Justice in *Melloni case* specified that "although the right of the defendant to appear at trial is an essential element of the right to a fair trial, that right is not absolute (…). The defendant may waive that right of his own free will, either expressly or tacitly, provided

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[132] CJEU, 26 February 2013, C-399/11, ECLI:EU:C:2013:107, available at http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0399&lang1=es&type=TXT&ancre (last access on 19 August 2019). See comments for instance by PLIAKOS, A. and ANGNOSTORAS, S. "Fundamental rights and the new battle over legal judicial supremacy: lessons from Melloni", *Yearbook of European Law*, n. 1(34), 2015, p. 97 ff. Also in Spain BACHMAIER WINTER, L. "Más reflexiones sobre la sentencia Melloni: primacía, diálogo y protección de los derechos fundamentales en juicios *in absentia* en el Derecho europeo", *Civitas: Revista española de Derecho europeo* 2015*,* no.56, pp. 153-180.

[133] ATC, no. 869, June 2011, ECLI:ES:TC:2011:86, legal basis para. 2 (c) (2), available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/22561#complete_resolucion&completa (last access on 19 August 2019).

[134] Literally, "2. Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain."

that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the defendant did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so*"*[135]. However, the Court of Justice stressed how the harmonization of the conditions of execution of an European arrest warrant enhances the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States[136]. This reflection suggests us the reference to the principle of harmonization mentioned indirectly in the Explanatory Memorandum of the Spanish Act implementing DEIO into the Spanish system[137].

Eventually, the Court of Justice stated "by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (…) rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State"[138]. The CJEU declared that if Member States had this faculty, such one would imply "to doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision"[139].

This interpretation is followed by the Spanish Courts. Specifically, the TS gathers up all this case-law in STS n. 733/2013, of 10 October, which reads as follows: *there is a consolidated body of jurisprudence in relation to the consequences arising from the existence of a European judicial area in the framework of the Union resulting from communion in the same values and guarantees shared among the Member States of the Union, although its concrete categorization depends on the legal traditions of each state,*

[135] Para. 49.
[136] Para. 51.
[137] See para. II.1. Today principle of harmonization has been substituted by principle of "approximation" according to Art. 82 (1) TFEU; see opinion and literature in JIMENO BULNES, M. *Un proceso europeo para el siglo XXI,* Civitas & Thomson Reuters, Madrid, 2011, at p. 35.
[138] Para. 59.
[139] Para. 63.

but that in all cases safeguard the essential content of those values and guarantees (own translation)[140].

At this point, a reference to specific investigative measures such as international supervised delivery in Art. 12 MLA 2000 can be made. The Spanish authority checks if the legislation of the state, where supervised delivery is put into practice, is fulfilled (*lex loci*). In a European judicial area, procedural actions in other Member States cannot be undermined by the Spanish legal system[141].

In general, we can affirm that the TS shows a confident attitude in the Area of Freedom, Security and Justice. For instance, there are examples in case-law such as STS n.1345/2005, of 14 October[142], STS n. 886/2007, of 2 November[143], or STS n. 630/2008, of 8 October[144]. Following the opinion of some authors[145], this confident position of the TS is not a shared point of view in other European Countries.

3.6 Specific investigative measures

3.6.1 General

The specific measures regulated in LRM cannot be here analysed in detail. However, the importance and useful information contained in EJN Website should be noted. Specifically, the information referred to Spain can be checked and compared with

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[140] STS, n. 733 10 October 2013, ECLI: ES:TS:2013:4777, legal basis para. 19.VII available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6856345&links=exhorto%20prueba%20uni%C3%B3n%20europea%20denegaci%C3%B3n&optimize=20131014&publicinterface=true (last access on 19 August 2019).

[141] 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, esp. p.17.

[142] STS, n. 1345, 14 October 2005, ECLI: ES:TS:2005:6210, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=1073029&links=%221345%2F2005%22&optimize=20051222&publicinterface=true (last access on 19 August 2019).

[143] STS, n. 886, 2 November 2007, ECLI: ES:TS:2007:7796, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=259078&links=%22886%2F2007%22&optimize=20071220&publicinterface=true (last access on 19 August 2019).

[144] STS, n. 630, 8 October 2008, ECLI: ES:TS:2008:5825, available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=3420015&links=%22630%2F2008%22&optimize=20081127&publicinterface=true (last access on 19 August 2019).

[145] MORÁN MARTÍNEZ, R. "Obtención y utilización de la prueba transnacional", *Revista de Derecho Penal* 2010, (30), esp. p. 94.

other national legislation in order to know all the important information such as its availability, the competent authority, procedural matters and the deadline, among others[146].

3.6.2 Coercive measures

Art. 189 (1) LRM provides requirements for the issuance of the EIO such as following: "the issuance of a European investigation order is necessary and proportionate for the purpose of the proceedings to which it is requested taking into account the rights of the investigated or defendant' and 'that the requested investigative measure or measures, whose recognition or execution is intended to have been agreed in the Spanish criminal proceeding in which the European investigation order is issued" (own translation). It does not contain any reference to coercive measures. In general, coercive investigative measures can be adopted during pre-trial investigation with restriction of fundamental rights and are regulated in Title VIII (Art. 545 – 588 g LECrim) under the heading "On investigative measures limiting rights recognised in article 18 of the Constitution"[147].

Indeed, all coercive investigative measures here included constitute assumptions of the so-called 'pre-constituted evidence',[148] whose fundamental requirement is to be transferred to the oral trial phase from one of the means of proof legally contemplated with observance of the procedural guarantees provided in this stage (orality, immediacy, contradiction, publicity, defence, etc.). In judicial practice, this transfer usually takes place under the declaration of police forces, i.e. the officer or officers who have practised the concrete investigative measure, as witnesses according to Art. 701 ff LECrim. Otherwise, these investigative measures practiced during the pre-trial investigation shall

[146] Fiche Belge of Spain, available at https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelges/EN/-2/373/-1# (last access on 19 August 2019).
[147] Literally, "1. The right to honor, to personal and family privacy and to the own image is guaranteed. 2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto. 3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order. 4. The law shall restrict the use of data processing in order to guarantee the honor and personal and family privacy of citizens and the full exercise of their rights." See English version of Spanish Constitution available at https://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/index.aspx (last access on 19 August 2019).
[148] Defined as "documentary evidence, which may be practiced by the Judge of the Investigative and its collaborating staff (judicial police and public prosecutor) on unrepeatable facts, which cannot, through ordinary means of proof, be processed at the time of oral trial".

not have any probative value according to Constitutional and Supreme Court case-law such as leading cases SSTC no. 150/1987, of 1 October, and no. 161/1990, of 19 October, and STS, of 5 May 1988[149].

The last condition established by Spanish procedural rules is the adoption of such coercive measures restricting fundamental rights during pre-trial investigation by judicial authority (i.e., the Inquiring Magistrate –*Juez de Instrucción*–), except the constitutional provision of *flagrante delicto*, whose concrete regulation is provided in the Act on Criminal Procedure. In these cases, the practice of concrete coercive measures by police forces shall be admissible under the condition of a later judicial validation according to criminal procedure rules. Otherwise, the exclusionary rule (*exclusión de la prueba ilícita*) shall be applied according to Art. 11 (1) of the Act on the Judiciary[150].

Regulation of coercive measures in Spain is provided in Art. 545 – 588 g LECrim with specific enumeration of concrete diligences such as the following ones: search and seizures in closed place (Art. 545 - 572 LECrim); register of books and documents (Art. 573 - 578 LECrim); warrant and opening of written and telegraphic correspondence (Art. 579 - 588 LECrim); Provisions common to the interception of telephone and telematic communications, gathering and recording of oral communications through the use of electronic devices, use of technical devices for tracking, locating and capturing the image, registering mass information storage devices and remote records on computer devices (Art. 588 a.i – 588 a.xi LECrim); interception of telephone and telematic communications (Art. 588 b.i – 588 b.xiii LECrim); gathering and recording of oral communications through the use of electronic devices (Art. 588 c.i – 588 c.v LECrim); use of technical devices for image acquisition, tracking and geolocalization (Art. 588 d.i – 588 d.iii LECrim); search and seizure of mass storage information devices (Art. 588 d.i – 588 d.iii LECrim); remote monitoring on electronic devices (Art. 588 e.i – 588 e.iii LECrim); freezing evidence measures (Art. 588 f LECrim).

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[149] All are available at official websites http://hj.tribunalconstitucional.es/ and http://www.poderjudicial.es/search/

[150] Textually, "taking of evidence which has, either directly or indirectly, infringed fundamental rights or freedoms, shall be inadmissible". Spanish Act on the Judiciary is regulated by Organic Act 6/1985, of 1 July, BOE n. 157, 2 July 1985, pp. 20632-20678, English version is available at https://www.boe.es/buscar/doc.php?id=BOE-A-1985-12666 (last access on 19 August 2019).

Other regulations provided in the Act on Criminal Procedure must be also taken into account as far as other coercive measures can be adopted, which are being used more and more frequently in judicial practice and in cross-border proceedings applying prior Conventions. This is the case of controlled deliveries (Art. 263 LECrim), cover investigation by officials (Art. 282 a LECrim), and DNA gathering and analysis and body interventions (Art. 363.II LECrim). Lastly, although amendments on the Act on Criminal Procedure already mention further diligences, their practice still needs to contemplate specific non procedural regulations; the so-called 'blood alcohol test' introduced at the time in road regulation, today provided in Art. 796 (1), rule 7 LECrim, and filming in public places, also now enshrined in new Art. 588 d.i LECrim.

3.7 Legal remedies at Spanish Level

Despite of the general provision contained in Art. 14 (1) DEIO in favour of legal remedies in order to challenge the issuance of EIO, no reference is expressly contemplated in the Spanish Act implementing EIO. In this case, reference to Art. 24 LRM is necessary. It provides as follows "against decisions issued by the Spanish judicial authority deciding on the European instruments on mutual recognition will be able to interpose the appeal that proceed according to the general rules foreseen in the Act of Criminal Procedure". To be noticed is that Recital 22 DEIO Preamble requires that "legal remedies available against a EIO should be at least equal to those available in a domestic case against the investigative measure concerned", joint with other conditions to be fulfilled.[151]

In this context, general rules regulated in Art. 216 LECrim *et seq* must be applied. Different types of legal remedies such as 'reform, appeal and complaint' (*recursos de reforma, apelación y queja*) are foreseen. As previously stated,[152] EIO shall be ordinarily issued by order (*auto*) from the Inquiring Magistrate (*Juez de Instrucción*) or, if it is the case, the Judge of Minors or Judge of Violence against Women, whose resolution can be appealed before the Superior Court (in particular, Court of Appeal or *Audiencia*

[151] Textually "in accordance with their national law Member States should ensure the applicability of such legal remedies, including by informing in due time any interested party about the possibilities and modalities for seeking those legal remedies. In cases where objections against the EIO are submitted by an interested party in the executing State in respect of the substantive reasons for issuing the EIO, it is advisable that information about such challenge be transmitted to the issuing authority and that the interested party be informed accordingly."

[152] See *supra* 2.1. Judicial authorities.

Provincial) as any other according to Art. 217 and 236 LECrim. The same solution shall be adopted in relation to the execution of EIO as far as the appropriate decision for it is also an order pronounced by the judicial authorities numerated in prior Art. 187 (3) LRM including again Judges of the Investigative (also Violence against Women, who work in criminal matters as Judges of the Investigative for gender violence); by contrast, if the EIO is executed by Central Judges of the Investigative, Minors and/or Criminal appropriate the authority shall be the National Court[153].

Concerning the cases when the EIO is issued and/or executed by a public prosecutor according to Article 187 LRM, no specific mention to legal remedies to decisions pronounced by this authority is foreseen in the Act on Criminal Procedure. It shall be considered that in Spain, at the moment, the public prosecutor cannot adopt criminal decisions as far as, also said[154], in Spain the direction of the investigative stage and/or pre-trial investigation is still conducted by a judge and the public prosecutor (*fiscal)* in charge of the task of the public accusation. Therefore, as noted by the General Council of the Judiciary a "*decreto"* by a public prosecutor issuing a EIO cannot be challenged.[155]

4. PROCEDURAL RIGHTS OF SUSPECTS IN CRIMINAL PROCEEDINGS

4.1 Introduction

The Council Resolution of 30 November 2009 on a Roadmap for strengthening the procedural rights of suspected or defendants in criminal proceedings[156] marked the beginning of a new phase for the European Union in this matter following the failure of initiatives in recent years[157].

In this regard, the unsuccessful Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union[158] shall be

[153] See Art. 65 (5) LOPJ.
[154] See *supra* 2.1. Judicial authorities.
[155] International Relations Service of the General Council of the Judiciary, EIO Guide, op. cit., esp. p.28.
[156] OJ, n. C 295, 4 December 2009, pp. 1-3.
[157] On this matter, see JIMENO BULNES, M., "The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings", *Eucrim,* 2009, no. 4, pp. 157-161; and, 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* February 2010, pp. 1-20.
[158] Document COM (2004) 0328 final.

remembered, presented by the Commission on 28 April 2004 and which failed to complete its legislative *iter*[159].

Unlike the Proposal for a Framework Decision, the Roadmap preferred to deal separately with each of the procedural safeguards because of their importance and complexity, on the pretext of giving some added value to each of them. A total of six Directives have so far been published as a result of this Roadmap.

In the three-year period 2010-2013, the first three Directives were adopted: Directive 2010/64/EU, of 20 October 2010, on the right to interpretation and translation in criminal proceedings[160]; Directive 2012/13/EU, of 22 May 2012, on the right to information in criminal proceedings[161] and, finally, Directive 2013/48/EU, of 22 October 2010, 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[162].

Once the three Directives we have just mentioned had been approved, a second period of development of the Roadmap began, culminating in 2016 with the publication of other three new Directives: Directive 2016/343/EU, of 9 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be

[159] In connection therewith, see 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; also, VALBUENA GONZÁLEZ, F., "Derechos procesales del imputado", in Jimeno Bulnes (coord.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales*, Bosch Editor, Barcelona, 2007, pp. 395-416. 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.

[160] OJ, n. L 280, 26 October 2010, pp. 1-7. For further information on this matter, see JIMENO BULNES, M., "El derecho a la interpretación y traducción gratuitas", *Diario La Ley* 14 March 2007, n. 6671, pp. 1-10.

[161] OJ, n. L 142, 1 June 2012, pp. 1-10. In connection therewith, see SERRANO MASSIP, M., "Directiva relativa al derecho a la información en los procesos penales", en Jimeno Bulnes (dir.), Miguel Barrio (coord.). *Espacio Judicial Europeo y Proceso Penal*, op. cit., pp. 219-248.

[162] OJ, n. L 294, 6 November 2013, pp. 1-12. On this matter, see ARANGÜENA FANEGO, C., "El derecho a la asistencia letrada en la Directiva 2013/48/UE", *Revista General de Derecho Europeo* 2014, no. 32, pp. 1-3, esp. 20. Available at http//:www.iustel.com (last access on Septembre 26th , 2019); also, VALBUENA GONZÁLEZ, F., "Directiva relativa al derecho a la asistencia letrada en los procesos penales", in Jimeno Bulnes y Miguel Barrio, *Espacio Judicial Europeo y Proceso Penal*, op. cit., pp. 249-261.

present at trial in criminal proceedings[163], Directive 2016/800/EU, of 11 May 2016, on procedural safeguards for children who are suspected or accused persons in criminal proceedings[164] and, finally, Directive 2016/1919/EU, of 26 October 2016, on legal aid for suspected and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings[165].

We will now deal with the state of transposition in Spain of the European Directives on procedural safeguards. To this end, three laws were initially passed in 2015.

Initially, Organic Act 5/2015 of 27 April amending the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*, hereinafter LECrim) and Organic Act 6/1985, of 1 July, on the Judiciary, to transpose Directive 2010/64/EU, of 20 October 2010, on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU, of 22 May 2012, on the right to information in criminal proceedings[166].

Shortly thereafter, on the same date, Organic Act 13/2015, of 5 October, amending the Criminal Procedure Act for the strengthening of procedural safeguards and the regulation of technological investigative measures[167], as well as Act 41/2015, of 5 October, amending the Criminal Procedure Act for the streamlining of criminal justice and the strengthening of procedural safeguards[168].

Both served, *inter alia*, for the transposition of Directive 2013/48/UE, of 22 October 2013, on the right of access to a lawyer in criminal proceedings and in European

[163] OJ, n. L 65, 11 March 2016, pp. 1-11. On this, see also 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 Arangüena Fanego y De Hoyos Sancho (dirs.), *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea*, Valencia, 2018, pp. 143-175.
[164] OJ, n. L 132, 21 May 2016, pp. 1-19. More specifically, see. 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", in Arangüena Fanego y De Hoyos Sancho, *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea*, op. cit., pp. 177-200.
[165] OJ, n. L 297, 4 November 2016, pp. 1-8. In this regard, see 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 Arangüena Fanego y De Hoyos Sancho, *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea*, op. cit., pp. 201-234.
[166] BOE, n. 101, 28 April 2015.
[167] BOE, n. 239, 6 October 2015.
[168] BOE, n. 239, 6 October 2015.

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.

More recently, Act 3/2018, of 11 June, amending Act 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union to regulate the European Arrest Warrant[169] has been used to transpose into our legal system Directive 2016/1919/EU, of 26 October 2016, on legal aid for suspected and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

Despite this legislative effort, it shall be noted that two of the three Directives published in 2016 have yet to be transposed into our legal system: Directive 2016/343/EU, of 9 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings and Directive 2016/800/EU, of 11 May 2016, on procedural safeguards for children who are suspected or accused persons in criminal proceedings.

We will now deal with the most relevant aspects of the new regulation in Spain of safeguards for suspected or accused persons in criminal proceedings, as a consequence of the transposition of the aforementioned Directives.

4.2 Right to translation and interpretation

The deadline for transposing Directive 2010/64/EU, of 20 October 2010, on the right to interpretation and translation in criminal proceedings into the national law of the Member States was 27 October 2013. The transposition into the Spanish Law was delayed by a year and a half through the amendment of the Criminal Procedure Act, by the aforementioned Organic Act 5/2015, of 27 April.

More particularly, a new chapter is introduced in the Criminal Procedure Act under the heading "On the right to translation and interpretation", integrated by Arts. 123 to 127, after having recognized such right among those enjoyed by the suspected person in Art. 118.f). Finally, Art. 416.3 incorporates the professional secrecy of translators and

[169] BOE, n. 142, 12 June 2018.

interpreters and, therefore, the dispensation from the obligation to testify as a witness in criminal proceedings concerning the facts with respect to which their intervention was referred.

Before this reform, the right to interpretation was practically limited to the taking of police or judicial statements, both in the pre-trial phase and in the oral trial. For its part, the right to translation was restricted to informing the detainee of his rights, by providing a form in the most common languages.

The assistance of an interpreter is guaranteed from the beginning of the procedure, and is expressly mentioned in the first interrogation by the police, the courts or the Public Prosecutor's Office, as well as in all court hearings. In addition, in conversations that the suspected or accused person may have with his or her lawyer.

The need for interpretation may be necessary even before the first interrogation for any proceedings carried out in the presence of the accused with the assistance of his or her counsel, so that the suspected person may receive their advice and know the scope of the proceedings[170].

Unlike the Directive –which does not specify the mode of interpretation– the Criminal Procedure Act indicates its preference for the simultaneous modality and additionally, the consecutive modality, which requires the physical presence of the interpreter next to the suspected or accused person.[171] If this is not possible, the assistance of the interpreter may be provided by videoconference or any other means of communication.

The translation of documents is limited to those that are essential to guarantee the right of defense of defendants and defendants who do not speak or understand the official

[170] In the same vein, see LÓPEZ JARA, M., "La modificación de la Ley de Enjuiciamiento Criminal en materia de derechos y garantías procesales", *Diario La Ley* 2015, no. 8540, esp. p. 8.
[171] In practice, because of the lack of technical means for simultaneous interpretation, this is provided by the technique of whispered interpretation, i.e., to the defendant's ear in a low voice, or by the subsidiary modality of consecutive interpretation. On this matter, see 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, no 1, pp. 5-40, esp. p. 9. Available at http://www.ree-uva.es (last access on September 26th, 2019)

language in which the proceedings are conducted. In any case, these documents include the resolutions agreeing to the imprisonment of the accused, the indictment and the sentence; eventually, any other document according to the circumstances of the case, after a judicial declaration.

In accordance with the Directive, Art. 123.4 of the Criminal Procedure Act requires the translation to be carried out within a reasonable period of time and, to this effect, provides that as soon as it is agreed by the judge, court or Public Prosecutor's Office, the applicable procedural periods will be suspended.

Both the interpretation and the translation are free of charge, so that the expenses arising from the exercise of such rights will be borne by the Administration, regardless of the outcome of the process.

However, the right to translation, unlike the right to interpretation, can be waived by the suspect or accused person. The Directive requires the waiver to be duly registered (Art. 7), an aspect that our legislator has not considered.

Finally, it should be noted that Spain has failed to meet the quality requirements for interpretation and translation required by the Directive. On the one hand, by empowering anyone who knows the language to intervene as an interpreter, without requiring a degree, excusing themselves for reasons of urgency that are not specified. On the other, by failing to comply with the obligation to submit a bill with a view to create an official register of independent translators and interpreters who are appropriately qualified[172] as referred to in the Directive.

4.3 Right to information

The deadline for transposing Directive 2012/13/EU, of 22 May 2012, on the right to information in criminal proceedings into the national law of the Member States was 2 June 2014. The transposition into the Spanish Law has taken place late and successively, through different legal reforms.

[172] The First Final Disposition of LO 5 /2015 set a maximum deadline of one year (28 April 2016) for the submission of the bill, which has not been published to date.

It began with a delay of almost a year, through the modification of the Criminal Procedure Act, through Organic Act 5/2015, of 27 April, which gave new wording to Arts. 118, 302, 505, 520 and 775.

It continued six months later, with a new modification of the Criminal Procedure Act, by Organic Act 13/2015, of October 5, which reformed Arts. 118 and 520 again, introduced the new Article 520 *ter* and modified Art. 527.

It has recently culminated in the amendment of Art. 50 of Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union, through Act 13/2018, of 11 June, with the aim of guaranteeing the right to information to the subject claimed under a European arrest warrant and surrender.

Prior to the first reform, most of the safeguards related to the right to information were recognized in the Criminal Procedure Act, although the transposition of the Directive has served to improve the position of the suspected or accused person, and particularly of the subject deprived of liberty.

With regard to the person under investigation, there are two outstanding novelties: on the one hand, the obligation to update the information on the facts charged and the object of the investigation in the face of any relevant change that arose during the instruction of the procedure; on the other hand, the express recognition of the right to examine the actions in due time in order to safeguard the right of defense and, in any case, prior to the taking of a statement[173].

The advances made with respect to the detainee are more relevant, since the catalogue of rights of which he or she must be informed is broadened and the way in which the information must be provided is significantly improved.

The catalogue is extended, on the one hand, with the right to access the elements of the proceedings that are essential to challenge the legality of the detention or

[173] Art. 118.1 a) and b) LECrim.

deprivation of liberty and, on the other hand, with the right to communicate by telephone, without undue delay, with a third party of his or her own choice[174].

For its part, the information must be provided in clear language, adapted to the addressee in view of his or her personal circumstances and also in writing, so that the detainee can keep the letter of rights in his or her possession and consult it at any time during the detention.

Of particular relevance is the possibility of now having access to the essential elements of the proceedings for the purpose of challenging the detention. However, on this point, the Spanish Law deviates from the Directive (Art. 7.1), which required Member States to surrender –and not only access– to the detainee or his lawyer those documents related to the specific file that are in the possession of the competent authorities and are fundamental to effectively challenge the legality of the detention.

4.4 Right of access to a lawyer

The deadline for the transposition into the national law of the Member States of Directive 2013/48/EU, 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 was set for 27 November 2016.

The transposition into Spanish Law initially took place within the deadline, through the amendment of the Criminal Procedure Act, by Organic Law 13/2015 of 5 October, which modifies Arts. 118, 509, 520 and 527 and introduces the new Art. 520 *ter*.

However, the recent Act 3/2018, of 11 June, has been used to complete an aspect omitted at the time, such as the right to the double defense of the defendant under a

[174] Art. 520.2 d) and f) LECrim.

European Arrest Warrant and surrender, that is, the appointment of a lawyer in the country of issue for the detainee in another State.[175]

Before the reform, the regulation of this matter in the Spanish law was already quite guarantist since the technical defense was mandatory in general terms, likewise demandable for the detainee through a lawyer of .his or her own choice, except in the cases in which the solitary confinement was decreed, in which case one shall be appointed *ex officio.*

However, with the transposition of the Directive, some aspects of the right to legal aid have been improved, including the introduction of a reserved interview between the lawyer and the person under investigation, prior to the interrogation of any authority, including the police authority[176], which had previously only been provided for in the case of minors.

The extension of the right has also been clarified in this same vein, by expressly stating that the presence of the lawyer must be taken into account in all the statements made by the person under investigation, as well as in the proceedings for recognition, face-to-face confrontations and reconstruction of the facts, with the goal of informing the suspect of the consequences of giving or refusing consent for the practice of such proceedings[177].

The reform has been used as an opportunity to improve the conditions for the provision of *ex officio* legal aid, by reducing from eight to three hours the time available to the lawyer to go to the detention facility, from the moment he receives the order[178].

It is also novel to set out the requirements to be met by the waiver of legal aid in order to be effective in those cases in which it is admitted, i.e. crimes against road safety. That is to say, that they have been given clear and sufficient information in simple and

[175] Art. 50 of Act 23/2014, of 20 November on mutual recognition of judicial decisions in criminal matters in the European Union.
[176] Art. 520.6 d) LECrim.
[177] Art. 520.6 b) and c) LECrim.
[178] Art. 520.5 LECrim.

understandable language about the content of the right and the consequences of the waiver, and they can revoke it at any time[179].

Among the consequences deriving from solitary confinement are, among others, the abridgment of the right to appoint a trusted lawyer, to have an interview in confidence with the lawyer appointed ex officio or to have access to the proceedings, except for the essential elements to be able to challenge the legality of the detention[180].

The newness in this point lies in the fact that such consequences do not occur automatically when the solitary confinement is decreed as in the past, but can be modified by the judge, who must motivate the reasons for the adoption of each of these exceptions to the general detention regime[181].

Finally, with regard to legal aid, the confidential nature of communications between the person under investigation and his or her lawyer is expressly recognized, except in the two following cases: the situation of solitary confinement already mentioned and when there are signs that the lawyer is involved in criminal acts.

In effect, if the conversations between lawyer and client had been captured or intervened during the execution of a technological investigation measure, as a general rule the judge will order to eliminate the recording, unless there are objective signs of participation of the lawyer in the criminal act under investigation or of his implication with the person under investigation in committing another criminal offence[182].

The Directive, whose transposition is examined in this paragraph, does not exhaust its content in the right to legal aid but extends –as its very name indicates– to other rights in connection with the possibility of relating to the outside world during deprivation of liberty, the right to inform a third party and to communicate with third parties and consular authorities.

[179] Art. 520.8 LECrim.
[180] Art. 527 LECrim.
[181] On this matter, see JUAN SÁNCHEZ, R., "El nuevo régimen de la incomunicación cautelar en el proceso penal español", *Indret* 2017, no.4.
[182] Art. 118.4 LECrim.

Both requirements have been incorporated into the Criminal Procedure Act, through the modification of Art. 520 by the aforementioned Organic Act 13/2015, of 5 October. Thus, the detainee has the right to be informed of the family member or person he or she wishes, without undue delay, his or her deprivation of liberty and the place of custody in which he or she is at all times[183], as well as the right to communicate by telephone, with a third party of his choice, in the presence of a police officer or similar authority designated by the judge or prosecutor[184].

If the detainee is a foreigner, he has the right to have the deprivation of liberty and the place of custody communicated to the consular office of his country, and shall be entitled to receive their visits, communicate and keep correspondence[185] with them. If the party has two or more nationalities, he or she may choose which consular authorities to contact and with whom to communicate[186].

Informing family members and consular authorities of the deprivation of liberty and the place of custody is not excepted even in cases where solitary confinement has been ordered, with the aim of ensuring that no secret detention is carried out[187].

4.5 Right to a legal aid

The deadline for the transposition of Directive 2016/1919/UE, of 26 October 2016, on legal aid for suspected and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings was set for 25 May 2019.

The transposition into the Spanish Law took place within the deadline, through the reform of the Act on legal aid, by Act 3/2018 of 11 June, which amends Act 23/2014 of 20 November, on mutual recognition of criminal decisions in the European Union to regulate the European Order of Investigation.

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[183] Art. 520 e) LECrim.
[184] Art. 520 f) LECrim.
[185] Art. 520 g) LECrim.
[186] Art. 520.3 LECrim.
[187] This follows from a joint interpretation of Articles 520.2 e) and 527.1 LECrim. In the same vein, also see ARANGÜENA FANEGO, C., "Las directivas europeas de armonización de garantías procesales de investigados y acusados. Su implementación en el Derecho español", op. cit., esp. p. 24.

Specifically, a last paragraph is introduced in Art.1, Art. 6.3 is modified and a new Art. 21 *bis* is introduced with the rubric *Substitution of the assigned professional* (own translation) in Act 1/1996, of 10 January, on legal aid[188].

Before the reform, the Spanish Law offered a broad coverage of free legal aid. For this reason, and also because of its close relationship with the right to legal aid, the transposition of the Directive has been simple and rapid, taking advantage of the legal reform introduced in Spain by the European Investigation Order.

This main new aspect consists in the extension of free defense and representation when the intervention of these professionals is not mandatory (procedure for minor offences), if –on the contrary– it is agreed by the court in view of the entity of the offence and the personal circumstances of the applicant[189].

Together with this novelty, we find the regulation of the procedure for the substitution of the initially designated professionals, at the request of the beneficiary by means of a duly justified request, whose purpose is to give effect to the right to free legal aid. The request for substitution is submitted to the corresponding Bar Association, which will reach a decision within fifteen days, prior transfer to the professional whose substitution is of interest, being able the decision denying the right to the designation of a new professional able to be challenged[190].

Finally, the new paragraph introduced in Art. 1 of the Act on legal aid states that *in the application of this Act, the specific needs of persons in a vulnerable situation must be taken into account* (own translation*)*. In this way, the requirements of Art. 9 of the transposed Directive –which compels Member States to take into consideration the specific needs of suspected, accused persons and wanted persons who are vulnerable– are somehow taken into account.

[188] First Final Disposition of Act 3/2018, of 11 June.
[189] Art. 6.3 b) LAJG (Act on legal aid in Spanish).
[190] Art. 21 *bis* LAJG.

4.6 Pending issues

As we have already anticipated,[191] the Spanish legislator has not yet taken any measure to implement in our legal system two of the Directives adopted on the harmonization of procedural safeguards for suspected and accused persons in criminal proceedings, despite the expiry of the respective maximum transposition period.

The same applies to Directive 2016/343/EU, of 9 March 2016, which reinforces certain aspects of the presumption of innocence and the right to be present at a trial[192] in criminal proceedings, whose deadline for transposition expired on 1 April 2018; and the same goes for Directive 2016/800/EU, of 11 May 2016, on procedural safeguards for minors suspected or accused in criminal proceedings[193], whose deadline for transposition expired on last 11 June 2019.

As far as the first Directive is concerned, our Criminal Procedure Act is already a sufficient guarantee of the right to the presumption of innocence and to be present at a trial, which may justify the lack of regulatory initiative.

Thus, for instance, with regard to the presumption of innocence, the suspect is recognized as having the right not to testify against himself/herself and not to confess guilt,[194] assuming the burden of proof over the facts imputed to the accusing parties[195].

Concerning the presence of the accused, the general rule is that the trial cannot take place in his or her absence, except in the case of minor offences[196] or, in the case of other offences dealt with under the abbreviated criminal procedure, the requested penalty does not exceed two years' deprivation of liberty or six years' deprivation of liberty if of a different nature.[197] In addition, a sentence handed down in the absence of the accused,

[191] See section 1.
[192] The state of transposition of this Directive into national law is available at https://eur-lex.europa.eu/legal-content/GA/NIM/?uri=celex:32016L0343 (last access on 26 September 2019).
[193] The state of transposition of this Directive into national law can is available at https://eur-lex.europa.eu/legal-content/ES/NIM/?uri=CELEX:32016L0800&qid=1567583833372 (last access on 26 September 2019).
[194] Art. 118.1 h) LECrim.
[195] Arts. 656, 781 LECrim and further in concordance.
[196] Art. 971 LECrim.
[197] Art. 786.1 LECrim.

whether or not it has been appealed, may be appealed against in the form of an annulment by the convicted person[198].

With regard to the second Directive, its forthcoming transposition will require the amendment of Organic Law 5/2000, of 12 January, regulating the criminal liability of minors.

Among other issues, it will be necessary to determine how to give effect to the reinforced right to information available to children, as well as the right to an individual assessment, in order to take into account the personality and maturity of the child, his or her economic, social and family context, as well as any specific vulnerability.

The occasion may also be used to bring the procedure for minors into line with the requirements arising from the other Directives on procedural safeguards, in particular interpretation and translation, legal aid or the presence of the minor in court[199].

Apart from the lack of transposition in Spain of these two Directives, there is one aspect still to be developed at a European level within the 2009 Roadmap to strengthen the procedural rights of suspected or accused in criminal proceedings, such as that relating to detention and provisional detention (Measure f). It is therefore appropriate to resume work in this area in order to complete the long-awaited status of the subject on suspected and accused persons in criminal proceedings.

[198] Art. 793.2 LECrim.

[199] In the same vein, see ARANGÜENA FANEGO, C., "Las directivas europeas de armonización de garantías procesales de investigados y acusados. Su implementación en el Derecho español", op. cit., esp. 28-31.

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