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LAWYERS4RIGHTS
Lawyers for the protection of fundamental rights

A study on the application of the Charter of Fundamental Rights of the European Union in civil and administrative jurisdiction

The fight against terrorism

edited by ALICE PISAPIA

IUSTITIAM COLIMUS
G. Giappichelli Editore

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BULGARIAN LAWYERS FOR HUMAN RIGHTS

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ORDINE DEGLI AVVOCATI DI MILANO

UNIVERSIDAD DE BURGOS

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INTRODUCTION

Under the framework of the Justice Programme, funded by the European Commission, a consortium composed by the Bulgarian Lawyers for Human Rights Foundation, Italian Association of Lawyers (Associazione Nazionale Forense, ANF), the Milan Bar Association (in particular the Commission for the protection of fundamental rights coordinated by Avv. Silvia Belloni), the Italian Federation of Liberal Professions (Fondazione Confprofessioni), the University of Burgos (Spain) and the General Council of Spanish Lawyers (Consejo General de la Abogacia Española) started the project Lawyers4Rights (JUST-JTRA-EJTR-AG-2017 - Grant agreement number 806974) to study the role of the EU Charter of Fundamental Rights (CFR) in face of emerging challenges such as migration and terrorism. The analysis of the CFR application has been focused into two main sectors: the right to family reunification, topic that belongs to civil law, the rights of defendants, pre-trial detainees and persons under investigation in the interest of criminal lawyers. Indeed, after the case Ebru Timtil in Turkey, it appear clearly that lawyers can play a relevant social role in the application of international legislative instrument to protect the fundamental rights. Consequently, the main scope of the European project funded by the European Commission was to implement a free program of training for legal practitioners with seminars, on-line trainings and written materials.

The key research question from which the work has been developed is about the role of the European Charter in the protection of fundamental rights. How has the CFR been integrated into the national systems? Which's the role of the CFR in the hierarchy of the international norms? Is the CFR a central tool for the protection of fundamental rights considering the multilevel system of protection designed at the supranational level?

In the present publication the work developed has been collected, thanks to the European funds, by the University of Burgos for what concerns the European norms and European case law, as well as the national application in Spain. For Italy and Bulgaria, the analysis has been carried out by national experts on the topic who are listed as authors of their respective contribution. The present publication with the review of the jurisprudence, national and European, applicable to the main area – family reunification and anti-terrorism measures – is only a part of the European project funded by the Commission. Indeed, the activities carried out by the partners includes training seminars in all the Member States involved and the adoption of a policy statement on the role of legal professions in the imple-

mentation of the CFR. About 450 persons will benefit from the project. Out of them, more than 300 are lawyers, practicing in the civil, criminal and fundamental rights fields; about 70 are academic staff in the field of human rights; and about 80 are staff of associations of liberal professions.

The objective of the project is to raise awareness on the CFR among legal professions and institutional bodies, improve the competency on human rights protection including mainstreaming of EU law among legal professions and trust in EU institutions, create feasible paths towards implementation of the CFR by doctrinal debate and jurisprudence review. Moreover, the project will aim at accelerating EU procedures towards human rights protection and related culture and enhancing inter-professional dialogue and mutual learning between legal professions, public institutions and bodies competent in human rights protection.

In order to answer the key research question mentioned above it is needed to recall the multilevel protection system designed at the supranational level: the UN system, purely international, the one of the Council of Europe (CoE) which is also participated by all the European Member States but not by the European Union per se and, finally, the one of the CFR, purely European. If it is somehow evident that the UN system is applicable only according the traditional tools of international law, the other two layers are more interconnected. Indeed, the European Court of Human Rights in Strasbourg is the guardian of the European Convention on Human Rights and Fundamental Freedoms and accepts complaints by individuals alleging a breach of one or more Convention articles by acts or omissions of the authorities of one of the forty-seven Contracting Parties of the Council of Europe, provided certain conditions of admissibility are met. The Court of Justice of the European Union, based in Luxembourg, is the guardian of the CFR and decides in specific cases whether acts or omissions of the EU institutions and/or certain acts or omissions of the authorities of one of the twenty seven Member States of the European Union are in conformity with the guarantees provided by the CFR. The entry into force of the Treaty of Lisbon in 2009, expressly mentioning the binding nature of the Charter (Art. 6 TUE), clarified definitively the binding legal basis for the protection of fundamental rights. However, even before 2009, the Court of Justice of the European Union referred to this document as a binding instrument for Member States and European institutions. The scope of the present study is to evaluate the CFR role as a core element in the national judicial system according to Artt. 6 and 51 of the Treaty of the European Union (TUE).

While there are differences in geographic coverage of the two juridical instruments and in the substantive scope of the protection provided by the two Courts, some cases can and have been brought before both supranational courts. It is needed to analyse in which way the two supranational systems of protection (ECHR and CJEU) interact and in which ways the national lawyers can invoke the documents and the international case-law in front of national judges. Considering such multi-level approach to the protection of fundamental rights, it is of the

utmost importance to provide adequate training to national judges and lawyers in order to understand the role of the CFR. Since the parallel existence of two supranational catalogues of fundamental rights and two supranational courts for their interpretation and enforcement is quite unique, the project compares some of the strengths and weaknesses of each of the two systems in the selected areas and attempts some proposals for a combined application in order to ensure the maximum protection. From what has been analysed we could say that a variety of approaches among Member States can also be found in the domestic treatment of EU law. One can identify several different paths used to ensure EU law's primacy. Some Member States embrace a monist vision of the relationship between orders, implying the unconditional acceptance of EU law (the Netherlands, Belgium, Luxembourg). Others expressly constitutionalize a set of limits to European integration (such as Germany and Sweden).

Thus, the **Italian Constitutional Court** argued that domestic judges should give precedence to the question of constitutionality. Such a procedural priority was deemed to be necessary since a different approach would have threatened the effectiveness of the catalogue of constitutional rights and, even more, the power of the Constitutional Court to establish a centralized model of constitutional review, whose decisions are valid *erga omnes*. With its latest decision n. 20/2019, the Constitutional Court has clarified how its new doctrine applies to the case of '*dual preliminarity*', interpreting that procedural priority in a more EU-friendly way. Firstly, in this recent decision the Italian Constitutional Court reiterates that the precedence of the constitutional review cannot affect the power of the ordinary judge to lodge a preliminary reference to the CJEU, but at the same time the Court states that a referral decision under Art. 267 TFEU can be made by the judge "*at every stage of the proceeding and for every reason she may deem it for necessary*" (while in the 2017 decision such a possibility seemed to be limited for the referring judges to issues that the Constitutional Court had not dealt with). Secondly, the Constitutional Court paves the way to a less rigid model of interaction with the ordinary judges: they are not prevented any more from the prior involvement of the ECJ in the preliminary reference procedure when both national and European fundamental rights are at stake. In the 2017 decision, the Italian Constitutional Court seemed to have codified its preeminence by making its prior involvement a necessity for judges. The new approach demonstrated in decisions nos. 269/2017 and 29/2018 appears to reflect the Italian Constitutional Court's decision to focus, in its balancing exercise, more on the domestic parameters than on the European ones, so as to keep a conversation going between the specific features of national constitutional rights and those protected at EU level.

With regards to the implementation into the **Spanish system** of the European legislation on family reunification and, specifically, of the provisions contained in Art. 7 CFR and Art. 8.1 ECHR, this has been done correctly, but in a rather restrictive way, especially in some aspects, such as those related to the regulation of

the fundamental rights of immigrants, which could initially be opposed to the provisions of Art. 13.1 of the Spanish Constitution, which guarantees foreigners the same rights as Spaniards. These suspicions of unconstitutionality required the intervention of the Constitutional Court itself. However, this constitutionally recognized equality between Spanish citizens and foreigners does not extend to the right to family privacy, referred to in Art. 18.1 CE, in the sense that public authorities must guarantee foreigners a life in common with their relatives in Spain. The Constitutional Court has stated that this constitutional precept only refers to the prohibition of illegitimate interference by third parties in the family environment.

Finally, as far as **Bulgaria** is concerned, unfortunately, the Bulgarian case-law or legislation is not amended as a result of the ECtHR judgments against other Member States. There is no internal mechanism in place to follow and analyze the case-law of supranational tribunals, leading to due amendments of the relevant provisions and practices that lead to identical violations. The law and case-law in Bulgaria change only after a series of judgments against Bulgaria that have established violations.

In the present publication the reader will find at first the analysis and explanation of the legislative tools applicable at the European level with an illustration of their interpretation made by the Supreme Court of the European judicial system and of the Court of Strasbourg. After having designed the EU framework applicable there will be an analysis of the national legislative tool and their interpretation by the local court for what concern Italy, Spain and Bulgaria. Moreover, it will be illustrated if the CFR could be considered a core element of interpretation by the national judges and if the national decisions are implementing correctly the European case law.

ABBREVIATIONS

AAN	Order by National Court in Spain
AFSJ	Area of Freedom, Security and Justice
AN	*Audiencia Nacional* (National Court in Spain)
AP	*Audiencia Provincial* (Provincial Court in Spain)
appl./appls.	application/applications
Art./Arts.	Article/Articles
BOE	*Boletín Oficial del Estado* (Spanish Official Journal)
BOCG	*Boletín Oficial de las Cortes Generales* (Official Journal of the Spanish Parliament)
Cass.	*Corte di Cassazione* (Italian Supreme Court)
CE	*Constitución Española* (Spanish Constitution)
CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of European Union
CPC	Criminal Procedure Code
EAW	European Arrest Warrant
EAW FWD	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
EEA	European Economic Area
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
GU	*Gazetta Ufficiale* (Official Journal in Italy)

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

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

Mar Jimeno Bulnes, Julio Pérez Gil,
Félix Valbuena González, Cristina Ruiz López
Translation and review by Alba Fernández Alonso

SOMMARIO: 1. Introduction. – 2. European arrest warrant. – 2.1. General background. – 2.2. EAW issuance. – 2.3. EAW execution. – 2.4. Surrender procedure. – 2.5. CJEU case law and statistics. – 3. European investigation order. – 3.1. General background. – 3.2. Scope of the DEIO. Art. 34 DEIO. – 3.3. Subjects. – 3.3.1. Competent authorities. – 3.3.2. The role of defence. – 3.4. EIO issuing and transmission. – 3.5. EIO recognition and execution. – 3.6. Specific provisions for certain investigative measures. – 3.7. CJEU case-law. – 4. Procedural rights of suspects in criminal proceedings. – 4.1. Introduction. – 4.2. The Green Paper of the Commission (2003). – 4.3. The failed proposal for a Council framework Decision (2004). – 4.4. The Directives arising from Roadmap strengthen the procedural rights of suspects and accused in criminal proceedings (2009). – 4.4.1. Directive on the right to interpretation and translation in criminal proceedings (2010). – 4.4.2. Directive on the right to information in criminal proceedings (2012). – 4.4.3. Directive on the right of access to a lawyer in criminal proceedings (2013). – 4.4.4. Directive on the presumption of innocence and of the right to be present at the trial in criminal proceedings (2016). – 4.4.5. Directive on procedural safeguards for children who are suspects or accused in criminal proceedings (2016). – 4.4.6. Directive on legal aid (2016). – References.

* 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 analyse 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.

These topics are explored respectively in the first part on "The right to family reunification in the EU and the case-law in accordance therewith", realized by professors Esther Gómez Campelo and Marina San Martín Calvo, and in the second part on "The fight against terrorism in the EU: Judicial cooperation in criminal matters and procedural rights", realised by professors Mar Jimeno Bulnes, Julio Pérez Gil and Félix Valbuena González with support by Cristina Ruiz López.

1. *Introduction*

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

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

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

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

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

[4] See specifically SPRONKEN, T., VERMEULEN, G., DE VOCHT, D. and VAN PUYENBROECK, L.

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

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

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(eds.) *EU procedural rights in criminal proceedings*, Maklu, Antwerpen, Apeldoorn, Portland, 2009, also resulting from European project funded by European Commission (Directorate General of Justice and Home Affairs). In terms of conjunction of both policies on mutual recognition instruments and protection of procedural rights see HODGSON, J., "EU criminal justice: the challenge of due process rights within a framework of mutual recognition", *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 37, n. 2, pp. 307-320.

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

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

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

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

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

particularly the European Arrest Warrant application as the case law delivered by the Court of Justice of European Union (henceforth, CJEU) and national courts show [10].

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

2. *European arrest warrant*

2.1. *General background*

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

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[10] See HERLIN-KARNELL, E., "From mutual trust to the full effectiveness of EU Law: 10 years of the European Arrest Warrant", *European Current Law*, 2013, n. 4, pp. 373-388; more recently EFRAT, A., "Assessing mutual trust among EU members: evidence from the European Arrest Warrant", *Journal of European Public Policy*, 2019, vol. 26, n. 5, pp. 656-675.

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

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

or EAW FWD, also known as 'euro-warrant')[13], further amended by Council Framework Decision 2009/299/JHA of 26 February 2009[14], was the first instrument enacted on the field of judicial cooperation in criminal matters in EU under the basis of the mutual recognition principle[15]. As defined in its first article, '*the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal proceeding or executing a custodial sentence or detention order*'. Therefore, the EAW FWD creates compelling obligations to all Member States as long as all of them '*shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision*' (Art. 1 (2) EAW). Only, *ab initio*, the observance of fundamental rights and principles ex Art. 6 TFEU appears to be an exception to such EAW execution according to Art. 1 (3) EAW provisions[16]; this is not a simple issue to handle as it has been shown by CJEU case law[17].

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[13] OJ, n. L 190, 18 July 2002, pp. 1-18. In the literature see specifically comments by author, eg 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 Publishers, Leiden/Boston, 2010, pp. 285-333; also, a literature review existing at the time on the topic is included.

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

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

[16] See specifically FICHERA, M., "EU fundamental rights and the European Arrest Warrant", in S. Douglas-Scott & N. Hatzis (eds.), *Research handbook on EU Human Rights Law*, Edwar Elgar,

Particularly, EAW presents itself as a juridical and procedural instrument of exclusive judicial nature by contrast to an extradition procedure, which entails administrative/political and judicial stages. In this context, the EAW supplanted the old system of extradition between Member States, whose Conventions [18] had

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

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

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

in any case not been very successful because of the few ratifications produced at the time. The same explanatory memorandum of the EAW FWD deems the extradition mechanism obsolete and establishes, as an objective of AFSJ, to abolish extradition [19] between Member States and replace it 'by a system of surrender between judicial authorities'; explicitly, '*the introduction of a new simplified system of surrender of sentenced or suspected persons for the purpose of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedure*' (Recital 5). For this reason, several Member States had already started bilateral discussions to prepare treaties of simple surrender of arrested persons to judicial authorities, as for example Italy and Spain, and Spain and the United Kingdom [20].

The EAW popularity as a measure to fight international terrorism fully increased because of the deplorable attacks in the United States of America on 11 September 2001 [21]. Moreover, the proposal of such Council Framework Decision was presented exactly eight days after [22], and the political negotiation to reach the necessary agreement among all Member States only needed three months [23]. Its implementation in all Member States should be done before 31 December 2003

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nal en la Unión Europea: la orden europea de detención y entrega, Lex Nova, Valladolid, 2005, pp. 19-73.

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

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

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

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

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

according to Art. 34 (1) of the EAW FWD and further evaluation by EU institutions (Commission and Council) shall also have to take place. At the moment, several instruments in support of the EAW's application by national judicial authorities exist, such as a Handbook on EAW [24] elaborated by the Council and Commission with the collaboration of several stakeholders including Eurojust and the European Judicial Network (EJN), whose websites also provided information on the topic [25]. Indeed, the idea to create a form translated into all the official languages of the Member States, which functions as certificate, enormously facilitates the task to the involved judicial authorities.

2.2. *EAW issuance*

In order to observe the principle of proportionality [26], a minimum punishment threshold is required according to Art. 2 (1) EAW, being this different for the purposes of an EAW issuance existing prior sentence or not in the issuing Member State; in particular, 'a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months'. As specified in the EAW Handbook, reference is made exclusively to the maxi-

[24] *Commission Notice - Handbook on how to issue and execute a European arrest warrant*, OJ, n. C 335, 6 October 2017, pp. 1-83, also available at ULR https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (last access on 20 December 2020) with short explanation and statistics on EAW practice.

[25] See for example in EJN website https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 20 December 2020) including EAW forms as amended by FWD 2009/299/JHA in all official languages in pdf and word format as well as practical information in all Member States, e.g., in relation to competent judicial authorities in each location; also reports by EU institutions, national legislation on EAW as well as case law by CJEU and national courts are provided. About expertise by EU actors see specifically MÉGIE, A., "The origin of EU authority in criminal matters: a sociology of legal experts in European policy-making", *Journal of European Public Policy*, 2014, vol. 21, n. 2, pp. 230-247.

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

mum possible punishment in the national law of the issuing Member State without any consideration to the law of the executing Member State according to the principle of mutual recognition; also, consideration of these imprisonment's thresholds takes place with regard to the punishment in abstract. Therefore, as said and also mentioned in the EAW Handbook, the principle of proportionality must always be observed, taking into account specific circumstances of the case [27].

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

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

[28] Particularly, "participation in a criminal organization; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons; munitions and explosives; corruption; fraud; laundering of the proceeds of crime; counterfeiting currency; including the euro; computer-related crime; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorized entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircrafts/ships; sabotage".

[29] See, for example, ALEGRE, S. and LEAF, M., "Mutual recognition in European judicial cooperation …", op. cit. on pp. 208-209 in their comment to Art. 7 ECHR, double criminality and retrospective application. Also ANDREU-GUZMÁN, F., *Terrorism and Human Rights No.2: New challenges and old dangers*, Occasional papers n.3, International Commission of Jurists, March 2003, on pp. 45 ff. See analysis of 32 crimes' list by KEIJZER, N., "The double criminality requirement", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, op. cit., pp 137-163, on pp. 152 ff and "The fate of the dual incrimination requirement", in E. Guild and L. Marín (eds.), *Still not resolved?...*, op. cit., pp. 61-75 at pp. 69 ff; also VAN SLIEDREGt, E., "The dual

sine lege, but it is one of the most important developments introduced by the EAW regulation in comparison with the classical extradition procedures and one of the outcomes of the mutual reliance on criminal legislation between Member States [30]. Furthermore, the objection as to the difficulty of making the legal typification contained within the different Member State legislations coincide with regard to the offences enumerated in this precept, has been solved by the jurisprudence of some national constitutional courts in relation to extradition proceedings [31].

For the effective transmission of a European arrest warrant, and pursuant to Art. 6 (1) of the EAW, it shall be assured that both, issuing and executing judicial authorities, are competent in their territories to issue/execute the EAW 'by virtue of the law of that State'. It means that, by contrast to other topics in the EU [32], there is not initially a European notion of judicial authority, but this is attached to

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criminality requirement", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 51-70 as well as BARBE, E., "El principio de doble incriminación", in L. Arroyo Zapatero, A. Nieto Martín (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea,* Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2006, pp. 195-205.

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

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

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

domestic Law; proof of it are the notifications addressed to General Secretariat of the Council ex Art. 6 (3) EAW by Member States determining competent judicial authorities in order to issue and execute an EAW[33]. Moreover, designation of central authority takes place in order to assist the competent judicial authorities according to Art. 7 EAW, usually the Minister of Justice.

As for the form in which to issue a European arrest warrant, the European rule provides an annex including same concepts numerated in Art. 8 of the EAW[34], and the EAW Handbook includes specific guidelines on how to fill the EAW form (Annex III). Furthermore, the translation 'into the official language or one of the official languages of the executing Member State' is requested, according to Art. 8 (2) of the EAW; each country chooses which language shall be required, usually the official one/s and an additional common one, usually English[35]. With regard to the transmission procedure of the EAW, the rule makes a substantial difference if the location of the requested person is known or unknown; in this last case there is the possibility for the judicial authority to issue an alert for the requested person in the Schengen Information System or SIS[36] ex Art. 9 of the

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[33] All of them contained in prior EJN website in relation to EAW at https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 20 December 2020). These judicial authorities can be not only judges but also public prosecutor and even police in some countries, e.g., Sweden where the National Police Board (*Rikspolisstyrelssen*) can be issuing judicial authority when the purpose of a EAW is to enforce 'a custodial sentence or other form of detention' according to cover note received on April 3rd, 2009, COPEN 101, EJN 31, EUROJUST 33.

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

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

[36] According to Art. 26 Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ n. L 205, 7 August 2007, pp. 63-84, which explicitly contemplates that "data on persons wanted for arrest for surrender purposes on the basis of a European Arrest Warrant or wanted for arrest for extradition shall be entered at the request of the judicial authority of the issuing Member State". Definition of alert is included in Art. 3 (1) (a) SIS II as "set of data entered in SIS II allowing the competent judicial authorities to identify a person or an object with a view to taking specific action". In this case transmission takes place through national SIRENE Bureau as indicated in EAW Handbook. See at the time with prior regulation JIMENO BULNES, M., "Las nuevas tecnologías en el ámbito de la cooperación judicial y policial europea", *Revista de Es-*

EAW. Nevertheless, and in practice, SIS is extensively employed in most of the Member States [37] even when the location of the requested person is known, something that is not prohibited according to Art. 9 (2) of the EAW.

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

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tudios Europeos, 2002, n. 31, pp. 97-124, on 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 (dirs.) and M. Muñoz de Morales (ed.), *La orden de detención y entrega europea*, op. cit., pp. 175-185.

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

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

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

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

2.3. *EAW execution*

According to the general rule provided in Art. 1 (2) of the EAW and confirmed by CJEU case law[41], 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'. As stated, this is the general rule but also exceptions to this one are contemplated in the same EAW regulation as Art. 1 (3) of the EAW provision which requires the 'obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union', which has been argued in relevant CJEU case law as in the mentioned *Aranyosi and Caldararu* and *Celmer* cases. In both of them, the CJEU understood that refusal to execute an EAW should be an exception to be strictly interpreted requiring the executing judicial authority to ask for supplementary information to the issuing judicial authority in order to determine 'specifically and precisely' if there is a real risk of breach of fundamental rights of the concerned individual, in which case a postponement of the EAW execution should take place[42]; nevertheless this decision must consider personal circumstances of con-

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[41] See recent case *LM* (also known as *Celmer*), 25 July 2018, C-216/18, ECLI:EU:C:2015:586, where is pointed that, "while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see to that effect, judgement of 10 August 2017, *Tupikas* C-270/17 PPU, EU:C:2017:628, paragraphs 49 and 50 and the case law cited)" (par. 41). Here the CJEU answers the request for a preliminary ruling promoted by the High Court of Ireland challenging the execution of several EAWs issued by Poland on the basis of Art. 1 (3) EAW due to the impact of legislative changes related to the judiciary in this country and the possible breach of the fundamental right to a fair trial guaranteed by Art. 47 (2) CFREU. The case has caused great discussion in literature like prior *Aranyosi and Caldararu* case due to the breach of mutual trust between Member States on the basis of such possible violation of fundamental rights; see recent comments on consequences by WENDEL, M., "Mutual trust, essence and federalism – Between consolidating and fragmenting the Area of Freedom, Security and Justice", *European Constitutional Review*, 2019, vol. 15, n. 1, pp. 17-47. Also about same discussion DE AMICIS, G., "Esecuzione del mandato di arresto europeo e tutela dei diritti fondamentali in presenza di gravi carenze nel sistema giudiziario dello stato di emissione: Corte di Giustizia dell'Unione Europea, Grande Sezione, 25 luglio 2018, C-216/18", *Cassazione Penale*, 2018, vol. 58, n. 11, pp. 3907-3913 and VERHEYEN, L., "The principle of mutual trust between the Member States in the context of an European Arrest Warrant at risk again? – the case of M. Artur Celmer (LM)", available at https://www.academia.edu/37996015/THE_PRINCIPLE_OF_MUTUAL_TRUST_BETWEEN_THE_MEMBER_STATES_IN_THE_CONTEXT_OF_A_EUROPEAN_ARREST_WARRANT_AT_RISK_AGAIN_The_case_of_Mr._Artur_Celmer_LM (last access on 20 December 2020).

[42] In concrete, the CJEU ruled in *Aranyosi and Caldararu* that "Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest

cerned individuals in a case-by-case basis and not argued in a general context accordingly [43].

The EAW rule likewise regulates specific grounds for non-execution in a double category classification, as it is mandatory and of optional nature. The first ones are numerated in Art. 3 EAW and are the same in all Member States as a consequence of such compulsory nature; they contemplate, specifically and briefly, 'if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State', 'if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided' (*ne/non bis in idem*) [44] and 'if the person who is subject of

warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information to be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end." Such case law is also introduced in the EAW Handbook providing concrete guidelines in relation to fundamental rights considerations on pp. 33 ff (par. 5.6); in sum, some procedural steps are numerated to guide the executing judicial authority in order to verify the risk of violation of fundamental rights if the requested person is surrendered.

[43] As it was ruled in *Celmer* case by CEU, "Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States … must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalized deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State".

[44] "Where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State", otherwise it will fall under the following grounds for optional non-execution of the EAW according to Art. 4 EAW. See on the topic VAN DER WILT, H., "The European Arrest Warrant and the principle *ne bis in idem"*, in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, op. cit., pp. 99-117 as well as CIMAMONTI. S., "European Arrest Warrant in practice and ne bis in ídem ", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 111-129;

the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State'. The second ones are compiled in a broader list, and are differently implemented by the Member States as a consequence of its facultative nature [45].

Art. 2 Council FWD 2009/299/JHA of 26 February 2009 added a new Art. 4a EAW contemplating an additional optional ground for the refusal of a EAW by an executing judicial authority 'if the person did not appear in person at the trial resulting in the decision' unless the European arrest warrant states the fulfilment of any of following requirements in favour of the requested person: 'a) either was summoned in person … or by other means … received official information of the scheduled date and place of that trial … and was informed that a decision may be handed down if he or she does not appear; or, b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial'; or 'c) after being served with the decision and being expressly informed about the rights of a retrial, or an appeal … i) expressly stated that he or she does not contest the decision; or ii) did not request a retrial or appeal..; or d) was not personally served with the decision but: i) will personally be served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, o an ap-

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also in Spain De Hoyos Sancho, M., "Eficacia transnacional del *non bis in ídem* y denegación de la euroorden", *Diario La Ley*, 2005, n. 6330, pp. 1-6 and Jimeno Bulnes, M., "El principio de *non bis in idem* en la orden de detención europea: régimen legal y tratamiento jurisprudencial", in A. de la Oliva Santos (dir.), M. Aguilera Morales and I. Cubillo López (eds.), *La justicia y la Carta de Derechos Fundamentales de la Unión Europea*, Colex, Madrid, 2008, pp. 275-294. In general on the grounds for refusal, De Hoyos Sancho, M., "Euro-orden y causas de denegación de la entrega", in C. Arangüena Fanego (ed.), *Cooperación judicial penal en la Unión Europea*, op. cit., pp. 207-312 as well as, specifically, EAW Handbook on pp. 29 ff (par. 5.4 ff).

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

peal … and ii) will be informed of the time frame within which he or she has to request such a retrial or appeal'. This amendment on the EAW is aimed at solving prior problems with the EAWs issued on the basis of judgments rendered in *absentia*, although, as stated in the Preamble, its aim is not to prohibit execution of such EAW but to guarantee the observance of the requested person's defence rights [46].

In fact, prior ground for refusal was included till then as specific guarantee and/or condition to be given by the issuing Member State, in particular cases in Art. 5 of the EAW together with the following ones: the review of the penalty or measure imposed in the case that the EAW is based on a custodial life sentence or a life-time detention order as well as the returning of the requested person to the executing Member State in order to serve there the custodial sentence or detention order if he or she is a national or resident of the executing Member State; here it must be remembered that the EAW, by contrast to the classic extradition affects both nationals and residents of the executing Member States [47]. The new provision has already given place to relevant CJEU case law such as *Melloni* [48], resulting

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

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

[48] Judgement of 26 February 2013, C-399/11 in relation with EAW issued by the *Tribunale di Ferrara* (District court, Ferrara, Italy) to be executed by *Audiencia Nacional* (Criminal Division of the High Court, Spain) against Stefano Melloni, who was sentenced *in absentia* to 10 years imprisonment for bankruptcy fraud. He filed in Spain a defence appeal (*recurso de amparo*) before the Spanish Constitutional Court (*Tribunal Constitucional*), who referred the respective preliminary ruling before the CJEU; interesting to point as said it was the first time that the Spanish Constitutional Court promoted a preliminary reference. See especially BACHMAIER WINTER, L., "Dealing with European Legal diversity and the Luxembourg Court: *Melloni a*nd the limits of European pluralism",

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

2.4. *Surrender procedure*

The following rules included in the EAW deal with the concrete surrender procedure to be carried out by the executing judicial authority. As specified in Art. 11 of the EAW, the first aspect to bear in mind to proceed is the arrest of the requested person as a sort of preventive measure of personal character[50], which usually takes place in national criminal proceedings but in this case is attached to the European context; such arrest, as a provisional measure with interim charac-

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in R. Colson and S. Field (eds.), *EU Criminal Justice and the challenge of diversity*, Cambridge University Press, Cambridge, 2016, pp. 160-178 and "Más reflexiones sobre la sentencia Melloni: primacía, diálogo y protección de los derechos fundamentals en juicios *in absentia* en el Derecho europeo", *Civitas. Revista Española de Derecho europeo*, 2015, n. 56, pp. 153-180; also same author "Diálogo entre tribunales cinco años después de Melloni. Reacciones a nivel nacional", *Revista General de Derecho Europeo*, 2018, n. 15, http://www.iustel.com, analyzing further consequences of *Melloni c*ase especially in Spain.

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

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

ter, must give later place to other preventive measure, either preventive detention/custody or provisional release according to national law (Art. 12 of the EAW). For the same reason, this provision also contemplates common procedural rights [51] established in national rules for such preventive measures and national criminal proceedings in general, as the right to a legal counsel and interpreter if necessary, both part of the right of defence; the right to information of the EAW's content as well as of the right to consent to surrender [52]. In all cases, the remission to national rules is done and currently it must be companied with the reference to appropriate Directives on procedural rights of suspects in criminal proceedings later analysed [53].

An important rule is enshrined in Art. 13 EAW in relation with the prior consent to surrender by the requested person joint, 'if appropriate' to the 'renunciation of the entitlement to the 'specialty rule'', which must be expressed before the executing judicial authority, again, according to national rules. The specialty rule is regulated in further Art. 27 EAW requiring specific notification by Member States [54] if the requested person may or 'may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered' (Art. 27 (2) EAW) [55]; also, exceptions and conditions for the application of such specialty rule are foreseen in this same precept, i.e., the fulfilment of the EAW requirements also in relation to the prior offence. Consent and renunciation can be revoked if it is

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

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

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

[54] See specifically countries notifications at EJN website https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 20 December 2020).

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

explicitly provided by the Member State in question and in accordance to its national rules.

As a matter of fact, the same consent determines the further proceeding to deal under the EAW execution as well as time limits in surrender of the requested person. Specifically, Art. 14 of the EAW points that 'where the arrested person does not consent to his or her surrender … he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member States'; the same right to be heard by the requested person is guaranteed in further Art. 19 of the EAW [56]. Usually, according to national implementation on EAW in each Member State, a hearing shall take place before the executing judicial authority observes specific procedural rules in the domestic criminal proceeding, especially those concerned to the protection of the right of the defence of the requested person [57]. Moreover, as anticipated, the time limits of the surrender decision are different according to the existence or nonexistence of consent to the surrender by the arrested person, whose provision is contained in Art. 17 of the EAW. First, if there is consent, the surrender decision will be adopted by the executing judicial authority in a time limit of ten days after the hearing; second, if there is not consent to the surrender, the surrender decision extends to a time limit of sixty days from the issuance of the arrest warrant (Article 19.3). In both cases, time limits may be extended by a further thirty days period if reasonable grounds are presented.

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

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

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

2.5. *CJEU case law and statistics*

Currently, there is extensive case law in relation with the EAW provided by the CJEU since the first judgment on 3 May 2007, *Advocaten voor de Wereld VZW*[60], until the last one at the time of writing this paper, just yesterday, all of

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

[59] "For example, if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health' with the condition that "the execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist" according to Art. 23 (4) EAW. In the case that such humanitarian reasons are "indefinite or permanent" the EAW Handbook recommends consultation between both issuing and executing judicial authorities in order to discuss the possibility to employ alternative measures to EAW "for example, possibilities to transfer proceedings or the custodial sentence to the executing Member State or to withdraw the EAW", especially in the case of serious permanent illness; see EAW Handbook on p. 35 (par. 5.9.1.). Also, in literature about this topic PANZAVOLTA, M., "Humanitarian concerns within the EAW system", in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, op. cit., pp. 179-212, on p. 197 ff. This could be present situation with pandemic COVID-19 although at the moment there is no CJEU case-law on the topic; see specifically JIMENO BULNES, M., "El impacto del COVID-19 en la cooperación judicial europea", *Revista Aranzadi Unión Europea*, 2020, n. 10, https://proview.thomsonreuters.com/library.html#/library, pp. 5 ff.

[60] C-303/05, ECLI:EU:C:2007/261 resulting of preliminary reference promoted by the *Arbitragehof* (Belgium) in relation with nature of FWD EAW as well as the double criminality requirement ruling the Court of Justice that "examination of the questions submitted has revealed no factor capable of affecting the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States". See for example comments by CLOOTS, E., "Germs of pluralist judicial adjudication: *Advocaten*

them available on the EJN website [61] together with the pending cases, although some delay in the updating of the website has been observed. Topics have been very different in all these judgments on EAW interpreting several provisions contained in the EAW FWD, some of them very controversial in national context as previously mentioned, e.g., *Melloni*. The case law deals with several questions related to the application of general procedural principles as *in absentia* and *non bis idem*, principles of legality and non-discrimination, specialty rule, time-limits, fundamental rights, judicial authority and other specific questions as shown in the specific report elaborated by Eurojust and posted in the above- mentioned website [62].

Particularly in relation with this last issue, a well known judgment up to now is *OG (Parquet de Lübeck)* and *PI (Parquet de Zwickau)* joint with *PF (Prosecutor General of Lithuania)*, both delivered on 27 May 2019 [63]. On this occasion, the Court of Justice interprets the concept of 'issuing judicial authority' differentiating the public prosecutor's offices in Germany, who cannot issue an EAW as far as they are not independent authorities and the Prosecutor General of Lithuania,

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voor Wereld and other references from the Belgian Constitutional Court", *Common Market Law Review*, 2010, vol. 47, n. 3, pp. 645-672; also HERLIN-KARNELL, E., "In the wake of Pupino: Advocaaten voor der Wereld and Dell'Orto", *German Law Journal*, 2007, vol. 8, n. 12, pp. 1147-1160, on p. 1153 ff.

[61] ULR https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 20 December 2020) including 47 cases on EAW at the moment classified by topics. In relation with CJEU case law see for example at the time SATZGER, H., "Mutual recognition in times of crisis. Mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant", *European Criminal Law Review*, 2018, n. 3, pp. 317-331.

[62] 'CJEU Case Law Overviews', 13 December 2017, available at https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=2063 (last access on 20 December 2020), providing an overview by CJEU with regard to the application of EAW according to different topics summarized as keywords in index.

[63] CJEU, 27 May 2019, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456; C-509/18, ECLI:EU:C:2019:457. See on the topic and both judgments comments by ALONSO MOREDA, N., "El fiscal como autoridad judicial de emisión de 'euro-órdenes' a la luz de las sentencias del Tribunal de Justicia de 27 de mayo de 2019 en el asunto 509/18 y en los asuntos acumulados C-508/18 y C-82/19 PPU ¿un paso definitivo en su concreción?", *Revista General de Derecho Europeo*, 2019, n. 49, http://www.iustel.com. In relation with firt one AMBOS, K., "Sobre las fiscalía alemanas como autoridad de emission de la orden europea de detención y entrega (Comentario a las sentencias del Tribunal de Justicia de la Unión Europea (Gran Sala), en los asuntos acumulados C-508/18 y C-82/19 PPU, de 27 de mayo de 2019)", *Revista Española de Derecho Europeo*, 2019, n. 71, pp. 9-18 and; also in Italy by DE AMICIS, G. "Emissione del mandato di arresto europeo e garanzie di independenza dell'autorità giudiziaria dal potere esecutivo: la Corte di giustizia precisa la nozione di 'autorità emittente': Corte di Giustizia dell'Unione Europea, Grande Sezione, 27 maggio 2019 (C-508/18 e C-82/19" and VANDELLI, L., "In concetto di 'autorità giudiziaria emittente' nella disciplina del mandato d'arresto europeo alla luce di una recente pronuncia della Corte di giustizia", *Cassazione Penale* 2019, vol. 59, n. 12, p. 4511 and pp. 4512-4517 respectively.

who, by contrast, must be considered an issuing judicial authority according to the EAW provisions as institutionally independent of the judiciary. The argument employed for the denial of such character in the first case is that the public prosecutor in Germany is 'exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive'. This judgment, which is presumed to be controversial, is not the only one in the matter with same result [64].

In relation to the general statistics, replies to the last questionnaire submitted by Member States to the Commission that date back to the year 2018, provide some figures, taking into account that not all Member States sent answers to such questionnaire every year. This one was published on 2 July2020 [65] and the Commission analyses different quantitative as well as some qualitative information provided by the Member States, who answered the standard questionnaire elaborated by the Council at the time [66]. Furthermore, a general background resulting from prior replies by Member States to this questionnaire is included in e-justice portal [67] with total figures from different years. As an example, it can be mentioned that 17.491 EAWs were issued in 2017 and 6.317 EAWs were executed, on average 50% surrenders with the consent of the requested person. This fact also affects to time-limits on surrender because if the consent takes place, the average time is fifteen days and around 40 days without consent.

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[64] See for example further CJEU judgment on 9 October 2019, *NJ (Parquet de Vienne),* C-489/19, ECLI:EU:C:849. See also comments by DE AMICIS, G., "Independenza delle autorità giudiziarie mittenti requisiti di validità del MAE: la Corte di Giustizia si pronuncial in relazione al sistema austriaco" and CECHETTI, L:, "MAE e tutela giurisdizionale effettiva: alcune precisazioni in relazione al sistema austriaco", both in *Cassazione Penale* 2020, vol. 60, n. 2, pp. 780-784 and 784-797.

[65] Commission Staff Working Document – Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018, SWD (2020) 127 final available at ULR https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/3250 (last access on 21 December 2020)

[66] Council document 11356/13 of 24 June 2013, COPEN 97, EJN 40, EUROJUST 47, available at Council of the European Union official website https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/ It contains specific questions such as how many EAWs have been issued and for which category of offence, how many persons have been arrested, how many surrender proceedings have been initiated, how many requested persons consented the surrender, how many days did the surrender procedure take, in how many cases the executing judicial authority refused the EAW's execution and for which grounds, …

[67] In concrete at https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (last access on 21 December 2020) although at the time there is not yet available date related to 2018.

3. European investigation order

3.1. General background

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [68] (hereinafter DEIO) is a new and comprehensive instrument aimed at the gathering of evidence located in another EU country [69].

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

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

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

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

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

3.2. Scope of the DEIO. Art. 34 DEIO

The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing Member State (Art. 1(1)). It does not cover the setting up of Joint Investigation Teams and the gathering of evidence

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

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

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

[71] On the status of implementation of Directive see: https://www.ejn-crimjust.europa.eu/ejn/EJN_StaticPage.aspx?Bread=10001 (last access on January 2021).

within such teams (Art. 3), a matter still regulated by the FD 2002/465/JHA of 13 June 2002, on joint investigation teams. Moreover, the DEIO should not apply to cross-border surveillance as referred to in Article 40 of the Convention implementing the Schengen Agreement of 14 June 1985 (hereinafter: CISA).

One of the first and most pragmatic issues posed by the entry into force of DEIO was related to the interpretation of Art. 34(1) of the DEIO, according to which from 22 May 2017 the Directive 'replaces' several instruments of judicial cooperation in criminal matters, applicable between Member States bound by this Directive. European conventions as listed under Art. 34 (1) DEIO are the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959 [72] as well as its two protocols [73]; Convention implementing the Schengen Agreement of 14 June 1985 (henceforth CISA) [74] and Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (henceforth MLA) [75] and its protocol [76]. Prior the European Convention of 20 April 1959 signed within the framework of the Council of Europe (MLA Convention 1959) operated as essential rule regarding the gathering of evidence in criminal matters in another Member State till the enforcement of MLA 2000 on August 23rd 2005 [77].

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[72] ETS n. 030, available at http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030 (last access on January 2021).

[73] Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS n. 099, and Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS n. 182, available at http://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/en_GB/7763526 (last access on 28 May 2019).

[74] Signed on 19 June 1990, OJ, n. L 239, 22 September 2000, p. 19, today considered Schengen *acquis* integrated into the framework of the European Union according to Protocol (No) 19 to Treaties on the European Union and on the Functioning of the European Union, OJ, n. C 115, 9 May 2008, p. 290.

[75] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01), OJ, n. C 197, 12 July 2000, p. 1.

[76] Protocol established by the Council in accordance with Article 34 of the Treaty on the European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ, n. C 326, 21 November 2001, p. 2.

[77] MORÁN MARTÍNEZ, R.A., "La orden Europea de Investigación", in M. Jimeno Bulnes (dir.) and R. Miguel Barrio (ed.), *Espacio judicial europeo y proceso penal*, cit., pp.163-186; 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, pp. 151-208; BACHMAIER WINTER, L., 'European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European directive', 2010 (9) *Zeitschrift für Internationale Strafrechtsdogmatik*, pp. 580-589, at p. 581; also ALLEGREZZA, S., "Critical remarks on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2010, n. 9, pp. 569-579. More extensively BELFIORE, R., "The European Investigation Order in criminal matters: developments in evidence-gathering across the EU", *European Criminal Law Review*, 2015, vol. 5, n. 3, pp. 312-324 and, specifically, MANGIARACINA, A., "A new and controversial scenar-

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

It should be mentioned that following the teleological/pragmatic interpretation provided by the Italian desk of Eurojust and by the European Judicial Network (EJN), the word 'replaces' has been interpreted in the sense that does not entail the automatic abolition of all the previous normative instruments adopted in the field of judicial assistance: they will still be applied in situations where the DEIO is not applicable, such as for instance in relation to Denmark and Ireland, which are not bound by the Directive, and also in relation to Member States that have not completely transposed the DEIO [79]. Such an interpretation would be in line with the aim of the Directive and with the application of the principle of interpretation in accordance with the contents of Directives, as developed by the CJEU [80].

3.3. *Subjects*

3.3.1. *Competent authorities*

In relation to the subjects who can issue an EIO, following its definition as *'a judicial decision which has been issued or validated by a judicial authority of a*

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io in the gathering of evidence at the European level. The Proposal for a Directive on the European Investigation Order", *Utrecht Law Review*, 2014, n. 1, vol. 10, pp.113-133, at p. 115.

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

[79] EUROJUST, *Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive*, p. 5, affirm that a majority of national authorities consulted were in favour of a pragmatic/teleological approach. A few national draft EIO laws prescribe the continued use of EU CMACM in relation to Member State that did not implement in time (draft laws in HU, RO and SK). French law which transposed EIO legislation prescribes the treatment of incoming MLA requests from Member States that have not yet transposed DEIO as if they were EIO (Article 5 of the Ordonnance of 1 December 2016).

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

*Member State' (*Art. 1), the issuing authority it is a judicial authority. However, the meaning of the concept "judicial authority" depends on the structure of each normative procedural system [81].

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

The document "*Competent authorities, languages accepted, urgent matters and scope of the EIO Directive1of the instrument in the EU Member States*" [82] synthetizes the different and varied competent authorities depending on each Member State. It should be highlighted that five different authorities in the legal procedure can be found:

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

Each Member State has pointed these different authorities according to their own national legislation [83]. In this point, it is important to note that as it was indicated in the framework of the "*Eurojust meeting on the European investigation order*" [84] *d*espite the direct contact among the different national authorities, the characteristic of the EIO is essential, the role of Eurojust facilitating communica-

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

[82] European Judicial Network, "Competent authorities, languages accepted, urgent matters and scope of the EIO Directive of the instrument in the EU Member States", available at https://www.ejnforum.eu/cp/registry-files/3339/Competent-authorities-languages-accepted-scope-290419f.pdf (last access on January 2021).

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

[84] Report *Eurojust meeting on the European investigation order. The Hague, 19-20 September 2018*, 11 December 2018, p. 16.

tion between the authorities involved in case the communication or relation is triggered and improving the coordination.

3.3.2. *The role of defence*

Regarding the exercise of defence rights, the text of the Directive expressly grants the possibility to request the issuing of an EIO '*within the framework of applicable defence rights in conformity with national criminal procedure*' (Art. 1(3) of the DEIO) to the suspected, the accused and their lawyers. As underlined by some scholars, although this provision is aimed at realizing the principle of equality of arms, it does not recognise an autonomous direct request of legal assistance to a foreign judicial authority. In this regard, Article 4(1) of the DEIO stressed the obligation to respect the fundamental rights and legal principles declared in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings. This necessity to respect human rights can affect one of the most important principles in the area of freedom, security and justice within the EU: mutual trust based in the confidence and presumption that Member States respect Union law, especially, human rights. Nevertheless, following Recital 19 of the DEIO, this principle of mutual trust can be affected by the destruction of the previous presumption of compliance. In this last scenario, the execution of the EIO could be refused.

3.4. *EIO issuing and transmission*

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

In the framework of the meetings organised by EJN, some problems were mentioned in the practical application of an EIO. The limit applying EIO only in cause of minor offences provokes the problem in finding a common understand-

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

ing of "minor offences" [86]. Both the issuing authority and the executing authority will assess whether it is proportionate to issue or to execute an EOI or not. It may possible that they have different valuation.

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

a) *data about the issuing authority and, where applicable, the validating authority;*
b) *the object of and reasons for the EIO;*
c) *the necessary information available on the person(s) concerned;*
d) *a description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal law of the issuing State;*
e) *a description of the investigative measures(s) requested and the evidence to be obtained.*

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

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

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

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[86] European Judicial Network, Conclusions 2018 On the European Investigation Order (EIO), Brussels, 7 December 2018, p. 6, available at https://www.ejnforum.eu/cp/registry-files/3456/ST-14755-2018-INIT-EN.pdf (last access on January 2021).

[87] European Judicial Network, Conclusions 2018, cit. p. 8.

[88] Council of the European Union, *Extracts from Conclusions of Plenary meetings of the EJN concerning the practical application of the EIO*, Brussels, 8 December 2017, available at https://www.ejnforum.eu/cp/registry-files/3373/ST-15210-2017-INIT-EN-COR-1.pdf (last access on 8 January 2021).

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

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

Regarding the types of proceedings for which the EIO can be issued, according to Article 4 DEIO, an EIO can be issued in the framework of criminal proceedings, administrative proceedings and judicial proceedings by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and proceedings related to the previous one in which the offences or infringements may imply to be held liable or punished in the issuing State.

3.5. *EIO recognition and execution*

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

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

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

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

Art. 11 (1) (d) of the DEIO provides as a ground for optional refusal of recognition or execution of the EIO the fact that it is contrary to the *ne bis in idem* principle. Such a narrow forecast should be interpreted in accordance with the explanations given in Recital 17 of the DEIO. Explanations, which, as doctrine has

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

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

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

In relation to the principle of territoriality, in case of an EIO issued for an offence committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, judicial authorities will apply the general condition based on the principle of double criminality, with its exceptions where the EIO has been issued for offences listed in Article 11 of the DEIO or for investigative acts mentioned in Article 10 (2) of the DEIO [93].

Once an EIO is transmitted, the authority of execution shall take a decision on recognition of execution in no later than 30 days after the receipt of the EIO (Ar-

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

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

ticle 12(3) DEIO). Since that moment, the execution shall carry out in no more than 90 days.

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

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

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

During the execution of an EIO, all the authorities shall respect the principle of confidentiality (Article 19 DEIO), and the protection of personal data shall be ensured by Council Framework Decision 2008/977/JHA (17) and the principles of the Council of Europe Convention for the protection of Individuals with regard to the Automatic Processing of Personal Data of 28 January 1981 and its Additional Protocol (Article 20 DEIO).

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

3.6. *Specific provisions for certain investigative measures*

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

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

In particular, the Directive has included rules on the temporary transfer of persons held in custody (to the issuing and the executing State (Arts. 22 and 23 DEIO); on the hearing by videoconference, other audio-visual transmission and tele-

phone (Articles 24 and 25 DEIO); measures aimed at obtaining information on banking and financial accounts and operations (Articles 26 and 27 DEIO), as well as certain measures implying the gathering of evidence in real time (Article 28 DEIO); covert investigations (Article 29) and interception of communications (Article 30 and 31 DEIO) [94].

3.7. *CJEU case-law*

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

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

The questions asked by the Bulgarian court were:

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

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

[95] OJ, 7 August 2017, C-324/17, available at https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2017.256.01.0016.01.ENG (last access on 8 January 2021).

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

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

According to the Conclusions by Advocate General:

1. *Article 14 DEIO must be interpreted as meaning that it is contrary to the Member State' legal system, such as Bulgarian legislation, which in no way establishes the possibility of challenging the substantive grounds of an investigation measure subject to a European Investigation Order, as well as an authority of that Member State can issue an European Investigation Order.*
2. *Article 14 of Directive 2014/41 cannot be invoked by an individual before a national court to challenge the substantive grounds for which a European Investigation Order has been issued when national law does not provide for remedies in the framework of similar national procedures.*
3. *The concept of 'interested party' within the meaning of Directive 2014/41 includes both the witness who is the subject of the investigative measures requested in a European Investigation Order and the person against whom the criminal charge has been brought, even if the research measures established in a European research order are not addressed to it*[96].

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

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

With an indirect connection to EIO, other case law can be found assessing other measures or principles. For instance, the prohibition of incurring *bis in idem* is configured as a right whose scope and meaning have been outlined by the Court of Justice of the EU in a progressive manner at Union level, and unlike in other supranational fields, the recognition of *non bis idem* as an inherent right came only with the wording of Article 50 of the CEDF. This Article states that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the

[96] Conclusions of the General Advocate Mr. Y. Bot, presented on 11 April, 2019, ECLI: EU: C: 2019: 312, available at http://curia.europa.eu/juris/celex.jsf?celex=62017CC0324&lang1=en&type=TXT&ancre= (last access on 8 January 2021).

law'. However, prior to its proclamation in the Charter, the prohibition of *non bis in idem* entitled the Court of Justice of the European Union to consider it a general principle of Community Law, under Articles 54 to 58 of the CISA. It is thus explained that this Convention -which, by the way, the DEOI is replacing *ex* art. 34 (1) (b), except for Ireland and Denmark as prior said- constitutes the normative basis for a good part of the ECJ rulings on *non bis in idem*[97], although there is no shortage of decisions on the application of this right in the context of mutual recognition instruments.

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

As far as its scope is concerned, one of the peculiarities of the banning of *bis in idem* at Union level is that it covers both the material or substantive dimension of this principle (duplicity of sanctions) and its procedural dimension (duplicity of processes), but this last dimension – and this is the peculiarity compared to the way in which proscription acts internally – only in cases where the duality of processes derives from an earlier process terminated by firm resolution on the crux of the matter. This means that *non bis in idem* does not cover situations of international *lis pendens*, but it does not mean either that a second procedure cannot be ruled out even if there is an ongoing enforcement process either in the executing state itself or in another state of the Union. In view of it, therefore, *non bis in idem* does not reach international *lis pendens* cases and that, unlike other instruments of mutual recognition[98], DEIO says nothing about *lis pendens* as ground for refusing recognition or execution of an OEI. For this reason, it is clear that this cannot be based on the fact that, on the same facts and with respect to the same subject, there is an ongoing criminal proceeding either in our country or in another state of the Union.

Non bis in idem is not confined to the criminal sphere but extends to the broader sanctioning area. It covers both the double procedure (administrative and criminal) and the double sanction (administrative and criminal) interdiction, but only in those cases where the administrative procedure and/or penalty is 'criminal in nature'. This categorization requires compliance with three parameters: (1) the legal classification of the offense in accordance with the domestic law of the state where it is envisaged; (2) the very nature of the infringement; and (3) the nature

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

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

and severity of the sanction that may be imposed on the interested party [99]. It is therefore understood that, from Luxembourg, it has been held that Art. 50 CFREU does not preclude a Member State from imposing on the same person and for the same facts a failure to comply with declaratory obligations in the field of VAT, which is at the same time tax surcharge and a criminal penalty [100]. Or whether the penalty is to be taken into account in respect of the sanction is to deprive the farmer who makes certain false declarations in order to obtain such aid and the criminal conviction of that farmer for subsidization fraud.

This legal doctrine from the Court of Justice of the European Union seems to fit in its formulation with that coined by the Spanish courts as to when the concurrence of criminal and administrative sanctions violates the constitutional prohibition of *non bis in idem.* The fact is that when this guarantee is linked to the so-called triple identity requirement – i.e., identity of subject, identity of fact and identity of foundation –, it is assumed that where the latter is lacking (that is, where protected and the sanction, criminal and administrative, is proportionate) the successive exercise of *ius puniendi a*nd the sanctioning power of the Administration does not harm *non bis in idem* [101].

4. *Procedural rights of suspects in criminal proceedings*

4.1. *Introduction*

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

As a matter of fact, on the occasion of the European Council celebrated in Nice on 7th December 2000, the Charter of Fundamental Rights of the European Union was signed and solemnly proclaimed. Its article 48.2, in the section on

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[99] This list corresponds to the criteria which, according to the ECHR, must be examined in order to determine whether the duplication of administrative and criminal sanctions infringes the *non bis in idem* enshrined in Protocol No 7 to the ECHR. At this point, however, attention should be drawn to the judgement pronounced by ECtHR, GC, 15 November 2016, *A and B c. Norway*, appls. n. 24130/11 and 29758/11, available at http://hudoc.echr.coe.int/eng?i=001-168972 (last access on 8 January 2021). As the ECJ points out in Order on 25 January 2017, *Menci*, C 524/15, available as further ECJ judgements at official website https://curia.europa.eu/jcms/jcms/j_6/en/ it is possible that this ruling may radiate its influence at Union level and that it is therefore not permissible to refuse a request for judicial cooperation in proceedings on the basis of *non bis in idem*, despite the existence of a duplication of sanctions and the possibility of being criminalized.

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

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

"justice", states that the rights of the defence of anyone who has been charged shall be guaranteed.

The Charter contains, for the first time in the history of the European Union in a single text, a compilation of all civil, political, economic and social rights of European citizens and all people living in the territory of the European Union classified in six large sections: dignity, freedoms, equality, solidarity, citizens' rights and justice [102].

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

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

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

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

4.2. *The Green Paper of the Commission (2003)*

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

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

[103] Document COM (2003) 75 final.

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

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

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

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

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

However, the chief merit of the Green Paper was to identify the appropriate spheres to develop community action, spheres that were limited to five and coincided with those agreed on the proposal for a council framework Decision, namely: 1) access to legal representation, both before the trial and at trial; 2) access to interpretation and translation; 3) ensuring that vulnerable suspects and accused in particular are properly protected; 4) consular assistance to foreign detainees; 5) notifying suspects and defendants of their rights ("Letter of Rights") [105].

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

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

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

As the regulatory scheme on criminal judicial cooperation was still of intergovernmental nature without implying "integration" in a strict sense (prior to the

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

[105] Aspects such as conditional release or impartiality on the taking of evidence were excluded for deserving separate further action.

[106] Document COM (2004) 0328 final.

enforcement of the Treaty of Lisbon), the framework Decision is employed. On the contrary, the matters with regard to civil judicial cooperation had already been subjected to the community rules (following the Treaty of Amsterdam [107]) in the shape of regulations, directives and decisions.

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

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

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

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

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

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

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

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

[107] Signed on 2 October 1997 and in force since 1 May 1999 in the European area.

[108] Signed in Rome, on 4 November 1950 in the Council of Europe.

[109] The number of actions increased in more than 500% between the years 1993 and 2000.

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

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

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

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

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

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

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

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[110] See conclusions 33, 35 and 36 of this Council.

[111] Framework Decision 2002/584/JAI, of 13 June 2002 (OJ, 18 July 2002, n. L 190, pp. 1-20).

[112] For a more detailed analysis, see our previous studies: VALBUENA GONZÁLEZ, F., "La Propuesta de Decisión Marco del Consejo relativa a determinados derechos procesales en los procesos penales celebrados en la Unión Europea", *Diario La Ley*, 2006, n. 6564, pp. 1-5; also VALBUENA GONZÁLEZ, F., "Derechos procesales del imputado", en M. Jimeno Bulnes (ed.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales*, Bosch Editor, Barcelona, 2007, pp. 395-416; also, VALBUENA GONZÁLEZ, F., "Adaptación de la Propuesta de Decisión Marco sobre Garantías Procesales al ordenamiento jurídico español", in M. De Hoyos Sancho (ed.), *El proceso penal en la Unión Europea: garantías esenciales*, Lex Nova, Valladolid, 2008, pp. 169-177; VALBUENA GONZÁLEZ, F., "El estatuto procesal del sospechoso y acusado en la Unión Europea", *Unión Europea Aranzadi*, n. 12, 2020.

[113] For further clarification, read JIMENO BULNES, M., "El derecho a la interpretación y traducción gratuitas", *Diario La Ley*, 2007, n. 6671, pp. 1-10.

[114] For further clarification, read DE HOYOS SANCHO, M., "Acerca de la necesidad de armonizar garantías procesales de los sospechosos en la Unión Europea: especial consideración de los grupos vulnerables", *Revista de Derecho y Proceso Penal*, 2007, n. 18, pp. 117-142.

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

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

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

In comparison with the original proposal, the former pursued to limit the number of rights and their scope, focusing on general rules and avoiding a detailed specification on the way each Member State should exercise those rights, having considered the differences observed in the existing procedural systems.

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

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

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

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

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[115] According to the Agreement of the Council of Justice and Home Affairs, 2732 Council Meeting, held in Luxemburg, 1 and 2 June 2006. (Press release 9409/06, Presse 144, released on the occasion of the cited Council of Justice and Home Affairs, p. 14, available on https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/89875.pdf (last access on 31 May 2019).

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

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

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

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

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

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

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

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

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

Nevertheless, the Council does not only extend the invitation to the Commission with a view to reaching compromises, but also dares to give instructions on the scope and content of those rights which show a decrease in the rights with regard to the proposal for a council framework Decision.

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

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

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

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

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

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

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

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

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

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

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

Even when the Council Resolutions on the Roadmap omitted any reference to the cost-free status of the service, the Directive stipulates that the Member States

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[119] OJ, n. L 280, 26 October 2010, pp. 1-7.

[120] Arts. 1.1, 2.5 and 3.5.

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

shall defray the costs of interpretation and translation, irrespective of the outcome of the proceeding [122].

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

On the contrary, a failure to meet the standards required with regard to the quality of the services of translation and interpreting is also observed [124]. Currently, the Member States shall only provide the necessary means to guarantee these services. Formerly, professional and qualified translators and interpreters were required for this purpose and, in the event of mal praxis, were subject of substitution. Besides, their interventions could likewise be subject to be recorded in order to verify their accuracy.

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

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

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

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

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

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[122] Art. 4 and Recital 17.

[123] Arts. 2.5 and 3.5.

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

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

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

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

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

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

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

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

Accused persons shall be provided with the information on the accusation at the latest on submission of the merits of the accusation to a court (Art. 6.3), a fact that the CJEU understood in the sense that communication of the charges shall be provided before the court begins to examine the merits of the charges so that the accused has enough time to prepare an effective defence [129].

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

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[127] Arts. 4.2 and 4.3.

[128] Art. 6.

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

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

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

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

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

However, this Directive does not confine its scope of application to the right of access to a lawyer, but also extends it to other rights in connection with the possibility of communicating with the outside during the period of deprivation of liberty, such as informing a third party of the condition or communication with consular authorities.

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

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

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

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

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

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

[134] Depending on the State, the right to have Access to a lawyer does not start to be exercised the moment a police arrest takes place. On the contrary, it can be delayed for some time, as it has been observed in the case of la garde à vue in the French Law. Besides, arrests during the weekend or at

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

Even when not mentioned explicitly, we understand that the right of access to a lawyer starts in the pre-trial proceedings and extends to the conclusion of the proceedings, so that the accused shall likewise have access to a lawyer during the trial and, if applicable, when bringing an appeal against the final resolution, pursuant to the general scope and the application of the time frames of the rights in the Directive [135].

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

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

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

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

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certain hours can likewise pose problems in this same context. On this subject, read ARANGÜENA FANEGO, C., "El derecho a la asistencia letrada en la Directiva 2013/48/UE", *Revista General de Derecho Europeo*, 2014, n. 32, pp. 1-3, esp. 20. Available on: http//:www.iustel.com.

[135] Art. 2.1 *in fine*: "The Directive […] applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

[136] On this matter, read VALBUENA GONZÁLEZ, F., "Directiva relativa al derecho a la asistencia letrada en los procesos penales", in M. Jimeno Bulnes (dir.), R. Miguel Barrio (ed.) *Espacio Judicial Europeo y Proceso Penal*, op. cit., pp. 249-261, esp. pp. 254 ff.

[137] Art. 5.

The contact with the outside of the individual deprived of liberty does not end with the communication with another person about their condition but extends to their right to communicate personally with other third parties, including the consular authorities [138].

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

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

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

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

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

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

Following a chronological order, the first Directive to be published was Directive 2016/343 of the European Parliament and Council on the strengthening of

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[138] Arts. 7 and 8.

[139] "The right of suspects and accused persons who are deprived of liberty to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals" (Recital 37).

[140] Art. 10.

[141] For further clarification, read JIMENO BULNES, M., "La Directiva 2013/48/UE del Parlamento Europeo y del Consejo de 22 de octubre de 2013 sobre los derechos de asistencia letrada y comunicación en el proceso penal: ¿realidad al fin?", op. cit., pp. 443-489.

certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [142].

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

With regard to its content, the provisions in connection with the presumption of innocence present a double approach: extra-procedural and procedural [144]. Concerning its extra-procedural side, the authorities are demanded to treat the accused pursuant to the safeguard, avoiding considering him guilty in public statements until the individual has been convicted in true form of law. Along these lines, the Member States are required to adopt measures to guarantee that the jurisdictional authorities abstain from presenting suspects or accused as being guilty before the jurisdictional authorities and audience through the use of measures of physical restraint [145].

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

The Directive also deals with the right to be present at the trial [147], requiring

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[142] OJ, 11 March 2016, L 65, pp. 1-11.

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

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

[145] Arts. 4 and 5.

[146] Arts. 6 and 7.

[147] The incorporation of this right to the Directive primarily arises from the conflicts on the application on the European arrest warrant of individuals imprisoned *in absentia.* See Judgment of CJEU (Grand Chamber) of 26 February 2016, case C-399, Melloni, EU:C:2013:107.

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

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

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

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

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

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

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

Particularly, the Directive incorporates a series of rights that strengthen the personal status of the investigated minor with respect to the adult, namely: the right to be accurately informed, which includes informing the holder of parental

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[148] Arts. 8 and 9.

[149] OJ, 21 May 2016, L 132, pp 1-19.

[150] On this, read JIMÉNEZ MARTÍN, J., "Garantías procesales de los menores sospechosos o acusados en el proceso penal. Cuestiones derivadas de la Directiva 2016/800/UE, de 11 de mayo", en C. Arangüena Fanego y M. De Hoyos Sancho (eds.), *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea*, op. cit., pp. 177-200.

[151] Art. 2.1.

[152] Art. 3.1.

responsibility who can accompany the minor during the proceedings [153]; the right to a lawyer and to legal aid [154]; the right to an individual assessment [155] where the child's personality and maturity shall specially be taken into account, the child's economic, social and family background together with any specific vulnerability; the right to a medical examination [156] without any undue delay with a view, in particular, to assessing the child's mental and physical condition; the right to audio-visual recording of the questionings [157]; the limitation of deprivation of liberty limited to the shortest period of time and subject to periodical reviews [158]; the right to a timely and diligent treatment of the case [159]; the right to the protection of privacy [160] in court hearings involving children held in the absence of public; and finally, the right of the child to appear in person and to effectively participate in the trial [161], by being given the opportunity to be heard and to express his or her views.

4.4.6. *Directive on legal aid (2016)*

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

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

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

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[153] Arts. 4, 5 and 15.

[154] Arts. 6 and 18.

[155] Art. 7.

[156] Art. 8.

[157] Art. 9.

[158] Arts. 10, 11 and 12.

[159] Art. 13.

[160] Art. 14.

[161] Art. 16.

[162] OJ, 4 November 2016, L 297, pp. 1-8.

[163] For further clarification, read VIDAL FERNÁNDEZ, B., "La aplicación de la Directiva 2016/1919 sobre asistencia jurídica gratuita a los sospechosos y acusados y a las personas buscada por una OEyDE", in C. Arangüena Fanego y M. De Hoyos Sancho (eds.), *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea*, op. cit., pp. 201-234.

[164] Art. 3.

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

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

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

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

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

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

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[165] Art. 2.

[166] Arts. 6 and 8.

[167] Art. 7.

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

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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", conducted 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.

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 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 safe-

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[1] BOE n. 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 at the time on 25 September 2019; unfortunately this link is not available at the moment). 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 n. 260, 17 September 1882, consolidated version available at https://www.boe.es/eli/es/rd/1882/09/14/(1)/con; also English translation was at the time 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.

guards 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 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.

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[4] See statistics on EAW use, available at https://e-justice.europa.eu/content_european_arrest_warrant-90-eno.do and also at https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14 (last access on 21December 2020). Last data are provided for 2018: a total of 824 EAWs were 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 2018", Brussels, 2 July 2020, SWD(2020) 127 final.

[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, n. 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, pp. 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, pp. 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.

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 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 re-

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[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 21 December 2020).

[10] BOE n. 65, 17 March 2003, pp. 10244-10258, available at https://www.boe.es/eli/es/l/2003/03/14/3/con (last access on 21 December 2020); 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, n. 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, n. 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.

[13] BOE n. 142, 12 June 2018, pp. 60161-60206 available at https://www.boe.es/diario_boe/

form 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 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

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txt.php?id=BOE-A-2018-7831 (last access on 21 December 2020). See generally GONZÁLEZ CANO, M.I. (dra.), *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/libdocumentproperties/EN/390 (last access on 21 December 2020); 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 2019).

[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, n. 12736/1/04 REV 1, COPEN 111, EJN 61, EUROJUST 82, available at the Council of European Union official website https://www.consilium.europa.eu/register/en/content/out (last access on 21 December 2020). In the case of Spain only the Spanish is provided.

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 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 is-

[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".

sued 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 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 respect-

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[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, n. 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, n. 19, pp. 13-32, in reference to prior Spanish EAW legislation.

[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".

ing 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.

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 crite-

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[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.

[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-PIÑERO y

ria 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 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

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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.

[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 Rela-

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.

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 pri-

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tions 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 21 December 2020) 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 n. 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 http://www.poderjudicial.es/cgpj/es/Temas/Redes-Judiciales/Red-Judicial-Espanola---REJUE-/ (last access on 21 December 2020).

[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."

or 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) 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

[30] BOE n. 11, 13 January 2000, consolidated version available at https://www.boe.es/buscar/act.php?id=BOE-A-2000-641 (last access on 21 December 2020).

[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 21 December 2020). See PÉREZ GIL, J., "Private interests seeking punishment: prosecution brought by private individuals and groups in Spain", *Law & Policy*, 2003, vol. 25, n. 3, pp. 151-172.

[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, n. 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.

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].

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 precau-

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[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 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.

tionary 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 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

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[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, n. 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.

[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;

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.

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

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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*, 30 September 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.

[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.

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 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

[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, n. 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, n. 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, n. 16303/03, COPEN 133, EJN 18, EUROJUST 21, available at https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx (last access on 21 December 2020).

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 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

[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.

[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, n. 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, n. 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".

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".

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

[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

[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*, 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*, 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).

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 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].

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[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 could be found at the time 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 21 December 2020). 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, n. 5, pp. 41-50.

[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

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.

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

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cautelares de carácter personal con motivo de la ejecución de una orden europea de detención y entrega" and other literature above quoted.

[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 2018", cit., at p. 15.

[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";

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 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 2018 shows that the Spanish judicial authorities issued a number of 824 EAWs and surrendered a number of 862 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 extradi-

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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.

[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 2018", cit., at pp. 9 and 14 respectively.

tion 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 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 n. 177/2006 [65] with estima-

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[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", cit., pp. 154 ff.

[60] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5632 (last access on 21 December 2020).

[61] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5685 (last access on 21 December 2020).

[62] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5779 (last access on 21 December 2020).

[63] Available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/5895 (last access on 21 December 2020).

[64] AAN no. 35, 13 May 2004, ECLI: ES:AN:2004:219, available at General Council of Judiciary Branch's official website http://www.poderjudicial.es/search/index.jsp.

[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

tion 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 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*

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 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, n. 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, n. 10, http://www.reei.org.

[68] For example, AAN n. 22, 11 July 2019 ECLI: ES:AN:2019:1593 available at prior official website available at General Council of Judiciary Branch's official website http://www.poderjudicial.es/search/index.jsp STC n. 3, 14 January 2019, ECLI:ES:TC:2019:3 available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/25835(last access on 21 December 2020).

[69] For example, ATS special case 20907/2017 (*Puigdemont*), 10 July 2019 ECLI:ES:TS:2019:8351A ATS special case 20907/2017 (*Puigdemont*), 1 July 2019 ECLI: ES:TS:2019:7605A, and ATS special case 20907/2017 (*Puigdemont*), 21 June 2019 ECLI:ES:TS:2019:6999, all of them available at prior official webistie https://hj.tribunalconstitucional.es/es/Resolucion/Show/25835.

[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 21 December 2020) and ATC 24/2017, of 14 February, available at https://hj.tribunalconstitucional.es/es/Resolucion/Show/25268 (last access on 2 October 2019).

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] 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

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[71] Judge Carmen Lamela Díaz, case n. 000082/2017, ECLI:ES:AN:2017:1115A available at prior website http://www.poderjudicial.es/search/index.jsp.

[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 oficial website http://www.poderjudicial.es/search/index.jsp.

[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 on21 December 2020).

[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, n. 9096, http://diariolaley.laley.net, at pp. 8 ff. There is varius literature in relation to *the*

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.

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.

[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 21 December 2020).

[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 (last access on 21 December 2020).

[78] 1 Ausl (A) 18/18 (20/18) available for example at https://dejure.org/dienste/gerichte searchform (last access on 21 December 2020). 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, n. 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 on21 December 2020). 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*, 2 May 2018, 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*, 24 May 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 prior official website http://www.poderjudicial.es/search/index.jsp.

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 reco-

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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 8 January 2021).

[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 8 January 2021).

On the status of implementation of Directive see https://www.ejn-crimjust.europa. eu/ejn/EJN_StaticPage.aspx?Bread=10001 (last access on 8 January 2021).

[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 8 January 2021).

[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 8 January 2021).

[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 8 January 2021).

gnition and execution had 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.

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[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 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.

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 a EIO 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 (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 be-

[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).

ing 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].

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 main 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

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[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.*

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 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 party 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 some 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

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[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 8 January 2021).

[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 8 January 2021). 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 8 January 2021).

[95] International Relations Service of the General Council of the Judiciary, EIO Guide, 2019, esp. p. 10.

means just a proposal but not a proper standing as far as the director of a pretrial investigation is only the Inquiring Judge (Juez de Instrucciòn). 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., Inquiring Judge) 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 party's request, who can be either the public prosecutor, a private prosecutor such as the victim (private prosecution), or any other citizen acting as a popular prosecution or the defendant person or his/her defender representation according to the LECrim.

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 argue 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].

According to 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 crimi-

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[96] See JIMENO BULNES, M. (dir.) and MIGUEL BARRIO, R. (ed.), *Espacio judicial europeo y proceso penal*, 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.

[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*, cit., pp.133-162, esp. p. 137.

nal 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 signature to avoid some problems with the latter [99].

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".

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

[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://

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 public officer shall receive directly the 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 concerned 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 pro-

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www.ejn-crimjust.europa.eu/ejnupload/news/2019-06-Joint_Note_EJ-EJN_practical_application_EIO_last.pdf (last access on 25 September 2019).

[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 8 January 2021) 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 8 January 2021).

[104] EJN Conclusions 2018 on the European Investigation Order, *op. cit.*, p. 7.

vided 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 several 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 indicates*" that the

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[105] General Public Prosecutor's Office, Annual Memory, esp. p. 711.

[106] Available at https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry.aspx (last access on 8 January 2021).

[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 8 January 2021. Data updated until 2017).

measure must be enforced by a judicial body. Regarding authorities that can execute such coercive measures, Art. 187 (3) LRM, mentions the following: *Inquiring Judges or Juvenil Judges from 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 matches 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 public officers. 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).

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

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[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*, cit., pp.163-186, esp. p. 168.

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 undermine 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 first

[109] International Relations Service of the General Council of the Judiciary, EIO Guide, *op. cit.*, esp. p. 40.

instance of civil, commercial, administrative and other case in the Spanish Procedural System [110].

The consequent delay of the pre-trial phase 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.

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 legal 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 Report 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 Office with 59 EIO requested [111].

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[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 8 January 2021).

[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 8 January 2021).

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.

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 for-

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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.

eign 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; 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

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

declares that "The 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 *ter* e (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 similar terms, Art. 5 Organic Law 3/2018 of the 5 December, on the Protection of Personal Data and guarantee on Digital Rights mentions the duty of confidentiality referred to in Art. 5 (1)(f) of the Regulation (EU) 679/2016 (GDPR). It shall be complementary to the duties of professional secrecy in accordance with it applicable rules.

In relation to state secrecy, Article 14 Act 19/2013, of December 9, on transparency, access to public information and good governance [118] 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).

Concerning bank secrecy, Article 6.1 Act 13/1994, of June 1, on the autonomy of the Bank of Spain [119] 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*

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

[118] 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 8 January 2021).

[119] 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 8 January 2021).

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 [120] 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 [121]. 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 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 at the moment is not very extensive. 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 Court 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 rela-*

[120] 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 8 January 2021). 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".

[121] 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.

tive 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) [122].

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 [123]. 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 [124]. 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 enti-

[122] 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 8 January 2021).

[123] 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.

[124] 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.

tled 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 [125], as recognized by the Charter and developed by the CJEU case-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 Constitu-

[125] 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, pp. 479-531. Also, in general VERVAELE, J.A.E., "The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights", *Utrecht Law Review*, 2005, no. 2(1), pp. 100-118.

tional Courts following the CJEU jurisprudence as well [126]. 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 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 [127] so that Spanish courts can notify the EIO. Only then, as some authors point out [128], will the way to the Spanish judicial

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[126] Today contemplated in Art. 48.1.c) and d) See specifically JIMENO BULNES, M., "El principio de *non bis in idem* …", 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.

[127] 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".

[128] 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*, cit., at p. 437 and 438.

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.

d) *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".

As highlighted by some specialised literature, this provision will emphasise the lack of harmonization in substantive criminal matter [129]. 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.

e) *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 [130] 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 Hu-

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

[130] 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.

man Rights and Fundamental Freedoms of the Council of Europe of 4 November 1950".

In the same way, 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 considered 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 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 well-known case *Melloni* [131], the preliminary ruling promoted by the Spanish Constitutional by ATC 86/2011, June 9, introduced 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) [132]. Beside, in this judgement, the Constitutional Court 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

[131] 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 8 January 2021). 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.

[132] 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 8 January 2021).

one imposes the obligation to provide an interpretation of fundamental rights based on international treaties [133].

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 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" [134]. 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 [135]. 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 [136].

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" [137]. 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" [138].

This interpretation is followed by the Spanish Courts. Specifically, the Supreme Court gathers up all this case-law in STS n. 733/2013, of 10 October,

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[133] 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".

[134] Para. 49.

[135] Para. 51.

[136] 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.

[137] Para. 59.

[138] Para. 63.

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, but that in all cases safeguard the essential content of those values and guarantees* (own translation) [139].

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 [140].

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 [141], STS n. 886/2007, of 2 November [142], or STS n. 630/2008, of 8 October [143]. Following the opinion of some authors [144], 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

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[139] 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 8 January 2021).

[140] 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.

[141] 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 8 January 2021).

[142] 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 8 January 2021).

[143] 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 8 January 2021).

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

noted. Specifically, the information referred to Spain can be checked and compared with 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 [145].

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" [146].

Indeed, all coercive investigative measures here included constitute assumptions of the so-called 'pre-constituted evidence' [147], 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 not have any probative value according to Constitutional and Supreme Court case-law such as leading cases

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[145] Fiche Belge of Spain, available at https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelges/EN/-2/373/-1# (last access on 8 January 2021).

[146] 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 8 January 2021).

[147] 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".

SSTC no. 150/1987, of 1 October, and no. 161/1990, of 19 October, and STS, of 5 May 1988 [148].

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 [149].

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).

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 dil-

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

[149] 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 8 January 2021).

igences, 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 [150].

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 [151], 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 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 [152].

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 Proce-

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[150] 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".

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

[152] See Art. 65 (5) LOPJ.

dure. It shall be considered that in Spain, at the moment, the public prosecutor cannot adopt criminal decisions as far as, also said [153], 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 [154].

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 [155] marked the beginning of a new phase for the European Union in this matter following the failure of initiatives in recent years [156].

In this regard, the unsuccessful Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union [157] shall be remembered, presented by the Commission on 28 April 2004 and which failed to complete its legislative *iter* [158].

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

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

[154] International Relations Service of the General Council of the Judiciary, EIO Guide, op. cit., esp. p.28.

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

[156] 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.

[157] Document COM (2004) 0328 final.

[158] 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.

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 [159]; Directive 2012/13/EU, of 22 May 2012, on the right to information in criminal proceedings [160] 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 [161].

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 present at trial in criminal proceedings [162], Directive 2016/800/EU, of 11 May 2016, on procedural safeguards for children who are suspected or accused persons in criminal proceedings [163] 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 [164].

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[159] 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.

[160] 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*, cit., pp. 219-248.

[161] 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.

[162] 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.

[163] 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.

[164] 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

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 [165].

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 [166], 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 [167].

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 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 [168] 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 [169].

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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.

[165] BOE, n. 101, 28 April 2015.

[166] BOE, n. 239, 6 October 2015.

[167] BOE, n. 239, 6 October 2015.

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

[169] See more in our recent paper: VALBUENA GONZÁLEZ, F., "Harmonization of procedural safeguards of suspected and accused persons; state of the matter in Spain", *Eucrim*, 2020, n. 1, pp. 50-54.

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 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.

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[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, n. 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, n. 1, pp. 5-40, esp. p. 9. Available at http://www.ree-uva.es (last access on September 26th, 2019).

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

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

[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.

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 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 communi-

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

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

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

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[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.

[179] Art. 520.8 LECrim.

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.

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 coun-

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[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, n. 4.

[182] Art. 118.4 LECrim.

[183] Art. 520 e) LECrim.

[184] Art. 520 f) LECrim.

try, 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.

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 ben-

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[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.

[188] First Final Disposition of Act 3/2018, of 11 June.

[189] Art. 6.3 b) LAJG (Act on legal aid in Spanish).

eficiary 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.

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].

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[190] Art. 21 *bis* LAJG.

[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.

[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.

[194] Art. 118.1 h) LECrim.

[195] Arts. 656, 781 LECrim and further in concordance.

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, 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.

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[196] Art. 971 LECrim.

[197] Art. 786.1 LECrim.

[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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THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND THE ITALIAN ANTI-TERRORISM LEGISLATION *

Donata Giorgia Cappelluto, Michele Tempesta, Giulia Martini

SOMMARIO: 1. Fundamental rights and antiterrorism: on the delicate balance between constitutional principles. – 1.1. The constitutional principles *in tensione*: security *versus* freedom. The constitutional regime of emergency. – 1.2. The Charter of Fundamental Rights of the European Union and the anti-terrorism legislation. Brief remarks. – 1.3. Antiterrorism legislation and protection of constitutional rights. – 2. The European framework. – 2.1. Anti-terrorism legislation in the light of European Union law. – 2.1.1. EU Directive 2017/541. – 2.2. Antiterrorism legislation (Directive 541/2017) in the light of the ECHR. – 2.3. Article 13 and the right to effective jurisdictional control (Kadi case). – 2.4. The pronunciation of the Great Chamber Nada c. Switzerland of 12.09.2012. – 3. The legislative and jurisprudential evolution in the field of antiterrorism in Italy. – 3.1. Law n. 438 of 2001. – 3.2. Law n. 155 of 31 July 2005. – 3.3. Law n. 43 of 2015 and Law n. 153 of 2016. – 3.4. Legislative decree n. 68 of 2018.

In recent years, the terrorist threat – not really a novelty of this Century – has become increasingly varied and widespread. Its protagonists are no longer just large organizations; very often, in fact, terrorist acts are planned and carried out by small local cells, by "lone wolves" who strike indiscriminately. The cases of the attacks in Belgium, in France, in Germany and Spain (just to mention a few) show that terrorism of our times can strike anywhere, anyone, and even with technologically limited means.

At the same time, however, the terrorist phenomenon retains its "original pur-

* 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 Charter of Fundamental Rights of the European Union and the Italian Anti-Terrorism Legislation", realized by Donata Giorgia Cappelluto (Lawyer in Parma, Italy), Michele Tempesta (Lawyer in Parma, Italy), and Giulia Martini (Lawyer in Verona, Italy).

pose", and it is also in this sense that our legislation approaches it: that is, as a complex of actions directed at "*to unduly compel a government or an international organisation to perform or abstain from performing any act, or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation*" (recital 8, Directive (UE) 2017/541) [1].

The European response (specifically entrusted to the aforementioned directive, which will be discussed later), starts from this double observation and, to say in a nutshell, it aims at anticipating the threshold of criminal relevance of the "terrorist" conduct. In other words, its purpose is to prevent acts of terrorism by penalizing also all of those behaviours that, in the broad sense, may constitute a prerequisite.

This is a systemic choice (also shared by the Italian legislator) that deserves to be emphasized. A choice that does not only present an ideologically relevant side, but it also helps to clearly define the theme of balance dealt within this introductory paragraph.

As it is known, the United States responded to terrorist attacks with a warlike logic: the terrorist is in itself an enemy and must be treated as such. The European response, indeed, has been different: Europe continues to consider criminal law as an effective tool of social defence, suitable to safeguard any threatened asset by means of criminal processes and jurisdictions.

Indeed, criminal jurisdiction constitutes a system of controls designed to ensure the possibility of defence to those persons experiencing any limitation of their freedom. The subjects charged with the management of this system – judges and lawyers – share a culture of legality that conforms to their function, and which cannot always be spotted among the officials of the executive power. Of course, this affects the withstand of the supreme principle of the separation of powers though, whose central importance – never to be taken for granted – does not require particular explanations inhere.

The European (and Italian) choice is far from trivial, especially when it comes to consider the nature of the "terrorist". In fact, unlike common criminals, a terrorist does not violate a specific legal rule, he does not limit himself to a specific good, but instead he opposes himself to a system that he thinks should be destroyed and replaced. Therefore, dealing with him within the framework of crimi-

[1] In terms not too dissimilar, art. 270-*sexies* of our Criminal Code states that "*are considered with terrorism purposes those behaviours which, due to their nature or context, can cause serious damage to a country or an international organization and are carried out with the aim of intimidating the population or forcing public authorities or an international organization to perform or refrain from performing any act or destabilizing or destroying the fundamental political, constitutional, economic and social structures of a country or an international organization, as well as other behaviours defined as terrorist or committed with the purpose of terrorism by conventions or other rules of international law that are binding for Italy*".

nal law is in itself an indication of the desire not to abdicate the protection of the fundamental rights that define our constitutional and democratic order.

One last remark. Art. 28, par. 1 of the Directive mentioned above provides that "*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive*". On this point it is emphasized that "antiterrorism" measures provided for by both European and Italian regulations imply or may involve, as seen, limitations of fundamental rights. If this is the case, the necessity is imposed that these limitations are arranged following the principle of the rule of law (and, as seen, of the reserve of jurisdiction), entrusting their discipline to sources of primary rank; this, among other things, also for the purpose of allowing the Constitutional Court to exercise its control pursuant to Art. 134 of the Italian Constitution. Not all regulatory instruments are therefore usable, but only those that are subject to the control (in the broad sense, or "widespread") of constitutional legitimacy.

Thus, as Aharon Barak stated, jurisdictional control is a moment for protecting democracy "*both from terrorism and from the means the state wants to use to fight terrorism*". In the age of the "*times of stress*" the system of constitutional guarantees does nothing but carry out its original function, ultimately: to defend democracy from itself. However, all this incorporates a sneaky danger that we can only rapidly mention here.

As stated by the Constitutional Court (*Corte Costituzionale*) in its ruling 15/1982 "if it is to be admitted that a legal system experiences a state of emergency when terrorism sows in it death – also through the ruthless murder of innocent "hostages" – and destruction, leading to insecurity and, therefore, to the need to entrust the salvation of life and property to armed escorts and to private police, however, it should also be agreed that, in its own sense, an emergency is certainly an anomalous and serious condition, but it is essentially temporary. It follows that it can legitimize unusual measures, but also that these lose legitimacy if unjustifiably continued over time." The Court – in its important yet ambiguous decision – draw points up that, even by resorting to ordinary legislative means, the "exceptional" response to the terrorist threat is and must be temporary. But here lies the danger. As Aharon Barak has observed, "we have to realize that whatever is judged in time of terrorist threat to security is destined to last for many years after terrorism would be defeated. *Indeed, we judges must act coherently and consistently. A wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes*".

The real risk, therefore, is that people get used to all those measures which, by limiting individual freedom and the exercise of fundamental rights in moments of crisis, should permit the return of "normality". With implications in a broad cultural sense that would not even be possible to mention here.

1. *Fundamental rights and antiterrorism: on the delicate balance between constitutional principles*

1.1. *The constitutional principles* in tensione*: security* versus *freedom*. *The constitutional regime of emergency*

As introduced, the choice is for the anticipation of the criminal relevance for the "terrorist" conduct, a choice that could be sustainable in our case, as will be explained in the following, but which raises some questions of primary importance under the light of the Italian constitutional law, also considering the theory of counter limits expressed by the Constitutional Court (*e.g. Corte Cost.*, decision 238/2014).

Firstly, from the point of view of the constitutionally grounded principle of harm (*nullum crimen sine iniuria*). According to this principle the legislator – even the European one – is required to construct a criminal law protecting the legal assets whose identification is not left to his full discretion but must always be constitutionally grounded. Although the Constitutional Court has always refused to establish a "hierarchy of values" (see, *ex multis*, *Corte Cost.*, decision 85/2013) it is however possible, by reasoning on the supreme principles of the Italian legal organization, to distinguish between goods of primary rank and goods of secondary rank.

The goods of primary rank are certainly those closely related to the human person (Art. 2 of the Italian Constitution) such as dignity, personal freedom, physical safety and health; those concerning collective health (Art. 32 of the Italian Constitution, also on the basis of "mandatory duties of solidarity"); those pertaining to the political-constitutional order and that are in turn a condition of safeguarding the inviolable rights of the human person.

On the other hand, goods of secondary importance are those that, although constitutionally protected, could be considered as "instrumental", (e.g., goods/patrimonial means such as the right to property). This distinction assumes a certain relevance here, since it is reasonable to argue that the higher the rank of the good, the more legitimate can be the anticipation of protection in phases prior to its (albeit potential) harm.

Therefore, considering that the terrorist threat strikes precisely goods of primary rank (life, individual or collective health, personal freedom, constitutional and democratic order of a system), it appears legitimate under this aspect to anticipate the penal response to cases not immediately connected to the actual damaging event, by sanctioning acts that are not even configurable as an attempt. From this point of view, therefore, the construction of the Directive, intended as said to anticipate the threshold of criminal relevance of terrorist conduct, does not appear incompatible with the principle of harm as constitutionally conceived. This being understood, the relationship between species-quantity of the envisaged punishment, and the degree-entity of the offence, and the rank of the considered good,

all contribute to the respect of the outlined principle of harm. A concern of which, however, the aforementioned Directive takes charge, given the provisions of its recitals 18 and especially 39.

Add the following. Respecting the principle of harm implies, as its corollary, that no one might be indicted on the basis of a mere criminal intention (*cogitationis poenam nemo patitur*).

Now, as mentioned, preparatory acts do not involve, as such, the injury of a good. So, it is reasonable to argue that, according to our legal system, a preparatory act (e.g. the instigation to commit an act of terrorism or the apologia of a terrorist act) comes to criminal relevance (because materially offensive) only if it is established among many persons; if, in other words, it involves (and manifests itself through) the cooperation of several individuals. Moreover, the constitutional legitimacy of the criminal relevance of preparatory acts has also been expressed by the Constitutional Court.

The latter, in its decision 177/1980, affirmed that it is admissible for the legal system to consider as criminally relevant those preparatory acts that "prepare the means and create the conditions for the crime", although not yet defining a criminal act. Therefore, the Court concludes that "the preparatory act consists of an external manifestation of the criminal intention that is instrumental with respect to the not-yet-begun realization of the criminal offence".

The external manifestation of the criminal purpose, realised through the cooperation and the connection of several subjects, prevents us from considering the intent to carry out terrorist acts as belonging to the mere intimacy (and, therefore, as being not sanctionable on the criminal level).

This aspect allows us to deal with a further question: the one relating to the identification of those goods/principles/constitutionally relevant rights that are suitable to be involved in the search for a possible balancing. In other words, given the mentioned legitimacy of the anticipation of the penal response to facts that can only be indirectly connected to terrorist acts, it is necessary to inquire where has to fall the point of equilibrium between the reasons for security and those for the protection of individual rights.

Again, it may be possible to distinguish two broad categories.

The first category is constituted by that limited set of rights/principles whose primary importance does not tolerate limitations, even though aimed at preventing or repress terrorist acts. Think of the prohibition of torture and inhuman or degrading treatment or punishment, in particular (in this sense, of course, consider Art. 13, par. 4, and Art. 27, par. 3 of the Italian Constitution; Art. 4 of the Charter of Fundamental Rights of the European Union, Art. 2 of the European Convention on Human Rights) or the principle of legality of the penalty, at least in its essential core of non-retroactivity of the incriminating norms (Art. 25, par. 2, Italian Constitution). Deviating from these principles would mean denying the very essence of the Italian constitutional order.

The second category is represented by all that complex of rights/principles which, although needing to be safeguarded in their "hard core", can be balanced and partly sacrificed to defend, as was said, the protection of other constitutional goods.

Without claiming to be complete, reference is therefore made, at least, to the right to the inviolability of personal freedom (Art. 13, Italian Constitution); to the right to freedom and confidentiality of correspondence and communication (art. 15, Italian Constitution); to the right of association (Art. 18, Italian Constitution); to the right to freely express one's thoughts (Art. 21, Italian Constitution). All those rights constituting the foundation of the constitutional state, whose implementation, under certain conditions and according to specific guarantees (first and foremost, depending on the case, the rule of law and reserve of jurisdiction) tolerates compressions, although still limited.

In general, the compression of the listed rights – obviously in need of a better and more precise definition – can be allowed, provided that: a) proven emergency situations, or, at least, particularly serious and fearful threats to society subsist; b) on the basis of an *ex ante* evaluation, the sacrifice – however limited – of the considered right appears suitable for the purpose; c) the derogation shall be strictly necessary, intended to be irreplaceable and proportionate to the purpose.

1.2. *The Charter of Fundamental Rights of the European Union and the anti-terrorism legislation. Brief remarks*

This paragraph deals with the relationship between the Charter of Fundamental Rights of the European Union and the anti-terrorism legislation; this correlation will be succinctly analyzed taking into consideration the most significant provisions of the Charter with respect to the subject that concerns us.

It is common knowledge that the Charter of Fundamental Rights of the European Union (also, the "Treaty of Nice"), as adapted in Strasbourg on December 12th, 2007, in the version resulting from the amendments made with the Lisbon Treaty, pursuant to art. 6, paragraph 1, of the TEU, acquired "*the same legal value as the Treaties*".

Hence, as of December 1st, 2009, the Treaty of Nice is a parameter of legitimacy for the action of the European Union bodies and, therefore, of the acts issued by the Community institutions. In this sense, in defining the scope of application of the EU Charter of Fundamental Rights, the Italian Constitutional Court, with judgment n. 80/2011, has clearly stated that "for the application of the Treaty of Nice, therefore, it is a necessary prerequisite that the case submitted to the judge is subject to European law – meaning as inherent in Union acts, or to national acts and behavior which implement EU law, or to what put forward by a Member State to justify a national measure that would otherwise be inconsistent with EU law – and not only to national rules devoid of any connection with that legisla-

tion". On this point, moreover, consider the provisions of Art. 52 of the Charter, which provides that "*the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties*".

It seems clear, then, that even the anti-terrorism regulations issued at EU level must respect the rules laid down in the Charter of Nice, on pain of invalidity.

In this sense, some preliminary and general considerations are required before moving on to the analysis of the individual provisions of the Charter that are relevant to the subject that concerns us.

The catalog of rights contained in the Treaty of Nice is not static, but dynamic, as it can be continuously updated in light of the general parameter of human dignity.

In this sense, it is significant what stated in the provisions of art. 1 of the Charter: "*Human dignity is inviolable. It must be respected and protected*". The concept of dignity, certainly elusive and difficult to define, but emblematically placed at the beginning of the entire document, is the logical presupposition of all fundamental rights listed in it. It follows that no act of the Union can harm what we can define as the minimum and incompressible core of human dignity, even in the hypothesis in which the aim pursued is to protect another right provided for by the Charter itself. Consequently, the anti-terrorism legislation could not include rules that violate the dignity of the individual, even if it is that of the alleged or potential "terrorist" and even for the purpose of opposing specific acts.

The combined provision of Articles 2 and 4 of the Charter is strictly connected to the concept that we just described. Respecting human dignity implies, also in the fight against terrorism, the obligation to respect the right to life (Art. 2) and the right to the integrity of the person (Art. 3) of who is involved in the carrying out of terrorist attacks, as well as, not lastly, the absolute prohibition of torture or penalties consisting of inhuman or degrading treatment (Art. 4).

With regard to the right to life (Art. 2) it is necessary to clarify, considering the subject that concerns us, the following. Article 52, paragraph 3 of the Treaty of Nice states that "*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*". In turn, Art. 2, par. 2, lett. a) of the European Convention on Human Rights, provides that: "*deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the*

use of force which is no more than absolutely necessary: in defence of any person from unlawful violence". Under certain conditions, and in the place where a terrorist attack is occurring, causing the death of the "terrorist" cannot be considered an illegal act in itself, even under EU law. However, the absolute prohibition of imposing death penalty remains, regardless of the crime committed (and, therefore, as stated elsewhere, independently of the legal asset intended to be protected). In this sense also the wording of Art. 2, paragraph 2, of the Treaty of Nice, providing that: "*no one shall be condemned to the death penalty, or executed*". Moreover, Art. 52, paragraph 3, already cited, according to which the Treaty of Nice may provide for a "more guaranteeing" legislation than that laid down by the European Convention on Human Rights ("*this provision shall not prevent Union law providing more extensive protection*").

As mentioned, the Treaty of Nice furthermore prohibits any form of damage to physical and mental integrity ("*everyone has the right to respect for his or her physical and mental integrity*", Art. 3, par. 1), precept that is further detailed in the following art. 4, according to which "*no shall be subjected to torture or inhuman or degrading treatment or punishment*" (which recalls, among other things, the identical Article 3 of the ECHR – European Convention of Human Rights).

The concept of dignity, therefore, in its further specifications (right to life, right to the integrity of the person, absolute prohibition to resort to acts of torture or penalties consisting of inhuman or degrading treatment), as succinctly outlined, constitutes a guiding idea, an interpretative parameter of the entire discipline provided for by the Treaty of Nice (especially in the area concerning us).

Moreover, from the systematic point of view, the following can be added.

First, following a technique that is typical of the constitutional system of rights, the Treaty of Nice explicitly refers to the instrument of the legal reserve. Article 52, paragraph 1, in fact, provides that "*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms*". The limitation of rights that may come into conflict with requirements related to the fight against the terrorist phenomenon must be, therefore, specifically set forth in a regulatory act. In this sense, to further specification, the same art. 52, paragraph 2, specifies that "*subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of other*". Not only will these limitations be specifically provided for by the "law", but they will only be legitimate if they result to be proportionate to their purpose, necessary, and responding to the protection of equal rights.

It should also be added that, except for what already recalled for the scope of applicability of the Treaty of Nice (Art. 51, Field of application), it remains the case that the definition of fundamental rights referred to must always take into account the common constitutional traditions of the members States (Article 52,

paragraph 4): "*in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions*"). The principle – of clear jurisprudential derivation – implies that the protection of fundamental rights is not a static phenomenon or even linked to minimum guarantees but projected towards the highest level that can be achieved through the comparison of experiences in nations.

The concepts briefly expressed determine the interpretation of the provisions of the Treaty of Nice, and, as far as we are concerned, of the most "sensitive" in terms of anti-terrorism legislation.

We therefore consider a rapid (and quite other than exhaustive) review of these provisions.

Art. 6 (Right to liberty and security) of the Charter of Fundamental Rights of the European Union provides that "*everyone has the right to liberty and security of person*". The arrangement, albeit laconic, is weighty, and of primary importance for the theme that concerns us. For its interpretation we can resort to Art. 52, par. 3. Consequently, the limitations of the right in question are the same as those already defined within the ECHR. More precisely, the limitation of freedom is permitted, pursuant to Art. 5 of the ECHR, among other things, if: "*c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*". The rule referred to, therefore, allows limitations, although temporary, of the personal freedom of subjects in the hypothesis in which there are credible reasons for believing that they are about to commit a crime. This, at least theoretically, allows for an anticipated intervention of the authorities precisely in order to prevent and counteract all collateral and instrumental conduct in the bud to carry out a terrorist act.

Article 11 of the Treaty of Nice (freedom of expression and information) provides, in paragraph 1, that "*everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*". The principle assumes a central importance in our study, given that, as is known, proselytizing and propaganda activity are typical and necessary instruments of any terrorist activity. It is no coincidence, moreover, that the directive in question (Article 5, public provocation to commit a terrorist offense) specifically deals with it. Here, it is sufficient to point out that the limitation of freedom of expression can be allowed provided that (principle of proportionality and necessity of the instrument, to be adopted, as seen, taking into account the pursued interest) it is strictly necessary for the purpose of prevention and prosecution of crimes related to terrorist activities; in other words, suitable for preventing or suppressing facts that undermine public safety or physical safety of citizens.

Furthermore, the provisions of articles 47 and 49 of the Charter, included in Title VI (Justice), are particularly relevant. Without going into details, let's just recall that these articles define the essential and unfailing characteristics of the guarantees placed to protect the defendant.

Among these, for the theme that concerns us and, above all, considering the "philosophy" followed by the European legislator (as mentioned elsewhere, aimed at countering the terrorist phenomenon by acting on a wide range), Art. 49, par. 3, appears to be of particular interest, by providing that "*the severity of penalties must not be disproportionate to the criminal offense*". In theory, the norm in question seems to allow the possibility of sanctioning even a conduct that is "distant" from the actual and complete realization of a terrorist act, provided that the sanction set forth is characterized by proportionality.

1.3. *Antiterrorism legislation and protection of specific constitutional rights*

For of the reasons above explained, antiterrorism legislation may constitute a justification to violate some fundamental rights enshrined in the Constitution. In this paragraph, we will try to highlight the main safeguards put in place to protect the individual as identified by the aforementioned constitutional provisions. The intent is to identify a series of broad principles that cannot be violated even by a legislation aiming at fighting terrorism.

Firstly, we shall consider personal freedom, whose inviolability is affirmed by Art. 13, par. 1, of the Italian Constitution. It's a central theme for this discussion, also in the light of the clear reference made by Art. 23 of Directive (EU) 2917/571, according to which "*this Directive shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles, as enshrined in Article 6 TEU*". In turn, article 6 of the Charter of Fundamental Rights of the European Union, with a lapidary formula, states that "*everyone has the right to liberty and security of person*". This demonstrates the importance that the concept of personal freedom assumes also for the purposes of the overall interpretation of the Directive and, therefore, of its implementation at national level.

Having said this quickly, the following is recalled.

As is known, in modern systems only states can be recognized with the monopoly of the use of force. Only the state, therefore, can limit personal freedom. We must therefore ask ourselves what is meant by personal freedom. In its minimal and original meaning "personal freedom" is synonymous with "physical freedom". It is the *habeas corpus* of English law, whose first appearance can be traced back to the 12th century. Over time, however, the concept has undergone an important evolution and a considerable expansion, to which the case law of the Constitutional Court also contributed, as regards our legal system.

Art. 13, par. 2, of the Italian Constitution states that "*No form of detention, in-*

spection or personal search nor any other restriction on personal freedom is admitted, except by a reasoned warrant issued by a judicial authority, and only in the cases and the manner provided for by law". The phrase "*nor any other restriction on personal freedom*" has allowed the Constitutional Court to broaden the concept of personal freedom, resorting to both a quantitative and a qualitative criterion.

On the basis of the first criterion, the Court excludes the violation of the prohibition established by Art. 13 for those physical limitations that can be evaluated as so slight as incapable to damage personal dignity (think, for example, of acts aimed at taking photographic images or fingerprints). This, obviously, does not imply that these acts are constitutionally irrelevant, having in any case to find "coverage" in the norm of Art. 23 of the Italian Constitution ("*No obligations of a personal or a financial nature may be imposed on any person except by law*").

The quantitative criterion, as mentioned, is completed by a qualitative criterion, which is explicitly based on Art. 13, par. 4 of the Italian Constitution ("*All acts of physical or moral violence against individuals subject in any way to limitations of freedom shall be punished*"). Because of this reciprocal completion between criteria, in the Court's case law, the concept of personal freedom ends with the extension to the prohibition of every violence and coercion that involves an offence for the dignity of the person, a juridical degradation for him/herself.

Essentially, the concept of personal freedom defined by the Constitutional Court is based not so much (and not only) on the purely physical nature of the constraint suffered by the individual, but (mainly) on the degree of juridical degradation that comes (or can come) into consideration.

The protection of personal freedom is guaranteed by a reserve of jurisdiction ("*by a reasoned warrant issued by a judicial authority*") and by an absolute reserve of law ("*only in the cases and the manner provided for by law*"). Furthermore, pursuant to Art. 111, par. 7, Italian Constitution "*Filing of petition to the Supreme Court of Appeal in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts*". The exception to the jurisdiction reserve – particularly relevant for our analysis – is however "compensated", pursuant to Art. 13, par. 3, by a reinforced rule of law: the public security authority can adopt provisional measures limiting personal freedom, but only "*In exceptional cases of necessity and urgency, strictly defined by the law*". The effectiveness of these measures is strictly limited in terms of time and, in any case, it is necessarily subject to the control of the judicial authority, although only ex post.

The antiterrorism legislation can also conflict with the right to the freedom and confidentiality of correspondence. The inviolability of the freedom and confidentiality of correspondence assumes a decisive importance in the theme that concerns us. Both on "operational" level – the instrument of "wiretapping", broadly understood – is, as is obvious, indispensable for preventing and combating terror-

ist activities – and on the level that this principle assumes in the constitutional system. In particular, it can be observed that, by decision no. 366/1991, which expressly refers to decision n. 34/1973 and is in continuity with decision n. 1146/1988, the Constitutional Court affirmed that "the freedom and confidentiality of correspondence and of any other means of communication constitute the right of the individual falling within the supreme constitutional values".

Not only.

With extreme clarity, the Court also specified that the essential content expressed by Art. 15 – due to its close connection with Art. 2 of the Italian Constitution, as an instrument of personality expression – cannot be subject to constitutional revision; and that "based on Art. 15 of the Constitution, the same right is inviolable in the sense that its value content cannot be subject to restrictions or limitations by any of the constituted powers, except by reason of the unquestionable satisfaction of a constitutionally relevant primary public interest, provided that the considered limiting intervention is strictly necessary for the protection of that interest, and provided that the double guarantee represented by the requirements of the rule of law and that the limiting measure is ordered with a motivated act of the judicial authority is respected".

Rule of law and reserve of jurisdiction constitute, therefore, as for the protection of personal freedom and inviolability of domicile, a fundamental institution to protect freedom and confidentiality of correspondence. It should be noted that, at least in principle, freedom and confidentiality are closely linked elements: a correspondence is fully free only if it is actually secret. At the same time, however, they are exposed to potentially distinct violations. In fact, the freedom of correspondence can be violated without violation of confidentiality (as in the case of the seizure of correspondence). And vice versa (as in the case of a control concerning a telephone conversation).

Article 15 does not allow (unlike articles 13 and 14) the possibility, by the public security authorities, of extraordinary interventions, and not previously arranged by the judicial authority, in cases of necessity and urgency. Far from considering it a mere forgetfulness of the Constituent, it can be assumed that this lack of forecast (*ubi lex noluit tacuit* ...) responds to well-founded needs. In particular, we shall consider that infringing the freedom/confidentiality of correspondence potentially involves damaging the position of a third party (the sender or recipient) not necessarily involved in the criminal activity; secondly, limiting the freedom/confidentiality of correspondence is much easier than breaking the sphere of personal or home freedom and, in this sense, lends itself to easy abuses by the authority.

The right to confidentiality of communications constitutes, within the European Union system, a freedom-means with respect to the protection of private and family life. Article 7 of the Nice Charter states that "*Everyone has the right to respect for his or her private and family life, home and communications*". However,

the confidentiality of the correspondence was described as a general principle of the European Community law already by the case law of the (future) EU Court of Justice.

It comes into consideration, in the field of the subject we are dealing with, among others, the decision C-115/1979, 18 May 1982, AM, with which the Luxembourg judge affirmed the centrality of the protection of confidentiality of correspondence between a persons and his/her lawyer; decision C-97-9 / 1987, 17 October 1989, Dow Ibérica, which extended the right to respect the confidentiality of the correspondence between lawyer and client already in the investigation phase.

Theoretically, the type of association with the purpose of terrorism – which in our system finds specific provision in Art. 270-bis of the Italian Criminal Code – raises some questions in terms of constitutional legitimacy with respect, of course, to the freedom of association guaranteed by Art. 18 Italian Constitution.

In this regard, the following is observed.

Firstly, Art. 18, par. 1 of the Italian Constitution already provides a general limitation: "*Citizens* (but, obviously, the term "*citizens*" should not be understood literally) *have the right to form associations freely, without authorisation, for ends that are not forbidden to individuals by criminal law*". Since the purposes referred to in Art. 270 sexies of the Italian Criminal Code are certainly forbidden even to individuals, the limitation in question cannot be accused of being illegitimately discriminating against associations as such.

Secondly, and according to a unanimous opinion, we shall look at the structure of a considered organization. In general, in order to be able to speak of "terrorist association" it shall present an organization concretely suitable for achieving the aim pursued [2]. Only in this case the principle of harm can be said to be respected (with the consequences mentioned above). However, a case law construction distinguishes between "internal" terrorist association and "international" terrorist association. This distinction, for the reasons that will be immediately expounded, raises some questions in terms of constitutional legitimacy.

The case law does not always correspond the same structure to the concept of terrorist association. In fact, according to Italian law, the structure of the "internal" terrorist association is different (or, in any case, does not necessarily coincide) from that of the "international" terrorist association. While for the configuration of an "internal" terrorist association, a particularly detailed organizational structure shall be found, a much more flexible structure is sufficient for an "international" terrorist association to exist.

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[2] Incidentally, it is observed that for the same Directive in comment, in Art. 2, "'*terrorist group' means a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences; 'structured group' means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure*".

According to the prevailing opinion, this distinction derives from the strongly preventive approach that qualifies the activity of combating "international" terrorism, an approach aimed at anticipating as much as possible the penal reaction in order to minimize the risk of carrying out attacks.

This great distinction – "internal"/"international" terrorist association – intersects with another important differentiation, always originated by courts.

In particular, it is necessary to further distinguish according to the type of link existing between the internal association (that is, operating at national level) and a wider international "reference" organization; in other words, it is necessary to distinguish between autonomy (first hypothesis) and connection (second hypothesis) between associations.

In the first hypothesis, the courts require that the structure of the internal association is not precarious, but persistent over time. Moreover, this structure shall be adequate for the purpose, in the sense of being effectively suitable for carrying out the crimes for which the association has been constituted. Particular attention to the element of the association structure is easily understood considering that, obviously, it is intrinsic to the associative crimes. Consequently, its particular valorisation allows to avoid that, through the anticipation of the penal response, the mere adhesion to a culture, to a way of thinking could be sanctioned. Which would lead to, as can be easily guessed, the violation of the already considered principle of harm.

We come then to the second hypothesis: "internal" association linked to "international" association (and not autonomous by it). In this second case, to take on particular importance, for our purposes, is the element of participation. It is no coincidence, in fact, that in order to recognize the due gravity of certain conduct, the case law has resorted to the institution of external competition in a terrorist association.

In the case of internal terrorism, the rigorous proof of the existence of an effective link between the "local" cell and the international organization is considered to be decisive by courts. Therefore, the mere constitution of a cell, devoid of organizational autonomy and lacking connections with international organizations, qualifies as criminally irrelevant in itself the fact of the constitution of the "cell".

In the case of international terrorism, on the contrary, the case law, in many cases, seem settled for giving importance to simple conducts of support to a generic terrorist project or purpose, without claiming, therefore, the proof of an effective connection between the cell and the international organization. But, indeed, the case law is not constant. In some pronunciations, courts tried at least to consider as necessary a form of unilateral connection, according to which the internal "cell" offers collaboration to the international organization, without creating a stable fusion between structures.

At this point, it can be observed that according to the reconstruction of international terrorism provided by the case law, even purely preparatory acts, placed in

a prodromal phase with respect to the same case of attempted association, can be punished. Moreover, the criminal relevance of these behaviours is considered to exist even in the absence of the local "cell", both of a real organization, and of a real criminal program. Given these conditions, therefore, the conception of international terrorism achieved by case law cannot be considered legitimate on a constitutional level.

Art. 5 of the Directive in question (*Public provocation to commit a terrorist offence*) significantly opens the Title III dedicated to *offences related to terrorist activities*.

It is, in fact, systematically significant that the European legislator has decided to inaugurate the most characteristic part of the Directive – being, as mentioned, inspired by the philosophy of hitting terrorism according to a wide-ranging approach – precisely with a provision aimed at "*the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally*".

Theoretically, the rule in question could contrast with the **principle of freedom of expression of thought referred to in art. 21 of the Italian Constitution**.

As is known, the freedom of expression of thought is an unquestionable presupposition of any democratic system, and the Constitutional Court itself has defined it as its "cornerstone".

For this reason, again in theory, no discrimination should be allowed between ideas: all ideas should be freely manifested and spreadable, regardless of their content, the aim pursued, the specific context considered. However, since our system is a pluralist democracy, even the right to freely express one's thoughts shall be balanced with other rights and principles of constitutional rank. This balancing was carried out by the Constitutional Court with specific reference to the so-called prosecution for one's beliefs. In general, the Constitutional Court stated that a distinction should be made between "expression of thought" and "start of action". In the case, therefore, of the crimes of instigation, apologia of crimes and publication of false or tendentious news, the Court stated that the expression of thought is punishable if, based on an assessment to be made case by case and to leave to the judge's estimation, it is suitable to directly determine the criminal act. In particular, the Court held that the expression of thought is in itself criminally relevant when it is likely to cause a concrete danger to public safety and physical safety of people (the so-called public order in a material sense).

In a passé but clear ruling, the Constitutional Court affirmed, with specific reference to instigation to commit crimes and precisely in terms of apologia, that "other from criticism of the law, from propaganda for its updating, from the fa-

vourable judgment on the author's motives, which are all legitimate manifestations of thought, is the direct, and appropriate, public apologia that leads to the violation of criminal laws.

Applauding facts that are punished by the legal system as criminal offences and glorifying its authors is considered by many to be a hypothesis of indirect instigation: certainly, the apologia of a criminal offence as a laudable means of obtaining the repeal of the law which foresees the criminal relevance of a specific fact is an attack against the very foundations of every imaginable system. In fact, freedom and democracy are conceivable only in the form of obedience to the laws that a free people freely establish and can freely change. The apologia punishable pursuant to art. 414, last paragraph, of the Italian Criminal Code is therefore not the manifestation of pure and simple thought, but the one which integrates in its modalities a behaviour specifically suitable to provoke the commission of crimes" (Decision n. 65/1970).

The implementation of the European Directive 2017/541, with reference to the provision of art. 5, does not seem to pose particular problems of constitutional legitimacy.

2. *The European framework*

2.1. *Antiterrorism legislation in the light of European Union law*

The fight against terrorism has always been considered one of the primary objectives of community and Union construction, first with the Single European Act in force on July 1st, 1987 [3], then continuing with the Maastricht Treaty of 1992, and the subsequent Treaty of Amsterdam, which entered into force on May 1st, 1999.

It is precisely with the Treaty of Amsterdam that the subject of criminal cooperation is inserted in Title VI of the Treaty on the Union, "*Provisions on police and judicial cooperation in criminal matters*", whose article 29 provided for a nucleus of crimes for which they were provided, within the framework of an "*area of freedom, security and justice*", for the prevention and repression of criminal offences through joint actions in the field of crime, organized or otherwise, and in particular terrorism, trafficking in human beings and crimes against minors, illicit drugs and arms trafficking, corruption and fraud.

Despite the wide competences attributed to the Union by the Treaty of Amsterdam, a real impulse had not been given to the policies of criminal cooperation

[3] In the same there is a first mention of a possible criminal and police cooperation: "*In order to promote the free movement of persons, the Member State shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also co-operate in combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques*".

until the attack of September 11th, 2001. The feeling of urgency to propose a series of acts whose aim was the fight against terrorism, the first of which was the framework decision of June 13th, 2002 on the fight against terrorism (2002/475/GAI), have rose only after that date. The mentioned decision gave firstly a definition of a terrorist act and of criminal purpose in criminal matters and then attempted to establish harmonized criminal sanctions.

However, the framework decision did not achieve the desired result, and the same can be said of the framework decisions subsequently adopted; in this regard, European legislation in 2002-2008 [4] failed to effectively affect national systems.

It is only with the Lisbon Treaty, which came into force on December 1st, 2009, that numerous and important changes were made to European criminal law: terrorism was included among the so-called *eurocrimes* under art. 83 TFEU, with the fundamental novelty that directives become the legal instrument, and consequently, in the event of failure or incomplete adjustment by Member States, it is possible for the European Court of Justice to check it and eventually impose an infringement procedure.

The adoption of Directive 2017/541 of March 15th, 2017, which replaces the Framework Decision 2002/475/GAI, represents the new step taken by the European legislator with a view to combating international terrorism, with the aim to improve the regulatory framework by bridging the existing gaps.

If, on the one hand, this provision pushes to question the state of the art of Italian legislation, as we will see in chapter 3, on the other obliges one to question the compatibility of the set of rules with the principles of human rights on which the European Union is based.

On this point, many remarks can be made.

Since we are dealing with the analysis of a European directive and the respect of the two principles of subsidiarity and of proportionality, it is first of all necessary to investigate on if the explanatory memorandum – in the section entitled subsidiarity – could justify the opportunity to intervene at supranational level through the introduction of minimum standards, in order to ensure more effective action to combat a phenomenon, such as terrorism of a cross-border nature, and to facilitate cooperation also with third countries.

Based on the principle of proportionality, with adherence to the Additional Protocol of the Council of Europe of October 22nd, 2015, the *explanatory memorandum* identifies how the European Union is bound to adopt minimum incriminations as indicated in the latter recalled document, in order to adapt the response the phenomenon's swings and to avoid both gaps in protection and the fragmentation of the law, which would put at risk the security of Member States and citizens.

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[4] The same Framework Decision 2002/475 /JHA was updated by the subsequent Framework Decision 2008/919/GAI.

Turning to the merits of the Directive, if on the one hand it sticks to an anticipatory logic of criminal punishment as well as a generic nature of the precepts, on the other hand it can be observed that the preference for generic formulations of the incrimination obligations leaves the adequate room for manoeuvre in the delineation of the precept and for determining the offensiveness threshold of the conduct to be implemented.

Moreover, it does not seem trivial to underline how the choice of the criminal instrument as a tool to fight terrorism, if it can be criticized for some aspects such as the penalization, as we will see, of the preparatory acts, brings along important guarantees for the suspect/defendant, guarantees that it would not have if other instruments were used, such as the administrative one, which would lead to weakening protection of human rights as a result of fewer defensive guarantees.

In conclusion, it is important to underline that both the Directive itself and Recitals 35, 39, and 40, clarify that the article must be constructed in accordance with the principles set forth in art. 2 of the TUE Charter, as well as the principles recognized by the Charter of Fundamental Rights of the European Union.

2.1.1. *EU Directive 2017/541*

In order to respond to the need to implement international obligations in this area, the first part of the EU Directive 2017/541 is presented as a summary document of the current obligations of the Member States.

The content of the Directive is developed in six Titles and thirty articles and is preceded by forty-three recitals which address the Member States in the action of transposition and interpretation of the provisions contained in the provision.

Coming to the articles, art. 1 defines the very object of the Directive, establishing minimum rules concerning the definition: criminal offences and sanctions in the area of terrorist offences (governed by Title II); offences related to a terrorist group and offences related to terrorist activities (Title III); protection of, and support and assistance to, victims of terrorism (Title V).

Based on the provisions of art. 3, the "*terrorist offence*" appears to be at the time when one of the serious crimes – "*intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation*" – among those indicated in par. 1 was committed with the alternative purpose of a) seriously intimidating a population; b) unduly compelling a government or an international organisation to perform or abstain from performing any act; c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Title III of the Directive – "*Offences related to terrorist activities*" – imposes on the Member States the obligation to incriminate a series of acts whose classification as a criminal offence – where intentionally implemented – is justified by

the potential that such conduct could "*lead to the commission of terrorist offences*" and the fact that they allow terrorists and terrorist groups to "*maintain and further develop their criminal activities*".

The conduct deemed punishable by the Directive – reproducing the text of the previous Framework Decision of 2002 – is that of "*Public provocation to commit terrorist offence*" (art. 5), "*Recruitment for terrorism*" (art. 6) and "*Providing training for terrorism*" (art. 7).

The subsequent articles, instead, introduce – implementing the aforementioned international law – four new incrimination obligations relating to the conduct of "*Receiving training for terrorism*" (art. 8), "*Travelling for the purpose of terrorism*" (art. 9), "*Organising or otherwise facilitating travelling for the purpose of terrorism*" (art. 10) and "*Terrorist financing*" (art. 11).

As regards the "receiving a training", the Directive obliges the Member States to incriminate the conduct of those who, knowingly, place themselves in the condition – receiving "*instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques*" – to be able to commit terrorist crimes or to contribute to their commission.

Articles 9 and 10, on the other hand, have the clear objective of countering the phenomenon of the so called *foreign fighters*, providing, on the one hand, for the punishment of the act of traveling to a Member State or a third country in order to commit or contribute to the commission of a criminal offence of terrorism or to participate knowingly in the activities of a terrorist group or to impart or receive training for terrorist purposes, and, on the other hand, the introduction of organizational conduct or facilitation of such travel.

Article 11 makes the conduct of those who finance terrorism punishable and, specifically, provides for the obligation for Member States to make punishable as a criminal offence the supply or collection of capital with the intention – or in the knowledge – that these capitals will be used to commit or contribute to the commission of one of the offences referred to in articles 3 to 10 of the Directive.

Finally, art. 12 punishes a series of specific offences related to the phenomenon of terrorism and, in particular, aggravated theft and extortion with the aim of committing one of the crimes referred to in art. 3 and the production or use of false administrative documents in order to commit a terrorist offence, to participate in the activities of a terrorist group or to commit the criminal offence of travelling for terrorism.

Title IV of the Directive provides for a series of general provisions relating to terrorist offences, crimes attributable to a terrorist group and crimes related to terrorist activities.

Article 13, entitled "Relationship to terrorist offences" establishes that the punishment of the conduct referred to in art. 4 (Offences relating to a terrorist group) and Title III (Offences related to terrorist activities) is not subject to the actual

commission of a terrorist offence; in addition, in the cases of the offences referred to in art. 5 to 10 and to art. 12, it is not necessary to establish a connection with another specific criminal offence listed in it, then art. 14 requires that the Member States adopt measures aimed at punishing forms of competition.

In conclusion, the tightening of the legislation in relation to instigation and attempt is evident: are now punishable the attempt to recruit or train for terrorist purposes, as well as the attempt to carry out the criminal offence of traveling abroad with the same purpose, of terrorist financing or one of the crimes related to terrorist activities, and the classification of a criminal offence is also extended to instigating the commission of crimes related to terrorist activities.

Article 15 specifies the penalties that can apply to natural persons, stating that they may involve delivery or extradition and recalling the effectiveness, proportionality and dissuasive criteria.

Article 16 provides for a series of extenuating circumstances that allow States to take into account factors that can lead to a reduction in the sanction, such as the renunciation of terrorist activity or collaboration with authorities.

With respect to legal entities, they are equally subject to criminal liability for all crimes envisaged by the legislation in question, providing for a series of specific sanctions, with the important clarification that the liability of the legal person cannot be relied on in alternative to that of natural persons.

With regard to procedural profiles, art. 20 establishes that during the investigation phase the competent authorities must have effective investigation tools, such as those used against organized criminal offence or other serious forms of crime; furthermore, Recital n. 21 states that "*Such tools should, where appropriate, include, for example, the search of any personal property, the interception of communications, covert surveillance including electronic surveillance, the taking and the keeping of audio recordings, in private or public vehicles and places, and of visual images of persons in public vehicles and places, and financial investigations*".

Article 21 provides for the adoption of measures to combat online content attributable to public provocation, requiring Member States to take the necessary measures to ensure the timely removal of online content that constitutes a public incitement to commit a criminal offence of terrorism pursuant to art. 5, specifying that the measures relating to removal and blocking must be established in accordance with transparent procedures and provide adequate guarantees, in order to ensure that such measures are proportionate and limited to the strictly necessary and that users are informed of the reason for such measures. The guarantees connected with the removal or blocking also include the possibility of legal recourse.

Article 22 of the Directive provides for the obligation to take all necessary measures to ensure that relevant information collected in the context of criminal proceedings related to terrorist offences are effectively and promptly accessible to the competent authorities of another Member State when such information could

be used for prevention, investigation or prosecution in relation to terrorist offences in that Member State.

Finally, art. 23, entitled "Fundamental rights and freedoms "is relevant since it specifies how the Directive does not prejudice the obligation to respect fundamental rights and legal principles enshrined in art. 6 TEU.

The second paragraph, however, introduces an unclear provision, according to which the Member States are authorized to establish the "*conditions required by, and in accordance with, fundamental principles relating to freedom of the press and other media*" and, in accordance with these principles, the conditions governing "*the rights and responsibilities for the press or other media*", as well as the relative "*procedural guarantees (...) such conditions relate to the determination or limitation of liability*".

Title V of the new Directive requires Member States to adopt provisions concerning the protection and support of victims of terrorist crimes, as well as their rights. These provisions supplement the provisions of Directive 2012/29 / EU and were introduced with the primary objective of protecting the victims of terrorism: completely peculiar victims in need of specific assistance.

First of all, art. 24 states that investigations into, or prosecution of, offences covered by this Directive are not dependent on a report or accusation made by a victim of terrorism or other person subjected to the offence, at least if the acts were committed on the territory of the Member State where one proceeds.

It is also necessary to provide for the establishment of support services that address the specific needs of victims of terrorism in accordance with Directive 2012/29/EU and that they are made available to such victims immediately after a terrorist attack and for as long as necessary. Particular attention is paid to the characteristics that these services shall have, such as being free and accessible for all victims; the same, indeed, shall guarantee adequate support from an emotional and psychological point of view, provide advice and information regarding legal and financial issues and assistance with regard to possible claims for compensation. Furthermore, it is specified that the mechanisms and protocols for activating these services must be included in the framework of national infrastructures aimed at facing the emergency, underlining the importance of effective coordination between authorities, agencies and bodies in charge of them.

Member States must guarantee victims adequate medical care within their national health systems and, moreover, in accordance with the provisions of Directive 2012/29/EU, access to free legal aid for victims who are party members of the criminal proceedings.

Article 25, entitled "*Protection of victims of terrorism*", states that Member States must provide for measures to protect victims of terrorism and their families, paying particular attention to "*the risk of intimidation and retaliation and to the need to protect the dignity and physical integrity of victims of terrorism, including during questioning and when testifying*".

Finally, art. 26 states that the authorities and support services of the Member States must put the victims in a position to have access to any kind of information, regardless of the Member State in which they are located; consequently, it will be necessary to provide victims with access to this information, whether they are in a Member State other than that of residence, or if they are in the Member State in which they reside, even if the terrorist offence has been committed in another member State.

2.2. *Antiterrorism legislation (Directive 541/2017) in the light of the ECHR*

Directive 541/2017 requires the Italian State to intervene on the internal criminal law once again, in terms of combating terrorism, including international terrorism, inspired by the special-preventive logic of the criminal instrument, so that the negative value of the conduct pursued does not lie in the injury effective of the property legally protected by the incriminating rule (national and international security), or of its concrete threat, but rather on the psychological coefficient of the author of the prohibited conduct, due to the (terrorist) offence pursued [5].

The introduction of criminal rules, which strongly anticipate the threshold of the harm of the offence in question first poses a (internal) problem of extreme tension with the founding principle of offensiveness operating in criminal matters and, then, a problem of compatibility with the principles of ECHR law and in particular respect for fundamental rights.

This last indicator is the parameter that the EDU Court has always been used to review the legitimacy of EU acts or international orders, even in the case of implementation of UN Security Council resolutions on international security and antiterrorism.

From this premise it follows that the point of equilibrium is to be identified in the delicate and complex balance between the fundamental rights of the individual and the protection of national and international security against rampant terrorism.

To this end, it is useful to analyse some judgments of the Strasbourg Judges who, although dating back to a period prior to the issuing of Directive 541/2017, provide very useful indicators to guide the interpretation and adaptation of the new rules, ensuring compliance with the law as a general mandatory principle.

In some ways the Directive under examination constitutes the landing point of the Community jurisprudential evolution in the matter of protection of the fundamental rights referred to in Title I of the ECHR, which is why, in the following, we will examine two particularly prestigious judicial rulings concerning subjects suspected of terrorism, who turned to community jurisdictional bodies complain-

[5] Based on the provision of Art. 3, par. 2, Directive 541/2017.

ing the violations of their fundamental rights, as an effect deriving from the absence, in the national legal system of reference, of legal remedies suitable for guaranteeing their protection.

On the basis of the cases that will be discussed in the following paragraphs, it is possible to affirm that, at the state of the art, the European Community, an autonomous legal order, contains in itself the constitutionality of the system and the antibodies to preserve it, suitable to prevent the bond of subordination to international law can actually compromise its fundamental values: respect the essential nucleus of the rights of the individual.

From this premise it follows that the implementation and interpretation of the antiterrorism directive, which each State is preparing to carry out, must be constitutionally oriented in a European sense, according to the indications already emerged in the case law of the Judges of Strasbourg.

2.3. *Article 13 and the right to effective jurisdictional control (Kadi case)*

At the end of a long and complex judicial affair that took place in three "acts" known as the "Kadi case", the Strasbourg Court allowed *the principle of jurisdictional control on the legitimacy of antiterrorism measures to be consolidated within the Community case law and in particular on the 'freezing' of capitals and economic resources* [6].

In the aftermath of the 2001 Twin Towers attack, based on international obligations arising from the UN Charter, people suspected of being linked to the terrorist network of Osama Bin Laden, and before Al-Quaeda, must be included in a special list (the so called *black list*); as a result of this insertion they are hit by harsh sanctioning measures including the "freezing" of various capitals and financial resources.

Well, Yassin Abdullah Kadi, a Saudi citizen, was added to the blacklist in 2001, precisely because he was suspected of being contiguous to Osama Bin Laden's network; as a result of this registration, it suffers the "freezing" of all its European assets [7].

As a result of this, Mr. Kadi appeals to the Court of First Instance of the European Community to obtain the annulment of the regulation on the basis of which it had suffered the "freezing" of its assets complaining of the evident contrast of said regulation with its fundamental rights: and specifically of the right of property, the right to attach exculpatory evidence (to prove the groundlessness of the suspicion of belonging to the terrorist network in question) and finally *the right to effective jurisdictional control*.

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[6] Sanction provided for in Resolution 1333/2000, further tightened by UN Security Council resolution 1390.

[7] Kadi c. Council and Commission, 21 September 2005, case T-315/01.

The appeal is rejected [8] by the Court seized on the basis of the principle of law, respectful of the hierarchy of sources, according to which all the community acts that implement UN Resolutions on international security and antiterrorism are distinguished by being disconnected from jurisdictional control, given that they are limited to implement international obligations deriving from the United Nations, without having any discretion; so, if a review of the legitimacy of the Community implementing regulation were allowed, the Community judge would indirectly be able to verify the legitimacy of the UN Resolution on duty; Criticising such a resolution is generally not allowed, unless it translates into a violation of fundamental rights, circumstance that the Court excluded in the case in question.

Mr. Kadi makes no appeasement on this ruling and takes the decision, finally obtaining the annulment of the Community regulation n. 881/2002 [9], limited to the part of his interest, by assuming that the European Community is a community of law; that being said, the Member States, like its institutions, are subject to the control of the conformity of their acts with the EC Treaty, which provides a complete system of legal remedies.

From this premise it follows that no international agreement can preclude the powers governed by the EC Treaty or the autonomy of the Community legal order.

With the occasion the Court of Justice expressly states that the obligations deriving from an international order cannot in any way compromise or adversely affect the constitutional principles of the EC Treaty (among which the inviolability of fundamental rights can be counted); therefore, Community acts must respect fundamental rights without any exception.

Differently arguing and having regard to the specificity of the scrutinized concrete case, the Court of Justice came to the conclusion that the applicant has suffered a violation of his fundamental rights, given that the regulation in question does not assure to the "suspect" any judicial protection against the measures sanctions arranged, with the immediate and incongruous effect of substantially affecting the enjoyment of his right to property.

In conclusion, the Court ruled that the need – of primary rank – to prevent terrorist crimes and to guarantee international security cannot justify the suppression of the fundamental rights of the natural person indefinitely and in an unconditional way!

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[8] Judgment of 21 September 2005.

[9] Regulation (EC) n. 881/2002 of the Council of 27 May 2002 which imposes specific restrictive measures against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban and repealing Regulation (EC) n. 467/2001 which prohibits the export of certain goods and services in Afghanistan, exacerbates the ban on flights and extends the freezing of capital and other financial resources towards the Taliban of Afghanistan.

2.4. *The pronunciation of the Great Chamber Nada c. Switzerland of 12.09.2012*

In 2001, Switzerland entered the name of Mr. Nada, the Italian-Egyptian businessman, in a *black list* [10] as suspected of being linked to the terrorist network of Al-Qaeda and Osama Bin Laden; as a result of this, he was banned from traveling and entering Switzerland, but he had his usual residence in Campione d'Italia.

Mr. Nada, although old and seriously ill, could not leave the territory of residence (the enclave of Campione d'Italia) neither to seek treatment, nor to cultivate her family affections; therefore he decided to appeal to the national judges several times, claiming the cancellation of his name from the *black list*, without result.

Once depleted the domestic law remedies, Mr. Nada appeals to the EDU Court, assuming he has suffered the violation of Articles 5, 8 and 13 of the ECHR, since the prohibition of entering the Swiss confederation, or only passing through it, jeopardizes its fundamental rights (respect for its private, professional and family life).

According to the appellant, this measure prevented him from visiting his doctors in Italy and Switzerland, as well as from visiting his family and friends; finally, the inclusion of his name in the blacklist certainly offended his reputation.

Mr. Nada then complained that he had not been in a position to resort to effective legal remedies aimed at obtaining the cancellation of his name from the black list, and because of this he had been deprived in practice of his own personal freedom by the Swiss authorities, which moreover lacked of any check on the legitimacy of such restrictive measures.

The Grand Chamber of the European Court of Human Rights accepts the complaints relating to Articles 8 and 13 ECHR, but not also the one relating to Art. 5 of the ECHR (right to freedom and security) assuming that the restrictions suffered did not prevent him from living and moving freely within the territory where he had deemed, in absolute autonomy, to permanently reside, not being limited in any way by any form of custodial or home detention.

His freedom of movement had simply been inhibited to a specific territory, while remaining free to move in the enclave; so that the Strasbourg judges had ruled out that he had not been deprived of personal liberty in the actual sense set forth in article 5 of the ECHR.

As for the violations referred to in articles 8 and 13 of the ECHR the Court

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[10] So called "ordinance on the Taliban" of which it is an integral part. Switzerland has implemented various anti-terrorism measures in compliance with the Resolutions (No. 1267/1999 and No. 1333/2000, among others) of the Security Council as a member of the UN. The Security Council has mandated the committee (of the UN Security Council) for the sanctions to keep, on the basis of the information communicated by the States and the regional organizations, an updated list of the persons and entities that the said committee has identified as associated to Osama bin Laden, including the Al-Qaeda organization.

condemned Switzerland in the proceedings brought by Youssef Nada on the basis of a double argument.

The defendant State by the appellant Nada had not taken into consideration the geographical singularity of the place of residence, in fact not common; nor had it taken into account the non-negligible figure that the disqualification of entry and transit in the Swiss confederation did not provide for a deadline and therefore the limitation imposed had lasted for a long time.

Following the previous ruling of the Court of Justice, the so called Kadi case [11], which had crystallized the principle of judicial control on UN sanctions (and in particular, the "freezing of the economic resources" of the suspect) and after noting that Switzerland had not adopted any effective jurisdictional remedy for cases of adoption of disproportionate disqualifications measures that undermine the exercise of the fundamental rights of the individual, Strasbourg judges accept the complaints of the elderly Italian-Egyptian businessman. Effective legal remedies and the contradictory guarantees necessary to present a request to cancel its name from the indicted list or to an exception to the freezing of assets had not been assured to Nada.

The Judges concluded by considering that the safeguarding of Switzerland's national security, as well as the prevention of terrorist crimes and crimes in general, when not necessary and not proportionate, as in the scrutinized case, do not achieve an acceptable balance between respect for fundamental rights of the person (private and family life) and community safety.

Also at the outcome of the present appeal the Court once again reaffirms the general principle of non-interference by the State in the fundamental rights of the natural person to his family and private life, when these limitations are not balanced with the provision of internal remedies (in respect of art. 13 ECHR) which guarantee a check on the compliance of international orders with the obligations deriving from the European Convention of human rights.

"*International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community*." [12].

The present ruling of the EDU Court is perfectly aligned with the tendential orientation already expressed with the Kadi case to make the **harmonization of the protection of the fundamental rights of the individual (*ius cogens*) and the safeguarding of international and national peace from the threat as concrete as possible. of terrorism**.

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[11] Referred to in paragraph 2.2.2.

[12] Par. 230 Corte EDU, judgment 12 September 2012, No. 10593/08, *Nada c. Svizzera*.

3. *The legislative and jurisprudential evolution in the field of antiterrorism in Italy*

In Italy, the need to adopt adequate measures to combat international terrorism has resulted in a discipline introduced by different interventions of the legislator that stratified over time. As explained in the following paragraphs, the legislator prepared solutions in line with those already experienced in the past regarding different and previous "emergencies", proposing and eventually refining repressive tools that had already been tested to face other criminal manifestations of associative nature, such as mafia or internal political terrorism.

3.1. *Law n. 438 of 2001*

The rule of the first article of the Law n. 438 of 2001 that amended art. 270-bis of the Criminal Code broadened the scope of applicability, on the one hand, and, on the other, tightened the provided penalties.

The need to urgently provide for the creation of this new crime hypothesis is based on the lack of criminal legislation aimed at repressing organizations that, although based in Italy, intend to carry out acts of violence against other countries.

Therefore, this law fills the punitive gap created by the impossibility of adapting existing incriminating cases (in particular art. 270-bis of the Criminal Code) to the new reality: that of transnational terrorism.

More in detail, the amended text is clearly applicable to anyone who promotes, constitutes, directs or finances associations aimed at carrying out acts of violence of a terrorist nature, specifying that the terrorist purpose also applies, under criminal law, when acts of violence are directed against a foreign state, an international institution or an organization [13].

With regard to the amended version of this article, the Supreme Court of Appeal (*Corte di Cassazione*), with its 2016 ruling (*Cass. Pen., Sezione V, No. 48001/2016*) draw the line of what may be criminally relevant with regard to associations with terrorist purposes: an associative structure takes on criminal rele-

[13] Art. 270-bis c.p.

[I]. Anyone who promotes, constitutes, organizes, directs or finances associations that propose to carry out acts of violence with the purpose of terrorism or subversion of the democratic order is punished with imprisonment from seven to fifteen years.

[II]. Anyone participating in such associations is punished with imprisonment from five to ten years.

[III]. For the purposes of criminal law, the purpose of terrorism [270-sexies] also occurs when the acts of violence are directed against a foreign State, an institution or an international body.

[IV]. With regard to the condemned, the confiscation of the things that were used or were destined to commit the crime is always obligatory and of the things that are the price, the product, the profit or which constitute its use [270-septies].

vance only when it focuses on the realization of violent acts qualified by the terrorist purpose. An association will therefore reflect the legal model provided by Art. 270-bis when its objectives consist in the performance of violent acts of a terrorist nature.

On the contrary, the activity of mere indoctrination aimed at inducing the recipients to offer a generic willingness to join those who fight for the Islamic cause does not constitute an activity in contrast with the rule set forth, because of the impossibility to identify those violent acts that represent the typical object of this kind of association.

Law n. 438 of 2001 introduces, *ex novo*, art. 270-ter of the Criminal Code [14], which defines the notion of "assistance to the associates": it punishes those who give shelter and provide food, hospitality, means of transport, and communication tools to some of the people who participate in the associations as envisaged in articles 270 and 270-bis of the Criminal Code, and introduces new conducts of abetting, assistance to the associates, in particular the supply of hospitality, means of transport and communication tools, also with reference to the mafia-type Associations Art. 418 of the Criminal Code and with reference to the participants of conspiracy or of armed band.

The crime referred to in Art. 270-ter of the Criminal Code consists in favouring some of the people who participate in the terrorist association, namely the individual members and not the association as a whole. It follows that the person who is considered to be permanently inserted in the organization and whose contribution is given to the entire organization will be punished according to Art. 270-bis and not to Art. 270-ter. The provision is inspired by the case already provided for by the code in Art. 307 on the assistance to conspiracy and armed gang participants.

With respect to the crime of aiding and abetting (established by Art. 378 Criminal Code) in relation to which Art. 270-ter provides for a reserve clause, it is noted that the two crimes differ not only because of the different nature of the offended legal asset, but also for the diversity of the subject helped and the aid provided.

In fact, a precondition for the crime of aiding and abetting is that a crime has been committed before aid is given to its author, while the assumption of art. 270-ter is that the aid is provided when the criminal activity has not yet ceased (and therefore the terrorist association still exists).

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[14] Art. 270-ter c.p.

[I]. Anyone, outside the cases of competition in the crime or abetting, gives shelter or provides food, hospitality, means of transport, communication tools to some of the people participating in the associations indicated in articles 270 and 270-bis is punished with imprisonment up to at four years.

[II]. The penalty is increased if assistance is provided continuously.

[III]. It is not punishable who commits the act in favour of a next relative.

Furthermore, while in the case of aiding and abetting, the assisted person is an unqualified person, under Art. 270-ter he is a participant in the association.

The law continues by providing valid instruments of investigation and repression for the fight against terrorism, essentially by providing for the application of provisions on wiretapping and on existing searches introduced in order to combat mafia-type crimes, in particular a deadline of longer duration for preliminary investigations has been set and the possible extension is adopted by the judge without any involvement of the person under investigation and/or of the injured party (Articles 406, par. 5-bis and 407, par. 2, no. 4, code of criminal procedure); the dual presumption of existence of precautionary needs and adequacy of the only measure of custody in prison is established in the event of activation of the libertarian incidental procedure for the application of a precautionary measure against the person subjected to the investigation (Art. 275, paragraph 3, code of criminal procedure).

Furthermore, a number of measures already in place to combat mafia's criminal organizations have also been extended to investigations relating to international terrorism, thus allowing the application of some specific institutions of the anti-mafia legislation. Considering interceptions, in particular, the possibility of making telephone, environmental and information flow interceptions in the presence of sufficient indications of a crime and the need for interceptions was introduced.

Furthermore, the aforementioned interceptions can also be carried out in advance, upon authorization of the public prosecutor and not of the judge but excluding any probative value of the relative results. In addition to this, the possibility for police members to carry out undercover activities have also been envisaged in relation to the fight against international terrorism; the application of personal and patrimonial prevention measures originally planned against the Mafia; the use of the videoconferencing system to examine and remotely participate the defendants in prison and collaborators of justice too.

Finally, by amending the Articles 52 and 328 of the Criminal Procedure Code, the Art. 10-bis provides district jurisdiction for these crimes.

Said important amendment still present a *vulnus* that had not been filled until the introduction of Law no. 155 of 2005, which has defined the conduct with purpose of terrorism.

3.2. *Law n. 155 of 31 July 2005*

A more incisive modification of legal provisions and of the criminal procedure intervened with Decree Law 27 July 2005, n. 144, converted with modifications in Law 31 July 2005, n. 155 (so called *Decreto Pisanu*, from the name of the Minister of the Interior).

This provision further adapted the substantive criminal law, proceeding to the

statement of a notion of "conduct with terrorist purposes" intended to minimize the risk of interpretative conflicts (Article 270-*sexies* of the Criminal Code) and also introducing new types of recruitment and training for terrorist purposes, including international ones (Articles 270-*quater* and 270-*quinquies* of the Criminal Code).

It continued in the process of widening the scope of applicability of measures created for fighting against Mafia organisations and can now be used to contrast terrorism on international level. Finally, the opportunity of the international terrorist emergency was taken to introduce, through the decree under examination and the subsequent law of conversion, some modifications of the criminal procedure of general scope, and not only concerning the proceedings relating to acts of terrorism.

With the introduction of the art. 270 *sexies* [15] an outline is given to the definition of terrorist conduct: the law, which is receptive in the Italian legal framework of the EU Framework Decision 2002/475/JHA, defines terrorist conduct both from an objective point of view (behaviours able to "*cause serious damage*"), and as regards the subjective aspect (conduct that is implemented "*for the purpose of*"). In order to identify an association with terrorist purposes, the interpreter must first identify the specific program of violent acts and then assess whether these violent acts are suitable for causing "serious damage" to a country.

Thus, the legal requisite of violence shall lead to exclude those behaviours which, without such a connotation, would instead may have represented a legitimate manifestation of the constitutionally guaranteed freedom of expression.

There is then a closure clause, by virtue of which all the behaviours defined as such by "conventions or other norms of international law binding for Italy" have a terrorist connotation.

Art. 270-quater Criminal Code [16] punishes "recruitment" or "the act of soliciting another person to commit or contribute to the commission", the Italian regula-

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[15] Art. 270-*sexies* c.p.:

[I] The purpose of terrorism is considered to be conduct that, due to its nature or context, can cause serious damage to a country or an international organization and is carried out with the aim of intimidating the population or forcing public authorities or an international organization to perform or refrain from performing any act or destabilize or destroy the fundamental political, constitutional, economic and social structures of a country or an international organization, as well as other behaviours defined as terrorist or committed with terrorist purposes by conventions or other norms of international law binding for Italy [270-bis, 270-septies].

[16] Art. 270-*quater* c.p.:

[I] Anyone, outside the cases referred to in Article 270-bis, recruits one or more persons for the performance of acts of violence or sabotage of essential public services, for the purpose of terrorism, even if directed against a foreign State, an institution or an international body, is punished with imprisonment from seven to fifteen years.

[II] Out of the cases referred to in Article 270-bis, and except in the case of training, the enlisted person is punished with imprisonment from five to eight years.

tion in no way clarifies what is meant by enrolment. The Supreme Court of Appeal (*Cass. Pen., Section I, n. 40699/2015*) intervened on the subject, clarifying how the term recruitment should not be understood as the actual insertion of the enlisted subject in military formations, which are then organized according to hierarchical models. This term shall instead be read as the completion of a serious agreement between the subjects. This agreement already represents the event of the crime, where it shows the characteristics of authority, credibility and concreteness of the proposal, as well as the firmness of the will to join the project. The double purpose required by the law (consisting in the performance of acts of violence or sabotage) should be evident.

The hypothesis referred to in Art. 270-*quinques*[17] of the Italian Criminal Code punishes the acts of imparting/receiving instructions for the manufacture or use of explosives, various types of weapons and hazardous and noxious substances, as well as other specific techniques or methods aimed at carrying out acts of terrorism.

With regard to the criminally relevant conduct, the Court has specified that it cannot be considered compliant with the normative paradigm – in terms of the objective element – the fact of who carries out a simple work of information and proselytising. This activity, in fact, is not capable of transmitting to the recipient those technical skills that are minimal but may have the aptitude to make them capable of performing one of the gestures described by the letter of the law (preparing or physically using weapons, preparing for use explosive substance, preparing harmful or dangerous substances). In reality, therefore, the conduct of information or proselytising does not have an immediate didactic potential, resolving itself in the mere propagation of news. (*Cass. Pen., Sezione I. n. 4433/2013*).

While as far as the subjective profile of the person who acts is concerned, there must be a double specific malice qualified both by the desire to put in practice a behaviour that is concretely suitable for the perpetration of acts of violence or sabotage, as well as by the sharing of the terrorist purpose (*Cass. Pen., Sezione VI. N. 29670/2011*).

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[17] Art. 270-*quinquies* c.p.:

[I] Anyone, apart from the cases referred to in Article 270-bis, trains or in any case provides instructions on the preparation or use of explosive materials, firearms or other weapons, harmful or dangerous chemical or bacteriological substances, as well as any other technique or method for the performance of acts of violence or sabotage of essential public services, with the purpose of terrorism, even if directed against a foreign State, an institution or an international body, is punished with imprisonment for five to ten years. The same penalty applies to the trained person, as well as to the person who, having acquired, even independently, the instructions for carrying out the deeds referred to in the first sentence, engages in univocal conduct aimed at the commission of the conduct referred to in Article 270 -sexies.

[II] The penalties provided for in this article are increased if the fact of the person training or instructing is committed through computer or electronic means.

Finally, it is worth underlining how the Italian legislation takes a step beyond what expressly provided for by the European directive where it is included in the scope of the application of paragraph 2 of the art. 270-quater also the fact of those who train themselves – the c.d. lone wolf – thus reflecting the opening, characterized by the use of the conditional 'should', which the eleventh Recital of the Directive makes to the opportunity to include 'self-learning' in the concept of 'receiving training' where it derives from active conduct aimed at committing or contributing to the commission of a crime of terrorism.

3.3. *Law n. 43 of 2015 and Law n. 153 of 2016*

On the level of substantive criminal law, thanks also to the supranational thrust, the adoption of incriminating cases characterized by a strong anticipation of the protection, as well as by often generic formulations, which make extensive use of specific fraud have been witnessed. In fact, as early as 2015, following UN resolution no. 2178/2015 and the Additional Protocol of the Council of Europe, numerous European States have introduced in their system incriminations aimed at repressing those conducts prodromal to attacks, such as the instigation to commit acts of terrorism, recruitment, training, accompanied by *ad hoc* forecasts to contrast the ever increasing number of *foreign fighters*.

Looking at the changes introduced by the Italian legislator, first with the Decree Law n. 7/2015, converted into Law 43/2015 and, subsequently, with Law no. 153/2016 of adaptation to some international instruments awaiting ratification, it is noted that our legal system has gone through all the phases characterizing the European trend described above.

New incriminating cases have been added to the complex microsystem of substantive law for the fight against terrorism, as well as an inaction of penalties and the "new" insertion of some ancillary penalties such as the loss of parental authority.

Art. 270-*quater*[18] of the Criminal Code, which punishes the "organization of transfers with terrorist purposes", the rule broadly follows the provision of art. 600-*quinquies*, where the fact of who organizes or promotes travel (in this case aimed at exploiting child prostitution) is equally punished.

Through a marked retreat of the punishability threshold, is therefore punished that conduct that has still has an exquisitely preparatory nature, with respect to the actual, material fulfilment of acts definable as terrorism.

Art. 270-*quinquies* Criminal Code[19] that punishes the financing of conducts

[18] Art. 270 *quater* c.p.:

[I] Outside the cases referred to in articles 270-bis and 270-quater, anyone who organizes, finances or promotes travel in foreign territory for the purpose of carrying out the conduct with terrorist purposes pursuant to article 270-sexies, is punished with imprisonment for five at eight years old.

[19] Art. 270 *quinquies1* c.p.:

with the same aims. The rationale of the law coincides with the need to prepare a response as broad, effective and preventive as possible, with respect to forms of aggression which – out of brutality and complexity – need to be able to avail themselves of considerable economic resources. It is a norm configured according to the scheme of the crime of danger, characterized by a considerable setback of the threshold of punishment, according to the logic of the preventive intervention.

Considering Art. 270-*quinquies* Criminal Code [20], providing the subtraction of assets or money subject to seizure, it is worth noting that the seizure to which the legislator refers is not only the constraint arising from the actual precautionary measure pursuant to Art. 321 Criminal Procedure Code, but also the one established for example by preventive measures.

Article 270-*septies* Criminal Code provides that a real security measure must be adopted in any case of conviction, but also where a penalty is applied pursuant to and for the purposes of Art. 444 Criminal Code, always in relation to one of the crimes committed with the purposes of terrorism pursuant to Art. 270-*sexies*. In other words, it has to be necessary to order the confiscation of the things that were materially used for the commission of the crime, as well as of what was simply destined to the commission of the same; the same mandatory measure also applies in relation to the things that represent the price, the product or the profit of the crime. In the event that it is impossible to dispose of such direct confiscation, it must proceed to confiscation for equivalent, thus subjecting to compulsory confiscation assets falling within the availability of the offender and having a value alternatively corresponding to the price, product or profit of the crime committed with the aim of terrorism.

Article 280-*ter* Criminal Code [21] entitled "Acts of nuclear terrorism", the conduct crystallized by the law is indicated in a very detailed and thorough manner; it

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[I]. Anyone, outside the cases referred to in articles 270-bis and 270-quater.1, collects, delivers or makes available goods or money, in any way realized, destined to be wholly or partly used for the fulfilment of the conducted for the purpose of terrorism pursuant to article 270-sexies shall be punished with imprisonment from seven to fifteen years, regardless of the actual use of the funds for the commission of the aforementioned conduct.

[II]. Anyone who deposits or guards the goods or money indicated in the first paragraph is punished with imprisonment from five to ten years.

[20] Art. 270 *quinquies2* c.p.

[I]. Anyone who subtracts, destroys, disperses, suppresses or deteriorates goods or money, subjected to seizure to prevent the financing of conduct with terrorist purposes pursuant to Article 270-sexies, is punished with imprisonment from two to six years and with a fine from € 3,000 to € 15,000.

[21] Art. 280 *ter* c.p.

[I]. Any person with the purpose of terrorism pursuant to Article 270-sexies shall be punished with imprisonment of no less than fifteen years:

1) proxy to himself or to other radioactive material;

2) creates a nuclear device or is otherwise in possession of it.

[II]. Anyone with the purpose of terrorism pursuant to Article 270-sexies shall be punished with imprisonment of not less than twenty years:

is a classic case in point constructed according to the restricted conduct crime scheme.

Finally, other cases have undergone changes aimed at widening the application scope: this is the case of Art. 270-*quater* Criminal Code, which now provides for the punishment of the enlisted person, as well as of Art. 270-*quinquies* which also affects the person who trains himself, collecting information autonomously in order to carry out acts with a unique terrorist purpose.

Also, on the procedural front, the legislator favoured markedly preventive measures focusing in particular on a strategy of contrast based on the use of new technologies.

Just think of the possibility of authorizing preventive interception in order to acquire news for the prevention of the crimes of which in the Art. 51, par. 3-*quater* of the Italian Criminal Procedure Code, if committed through the use of information technology or telematics; the obligation on the part of connectivity providers, at the request of the judicial authority, to inhibit access to certain internet sites or to remove terrorist content from the network; the preparation of a black list of sites used for propaganda, recruitment or instigation purposes.

3.4. *Legislative decree n. 68 of 2018*

The 2018 novella introduces, with specific regard to the anti-terrorist legislation, two amendments to the Criminal Code.

Article 5, par. 1, a), inserts the art. 61-bis of the Criminal Code, in reality doing nothing more than codifying a provision already envisaged since 2006. This is the so-called aggravating circumstance of transnationality, which increases the crimes for the commission of which have contributed to organized criminal groups that engage in criminal activities in more than one state.

Article 5, par. 1, c), introduces the art. 270-*bis* of the Criminal Code, also a product of the codification of special criminal laws.

The aggravating circumstance in question provides for an increase of half of the foreseen punishment, if the sentence of life imprisonment is not already provided, for crimes committed for the purpose of terrorism, if the circumstance is not already a constitutive element of the crime.

The same as already commented by the Supreme Court of Appeal can be applied to any type of crime (*Cass. Pen., Sezione I, n. 10283/06*).

Finally, the law in question provides for a special cause of non-punishment based on the voluntary impediment of the event and on the qualified collaboration

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1) uses radioactive material or a nuclear device;

2) uses or damages a nuclear plant in such a way as to release or with the concrete danger that it releases radioactive material.

[III]. The penalties referred to in the first and second paragraphs are also applied when the conduct described therein relates to chemical or bacteriological materials or aggressions.

in the investigations and a decreasing one applicable to those who dissociate themselves from the other currents and activate because the criminal conduct supported by the terrorist or subversive purpose reaches further consequences.

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THE FIGHT AGAINST TERRORISM IN THE EU: JUDICIAL COOPERATION IN CRIMINAL MATTERS AND PROCEDURAL RIGHTS BULGARIAN REPORT *

Dilyana Giteva, Hristo Peshev

SOMMARIO: 1. Introduction. – 2. European arrest warrant and bulgarian legislation and case law. – 2.1. Background. – 3. European investigation order. – 3.1. Background. – 3.2. Scope of the EIOA. – 3.3. Subjects. – 3.3.1. Competent Authority. – 3.3.2. The role of defence. – 3.4. EIO issuing and transmission. – 3.5. EIO recognition and execution. – 3.6. Specific provisions for certain investigative measures. – 4. Procedural rights of suspects in criminal proceedings. – 4.1. Directive 2010/64/EU of the European Parliament and the Council on the right to interpretation and translation in criminal proceedings. – 4.2. Directive 2012/13/EU of the European Parliament and the Council on the right to information in criminal proceedings. – 4.3. Directive 2013/48/EU 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. – 4.4. Directive 2016/343 of the European Parliament and Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (Directive 2016/343). – 4.5. 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 persons in criminal proceedings (Directive (EU) 2016/800). – 4.6. 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. – References.

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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 and judicial cooperation in criminal matters in the Bulgarian legal order", realized by Dilyana Giteva, attorney-at-law, member of the Sofia City Bar, and Hristo Peshev, intern.

1. *Introduction*

The aim of this report is to provide practical insight into the fight against terrorism in the EU through the analysis of the application of the instruments of the European Arrest Warrant, the European Investigation Order and the procedural safeguards governing these proceedings, namely through the Law on Extradition and the European Arrest Warrant, the European Investigation Order Act, and several Directives of the European Union. The researchers have focused on systematic analysis of Bulgarian legislation governing these institutes with extensive references to recent case law of the national courts. Although none of the utilized case law has been directly related to terrorism due to lack of such instances in Bulgaria, the references paint a detailed picture into well accepted standards for administration of the aforementioned instruments.

2. *European arrest warrant and bulgarian legislation and case law*

2.1. *Background*

The European Arrest Warrant (hereinafter EAW) is a decision concerning surrender of persons on criminal matters, issued by a Member State of the European Union. This decision is taken based on a request of another Member State in light of the principle of mutual recognition within the EU. The EAW was introduced through Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, further amended by Council Framework Decision 2009/299/JHA of 26 February 2009 and its implementation has been binding for Bulgaria since its accession to the European Union on the 1st of January 2007. The following section is intended to present in detail the legal framework under which the instrument of the EAW is applied in Bulgaria and provide examples of its implementation through references to domestic case law.

The Framework Decision 2002/584/JHA was transposed by Bulgaria through the Law on Extradition and the European Arrest Warrant (hereinafter LEEAW) [1].

Bulgaria has made the following statements regarding the implementation of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States:

Statement under Article 6(3)

(a) Bulgaria designates the relevant prosecutor – for accused (in the pre-

[1] Promulgated SG No 46/3.6.2005 and effective from 4 July 2005.

trial phase of criminal proceedings) or sentenced persons – and the relevant court – for defendants (in the trial phase of criminal proceedings) – as the authorities competent to issue a European arrest warrant (issuing judicial authorities);

(b) Bulgaria designates the district courts as the judicial authorities competent to execute a European arrest warrant issued by a judicial authority of another Member State of the European Union (executing judicial authorities).

The execution of a European arrest warrant is entrusted to the district court on the territory of which the requested person is located. There are 28 district courts in Bulgaria. To identify the Bulgarian executing judicial authority competent in each individual case, the foreign issuing judicial authority or foreign central authority may consult the information concerning Bulgaria available in the European Arrest Warrant Atlas on the European Judicial Network website [2]. Requests for assistance may be made to Bulgaria's national contact points for the European Judicial Network.

Statement under Article 7

The central authority designated by Bulgaria to assist the judicial authorities is the Minister of Justice. It is competent to receive an European arrest warrant issued by a judicial authority in another Member State of the European Union and to forward it to the Bulgarian executing judicial authority if the issuing judicial authority does not succeed in transmitting the European arrest warrant directly to the Bulgarian executing judicial authority.

The central authority is competent to forward an European arrest warrant issued by a Bulgarian judicial authority if the latter is unable to transmit it directly to the foreign executing judicial authority or the executing Member State has designated the Ministry of Justice as the receiving authority.

Statement under Article 8(2)

A European arrest warrant transmitted for execution to the Bulgarian authorities must be translated into Bulgarian.

Statement under Article 25(2)

Bulgaria designates the Minister of Justice as the authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. The Minister will immediately send a request to the Supreme Cassation Prosecution Office, which will grant the transit

[2] www.ejn-crimjust.europa.eu.

of the requested person through the territory of the Republic of Bulgaria and inform the requesting Member State of its decision.

Competent Bodies

The European Arrest Warrant is defined as a judicial decision and therefore must be issued by a competent judicial authority. As it was pointed out above in its Statement under Article 6(3), Bulgaria has designated the prosecutors and the national courts as the issuing judicial bodies. This has been laid down in national law through Article 56 of the LEEAW. The law differentiates which authority shall be responsible depending on the type of crime committed and the role of the person, against whom the EAW has been issued: for an accused, but not yet brought before court or for a person with a conviction which has been entered into force the authority is the prosecutor; for a defendant in the course of court proceedings it is the relevant court.

Issue of European Arrest Warrant in the Republic of Bulgaria

The LEEAW provides a specific form for EAW to be filled. It also points out, that the EAW, issued by a Bulgarian body, shall be accompanied by a translation in the official or in one of the official languages of the executing Member State or in another official language of the institutions of the European Communities, which has been accepted by it through a declaration. An EAW, sent to a Bulgarian body, shall be accompanied by a translation in the Bulgarian language [3]. When the EAW received thorough Schengen Information System, EJN or Interpol is not accompanied by a translation in Bulgarian, the prosecutor shall notify immediately the issuing Member State to deliver it within 72 hours. If a translation of the EAW is not received within this time limit, the person under detention shall be released by the prosecutor [4].

Sending of European Arrest Warrant

After its issuance, the EAW is then sent to the executing body of the Member State in which the person is located, unless his location is unknown. In the case of the latter, the issuing authorities shall turn to the police authorities to utilize the Schengen Information System, in accordance with Art. 26 of 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, L 205/63 of 7 August 2009) in order to establish the location and arrest the person, being sought [5].

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[3] Art. 37, paragraph 2 and 3 of the LEEAW.

[4] Art. 42. Paragraph 5 of LEEAW.

[5] Art. 57 of the LEEAW.

Information about the issued EAW shall be provided, upon request to the executing State, including exercise of and information about the right to legal counsel, when the defendant has requested this right to be exercised in the issuing country [6]. In cases of delay of the execution of the issued in Bulgaria EAW, the Minister of Justice may notify the Council of the EU in order for an assessment procedure to be conducted [7].

Rights of the detained person

When a European Arrest Warrant is issued, the LEEAW provides important procedural safeguards for a fair hearing. In cases where the offence may be punishable by life imprisonment, the warrant shall only be executed if the issuing Member State provides the opportunity to revise the imposed measure at the request of the person or ex officio in not more than 20 years or if the law or practice of the requesting State provides possibility of clemency [8]. Such is the case of a Bulgarian citizen, who has had a warrant issued by the German authorities on accusations of attempted murder, accompanied by dangerous and serious bodily harm. The Sofia City Court and the Sofia Appellate Court have found that the warranties provided by the issuing German body together with the arrest warrant are sufficient in regard that this crime is punishable by life imprisonment [9]. Furthermore, in cases where the EAW has been issued against a permanent resident of the country or a Bulgarian citizen, subject to ongoing criminal proceedings, the warrant shall only be executed if the issuing Member State provides an advance guarantee that the person shall be returned to Bulgaria for execution of imposed detention or imprisonment measures in accordance to the Law on Recognition, Enforcement and Forwarding of Judicial Acts and its applicable provisions [10]. In those particular proceedings before the Sofia City and Appellate Courts these guarantees have been provided together with the issued arrest warrant and both instances have approved its execution. The case is peculiar as it contains information that the accused Bulgarian has recently been treated at a mental institution in relation to another court case from the same year. However, after subsequent examination during the proceedings both courts are satisfied that the person may participate effectively and give adequate and authentic statements regarding his charges before the German courts. In some cases concerning ongoing criminal proceedings, it is possible for the issuing body to re-

[6] Art. 58 of the LEEAW.

[7] Art. 59 of the LEEAW.

[8] Art. 41, para. 2 of the LEAAW.

[9] Decision № 653 on case 2855/19 of the Sofia City Court and Decision № 332 on appellate case 906/2019 of the Sofia Appellate Court.

[10] Art. 41, para. 3 and Art. 55, para. 4 of the LEEAW.

quest hearing of the person through temporary surrender. The LEEAW provides two courses of action for the Bulgarian courts: they may hear the person without surrender, in the presence of the issuing body or they may surrender the person temporarily under conditions, defined in an agreement between the issuing body and the District Court which shall guarantee the return of the person for delivery of the decision on the EAW [11].

After a person has been detained under an EAW he shall have the right to an interpreter, if required, and the right to a defender [12], and to be acquainted with the warrant and the grounds on which it was issued. The Report of the European Union Agency on Fundamental Rights: "Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant Proceedings" contains information about a defendant interviewed in Bulgaria, who describes the problem of delays in receiving legal assistance: "*No [I was not able to talk to the lawyer alone]. It was something like five minutes, even less, outside. We entered the courtroom immediately. After that, when we went out, while the interpreter went to the toilet, and as he [the lawyer] spoke a little Russian, I tried, but we could not understand each other what exactly was going on. Meanwhile the interpreter went out and just left*" (EAW defendant, Bulgaria) [13].

In addition, the detainee shall be informed of their right to legal counsel in the issuing Member State which, if requested shall immediately be forwarded to its competent body. The court shall then inform the detainee about the consequences of expressing consent for surrender or disavowal of his right to protection under the speciality rule for non-prosecution for previous offences [14]. The procedure for voluntary surrender shall not apply if there are pending criminal investigations or pending penalties for different offences before the domestic authorities [15]. In all other cases, consent for surrender may be withdrawn within three days, in which case the proceedings shall continue under the general rules [16]. In a case before the Sofia City Court, a Turkish-born Bulgarian citizen is wanted by the French authorities in relation to a verdict of fraud, committed by an organized criminal group through use of skimming devices placed on cash machines, with an imposed penalty of one year in prison [17]. The accused, after being informed of the consequences, has expressed his written consent for surrender before the court, however without disavowal of his rights under the speciality rule. The court has

[11] Art. 50 of the LEEAW.

[12] Art. 43 of the LEEAW.

[13] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf page 66.

[14] Article 27 (2) of the EAW FWD and Article 61 of the LEEAW.

[15] Article 45, para. 1 of the LEEAW.

[16] Article 45, para. 2 of the LEEAW.

[17] Decision № 689 on case 2891/19 of the Sofia City Court.

approved execution of the arrest warrant with prior consideration to other important warranties in connection to his absence of the proceedings. Finally, upon request by the detainee, there is a possibility for the District Court to alter the initial detention measure into a different one, which has to guarantee their participation in the proceedings [18].

Court Procedure

When the person has been detained under an EAW, the District Court shall start the proceedings by appointing a court session with a panel of three judges and a prosecutor within 7 days of the detention. The judges may request additional information by the issuing Member State and provide terms for receipt. The whole proceedings, including delivery of an appeal decision shall not exceed 60 days, considered from the first day of detention [19]. In exceptional circumstances, this term may be increased by 30 days, however the relevant court shall have to inform the issuing body about the reasons for delay. In case this 90-day period is exceeded, the courts shall have to communicate the reasons for delay to Eurojust [20]. Exceeding this time limit due to unreasonable delay by the requesting Member State has been grounds for refusal to execute the EAW. [21] Starting the proceedings, the court shall first ensure that the rights of the detainee have all been adhered to and then proceed to hear the prosecution, the detainee and their defender. The court shall then proceed to examine the grounds for execution of the EAW.

According to Art. 36 of the LEEAW the EAW can be issued for persons who have committed offences, which carry, as per the legislation of the requesting country, a maximum term of not less than one year imprisonment or a measure requiring detention, or another, more severe penalty, or if the imposed penalty imprisonment or the requiring detention measure is not shorter than 4 months. The surrender on the base of European Arrest Warrant shall be carried out, if the offence which the warrant has been issued for, constitutes an offence as per the Bulgarian legislation as well. For example, due to lack of analogue between Bulgarian and Hungarian criminal law, the Haskovo District Court refused to surrender a Bulgarian citizen for causing damage to a railroad barrier, which per Hungarian legislation is punishable by up to 1 year in prison [22]. The execution of an European Arrest Warrant related to taxes, custom fees or currency exchange cannot be refused on the ground that the Bulgarian legislation does not stipulate the

[18] Art. 43, para. 7 of the LEEAW.

[19] Art. 48, para. 3 of the LEEAW.

[20] Art. 49, paras. 1 and 2 of the LEEAW.

[21] Decision № 59 on case 133/2014 of the Sofia Appellate Court.

[22] Decision № 92 on case 386/2019 of the Haskovo District Court.

same type of taxes or fees or does not settle the taxes, fees, custom fees or the currency exchange in the same way as the legislation of the issuing Member State does. Double criminality shall not be required for the listed 32 offences, one of which is terrorism, if in the issuing State they carry maximum term of not less than three years of imprisonment or with another more severe penalty, or for them a measure requiring detention for a maximum term of not less than of 3 years is provided.

Grounds for Refusal of Execution

Art. 39 of the LEEAW lists the cases where the District court is obligated to refuse to execute an EAW. These are the cases when the crime, for which the warrant has been issued, is amnestied in the Republic of Bulgaria and is under its jurisdiction for prosecution. Another case is when the District court has been notified that the requested person has been convicted by a final court judgment by a Bulgarian a third Member State court and the person is currently serving or has served the sentence, or the sentence cannot be executed as per the legislation of the country where the person has been sentenced for the same offence as that in the warrant. The third case is when the required person is underage as per the Bulgarian legislation and cannot be held criminally responsible.

Art. 40 of the LEEAW lists 7 grounds on which execution of EAW may be refused: 1) the person was accused or summoned before the Bulgarian court for the same crime, before the warrant has been received; 2) the penal proceedings on the crime, for which the EAW was issued, have been terminated in the Republic of Bulgaria prior to its reception; 3) the limitation period for the prosecution or for execution of the penalty has elapsed as per the Bulgarian legislation and the offence is under the jurisdiction of the Bulgarian court; 4) the court has been notified that the required person has served or is serving a penalty in a state, not a member of the European Union, upon an enacted sentence for the same offence for which the warrant has been issued for, or the sentence may not be executed as per the legislation, where the person has been sentenced; 5) the required person lives in or is a permanent resident of Bulgaria, or is a Bulgarian citizen and a Bulgarian court admits for execution an imprisonment sentence, imposed by the courts of the issuing Member State, in which case Art. 29, Para. 2 of the Act on Recognition, Enforcement and Forwarding of Judicial Acts Imposing the Penalty Of Imprisonment or of Measures Involving Imprisonment shall apply. In those cases regard is also had to Article 8 of the ECHR and Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules for imprisonment closest to their homes and families [23]; 6) the offence has been committed, as a whole or partially, on the territory of the Repub-

[23] For example Decision № 571 on court case 2492/2019 of Sofia City Court.

lic of Bulgaria, or has been committed outside territory of the issuing Member State and the Bulgarian legislation does not admit prosecution for such offences outside the territory of the Republic of Bulgaria; 7) the EAW is issued for the purposes of execution of a custodial sentence or detention order rendered at a trial where the person has not appeared in person, unless the EAW explicitly states that one of the following conditions is met: 1. the person was summoned in person and thus informed, in due time, of the fixed date and place of the trial, or was otherwise officially informed thereof in such a manner that it was unambiguously established that he/she was aware of the scheduled trial, and was informed that a decision may be rendered if he/she does not appear; 2. having been informed of the scheduled trial in due time, the person gave mandate to a defence counsel, or the court appointed one for the person, to defend him/her during the trial, and the person was indeed so defended; 3. after the person was delivered the decision in person and was expressly informed about the right to a retrial or appeal, in which he/she has the right to participate and which allows the merits of the case, including new evidence, to be re-examined, and which may lead to the original act being revoked, he/she expressly stated that he/she did not contest the decision, or he/she did not request a retrial or appeal within the applicable timeframe; 4. the person was not delivered the decision in person, but will be delivered without delay after the surrender, and the person will be explicitly informed of the right to a retrial or appeal, in which he/she is entitled to participate and which allows the merits of the case, including new evidence, to be re-examined, and which may lead to the original act being revoked, and of the time frame within which he/she may request a retrial or appeal. In a previously mentioned court case before the Sofia City Court [24], the judges were satisfied with the French authorities' advance guarantees that a verdict delivered in absentia shall be presented to the accused immediately at the time of surrender after which he will have 10 days to appeal on grounds of new facts and evidence. In addition, the person shall also have the opportunity to challenge the detention and the imprisonment measures, which if successful, shall lead to reinstitution of the criminal proceedings through annulment of the verdict on procedural grounds.

Execution of the EAW may also be subject to procedural conditions, such as is the provision of Article 52 of the LEEAW. Execution may be delayed if there is an ongoing criminal investigation or an effective custodial sentence against the person in Bulgaria until the latter have been processed. The Law provides an opportunity for conditional execution, albeit these restrictions, in case a written agreement is made between the Bulgarian court and the issuing body of the other Member State. Execution may also be delayed in cases of immunity – the court shall make an immediate request to the competent national or international body

[24] Decision № 689 on case 2891/19 of the Sofia City Court.

for deprivation of that privilege and execution shall begin from the date approval is received [25].

In some cases it might be possible that more than one EAW is forwarded by several Member States for a single person. In those cases the law requires the courts to take into account all of the circumstances of the case, the severity and the place of the offences, the date of submission of the warrants and the purposes for which they have been issued [26]. In its handbook on the EAW from 2017, the European Commission, in light of Article 16 of the EAW FWD, recommends that before a decision is made, all involved bodies should communicate on the issue through the utilization of Eurojust and reach an agreement, which however shall not bind the court. Case law on these matters is scarce – in one case the Sofia City Court had to decide on two simultaneous arrest warrants issued by the French and Italian authorities regarding criminal charges on use of skimming devices on cash machines by a Bulgarian citizen in both countries. The Bulgarian court, after taking all circumstances into consideration ruled that due to the accusations of more extensive criminal activity and higher financial damage caused in Italy, the citizen shall be surrendered to the Italian authorities [27]. Another case of competition of warrants between the Polish and Czech authorities was resolved due to lack of provided guarantees by the Polish authorities for return of the Bulgarian citizen after finalization of the proceedings [28]. Additionally, if a request for extradition is received from the International Criminal Court, it shall have priority over the EAW [29], however in cases of competition between an EAW and an extradition request from a State outside of the EU, the Court has to take into account all relevant circumstances. In a series of decisions, the Plovdiv District and Appellate courts were faced with a case concerning a Turkish national, who was wanted by the Romanian authorities on charges of drug trafficking. The decision for surrender to the Romanian authorities based on the EAW was challenged by the prosecutor due to a received extradition request regarding a sentence entered into force for the same type of crimes in Turkey. Although the outcome of the extradition proceedings is unknown, the Plovdiv Appellate Court imposed a measure of 40 days detention in custody in relation to the extradition proceedings having taken into consideration the expiring limitation periods for the execution of the EAW [30].

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[25] Art. 47 of the LEEAW.

[26] Art. 46, para. 1 of the LEEAW.

[27] Decision № 818 on court case 2693/2011 of the Sofia City Court.

[28] Decision № 221 on court case 468/2017 of the Sofia City Court.

[29] Art. 46, para. 4 of the LEEAW and Art. 16, para. 4 of the EAW FWD.

[30] Decision № 72 on court case 133/2017 of the Plovdiv Appellate Court.

Decision on execution of the European Arrest Warrant and implementation

After taking the law and all the facts of the case into consideration, the District Court delivers an immediate decision for surrender or refusal to execute the EAW. If the warrant is approved, the person is then detained until the transfer. If there are pending criminal proceedings, detention shall be counted from the date of their conclusion or serving of the imposed penalty [31]. Then the court examines and pronounces on the legality of the preliminary detention measure. The decision may be appealed before the relevant Appellate Court within 5 days of its delivery. The Appellate Court shall then have 5 days to consider the case and schedule a date for an open court session with the participation of all parties on which a final decision shall be delivered. The District Court notifies the issuing body about the decisions taken in the proceedings and the actions which shall be undertaken regarding the European Arrest Warrant. Decisions which have entered into force are sent to the Supreme Cassation Prosecution's office and the Ministry of Justice for implementation [32].

When a decision for surrender has entered into force, the executing authorities are bound to execute the warrant within 10 days. If this period is exceeded, the Supreme Prosecutor of Cassation's office, the National Central Bureau of Interpol and the issuing body shall agree on another date which shall have to be executed in a period of no longer than 10 days. In exceptional cases, where the District Court receives credible information for danger for the life and health of the person it may suspend the surrender temporarily, until the danger has passed, after which a new 10 day period shall be counted. If the person is not transferred within these 10 day periods, he shall have to be released [33]. Implementation of the decision for approval of the EAW shall be carried out with the approval of the Minister of Justice and the Supreme Prosecution of Cassation with at least information about the identity and the citizenship of the person, the issued EAW, the nature and legal classification of the offence and the circumstances upon which the offence has been committed, including the date and place of commitment [34]. The issuing body must confirm the conditions for physical surrender in writing. In cases where an EAW has been approved against a person, who has been extradited to Bulgaria from a third country, which is not a member of the European Union, that person may only be surrendered with the approval of the relevant body of that third country [35].

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[31] Art. 44, para. 7 of the LEEAW.

[32] Art. 53 of the LEEAW.

[33] Art. 54 of the LEEAW.

[34] Art. 55, para. 2 of the LEEAW.

[35] Art. 51 of the LEEAW.

3. *European investigation order*

3.1. *Background*

In April 2010 seven EU Member States, one of which was Bulgaria [36], presented a proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters (hereafter "the EIO"). The objective of the proposal was to end the fragmented regime on obtaining evidence between the Member States by replacing the existing legal framework, including the Framework Decision 2008/978/JHA on the European Evidence Warrant, with a single legal instrument [37]. The other objectives of the proposal, except the creation of a single comprehensive legal framework, were to speed up the gathering and transfer of evidence and to ensure a high level of protection of fundamental rights.

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [38] (hereinafter DEIO) was transposed in Bulgarian legislation through the European Investigation Order Act [39] (hereinafter EIOA). The EIOA follows the content of the Directive 2014/41/EU.

3.2. *Scope of the EIOA*

The EIOA regulates the terms and procedure for the recognition and execution of an EIO in criminal matters issued in another Member State and the issuing of a European Investigation Order in criminal matters and the transmission of the said order for recognition and execution in another Member State.

According to Art. 2 of EIOA, the European investigation order is an act, issued by a competent body of a Member State, by which a request is sent to a competent body of another Member State for collection of evidence, including such, with which the latter Member State already has, or for executing an action on the investigation and other procedure actions.

3.3. *Subjects*

3.3.1. *Competent Authority*

– Issuing authority: Art. 5 of EIOA points out who can issue an EIO in Bulgaria.

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[36] The others were Austria, Belgium, Estonia, Slovenia, Spain and Sweden.

[37] See Interinstitutional File: 2010/0817 (COD) https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016868%202010%20INIT.

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

[39] Promulgated SG 16/20 Feb 2018.

It depends on the phase of the process. In pre-trial proceedings the issuing authority is the respective prosecutor, while in the trial proceedings it will be the respective court;

– Validating authority: According to the Additional Provisions to the EIOA, para. 1, point 4b the EIO shall be validated, after examination of its compliance with the conditions for issuing an EIO, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO;
– Executing authority: In the pretrial procedure this is either a prosecutor from the relevant District or Military-district prosecution, in whose region the execution of the relevant action on investigation or other procedural actions, or transfer of evidences, which are at disposal, are required, or a prosecutor from the specialized prosecution. In the trial proceedings – the relevant District or Military Court, in whose jurisdiction is the execution of the relevant judicial investigation action or transfer of evidences, which are already at disposal or the specialized penal court. Where an EIO requests the carrying out of an investigative measure or other procedural measures which extend to multiple judicial districts, the authority competent to recognise any such order shall be the authority within whose judicial district the most urgent measure is to be carried out.
– Receiving authority: Where an EIO has been transmitted to an authority which has no competence to recognise the said order, that authority shall, ex officio, transmit the order to the relevant competent authority and shall inform the issuing authority by any means capable of establishing in writing the authenticity of the receipt and the content of the order.

3.3.2. *The role of defence*

According to Art. 5, para. 2 of EIOA the issuance of EIO may be requested also by the accused, the defendant, or by their lawyer "*for the implementation of the necessary defence in the criminal proceeding in compliance with the Penal-procedure Code*".

3.4. *EIO issuing and transmission*

Art. 6 of the EIOA requires the competent body, before issuing the EOI, to examine whether the issuance of an European investigation order is necessary and proportionate to the purposes of the penal proceeding, taking into account the rights of the accused or defendant and whether the investigation and other procedural actions, for which a European investigation order is issued, may be executed under the same conditions, according to the Bulgarian legislation in a similar case.

As to the language that can be used, Art. 6, para. 3 of the EIOA requires the EIO to be accompanied by translation in the official, or one of the official languages of the executing state or in another official language of the EU institutions, which it has indicated in a declaration, deposited by it to the General Secretariat of the EU Council.

Art. 7 of EIOA provides, that the EIO shall be sent to the executing body in a way that allows a written record and certification of authenticity, where the whole following official communication shall be realized through direct contacts between the competent issuing body and the executing body.

The issuing body may use all possible or appropriate means for transfer of the EIO through the protected telecommunication system of the European judicial network, Eurojust or through other channels, used by the judicial or law enforcement bodies.

Where the issuing body has no information about the executing body, it shall send an inquiry to the executing state, including through the contact units of the European judicial network.

As to the types of proceedings for which the EIO can be issued, according to Art. 2, para 2 of EIOA these are criminal proceedings, administrative proceedings, proceedings brought by judicial authorities in connection with acts which are punishable under the law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in criminal matters and acts in connection with proceedings, which relate to criminal offences or infringements, related to the above listed proceedings for which a legal person may be held liable or punished in the issuing State.

3.5. *EIO recognition and execution*

Art. 10, para 1 of the EIOA provides that the EIO shall be recognized on the territory of the Republic of Bulgaria if it refers to acts which are crimes under the Bulgarian legislation as well, where notwithstanding of the differences of their compositions, their major indicators are the same.

EIOA does not require double criminality in 32 cases, one of which is terrorism. Where the EIO concerns crime related to taxes or charges, customs duties or currency exchange, the competent body shall not refuse recognition and execution under the ground that the Bulgarian legislation does not provide the same type of tax or charge and that it does not contain provisions for the same type of taxes, charges and customs duties or currency exchange as the law of the issuing state.

Art. 13 of the EIOA obliges the competent bodies on the execution of the EIO to undertake timely measures for its execution and to observe the formalities and procedures, indicated by the issuing body, unless these formalities and procedures contradict the Bulgarian legislation. The Bulgarian competent body and the issu-

ing body may consult in view to facilitate the efficient execution of the EIO.

Art. 14 of the EIOA describes the terms for execution of the EIO. After receiving the EIO by post, e-mail, fax or any other way, allowing written certification of the authenticity of receiving and its contents, the competent body shall start a recognition proceeding. Within 30 days from receiving the EIO, the competent body shall issue an act on recognition and execution of EIO. This term may be extended with up to 30 days, stating the reasons for the delay and following consultations between the executing body and the issuing body.

Art. 14, para 4 of EIOA obliges the executing body to carry out the investigative measure not later than 90 days following the taking of the decision on recognition of the EIO. Where this term is impossible to be observed, the executing body shall immediately notify the issuing body about the reasons for the delay and, after conducting consultations, the necessary additional time shall be determined for execution of the EIO.

Where the issuing body has indicated in the EIO that due to procedural deadlines, the seriousness of the offence or other particularly urgent circumstances, a shorter deadline is necessary, or if the issuing body has indicated in the EIO that the investigative measure must be carried out on a specific date, the executing authority shall comply with this requirement to the fullest extent possible. Where it is not possible to observe the term or the concrete date the executing body shall notify the issuing body about the reasons, and after conducting consultations, the needed additional time shall be determined for execution of EIO.

Art. 15 of the EIOA regulates the selection of investigative measures. It provides that the executive body may choose investigative measures, other than those indicated in the EIO, where the actions indicated in the European investigation order have not been provided by the Bulgarian legislation or the actions indicated in the European investigation order cannot be used in a similar case under the Bulgarian legislation and with the selected action, the same result will be achieved, but with means, which in a smaller degree violate the inviolability and legitimate interests and rights of the person in comparison with the measures, indicated in the EIO. In this case the executing body shall immediately notify the issuing body, which may decide to withdraw or supplement the European investigation order.

The grounds for non-recognition and non-execution of EIO are listed in Art. 16 of the EIOA. They include: immunity or privilege under the Bulgarian legislation, which make the execution impossible; the execution of EIO would harm the fundamental national security interests or would endanger a source of information, or would require using of classified information, related to specific intelligence activities; the execution of the EIO would be in contradiction with the principle *ne bis in idem*; the EIO has been issued in relation to proceedings, initiated by administrative bodies or by judicial bodies and the investigative measure would not be authorised under the law of the executing State in a similar domestic

case; when there are substantial grounds to be considered, that execution of the measure would be incompatible with the observation of the rights and freedoms, guaranteed by the European Convention on Human Rights and the EU Charter on Fundamental Rights; when there is a decision on legal remedies, which invalidates the EIO; the conduct for which the EIO has been issued does not constitute an offence under the Bulgarian Legislation, unless it concerns an some of 32 cases, to which the principal of double criminality does not apply; when the use of the investigative measure indicated in the EIO is restricted under the Bulgarian law to a certain category of crimes or to offences punishable by a certain threshold, which does not include the offence covered by the EI

According to Art. 17 of EIOA the executing body shall transfer to the issuing state without any delay the evidences collected or already at disposal as a result of the execution of the EIO. The transfer of evidences may be suspended by ordering a decision in relation to used legal remedies for protection, unless sufficient reasons are indicated in the EIO that an immediate transfer of the said evidence is essential for the proper conduct of the investigation or for the preservation of the rights of the person concerned. Notwithstanding the indication of such reasons, the transfer of evidence shall be suspended if it would cause serious and irreversible damage to the person concerned.

Art. 18 of the EIOA provides that legal remedies and time limits available in similar cases under Bulgarian legislation shall apply to defence of the persons concerned when carrying out an investigative measure and other procedural measures indicated in the EIO. The substantive reasons for issuing an EIO may be appealed only in the issuing State, without prejudice to the guarantees of fundamental rights provided for in Bulgarian legislation. The issuing authority and the executing authority shall take measures to ensure that information is provided about the possibilities for seeking the legal remedies when these become applicable and shall ensure the effective exercise of the said remedies in due time. The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of a EIO. An appeal of an investigative measure and other procedural measures shall not suspend the execution of the said measures, unless this is provided for under Bulgarian legislation in similar cases.

The confidentiality and protection of personal data issues are regulated respectively in Art. 23 and Art. 24 of the EIOA. The competent authorities are obliged to take the necessary measures under Bulgarian legislation to ensure that due account is taken of the confidentiality of the investigation. The authorities shall take the necessary measures to guarantee the confidentiality of the facts and the substance of the EIO, except to the extent necessary to execute the investigative measure and other procedural measures.

The costs related to the execution of a European Investigative Order on the territory of the country shall be borne by the Bulgarian State. Where the costs prove

to be excessive, the executing authority shall inform the issuing authority of the detailed specifications of the said costs and may consult with the issuing authority on how the said costs could be shared or the EIO modified. Where no agreement can be reached, the issuing authority may withdraw the EIO in whole or in part or bear the costs deemed excessive.

3.6. *Specific provisions for certain investigative measures*

Chapter Four of the EIOA regulates the specific rules for carrying out certain investigative measures and other procedural measures. It includes rules on temporary transfer of persons held in custody for the purpose of carrying out investigative measures and other procedural measures (Art. 26 of the EIOA); rules on transit of persons held in custody for temporary transfer for the purpose of carrying out investigative measure and other procedural measures (Art. 27 of the EIOA) – the Lovetch District Court has made a ruling on one case, denying transfer of the person due to objective impossibility to observe the time limit[40]; rules on hearing by videoconference or other audio-visual transmission (Art. 28 of the EIOA), which court practice shows is the most utilized purpose of the EIO; hearing by telephone conference (Art. 29 of the EIOA); information on bank accounts and other financial accounts (Art. 30 of the EIOA); information on banking and other financial operations (Art. 31 of the EIOA); investigative measures and other procedural measures implying gathering of evidence in real time, continuously and over certain period of time (Art. 32 of the EIOA); investigation by undercover officer (Art. 33 of the EIOA); interception of electronic communications with technical assistance of another member state (Art. 34 of the EIOA) and notification of member state where subject of interception is located from which no technical assistance is needed (Art. 35 of the EIOA).

4. *Procedural rights of suspects in criminal proceedings*

4.1. *Directive 2010/64/EU of the European Parliament and the Council on the right to interpretation and translation in criminal proceedings*

According the Directive 2010/64/EU the right to interpretation and translation in criminal proceedings has been guaranteed since the moment the competent authorities of a Member State inform about a suspect or an accused of having committed an offence and lasts until the end of the proceedings.

The Bulgarian Penal Procedure Code (PPC) was amended to remove all references to ‘suspects’. Presently such procedural figure in the Bulgarian legislation

[40] Decision No. 83 on court case 485/2018 of the Lovetch District Court.

does not exist. This limits the rights, guaranteed by the Directives, solely to 'defendants', who have been notified of their status as accused persons. These national specifics concern the transposition of the Directive 2010/64/EU, which applies only to 'defendants'. There are cases, where the people, who are officially summoned and interrogated as witnesses, but are known to be the only or main suspects cannot enjoy the protection of the Directives.

According to art. 21 of the PPC, the penal procedure shall be conducted in the Bulgarian language and the persons who do not speak Bulgarian language may use either their native or another language. In such case, an interpreter shall be appointed.

Art. 55, para. 4 of the PPC provides that a defendant who does not speak Bulgarian, shall have the right to interpretation and translation in criminal proceedings in a language he/she understands. The defendant shall be provided with a written translation of the decree for bringing the accusations, of the court rulings for a constraint measure, of the act of indictment, of the judgment delivered, of the decision of the court of appeal and of the decision of the cassation instance. A defendant shall be entitled to refuse written translation where he/she has a defence counsel and his/her procedural rights are not being violated. In regard to the right to translation of the indictment, the Supreme Court of Cassation has hold that "*breaching the obligation to serve the defendant a written translation of the indictment in a language he understands, the Court of First Instance also infringed Directive 2012/13/EU ... Directive 2012/13/EU requires Member States to guarantee at least the following rights of suspects and accused persons: (a) the right of access to a lawyer; (b) any right to legal advice free of charge and the conditions for obtaining it; (c) the right to be informed of the prosecution in accordance with Article 6; (d) the right to interpretation and translation; e) the right to remain silent*" [41]. In another decision the Supreme Court of Cassations points out that the "*wording of Article 55, paragraph 3 of the PPC introduces European requirements for the types of documents which are always considered essential to guarantee a fair trial - any decision on imprisonment, every indictment or indictment raised, and every court decision. The court and the pre-trial authorities are empowered, by their own motion or at the request of the defendant or his defence counsel, to provide translation and other documents in the case when they are essential for the exercise of the rights of the defence, but they cannot depart from their duty to explicitly hand over the documents always considered essential in order to ensure due process*" [42]. The Supreme Court of Cassation also reiterates that "*the service of a written translation of the relevant act of the court does not*

[41] Decision No. 229 of 25.11.2016 on the case No. 821/2016 of the Supreme Court of Cassation, 2nd chamber.

[42] . Decision No. 229 of 25.11.2016 on the case No. 821/2016 of the Supreme Court of Cassation, 2nd chamber.

relieve the latter of the obligation to provide an interpretation to the defendant who is not fluent in Bulgarian, in all actions in which he participates, including in the separate mandatory stage of pronouncement of the sentence" [43].

Art. 4 of Directive 2010/64/EU requires the Member States to meet the costs of interpretation and translation resulting from the application of art. 2 and 3 of the Directive, irrespective of the outcome of the proceedings. At the same time art. 189 of the PPC provides that the court shall decide on the issue of expenses. The expenses for an interpreter in the pre-trial procedure shall be on the account of the respective body, and the expenses for an interpreter in the court procedure shall be on the account of the respective court. Where the defendant has been found guilty, the court shall verdict him/her to pay the expenses on the case, including the counsel's fee and the other expenses for the ex-officio appointed counsel, as well as the expenses incurred by the private prosecutor and the indicter.

PPC has a separate Chapter thirty "a" which is called Special Rules for Hearing Cases for Crimes Committed by Persons Who Do Not Speak and Understand Bulgarian Language. Providing Interpretation and Translation in Penal Proceedings. Art. 395b of PPC concerns the testing of the defendant's knowledge of the Bulgarian language. Rulings of the investigating authority or of the court establishing that the defendant has a command of Bulgarian language shall be subject to appeal.

According to art. 395d of the PPC the court and the pre-trial authorities may refuse to provide interpretation or translation of the documents under in those cases where these documents are not essential to the exercise of the right of defence or may refuse written translation of parts thereof when they are irrelevant to the right of defence of the accused person. The refusal shall be a subject to appeal.

Very important provisions are those concerning the objection of the accuracy of Translation. Art. 395e of the PPC gives the defendant the right to object to the accuracy of translation in any phase of the case. Where the competent body establishes that the objection is justified, it shall remove the translator and appoint a new one or re-order translation.

4.2. *Directive 2012/13/EU of the European Parliament and the Council on the right to information in criminal proceedings*

The right to information in criminal proceedings is both a procedural right itself and a prerequisite for the effective exercise of the rest of the procedural rights acknowledged to suspects.

Art. 15 of the PPC enshrines the principle that the defendant shall be entitled to defence and shall be provided with all procedural remedies necessary for the

[43] Decision No. 405 of November 5, 2015, No. 1025/2015 of the Supreme Court of Cassation, 1st chamber.

defence of his/her rights and legitimate interests. The provision obliges the court, the prosecutor and the investigating bodies to make clear to the defendants their procedural rights and shall provide them with the possibility to exercise those rights.

The rights of the defendant stipulated in art. 5 of PPC included the right: to learn for which crime he/she is involved in this capacity and on the base of what evidence; to give or to refuse to give explanations about the accusation; to become acquainted with the case, including with the information obtained by usage of special intelligence devices and to make the necessary extracts; to submit evidence; to participate in the penal procedure; to make requests, notes and objections; to make statements last; to appeal the acts which harm his/her rights and legitimate interests; to have a defender. The defendant shall have the right of participation of his/her defender in the performance of all the actions of investigation and other procedural actions with his/her participation, except if he/she abandons this right explicitly. The accused person shall have the right to freely contact his defence counsel, meet him privately, receive advice and other legal assistance, including before and during the interrogation and any other procedural action involving the accused.

Instruction No. 8121h-78 of January 24, 2015, on the order for the detention, the equipment of the detention facilities and the order in the Ministry of Interior contains a template of a Letter of Rights (declaration) containing a list of rights, to be signed by the arrested person in two copies.

4.3. *Directive 2013/48/EU 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*

The Bulgarian Legal Aid Act (LAA) regulates the legal assistance in criminal, civil and administrative cases before all courts. According to LAA the legal assistance shall be provided by lawyers and funded by the state.

The purpose of the law is to guarantee equal access to justice by ensuring and providing effective legal assistance, funded by the state budget.

Article 4 of LAA regulates the legal aid in criminal proceedings and ensures that the accused persons who lack enough resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require. The right to have a defender is one of the rights of the accused/defendant, stipulated in article 55 of PPC. The provision contains several cases where the participation of a defender in criminal proceedings is obligatory, namely when the defendant is a minor; or suffers physical or mental disabilities, which establish obstacle to defend him/herself; or when the case is for a crime, for which a punishment of imprisonment not less than 10 years or another, more severe punishment is provided;

or the defendant does not speak the Bulgarian language; or the interests of the defendants are contradictory and one of them has a defender; or where a request for detention in pre-trail procedure is made or the defendant has been arrested; or when the case shall be heard in the absence of the defendant; or the defendant is not able to pay attorney-fee, wants to have a defender and the interests of the jurisdiction demand so.

Bulgarian authorities apply both a means test and a merit test to determine whether legal aid is to be granted. According to art. 23 of Bulgarian Legal Aid Act in criminal matters, the determination that the accused or the defendant have no funds to pay an attorney's fee shall be made on the basis of the property status of the person ascertained ex officio in the specific matter and of the following circumstances: 1. the income of the person or of their family; 2. the property status, certified by affidavit; 3. the family status; 4. the health status; 5. employment status; 6. the age; 7. other circumstances.

Because of the absence of a legal definition in the national legislation, Bulgarian courts in their practice have accepted the following criteria established by the European Court of Human Rights: 1. the seriousness of the criminal offence; 2. the complexity of the case; 3. the severity of the sanction. The same criteria are adopted in Directive 2016/1919/ EU.

According to art. 43 of the LEEAW in the procedure, where the preliminary detention of the requested person is decided, the court shall appoint a defence lawyer and an interpreter if the requested person does not speak Bulgarian. In the trial phase, when the actual surrender is decided, the court again shall appoint a defence lawyer and an interpreter if the requested person does not speak Bulgarian (art. 44 of the LEEAW).

The determination that the accused or the defendant needs legal aid shall be made by the authority directing the procedural actions (Article 23, para 4 of LAA). This is either an investigating body /investigating police officer, investigating magistrate/, or prosecutor, or judge. In all cases the competent authority is bound and obliged to react whenever the grounds for granting of legal aid are present.

The Report of the European Union Agency on Fundamental Rights: "Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant Proceedings" points out that in Bulgaria "*practitioners raise concerns over the practice of 'informal intelligence talks' held with persons who have not been called in as witnesses or have not yet been formally charged, so the obligation to inform persons about this right has not taken effect. Two of the lawyers interviewed mention that, in these cases, persons do not receive any information about their right to a lawyer. The information provided in these informal talks is later used in the proceedings through the 'by proxy' testimony of the police officers who conducted the talks*" [44].

[44] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf page 41.

The report also says that "*two members of the monitoring bodies from Bulgaria state that they have witnessed either this practice of delaying the provision of this information or cases in which defendants were even advised not to call a lawyer*" [45].

4.4. *Directive 2016/343 of the European Parliament and Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (Directive 2016/343)*

Art. 31, para 3 of the Constitution of the Republic of Bulgarian [46], enshrines one of the fundamental legal principals, which is the presumption of innocence. The provision states that '*a defendant shall be considered innocent until proven otherwise by a final verdict*'. Another provision in this regard is Art. 16 of the Penal Procedure Code [47], according to which '*The defendant shall be considered innocent until the conclusion of the penal proceedings with an effective verdict establishing the contrary*'. These provisions relate to Art. 3 of the Directive 2016/343 according to which, the '*Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law*'.

The provision of Art. 4 of the Directive 2016/343, concerning the public references to guilt is not reflected in the Bulgarian national legislation. There are no measures undertaken by the state to ensure that, '*for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty*'. There is no legal remedies and respectively national case law on the effective domestic remedies in case of a breach of the obligation not to refer to accused persons as being guilty. Making public statements by public authorities referring to the accused person as being guilty are common practice in Bulgaria [48].

In terms of the right of the accused people to remain silent and not to incriminate themselves – we can find public statements by public authorities in the Bulgarian media, where the exercise of this right is pointed out as an evidence that the accused has committed a criminal offence [49].

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[45] *Ibid* page 42.

[46] Promulgated SG 56/13 Jul 1991.

[47] Promulgated SG. 83/18 Oct 2005.

[48] See the article 'The Presumption of Innocence and its Modern Interpretation' http://defakto.bg/2019/08/06.

[49] *Ibid.*

There are recent cases where the accused persons are presented as being guilty in public, using measures of physical restraint, namely using of leg irons during a public arrest of two ladies [50].

As to the right under Directive 2016/343 the accused to be present at the trial, the Bulgarian legislation is almost unchanged following the adoption of the Directive. The amendments in the PPC from 2017 provided so-called 'preliminary hearing'. Although this provision was not intended to specifically address the right of the accused to participate at the trial, it has some impact on the exercise of this right, because before the conduct of the preliminary hearing, the court sends the indictment to the accused, together with information of the date of the preliminary hearing, information about the procedural rights and information on the consequences of non-appearance before the court.

According to Art 269 of the PPC in cases of indictment in a grave crime, the defendant's attendance in the Court session shall be obligatory. The Court may also order the defendant to appear in cases in which his or her attendance is not obligatory, where it is necessary for the establishing of the objective truth. Where the absence is not an obstacle for the establishing of the objective truth, the case may be tried in the absence of the defendant, if: 1) he or she has not been found at the address pointed by him/her or has changed the latter, without notifying the respective body of this; 2) his/her residence in the country is not known and after a diligent searching he/she has not been found; 3) he/she is validly summoned, fails to provide any justified reasons for the failure to appear if he/she received a copy of the indictment, was notified about the preliminary hearing and about the right to have a lawyer, as well as that the case may be heard and decided in his/her absence; 4) is outside the Republic of Bulgaria, and: a) his/her residence is not known; b) summoning for other reasons is impossible; c) is regularly summoned and has not stated good reasons for his/her absence.

Art. 423 of the PPC gives the individual, who was convicted in absentia a right within six-month from learning about the sentence or from the actual transfer from another state to the Republic of Bulgaria to request a reopening of the criminal case, because he/she has not participated in the criminal proceedings. The request shall be granted, unless the convicted person has fled or absconded after being charged with a crime in the pre-trial proceedings, which became a reason the preliminary hearing proceeding not to be fulfilled or, after being fulfilled, has not appeared at a court hearing without good reason.

The request does not suspend the execution of the sentence, unless the court decides otherwise.

When the request is made by a convicted person sent by another state following extradition, with providing of guarantees for reopening the case, the court re-

[50] *Ibid.*

opens it without considering whether the person was aware of the court proceedings against him/her.

The statistical data of the Supreme Court of Cassation (SCC) shows, that the number of re-trials requested after a trial conducted in absentia has significantly decreased since 2013 and the percentage of trials granted is also becoming smaller[51]:

Year	Number of requests for re-trial made by persons sentenced in absentia	Number of granted re-trials on request of persons sentenced in absentia
2013	93	37
2014	73	28
2015	81	20
2016	76	21
2017	50	8

According to the Report Data Collection, within the project: Enhancing the Right to be Present PRESENT[52], "*the judges are trying to use all means to contact the accused and to conduct trials in absentia only as an exception. Most of them report an extremely low percentage of trials conducted in absentia. However, it must be noted that a high percentage of persons put on trial in absentia in Bulgaria are convicted*".

In Bulgarian legislation there is no specific procedure or written obligation of the authorities to inform the convicted person about the possibility to challenge the decision and about the right to a new trial or to another legal remedy, as required by Art. 8, para 4 of Directive 2016/343.

4.5. *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 persons in criminal proceedings (Directive (EU) 2016/800)*

Directive (EU) 2016/800 aims to establish procedural safeguards to ensure that children (persons under age of 18), who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration.

According to Art. 94, para 1, point 1 of the PPC the participation of a defence lawyer is mandatory when the accused person is a minor.

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[51] Report Data Collection, GA No. 760482 Enhancing the Right to be Present PRESENT, JUST JACC PROC AG 2016 Action grants to support transnational projects to enhance the rights of persons suspected or accused of crime JUSTICE PROGRAMME.

[52] *Ibid.*

As it was explained above, the Bulgarian criminal justice system does not recognise the figure of 'suspected person', so EU directives and art. 94 of the PPC are not applicable to persons that are not formally accused, unless they are detained in police custody. For example, it is a common practice just to 'invite' the child in the police office 'just to ask some questions'. In such cases, according the PPC it is not obligatory the minor to be represented by a lawyer, because the she/he appears before the police as a 'witness'.

In Bulgaria the mandatory defence by a lawyer is not available for defendants who attained the age of 18 during the trial stage even if the crime has been committed before their eighteenth birthday (Art. 394 of PPC).

The testimonies of police officers who have questioned the child without a lawyer are legally admissible in the trial. Children often have to give a statement or sign documents in the absence of a lawyer during police questioning.

The Letter of Rights is not drafted in child-friendly language. The complicated language used in the Letter of Rights may lead some children to waive their right to a lawyer and its translation in other languages is not available in all police departments. Interpreters are guaranteed only for foreign children and not for Bulgarian children originally from minority populations. Children can waive their right to receive a written translation. Not all documents are translated, there is no regulation on which documents must be translated. There is a shortage of translators outside the big cities. It is possible to object to the quality of the translation.

Art. 15, para. 2 of Directive (EU) 2016/800 provides that the child shall have the right to be accompanied by another appropriate adult who is nominated by the child and accepted as such by the competent authority. The Bulgarian PPC explicitly lists the people, who can accompany the child, and these are only parents or legal representatives.

Using of audio-visual recording during police hearings of child suspects is not very common.

Subjects on the right of the child, participants in criminal proceedings are not obligatory in the universities, or even are not included in the curricula. There is no mandatory specialisation for lawyers working with children.

4.6. *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*

According to Article 7 of the Directive, Member States shall take necessary measures, including funding, to ensure that:

– there is an effective legal aid system that is of an adequate quality;
– and that legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.

The states shall ensure that adequate training is provided to lawyers, giving legal aid services, and to the staff involved in the decision-making on legal aid.

According to art. 27 of the Bulgarian Attorney's Act the lawyers are obliged to maintain and improve their skills.

The Supreme Bar Council organizes Training centre for lawyers, which organizes and conducts workshops, lectures and other forms of training; organizes and supports the publication and distribution of specialized legal literature; cooperates and participates in similar Bulgarian, foreign and international organizations and institutions;

According to Art. 29 of the Bulgarian Attorney's Act the lawyer is equated with the judge regarding the due respect, and all bodies are obliged to give him assistance as to a judge and the lawyers are bound to be independent in the performance of their professional duties and must not allow impact and influence in carrying out their activities.

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Report of the European Union Agency on Fundamental Rights: "Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant Proceedings"

II. *Case law*

Decision no. 653 in case 2855/19 of the Sofia City Court and Decision no. 332 in appellate case 906/2019 of the Sofia Appellate Court

Decision no. 689 in case 2891/19 of the Sofia City Court

Decision no. 59 in case 133/2014 of the Sofia Appellate Court

Decision no. 92 in case 386/2019 of the Haskovo District Court

Decision no. 571 in court case 2492/2019 of Sofia City Court

Decision no. 818 in court case 2693/2011 of the Sofia City Court

Decision no. 221 in court case 468/2017 of the Sofia City Court

Decision no. 72 in court case 133/2017 of the Plovdiv Appellate Court

Decision no. 83 in court case 485/2018 of the Lovetch District Court
Decision No. 229 of 25.11.2016 in the case No. 821/2016 of the Supreme Court of Cassation, 2nd chamber
Decision No. 229 of 25.11.2016 in the case No. 821/2016 of the Supreme Court of Cassation, 2nd chamber
Decision No. 405 of November 5, 2015, No. 1025/2015 of the Supreme Court of Cassation, 1st chamber

CONCLUSION

Having analyzed the European framework, as well as the internal situation of three Member States – Spain, Italy and Bulgaria – applicable to the fundamental right to a due process, with a particular attention to the right to ensure procedural guarantees in the case against terrorism, it's needed to answer the key research question elaborated in the introduction about the role of the CFR in the protection of fundamental rights. How has the CFR been integrated until present into the national systems? Is the European tool effective in the protections of the individuals?

The CFR devote attention to justice rights (Arts. 47-50) that provide fundamental procedural rights, whose origin must be essentially found in Art. 6 of the ECHR, regulating the right to a 'fair trial' in general terms with consequent case law delivered by the European Court of Human Rights. This essential background must be balanced with the general policy proposed by the European Union on the field of judicial cooperation in criminal matters and the principles supporting it in order to combat terrorism and organized crime in all Member States. The EU norms applicable in the field of criminal law, and in particular in the fight against terrorism and the relevant rights of defendants, of pre-trial detainees and persons under investigation, are characterized by the need of implementation by Member States. Indeed, the instrument of mutual recognition by Member States and the implementation of the directives applicable in the field determines a lack of complete harmonization in the territory of the European Union.

Moreover, the emergency situations caused by terrorist attack could lead to legislations which reverse the ordinary approach to fundamental rights in the national legal system and, in order to pursue anti-terrorism measures, does not provide full application of the CFR and the case law applicable, as for example the legislation adopted in France following the attack to Charlie Hebdo. One of the key research question of this project has been: in modern occidental democracy, as law practitioners can we tolerate the reduction of protection of fundamental rights in our national system? And if so, to which extent is it acceptable?

The principle mutual recognition of judgements and judicial decisions – Art. 82 (1) TFEU legal basis for the judicial cooperation in criminal matters – and the principle of approximation of the laws and regulations of the Member States, explain the existence of different procedural instruments related to criminal proceedings in order to make judicial cooperation between Member States possible for the purposes of fighting criminality and delinquency on the one hand as well as gua-

ranteeing procedural safeguards of individuals (suspects and victims) in criminal proceedings on the other.

For the purpose of the project the report of the three Member States considered the most important instruments of mutual recognition of judicial decisions in criminal matters that have been selected by the authors, as for example, the European Arrest Warrant and the European Investigation Order. For what concern the implementation of the procedural rights of suspects in criminal proceedings the analyses has been carried out for all of them in general. The aim of the reports has been to provide practical insight into the fight against terrorism in the EU through the analysis of the application of the instruments of the European Arrest Warrant, the European Investigation Order and the procedural safeguards governing these proceedings, namely through the Law on Extradition and the European Arrest Warrant, the European Investigation Order Act, and several Directives of the European Union.

As stressed by some authors, the antiterrorism measures requested by the EU norms and provided for by both European and Italian regulations imply or may involve limitations of fundamental rights. If this is the case, the necessity is imposed that these limitations are arranged following the principle of the rule of law entrusting their discipline to sources of primary rank. It seems that while fighting terrorism the application of the CFR instrument is reduced or, in any case, minimised due to the supreme public interest. On the contrary we believe that should be the opposite: more important is the object to be protected more intense should be the application of the CFR and applicable case law to ensure the maximum level of protections for the persons under investigations or arrested or accused.

Moreover, considering the effect of those norms into the fundamental rights it is of the outmost importance ensuring an effective legal aid system and an adequate quality of the legal service in order to safeguard the fairness of the proceedings as requested by Art. 7 of the Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

In conclusion, according to the findings of the reports, it appears that the full knowledge and understanding of the CFR and of the case-law applicable is still not a primary source of law for the national practitioners – judges as well as lawyers – which use those parameters of legitimacy only as an additional element to the internal ones, especially while challenging in front of the Constitutional Courts.

Even if the United Kingdom it out of the scope of the research of the project, however I do believe it is needed to share a consideration about the Brexit situation with regards to the mutual recognition principle. Indeed, the agreement negotiated between UK and EU does not include any specific details about the judicial cooperation in civil nor criminal matters which means that there would be a involution of the regime applicable until the end of 2020. Even if UK enjoyed in the

past – while being a member of the Union - the opting-out clause for the application of the Charter, however the general principle of Eu law, including the mutual recognition, where directly applicable by the national courts. Starting from 2021, all the EU legislation applicable in the sector analysed by the present project will no longer find any legal basis for their application, not even the general principle, being only regulated by national British law and international law in the relationship with thir States and all the members of the Union.

Finally, it seems that the intervention of the EU legislator in this sector is essential. Indeed, for as much as the interpretation and application of the CFR through practitioners of law is needed, however this aspect cannot substitute the intervention of the EU legislator which is called to take further steps for ensuring a better integration of the CFR into the national criminal procedures. In my opinion such intervention is especially required while national legislation deals with emergency situations.