



CAJI
Cooperación Judicial Civil y Penal
en el Ámbito de la Unión Europea:
Instrumentos Procesales
ubu.es



COUNTRY REPORT: *SPAIN*

Project MR 2.0



UNIVERSIDAD DE BURGOS



CAJI
Cooperación Judicial Civil y Penal
en el Ámbito de la Unión Europea:
Instrumentos Procesales
ultra.es



**UNIVERSIDAD
DE BURGOS**
Facultad de Derecho



MutualRecognition2.0
RESEARCH PROJECT



Acknowledgements

Thanks to the European Commission for allowing, through its funding, the promotion of research and knowledge in judicial cooperation in criminal matters, in order to direct and focus on more effective, efficient and coherent judicial cooperation. In this way, we leave behind conformism and expand our objectives of improvement and growth in the judicial field, thus demonstrating the unbreakable union of Europe and all its Member States and the coordination of all of them to achieve a stronger, more efficient and modern Union, ready to overcome all those challenges to be faced in this area.

On the other hand, we would like to thank the deep commitment of the universities with which we have worked to carry out this ambitious Project. The role of European universities is fundamental in further developing research and increasing knowledge on judicial cooperation in criminal matters. Universities are the highest centers of training and research, which tirelessly fight and work to detect all the problems, challenges and threats faced by the judicial institutions of the EU MS. At the same time, they facilitate and promote alternatives and solutions to these threats. The whole world should be enormously grateful to our historic, prestigious and unrivalled universities in the European Union.



CAJI
Cooperación Judicial Civil y Penal
en el Ámbito de la Unión Europea:
Instrumentos Procesales
ultra.es



To all our historic and prestigious universities in Europe.



NATIONAL SPANISH REPORT

Version Definitive

Preparation Date Deliverable Work Package

Authors: Mar Jimeno Bulnes, Serena Sabrina Immacolata Cacciatore, and M. Isabel Merino Díaz

Approved by Coordinator on:

Approved by Quality Manager on:

Dissemination level:



SUMMARY

ABBREVIATIONS AND ACRONYMS

EXECUTIVE SUMMARY

INTRODUCTION

Content

Methodology

About interviews

1. THE INSTRUMENTS AND NATIONAL LAW

1.1. Transposition of EU instruments

1.1.1. Transposition of EAW

1.1.2. Transposition of EIO

1.1.3. Transposition of ESO

1.2. Ratification of conventions

1.2.1. Ratification of Convention established by the Council in accordance with 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between Member States of the European Union (EU Convention on Mutual Assistance in Criminal Matters)

1.2.2. Ratification of the European Convention on the Transfer of Proceedings in Criminal Matters

1.2.3. Ratification of the European Convention on Mutual Assistance in Criminal Matters

1.3. Competent (judicial) authorities and central authorities

1.3.1. Competent (judicial) authorities

- a) EAW
- b) EIO
- c) ESO



d) Conclusions

1.3.2. Central authorities

1.3.3. Coordination

2. THE INSTRUMENTS AND INVESTIGATION/PROSECUTION

2.1. Applicability of the instruments according to EU law

2.1.1. Pre-trial stage

2.1.1.1. Substage 1 (no detention on remand possible)

- (a) Person concerned present in issuing MS
- (b) Person concerned present in another MS

2.1.1.2. Substage 2 (detention on remand possible)

- (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person in detention on remand
- (b) Person concerned present in another MS
 - (i) detention on remand possible but not ordered
 - (ii) detention on remand ordered

2.1.2. Trial Stage

- (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person concerned in detention on remand
- (b) Person concerned is present in another MS
 - (i) detention on remand possible but not ordered



(ii) detention on remand ordered

2.2. Application of the instruments at the pre-trial stage according to national law

2.2.1. Substage 1 (no detention on remand possible)

- (a) Person concerned present in issuing MS
- (b) Person concerned is present in another MS

2.2.2. Substage 2 (detention on remand possible)

- (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person concerned in detention on remand
- (b) Person concerned is present in another MS
 - (i) detention on remand possible but not ordered
 - (ii) detention on remand ordered

2.3. Application of the instruments at the trial stage according to national law

- (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person concerned in detention on remand
- (b) Person concerned is present in another MS
 - (i) detention on remand possible but not ordered
 - (ii) detention on remand ordered



3. THE INSTRUMENTS AND SENTENCE ENFORCEMENT

3.1. Applicability of the instruments or conventions according to EU law

- (a) Person concerned is present in issuing MS
- (b) Person concerned is present in another MS

3.2. Applicability and application of the instruments according to national law

- (a) Person concerned is present in issuing MS
- (b) Person is present in another MS

4. ANTICIPATING THE APPLICATION OF INSTRUMENTS: SENTENCING

5. MISCELLANEOUS: WHEREABOUTS UNKNOWN AND IN ABSENTIA

- 5.1. Summons and notifications
- 5.2. Locating the accused person through judicial cooperation
- 5.3. Celebration of the trial without the presence of the accused person

6. MEMORANDUM

7. LITERATURE, LEGISLATION AND CASE-LAW

8. ANNEXES: INTERVIEWS



ABBREVIATIONS AND ACRONYMS

ABBREVIATIONS AND ACRONYMS	MEANING
AFSJ	Area of Freedom, Security and Justice
AN	Audiencia Nacional (National Court)
AAN	Order by National Court
AP	Audiencia Provincial (Provincial Court)
Appl./ appls.	Application / Applications
Art.	Article
BOE	<i>Boletín Oficial del Estado</i> (Spanish Official Journal)
CE	<i>Constitución Española</i> (Spanish Constitution 1978)
CFREU	Charter of Fundamental Rights of the European Union
CGPJ	<i>Consejo General del Poder Judicial</i> (General Council of the Judiciary)
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of the European Union
CP	<i>Código Penal</i> (Spanish Criminal Code)
EA W FWD	Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
DEIO	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
EA W	European Arrest Warrant
ECHR	European Court of Human Rights
ECJ	European Court of Justice
Ed./eds.	Editor/editors.
EEW	European Evidence Warrant
e.g.	<i>Exempli gratia</i>
EIO	European Investigation Order
EPO	European Protection Order
ESO	European Surveillance Order
ETS	European Treaty Series
EU	European Union
ex	According to



ff/et seq.	And the following
FGE	<i>Fiscalía General del Estado</i> (General Public Prosecutor's Office)
FWD	(Council) Framework Decision
i.e.	<i>Id est</i>
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966
IT	Information Technology
LECrim	<i>Ley de Enjuiciamiento Criminal</i> (Spanish Act on Criminal Procedure 1882)
LOGP	<i>Ley Orgánica General Penitenciaria</i> (General Penitentiary Organic Law)
LO	<i>Ley Orgánica</i> (Organic Law/ Act)
LOEDE	Law 3/2003, on March 14 th , on European Arrest Warrant and Surrender
LOPJ	<i>Ley Orgánica del Poder Judicial</i> (Act on the Judiciary)
LRM	<i>Ley de Reconocimiento Mutuo</i> (Act of mutual recognition)
MLA 2000	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000
MF	<i>Ministerio Fiscal</i> (Spanish Prosecutor's Office)
MS	Member State
n. /No.	Number
O.J.	Official Journal of the European Union
op. cit.	<i>opus citatum</i>
p./pp.	Page/pages
para.	Paragraph (<i>Fundamento Jurídico</i>)
SAN	Judgement by National Court (<i>Audiencia Nacional</i>)
SAP	Judgement by Provincial Court (<i>Audiencia Provincial</i>)
STC	Judgement by Constitutional Court (<i>Tribunal Constitucional</i>)
STS	Judgement by Supreme Court (<i>Tribunal Supremo</i>)
TC	<i>Tribunal Constitucional</i> (Constitutional Court)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the



	European Union
TS	<i>Tribunal Supremo</i> (Supreme Court)
v.	<i>Versus</i>
Vol./ vol.	Volume

EXECUTIVE SUMMARY

The purpose of the report is to illustrate how the application of mutual recognition instruments in criminal matters is developing in Spain in a context of European judicial cooperation. In particular, it seeks to examine whether such implementation is efficient, effective, proportionate and coherent. Certain mutual recognition instruments will be studied, such as the European Arrest Warrant (EAW)¹, the European Investigation Order (EIO)², and the European Surveillance Order (ESO)³. This report is one more piece that, together with the rest of the reports of the other countries participating in the project, specifically the Netherlands, Germany and Poland⁴, will make up the puzzle that aims to

¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. O.J. 2002, L 190/1, ELI: http://data.europa.eu/eli/dec_framw/2002/584/oj (last visited 2 Jan. 2025). For a general overview see for example Jimeno Bulnes, “Perspectiva de la orden de detención y entrega: el principio de reconocimiento mutuo y la cooperación judicial en la Unión Europea”, in Burgos Ladrón De Guevara (Ed.) *La cooperación judicial entre España e Italia* (Instituto Vasco de Derecho Procesal, 2017), pp. 5-33, as well as Satzger, “Mutual recognition in times of crisis - Mutual recognition in crisis? An analysis of the new jurisprudence of the European Arrest Warrant”, No. 3, *EuCL* (2018), 317-331, at 317; also specifically and recently in Spain, Jimeno Bulnes, *La orden europea de detención y entrega* (Tirant lo Blanch, 2024).

² Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. O.J. 2014, L 130/1, ELI: <http://data.europa.eu/eli/dir/2014/41/oj> (last visited 2 Jan. 2025). In this regard, Caianello, “La nuova direttiva UE sull'ordine europeo d'indagine penale tra mutuo riconoscimento e ammissione reciproca delle prove”, No. 3, *Processo penale e giustizia* (2015), 1-11 and Jimeno Bulnes, “Orden europea de investigación en materia penal”, in Jimeno Bulnes (Ed.), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar* (Bosch, 2016), pp. 151-208; in relation to Spain see Cacciatore, “La aplicación práctica de la orden europea de investigación como mecanismo de obtención transnacional de pruebas”, in Jimeno Bulnes and Ruiz López (Eds.), *La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español*, (Tirant lo Blanch, 2022), pp. 293-313 as well as Jimeno Bulnes, “La prueba transfronteriza y su incorporación al proceso penal español”, in González Cano (Ed.), *Orden europea de investigación y prueba transfronteriza en la Unión Europea* (Tirant lo Blanch, 2019), pp. 719-766.

³ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, O.J. 2009, L 294/20, ELI: http://data.europa.eu/eli/dec_framw/2009/829/oj (last visited 2 Jan. 2025). In the Spanish literature Campaner Muñoz, “La orden europea de vigilancia: statu quo y perspectivas de futuro. Hacia una necesaria armonización de las medidas cautelares personales en la UE”, No. 30, *Revista Derecho y Proceso Penal* (2013), 161-187. Criticism on short-term imprisonment with a criminological approach Kantorowicz-Reznichenko, “Cognitive biases and procedural rules: Enhancing the use of alternative sanctions”, 23 *Eur.J.Crime Cr.L.Cr.J.* (2015), 191-213. Last, already highlighting their infra-utilisation, Montero Pérez de Tudela and García Ruiz, “The underutilisation of the European Supervision Order: Framework decision 2009/829/JHA as just a scrap of paper”, 46 *EL Rev.* (2021), 306-324.

⁴ In particular, the University of Maastricht, the University of Bonn, the John Paul II Catholic University of



compare and contrast the application of mutual recognition instruments in criminal matters in Europe, taking into account the differences, similarities, obstacles and deficiencies in such application. In addition, it is intended to formulate useful recommendations for the Member States (MS) of the European Union (EU) on the use of these instruments, as well as common solutions to the potential problems detected in the application of these instruments.

It is feared that the European competent authorities will not apply the above-mentioned instruments in accordance with the principles of efficiency, effectiveness, proportionality and consistency. This fear and suspicion have been the basis for the launch of the “Mutual Recognition 2.0: Effective, Coherent, Integrative and Proportionate Application of Judicial Cooperation Instruments in Criminal Matters”⁵ (MR2.0 onwards) project and the preparation of this report will contribute, together with the other national reports, to achieving the primary objective set out here.

According to a specific methodology that is essentially deductive (with the exception of the interviews and their conclusions presented here, where an inductive methodology will be applied), more practical aspects will be addressed that will allow us to know first-hand the authentic application of the instruments in relation to their strengths and weaknesses. Of course, the report intends not only to make an objective critique, pointing out any shortcomings in the practical application, but also to highlight the main vicissitudes that must be faced in order to achieve an effective, efficient, proportionate and coherent application of the instruments of mutual recognition in criminal matters. Likewise, the document presented here aims to make contributions and recommendations that represent more accurate and effective alternatives.

To this end, the report will be based not only on tools of a more theoretical and technical nature, such as Spanish legislation and European regulations, but also on a variety of jurisprudence, doctrine (hand in hand with literature, bibliography and articles in prestigious scientific journals) and on the conclusions drawn from the twenty interviews carried out with different legal professionals who know first-hand more practical aspects of the process and, as a consequence, the application of mutual recognition instruments, thus providing a more realistic, objective and practical perspective. The answers given based on their experiences will allow us to know the current state of European judicial cooperation with the aim of drawing up a common roadmap for all MS. Experience in this area can therefore be very useful in identifying the main difficulties faced by the EU cooperation system, which should be based on the principle of mutual recognition, based on mutual trust between judicial authorities. The answers resulting from the interviews are mostly anonymous, since most of the professionals interviewed decided to take advantage of anonymity, with the exception of some of them, such as the magistrate of the Court of

Lublin, and the District Court of Amsterdam (coord.).

⁵ Available on website with URL: <https://mutualrecognitionnextlevel.eu/> (last visited 2 Jan. 2025).



Instruction No. 2 of Burgos Rebeca Huertos, the Judge of the Court of Penitentiary Surveillance of Valladolid Florencio Madruga, and the Prosecutor of International Cooperation in Seville, José Manuel Rueda.

INTRODUCTION

Content

The aim of this report is to address the application of mutual recognition instruments in criminal matters in Spain within the framework of European judicial cooperation and in relation to their efficiency, effectiveness, proportionality and coherence. The main instruments studied here are the European Arrest Warrant (EAW), the European Investigation Order (EIO) and the European Surveillance Order (ESO) (as well as others listed in FWD 2008/909 and FWD 2008/947). The aim of this is to analyse the decisions that lead to the application of a mutual recognition instrument in criminal matters based on normative elements (national and European legislation) and the powers of the competent national judicial authority, as well as the coherence and effectiveness of the application of the mutual recognition instrument, the weaknesses and challenges in its application. In addition, the recently adopted Directives have a major impact on the implementation of these instruments; the development of new technologies and their influence on their execution in relation to their agility, effectiveness and efficiency; and the current situation in the field of procedural guarantees and fundamental rights of the person under investigation and/or accused in the framework of European judicial cooperation.

In order to carry out a detailed investigation into all the aforementioned issues, it has been necessary to first resort to the instruments of mutual recognition⁶, included in national legislation, specifically Act 23/2014, of 20 November on the mutual recognition of judicial decisions in criminal matters in the European Union⁷, which transposes the European Directives that regulate the instruments on mutual recognition in criminal proceedings. It has also been necessary to resort to a plurality of European Directives, Framework Decisions and Regulations, as well as to the corresponding Conventions and

⁶ Among the Spanish bibliography, Guerrero Palomares, “La reforma de los instrumentos de reconocimiento mutuo a la luz de la jurisprudencia del TJUE”, in Hernández López and Laro González (Eds.), *Proceso penal europeo: últimas tendencias, análisis y perspectivas* (Aranzadi 2023), pp. 291-314.

⁷ Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, BOE of 21 Nov. 2014, n. 282, ELI: <https://www.boe.es/eli/es/l/2014/11/20/23/con> (last visited 2 Jan. 2025 2024); English version available at <https://www.ejn-crimjust.europa.eu/ejnupload/InfoAbout/English%20version%20LAW%2023%20of%202014.pdf> (last visited 2 Jan. 2025). See Arangüena Fanego, De Hoyos Sancho y Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre* (Aranzadi, 2015); more recently, Mapelli Caffarena and Posada Pérez (Ed.), *Análisis empírico y doctrinal de la Ley 23/2014 de reconocimiento mutuo de resoluciones penales*, (Aranzadi, 2022).



their ratification in national terms. Compiling the entire legal architecture with respect to the instruments, we have examined the role of the competent state judicial authorities in relation to their competence (see, inter alia, the criteria for determining jurisdiction under Spanish law⁸) and coordination with their counterparts in third countries. Once these more theoretical aspects have been addressed, we have proceeded to get to the substance of the case, that is, the application of mutual recognition instruments in criminal matters in Spain. It should be noted that in the drafting of the central content of the report, a distinction has been made between the different phases of the procedure, which in Spain are basically the investigation phase, the intermediate phase and the trial phase⁹.

In the first place, the execution of the instruments in the first phase of the procedure, the investigation, where all the investigative machinery is developed, will be exposed. Subsequently, the trial phase will be carried out, in which the oral trial is carried out, the evidence is taken, for example, the statement of the accused, the evidence of witnesses, confrontations, expert evidence and documentary evidence¹⁰, and a sentence is handed down. Next, the process of enforcement of the judgment will be examined when an instrument of mutual recognition is involved¹¹.

Secondly, more concrete and specific aspects will be studied, such as the anticipation of the application of the instruments at the sentencing stage or the approach in cases of unknown whereabouts of the person under investigation and/or accused.

This will be followed by a *Memorandum and Good Practices*, similar to the *de lege ferenda* proposals, which aims to make its own contributions for improvement, in order to achieve a more effective, efficient, proportional and coherent application of the mutual recognition instruments. A number of constructive criticisms will be grouped together as well as a variety of potential initiatives in the framework of judicial cooperation in the EU that will result in common solutions.

To conclude the report, the corresponding annex will attach the two interview models that have been prepared (one for the judiciary, prosecutors and lawyers in the

⁸ As example in literature Gómez Colomer, “La competencia penal”, in Gómez Colomer and Barona Vilar (Eds.), *Proceso penal. Derecho Procesal III*, 2nd ed. (Tirant lo Blanch, 2022), pp. 55-72.

⁹ In more detail, as example, Armenta Deu, *Derecho Procesal penal*, 15th ed. (Marcial Pons, 2024), pp. 145 et seq. 255 et seq and 267 et seq.

¹⁰ E.g. Barona Vilar, “La prueba”, in Gómez Colomer and Barona Vilar (Eds.), *Proceso penal. Derecho Procesal III*, 2nd ed., op. cit., pp. 403-423.

¹¹ In this regard, Öberg, “Trust in the Law? Mutual recognition as a justification to domestic criminal procedure”, 16 Eur. Const.Law Rev. (2020), 33-62, as well as Cacciatore, “El reconocimiento mutuo como principio clave para la lucha contra el crimen organizado”, in Garrido Carrillo and Faggiani (Eds.), *Lucha contra la criminalidad organizada y cooperación judicial en la UE: instrumentos, límites y perspectivas en la era digital*, (Aranzadi, 2022), pp. 171-186. Also recently Jimeno Bulnes, *La orden europea de detención y entrega*, op. cit., pp. 49 et seq.; from a practical perspective in Spain González Vega, *La cooperación judicial penal en Europa: de la asistencia judicial al reconocimiento mutuo* (Consejo General del Poder Judicial, 2023).



administration of justice and another for lawyers and academics) for the interviews conducted with relevant national judicial authorities, in particular Magistrates, Public Prosecutors and Law Clerks of the Administration of Justice (former court clerks)¹², notable members of Spanish¹³ and European legal institutions¹⁴ and third-party professional agents involved, studying or directly or indirectly affected by European judicial cooperation, such as legal professionals¹⁵, university lecturers and lawyers specializing in this field¹⁶. These twenty interviews have managed to provide a comprehensive perspective of practical aspects on the application of the instruments that are sometimes completely unknown to researchers, as well as have made it possible to compile a series of reflections on the subject matter of this report.

Methodology

In order to achieve the goals set out here, it has been necessary to resort, indisputably, to the Spanish legislation that regulates the application of mutual recognition instruments in criminal matters, subject to the guidelines of the European Directives and Regulations; as cited above, this is Act 23/2014, of 20 November on the mutual recognition of judicial decisions in criminal matters in the European Union. Of course, recourse has also been made to this European regulation, which will always be the guiding force for the implementation of the instruments, regardless of the Member State in which we are located. By European regulations we refer to Directives, Framework Decisions and Regulations issued by the EU and the Council of Europe as well as Conventions signed and ratified by European authorities. Some of the rules used here are the European Convention on Mutual Assistance in Criminal Matters¹⁷ and the European Convention on the Transfer of Proceedings in Criminal Matters¹⁸ as well as Directive 2014/41/EU of the

¹² For example, Spain's national member magistrate at Eurojust, José De La Mata, the Prosecutor of the International Cooperation Chamber, as well as to have an international and not only European perspective, liaison magistrate in Washington (USA).

¹³ See members of the *Audiencia Nacional*, *Consejo General del Poder Judicial* and *Ministerio de Justicia*.

¹⁴ See Eurojust. In this regard in Spain at the time, Alonso Moreda, "Eurojust, a la vanguardia de la cooperación judicial en materia penal en la Unión Europea", 16 *Revista de Derecho Comunitario Europeo* (2012), 119-157; more recently Escalada López, "La Cooperación judicial en la UE. Especial referencia a Eurojust y a las novedades normativas que le afectan", No. Extra 1, *Revista de Estudios Europeos* (2023), 475-502, as well as Jiménez-Villarejo Fernández, "Cooperación de la Fiscalía Europea con Eurojust, Europol y OLAF", in Guerrero Palomares, Fontestad Portalés, Hernández López and Suárez Xavier (Eds.), *Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021, de 1 de julio* (Aranzadi, 2023), pp. 675-718.

¹⁵ We were able to interview lawyers who are qualified to litigate before the International Criminal Court.

¹⁶ See academics belonging to highly prestigious universities in Spain and internationally, such as the University of Malaga and the University of the Balearic Islands.

¹⁷ Signed on Strasbourg, 20 April 1959, ETS No. 30, available at official website <https://rm.coe.int/16800656ce> (last visited 2 Jan. 2025). Such convention was ratified by Spain on 14 July 1982, BOE of 17 Sept. 1982, n. 223, pp. 25166-25174, ELI: <https://www.boe.es/eli/es/ai/1959/04/20/2> (last visited 2 Jan. 2025).

¹⁸ Signed on Strasbourg, 15 May 1972, ETS No. 73, available at official website <https://rm.coe.int/1680072d42> (last visited 2 Jan. 2025). Such convention was ratified by Spain on 15 May 1972, BOE of 10 Nov. 1988, n. 270, pp. 32060-32065, ELI: <https://www.boe.es/eli/es/ai/1972/05/15/1>



European Parliament and of the Council of 2 April 2014 regarding the European Investigation Order in criminal matters (Directive 2014/14/EU) or the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (FWD 2002/584/JHA), both of the last ones already mentioned. However, it will not be the subject of consideration other legislation, whose implementation is still being processed, such as the recently published new Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters¹⁹.

Likewise, the jurisprudence emanating from the Spanish courts has been fundamental in the preparation of this report, resorting to judgments handed down mainly by the National Appellate Court, the competent court in this matter. At the same time, different judgments handed down by the Court of Justice of the European Union (CJEU or prior ECJ) in this area have been compiled. All this jurisprudence will serve to draw conclusions that will help in the development of the report.

In addition, a variety of works, articles from scientific journals and other doctrinal and bibliographic material have been used to address this subject in a detailed and specific manner and to serve for the preparation of this report²⁰.

Finally, and in order to gain a more comprehensive understanding of the most practical and realistic aspects of the implementation of these instruments of mutual recognition in criminal matters in Spain, numerous interviews have been carried out, twenty of them in particular²¹, with a mosaic of Spanish professionals of recognized prestige from various areas, professions and training in the field of European judicial cooperation. ranging from magistrates to university professors. These, in turn, have provided a clearer perspective on matters of a more practical, bureaucratic, dynamic and even personal nature that are somewhat unknown to researchers and that, as a result, raise many questions. And that for the report they will show key aspects in the application of mutual recognition instruments in criminal matters in Spain in relation to their effectiveness, efficiency, proportionality and coherence. Some of these aspects are found in the sphere of judges or prosecutors, for example, with regard to decision-making, internal and external communications and subjective assessments they make in this area. Other aspects of a more personal content have to do with the prejudices caused in the

(last visited 2 Jan. 2025).

¹⁹ O.J. 18 Dec. 2024, L, ELI: <http://data.europa.eu/eli/reg/2024/3011/oj> (last visited 2 Jan. 2025). See in Spain comments on the prior proposal by Buchhalter Montero, “La remisión de procesos penales en la Unión europea: examen de la propuesta de Reglamento de 5 de abril de 2023”, No. 62, *Revista General de Derecho Procesal* (2024), <https://www.iustel.com>

²⁰ Among the manuals used are Kistoris (Ed), *Manual de Derecho procesal penal europeo*, (Marcial Pons, 2022), as well as, among Spanish literature, Arroyo Jiménez and Nieto Martín (Eds.), *El reconocimiento mutuo en el Derecho español y europeo* (Marcial Pons, 2018).

²¹ Twenty professionals were interviewed, of whom three were practicing lawyers and university lecturers, one practiced as a lawyer in the Administration of Justice, one belonged to the Ministry of Justice, nine were magistrates and six were public prosecutors.



personal, family and psychological spheres of the person under investigation and/or accused, as well as of the witnesses. All these dimensions have been illustrated to us thanks to the interviews.

As can be seen, the methodology used is deductive, except on some more specific occasions, as in the case of interviews where deduction is replaced by the use of the inductive and a sort of empirical method specifically applied to legal professionals²².

About interviews

It is with regard to the interviews carried out that the methodology applied has been modified in favor of induction. A number of professionals from the legal field involved in judicial cooperation were selected. To make the selection, lists of interviewees from previous research projects such as *Eurocoord*²³ and close contacts were used. Their specialization in the field of judicial cooperation in the criminal field was valued, either because of their previous training or because of their profession. Once selected, according to their professions, it was decided to develop two interview models, one of them aimed at the judiciary, that is, judges, prosecutors and lawyers in the administration of justice (model 1), and another aimed at legal professionals who, curiously, were simultaneously teaching at university (model 2). Both interviews consisted of an initial phase of questions related to their profession, years of experience and links with judicial cooperation and the use of mutual recognition instruments. On the merits of the case, an attempt was made to ask about practical aspects in relation to coordination and communication between competent judicial authorities and between judicial authorities and defense lawyers, the impact of the application of the instruments on the person under investigation/accused, the effects of digitalization on judicial cooperation, the dichotomy of procedural economy and effective judicial protection, etc. A total of twenty professionals were interviewed, nine magistrates, six prosecutors, one member of the Ministry of Justice, one lawyer from the administration of justice and three lawyers.

Once the models were made, they were sent by email to the professionals. In this email, in addition to attaching the interview sheets, the purpose of the interview, the MR2.0 project and instructions were offered on how the interview would proceed. The professionals who responded willing to be interviewed gave us their availability to arrange it. They were offered to carry it out in writing (we attach the interview in word format, editable) and also telematically through a video call through Microsoft Teams. For those professionals who resided in Burgos, they were offered the possibility of conducting the

²² See Casaleiro, Roach Anleu and Dias, "Introduction. Empirical research with judicial professionals and courts: methods and practices", 13 *Oñati Socio-Legal Series* (2023), S1-S9; also Roach Anleu and Mack, "Empirical research with judicial officers: The biography of a research project", 13 *Oñati Socio-Legal Series* (2023), S30-S57.

²³ Available at University of Burgos' website with URL: <https://www3.ubu.es/eurocoord/> (last visited 2 Jan. 2025).



interview in person, as was the case with the magistrate of the Court of Instruction No. 2 of Burgos, Rebeca Huertos. At the outset of the interviews, permission was requested for their recording and, in turn, in order to cite their names in the present report, most of them decided to remain anonymous and nevertheless agreed to the recording of the interview.

It should be noted that some questions were modified during the course of the interviews, as some questions were considered to be of a more theoretical or technical nature. Likewise, also as the interviews developed, new professionals emerged, generally known to the interviewees, willing to be interviewed. At the same time as other interviews, they were transcribed in written form to facilitate their reading and to extract conclusions and reflections to be reflected in this report.

1. THE INSTRUMENTS AND NATIONAL LAW

General introduction

This chapter deals with two general matters:

1. the transposition/ratification of the instruments by the MS of the NAR;
2. the (judicial) authorities/central authorities designated by that MS under the instruments/convention.

In the proposal, we stated that the ‘perspective adopted by this project is that of a criminal prosecution or enforcement proceedings with a transnational aspect. That transnational aspect is linked to the accused or the convicted person. The accused or convicted person is present in another Member State [than the issuing Member State] or is a national or a resident of another Member State’.²⁴ The latter circumstance presupposes that the person concerned is present in the issuing MS. Situations in which the whereabouts of the person concerned are unknown are addressed in Chapter 5.

Only those proceedings in which a subject has been identified fall within the scope of the project. That is to say, situations in which the competent authorities have reasons to believe that an offence was committed but do not yet know who the probable author of that offence was do not fall within the scope. At the same time, an enforcement proceeding is not conceivable without a convicted person whose identity is known.

²⁴ *Proposal (amended)*, p. 8.



The proposal also states that the project will focus on instruments that are capable of prejudicing the liberty (in a broad sense) of the suspect/accused/convicted person.²⁵

This means that the perspective of a criminal prosecution or enforcement proceedings with a transnational aspect inherently concerns investigation/prosecution/enforcement proceedings with regard to an offence for which detention on remand²⁶ is (ultimately) possible.²⁷

Against this background, the project will examine two categories of instruments:

- instruments that involve deprivation of liberty of a suspect, accused or convicted person, and
- instruments that offer a (less intrusive) alternative to measures involving deprivation of liberty of a suspect, accused or convicted person.

In order to establish whether the effectiveness and coherence of the application of instruments involving deprivation of liberty can be improved, it is absolutely essential to include some instruments that do not impinge on the liberty of the person concerned. Some of these instruments could serve as a less intrusive but sufficiently effective – and therefore proportionate – alternative to instruments that do impinge on liberty. Since proportionality is an essential part of our definition of the concept of ‘effective and coherent application’²⁸ these less intrusive instruments are therefore in scope even though they do not impinge on liberty. This is in line with the European Commission’s Recommendation 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.²⁹

²⁵ *Proposal (amended)*, p. 8. With regard to investigation/prosecution we use “suspect”, “accused person” or “suspect/accused person”.

²⁶ We use the term “detention on remand” and not “pre-trial detention” because the latter term seems to exclude detention during the trial stage.

²⁷ The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*) for that offence. After all, detention on remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence.

Consequently, proceedings concerning an offence, which only carries a non-custodial sanction, are out of scope.

²⁸ See *MR2.0: some preliminary explorations*, p. 2.

²⁹ O.J. 2023, L 86/44. See Recital n. 10: “Member States should use pre-trial detention only as a measure of last resort. Alternative measures to detention should be preferred (...)”.



With regard to the concept of ‘intrusiveness’ the following scale could give guidance.

Using an instrument without detention is less intrusive than using an instrument with detention. Involvement without physical presence in the requesting MS (e.g. through video-conferencing) is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

Included in the research are the following instruments:

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FWD³⁰ 2002/584/JHA);³¹
- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FWD 2008/909/JHA);³²
- Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (FWD 2008/947/JHA);³³
- Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (FWD 2009/829/JHA);³⁴
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (Directive 2014/41/EU);^{35,36}

³⁰ ‘FWD’ is a commonly used abbreviation of the words ‘Framework Decision’.

³¹ O.J. 2002, L 190/1, as amended by O.J. 2009, L 81/24.

³² O.J. 2008, L 327/27, as amended by O.J. 2009, L 81/24.

³³ O.J. 2008, L 337/102, as amended by O.J. 2009, L 81/24.

³⁴ O.J. 2009, L 294/20.

³⁵ O.J. 2014, L 130/1.

³⁶ These first five instruments were mentioned in the call document: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/just/wp-call/2021-2022/call-fiche_just-2022-jcoo_en.pdf (last visited 2 Jan. 2025). Regulation 2018/1805/EU is mentioned in the call document but not included in the proposal. That regulation only touches upon deprivation of liberty in an indirect way: once a freezing order or confiscation order is recognised by the executing MS, *subsequent* decisions by the competent authorities



- Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (EU Convention on Mutual Assistance in Criminal Matters);³⁷
- (CoE) European Convention on the Transfer of Proceedings in Criminal Matters;³⁸
- (CoE) European Convention on Mutual Assistance in Criminal Matters.³⁹

(The NARs are invited to identify and include other instruments insofar as they can contribute to effective and coherent judicial cooperation.)⁴⁰

A number of these instruments concern decisions concerning deprivation of liberty *stricto sensu* (FWD 2002/584/JHA and FWD 2008/909/JHA) or *lato sensu* (restriction of liberty: FWD 2008/947/JHA and 2009/829/JHA).

Directive 2014/41/EU does not interfere with the right to liberty of the person concerned, except for the temporary transfer of a person already held in custody for the purpose of investigating measures.⁴¹ However, this instrument offers (less intrusive) alternatives to surrender on the basis of a prosecution-EAW: temporary transfer to the issuing MS⁴² to

of the executing MS may include the imposition of a custodial sentence. However, the focus of the project is on the decisions taken by the issuing MS. Moreover, a freezing order or confiscation order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.

Not mentioned in the call document and equally not included in the proposal for more or less the same reasons: Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.

Regulation 2023/1543/EU on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings is not included in the research (this regulation will apply from 18 August 2026). The regulation is not directly related to measures concerning deprivation of liberty and a European Production Order /European Preservation Order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.

³⁷ O.J. 2000, C 197/3.

³⁸ Strasbourg 15 May 1972, ETS No. 73.

³⁹ Strasbourg 20 April 1959, ETS No. 30, added during the first Research Team meeting.

⁴⁰ With the exception of the European Convention on the Transfer of Proceedings in Criminal Matters, the instruments/conventions listed are instruments/conventions that are binding on all MS participating in the project. Bilateral agreements are not included. Including such agreements would hamper making a comparison between the four participating MS ('comparing apples with oranges'). However, if in the opinion of a NAR a bilateral agreement facilitates 'effective and coherent' application of the instruments and, therefore, constitutes a 'best practice', he or she is encouraged to mention this as such.

⁴¹ Case 584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, ECLI:EU:C:2020:1002, para. 73.

⁴² We will use the words 'issuing Member State' in a broad sense: the Member State that requests judicial cooperation or initiates judicial cooperation based on mutual recognition.



be interrogated as a suspect/accused person⁴³ and interrogating a suspect/accused person by videoconference.⁴⁴ Other investigative measures that can be requested by an EIO, such as search and seizure of evidence or hearing a witness, cannot function as an alternative and are, therefore, out of scope.

The three conventions do not as such impinge on the right to liberty of a suspect, accused or convicted person.⁴⁵ Like Directive 2014/41, they are included insofar as they offer *alternatives* to measures that do involve deprivation of liberty.

The EU Convention on Mutual Assistance in Criminal Matters is only included insofar as it contains provisions concerning sending to and serving documents on a suspect, accused person or convicted person who resides abroad.⁴⁶ Summoning a suspect to an interrogation, an accused person to his trial or a convicted person to report to prison to undergo a sentence may already suffice to attain the goal pursued, thus obviating the need for employing forms of judicial cooperation that involve deprivation of liberty.

The CoE European Convention on the Transfer of Proceedings in Criminal Matters is included, because transfer of proceedings can serve as an alternative to surrender on the basis of an EAW or to recognition and enforcement of a sentence.⁴⁷

The CoE European Convention on Mutual Assistance in Criminal Matters is only included insofar as it offers a mechanism to achieve the result of a transfer of proceedings, without complying with the formalities of the CoE European Convention on the Transfer of Proceedings in Criminal Matters.⁴⁸ Moreover, not all Member States have ratified the CoE European Convention on the Transfer of Proceedings in Criminal Matters.⁴⁹

⁴³ Art. 22(1).

⁴⁴ Art. 24(1).

⁴⁵ The EU Convention on Mutual Assistance in Criminal Matters includes provisions on the temporary transfer of a person already held in custody for the purpose of investigative measures (Art. 9) and on hearing by videoconference (Art. 10), but these provisions are replaced by the corresponding provisions in Directive 2014/41/EU (Art. 34(1)).

⁴⁶ Art. 5.

⁴⁷ In certain circumstances, the CoE European Convention on the Transfer of Proceedings in Criminal Matters also applies when the person concerned has already been finally convicted. See *MR2.0: some preliminary explorations*.

⁴⁸ Art. 21(1) of the European Convention on Mutual Assistance in Criminal Matters: the 'laying of information' by one MS 'with a view to proceedings in the courts of another' MS.

⁴⁹ Germany and Poland are not bound by this convention.



The Protocol to the EU Convention on Mutual Assistance in Criminal Matters nor the Additional Protocols to the CoE Convention on Mutual Assistance in Criminal Matters are included. They do not contain forms of judicial cooperation that can serve as alternatives to measures involving deprivation of liberty.

It should be recalled that the provisions of the EU Convention on Mutual Assistance in Criminal Matters and the CoE European Convention on Mutual Assistance in Criminal Matters that are relevant to this project, were not replaced by the directive on the EIO (Directive 2014/41/EU).⁵⁰

This section will list and analyze all the regulations governing mutual recognition instruments in criminal matters. In particular, the European legislation and the Conventions on judicial cooperation in criminal matters. In more detail, we will examine the transposition in Spain of the different mutual recognition instruments studied here, i.e. the FWD 2008/909 and FWD 2008/947. In this way, Spanish national legislation that incorporates into domestic law the stipulations of European Directives, Framework Decisions and Conventions on criminal matters will be cited. On the other hand, we will also explain in more detail which judicial authorities are competent in Spain in the field of judicial cooperation, as well as the process of coordination with their counterparts in the rest of the EU.

1.1. Transposition of EU instruments

- (a) FWD 2002/584/JHA;
- (b) FWD 2008/909/JHA;
- (c) FWD 2008/947/JHA;
- (d) FWD 2009/829/JHA;
- (e) Directive 2014/41/EU.⁵¹

⁵⁰ See Art. 34(1): ‘(...) this Directive replaces, as from 22 May 2017, the corresponding provisions of the following conventions (...)’. The directive does not contain any provisions on sending to and serving documents on a suspect, accused person or convicted person who resides abroad, nor on the ‘laying of information’ by one MS ‘with a view to proceedings in the courts of another’ MS. That is so, because the directive is only concerned with obtaining evidence.

⁵¹ FWD 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. 2009, L328/42 is not listed here. Although there are strong links with the conventions on transfer of proceedings in criminal matters (see 1.2 below), this framework decision does not regulate any form of judicial cooperation. Moreover, this framework decision only applies to



Explain for each of these instruments whether your MS transposed them and, if so, whether in separate laws or as a part of the Code of Criminal Procedure.⁵²

On 5 April 2023, the European Commission submitted a proposal for a regulation of the European Parliament and of the Council on transfer of proceedings in criminal matters.⁵³ This proposal will not be included in the country reports but the NARs will address the relevance of this proposal for effective and coherent application of the existing instruments in their analysis in the separate memorandum.

Exactly, on this proposal, a magistrate of the National Court in Spain with 40 years of experience that we have been able to interview believes that "It is absolutely relevant, particularly to solve the practical problems arising from the transfer of jurisdiction, which will usually be the result of agreements adopted in coordination meetings in Eurojust or of recommendations of Eurojust"⁵⁴. However, we must admit that most of the professionals interviewed at the time had not yet read the proposal carefully, because it is a very recent proposal, today recent regulation⁵⁵ not already implemented, at least in Spain.

The mutual recognition instruments addressed in this report are the European arrest warrant (EAW), the European Investigation order (EIO) and the European Surveillance order (ESO), and all of them are currently regulated in Spain under (Arts. 34 to 62 EAW; Arts. 186 to 223 EIO; Arts.109 to 129 ESO) Act 23/2014, of 20 November on the mutual recognition of judicial decisions in criminal matters in the European Union (LRM). In fact, Article 2 of the aforementioned Law includes a list of all the mutual recognition instruments applicable in Spain, including EAW (Art. 2(a)), EIO (Art. 2(i)) and ESO (Art. 2(d)). This Law is the one that transposes the instruments of mutual recognition in criminal matters issued by European Directives and Framework Decisions. Likewise, it is provided that the recognition and execution of the instruments will be carried out in accordance

parallel proceedings in more than one MS against the same person for the same acts.

⁵² Incorrect transposition into national law *per se* is out of scope. Incorrect transposition is only relevant if it has an impact on the "effective and coherent" application of the instruments. If, e.g., the NAR is of the opinion that transposition of the optional grounds for refusal of Directive 2014/41/EU as mandatory grounds for refusal is in contravention of that directive *and has a negative impact on the "effective and coherent application" of instruments*, this is relevant and worthy of mention.

⁵³ COM (2023) 185 final.

⁵⁴ Interview conducted by video-call on April 18, 2024 at 13:30 p.m.

⁵⁵ Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, prior quoted.



with the provisions of the LRM, EU standards, and the international conventions in force to which Spain is a party. In the alternative, and in the absence of more specific provisions, the legal regime provided for in the *Ley de Enjuiciamiento Criminal*⁵⁶ (LECrIm) will apply according to Article 4 (1) LRM⁵⁷.

The LRM represents the total and complete regulatory unification in Spanish law, through a single regulatory text of each and every one of the framework decisions and directives approved in this area. With this unification embodied in a single standard, regulatory dispersion is avoided, thus achieving greater specificity and agility for those who have to resort to regulation on the recognition and enforcement of mutual recognition instruments in criminal matters. Its structure also facilitates the future incorporation of directives that may be progressively adopted on these issues. On the other hand, its conception outside the LECrIm has been a complete success, since by integrating European regulatory dynamics, it was considered more appropriate to constitute it in a different law. This is stated in the Preamble Section I of Law 3/2018 of 11 June, amending Law 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union, to regulate the European Investigation Order⁵⁸, which substitutes prior European Evidence Warrant provisions by EIO⁵⁹.

1.1.1. Transposition of EAW

The EAW is based on the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW FWD) and this rule has been transposed into the LRM, specifically in Articles 34 to 62 contained in Title II: "European arrest and surrender warrant" (EAW)⁶⁰. Although it was adopted earlier, to be exact under the repealed Law 3/2003, of 14 March, on the European Arrest Warrant and in the Organic Law 2/2003, of 14 March, complementary to the

⁵⁶ *Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*, *Gazeta de Madrid*, 17 Sept. 1882, n. 260, ELI: <https://www.boe.es/eli/es/rd/1882/09/14/1/con> (last visited 2 Jan. 2025), English version available at <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf> (last visited 2 Jan. 2025).

⁵⁷ Literally: "In the absence of specific provisions, the legal regime provided by the Criminal Procedure Act shall be applicable".

⁵⁸ *Ley 3/2018, de 11 de junio, por la que se modifica la Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, para regular la Orden Europea de Investigación*, BOE of 12 June 2018, n. 142, pp. 6061-60206, ELI: <https://www.boe.es/eli/es/l/2018/06/11/3> (last visited 2 Jan. 2025). Be aware that the new amendment is not included in LRM English version.

⁵⁹ Title X, Chapter 1, Arts. 186-223: "European Investigation Order in criminal matters".

⁶⁰ See for example Jimeno Bulnes "La orden europea de detención y entrega: análisis normativo" and Ruz Gutiérrez, "Cuestiones prácticas relativas a la orden europea de detención y entrega", both in Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre*, op. cit., pp. 35-76 and 77-105 as well as Florez Miranda, "Orden europea de detención", No. 9719, *Diario La Ley* (2020), <https://diariolaley.laleynext.es/> More extensively Jimeno Bulnes, *La orden europea de detención y entrega*, op. cit.



previous one⁶¹. Spain promptly adapted the corresponding Framework Decision being the first country to fulfill its task⁶².

The interpretation in matters of EAW will be carried out under the indications of the LRM but always in accordance with the EAW FWD (Art. 4(3) LRM) and, in turn, with the supplementary nature of the LECrim (Art. 4(1) LRM)⁶³.

1.1.2. Transposition of EIO

The EIO has its origin in Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (DEIO) and has been transposed into the LRM through Articles 186 to 223 of Title X: "European Investigation Order in Criminal Matters". In order for this transposition to have been carried out, it was necessary to approve Law 3/2018, of 11 June, amending Law 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union, to regulate the European Investigation Order as prior said. As can be seen, the transposition into the Spanish legal system had to be after May 22, 2017, the date on which it should have been implemented. As a consequence, the EU gave an ultimatum to Spain granting a deadline for such implementation to happen, otherwise it would raise the case to the CJEU through an appeal for non-compliance⁶⁴.

Thus, the EIO works as a judicial decision issued or validated by a judicial authority of an MS -the issuing State- to carry out one or more investigative measures in

⁶¹ *Ley Orgánica 2/2003, de 14 de marzo, complementaria de la Ley sobre la orden europea de detención y entrega*, BOE of 17 March 2003, n. 65, pp. 10244-10258, ELI: <https://www.boe.es/eli/es/lo/2003/03/14/2> (last visited 2 Jan. 2025). In the Spanish literature at the time Arangüena Fanego, "La orden europea de detención y entrega: análisis de las leyes 2 y 3 de 14 de marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la 'euroorden'", No. 10, *Revista de Derecho Penal* (2003), 11-95; also Jimeno Bulnes, "La orden europea de detención y entrega: aspectos procesales", No. 5979, *Diario La Ley*, 2004, 1-7 and generally "Capítulo V.2. Orden de detención europea" in Jimeno Bulnes (Ed.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales* (Bosch, 2007), pp. 299-339. With general character and for a deepening, Gómez Campelo, "Orden de detención europea y extradición", in Jimeno Bulnes (Ed.), *Justicia versus seguridad en el espacio judicial europeo: orden de detención europea y garantías procesales* (Tirant lo Blanch, 2011), pp. 19-59. Last, in English language Jimeno Bulnes, "The European Arrest Warrant as a measure against terrorism. Spanish implementation on the EAW: a procedural view", in Gruszczak (Ed.), *European Arrest Warrant – Achievements and dilemmas*, Working paper 3/06 (European Centre Natolin, 2006), pp. 43-70 and "Spain and the EAW – A view from a 'key user'", in Guild (Ed.), *Constitutional challenges to European Arrest Warrant* (Wolf Legal Publishers, 2006), pp. 163-185.

⁶² Jimeno Bulnes, "The enforcement of the European Arrest Warrant: a comparison between Spain and the UK", 15 *Eur.J.Crime Cr.L.Cr.J.* (2007), 263-307 at 268-269.

⁶³ In this regard, Ruiz Albert, "La orden europea de detención y entrega" in Jimeno Bulnes and Miguel Barrio (Ed.), *Espacio judicial europeo y proceso penal*, op. cit., pp. 81-114 at p. 82.

⁶⁴ Of this opinion Cacciatore, "La aplicación práctica de la orden europea de investigación como mecanismo de obtención transnacional de pruebas", op. cit., at pp. 307-308; also Cacciatore, "European Investigation order as an instrument for the fight against organised crime", in *The Significance of EU Criminal Law in the 21 Century: The Need for Further Harmonisation or New Criminal Policy?* (Vilnius University Press, 2021), pp. 34-38.

another MS, i.e., the State of execution (Art. 1(1) DEIO). In addition, thanks to the EIO and its implementation in the Spanish legal system, precautionary and/or provisional measures may also be taken in order to protect future sources of evidence (Art. 32 DEIO). As a consequence, its use is frequent in practice, being one of the most employed instruments in the judicial practice joint with the European Arrest Warrant⁶⁵.

1.1.3. Transposition of ESO

Its incorporation into the LRM is a consequence of implementing the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention prior quoted. But the LRM uses another nomenclature to refer to ESO inasmuch Title V (Arts. 109-129) are translated into English according to official text as “Decisions on alternative measures to provisional detention” (*Resoluciones sobre medidas alternativas a la prisión provisional* in Spanish). This title deals with both the transfer of an alternative measure to provisional or provisionl detention⁶⁶ and the execution of such detention. It also contains a Chapter I of general provisions referring to such measures which, among other things, specifies the authorities that have competence in relation to this instrument of mutual recognition.

ESO in Spain, in strictly legal terms, is known as "provisional release surveillance measures"⁶⁷. This can sometimes lead to confusion, as it is commonly and "colloquially" referred to as the European surveillance order (*orden de eurovigilancia*). This name has its origin in the process of preparing the Council Framework, where alternatives were considered that aspired to a more ambitious instrument that received the name of ESO, as indicated in the Proposal dated August 2006 of the Council Framework Decision on ESO in the framework of precautionary measures applied in the MS⁶⁸. These proposals were

⁶⁵ See specifically Jimeno Bulnes, “La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español”, in Jimeno Bulnes and Ruiz López (Eds.), *La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español*, op. cit., pp. 27-81, at pp. 51 et seq.

⁶⁶ On the topic Loibl, “Arrest and Pre-Trial Detention”, in Klip (Ed.), *Comparative Perspectives of Criminal Procedure* (Intersentia, 2024), pp.79-103.

⁶⁷ On the subject, Arangüena Fanego, “Eficacia transnacional de medidas de vigilancia y de protección”, in De Hoyos Sancho (Ed.), *Garantías y derechos de las víctimas especialmente vulnerables en el marco jurídico de la Unión Europea* (Tirant lo Blanch, 2013), pp. 327-352; as an example of these surveillance measures Negri, “Nuove tecnologie e compressione della libertà personale: la sorveglianza con dispositivi elettronici dell’imputato sottoposto a misure cautelari”, *5 Revista Brasileira de Direito Processual Penal* (2019), 1255-1275.

⁶⁸ Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, Brussels, 29.8.2006, COM (2006) 468 final. Of this view Garcimartín Montero, “Resoluciones penales que imponen medidas alternativas a la prisión”, in Jimeno Bulnes and Ruiz López (Eds.), *La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español*, op. cit., pp. 239-263, at pp. 239-240, also Neira Pena, “The reason behind the failure of the European Supervision Order: The defeat of Liberty Versus Security”, *5 European Papers*



not successful, and the name ESO, which was given to it during the preparatory work for the Council Framework Decision, was abandoned. However, although the Council Framework Decision refers to this instrument as "supervision measures" and the LRM refers to it as "alternative measures to provisional detention" (in Title V), it cannot be considered incorrect the name chosen by the Spanish legislature since it refers more clearly to the purpose of the measure and to the terminology of domestic law. Certainly, it is true that it can give rise to some confusion as we have already mentioned, since all European documentation and certificates use the expressions of the Council Framework Decision and not those adopted by the LRM⁶⁹.

1.2. Ratification of conventions

- (a) EU Convention on Mutual Assistance in Criminal Matters;
- (b) European Convention on the Transfer of Proceedings in Criminal Matters;
- (c) European Convention on Mutual Assistance in Criminal Matters.

Explain for each of those instruments whether your MS ratified them. If not, explain why not. If so, explain whether your MS implemented them into national law and, if so, whether in separate laws or as a part of the Code of Criminal Procedure; also list any reservations and declarations your MS made that could have an impact on coherence.⁷⁰

This section will describe the main conventions that regulate judicial cooperation in criminal matters. At the same time, the dates and procedure for the ratification of these conventions by Spain will be indicated.

Ratification of conventions is a formal process by which a state commits itself to the obligations of an international treaty or convention that it has previously signed⁷¹. This translates into the incorporation of the convention into the domestic law of the country ratifying it. It means being subject to the provisions of the convention. In Spain, the

(2020), 1493-1510.

⁶⁹ Garcimartín Montero, "Resoluciones penales que imponen medidas alternativas a la prisión", op. cit., at pp. 240-241.

⁷⁰ The CoE is in the process of analysing and reviewing reservations and declarations pertaining to its conventions.

⁷¹ Of a general character, Cataldi, "Un processus de ratification lent et complexe: les zones grises de la convention", in Sobrino Heredia (Ed.), *La contribución de la convención de las Naciones Unidas sobre el derecho del mar a la buena gobernanza de los mares y océanos* (Editoriale Scientifica, 2014), pp. 21-31.



process of ratification of conventions and/or agreements follows these steps. Firstly, the initial signature, i.e. an authorised representative of the Spanish government signs the international convention. Second, the approval by the Parliament; then the convention is submitted to the *Cortes Generales* (Congress of Deputies and Senate) for debate and approval. Prior it is discussed in the foreign affairs committees or other relevant committees and this is followed by a vote by the chambers on the approval of the treaty. Third, once approved by the *Cortes Generales*, the King of Spain issues the instrument of ratification, which is handled by the Ministry of Foreign Affairs. The instrument of ratification is deposited with the depositary of the treaty. Fourth, once the agreement has been signed and ratified, it must be published in the Spanish Official Journal (*Boletín Oficial del Estado* or BOE) and after the *vacatio legis* period -20 days as a general rule- it will enter into force.

This procedure is possible thanks to Article 96(1) Spanish Constitution (*Constitución Española*, henceforth CE)⁷². The article reads as follows: "Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law." However, before its publication in the BOE, it is necessary for the Parliament to approve or authorise the Agreement. This is stated in Article 94 (1) CE: "Before contracting obligations by means of treaties or agreements, the State shall require the prior authorisation of the *Cortes Generales* [...]". These Courts are the Congress of Deputies (*Congreso de los Diputados* in Spanish) and the Senate (*Senado* in Spanish). Next, the same article lists certain types of treaties that will require the authorisation of the *Cortes Generales*:

- (a) Treaties of a political nature;
- (b) Treaties or agreements of a military nature;
- (c) Treaties or agreements affecting the territorial integrity of the State or the fundamental rights and duties established under Title I⁷³;
- (d) Treaties or agreements which imply financial obligations for the Public Treasury;
- (e) Treaties or conventions which involve amendment or repeal of some law or

⁷² Ratified in the referendum of December 6, 1978, BOE of 29 Dec. 1978, n. 311, pp. 29313-29424, [https://www.boe.es/eli/es/c/1978/12/27/\(1\)](https://www.boe.es/eli/es/c/1978/12/27/(1)) (last visited 2 Jan. 2025). English version available for example <https://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html?lang=en> (last visited 2 Jan. 2025).

⁷³ Fundamental rights and public liberties are numerated in Section I (Arts. 14-29) and rights and duties of citizens in Section 2 (Arts. 30-38).



require legislative measures for their execution.

The latter type of convention recognised in Article 94 (1) CE could be the type of convention that characterises the subsequent conventions that will be analysed below. All of them deal with criminal matters within the framework of judicial cooperation trying to put into practice the assistance between judicial authorities from different Member States, task not always easy⁷⁴.

1.2.1. Ratification of Convention established by the Council in accordance with 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between Member States of the European Union (EU Convention on Mutual Assistance in Criminal Matters)

The ratification of the Convention established by the Council of the EU by act of 29 May 2000 as provided for in Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between EU Member States⁷⁵ coincides with the moment at which the EU Member States officially agree to follow the rules of this convention (i.e. be bound by the obligations and provisions of the convention). When a country ratifies this Convention, it signifies in simple words that it agrees to follow the rules set out in it and once ratified this Convention it becomes part of the "laws" of that country. Spain declared the provisional application of the Convention on Mutual Assistance on 23 September 2003 indicating as starting date the 6 October of 2003⁷⁶ and, finally, definitive application of Convention on Mutual Assistance took place since 23 August 2005 according to general publication in Spanish Official Journal⁷⁷.

⁷⁴ See example of difficulties in judicial practice by Salom Lucas and Llambés Sánchez, "Mutual legal assistance on criminal matters: when theory meets practice", 22 *ERA Forum* (2021), 337-349.

⁷⁵ Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. 12 of July 2000, C 197, pp. 1-23; consolidated version at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02000A0712%2801%29-20000712> (last visited 2 Jan. 2025). See brief comment at the time by Jimeno Bulnes, "European judicial cooperation in criminal matters", 9 *ELJ* (2003), 614-630 at 624-625; also Denza, "The 2000 Convention on Mutual Assistance in Criminal Matters", 40 *CMLRev.* (2003), 1047-1074. In Spain specifically Pérez Gil, "El Convenio de Asistencia Judicial en Materia Penal entre los Estados Miembros de la UE: ¿un instrumento anclado en coordenadas superadas?", No. 6208, *Diario La Ley* (2005), 1-5.

⁷⁶ *Declaración de aplicación provisional del Convenio de asistencia judicial en materia penal entre los Estados miembros de la Unión Europea, hecho en Bruselas el 29 de mayo de 2000*, BOE of 15 Oct. 2003, n. 247, pp. 36894-36904, ELI: <https://www.boe.es/eli/es/ai/2000/05/29/1> (last visited 2 Jan. 2025). See specifically Uriarte Valiente, "El Convenio de Asistencia Judicial en Materia Penal entre los Estados miembros de la Unión Europea, hecho en Bruselas el 29 de mayo de 2000 (BOE 15 octubre 2003)", in González-Cuéllar Serrano, Jiménez -Villarejo Fernández, Zaragoza Aguado, Uriarte Valiente and Tirado Estrada, *Mecanismos de cooperación judicial internacional*, (Aranzadi, 2006), pp. 111-142.

⁷⁷ *Entrada en vigor del Convenio celebrado por el Consejo, de conformidad con el artículo 34 del Tratado de la Unión Europea, relativo a la asistencia judicial en materia penal entre los Estados miembros de la Unión Europea, hecho en Bruselas el 29 de mayo de 2000*, BOE of 28 October 2005, n. 258, pp. 35347-



The aim of this convention is to facilitate cooperation between EU countries on investigations, prosecutions (in criminal matters) and enforcement of sentences; for example, they could share evidence, extradite suspects or convicted people, etc. In other words, the convention facilitates cooperation between judicial authorities of EU Member States in obtaining evidence, executing mutual assistance requests, and conducting cross-border investigations. To be remembered that this convention is also implemented by a Protocol signed on 16 October 2001⁷⁸, which adds some other measures especially referred to organized crime, money-laundering, and finance crimes.

Specifically, Article 13 details the requirements and the process for its entry into force. In concrete, Article 13(1) states that this Protocol is subject to its adoption and integration by the MS in accordance with their respective constitutional requirements. investigations. As we have already indicated in the introductory part of this section, in Spain the ratification and integration of Conventions into the Spanish legal system is regulated by Articles 94 et seq. of the Spanish Constitution. On the other hand, Article 13 (2) of the Convention specifies that MS have the obligation to notify the Secretary General of the Council of the EU of the conclusion of their constitutional procedures for the adoption of the Convention.

In addition, an interesting feature of the Convention is that contained in Article 14, which is the possibility that any State that is going to be part of the EU can accede to the Convention. Finally, in line with Article 13(3) of this Convention, further Article 14 (4) warns that the Convention shall enter into force for the State acceding to "90 days after the date of deposit of its instrument of accession, or on the date of entry into force of this Protocol if this Protocol has not yet entered into force at the time of expiry of the said period of 90 days". For the States at the time concerned, Article 13(3) states that "it shall enter into force in the eight Member States concerned 90 days after the notification referred to in paragraph 2 by the State, member of the European Union at the time of adoption by the Council of the the Act establishing this Protocol, which is the eighth to complete that formality".

1.2.2. Ratification of the European Convention on the Transfer of Proceedings in Criminal Matters

Ratification of the European Convention on the Transfer of Proceedings in Criminal Matters done at Strasbourg on May 15, 1972, already mentioned is a crucial step towards improving judicial cooperation and optimising the administration of justice in

35348, [https://www.boe.es/eli/es/res/2000/05/29/\(4\)](https://www.boe.es/eli/es/res/2000/05/29/(4)) (last visited 2 Jan. 2025).

⁷⁸ Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. 2001, C 326/2.



transnational cases⁷⁹. In Spain, this process involves legislative approval by the Spanish Parliament and formalisation by the executive, ensuring that the provisions of the convention are fully integrated into the national legal system. This Convention was first signed by Spain on 30 May 1984 and ratified on 11 August 1988⁸⁰ by means of the Instrument of Ratification published accordingly in Spanish Official Journal⁸¹. It entered into force on 12 November 1988, for, as provided for in Article 38 (3) of the said Convention, i.e., it shall enter into force for any signatory State that ratifies or accepts it subsequently, three months after the deposit of its instrument of ratification or acceptance.

Under this Convention any Party may request another Party to take proceedings against a suspected person in its stead. Such a request may be made: if the suspected person is normally resident in the requested State or if he/she is a national of that State; if he/she is to serve a prison sentence or face other proceedings in that State; if the transfer of proceedings is warranted in the interests of a fair trial or if the enforcement in the requested State of a sentence, if one were passed, is likely to improve the prospects of his/her social rehabilitation. The requested State may not refuse acceptance of the request except in specific cases and in particular if it considers that the offence is of a political nature or that the request is based on considerations of race, religion or nationality.

1.2.3. Ratification of the European Convention on Mutual Assistance in Criminal Matters

Convention No 30 of the Council of Europe or European Convention on Mutual Assistance in Criminal Matters, signed at Strasbourg on 20 April 1959, also already mentioned, as supplemented by the Additional Protocol to the Convention of 17 March 1978⁸², is the lighthouse that illuminates the European legislation on criminal

⁷⁹ In this case, it is appropriate to recall the interview with the UK liaison magistrate, José Miguel García Moreno, who stated that after Brexit the Spanish central authority receives letters rogatory from Spanish courts and prosecutors and forwards them to the UK central authority. The Ministry of Justice or Spanish central authority does control and coordination, for example, when a rogatory commission is defective (no signature, does not have the required form), does not accept it, returns it to the Spanish court because it will not be accepted by the UK central authority, recommends that you contact the liaison magistrate who is more informed and can advise you on the wording. And here there is such coordination. (Interview conducted online with the Spanish liaison magistrate in the UK on 12 March 2024). For more on this issue, García Moreno, “El impacto del Brexit en la Cooperación Jurídica Internacional en materia penal entre España y el Reino Unido”, No. 8-9, *Unión Europea Aranzadi* (2021), <https://tienda.aranzadilaley.es/revista-union-europea-aranzadi> (access under suscription); also on the topic Jimeno Bulnes, “Brexit and the future of European Criminal Law – a Spanish perspective”, 28 *Crim.L.F.* (2017), 325-347.

⁸⁰ Information available at Council of Europe website: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=073> (last visited 2 Jan. 2025).

⁸¹ BOE of 10 Nov. 1988, n. 270, pp. 32060-32065, ELI: <https://www.boe.es/eli/es/ai/1972/05/15/1> (last visited 2 Jan. 2025).

⁸² ETS No. 99, available at Council of Europe’s website <https://publicsearch.coe.int/> (last visited 2 Jan.



matters in the context of judicial cooperation. The main objectives are to obtain evidence, including, for example, testimony and documents, necessary for criminal proceedings. It also allows States to request the execution of searches, seizures and other judicial measures on the territory of another Member State. Beyond that, it provides a framework for the transmission of judicial and procedural documents between Member States and allows for the conduct of interrogations and the taking of statements by judicial authorities of one State on the territory of another. Finally, it ensures that mutual assistance is carried out with respect for the fundamental rights of individuals involved in criminal proceedings.

This Convention was signed by Spain on 24 July 1979 and ratified on 18 August 1982 being published in Spanish Official Journal⁸³ as required according to Article 96 (1) CE; it entered into force in Spain on 16 November 1982⁸⁴. Spain's ratification of the Convention, protocols, declarations and reservations required the prior authorisation of the Parliament, as they fall within the scope of Article 94(1) (e) of the Constitution prior commented. By signing and ratifying the Convention, the MS undertake to provide each other, in accordance with the provisions contained therein, "the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party" (Art. 1(1)). It should also be noted that also Spain signed and ratified on 27 May 1991 the Additional Protocol to the European Convention of 17 March 1978⁸⁵.

1.3. Competent (judicial) authorities and central authorities

Spanish national law integrates the EU's mutual recognition instruments into its legal system, assigning competences to both judicial and central authorities to ensure effective and efficient cooperation with other Member States⁸⁶.

2025).

⁸³ BOE of 17 Sept. 1982, n. 223, pp. 25166-25174, ELI: [https://www.boe.es/eli/es/ai/1959/04/20/\(2\)](https://www.boe.es/eli/es/ai/1959/04/20/(2)) (last visited 2 Jan. 2025).

⁸⁴ More information on the official website: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=030> (last visited 2 Jan. 2025). Also specific instruction on relation with this and prior convention on Mutual Legal Assistance 2000 by Attorney-General's Office: *Instruction No. 3/2001 of 28 June 2001 on the current mechanisms and modalities of international legal assistance in criminal matters*, available on website: https://www.fiscal.es/memorias/estudio2016/INS/INS_03_2001.html (last visited 2 Jan. 2025).

⁸⁵ *Instrumento de ratificación del Protocolo Adicional al Convenio Europeo de Asistencia Judicial en Materia Penal hecho en Estrasburgo el 17 de marzo de 1978*, BOE of 2 August 1991, n. 184, pp. 25610-25174, ELI: [https://www.boe.es/eli/es/ai/1978/03/17/\(1\)](https://www.boe.es/eli/es/ai/1978/03/17/(1)) (last visited 2 Jan. 2025).

⁸⁶ By way of example, on the one hand, among the competent judicial authorities in Spain we find the *Juzgados de lo Penal*, competent in the application of the EAW and other penal instruments, as well as the *Audiencia Nacional*, whereas it has specific competences in the field of international judicial cooperation,



Given that Article 82 (1) (d) of the Treaty on the Functioning of the EU does not specify what is meant by "judicial authority", the EMs, including Spain, have had to specify which national authorities are competent to issue or execute an instrument of mutual recognition in criminal matters. This means that it will be determined by the domestic law of each MS.

1.3.1. Competent (judicial) authorities

- (a) FWD 2002/584/JHA;
- (b) FWD 2008/909/JHA;
- (c) FWD 2008/947/JHA;
- (d) FWD 2009/829/JHA;
- (e) Directive 2014/41/EU;
- (f) EU Convention on Mutual Assistance in Criminal Matters;
- (g) European Convention on the Transfer of Proceedings in Criminal Matters;
- (h) European Convention on Mutual Assistance in Criminal Matters.

Describe which (judicial) authorities are competent under each of those instruments.

Concerning FWD 2009/829/JHA and FWD 2008/947/JHA: explain how the condition of equivalence⁸⁷ is met (Art. 3(2) of FWD 2008/947/JHA; Article 6(2) of FWD 2009/829/JHA) if the designated competent authority is not a 'judicial' authority. Also, if the designated competent authority is not a 'judicial' authority, explain the reasons for the choice.

Explain how the right to an effective remedy before a tribunal (Article 47(1) of the Charter) is guaranteed, if the competent authority is not a court.

including the execution of European arrest warrants. On the other hand, among the central authorities in Spain, the following are evident: *Fiscalía General del Estado* which cooperates with the judicial authorities and other bodies in the implementation of mutual recognition instruments, especially in criminal matters, as well as the *policía nacional y la guardia civil* involved in the execution of European arrest warrants and other instruments related to judicial cooperation in criminal matters, and *Ministerio de Justicia*, which acts as a central authority for various mutual recognition instruments, facilitating judicial and administrative cooperation with other MS.

⁸⁷ See MR2.0: some preliminary explorations, p. 16.

In this section, we will study which authorities are competent to know about the mutual recognition instrument in Spain, specifically the EAW, EIO and ESO. The judicial authorities considered competent to deal with the instruments of mutual recognition by law will be vested with a series of unique and exclusive powers, such as, for example, the power to issue an EAW, ESO or EIO, or the power to execute a decision of another MS in criminal matters. In Spain, the LRM establishes, depending on the specific instrument, who are the competent authorities in Spain, which, as a general rule, are the judges.

a) EAW: competent judicial authorities

Although the General Council of the Judiciary (CGPJ) in its 11 April 2013 report on the Preliminary Directive of the LRM⁸⁸ does include the Public Prosecutor's Office (MF) as a judicial authority, in the matter of EAW the legislator has decided not to integrate the MF into the concept of judicial authority⁸⁹. Thus, in Article 35 LRM, which follows in the wake of the repealed *Ley 2/2003, de 14 de marzo*, only judges and courts may be considered judicial authorities for both the issuance and execution of an EAW, which excludes and makes it impossible to attribute competence to the MF, at least as far as Spain is concerned. In concrete Article 35 LRM explicitly provides that “the competent judicial authorities to issue a European arrest and surrender warrant are the Judge or Court hearing the case in which such orders are appropriate”, currently the Judges of the Investigative. By contrast the provision of appropriate judicial authority to execute a EAW is centralized in MaDirectiveid inasmuch competence is attributed to the Central Judges of the Investigative or the Central Judge for Minors⁹⁰ when order is adDirectiveessed to a minor between 14-18 years old according to respective law⁹¹.

⁸⁸ *Informe al Anteproyecto de Ley de reconocimiento mutuo de resoluciones judiciales penales en la Unión Europea y al Anteproyecto de Ley Orgánica complementaria de la anterior por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*, available at <https://www.poderjudicial.es/cgpj/en/Judiciary/General-Council-of-the-Judiciary/Activity-of-the-CGPJ/Reports/Informe-al-Anteproyecto-de-Ley-de-reconocimiento-mutuo-de-resoluciones-judiciales-penales-en-la-Union-Europea-y-al-Anteproyecto-de-Ley-Organica-complementaria-de-la-anterior--por-la-que-se-modifica-la-Ley-Organica-6-1985--de-1-de-julio--del-Poder-Judicial> (last visited 2 Jan. 2025), at pp. 12 et seq.

⁸⁹ Bautista Samaniego, *Aproximación crítica a la orden europea de detención y entrega*, (Comares, 2015), p. 23; also specifically at the time López Ortega, “La orden de detención europea: legalidad y jurisdicción de la entrega”, No. 45, *Jueces para la democracia* (2002), 28-33 at 28-29. In general about such aspects related to EAW Rombi, “Il mandato d’arresto europeo: tra teoria e prassi”, No. 11, *Giurisprudenza Italiana* (2022), 2513-2527.

⁹⁰ Explicitly: “2. The competent judicial authority to execute a European arrest warrant shall be the Central Judge of Criminal Investigation of the National High Court. When the order refers to a minor, jurisdiction shall lie with the Central Judge for Minors” (official English translation).

⁹¹ *Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores*, BOE of 13 Jan. 2000, n. 11, pp. 1422-1441, ELI: <https://www.boe.es/eli/es/lo/2000/01/12/5/con> (last visited 2 Jan. 2025).



However, on certain occasions, the Spanish legislator allows the MF to have competence to act in the same way as the judicial authority, i.e. the judges and courts⁹². In these cases, the national legislature expressly indicates this, as is the case of the preventive seizure and seizure of evidence in criminal proceedings regulated by arts. 144(1) and 144(2) of the LRM⁹³, which reads as follows:

1.The issuing authorities of an order freezing property or evidence are the Judges or Courts that hear the proceedings in which the measure must be adopted, as well as the Public Prosecutors carrying out the investigation proceedings in which a measure must be adopted to secure evidence that does not limit fundamental rights.

2.The competent authorities in Spain to execute an order freezing property or evidence are the Judges of Criminal Investigation of the place where the property or documents to be frozen, or the evidence to be secured are located, as well as the Public Prosecutors for execution of the evidence assurance measures that may be applied within their powers without adopting measures limit fundamental rights

b) EIO: competent judicial authorities

However, as far as the EIO is concerned⁹⁴, it is characterized as the first mutual recognition instrument that allows the issuance and execution by the MF. All this is the result of the intentions of the Spanish legislator who preferred "a model of shared competence between Judges and Prosecutors, depending on which, respectively, the EIO serves either as a container for measures restricting fundamental rights or for measures

⁹² Also in this case, on the notion of "issuing authority", see case-law pronounced by the Court of Justice and quoted in recent judgment (Second Chamber) of 6 July 2023, C-142/22, *OE v. Minister for Justice and Equality*, ECLI:EU:C:2023:544, para 31 et seq. See specifically in literature on this question Harkin, "The case law of the court of Justice of the European Union on 'judicial authority' and issuing European arrest warrants", 12 NJECL, (2021), 508-530; in Spain García Moreno, "El concepto de autoridad judicial emisora en la jurisprudencia del TJUE relativa a la orden europea de detención y entrega", No. 103, *Jueces para la democracia*, (2022), 119-138.

⁹³ In the division of competences between judges and prosecutors see for example Cacciatore, "La aplicación práctica de la orden europea de investigación como mecanismo de obtención transnacional de pruebas", op. cit., at p. 309.

⁹⁴ In Spain in general from the European, Spanish and practical perspective see respectively p., "La orden europea de investigación desde la perspectiva europea", Bachmaier Winter, "La orden europea de investigación desde la perspectiva española" and Morán López "La orden europea de investigación desde la perspectiva práctica", in Jimeno Bulnes and Miguel Barrio (Ed.), *Espacio judicial europeo y proceso penal*, op. cit., pp. 115-131, pp. 133-162 and pp. 149-186. Also in Spain as example Martínez García, "La orden europea de investigación", in González Cano (Ed.), *Integración europea y justicia penal* (Tirant lo Blanch, 2018), pp. 403-435.



not limiting these rights"⁹⁵. The competent authorities to issue or execute an EIO in Spain are described in Article 187 (1) LRM that:

The authorities issuing a European Investigation Order are the judges or courts hearing the criminal proceedings in which the investigative measure is to be taken or which have admitted the evidence if the proceedings are at the trial stage.

But second paragraph states that:

The issuing authorities are also the public prosecutors in the proceedings they conduct, provided the measure contained in the European Investigation Order does not restrict fundamental rights.

The fact that the public prosecutor or MF in Spain can only have jurisdiction when the EIO does not limit fundamental rights, means that the competence of the MF as issuing authority is limited in that it can only order measures that do not limit fundamental rights; otherwise it shall be necessary the issuing of EIO by the appropriate Judge or Court. Likewise, also public prosecutors, shall be competent to receive EIOs for recognition and enforcement if the latter does not imply a restriction of fundamental rights; otherwise, and provided that the requested measure cannot be replaced by another measure that does not imply a restriction of such rights or expressly statement of execution by a judicial body is included⁹⁶, the EIO shall be referred for recognition and enforcement to a competent judge or court. On the other hand, unlike in other Member States, the issuing of EIOs by police and/or administrative authorities is not allowed⁹⁷.

This situation opens up a very controversial debate in Spain regarding whether or not the prosecutor should direct the investigation phase, for which a modification of the LECrim would be necessary⁹⁸; or even a new act on criminal procedure, as has been proposed and tried for years⁹⁹. As far as the EIO is “a judicial decision which has been

⁹⁵ Cacciatore, “La aplicación práctica de la orden europea de investigación como mecanismo de obtención transnacional de pruebas”, op. cit., at p. 310.

⁹⁶ Literally: “Where the European Investigation Order contains a measure restricting fundamental rights and which cannot be replaced by another measure that does not restrict those rights, it shall be referred by the Public Prosecutor's Office to the judge or court for recognition and enforcement. A European Investigation Order which expressly states by the issuing authority that the investigative measure is to be executed by a judicial body shall also be forwarded by the Public Prosecutor's Office to the judge or court for recognition and execution”. (Art. 187 (2) III (b) LRM). Personal translation.

⁹⁷ See specifically Domínguez Ruiz, *La orden europea de investigación. Análisis legal y aplicaciones prácticas* (Tirant lo Blanch, 2019), at p. 73.

⁹⁸ Bautista Samaniego, *Aproximación crítica a la orden europea de detención y entrega*, op. cit., p. 23.

⁹⁹ Directiveafts enacted on 2011, 2013 and 2020, last one still available at <https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf> (last visited 2 Jan.



issued or validated by a judicial authority of a Member State” (Art. 1 DEIO) in Spain such judicial decision only could be initially adopted and/or ‘validated’ by a judge or a court according to the Spanish criminal procedure model, classified as mixed¹⁰⁰.

In Spain the direction of the investigative stage and/or pre-trial investigation is still conducted by a judge, generally the Investigating Judge/Judge of the Investigative (*Juzgado de Instrucción*) with exception of the Judge of Violence against Women, who only deals with the investigation of causes related to gender violence¹⁰¹. Public prosecutor (*fiscal*) is only charged with the task of the public accusation to be shared with the private and popular accusation (Art. 101 LECrim) and joint with the civil action (Arts. 100 and 108 LECrim) if it is the case. In sum, according to this restrictive interpretation of the concept of “judicial authority”, no prosecutorial party, private or public, could be initially in Spain issue and/or validate the EIO¹⁰².

According to prior premises, issuing and executing authorities in Spain such as defined in arts. 2 DEIO only could be judicial authorities according to restrictive definition, ie, judges and courts; also the existing regulation in Spain on the EAW prior mentioned is useful providing that only judges and courts shall be competent authorities to issue and execute EAWs. As said, usually shall be the Investigative Judge in Spain the appropriate judicial authority in order to issue an EIO as well as Judge of Violence against Women acting as investigative judge in criminal causes. But also, it could be such EIO delivered by the Judge of the Criminal and even Provincial Court according to their judicial competence if the issuing of EIO takes place along the trial as far as ‘the EIO may also issued for obtaining evidence that is already in the possession of the competent authorities of the executing State’ (Art. 1 DEIO). Nevertheless, it is agreed that main purpose of new European instrument is the practice of investigative measures abroad along the pre-trial investigation stage; for this reason, EIO shall be usually issued by the Judge of the Investigative in Spain.

By contrast, the Bill implementing the EIO in Spain or *Proyecto de Ley* has chosen an extensive interpretation of judicial authority according to the spirit of prior European

2025); all provide attribute the direction of the investigation in criminal procedure to the MF. On the topic, Barona Vilar, “En busca de un nuevo modelo procesal penal español”, in González Granda, Damián Moreno and Ariza Colmenarejo (Eds.), *Variaciones sobre un tema: el ejercicio procesal de los derechos. Libro homenaje a Valentín Cortés Domínguez* (Colex, 2022), pp. 153-178.

¹⁰⁰ See characteristics and criticism by Jimeno-Bulnes, “American criminal procedure in a European context”, 21 *Cardozo Journal of International and Comparative Law* (2013), 429-459, at 423 et seq.

¹⁰¹ See Art. 87 ter Act on the Judiciary. Specifically on the topic Jimeno Bulnes, “Jurisdicción y competencia en materia de violencia de género: los Juzgados de Violencia sobre la Mujer. Problemática a la luz de su experiencia”, No. 1-2, *Justicia*, (2009), 157-206, at 179 et seq in relation to its criminal competence.

¹⁰² From national point of view see Jiménez López, “La orden europea de investigación”, in Fontestad Portalés and Caro Catalán (Eds.), *La globalización del derecho procesal* (Tirant lo Blanch, 2020), pp. 237-254 and Martínez García, “La orden europea de investigación”, in González Cano (Ed.), *Integración europea y justicia penal* (Tirant lo Blanch, 2018), pp. 403-435.



conventions such as Convention of Council of Europe 1959 and MLA 2000 already mentioned; this is also the position of the Court of Justice in defining the concept of judicial authority precisely in relation to the issuing of EIOs¹⁰³. In this context, further art. 187(1) LRM shall provide that issuing judicial authorities shall be, joint with judges and courts with knowledge of criminal proceeding where the EIO shall be adopted, also 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. Besides, Article 187(2) LRM shall institute the Prosecution Office as the appropriate authority in Spain to receive the European investigation orders issued by the appropriate authorities of other Member States centralizing the reception of EIO in Spain. This attribution of competence to the Public Prosecutor's Office in the field of mutual recognition is undoubtedly a significant novelty in Spain¹⁰⁴.

But public prosecutor only shall be able to execute the EIO in Spain, again, when such one does not entail restriction of fundamental rights, ie, when it does not deal with a coercive measure. Otherwise, if the EIO contains any coercive measure and cannot be replaced by another measure does not restrict those rights, it will be sent by the public prosecutor to the judicial body for its recognition and execution as prior said. Same proceeding shall take place when the issuing judicial authority ‘expressly indicates’ that the measure must be enforced by a judicial body, also already indicated. Last, also the concrete judicial bodies to execute such coercive measures are numerated in further Article 187(3) LRM: Judges of the Investigative or Minors of the place where the coercive measures must be carried out or subsidiarily, 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.

c) ESO: competent judicial authorities

Article 111 LRM indicates the competent authorities in Spain to issue and enforce a decision on alternative measures to provisional detention¹⁰⁵. Unlike the EIO, the ESO

¹⁰³ For example, judgment of the Court of Justice (Third Chamber) of 2 March 2023, case C-16/22, *Staatsanwaltschaft Graz v. MS*, ECLI:EU:C:2023:148, para. 24 et seq.

¹⁰⁴ See specifically Aguilera Morales, “Nuevas competencias para el Ministerio Fiscal con ocasión de la orden europea de investigación”, in González Cano (Ed.), *Orden europea de investigación y prueba transfronteriza en la Unión Europea*, op. cit., pp. 457-471; also in same volumen Nieva Fenoll, “Orden europea de investigación: autoridades competentes en el Estado emisor y de ejecución. Especial consideración del papel del Ministerio Fiscal”, pp. 437-456 with reference to various models of issuing and executing judicial authorities.

¹⁰⁵ The investigating judges (*jueces de instrucción*), at the request of the prosecution or the defence (*fiscalía o de la defensa*), may issue an ESO if they consider that the suspect can be adequately supervised in another Member State and there is no significant risk of absconding. For the recognition of the ESO, when Spain receives an ESO issued by another Member State, the investigating judges are responsible for recognising



does not indicate, under any circumstances, that the MF can have competences; competence is attributed solely and exclusively to the Judges or Courts. In addition, Article 111 specifies specific conditions that must be met by judges or courts, such as that they must be the judges or courts that have previously issued the decision to release the accused person in the criminal proceedings, at least with regard to the issuance of an alternative measure to pretrial detention. As prior EAW and EIO, these are Judges of the Investigative (also Central Judges of the Investigative), Judges of Violence against Women, Judges of the Criminal (also Central Judges of Criminal), Provincial Courts, National Courts and even Regional Supreme Courts and Supreme Court¹⁰⁶; also Judges for Minors in the case of measures applied to minors between 14-18 according to respective law prior indicated.

With regard to enforcement, Article 111(2) confers competence to enforce a decision providing for such measures on the “investigating judges or Gender Violence Judges (i.e., Judges of Violence against Women) where the accused is resident, in respect of the offences within their jurisdiction. The same line is followed by the Law with regard to offences for which they have jurisdiction”. Also, competence for execution must be attributed to Judges for Minors in the case of measures applied to minors despite the silence of Article 111(2) LRM on this point, which we believe is due to forgetfulness¹⁰⁷. Again, the competence to transmit a decision on alternative measures to provisional detention is solely granted to judges and courts as further indicated in Article 112 LRM.

d) Conclusions

As we have seen, depending on the instrument we are dealing with, and depending on the specific action to be carried out (issuance and/or execution), Judges, Courts and/or public prosecutors (MF) may be competent. And, if we take into account that, in general terms, in Spain the MF is included within the concept of judicial authority according to the interpretations of the European texts by CGPJ, we can affirm that in Spain there is no debate whatsoever on compliance with the *condition of equivalence* or on the guarantee

and implementing the order, establishing the specific conditions for supervision in Spanish territory. In this regard, Pastor Motta, “Las medidas alternativas a la prisión provisional”, in Dorrego de Carlos (Ed.), *Régimen jurídico de la prisión provisional* (Sepin, 2004), pp. 305-332.

¹⁰⁶ See Arangüena Fanego, “Reconocimiento mutuo de resoluciones sobre medidas alternativas a la prisión provisional: análisis normativo”, in Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre*, op. cit., pp. 207-241, at pp. 219-220.

¹⁰⁷ We agree with Arangüena Fanego, “Reconocimiento mutuo de resoluciones sobre medidas alternativas a la prisión provisional: análisis normativo”, op. cit., at pp. 236-237. On the contrary, other authors consider that the jurisdiction in these cases would be held by the adult courts and not specifically by the juvenile courts as long as the literal wording of the law is not modified; see Pando Echeverría, “Cuestiones prácticas relativas al reconocimiento de resoluciones sobre medidas alternativas a la prisión provisional”, in Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre*, op. cit., pp. 249-268, at p. 262.



of effective judicial protection in cases in which the competent authority is not judicial for such a case cannot happen in Spain. The competent authority is always and unconditionally judicial in all instruments of mutual recognition, either by placing such competence in Judges or Courts solely or in a shared manner with the MF but no competence for this is attributed to either police or administrative authorities, unlike in other Member States.

Despite this, we wanted to ask various professionals specializing in judicial cooperation for their opinion on the guarantee of effective judicial protection for the person under investigation when the competent authority is not a court, a situation that may occur in other EU countries but not in Spain. A prosecutor of the Penitentiary Supervision Courts (*Juzgado de Vigilancia Penitenciaria*) believes that this possibility, that is, the fact that a non-judisdictional authority may be competent, "generates respect and suspicion because I would not conceive of it in Spain. However, this issue has been resolved by the CJEU, so it understands that effective judicial protection is guaranteed and there is no reduction of rights for the person investigated or accused in this case". In the same vein and on this issue, the magistrate of the Court of Instruction (*Juzgado de Instrucción*) No. 2 of Burgos, previously mentioned, Rebeca Huertos¹⁰⁸, states that "the taking of the statement of the investigated must be done in accordance with the laws of the State where the trial is to be carried out. Each country is sovereign and guarantees the rights of the person under investigation in accordance with its rules". Additionally, a prosecutor from the International Cooperation Section does not consider that the competence in the hands of a non-judicial body or authority can impair effective judicial protection, since "the appointment of a court-appointed or freely appointed lawyer together with corresponding legal summons of the person under investigation/accused [...] guarantees effective judicial protection [...] as well as the assignment of an interpreter if necessary".

Appeals against the decisions on transmission of mutual recognition instruments are specifically contemplated in Article 13(1) LRM, i.e.: "the appeals foreseen in the Spanish legal order may be filed against decisions ordering transmission of a mutual recognition instrument, which shall be processed and resolved exclusively by the competent Spanish judicial authority pursuant to Spanish Law.

However, there is a specific exception for the case where the issuance is carried out by the public prosecutor, the only case of which is the EIO when there is no restriction of fundamental rights; in this case appeal is expressly excluded according to Article 13 (4), i.e.: "No appeal whatsoever shall be admitted against the decision to transmit a mutual recognition instrument ordered by the Public Prosecutor in his investigation

¹⁰⁸ We have quoted the interviewee since she gave her consent to do so before conducting the interview. Interview was made on 11 March 2024.



proceedings, without prejudice to subsequent evaluation thereof in the relevant criminal proceedings, pursuant to the terms foreseen in the Criminal Procedure Act” .

In relation with appeals against execution of mutual recognition instruments in criminal matters by Spanish judicial authorities appropriate provision is Article 24(1) LRM with remission to Spanish Criminal Procedure Act¹⁰⁹. But the same problem arises with EIOs executed by the public prosecutor, as Article 24(4) LRM also states: “No appeal may be lodged against the decisions by the Public Prosecutor in enforcement of the mutual recognition instruments, without prejudice to possible motions to contest the underlying matter before the issuing authority and subsequent valuation in the criminal proceedings conducted in the issuing State”.

Precisely for this reason, there has been considerable criticism in Spanish literature against this competence granted to the public prosecutor in matters of EIO¹¹⁰, in contrast to other instruments of mutual recognition where the competent judicial authority in Spain is only Judges and Courts, i.e. jurisdictional bodies, and where it is admissible for their decisions to be challenged in any case in accordance with ordinary procedural criminal law (Criminal Procedure Act) and specific legislation on mutual recognition in criminal matters (LRM). The same problem arises in Spain in relation to the decrees issued now by the European Delegated Prosecutors in the context of the European Public Prosecutor's Office, and thus the raising of a preliminary question in this respect by the Central Judge of the Investigative No. 6 in Madrid, to date still pending resolution, and the recent opinion of the Advocate General¹¹¹.

¹⁰⁹ *Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*, *Gazeta de Madrid*, 17 Sept. 1882, n. 260, ELI: [https://www.boe.es/eli/es/rd/1882/09/14/\(1\)/con](https://www.boe.es/eli/es/rd/1882/09/14/(1)/con) (last visited 2 Jan. 2025). English version available at <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf> (last visited 2 Jan. 2025).

¹¹⁰ See as example Aguilera Morales, “Nuevas competencias para el Ministerio Fiscal con ocasión de la orden europea de investigación”, op. cit., at p. 466.

¹¹¹ Case C-292/23, *European Public Prosecutor's Office v. I.R.O.*, F.J.L.R., ECLI:EU:C2024:856, Opinion of Advocate General Collins delivered on 4 October 2024 arguing as conclusion that “Article 42(1) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, the second subparagraph of Article 19(1) TEU and the principles of equivalence and effectiveness, must be interpreted as precluding national legislation pursuant to which persons who are the subject of an investigation by the European Public Prosecutor's Office may not directly challenge before a competent national court a decision by which, in the context of that investigation, the European Delegated Prosecutor handling the case summonses third parties to appear as witnesses where that decision is intended to produce legal effects vis-à-vis those persons. That issue is for the national court to determine by ascertaining whether such a decision is an act intended to produce legal effects binding on and is capable of affecting the interests of those persons by bringing about a distinct change in their legal position. To that end, the national court must examine the substance of the decision and assess its effects in the light of objective criteria, such as its content, taking into account, as appropriate, the context in which it was made and the powers of the body that adopted it.” (para. 63).



1.3.2. Central authorities

Did your MS designate “central authorities” (within the meaning of the instruments)? If so, which authorities and what are their respective competences? What is the role of the central authority in choosing the form of cooperation?¹¹²

In accordance with the LRM it is the Ministry of Justice of Spain that is considered to be the central authority. This is stated in Article 6(3) LRM, which contemplates that "the Ministry of Justice shall be the Central Authority responsible for assisting the judicial authorities". The fact that the Ministry of Justice is the central authority for international judicial cooperation in criminal matters¹¹³, as well as in civil matters, entails a series of obligations on the part of the Judges and Courts towards this Ministry. These obligations are set out in Articles 6(1) and (2). The first warns judges and courts that whenever they transmit or execute the instruments of mutual recognition provided for in this Law, they must reflect this in the quarterly statistical bulletins and send it to the Ministry of Justice. In addition, the Attorney General's Office shall submit to the Ministry of Justice every six months a list of mutual recognition instruments issued or executed by representatives of the Public Prosecutor's Office, in accordance with the provisions of Article 6(2) of the LRM. These obligations are known as the "duty of information", as stated in the title of Article 6 of the aforementioned regulation.

1.3.3 Coordination

Are there any mechanisms (in law or in practice) for coordinating between:

- different (judicial) authorities that are competent under one and the same instrument/convention and;
- different (judicial) authorities that are competent under different instruments/conventions?

In relation to coordination, according to a prosecutor for International Cooperation, it is done through a European institution, Eurojust, as well as through the liaison magistrates. In fact, a liaison magistrate points out that, as a general rule, communication is direct between judicial authorities. Although it is true that in Spain, according to this liaison magistrate, the Ministry of Justice, the Attorney General's Office (FGE) and the General Council of the Judiciary (CGPJ) have established internal networks

¹¹² It is assumed that the central authority has no role in deciding whether to ask for judicial cooperation, and if so, which form of judicial cooperation. However, if that assumption does not hold true for your MS, please explain.

¹¹³ García-Varela Iglesias, *Herramientas y mecanismos para la consecución del auxilio judicial internacional* (Centro de Estudios Jurídicos, 2022), p. 6.



of judicial cooperation where they respond to doubts, queries or questions from the Spanish judicial authorities. A court or public prosecutor's office may appeal to the CGPJ or the FGE for advice on mutual recognition. Of course, these consultations are voluntary, it is not mandatory to carry them out.

For example, the CGPJ within the International Relations service directorate¹¹⁴ has an international legal aid section in permanent contact with Eurojust, according to a magistrate from the CGPJ's international relations services.

Where appropriate, supranational institutions such as Eurojust or the liaison magistrates or the contact points of the European Judicial Network in criminal matters can also be approached for clarification of any doubts or questions in this area. But, in general terms, we would say that the only existing mechanisms would be of an informal nature. Moreover, not all legal practitioners praise the work of Eurojust or judicial networks, some considering that they operate as intermediaries in the work of judicial cooperation when the latter should be direct and immediate between judicial authorities.

However, Spanish legislation such as the Act on the Judiciary or LOPJ provides for certain steps to be taken in certain cases, conflicts of jurisdiction (Arts. 38 to 40 LOPJ) and conflicts of competence (Arts. 42 to 50 LOPJ). By way of example, Article 39(1) of the LOPJ provides for the existence of a Chamber of Conflicts of Jurisdiction with competence to resolve any conflict of jurisdiction between courts of any jurisdictional order and military judicial bodies. The same is done by Article 38(1) of the LOPJ, which regulates conflicts of jurisdiction between courts and the Administration. In this sense, and in the face of possible cases of conflicts of national jurisdictions in the criminal field, some scholars in Spain¹¹⁵ states that although Article 117(3) EC and Article 2(1) of the LOPJ confirm and recognise the exercise of judicial power in all types of proceedings only by the courts and tribunals determined by law, certain conflicts may sometimes arise due to the "asymmetries" of the legal systems that may be based on different legal traditions, mutual distrust between States and the excessive protection of their sovereignty, etc.

Nevertheless, the European authorities have already established (for years) regulations and principles with the aim of minimising the survival of this type of conflict. An example of this could be the creation by the Council of Europe of the Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972, regulating, among others, the principle *ne bis in idem*, by which a person against whom a final judgment has been pronounced may no longer be sentenced to the execution of a penalty in another

¹¹⁴ More information on the official website: <https://www.poderjudicial.es/cgpj/es/Temas/Relaciones-internacionales/El-Servicio-de-Relaciones-Internacionales/> (last visited 2 Jan. 2025).

¹¹⁵ In concrete Rodríguez García, "Los conflictos entre jurisdicciones nacionales en el ámbito penal: vías para su prevención y resolución", in Martín Ostos (Ed.), *El Derecho Procesal en el espacio judicial europeo* (Atelier, 2013), pp. 421-439, at p. 428 et seq.



Member State (provided that he has been acquitted, the sanction was being served or has already been served, if he has been pardoned or amnestied¹¹⁶, or if the sanction or penalty has expired)¹¹⁷. However, we consider it necessary to have a European regulation on *ne bis in idem*, which was forgotten at the time despite the legislative initiative on the matter¹¹⁸.

2. The instruments and investigation/prosecution

General introduction

As discussed in the proposal, our perspective is the perspective of the competent national authority that has to decide whether or not to request judicial cooperation in a criminal case with a particular transnational component:

- either the person concerned resides in another Member State;
- or he¹¹⁹ is a national or resident of another Member State (but present in the issuing Member State).

In order to establish (a lack of) coherence and effectiveness when applying the instruments, chapters 2 and 3 are divided according to the general goals pursued by the competent national authority: investigation/prosecution on the one hand (Chapter 2) and enforcement of a sentence on the other (Chapter 3). Chapters 2-5 correspond to elements I and II of the methodology.

As to Chapter 2, the goal of investigation and/or prosecution can only be pursued in the stages preceding the stage of enforcement of a sentence. Those stages are the pre-trial

¹¹⁶ See in Spain the controversial and famous Catalan case of Carles Puigdemont and the Amnesty. As an example see information available in the press <https://www.elmundo.es/espana/2024/05/30/66576eace4d4d8176c8b457c.html> (last visited 2 Jan. 2025).

¹¹⁷ Rodríguez García, “Los conflictos entre jurisdicciones nacionales en el ámbito penal: vías para su prevención y resolución”, op.cit., pp. 430 et seq.

¹¹⁸ Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘ne bis in idem’ principle, O.J. 2003, C 100/24, leading to subsequent Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696 final. however, only conflicts of jurisdiction are covered by the final legislation undertaken by Council Framework Decision of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. 2009, L 328/42. On the latter issue see Hernández López, *Conflicts of criminal jurisdiction and transfer of proceedings in the EU*, (Springer, 2022).

¹¹⁹ With a view to readability, “he” is used instead of “he/she/they”.



stage and the trial stage. Thus, the concept of “prosecution” includes the trial. It is not excluded that at the trial stage – and thus during “prosecution” – investigative measures (such as interrogating the defendant in another MS) are carried out.

The pre-trial stage comprises the investigation into an offence from the moment the authorities become aware that an offence has been committed (even when the probable author of that offence is not yet known) up to the decision that the probable author of the offence must stand trial. The trial stage starts from the moment the competent national authority decides that the person concerned must stand trial. It ends when the decision of a court to convict the person concerned and to impose a sentence on him becomes final and enforceable. It comprises, therefore, a trial on appeal. Proceedings in which only questions of law are addressed are excluded. During such proceedings, there is no need for forms of judicial cooperation that are in the scope of the project, i.e. that are capable of prejudicing the liberty of the person concerned (see p. 6).¹²⁰

The chapter on investigation/prosecution is subdivided into:

- a general part, identifying *in abstracto* the instruments that can be employed to pursue the general goal of investigation/prosecution (i.e. their “applicability”) (2.1), and
- a specific part, identifying the considerations that play a role when deciding on whether to employ those instruments *in concreto* in the pre-trial and trial stages (2.2 and 2.3) in connection with more specific goals that are pursued (i.e. their “application” in a given case).

2.1 Applicability of the instruments¹²¹ according to EU law

¹²⁰ Of course, once the sentence is final it may be necessary to order the arrest and detention of the person concerned to ensure the enforcement of the sentence, but this concerns the enforcement stage, not the trial stage.

¹²¹ Order of the instruments in accordance with sections 1.1 and 1.2.

In Section 2.1, the listed instruments are those that – in our preliminary view – apply to that particular stage from the of EU-law perspective. This means that in this stage national law and national arrangements are not relevant.¹²²

From the perspective of EU law, there are doubts regarding the applicability of some of the instruments listed.¹²³ These instruments are denoted by a question mark in red, like this: ‘FWD 2009/829/JHA (?)’. The reason for the question mark is explained in red. The NARs will give their opinion on the applicability of those instruments from the perspective of EU law. Please refer to the case-law of the CJEU, national case-law, legal literature and national parliamentary debates where relevant.¹²⁴

Next, in the following sections, we will develop the application of mutual recognition instruments (EAW, EIO and ESO) in the different phases of the criminal process in Spain. In general, there would be two phases: the pre-trial phase and the trial phase. The investigation (*instrucción* in Spanish) would correspond to what the report calls the "pre-trial stage", or in other words, the phase prior to the oral trial (*juicio oral* in Spanish). The trial refers to the holding of the oral trial and corresponds to what the report describes as a "trial stage". In addition, within the two main stages of instruction/investigation and prosecution, we will make a classification depending on whether the person concerned is present (or not) in the issuing Member State or if he or she is present in a third MS. As we shall see below, in general terms, it is not possible to recognize a situation in which the person under investigation is in the territory of the issuing MS, since there could be no judicial cooperation. Judicial cooperation requires a transnational element. In fact, the issuing MS is issuing precisely because it seeks to issue a warrant because the person it intends to investigate or prosecute is not in its territory. If the person concerned is already in the territory of the issuing MS, it makes no sense to issue an order or request judicial cooperation from the competent authorities of another MS.

We will also classify all these issues taking into account whether the arrest of the person under investigation is possible (or not) and whether or not the arrest of the person under investigation is ordered (if detention is possible).

¹²² Considerations with regard to national law and arrangements are relevant when dealing with the application of instruments *in concreto*, therefore in Chapter 2.2 and 2.3.

¹²³ See also *MR2.0: some preliminary explorations*, p. 5-9.

¹²⁴ With regard to national sources: only insofar as they concern the applicability/the scope of the EU instrument.



In such a way that this section will be developed taking into account not only European and national legislation, but also integrating the reflections and conclusions of various doctrines and professionals in the field that we have been able to interview.

2.1.1. Pre-trial stage

The pre-trial stage is subdivided into two parts:¹²⁵

- substage 1: the national authorities have reasonable grounds for believing that a certain person has committed the offence but cannot yet order his arrest and detention on remand under national law.
- substage 2: arrest and detention on remand are possible under national law.

Each of the two substages corresponds to a subsection: section 2.1.1.1 (substage 1) and section 2.1.1.2 (substage 2). Each of those subsections distinguishes between two situations: either the suspect is present in the issuing Member State or he is present in another Member State.

In Spain, this phase corresponds to what is known as the *instrucción* or investigation stage, which is inquisitorial in nature, where all investigative actions aimed at discovering the material truth are carried out. This phase is led by the investigating judge, who is different from the judge in the trial phase¹²⁶. And it is in this phase where the application of the EIO¹²⁷, whose main purpose is the gathering of evidence, has its place (Preamble Recital n. 8 DEIO). The EIO will include all investigative measures with the exception of the creation of a joint investigation team¹²⁸, as is well determined by the scope of application of the EIO in Article 3 of DEIO.

Under national law it would be possible to order provisional detention only if there

¹²⁵ There is a third stage that precedes the two substages mentioned but that substage is out of scope (substage 0: the national authorities are aware that an offence has been committed but the probable author of that offence is unknown as yet). See the introduction to Chapter 1.

¹²⁶ Concerning Spanish criminal procedure in English language as example Gascón Inchausti and Villamarín López, "Criminal procedure in Spain", in Vogler and Huber (Eds.), *Criminal procedure in Europe*, (Duncker & Humblot, 2008), pp. 542-653, at p. 553; also more recently López Gil, "Criminal courts and the classification of mode trials", in De Lucchi López-Tapia, Jiménez López and Spada Jiménez (Eds.), *The criminal justice system in Spain* (Atelier, 2022), pp. 53-80 at p. 54.

¹²⁷ On the topic Guerra and Janssens, "Legal and practical challenges in the application of the European investigation order", No 1, *Eu crim the European Criminal Law Associations' forum*, (2019), 46-53.

¹²⁸ See for example Hernández López, "El equipo conjunto de investigación como instrumento en la lucha contra el crimen organizado en la era de la digitalización", in Garrido Carrillo and Faggiani (Eds.), *Lucha contra la criminalidad organizada y cooperación judicial en la UE: instrumentos, límites y perspectivas en la era digital* (Aranzadi, 2022), pp. 263-289.



is sufficient evidence to believe that the person under investigation could abscond or tamper with evidence and provided that "there are no less onerous measures for the right to liberty by which the same purpose as provisional detention may be achieved" (Art. 502(2) LECrim).

2.1.1.1. Substage 1 (no detention on remand possible)

Sometimes, provisional detention of the person under investigation is not possible. This is what we will analyze in this section. In Spain, detention on remand is known as *prisión provisional*. And, in Spain, as said, it is only possible to order it when "there are no less onerous measures for the right to liberty by which the same purpose as provisional detention may be achieved" (Article 502(2) LECrim) due to the enforcement of the principle of proportionality. This means that detention on remand is a measure of last resort. It is a subsidiary measure, it will only be resorted to when it is not possible to achieve the intended ends with a measure that is less invasive of the right to liberty of the person under investigation¹²⁹.

It should be remembered that the right to freedom of movement is a fundamental right recognized in the UDHR (Article 13), ECHR (Article 2 protocol n. 4), and in the Spanish Constitution (Article 19 CE). That is why there have been some conflicts lately. Some people consider EAWs to be issued, for example, when it's really unnecessary. Or, for example, some judicial authorities are also accused of ordering detentions on remand to achieve ends that could be achieved through other measures that are less invasive of the right to freedom of movement of the person under investigation. It is also being stated that sometimes the judicial authorities and the legislator, trying to achieve a "procedural economy", are putting this before the rights of the person under investigation and his or her right to effective judicial protection (Article 24 (2) CE). However, most of the professionals we have been able to interview disagree with these statements. For example, Paula Monge¹³⁰, from the Spanish Ministry of Justice, states that procedural economy and effective judicial protection of the person under investigation "are not incompatible, on the contrary, the more procedural economy, the greater the effective judicial protection.

At the end of the day, what effective judicial protection aims to do is for justice to be agile, useful and actionable. As well as that it actually protects or offers that justice to the people who request it. The more agile and faster it can be provided, the better. In fact, one of the great complaints of historical justice is slowness, with this one of those barriers is eliminated." In the same vein, other professionals maintain the same line, such as an

¹²⁹ On this topic classic literature in Spain such as Barona Vilar, *Prisión provisional y medidas alternativas* (Bosch, 1988).

¹³⁰ She is currently Deputy Director General for International Judicial Cooperation at the Spanish Ministry of Justice. He has held that position since 2011. The interview was conducted online via videoconference on April 20, 2024 at 16:00 p.m.



anti-Directiveug prosecutor¹³¹ responds to the question of "is procedural economy being put before effective judicial protection?" by pointing out that "No (very emphatic). International judicial cooperation in the area of crime prosecution is agile and effective, because it allows it to inform a foreign authority that a person under investigation in Spain is going to cross the border and go to its territory. Effective judicial protection is not violated because everything will always be done respecting their rights."

On the other hand, there are those who argue that the rights of the person under investigation should not be so much affected, since they are already sufficiently protected. In the words of a U.S. liaison magistrate: "I am not so much concerned about the rights of the person detained or investigated, but about the rights of the victims. Sometimes it is difficult to identify the person under investigation/arrest. They are usually unknown authors. I am more concerned about the rights of victims. For example, the right of a woman who suddenly sees her nude photos on social media and when she demands that those photos be removed has no viable criminal mechanism to have those photos removed, if she wants to come to the United States, she has to use a civil procedure. It is not concerned about the rights of the person under investigation, because it will have the rights corresponding to the jurisdiction where it is investigated when it is identified. The problem is identifying it. For example, the case of the mafias in Nigeria. When they are located, if they are in Spain they will have the corresponding rights, and if they are in another country and we get their extradition, we will see"¹³².

(a) Person concerned present in issuing MS

- FWD 2009/829/JHA (?)
- Directive 2014/41/EU
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

This scenario is not possible. Mutual recognition instruments are issued for the purpose of being able to request a detention (EAW), investigation (EIO) or surveillance (ESO) measure from another MS. For this to be possible, there must be an issuing state and an executing state, and therefore the person under investigation must be in a third state

¹³¹ Interview conducted by video call on February 26, 2024 at 9:00 a.m.

¹³² Interview conducted by video call on March 20, 2024 at 16:00 p.m.



other than the issuing state¹³³. So, if the person under investigation is in the territory of the issuing state, there is no room for European judicial cooperation or mutual recognition¹³⁴.

By way of example, in order to issue an EAW (a judicial decision), it must be issued by an MS with a view to the arrest and surrender by another MS of a person wanted for the purpose of criminal proceedings or for the enforcement of a custodial sentence or detention order (Article 1(1) EAW FWD).

According to Article 1 of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, "[...] Member State recognises a decision on supervision measures issued in another Member State"¹³⁵. Also in the Spanish transposition such as it is Article 112(1) LRM states that "The competent Judge or Court shall transmit the decision on alternative measures to provisional detention to the competent authority of the Member State in which any of the following circumstances concurs: a) that the accused has his lawful and ordinary residence in the executing State and consents to return to that State; b) that the accused request transfer to a State other than that of his residence and the competent authority of that State consents this."

We understand that the involvement of two Member States, the issuing Member State and the executing Member State, is necessary. For this action by two Member States to take place, it is mandatory that the suspected person is located in a Member State other than the one issuing the ESO. Furthermore, Article 1 of Council Framework Decision 2009/829/JHA states that "[...] and surrenders the person concerned to the issuing State in case of breach of these measures". If the suspected person is in the issuing Member State,

¹³³ In line with what was stated by the Prosecutor for International Criminal Cooperation: "The mechanism for cooperation between judicial authorities has different levels. Mutual recognition has a bilateral approach, State A and State B. The coordination mechanism is to use as much as possible of the resources available. The coordination mechanism is to use to the maximum, to develop each of the consultation procedures contained in each instrument of mutual recognition to their fullest extent mutual recognition instrument". Interview conducted by video call on 4 March, 2024 at 16:00 p.m.

¹³⁴ For a general overview see Nogueroles Llinares, "La Orden Europea de Detención y la Decisión Marco 909/2008 sobre aplicación del reconocimiento mutuo de sentencias penales que imponen penas o medidas privativas de libertad", No 1, *Revista del Centro de Estudios Jurídicos y de Postgrado CEJUP* (2023), 386-401, as well as the Judgment of the Court (Seventh Chamber) of 21 December 2023, Case C-398/22, Cacciatore, "Concepto de «juicio del que derive la resolución» y la interpretación del principio de primacía del Derecho de la Unión Sentencia del Tribunal de Justicia, Sala Séptima, de 21 de diciembre de 2023, asunto C-398/22 Generalstaatsanwaltschaft Berlin", No. 122, *La Ley Unión Europea* (2024), <https://tienda.aranzadilaley.es/revista-union-europea-aranzadi>

¹³⁵ Article 1, of the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, O.J. 2009, L 294/20, ELI: http://data.europa.eu/eli/dec_framw/2009/829/oj (last visited 2 Jan. 2025). That article states that "This Framework Decision lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures".



there is no point in issuing an ESO, as there is no Member State to which to send such a request.

Reference can be made to the recent decision by the Court of Justice of the European Union (CJEU) in Judgment of the Court of Justice (Eighth Chamber), of 24 March 2022, *European Commission v Ireland*¹³⁶. This case clarified that the Framework Decision requires the cooperation of both the issuing and executing Member States, and the suspect must be located in a Member State other than the issuing one for an ESO to be applicable. The CJEU emphasized that the mutual recognition of decisions on supervision measures is predicated on cross-border cooperation. Therefore, issuing an ESO while the suspect is still in the issuing Member State would contradict the purpose of the Framework Decision, which is designed to facilitate supervision measures across borders.

This interpretation aligns with the principle that an ESO is intended for situations where the suspect is not present in the issuing Member State but in another Member State that can execute the supervision measures.

It could only be possible in a specific case, where the person is in the issuing MS but has his or her lawful and habitual residence¹³⁷ in the potential executing MS and provided that it is understood that he or she intends to return to that State so that the executing MS can implement the decision on supervision measures of the issuing MS. It is the only case for the decision on the supervision measures that could be forwarded.

It should be noted that the limited use of this instrument, especially at the national level, i.e. in Spain, prevents us from being able to analyse this aspect more accurately. So much so that many of the professionals we have been able to interview have not been able to give us an answer to this question. Moreover, there is not much case law on the subject; unfortunately, on mostly of the occasions, since the defence claims the application of the ESO in cases of citizens residing in other Member States and thus the enforcement of precautionary measures in the latter until the oral trial is held, the Spanish judicial authorities prefer to keep the person under investigation in Spain by adopting any precautionary measures (not necessarily pre-trial detention)¹³⁸.

(b) Person concerned present in another MS

¹³⁶ Judgment of the Court of Justice (Eighth Chamber), of 24 March 2022, *European Commission v Ireland*, case C-126/21, ECLI:EU:C:2022:214, para. 2.

¹³⁷ Article 9(1) of the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. This article literally indicates that “A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State”.

¹³⁸ For example, as recent case-law, judgment No. 630/2023 of 11 of December of 2023, *National Court* (Ch. crim.), ECLI: ES: AN:2023:11626A.



- FWD 2009/829/JHA (?)
- Directive 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

FWD 2009/829/JHA seems to require that detention on remand is possible as a precondition to issuing an ESO. After all, ESO is ‘an alternative to provisional detention’ (Art. 1). Is it possible under EU law to issue an ESO, if detention on remand itself is not possible?

Although an EAW, in general, can be issued in the pre-trial stage, it is not mentioned here, because in substage 1 it is not possible to order detention on remand.

In this case, FWD 2009/829/JHA in Article 21(1) allows for the surrender of the person if the competent authority of the issuing State issues an EAW or any other enforceable judicial decision having the same effect, the person concerned will then be surrendered under the EAW Framework Decision. Furthermore, according to Article 21(2) the competent authority of the executing State may not invoke Article 2(1) of the EAW Framework Decision to refuse surrender. It is important to clarify that the purpose of FWD 2009/829/JHA will in no case be to allow a person the right to use, in the framework of criminal proceedings, non-custodial measures as an alternative to custodial measures (Art. 2(2))¹³⁹.

The EIO provides for the possibility for the person under investigation, who has not been arrested, to appear by video conference or other means of audiovisual transmission when this person is in the territory of the executing State and has to be heard (Article 24(1) DEIO). Of course, it is a mandatory requirement that the person under investigation gives his or her consent in order to carry out such an investigative measure (Article 24(2)(a) DEIO). There are also a variety of investigative measures provided for in the EIO for persons under investigation whose arrest is not possible and who are located in a third State other than the issuing State, such as the interception of telecommunications

¹³⁹ In this regard, among the questions asked during the interviews conducted by the University of Burgos, the question concerning the Spanish criminal procedure is particularly noteworthy. Is it considered possible, under Spanish law, to issue an EAW only for the purpose of executing investigative measures? In this case, a lawyer, stated that this is not possible under Spanish law, nor under EU law, but that in practice this instrument is used too invasively. Interview conducted by video call on 12 March 2024.



with the technical assistance of another MS (Art. 30 DEIO). It is also possible to resort to the interim measures provided for in Article 32 DEIO¹⁴⁰.

The EU Convention on Mutual Assistance in Criminal Matters¹⁴¹ also contains some investigative measures that do not require the arrest of the person under investigation. Article 1 of the Convention allows for the request for information on bank accounts, and, in the same vein, Article 3 allows for the request for monitoring of bank transactions.

In general terms, we understand that in order to issue an ESO the person under investigation must not be detained (in Spain ordered provisional detention), although he or she must be liable to be detained, since the ESO provides for the possibility that the competent authority of the issuing State may take any subsequent decisions related to the decision on supervision measures, including the issuance of an arrest warrant or any other enforceable judicial decision having the same effects (Art. 18(1)(c) FWD 2009/829/JHA). However, we deduce that the person under investigation must not be in detention since the scope of application of the ESO interferes with the sphere of liberty of the person under investigation, i.e. it is illogical to apply the ESO if the person has been deprived of liberty. By way of example, Article 8(1) lists the possible supervision measures that can be applied to the person under investigation, some of them are the obligation to inform the competent authority of the executing State of any change of address (Art. 8 (1) (a)), the obligation not to enter certain localities, places or defined areas of the issuing or executing State (Art. 8(1)(b)), the obligation to remain in a specified place, where appropriate, for specified periods (Art. 8(1)(c)), the imposition of limitations on leaving the territory of the executing State (Art. 8(1)(d)), the obligation to report at specified times to a specified authority (Art. 8(1)(e)) and the prohibition of approach to specified persons connected with the offences alleged to have been committed (Art. 8(1)(f)). As can be seen, all these measures cover the sphere of the right to liberty of the person under investigation, which is why it is necessary that the suspected person maintains his or her freedom of movement and has not been deprived of it.

¹⁴⁰ According to a liaison judge in Washington (USA), María de las Heras, by far the most used instrument is the EIO, because of its ease of use, which is what they needed. Perhaps she believes that more direct and real contacts between different authorities are still needed. For example, contacting colleagues by e-mail and telephone, for example, is always conducive to successful cooperation. Interview conducted by video call on 20 March 2024; more information on María de la Heras available at <https://www.elmundo.es/espana/2020/03/12/5e6a1ef221efa036508b4629.html>, 12 March 2020 (last visited 2 Jan. 2025).

¹⁴¹ Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union. O.J. 2000, C 197/3. Available at Eur-lex's website: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42000A0712%2801%29> (last visited 2 Jan. 2025). Of particular interest, Pérez Gil, "El Convenio de Asistencia Judicial en materia penal entre los Estados miembros de la UE: ¿un instrumento anclado en coordenadas superadas?", op. cit.



2.1.1.2. Subtage 2 (detention on remand is possible)

At other times, the arrest of the suspect or person under investigation is possible. In Spain this is possible when, again, in accordance with Article 502(2) LECrim, " [...] there are no less onerous measures for the right to liberty by which the same purpose as provisional detention may be achieved". Likewise, before ordering the arrest, the competent judicial authority in Spain must assess certain aspects. Thus, Article 502(3) LECrim states that "The judge or court will, when ordering provisional detention, take into account the repercussions that this measure may have on the person investigated or accused, taking their circumstances and the facts of the case into account, as well as the length of the sentence that may be imposed". This means that the competent authorities cannot arbitrarily order detention. They must always weigh up the possible consequences that might befall the person who is the subject of that measure, that is, according to his or her circumstances. This is what one of the legal professionals and academics we have interviewed refers to, in particular, regarding the issuance and execution of an EAW, indicating that "The problem with an EAW is that the sacrifice of the right to personal liberty is more burdensome, if I am arrested to take myself to Belgium, I wouldn't know how to speak the language they speak. It is also a place where a foreigner has no family or friends, if they do not know the language, it makes the situation quite traumatic for the detainee. I've had a lot of clients in this very complicated situation"¹⁴². As far as his experience is concerned, he has had several cases in which the competent authority of the MS that has issued the EAW and the competent judicial authority in Spain do not seem to have taken into account the specific circumstances of the detained person (language, location of his personal and family environment, etc.).

An ESO is 'an alternative to provisional detention' (Art. 1 FWD 2009/829/JHA). Does this mean that under EU law detention on remand must be ordered as a precondition to issuing an ESO subsequently?

The Council Framework Decision 2009/829/JHA does not indicate that this is a requirement and does not either the Spanish Law¹⁴³. Moreover, a professional lawyer and professor at the *Universitat de les Illes Balears*¹⁴⁴ with seventeen years of experience does confirm it. However, we want to insist that an ESO cannot be issued if the person has already been arrested and imprisoned. Although the Council Framework Decision 2009/829/JHA does not seem to say otherwise, we also consider that it makes no sense

¹⁴² Interview conducted by video call on March 5, 2024 at 10:00 a.m.

¹⁴³ See Arts. 109 et seq. LRM.

¹⁴⁴ Interview conducted on March 12, 2024 by video call at 11:00 a.m.



whatsoever to issue the ESO to a person who is provisionally detained. Precisely, this regulation, as its name indicates, relates to “decisions on supervision measures as an alternative to provisional detention”. Because precisely what is intended is to avoid the application of imprisonment. In addition, all the surveillance measures included in this regulation, specifically in Article 8(1)¹⁴⁵, are aimed at persons who are at liberty. We also believe that provisional detention ensures that all surveillance measures are covered. For example, Article 8(1)(d) refers to the obligation to stay in a specified place for specified periods. If such a person is in prison, this measure is meaningless as he is already in a certain place for the duration of the provisional detention, where he is perfectly traceable.

The same applies to all other measures in one form or another. In addition, Article 15(h)¹⁴⁶ includes the possibility in case of non-compliance with the supervision measures for an EAW to be issued against the suspected person for arrest and surrender; same provision is contemplated according to Article 128 LRM¹⁴⁷. Such a possibility of future detention is envisaged precisely because it is assumed that the person is at liberty at the time of issuing and executing the ESO.

(a) Person concerned present in issuing MS

As we have already indicated, there are no cases in which the person under investigation is located in the issuing MS. In this case, there is no judicial cooperation because there is a lack of an essential element, the transnational element. For this reason, it is not possible to analyze or develop the following sections.

It would only be possible for an ESO to be issued in this case.

¹⁴⁵ Article 8(1) of the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, includes the following measures: (a) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; (b) an obligation not to enter certain localities, places or defined areas in the issuing or executing State; (c) an obligation to remain at a specified place, where applicable during specified times; (d) an obligation containing limitations on leaving the territory of the executing State; (e) an obligation to report at specified times to a specific authority; (f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.

¹⁴⁶ Article 15(h) of the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention states that “[...] in case of breach of the supervision measures, have to refuse to surrender the person concerned in accordance with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter referred to as the ‘Framework Decision on the European Arrest Warrant’).”

¹⁴⁷ Explicitly: “In the event of the competent authority of the issuing State having issued a European arrest and surrender warrant, the accused shall be delivered according to the terms foreseen in Title II”.



(i) detention on remand possible but not ordered

- FWD 2009/829/JHA (?)
- Directive 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

An ESO is ‘an alternative to provisional detention’ (Art. 1 FWD 2009/829/JHA). Does this mean that under EU law detention on remand must be ordered as a precondition to issuing an ESO subsequently?

Provisional detention is not a condition or requirement for issuing an ESO, although it may give rise to it.

(ii) person in detention on remand

- FWD 2009/829/JHA
- Directive 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Again, we re-emphasise the point made in section 2.1.1.1 a), as judicial cooperation and European warrants have no place if there is no cross-border element or, in other words, if the person under investigation is not located in a third MS from which a warrant is intended to be issued.

However, in relation to ESO, although provisional detention would not be a requirement or condition for issuing this instrument, it is possible that it could lead to it.

(ii) person in detention on remand



Same situation as in the previous section.

(b) Person concerned present in another MS

Unlike the previous cases, this scenario is possible and is the most common. In fact, it is what gives meaning to judicial cooperation and mutual recognition instruments. We are talking about cases in which the person of interest to the issuing MS is located outside that State, i.e. in a third MS. For this reason, the issuing MS requests the competent authority of another State in which the person under investigation is located to carry out the specific measures required (EAW, EIO, ESO...). Thus, the third State in which the person under investigation is located becomes the executing State of the measures requested by the issuing MS. Occasionally, however, the executing State may deny the order or measures requested by the issuing MS, under certain circumstances. An example of this is the famous and controversial case that happened in Spain with the Catalan politician Carles Puigdemont. Regarding this case, after Carles Puigdemont fled in October 2017, the investigating judge in Spain, Pablo Llarena, issued an EAW addressed to the competent judicial authorities of the country in which Puigdemont was located (who was in various European countries, from Finland to Belgium and Germany). However, some authorities, such as the German authorities, through the High Court of Land (*Oberlandesgericht*) *Schleswig Holstein*, did not apply the principle of mutual recognition and refused to carry out the arrest and surrender of the former Catalan president. There was no judicial cooperation of any kind. Some of the reasons given were, *inter alia*, the absence of dual criminality¹⁴⁸.

In Spain, for example, Title I, Chapter II, Section 2 of the LRM regulates the refusal to recognize or enforce a mutual recognition instrument. Specifically, Article 32 sets out very specific grounds that will be grounds for refusal by the Spanish judicial authority of a measure specific to an order or resolution within the framework of European judicial cooperation. These assumptions are:

- A) When a final decision has been handed down in Spain or another State other than that of issue, condemning or acquitting the same person and with regard to the same events, and if enforcement thereof were to breach the principle of non bis in idem under the terms foreseen in the international laws, conventions and treaties to which Spain is party and even when the sentenced person has subsequently been pardoned.
- b) when the order or decision refers to facts for trial of which the Spanish authorities

¹⁴⁸ Bachmaier Winter, “Orden Europea de Detención y Entrega, doble incriminación y reconocimiento mutuo a la luz del caso Puigdemont”, in Arroyo Jiménez, Nieto Martín and Muñoz de Morales Romero (Eds.), *Cooperar y Castigar: el caso de Puigdemont* (Ediciones de la Universidad de Castilla-La Mancha, 2018), pp. 29-40. Also Jimeno Bulnes, *La orden europea de detención y entrega*, op. cit., pp. 442 et seq.



are competent, and if the sentence is handed down by a Spanish jurisdictional body, the penalty imposed has expired pursuant to Spanish Law;

- c) when the form or certificate that is to accompany the application to adopt the measures is incomplete, or is manifestly incorrect, or does not respond to the measure, or when the certificate is missing, without prejudice to the terms set forth in Article 19;
- d) when there is an immunity that prevents execution of the decision.

Likewise, in accordance with Article 33 LRM, decisions issued in the absence of the accused person may also be refused by the Spanish authorities. Unless certain requirements are met, such as, for example, that the authorities have properly summoned the accused person, or that the accused person appoints a lawyer for his defence at trial, etc.

Fortunately, Article 30 of the LRM provides for the possibility of correcting some errors or failures (which can be corrected) that may exist in the request for the execution of a measure or resolution. This art. It allows, in cases where there may be a ground for refusal, for the competent authority to request additional information from the issuing MS authority, setting a time limit within which such information must be submitted.

At the same time, various European legislation also includes a series of assessed grounds on which the refusal of a particular order or measure is justified¹⁴⁹. For example, FWD 2002/584/JHA, which regulates the EAW, in its Article 3 states that it may be compulsorily denied when:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. 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 that, 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;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

¹⁴⁹ On the topic in general Böse, “Mandatory and optional refusal grounds in mutual recognition instruments”, in Luchtman, *Of swords and shield: due process and crime control in times of globalization. Liber amicorum prof. dr. J.A.E. Vervaele* (Eleven, 2023), pp. 425-432.



It is currently a matter of concern that the denial of a measure or resolution by the authorities of an MS will have a negative influence on the issuing authorities, in the sense that, due to a refusal, they think that if they issue an order again, the execution or recognition will be denied again. Many of the professionals we have interviewed have expressed themselves in this regard, most of whom have been judicial authorities belonging to the issuing MS. Rebeca Huertos, magistrate in the Court of Instruction No. 2 of Burgos, states that "Full denials do not usually occur. The refusal is followed by a statement of reasons and is usually salvageable, i.e. modifiable"¹⁵⁰. However, another judicial authority with 36 years of experience, confirms that "In my personal opinion, it is the human condition pure and simple. When something is tried and not achieved in a way, the normal thing is to discourage or discourage the one who has tried it"¹⁵¹. On the contrary, a prosecutor of recognized prestige in Spain with a professional career of 26 years, insists that "in her specific case, with Latvia there was a denial of a very important seizure order, and it was not taken into account at all so as not to continue improving the request. In fact, in the end, they were granted the embargo. So, no, I don't take the denial into account and it doesn't affect me for my performance in the future"¹⁵². Opinions are mixed. It appears to be a matter of a personal rather than a professional nature, subject to the personal character and perspective of each of the competent authorities.

As to whether the issuance of an ESO requires the presence of the suspected person in the issuing member state, we disagree with this statement. Firstly, because neither the Council Framework Decision 2009/829/JHA nor LRM in Spain do not contain such a requirement¹⁵³. Secondly, we rely on the purpose of the Council Framework Decision 2009/829/JHA itself which is to facilitate non-custodial supervision of suspects in their own Member State in order to avoid provisional detention in a different State, as well as to promote the free movement of persons within the EU and judicial cooperation between Member States.

Therefore, following a logical-interpretative approach, we understand that the issuance of an ESO should be aimed at allowing the suspect to be supervised in his Member State of residence, not necessarily in the issuing MS. Therefore, the presence of the suspect in the issuing State should not be a prerequisite for issuing an ESO. For, an ESO is issued precisely because it is expected that the suspect will not remain in the issuing State, but will be supervised in his State of residence. Thus, the interpretation that presence in the issuing State is a requirement has no solid basis in the text of the Framework Decision and contravenes its objectives.

¹⁵⁰ Interview conducted by video call on March 3, 2024 at 9:00 a.m.

¹⁵¹ Interview conducted by video call on February 26, 2024, at 11:00 a.m.

¹⁵² Interview conducted by video call on February 26, 2024, at 17:00 p.m.

¹⁵³ See prior Art. 112(1) LRM.



(i) detention on remand possible but not ordered

- FWD 2009/829/JHA (?)
- Directive 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

If the person under investigation may be subject to provisional arrest, but this has not been ordered, the suspect may be subject to the measures of an ESO or EIO. This is without prejudice to the possibility that an EAW may subsequently be issued (Art. 21(1) FWD 2009/829/JHA). In fact, a lawyer of recognised prestige in Spain states that "he sees no theoretical inconvenience in issuing an ESO when it is possible to order provisional detention but it has not been ordered".

In relation to this order, the ESO, Article 8(1) FWD 2009/829/JHA lists the possible supervision measures that can be applied to the person under investigation, some of them are: the obligation to inform the competent authority of the executing State of any change of address (Art. 8(1)(a)), the obligation not to enter certain localities, places or defined areas of the issuing State or the executing State (Art. 8(1)(b)), the obligation to remain in a specified place, where appropriate, for specified periods (Art. 8(1)(c)), the imposition of limitations on leaving the territory of the executing State (Art. 8(1)(d)), the obligation to report at specified dates to a specified authority (Art. 8(1)(e)) and the prohibition on approaching specified persons connected with the offences alleged to have been committed (Art. 8(1)(f)).

In principle, and as the name of the regulation itself indicates, the supervision measures of the ESO are applied "as a substitute for provisional detention". This means that the execution of both measures is totally incompatible, both cannot be ordered simultaneously. Provisional detention is not a precondition for the subsequent issuing of an ESO. On the contrary, supervision measures exist because they are intended to avoid the ordering of provisional detention, if and when the specific case allows it. Importantly, ESO supervision measures must comply with due process and the fundamental rights of individuals, such as the right to a fair trial, the principle of presumption of innocence and the right to defence. Furthermore, such ESO supervision measures should be individualised and proportionate to the specific case, taking into account factors such as the seriousness of the offence, the risk of absconding, etc¹⁵⁴.

¹⁵⁴ Unlike provisional detention, which is primarily aimed at ensuring the appearance of the accused during



(ii) detention on remand ordered

- FWD 2002/584/JHA (?)
- FWD 2009/829/JHA (?)
- Directive 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

What is the view in your country on whether it is possible, under EU law,¹⁵⁵ to issue a prosecution-EAW with the sole purpose of interrogating the requested person as a suspect/accused?

FWD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State’. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

This case gives rise to the issuing State issuing an EAW. An EAW is a judicial decision issued by an MS with a view to the arrest and surrender by another Member State of a person wanted for the purpose of criminal proceedings or for the execution of a custodial sentence or detention order (Art. 1(1) EAW FWD). The enforcement of the

criminal proceedings, ESO supervision measures may have a more rehabilitative purpose, seeking to reintegrate the individual into society while ensuring public safety. In this regard, Pascual Rodríguez, “La escasa actividad del tribunal europeo de derechos humanos con relación a España en el ámbito de la privación de libertad”, No. 37, *Revista General de Derecho Penal* (2022), 1698-1189.

¹⁵⁵ At various places the Annotated Index requires the NARs to put forward their opinion on the applicability of certain instruments to certain substages, either as a matter of EU law or as a matter of national law. These are different questions. It may well be that a certain instrument does apply as a matter of EU law, but does not apply as a matter national law, and vice versa. It may also be that a certain instrument allows a MS to refrain from providing for a certain measure but that a MS has chosen not to make use of that option. The answer to such questions may show that there are defects – (in the former situation) or legitimate choices (in the latter situation) that stand in the way of “effective and coherent” application of the instruments (see p. 3).



EAW will always be done under the principle of mutual recognition (Art. 1(2) EAW FWD). On the other hand, it should be noted that an EAW cannot be issued for just any type of offence, but that certain requirements must be met for it to be issued. For example, such an order may be issued for acts for which the law of the issuing MS provides for a custodial sentence or detention order for a maximum period of at least 12 months or, where the purpose of the claim is to enforce a sentence to a custodial sentence or detention order of not less than four months (Art. 2(1) EAW FWD)¹⁵⁶.

In turn, offences punishable in the issuing Member State by a custodial sentence or a detention order of a maximum of at least three years, as defined by the law of the issuing Member State, may be subject to the EAW without dual criminality check if they are in particular offences of (i) membership of a criminal organisation, (ii) terrorism, (iii) trafficking in human beings, (iv) sexual exploitation of children and child pornography, (v) illicit trafficking in narcotic Drugs and psychotropic substances, (vi) illicit trafficking in arms, munitions and explosives, corruption, (vii) fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, (viii) laundering of the proceeds of crime, (ix) counterfeiting currency, including of the euro, (x) computer-related crime, (xi) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, (xii) facilitation of unauthorised entry and residence, (xiii) murder, grievous bodily injury, (xiv) illicit trade in human organs and tissue, (xv) kidnapping, illegal restraint and hostage-taking, (xvi) racism and xenophobia, (xvii) organised or armed robbery, (xviii) illicit trafficking in cultural goods, including antiques and works of art, (xix) swindling, (xx) racketeering and extortion, (xxi) counterfeiting and piracy of products, (xxii) forgery of administrative documents and trafficking therein, (xxiii) forgery of means of payment, (xxiv) illicit trafficking in hormonal substances and other growth promoters, (xxv) illicit trafficking in nuclear or radioactive materials, (xxvi) trafficking in stolen vehicles, (xxvii) rape, (xxviii) arson, (xxix) crimes within the jurisdiction of the International Criminal Court, (xxx) unlawful seizure of aircraft/ships and (xxxi) sabotage¹⁵⁷.

Of course, the sole purpose of the EAW is the arrest and surrender by another MS of a person sought for the purpose of criminal proceedings or for the execution of a custodial sentence or detention order (Art. 1(1) EAW FWD), as we pointed out at the beginning. It is for this reason that the issuing of this warrant for any other purpose, such as, for example, to interrogate the suspect or person under investigation would be, in the words of a lawyer of recognised prestige in Spain, an "abuse of the instrument designed for other things, insofar as the deprivation of a person's liberty must be exceptional and

¹⁵⁶ It should be noted that among the professionals interviewed, the majority answered that the EAW is the most widely used mutual recognition instrument in judicial cooperation in criminal matters.

¹⁵⁷ Also for a brief description of the different types of crime Jimeno Bulnes, *La orden europea de detención y entrega*, op. cit., at pp. 167 et seq.



subsidiary". In any case, for cases in which it is a questioning of the person under investigation, it is necessary to resort, as a Spanish lawyer rightly defends, "to the EIO, unless there are justified or well-founded reasons that the suspect may evade justice. For the taking of a statement, the EIO should be applied by default in such a case. Moreover, according to Spanish law it is possible, Act 23/2014 of mutual recognition allows it"¹⁵⁸. On the other hand, this professional lawyer insists that the use of the EAW for the purposes of interrogating the person under investigation is a practice that currently occurs, and "is not in accordance with the Law or the principles of European criminal procedure, including the principle of proportionality. Perhaps the law should be amended and expressly establish the impossibility of agreeing to an EAW when the only purpose is the interrogation of the accused. But this is not stated in the law, so it is open to free interpretation".

Finally, in this case, there could also be an option contemplated by the EIO, such as the temporary transfer of the detainee. Specifically, the EIO provides for the possibility of temporarily transferring detainees to the issuing State for the purpose of carrying out an investigative measure, provided that the aim is to obtain evidence that requires the presence of the detainee in the territory of the issuing State for this purpose, and provided that the person is returned within the period stipulated by the executing State (Art. 22 (1) Directive 2014/41/EU). However, for the temporary transfer to take place, it is a *sine qua non* requirement that the detained person gives his or her consent (Art. 22 (2) (a)), otherwise the lack of consent of the detained person may be a ground for refusal of the EIO. Similarly, if the temporary transfer is likely to result in a prolongation of the detained person's detention, it may also be grounds for refusal of EIO (Art. 22 (2) (b))¹⁵⁹.

Regarding the possibility that under EU law an ESO is issued when the person concerned has already returned to that MS, we consider that this is not possible, as the ESO provides that these supervision measures are applied to a natural person and that in case of non-compliance with such measures the person concerned will be handed over to the issuing MS (Art. 1 FWD 2009/829/JHA). This leads to the conclusion that it is imperative that the person concerned is outside the issuing MS.

2.1.2. Trial Stage

This section will look at how mutual recognition instruments and procedures are applied during the trial stage of criminal proceedings¹⁶⁰. It looks at how these legal tools

¹⁵⁸ Interview conducted on March 5, 2024 at 10:00 a.m.

¹⁵⁹ From a national perspective Fauchon, "La Fiscalía como autoridad de ejecución de una orden europea de investigación no es un órgano jurisdiccional, Comentario de la STJUE, XK, 2 de septiembre de 2021, C-66/20", *IUDICIUM: Revista de Derecho Procesal de la asociación iberoamericana de la Universidad de Salamanca* (2021), 125-132.

¹⁶⁰ See, Pérez Marín, "El procedimiento para el reconocimiento y la ejecución de resoluciones de embargo



are used both when the person involved is present in the issuing member state and when he or she is in another member state. It is essential to understand how these legal instruments are applied in different situations to ensure a fair and equitable process for all parties involved in the judicial process.

(a) Person concerned present in issuing MS

As stated earlier, this is a scenario is not possible. Mutual recognition instruments are issued in order to be able to request a measure of internment (EAW), investigation (EIO) or surveillance (ESO) to another MS. For this to be possible, there must be a State of issue and a State of execution, so that the person under investigation must be in a third State other than the State of issue. Therefore, if the person under investigation is located in the territory of the issuing State, there is no place for European judicial cooperation or mutual recognition¹⁶¹.

By way of example, in order to issue an EAW (judicial decision), it must be issued by a Member State with a view to the arrest and surrender by another Member State of a requested person for the purposes of criminal proceedings or for the execution of a custodial sentence or detention order (Art. 1(1), of the EAW FWD)¹⁶².

For this reason, the following paragraphs 2.1.2(a)(i), and 2.1.2(a)(ii) will be left empty.

On the other hand, we must mention in relation to EIO the fact that detention on remand is not ordered in the issuing MS does not preclude detention in the executing MS in another case. According to Spanish law and jurisprudence, the principle of judicial cooperation in criminal matters, in particular as regards the EIO and temporary transfer, allows a person to be transferred to participate in proceedings under an EIO even if he or she is not remanded in custody in the issuing Member State, provided that he or she is

y decomiso basado en el principio de reconocimiento mutuo: acercamiento a la propuesta para una nueva regulación en la Unión Europea”, in Cachón Cadenas, Franco Arias and Ramos Méndez (Eds.), *Derecho y proceso: Liber Amicorum del profesor Francisco Ramos Méndez*, (Atelier, 2018), pp. 2017-2042, as well as Páramo Montero, “La ejecución transfronteriza de sanciones penales y administrativas, asistencia y reconocimiento mutuos en los procedimientos sancionadores en el ámbito de la Unión Europea: especial referencia a los supuestos del orden social”, No. 78, *Revista del Ministerio de Trabajo y Asuntos Sociales: Revista del Ministerio de Trabajo e Inmigración* (2008), pp. 323-344.

¹⁶¹ Once again, on the principle of mutual recognition, Saez Zambrana, “Principio de reconocimiento mutuo y de cooperación en la Unión Europea, la orden europea de investigación como su exponente”, 5 *Spanish Journal of Legislative Studies* (2023), 1-17.

¹⁶² On this subject, Fontestad Portalés, “El procedimiento de transmisión de la orden europea de detención y entrega en la nueva ley de reconocimiento mutuo de resoluciones penales en la Unión Europea”, in Robles Garzón (Ed.), *Reflexiones jurídicas sobre cuestiones actuales* (Aranzadi, 2017), pp. 389-426; same autor in *Perspectiva crítica de la orden europea de detención y entrega a la luz de la Decisión Marco 2002/584/JAI y la Ley 23/2014 de reconocimiento mutuo de resoluciones penales en la Unión Europea (Análisis comparativo con la Ley 3/2003)* (Aranzadi, 2022), at pp. 160 et seq.



detained in another case in the executing Member State. In addition, we have to remark that EAW should not be used with the sole purpose of interrogating the suspect. The issuing of this warrant for any other purpose, such as, for example, to interrogate the suspect or person under investigation would be, in the words of a lawyer of recognised prestige in Spain with 24 years of experience¹⁶³, an "abuse of the instrument designed for other things, insofar as the deprivation of a person's liberty must be exceptional and subsidiary". In any case, for cases in which it is a questioning of the person under investigation, it is necessary to resort, as a Spanish lawyer rightly defends, "to the EIO, unless there are justified or well-founded reasons that the suspect may evade justice. For the taking of a statement, the EIO should be applied by default in such a case. Moreover, according to Spanish law it is possible, Act 23/2014 of mutual recognition allows it". On the other hand, this professional lawyer insists that the use of the EAW for the purposes of interrogating the person under investigation is a practice that currently occurs, and "is not in accordance with the Law or the principles of European criminal procedure, including the principle of proportionality. Perhaps the law should be amended and expressly establish the impossibility of agreeing to an EAW when the only purpose is the interrogation of the accused. But this is not stated in the law, so it is open to free interpretation".

With respect to ESO, it would be possible to issue this instrument in this case.

(i) detention on remand possible but not ordered

- FWD 2009/829/JHA (?)
- Directive 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

An ESO is 'an alternative to provisional detention' (Art. 1 FWD 2009/829/JHA). Does this mean that, under EU law, detention on remand must be ordered as a precondition to issuing an ESO subsequently?

Provisional detention is not a condition for issuing an ESO, but it could lead to it.

¹⁶³ Interview carried out on 5 March, 2024 by video call at 10:00 a.m.



(ii) person concerned in detention on remand

- FWD 2009/829/JHA
- Directive 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

(b) Person concerned is present in another MS

This section refers to those cases in which the person concerned is in another MS. All of this is always within the framework of the trial phase (*enjuiciamiento* in spanish). The development of this section will take into account certain cases, taking into account whether it is possible to order the arrest of the accused person even if it has not been ordered, and in the event that his arrest is possible, it has been ordered.

(i) detention on remand possible but not ordered

- FWD 2009/829/JHA (?)
- Directive 2014/41 (?)
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

FWD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) “A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State”. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?



Although an EAW, in general, can be issued in the trial stage, it is not mentioned here, because detention on remand is not ordered.

Directive 2014/41 sets rules that apply to ‘all stages of criminal proceedings, including the trial phase’ (recital (25)). At the same time, these rules pertain to carrying out ‘investigative’ measures ‘with a view to gathering evidence’ (recital (25)).

Under Directive 2014/41, is a videoconference possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?¹⁶⁴ If not: is such a videoconference possible without issuing an EIO?¹⁶⁵ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

Provisional detention is a precautionary measure used in criminal proceedings to ensure the presence of the accused during the trial, to avoid the destruction of evidence or to prevent reoffending. When we speak of "detention on remand possible but not ordered", we refer to a situation in which the law permits the application of detention, but the judge decides not to impose it in a specific case. This decision is based on the assessment of various factors and procedural safeguards.

What are the factors considered by the judge? Danger of absconding, which coincides in the first place with the assessment of the significant risk that the accused may escape in order to evade prosecution. Secondly, with the alternative measures, if the risk of absconding is considered to be low, the judge may opt for other less restrictive precautionary measures, such as the obligation to report periodically to an authority or the withholding of a passport. Another factor to be assessed by the judge is the repetition of the offence, namely the defendant's criminal record. The judge analyses whether there is a risk of the defendant committing further offences while at liberty. As well as factors such as the social and family environment of the defendant that may influence the decision¹⁶⁶.

¹⁶⁴ Cf. Case C-285/23.

¹⁶⁵ Cf. Case C-255/23.

¹⁶⁶ Among the factors considered by the judge, we could add the following factors destruction of evidence, i.e. whether the defendant has the ability and intent to destroy, alter, or conceal evidence relevant to the case.



DEIO regulates what is a single instrument called the European Investigation Order (EIO). An EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the State executing the EIO ('the executing State') with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority (para. 7 DEIO).

Article 24(1) DEIO allows the person under investigation or accused to be heard by videoconference or other means of audiovisual transmission in the likeness of witnesses and experts. It is always done to make an appearance. The article only refers to the need to appear as a justification for the request for a videoconference, not to the use of the EIO in order to guarantee the presence of the accused at the trial, so it is understood that it would not be possible to issue the EIO to hold a videoconference for that purpose. However, a magistrate has confirmed to us that in practice it is usually done, and that "it is relatively common to ensure the presence of the accused". A Spanish lawyer and academic with 24 years of experience in the practice of law, on the other hand, told us his personal experience, stating the following: "I have witnessed EIOs in the trial phase but for experts and witnesses who were abroad. I have never witnessed an EIO for the accused testifying by videoconference in their country of origin. I think it is problematic. Unless there are exceptional circumstances and he can follow the trial from his home country, due to illness or serious indisposition. He must come to the trial otherwise. A temporary transfer could be the solution. The widespread use of video-conferencing in respect of the accused raises doubts [with respect to their rights and guarantees]"¹⁶⁷.

On the other hand, Article 24 DEIO seems to link the issuance of an EIO to the conduct of a videoconference, so it is understood that it is appropriate to issue an EIO when the person concerned is in the executing State and must be heard by the judicial authorities of the issuing State¹⁶⁸.

Article 23(1) DEIO also allows for the temporary transfer of detainees to the executing State for the purpose of carrying out an investigative measure aimed at obtaining evidence that requires the presence of the detained person in the territory of the executing State, for which it will be necessary to issue the corresponding EIO. This means that the issuance of an EIO for the purpose of obtaining a temporary transfer of the detained person can only be justified by the need to obtain evidence, as this is explicitly stated in Article 23(1) of the aforementioned Directive. Therefore, issuing an EIO for a temporary transfer of the detained person for other purposes such as ensuring the presence of the accused person at the trial without any intention of gathering evidence, would not be possible, on

And co-operation: the defendant's willingness to co-operate with the investigation may reduce the need for provisional detention.

¹⁶⁷ Interview conducted by video call on 5 march 2024 at 10:00 a.m.

¹⁶⁸ On the subject we note the judgment of the Court (Sixth Chamber) of 6 June 2024, C-255/23 and C-285/23, *Rīgas tiesas apgabala prokuratūra*, ECLI:EU:C:2024:462.



the contrary, it would be contradictory to the provisions of Article 21(1) DEIO.

Even so, it is important to emphasize that in Spain no investigative measures can be carried out in the trial or trial phase, as these are part of the investigation phase. That is why everything explained here is typical of the investigation phase or investigation phase, despite the fact that European regulations that regulate these mutual recognition instruments allow the organization and execution of these measures at any stage of the procedure.

However, it is appropriate here to quote the words of a famous Judge, who, when asked whether in the trial phase, according to Spanish national legislation, could an OEI be used to ensure the presence of the accused at the trial (either by videoconference or temporary transfer), and according to European legislation? He replies: "Yes, we have used it in terrorism with alleged ETA terrorists, they took advantage of the fact that they were in France in prison, they were temporarily handed over to us and at that time we held the oral trial with them in their physical presence. It is one of the best options because it is very expensive to fly a person who is serving a sentence in France in order to be able to hold trials in Spain, it has to be for very clear reasons, and to guarantee the principle of immediacy, at least in the case of serious crimes". The interviewee continues: "Immediacy is guaranteed, especially in serious crimes, it works very well. In these temporary transfers, the proportionality of mutual responsibilities has to be weighed up. In these international instruments, more fine-tuning is needed"¹⁶⁹.

(ii) detention on remand ordered

- FWD 2002/584/JHA¹⁷⁰
- FWD 2009/829/JHA (?)
- Directive 2014/41 (?)
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

¹⁶⁹ Interview conducted by video call on 26 February, 2024 at 13:00 p.m.

¹⁷⁰ The ultimate objective of a prosecution-EAW is surrender to the issuing MS in order to conduct a criminal prosecution (which includes the trial stage). Pending the decision on the execution of a *prosecution*-EAW, FWD 2002/584/JHA provides for two forms of intermediate judicial cooperation in connection with the prosecution in the issuing MS: hearing the person concerned in the executing MS by a judicial authority of that MS (Art. 18(1)(a) and Art. 19 FWD 2002/584/JHA) or temporarily transferring the person concerned to the issuing MS to be heard there (Art. 19(1)(b) and (2) FWD 2002/584/JHA).



FWD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State’. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS? Directive 2014/41 sets rules that apply to ‘all stages of criminal proceedings, including the trial phase’ (Recital (25)). At the same time, these rules pertain to carrying out ‘investigative’ measures ‘with a view to gathering evidence’ (Recital (25)).

Under Directive 2014/41, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? If not: is such a videoconference possible without issuing an EIO?¹⁷¹ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO? Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

As regards the possibility of issuing an ESO under EU law when the person concerned has already returned to that issuing Member State, we consider that this is not possible, as the ESO provides that these supervisory measures apply to a natural person and that, in the event of non-compliance with those measures, the person concerned shall be handed over to the issuing MS (Art. 1 FWD 2009/829/JHA). This leads to the conclusion that it is imperative that the person concerned be located outside the issuing Member State. In any event, it would only be possible under EU law to issue an EIO for the temporary transfer of the detained person in the issuing State to the executing State when the latter intends to carry out an investigative measure (Art. 22 DEIO)¹⁷².

¹⁷¹ Cf. Case C-255/23 and Case C-285/23.

¹⁷² On this topic, Muñoz Aunión and León Silva, “La detención de extranjeros en situación de vulnerabilidad vs. derechos humanos”, No. 23, *Anuario Hispano-Luso-Americano de derecho internacional* (2017), 285-301, as well as Tarallo “Unicità dell’impugnazione”, “giudicato cautelare” e tutela dei latitanti: qualche perplessità sulle scelte della Corte e.d.u.”, No. 2, *Processo Penale e Giustizia: Rivista di dottrina e giurisprudenza* (2020), 418-437.



To conclude, with regard to videoconferencing, which is nothing more than the result of the integration of new technologies and the exponential development of digitalization in the legal field, there are those who criticize the malpractice in its use and the consequent risks that may be incurred¹⁷³. For example, a prosecutor specialising in criminal judicial cooperation in Spain argues that, although "the introduction of videoconferencing is very useful [...]" and that "there has been a change of mentality as a result of the pandemic that has been global and universal, not only in Spain. Before, a video call with the defendant was looked at with a magnifying glass. Now it is being widely accepted" but there is "a problem that exists now, which is not that it is not accepted, it is that the courts allow [videoconferencing] to be introduced if the defendant agrees and his defense, without the need for an EIO, is approved to connect via Skype [...]" it seems that there is no problem when there is, because national sovereignty is ignored, because there is no formal request or an EIO." In addition, this Spanish Prosecutor stresses the potential danger to which witnesses or experts may be exposed because "it is not guaranteed that the witness is not threatened (that, for example, a gun is being pointed at him behind the screen)", so he insists that "we must be cautious"¹⁷⁴. The EIO provides for videoconferencing to be done in the presence of the executing judicial authority, prosecutor or judge, but it has to be judicial. Another thing is whether the presence is physical or through videoconferencing. Sometimes the prosecutor has been allowed to be present via another videoconference with prisons. But there has to be someone who controls/assesses that the legal requirements established in Spain are met to be able to make the videoconference, or if the questions are typical of a witness or questions of an investigated or accused person, etc."

This is the main risk for many professionals in the legal field, ignoring the formal requirements demanded by EU legislation, which can lead to a violation of fundamental rights, as well as breaking the provisions of the Law and some general principles.

On the other hand, it is important to emphasise, as in the previous section, that mutual recognition instruments are issued and enforced during the investigation phase, at least in Spain, so they would not have a place in the enforcement phase, despite the fact that European legislation provides for their use in the case of some instruments at any

¹⁷³ In this regard, during our interviews, we asked about the impact of globalisation and new technologies on the fundamental and procedural rights of the person being investigated or detained. A liaison judge in Washington (USA), replied that she is not so much concerned about the rights of the person under arrest or under investigation, but rather about the rights of the victims. Sometimes it is difficult to identify the person under investigation/detainee. They are usually unknown perpetrators. Thus, in his words, "I am more concerned about the rights of the victims, the person under investigation will have the rights corresponding to the jurisdiction where he is being investigated when he is identified. The problem is to identify him". Interview conducted by video call on 20 March 2024 at 9:30 a.m.

¹⁷⁴ In the opinion of a lawyer in the administration of justice, and to hear other points of view, globalisation and new technologies have had an influence, both in broadening the framework for action and in increasing the need for international and European judicial cooperation. Interview conducted by video call on March 19, 2024 at 10:00 a.m.



stage of the criminal process¹⁷⁵.

2.2. Application of the instruments at the pre-trial stage according to national law

General introduction

In this section, the object is to tie instruments that are applicable *in abstracto* in the various (sub)stages of the pre-trial stage to *specific* needs for judicial cooperation.

This presupposes that the instruments that are applicable *in abstracto* according to both EU law (see paragraph 2.1) and *national law*. If there are applicability issues according to national law concerning the pre-trial stage, the NARs are requested to address them in this paragraph.

Given our person based approach and given the focus on (alternatives to) measures concerning deprivation of liberty, in the pre-trial stage the specific needs for judicial cooperation are basically twofold:

- (aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS);¹⁷⁶
- (bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution (whether or not he is present in the issuing MS).¹⁷⁷ This means ensuring that the competent

¹⁷⁵ See Cagossi, “Una comparación entre dos instrumentos de mutuo reconocimiento: la orden de detención y la orden europea de protección”, in Burgos Ladrón de Guevara (Ed.), *La cooperación judicial entre España e Italia: la Orden europea de detención y entrega en la ejecución de sentencias penales*, op. cit., pp. 107-113 as well as García Rodríguez, “La orden europea de protección a la luz de la Ley 23/2014, sobre reconocimiento mutuo de resoluciones penales en la Unión Europea: emisión y ejecución en España”, No. 41, *La Ley Unión Europea* (2016), <https://www.aranzadilaley.es/revistas/revista-laley-union-europea.html> at 22.

¹⁷⁶ (aa) concerns measures which require the presence of the person concerned, such as interrogation (whether or not by videoconference) or confrontation. For convenience’s sake, we will use ‘interrogation’ as a short hand designation.

¹⁷⁷ Later on, we will clarify why the situation in which the person is in the issuing MS is also taken into account.



authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*.¹⁷⁸

However, as a safety-valve, we have included the option ‘(dd) other?’¹⁷⁹

With regard to each substage and each subdivision of each substage (present in issuing MS/present in another MS; detention on remand not possible/detention on remand possible; detention on remand possible but not ordered/detention on remand ordered) the NAR will first describe which national authority is in charge of the investigation/prosecution at that stage and, with regard to each specific need for judicial cooperation, which national authority is competent to request that form of judicial cooperation at that stage.¹⁸⁰ Please be as concrete as possible: do not just mention “the Public Prosecutor’s Office” or “the court”, but specify to which tier of jurisdiction the competent authorities belong, e.g. “the Public Prosecutor’s Office at the first instance court” or “the first instance court” and, where relevant, specify their territorial competence, e.g. “the Public Prosecutor’s Office at the first instance court in X” or “the first instance court in X”.

The NAR will examine whether the competent national authority takes into account less intrusive alternatives when deciding on which form of judicial cooperation to request and which instrument(s) to apply. The NAR will describe in a factual way which considerations play a role¹⁸¹ when the competent national authority has to take that decision. To that end, the NARs will (also) endeavour to ascertain whether:

- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions);¹⁸²

¹⁷⁸ E.g., by summoning the person concerned.

¹⁷⁹ Not “(cc)”. That designation is reserved for something else. See the introduction to section 2.3.

¹⁸⁰ Refer to the relevant provisions of national law and, if necessary, to national case-law in the footnotes.

¹⁸¹ That means that at this point no normative approach as to which considerations should play a role should be used. The normative approach is reserved for the separate memorandum.

¹⁸² O.J. 2023, L 86/44.



- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;
- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;¹⁸³
- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audio-visual transmission)/telephone conference to that end.

In the country report, only these considerations will be described. In a *separate* memorandum, the NAR will express his opinion on whether the decisions of the competent national authorities on the application of the various instruments are ‘effective and coherent’ (within the meaning of *MR2.0: some preliminary explorations*).¹⁸⁴ These four separate memoranda will, in turn, form the basis of the overarching analysis in the end report.

Some of the instruments are followed by a question mark in red. Those are the instruments whose applicability under EU law is under doubt (see 2.1). The NARs will provide their assessment regarding the applicability of those instruments within the framework of national law. Please refer to case-law of the CJEU, to national case-law and legal literature, where relevant. Also, refer to infringement proceedings against the NAR’s MS, where relevant.

The pre-trial stage in Spain is called *instrucción*. And it encompasses the entire research machinery. It could be defined as the preparatory phase of the oral trial. In this phase, it is investigated whether the accused acts are really worthy of being judged in the oral trial (the second and next phase). It could be understood that they are worthy of being judged if, in principle, they have the appearance of a crime and can be imputed to a specific and individualized person. In this sense, its main function is to determine whether the

¹⁸³ This calls for an exercise in thinking in scenarios: if the requested form of judicial cooperation does not achieve its intended result, what other form(s) of judicial cooperation will the issuing judicial authority then employ?

¹⁸⁴ See <https://mutualrecognitionnextlevel.eu/>



notitia criminis can give rise to trial. This will determine whether or not the offence was committed, determine who the perpetrator is and his guilt, and provide for the criminal and civil consequences of the offence¹⁸⁵.

During this phase, the investigating judge (*juez de instrucción*), together with the prosecutor (*fiscal*) and the judicial police, works to gather all relevant information. The main objective is to establish whether the accused acts constitute an offence and whether they can be attributed to a specific person. The evidence collected includes testimonies, documents, expert opinions and other evidence that may support the prosecution or defence. The investigating judge is responsible for ensuring that the investigation is complete and impartial. If it emerges during the investigation that there is insufficient evidence, the case may be dismissed. Conversely, if the evidence is sufficient, the case is remanded, thus preparing the ground for the oral trial.

2.2.1. Substage 1 (no detention on remand possible)

The application of mutual recognition instruments in the pre-trial phase (pre-trial investigation) will be analysed here, provided that the arrest of the person under investigation is not possible. This section is subdivided into others according to the location of the person under investigation, that is, depending on whether he or she is in the issuing MS or in the executing or requested MS.

(a) Person concerned present in issuing MS

(bb) Ensuring that the suspect is available¹⁸⁶

- FWD 2009/829/JHA (?)

ESO possible under national law?

This specific case does not give rise to judicial cooperation, so that the instruments of mutual recognition will not be used. If the person concerned is in the issuing MS, then there is no element of a transnational nature that justifies the issuance of an order, such as the EAW or EIO. As a consequence, this section cannot be studied. An ESO could only

¹⁸⁵ See as literature in English language Gascón Inchausti and Villamarín López, “Criminal procedure in Spain”, op. cit., pp. 574 et seq; also more recently Fontestad Portalés, “Initiation of the criminal prosecution. Different stages of the proceedings”, in De Lucchi López-Tapia, Jiménez López and Spada Jiménez (Eds.), *The criminal justice system in Spain*, op.cit., pp. 123-146.

¹⁸⁶ ‘(aa)’ does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.



be issued for this specific case.

(b) Person concerned is present in another MS

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- Directive 2014/41¹⁸⁷

Temporary transfer¹⁸⁸/videoconference

- EU Convention on Mutual Assistance

Inviting him for an interrogation or confrontation etc.
(sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

(bb) Ensuring that the suspect is available

- FWD 2009/829/JHA (?)

ESO possible under national law?

- EU Convention on Mutual Assistance

Keeping in contact with him while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that the suspect is available for the benefit of the investigation/prosecution in the issuing MS.

¹⁸⁷ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

¹⁸⁸ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see.



However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option.

(dd) Other (?)

For all those situations in which it is not possible to order the provisional detention of the person concerned in the investigation/investigation phase and he or she is in another MS other than the issuing State, it is likely that the competent judicial authorities at the national level will seek alternative measures in order to investigate the facts denounced. Obtain evidence that supports the accusation and proves the guilt of the accused person. In order to achieve these objectives, the competent judicial authorities will probably request a temporary transfer, videoconference, or telephone call for the appearance and statement of the person under investigation/accused. Likewise, in those cases in which it may be suspected that the accused person may abscond, surveillance measures will be imposed to ensure the availability of the person under investigation during the investigation phase and for the subsequent oral trial, if applicable.

It is at this stage that the EIO can be applied, which aims to carry out one or more investigative measures in another Member State ('the executing State') with a view to obtaining evidence under this Directive (Art. 1(1) DEIO)¹⁸⁹. With the intention of obtaining evidence at this stage of the investigation, an EIO could be issued to request a temporary transfer of the detained person or the statement of the detained person by videoconference or telephone call. However, DEIO insists that the issuance of an EIO with any of these intentions requires a prior assessment by the issuing State as to whether the issuance of an EIO for the appearance of an investigated person or an accused person by videoconference may constitute an effective alternative (para. 26 DEIO). Thus, the temporary transfer of the detained person to the issuing State may be requested with the intention of carrying out an investigative measure, for which the consent of the detained person will be required (Art. 22(2)(a)) and that the transfer does not cause the prolongation of the detainee's detention (Art. 22(2)(b)). Of course, the time of detention of the person in the issuing State will be deducted from the period of deprivation of liberty to which the person is or will be subjected in the executing State (Art. 22(7))¹⁹⁰.

We must also emphasise para. 21 DEIO which refers to the importance of setting time limits to ensure that judicial cooperation in criminal matters is rapid, effective and consistent. The speed and priority with which these aspects should be addressed should be exactly the same as when dealing with similar internal situations (Art. 12(1) DEIO).

¹⁸⁹ Bachmaier Winter, "Cross-border Investigation of tax Offences in the EU: Scope of Application and Grounds for Refusal of the European Investigation Order", 7 EuCLR (2017), 46-66.

¹⁹⁰ See, Biasiotti and Turchi, *European Investigation Order* (Springer, 2023), as well as Domínguez Ruiz, "Obtención de prueba penal transfronteriza en la Unión Europea, la orden europea de investigación", in Hernández López and Laro González (Eds.), *Proceso penal europeo: últimas tendencias, análisis y perspectivas* (Aranzadi, 2023), pp. 177-196.



This issue should be given greater prominence by the competent judicial authorities, as well as by the national legislator of each of the MS¹⁹¹.

With regard to the ESO and according to the Spanish regulations (LRM), it can be applied in cases in which we find a person under investigation who cannot be arrested and who is outside the issuing State. The basic requirement to be able to issue an ESO is that the person is free, since we must remember that this instrument of mutual recognition is created with the aim of being an alternative or rather substitute measure to provisional detention (Art. 109(1) LRM)¹⁹². In addition, these surveillance measures may be transmitted and enforced in another MS as indicated in Article 110(1) LRM.

2.2.2. Substage 2 (detention on remand possible)

Next, the application of mutual recognition instruments in criminal matters within the framework of judicial cooperation will be analysed in certain cases: if the person under investigation is in the issuing MS and when the person under investigation is present in the executing or requested MS. All these cases are based on the premise that detention on remand against the person under investigation is possible because there are important reasons that justify it.

(a) Person concerned present in issuing MS

In the same vein as stated in previous sections, this case does not take place within the framework of judicial cooperation.

(i) detention on remand possible but not ordered

(bb) Ensuring that the suspect is available

- FWD 2008/829/JHA (?)

ESO possible under national law?

(dd) Other (?)

¹⁹¹ In this case, it seems pertinent to mention that, among the professionals interviewed, the European Investigation Order (EIO) is the most commonly used recognition instrument. A prosecutor told us that she had never worked with an EAW, but rather with EIOs and passive rogatory commissions and judicial assistance.

¹⁹² Pérez Marín, “Dos ejemplos de medidas cautelares penales en el espacio judicial europeo: las medidas alternativas a la prisión provisional y el embargo preventivo previo al decomiso de los efectos procedentes del delito”, in Gutiérrez-Alviz, *El derecho procesal en el espacio judicial europeo* (Atelier, 2013), p. 377.



Yes, it would be possible to issue an ESO in this case.

(ii) person concerned in detention on remand

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures.

(b) Person concerned is present in another MS

Under this heading, under the premise that the person under investigation is in another MS other than the issuing MS, that is, in the executing or requested MS, we will study in greater detail how the execution of mutual recognition instruments in criminal matters proceeds. Unlike other headings, this one does contain transnational aspects that justify and necessarily imply judicial cooperation.

(i) detention on remand possible but not ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- Directive 2014/41¹⁹³

Temporary transfer¹⁹⁴/videoconference

- EU Convention on Mutual Assistance

Inviting him for, e.g., an interrogation (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

¹⁹³ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

¹⁹⁴ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS,



(bb) Ensuring that the suspect is available

- FWD 2008/829/JHA (?)

An ESO is ‘an alternative to provisional detention’ (Art. 1 FWD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention remand is possible but not ordered?

- EU Convention on Mutual Assistance

Keeping in contact with him while he’s abroad (sending/service documents)

- Convention on Transfer on Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

(dd) Other (?)

If the competent judicial authorities have decided not to order provisional detention, and given that we are in the pre-trial phase (pre-trial/investigation phase), then it is likely that the judicial authorities will resort to mutual recognition instruments such as the ESO or the EIO. DEIO in Recital 25 contemplates the possibility of carrying out investigative measures at any of the stages of the criminal procedure¹⁹⁵ (although in Spain this is not possible, since investigative measures are reserved for the investigation phase of the criminal proceedings). The EIO will be issued for the purpose of obtaining evidence exclusively¹⁹⁶ that will help to elucidate the veracity of the accusations and the guilt of the accused person (Art. 1 DEIO). These investigative measures include the temporary

¹⁹⁵ In this regard, we recall the interview with the Prosecutor General Coordinator of International Criminal Cooperation. The Prosecutor told us that when referring to the EIO and the EAW, their application depends greatly on which country will ultimately finish the investigation, take the case to trial, or when negotiating the agreement, that is, during key jurisdictional matters. The procedural legal requirements and standards of evidence admissibility of one country and another are not the same, legal and judicial systems remain different, so it is an important issue to consider from the beginning of the investigation, especially if there is a parallel investigation and a certain coordination. Interview conducted by video call on March 4, 2024 at 16:00 p.m.

¹⁹⁶ See recently Case C-583/23, *AK v. Ministère public (Delda)*, ECLI:EU:C2024:863, Opinion of Advocate General Collins delivered on 4 October 2024 arguing that any request for the adoption of any measures “could come within the scope of a European Investigation Order only if its purpose was in fact to gather evidence” (para. 41).



transfer of detained persons to the issuing and/or executing State for the purpose of conducting pre-trial proceedings, holding hearings by videoconference or telephone conference for the testimony of witnesses and experts and even, where appropriate, the person under investigation and/or accused, obtaining information on bank accounts or other types of financial transactions; monitoring of banking transactions and controlled deliveries, undercover investigations and interception of communications.

On the other hand, surveillance measures (Arts. 109 et seq. LRM) may take the form of an obligation on the person to notify the competent judicial authority of the executing State of any change of domicile, the prohibition of entry into certain localities, places or defined areas of the issuing State or of the executing State, the obligation to remain in a specified place for the specified period, the obligation to respect the limitations imposed in relation to departure from the territory of the executing State, the obligation to report to a specific authority on certain dates, the prohibition of approaching certain persons related to the offences allegedly committed, the disqualification from practicing certain professions or activities linked to the offence allegedly committed, the obligation not to drive a motor vehicle, the obligation to post a bond or provide other security, either within certain periods or in a lump sum, the obligation to undergo detoxification or addiction cessation treatment, the prohibition of the possession and carrying of weapons or other specific objects related to the offence prosecuted.

(ii) detention on remand ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- FWD 2002/584/JHA (?)

Under national law, is it possible to issue a prosecution-EAW for the sole¹⁹⁷ purpose of interrogating the requested person as a suspect?

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FWD 2002/584/JHA.

- Directive 2014/41¹⁹⁸

¹⁹⁷ It is rumoured that the issuing judicial authorities of one MS issue an EAW just to hear the requested person. After having heard the surrendered person, he is then released.

¹⁹⁸ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board



Temporary transfer¹⁹⁹/videoconference

- EU Convention on Mutual Assistance

Summoning him, e.g., to an interrogation while he's abroad
(sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for, e.g., interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

(bb) Ensuring that the suspect is available

- FWD 2002/584/JHA

Prosecution-EAW

- FWD 2008/829/JHA (?)

ESO possible under national law?

- EU Convention on Mutual Assistance

Keeping in touch with him while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available for investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to the MS of residence may be an option.

(dd) Other (?)

In a case like this, an EAW is issued, i.e. an order from the issuing State to the

whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

¹⁹⁹ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS.



executing State to arrest and surrender the person under investigation and/or accused. The EAW is regulated by FWD EAW 2002/584/JHA (EAW FWD, hereinafter referred to as)²⁰⁰. An EAW is a judicial decision issued by an MS with a view to the arrest and surrender by another Member State of a requested person for the purpose of criminal prosecution or for the execution of a custodial sentence or detention order (Art. 1(1) EAW FWD). The implementation of the EAW will always be done under the principle of mutual recognition (Art. 1(2) EAW FWD). On the other hand, it should be noted that an EAW cannot be issued for any type of crime, but certain requirements must be met for it. For example, such an order may be issued for acts for which the law of the issuing Member State prescribes a custodial sentence or detention order for a maximum duration of at least 12 months or, where the claim relates to the serving of a sentence or detention order of not less than four months' deprivation of liberty (Art. 2(1) EAW FWD).

In this regard, it is necessary to refer to the *Aranyosi and Căldăraru* Judgment (C-404/15 and C-659/15 PPU)²⁰¹ of the Court of Justice of the European Union (CJEU), issued on April 5, 2016. The judgment concerns the interpretation of the European Arrest Warrant (EAW) in relation to the fundamental rights of detainees. The joined case involved two citizens, Pál Aranyosi and Robert Căldăraru, for whom an EAW had been issued by the German and Romanian authorities, respectively. The central issue was the risk of violation of fundamental rights due to detention conditions in the requesting Member States (Hungary and Romania).

The Court of Justice was called upon to determine whether the execution of an EAW could be refused or suspended in the presence of serious risks of inhuman or degrading treatment, contrary to Article 4 of the *Charter of Fundamental Rights of the European Union* (CFREU)²⁰². The Court of Justice affirmed that, although the EAW system is based on the principle of mutual trust between the MS of the EU, this trust is not absolute. The judicial authority of the executing State must assess the existence of a real risk of inhuman or degrading treatment based on objective, reliable, precise, and updated evidence regarding the detention conditions in the issuing MS. In the presence of a real risk, the judicial authority must suspend the surrender decision until it receives sufficient information from the authorities of the issuing MS to exclude such a risk.

Furthermore, the judicial authorities of the Member States must cooperate and exchange the necessary information to assess the detention conditions and ensure the protection of fundamental rights. This judgment introduced a compliance check on detention conditions and fundamental rights. It also reinforced the role of national judicial

²⁰⁰ Chelo, “Solo un provvedimento del giudice può trovare esecuzione con il mandato di arresto europeo”, No. 1, *Processo Penale e Giustizia* (2018), 53-59.

²⁰¹ Judgment of the Court (Grand Chamber) of 5 April 2016, Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, ECLI:EU:C:2016:198.

²⁰² Charter of fundamental rights of the European Union, O.J. 2000, C 364/391, ELI: http://data.europa.eu/eli/treaty/char_2012/oj (last visited 2 Jan. 2025).



authorities in guaranteeing the protection of human rights within the context of the EAW. Indeed, the need for continuous dialogue and cooperation among the judicial authorities of the MS is essential to balance the efficiency of justice and the protection of fundamental rights²⁰³.

Of course, the sole purpose of the EAW is the arrest and surrender by another MS of a wanted person for the purpose of criminal prosecution or for the execution of a custodial sentence or detention order (Art. 1(1) EAW FWD), as we have already pointed out at the beginning. It is for this reason that the issuance of this order for any other purpose, such as questioning the suspect or person under investigation would be, in the words of a lawyer of recognized prestige in Spain, an "abuse of the instrument designed for other things, to the extent that the deprivation of liberty of a person must be exceptional and subsidiary". In any case, for cases in which it is a question of obtaining the interrogation of the person under investigation, it is necessary to resort, as a Spanish lawyer argues, "to the EIO, unless there are motivated, or well-founded, reasons that the suspect may evade the action of justice. By default, the EIO should be applied to the declaration in this case. In addition, according to Spanish law it is possible, Act 23/2014 allows it". On the other hand, this legal professional insists that the use of EAW for interrogation purposes of the person under investigation is a practice that occurs today, and "is not in accordance with the law or the principles of European criminal procedure, including the principle of proportionality. Perhaps the Act should be amended and expressly provide for the impossibility of agreeing to an EAW when the purpose is only the interrogation of the accused. But the law does not indicate that, so the possibility of free interpretation is opened." In addition, the EAW is aimed at the arrest and surrender of the accused person to be brought before the court for trial and must be issued in accordance with FWD 2002/584/JHA (Preamble Recital n. 25 DEIO)²⁰⁴.

Based on the above, it is necessary to refer to another judgment of the CJEU, issued on June 1, 2016, the Bob-Dogi judgment (C-241/15), which deals with the issuance of a EAW for the purpose of interrogating the person under investigation. The case involved Zoltán Bob-Dogi, a Hungarian citizen, for whom the Romanian authorities had issued an EAW²⁰⁵. The Court of Justice had to determine whether the issuance of an EAW was legitimate if it was based on a national arrest warrant issued solely for the purpose of conducting a preliminary interrogation, in the absence of a formal charge. The Court of Justice established that an EAW must be based on a valid national arrest warrant, which

²⁰³ Gáspár-Szilágyi, "Joined Cases Aranyosi and Caldáru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant", 24 Eur.J.Crime Cr.L.Cr.J. (2016), 197-219 as well as Muñoz de Morales Romero, "Dime cómo son tus cárceles y ya veré yo si coopero": Los casos Caldáru y Aranyosi como nueva forma de entender el principio de reconocimiento mutuo", No. 1, *Indret: Revista para el Análisis del Derecho* (2017), <https://www.indret.com>

²⁰⁴ See Kleizen, Wynen, and Junjan, "Between Aims and Execution: Value Trade-Offs in the Practical Implementation of the European Arrest Warrant?", 15 EJRR (2024), 737-756.

²⁰⁵ Judgment of the Court (Second Chamber) of 1 June 2016, C-241/15, *Bob-Dogi*, ECLI:EU:C:2016:385.



must have a clear legal basis and cannot be issued solely for investigative purposes without a formal charge. Additionally, it must be issued in the context of an already initiated criminal proceeding and must refer to specific offenses.

The Court of Justice affirmed that the issuance of an EAW must respect the principle of proportionality, ensuring a balance between the necessity of the arrest and the fundamental rights of the person under investigation. The judgment established, on the one hand, that an EAW cannot be issued without a valid national legal basis and without a concrete charge, thus strengthening procedural guarantees for the accused. On the other hand, it emphasized the importance of protecting the fundamental rights of the accused, ensuring that the EAW is issued only within the context of a fair trial²⁰⁶.

The EAW is the most widely used mutual recognition instrument in Spain, it is the common and unanimous response of all the professionals we have interviewed, from legal professionals and academics to prosecutors and judges. Next, the most used is the EIO and, finally, the ESO, the latter being the least used instrument and even almost unknown to some professionals, as is the case of a lawyer and teacher in Spain with 24 years of professional experience who has not been able to answer our questions about ESO because "he does not know the instrument since he has never worked with it".

In fact, two lawyers of recognized prestige in Spain whom we have interviewed, one of them with 17 years of experience in the legal profession and the other with 20 years, affirm about the ESO that it is used sporadically because judges are reluctant to use it, he believes that due to lack of knowledge because they think that it involves a lot of work". In addition, one of the people interviewed believes that "It should be used more". The few scholars that study this instrument also reaches these conclusions, stating that ESO "[...] has been systematically ignored or underused by the competent authorities of the various Member States"²⁰⁷. This is confirmed by the corresponding statistics.

Years	ESO received (in Spain)	ESO issued (in Spain)
2017	3	2

²⁰⁶ The Bob-Dogi judgment represents an important reference point for ensuring that the issuance of an EAW respects the procedural and fundamental rights of the accused, avoiding abuses of the instrument for purely investigative purposes. On the same subject, that is to say, fundamental rights, there is another judgment: Judgment of the Court (Fourth Chamber) of 17 December 2020, C-416/20 PPU, *Generalstaatsanwaltschaft Hamburg*, ECLI:EU:C:2020:1042, refusal of EAW for infringement of fundamental rights.

²⁰⁷ Neira Pena, "La orden europea de vigilancia. Las razones de su escaso nivel de aplicación", in Arangüena and De Hoyos Sancho (Eds.), *Hacia un derecho procesal europeo* (Atelier, 2024), pp. 435-447, at pp. 437 et seq.



2018	0	1
2019	2	7
2020	12	9
2021	2	4
2022	5	2

Source: Prepared by the authors based on the data provided in Neira Pena, “La orden europea de vigilancia. Las razones de su escaso nivel de aplicación”, in Arangüena Fanego and De Hoyos Sancho (Eds.), *Hacia un derecho procesal europeo*, (Atelier, 2024), pp. 435-448, at p. 436.

In sum, the scarce use of this instrument is attributed to a series of causes²⁰⁸:

1. The degree of mutual trust required for the issuance, processing and management of an ESO is higher than with the other instruments, because it involves a transfer of the supervisory power of the person under investigation from the issuing State to the executing State.
2. The decision to recall an ESO is discretionary, and inevitably involves granting control to a foreign authority, which is sometimes interpreted as a risk for the development of the criminal investigation underway. This will reduce the cases in which an ESO is issued only in cases where mutual trust between authorities is really strong, or when the guarantees for the investigation already initiated are sufficient.
1. On the other hand, it follows that ESO could entail a greater workload as a result of the need for communication and consultation between the competent authorities to avoid any interruption in the supervision of the person under investigation.

2.3. Application of the instruments at the trial stage according to national law

²⁰⁸ Neira Pena, “La orden europea de vigilancia. Las razones de su escaso nivel de aplicación”, op. cit., pp. 439-444.



General introduction

In section 2.3, the various instruments will be linked to specific needs for judicial cooperation at the trial stage. The needs in this section are as follows:

- (aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS);
209
- (bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution or ensuring his availability for the trial (whether or not he is present in the issuing MS). This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*.
- (cc) ensuring the suspect's presence at trial:
- (dd) other (?)

Nota bene: the trial stage is part of the investigation/prosecution phase. That is why (aa) is also included. As stated before, at the trial stage, and thus during “prosecution”, there may be a need for investigative measures.

What was said in the introduction to section 2.2 concerning the task of the NAR applies *mutatis mutandis* to this section. To be clear: applicability according to national law is only to be assessed if there are applicability issues.

In this section, we will discuss the application of mutual recognition instruments at the trial stage according to national law, but without forgetting the guidelines set out in the European Directives and the corresponding Regulations on this matter, since Spanish legislation has its basis and foundation in the European regulations that are hierarchically superior. Having regard also to the primacy of European law over national law. To this end, controversial aspects that were already analysed in the previous section will be taken into account, such as the impact of detention and/or EAW on the right to liberty of the person under investigation and/or accused, whether the competent judicial authorities assess alternatives to provisional detention, whether these authorities engage in prior

²⁰⁹ See the Introduction to section 2.2.



discussions with the executing authority before making a final decision, etc. At the same time, the impact that the rejection of a previous request for judicial cooperation may have on the issuance of new requests for judicial cooperation or on the adoption of new decisions will also be analysed²¹⁰.

Again, it is important to clarify that in Spain the trial phase is clearly differentiated from the instruction/investigation phase. The measures that may be taken at the pre-trial stage cannot be taken at the trial stage. That is why the application of the instruments at this stage will be somewhat more limited. At the trial stage, the oral trial is held. This phase includes actions such as the examination of the accused person, the taking of evidence, the testimony of witnesses, etc. The phase ends with the sentence, which can be a conviction or an acquittal²¹¹.

Returning to the instruments of mutual recognition, some, such as the EIO, which contemplate investigative measures, in Spain, can only be executed in the investigation phase. However, others, such as the EAW, will have a greater role in the trial phase, as it provides for measures aimed at "the arrest and surrender by another MS of a wanted person for the purpose of criminal prosecution or for the execution of a custodial sentence or detention order" (Art. 1(1) FWD EAW)²¹².

(a) Person concerned present in issuing MS

From the point of view of judicial cooperation in criminal matters, this assumption is not possible. If the person under investigation is in the issuing MS, the transnational element that gives rise to judicial cooperation between the different EU MSs disappears. For this reason, this section may not be the subject of study or analysis.

(i) detention on remand possible but not ordered

²¹⁰ See specifically Montaldo and Grossio, "La riforma della disciplina di recepimento del mandato d'arresto europeo: il nuovo assetto dei limiti all'esecuzione della richiesta di consegna", No. 3, *Freedom, Security & Justice: European Legal Studies* (2021), 95-135 as well as Alesci, "La competenza funzionale all'emissione del mandato d'arresto europeo processuale", No. 4, *Processo Penale e Giustizia: Rivista di dottrina e giurisprudenza* (2014), 109-115.

²¹¹ Rodríguez-Piñero and Bravo-Ferrer, "La agilización del proceso penal, el procedimiento de decomiso autónomo y la ampliación de la apelación en el proyecto de reforma de la Ley de Enjuiciamiento Criminal", No. 8527, *Diario La Ley* (2015), <https://diariolaley.laleynext.es/> (last visited 2 Jan. 2025).

²¹² For a comparison between the European Investigation Order and the European Arrest see Lozano Gago, "El proceso de emisión de la orden europea de detención. Referencia a la orden europea de investigación. La intervención del letrado de la administración de justicia", No. 8, *Revista Acta Judicial* (2021), 44-59, as well as Urcelay Lecue "Los fiscales de un Estado miembro pueden emitir una orden europea de investigación, en el marco de un proceso penal, pero no una orden de detención europea: Sentencia de 8 de diciembre de 2020 (PROV\2020\349291) (Gran Sala)", No. 3, *Revista Aranzadi Doctrinal* (2021), <https://tienda.aranzadilaley.es/revista-aranzadi-doctrinal> (last visited 2 Jan. 2025).



(bb) Ensuring that the suspect is available²¹³

- FWD 2009/829/JHA (?)

An ESO is ‘an alternative to provisional detention’ (Art. 1 FWD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention on remand is possible but not ordered, and, if so, under what conditions?

(dd) Other (?)

Yes, it is possible.

(ii) person concerned in detention on remand

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures and availability for trial is ensured.

(b) Person concerned is present in another MS

Unlike paragraph (a), this case gives rise to the development of judicial cooperation and the issuance and/or enforcement of mutual recognition instruments, since the concerned person is in a country other than the issuing MS, the famous transnational element for which these mutual recognition instruments were created appears. In order to facilitate the investigation and arrest and surrender of persons under investigation in an MS other than the MS that is carrying out criminal judicial proceedings against the concerned person²¹⁴.

Next, we will proceed to a more detailed study of those cases of application of mutual recognition instruments at the trial stage in Spain, taking into account two assumptions, the first, if detention on remand is possible but not ordered, and second, whether detention on remand is possible and, in addition, it is ordered.

(i) detention on remand possible but no ordered

²¹³ ‘(aa)’ does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

²¹⁴ On this subject, Spagnolo, “La nuova cooperazione giudiziaria penale: mutuo riconoscimento e tutela dei diritti fondamentali”, 60 *Cassazione penale* (2020), 1290-1301 as well as W, “Il mutuo riconoscimento dei provvedimenti di congelamento e confisca: il Regolamento (UE) 2018/1805”, No. 5, *Processo Penale e Giustizia: Rivista di dottrina e giurisprudenza* (2021), <https://www.processopenaleegiustizia.it/> (last visited 2 Jan. 2025).



(aa) executing investigative measures/prosecution such as interrogating the suspect;

- Directive 2014/41²¹⁵ (?)

Temporary transfer²¹⁶/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?²¹⁷ If not: is such a videoconference possible without issuing an EIO?²¹⁸ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

- EU Convention on Mutual Assistance

Inviting him for an interrogation (serving summons abroad)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for executing investigative measure/prosecution in the issuing MS, e.g. interrogation. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible

²¹⁵ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

²¹⁶ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS.

²¹⁷ Cf. Case C-285/23.

²¹⁸ Cf. Case C-255/23.



under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

(bb) Ensuring that the suspect is available

- FWD 2009/829/JHA (?)

Is it possible under national law to issue an ESO, when the person concerned is in the MS of his lawful and ordinary residence and detention is not ordered?

- EU Convention on Mutual Assistance

Keeping in contact with him while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for ensuring that the suspect is available for executing investigative/prosecution measures nor for ensuring his availability for the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

(cc) Ensuring the suspect's presence at trial

- FWD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence and no detention on remand is ordered?

- Directive 2014/41 (?)²¹⁹

Is it possible under national law to employ an EIO for the purpose of ensuring presence at the trial (either through a videoconference or a temporary transfer)?

²¹⁹ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.



- EU Convention on Mutual Assistance

Summoning the person concerned abroad

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the accused is present.

This is not an instrument that provides for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

(dd) Other (?)

If the person under investigation and/or accused is in an MS other than the issuing MS, and if, in addition, detention on remand cannot be ordered, then the EAW will have no place here. For this reason, one of the mutual recognition instruments that can be applied in this case is the EIO. Although in general terms it is made up of investigative measures that in Spain are reserved only (and exclusively) for the investigation phase (*instrucción* in Spanish), it is true that the EIO provides for a measure that could be applicable to the trial phase, such as the temporary transfer of the concerned person for an appearance by videoconference (Preamble Recital n. 25 DEIO)²²⁰.

However, it is important to clarify that DEIO itself (para. 25) states categorically (and without room for confusion) that in the event that "the person must be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of the standing trial, a European arrest warrant (EAW) shall be issued in accordance with Council Framework Decision 2002/584/JHA."

Even so, it should be noted that when the EIO must be replaced by an EAW, it is only in the event that the detained concerned person is to be handed over for prosecution. This means that, apart from the intention to prosecute, if what is sought, for example, is an appearance by videoconference or other audiovisual means, then an EIO may be issued for that purpose. This is contemplated in Spanish legislation in Article 197(1) LRM²²¹. As

²²⁰ See Tinoco Pastrana, "La transposición de la orden europea de investigación en materia penal en el ordenamiento español", No. 3, *Freedom, Security & Justice: European Legal Studies* (2018), 116-145 at 129 et seq.

²²¹ See Tinoco Pastrana, "La transposición de la orden europea de investigación en materia penal en el ordenamiento español", op. cit., at 133. Also in relation with the EIO practice in general see Szijártó, "The Interplay Between the European Investigation Order and the Principle of Mutual Recognition", 8 *European papers* (2023), 1575-1597.



far as Spanish legislation is concerned, it seems to be a necessary requirement to issue an EIO if you want to obtain a videoconference with the concerned person. It is understood that, with his statement by videoconference, the judicial authority that has issued the EIO intends to conduct an interrogation or rather listen to the person under investigation or obtain more information. However, we would also like to mention the option provided by the EAW through Article 43(2) LRM that allows a temporary surrender to be requested to carry out criminal proceedings or the holding of the oral hearing. It is true that there is no talk here of videoconferencing, but in the end the temporary delivery also allows the appearance of the person under investigation and/or accused, for this reason we have mentioned it. Videoconference at the Trial Stage and suspect present in another MS.

To interrogate suspect at the trial could be possible with EIO. This is expressly provided for and mentioned in second paragraph of Article 24(1) DEIO: “The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission.” Same provision is contemplated in Article 197(1) LRM: “When the competent Spanish authority hearing criminal proceedings in Spain considers it necessary to hear the defendant or accused person or a witness or expert witness who is in the territory of another Member State, it shall issue a European Investigation Order for the hearing to take place by videoconference or other means of audio-visual transmission.”

Although it does not mention that it is expressly allowed for the oral trial, neither does it exclude it, nor does it contravene its objectives and nature in case it is issued for that purpose for the trial phase²²². It should be recalled that concerning Spanish EIO regulation in Article 187(1) LRM generally recognises the following as issuing authorities: “The authorities for issuing a European Investigation Order are the judges or

²²² See Judgement of Supreme Court, of 17 March 2015, n. 812/2015, ECLI:ES:TS: 2015:812. The use of videoconferencing is analysed, starting from the regulation established in the article 229(3) LOPJ (“These proceedings may be conducted by videoconference. or any other similar system which allows for two-way communication and simultaneous relay of sound and image providing visual, hearing and verbal interaction between persons or groups located at different places, ensuring at all times that the parties may discuss with each other and upholding at all times the right of defence, all of which in the terms provided by the judge or the court. In these cases, the Court Registrar of the court or tribunal which agreed on that system will certify from the seat of the court itself the identity of the persons who are to take part by means of videoconference either by prior submission or exhibition of documents, or because the individuals appearing are personally known to him or by any other suitable procedural system”) and the art. 731 a LECrim (“The Court, ex officio or at the request of a party, for reasons of practicality, security or public order, and in such cases where the appearance of whoever must intervene in any kind of criminal proceedings as the accused, witness, expert, or in any other capacity, is particularly onerous or prejudicial, and, particularly, where a minor is concerned, may agree that the appearance is made via video conference or other similar systems allowing two-way, simultaneous communication of sound and vision, in accordance with the provisions of paragraph 3 of article 229 of the Judiciary Act”) and the fact that the creation of a European judicial area has made videoconferencing a regulated means of widespread application in the different legal instruments that regulate judicial cooperation between States. See <https://www.icab.es/export/sites/icab/.galleries/documents-noticies/2015/sentencia-num.-161-2015-de-la-sala-del-penal-del-tribunal-suprem-protestes-davant-el-parlament.pdf> (last visited 2 Jan. 2025).



courts hearing the criminal proceedings in which the investigative measure is to be taken or **which have admitted the evidence if the proceedings are at the trial stage.**²²³

However, to ensure presence at trial without an EIO could be confused. In recent CJEU case-law²²⁴ it is concluded that Directive (EU) 2016/343 of 9 March 2016 on strengthening of the certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings²²⁵ does not preclude “an accused person from being able, at his or her express request, to participate in the hearings in his or her trial by videoconference, provided that the right to a fair trial is guaranteed”. Therefore, this issue is left to Member States, provided that the right to a fair trial is guaranteed. This judgment does not answer the question whether, under EU law, videoconferencing for participating in the trial is possible without an ESO. However, since DEIO does not cover videoconferencing for attendance at trial, Member States seem free to regulate this. However, this raises issues of legal security and national sovereignty. And the problem we encounter in this scenario without issuing an EIO is, what other instrument is to be used for this purpose? The use of an EAW would be highly invasive, as well as abusive, would contravene the objectives and nature of the EAW, and would infringe the accused person's right to liberty without adequate reasoning²²⁶.

Many practitioners, especially judges, such as a judge-magistrate of the *Audiencia Nacional* with 40 years of experience²²⁷, have confirmed to us that they have sometimes ordered a temporary transfer to ensure the presence of the accused person at the trial. However, we consider that, in the light of Article 1 EAW FWD²²⁸ the transfer of the person by means of an EAW should not be lawful, as it contradicts the objective and purpose for which an EAW should be issued (enforcement of criminal proceedings, security measure, etc.). The contrary would be a misuse of this instrument, not to say abusive. In addition, the issuing of an EAW for the sole purpose of interrogating the accused person at the trial. There are other instruments such as the EIO and the ESO that are less invasive of the

²²³ Free translation and emphasis added. In this sense, “the EIO covers the practice in the State of execution of both summary proceedings and evidentiary activity”, as the EIO replaces the former European Evidence Warrant (EEE); see textually Jimeno Bulnes, “Orden europea de investigación en materia penal”, op. cit, at p. 169.

²²⁴ Judgement of Court of Justice (First Chamber) of 4 July, 2024, Case C-760/22, *Procès par visioconférence*, ECLI:EU:C:2024:574.

²²⁵ O.J. 2016, L 65/1. Among the literature quoting other case-law see for example Villamarín López, “Recent European Court of Justice case-law on Directive 2016/343 on the presumption of innocence (Milev, RH & DK): are pretrial detentions covered by this instrument?”, No. 22, *ERA Forum* (2021), 137-146; from the national perspective quoting Spanish case-law Guerrero Palomares, “Presunción de Inocencia: (tres) cuestiones sin resolver, in Arangüena Fanego and De Hoyos Sancho (Eds.), *Hacia un Derecho Procesal europeo* (Atelier, 2024), pp. 25-61.

²²⁶ On the nature of the EAW, see for example the Judgement of the Court of Justice (Grand Chamber), of 31 January 2023, *Puig Gordi et al.*, case C-158/21, ECLI:EU:C:2023:57, para. 67 et seq.

²²⁷ Interview carried out on 18 March by video call at 13:30 p.m.

²²⁸ Literally: “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 purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”



accused person's right to liberty and through which an interrogation, etc. could be achieved. The problem is that these instruments, especially the ESO, are rarely used, perhaps because of a lack of knowledge or because they are thought to be more complex to use, as stated by several professionals interviewed. Last, European conventions could be taken into account in relation with Member States, which have signed and enforced such conventions; this is the case of Convention on Mutual Assistance in Criminal Matters between Member States of the European Union. In this context Article 10 (1) the European Convention on Mutual Assistance in Criminal Matters: “Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. In this case, the decision to hold the videoconference, and the manner in which the videoconference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.”

On the other hand, it should be noted that in Spain the LRM does not contemplate the possibility of issuing an EIO for the temporary transfer of persons under investigation who cannot be arrested or have not been previously detained. The only cases of temporary transfer included in the LRM are for the temporary transfer of detainees (Arts. 195 and 196). That is why in this section focused on cases in which the person under investigation can be arrested, but, nevertheless, the arrest has not been ordered, the temporary transfer through an EIO would not be possible with the requirements contemplated by the LRM in Articles 195-196.

A notable judgment that can be mentioned in this context is Judgment C-108/16 PPU - *Openbaar Ministerie v. Paweł Dworzecki*, issued by the CJEU on 24 May 2016²²⁹. This judgment concerns the EAW and the fundamental rights of detained or suspected persons. In the case under study, *Paweł Dworzecki*, a Polish citizen, had been arrested in the Netherlands on the basis of a EAW issued by the Polish authorities to execute a prison sentence. However, the Dutch authorities had doubts about the lawfulness of the requested transfer, as *Dworzecki* had not been personally informed of the process leading to his conviction in Poland, which raised questions of respect for fundamental rights. The ECJ ruled that the execution of an EAW can be refused if the fundamental rights of the suspect or convicted person are not respected. In particular, it emphasised that: the right to be informed personally about the trial and conviction is fundamental to ensuring a fair trial.

In addition, although the EAW system is based on the principle of mutual trust between EU Member States, this trust is not absolute and must be balanced against the protection of fundamental rights, as has been anticipated in other judgments cited in the

²²⁹ Judgment of the Court of Justice (Fourth Chamber) of 24 May 2016, C-108/16 PPU, *Dworzecki*, ECLI:EU:C:2016:346.

work presented here²³⁰.

The *Dworzecki* judgment is relevant to the discussion on the limitations provided by the Spanish LRM regarding the issuance of an EIO for the temporary transfer of investigated persons. It underscores the importance of ensuring that any judicial cooperation measure, including temporary transfers, is carried out in compliance with fundamental rights and procedural safeguards.

On the other hand, in this case studied here, it will also be possible to apply surveillance measures specific to ESO. FWD 2009/829/JHA in its para. 3 already states that all the measures contained therein are aimed at "a person residing in a Member State, but who is subject to criminal proceedings in a second MS, is monitored by the authorities of the State in which he resides pending the trial". For this reason, it is possible to order an ESO when the person under investigation is in another MS where he or she has his or her residence and is not detained. It is important to emphasize that the person under investigation should NOT be detained, as it is one of the foundations of the ESO, and one of the objectives for which it was created, "[...] the promotion, where appropriate, of the use of non-custodial measures as a substitute for provisional detention".

However, it is true that the issuing MS may transfer the procedure to the requested MS, when the person under investigation has the habitual residence of the requested MS, as indicated in FWD 2009/829/JHA in Article 9(1), "A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State." In the same vein, according to the LRM (Art. 112(1)(a)), a decision on alternative measures to provisional detention may be transmitted when the accused person has his habitual and legal residence in the executing State and consents to return to that State. In this way, it is clear that an MS can issue an ESO against a person under investigation who is in another MS, even if it is the one of his habitual and legal residence. This does not mean that, as we have pointed out above, the MS decides to transfer the decision on these measures to the MS in which the person under investigation is located (executing MS) and in which he or she has his or her habitual and legal residence. It is important to point out that it is a mandatory requirement that the person under investigation gives his/her consent to return to the MS in which he/she has his/her habitual and/or legal residence in case he/she is not there (Art. 112(1)(a) LRM).

A relevant judgment involving Spain in relation to the EAW, is Case C-220/18

²³⁰ This ruling strengthened the control of compliance with fundamental rights in the context of the EAW. It established those judicial authorities in Member States must ensure that the procedural and fundamental rights of individuals are respected before proceeding with the execution of a European arrest warrant.



PPU, ML (*Generalstaatsanwaltschaft* (Public Prosecutor's Office) in Lübeck)²³¹. This ruling, issued by the CJEU on 25 July 2018, deals with issues of mutual trust and protection of fundamental rights in the context of the execution of an EAW.

The case concerned a Spanish national wanted in Germany with an EAW issued by the German authorities. The person was the subject of a criminal investigation in Germany for suspected drug offences. The Spanish judicial authorities responsible for the execution of the EAW had raised doubts about the compliance of the criminal process in Germany with the fundamental rights of the individual, in particular the right to a fair trial and the conditions of detention.

The case raised the question whether the Spanish judicial authorities could refuse the execution of the EAW on the basis of concerns regarding respect for the fundamental rights of the requested person, in particular in relation to the conditions of detention in Germany.

The Court of Justice reiterated the principles set out in the *Aranyosi* and *Căldăraru* judgment (C-404/15 and C-659/15 PPU), stressing that: the judicial authorities of the executing State should assess whether there is objective, reliable, accurate and up-to-date evidence indicating a real risk of inhuman or degrading treatment due to the conditions of detention in the issuing MS. The same authorities should request additional information from the authorities of the issuing MS to verify whether the conditions of detention respect fundamental rights. If the risk cannot be excluded, the execution of the EAW must be suspended.

The ruling stressed that the Spanish judicial authorities, as well as those of other Member States, must carry out a concrete assessment of detention conditions and fundamental rights before proceeding with the execution of an EAW. This ensures that the implementation of the EAW complies with the human rights standards laid down in the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).

(ii) detention on remand ordered

(aa) executing investigative measures/prosecution such as
interrogating the suspect;

- FWD 2002/584/JHA

²³¹ Judgment of the Court of Justice (First Chamber) of 25 July 2018, C-220/18 PPU, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, ECLI:EU:C:2018:589.



Prosecution-EAW. Is it possible under national law to issue a prosecution-EAW just to execute investigative measures, such as an interrogation?

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FWD 2002/584/JHA.

- Directive 2014/41²³² (?)

Temporary transfer²³³/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?²³⁴ If not: is such a videoconference possible without issuing an EIO?²³⁵ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

- EU Convention on Mutual Assistance

Inviting him, e.g., to an interrogation (serving summons abroad)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer proceedings to the MS where the accused is present. This is not an instrument that provides for executing investigative

²³² Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

²³³ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS.

²³⁴ Cf. Case C-285/23.

²³⁵ Cf. Case C-255/23.



measures/prosecution in the issuing MS, e.g. an interrogation in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(bb) Ensuring that the suspect is available

- FWD 2002/584/JHA

Prosecution-EAW

- FWD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence?

- EU Convention on Mutual Assistance

Keeping in contact with the person concerned while he is abroad (sending/service of documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the accused is present (in order for him to be present at the trial in that MS). This is not an instrument that provides for ensuring that a suspect is available for executing investigative measures/prosecution in the issuing MS, e.g. interrogation, nor for ensuring his availability for the benefit of the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(cc) Ensuring the suspect's presence at trial

- FWD 2002/584/JHA

Prosecution-EAW

- FWD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is the MS of his ordinary residence?



- Directive 2014/41 (?)²³⁶

Is it possible under national law to employ an EIO for the purpose of ensuring the presence of the accused at the trial (either through a videoconference or a temporary transfer)?

- EU Convention on Mutual Assistance

Summoning the person concerned abroad

- European Convention on Transfer/European Convention on Mutual Assistance in Criminal Matters (?)

- Transfer of proceedings. This is not an instrument that provides for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(dd) Other (?)

²³⁶ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.



Once detention on remand has been ordered against the person under investigation and/or accused, we must analyse how the instruments of mutual recognition are applied at the trial stage, in relation to which instruments of recognition can be applied, in what way, under what conditions, etc.

To begin with this section, we will talk about the EAW, since it is in general terms the key mutual recognition instrument for the arrest and surrender of the person under investigation. In addition, as confirmed by the professionals we have interviewed, it is the "most widely used" mutual recognition instrument, followed by EIO. As we have already indicated on previous occasions, the purpose of the EAW is "the arrest and surrender by another MS of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (Art. 1 FWD EAW). In this way, thanks to the issuance of an EAW, it is possible to obtain the arrest of the person under investigation to transfer him or her to the MS of issue to carry out his or her prosecution. Hence its link with the trial or prosecution phase.

There are rumours of malpractice carried out by competent authorities in relation to the purpose for which an EAW is issued. For example, it is rumoured that the judicial authorities of an issuing MS issue an EAW only to hear the wanted person (by way of interrogation). And after having listened to the surrendered person, he is released. In this sense, this is not possible. As stated in Article 1 of the FWD EAW, the purpose of the application of this order is to place the detained person at the disposal of the requesting judicial authority in order to be prosecuted or to execute a sentence or detention measure (the latter would correspond to the phase of execution of the sentence that will be analysed below). This means that it is not possible to issue an EAW just to execute investigative measures. It is not contemplated by European regulations or Spanish legislation (the LRM). However, Article 18(1)(b) of the FWD EAW allows for the temporary transfer of the requested person, so that the requested person must be able to return to the MS of execution to attend the oral hearings concerning him/her, within the framework of the surrender procedure (Art. 18(3) FWD EAW). This means that it is possible to issue an EAW to request a temporary transfer to hear the person under investigation, but in Spain this is not considered an investigative measure (reserved for the investigation phase and not for the trial phase), but a measure specific to the trial phase. In the same vein, Article 43 LRM provides for temporary delivery and the taking of a statement in the execution MS. Article 43(2) LRM guarantees that a request for temporary surrender may be made, even before the executing authority has ruled on the final surrender, in order to carry out criminal proceedings or hold an oral hearing.

And about temporary transfer for ensuring presence at the trial we can affirm that the use of EIO it is not possible. The temporary transfer of the concerned person to both the issuing MS and executing MS through an EIO must be solely for the purpose of



carrying out an investigative measure aimed at gathering evidence (Arts. 2 (1) and 23(1) DEIO).

For example, Article 22(1) DEIO relating to the temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure: “An EIO may be issued for the temporary transfer of a person in custody in the executing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State” .

The same happens with Article 23(1) DEIO²³⁷ relating to the temporary transfer to the executing State of persons held in custody for the purpose of carrying out an investigative measure. As far as Spain is concerned, the country is subject to the Directive and therefore has to comply with its principles and provisions. For this reason, same provision is contemplated in Article 195(1) LRM introduced by the mentioned Law 3/2018, of 11 June considering that the EIO in these cases of temporary transfer is only suitable for use during the pre-trial phase, but not for the trial phase, for which it is expressly exempted²³⁸.

The exactly the same case as above is the temporary transfer provided by DEIO for interrogating the suspect at the trial, more or less. Issuing an EIO for a temporary transfer for the purpose of questioning the suspect at trial is not included as a purpose or cause for issuing this instrument. We do not agree with the use of the EIO for these purposes and we refer to the arguments set out above.

Moreover, and unlike the case in which detention on remand is not ordered, here it is not necessary to issue an EIO or request a videoconference of the person under investigation or any other measure intended to ensure the presence of the concerned person at the trial, since detention as such is understood to guarantee the presence of the person concerned at the trial stage. Nor would there be room for the ESO once the person has been detained by means of an EAW, since as we have already pointed out in previous sections, the ESO requires that the concerned person be free, since the surveillance measures are aimed at "limiting" the freedom of movement of the person in order to monitor him or her and control his or her location, without prejudice to the fact that an

²³⁷ Literally: “An EIO may be issued for the temporary transfer of a person held in custody in the issuing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which his presence on the territory of the executing State is required”.

²³⁸ Textually: “1. The competent Spanish authority shall issue a European Investigation Order for the temporary transfer to Spain of a person deprived of liberty in the executing State when the investigation requires his/her presence in Spain; and provided that it is not for the purpose of prosecution (*enjuiciamiento*), in which case it shall opt for the issuing of a European arrest warrant” (free translation and emphasis added).



EAW could subsequently be issued if the necessary circumstances for this were met (Art. 120(1)(c) LRM). In any case, it could be the case that the EAW is denied or rejected by the requested MS. In such a case, the authority of the issuing MS must consider the issuance of another instrument, in the alternative. Either try to reissue an EAW or correct the error (if possible) that would have caused the denial of the EAW by the requested MS. By way of example, in Spain, Article 30 LRM provides for the possibility of correcting some errors or failures (which can be corrected) that may exist in the request for enforcement of a measure or resolution. Thus, in cases where there may be a ground for refusal, it is permissible for the competent authority to request additional information from the issuing authority of the Member State, setting a time limit within which such information must be submitted. At the same time, a number of European laws also include a number of assessed grounds on which the refusal of a particular order or measure is justified. For example, Article 3 FWD 2002/584/JHA, which regulates the EAW, sets out a number of grounds that may be grounds for refusal of the EAW.

Likewise, as we have already stated in different sections referring to the trial phase, most of the professionals we have been able to interview have already indicated to us that it is "unusual for applications for the application of a mutual recognition instrument to be rejected" and that, if it is refused, this does not have a negative influence on subsequent requests for judicial cooperation. On the contrary, "errors [of form, content, etc.] that may have led to the rejection of the application are "insisted upon" or "corrected". In this regard, a Spanish anti-drug prosecutor with a professional career of 16 years insists that "we have to see what the reason for refusal is, and from there assess whether it is requested in another way, if the information is complemented or more data is given on the reason for refusal, and see how to solve it, if the collaboration of the other state is really needed, which is the most common."

On the other hand, since we are dealing with a case of ordering the arrest of the person under investigation, it is necessary to allude to some somewhat controversial issues involving the EAW, as we have already done in previous sections. First of all, we must mention whether the national authorities take into account the impact on the free movement rights of the person under investigation in the decisions they take in this matter. The different professionals we have been able to interview have expressed themselves on this. For example, a Spanish anti-drug prosecutor with 16 years of experience says that she does value the impact it may have on the rights of the person under investigation because "That will limit their free movement, so you have to be scrupulous, respectful and meticulous with this aspect in these cases. It's highly valued." However, she also states in relation to evaluating alternatives to pretrial detention that "Normally, 95% of people are in provisional detention, taking into account the type of issues that she deals with in her work position, which mainly covers matters of transnational crime. She has no alternative to provisional detention. In other areas or other judicial bodies that deal with other types of crime, they will perhaps consider the withdrawal of passports, a ban on international



departure, etc."

3.THE INSTRUMENTS AND SENTENCE ENFORCEMENT

General introduction

The enforcement stage starts once the sentence imposed on the convicted person (custodial sentence/measure of deprivation of liberty, alternative sanction, probation decision) is final and enforceable.

As with Chapter 2, first, the instruments that are applicable to the enforcement stage *in abstracto* are listed (section 3.1), distinguishing between two situations: the person concerned is present in the issuing MS and he is present in another MS. Subsequently, in section 3.2 specific needs for judicial cooperation are tied to the various instruments. These needs are:

- (ee) enforcement in another MS;
- (ff) enforcement in the issuing MS (if the person concerned is present in another MS).

As with sections 2.2 and 2.3, the NAR will:

- describe which national authority is in charge of the enforcement stage and which national authority is competent to request judicial cooperation concerning enforcement of the sentence;
- address applicability issues according to national law if there are such issues;
- describe which considerations play a role when the competent national authority has to take a decision on requesting judicial cooperation and on which instrument(s) to employ.

In doing so, the NAR will take into account the list of considerations mentioned in the introduction to section 2.3 where applicable, *viz.* whether



- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions);²³⁹
- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;
- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;²⁴⁰
- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audiovisual transmission)/telephone conference to that end.

In addition to those considerations, the NAR will take into account whether ‘composite sentences’ (sentences composed of unconditional deprivation of liberty and conditional deprivation of liberty present problems.²⁴¹

Sentence enforcement is arguably the last phase of the criminal process. And it occurs after the trial phase, once the judge has handed down a sentence, which can be a conviction or acquittal. It is mandatory that the sentence be a conviction in order for it to be enforced. At the same time, the execution phase of the judgment is the first phase of the procedure to implement the judicial decision. Basically, in the execution of the sentence, all the measures or penalties set out in the sentence are carried out and made effective. This phase is especially relevant in those cases in which the "losing" party does not intend to comply with the stipulations of the judgment voluntarily.

The enforcement stage starts once the sentence imposed on the convicted person (custodial sentence/measure of deprivation of liberty, alternative sanction, probation

²³⁹ O.J. 2023, L 86/44.

²⁴⁰ This might require thinking of different scenarios. For instance, what if the sought-after instrument for judicial cooperation does not result in the desired outcome? To what alternative form(s) of judicial cooperation will the issuing authority resort to?

²⁴¹ In the Netherlands, e.g., the courts can impose the following sentence: a sentence of four years deprivation of liberty, of which two years will not be enforced as long as the person concerned complies with certain conditions during a probation period of three years.



decision) is final and enforceable.

It should be noted that the enforcement of judgments is part of the jurisdictional power to "judge and enforce what has been judged" that corresponds exclusively to the Judges and Courts, enshrined in Article 117(3) of the Spanish Constitution. Article 2(2) Act on the Judiciary or LOPJ reaffirms this²⁴². At the same time that the enforcement of the judicial decision is a power for Judges and Courts, it is a right for the "winning" party of the judicial process. In criminal cases, it is a right taking into account the situation of the person who has been harmed or is the victim of a criminal act that has been committed against him or her and has a special interest in having the provisions of the judgment recognized in a practical way.

That said, in this section we intend to analyze in greater detail the application of mutual recognition instruments in criminal proceedings in Spain at the enforcement phase of the sentence, taking into account certain aspects, such as whether the person concerned is present (or not) in the issuing MS or in the executing or requested MS²⁴³.

Of course, and as in the previous paragraphs, account will be taken of the impact that there may be on the right to liberty of the convicted person throughout the study of this phase, if the fact that a previous request for judicial cooperation has not been accepted is taken into account when taking new decisions. And, as a novelty of this phase, we will also take into account whether composite sentences (sentences composed of unconditional deprivation of liberty and conditional deprivation of liberty) present problems. Regarding these "composite sentences" it is important to point out that in Spain they are not known in this way, that is, the term composite sentences does not exist as such. For these reasons, experienced professionals in the field were asked during the interviews what their opinion on the matter was.

So much so that a prosecutor for international cooperation in Burgos, when asked about this issue, replied that "He's researched and asked about it, but they don't have that figure. In Spanish law there is no such figure, what it can say is that on the basis of execution they are governed by the LRM and would have to do with that reciprocity, with respect to custodial sentences, not custodial sentences of Article 65 et seq. But he doesn't

²⁴² Textually: "The courts and Tribunals will not perform functions other than those outlined in the previous paragraph and those expressly assigned to them by law in order to safeguard a given right.". Although the official translation uses the expression "Courts and Tribunals" we prefer here the nomenclature of... used in the Spanish version, which is more in keeping with the dual unipersonal and collegiate nature of the courts.

²⁴³ Nistal Burón, "El reconocimiento mutuo de resoluciones penales en la Unión Europea. El cumplimiento en España de penas privativas de libertad impuestas en otros estados miembros de la Unión Europea", No. 114, *La ley penal: revista de derecho penal, procesal y penitenciario* (2015), <https://tienda.aranzadilaley.es/la-ley-penal> and González Cano, "Algunas consideraciones sobre el reconocimiento mutuo de resoluciones firmes en materia penal", No.7, *Tribunales de justicia: Revista española de derecho procesal* (2001), 19-39.

know the subject well”.

Composite sentences are typical of northern European countries. An example of this is the Netherlands. There, the courts may impose the following penalty: a sentence of four years' deprivation of liberty, of which two years shall not be executed as long as the person concerned fulfils certain conditions during a probation period of three years. This has given us a lot of problems in the interviews with professionals, in order to ask them about this question, since most of them did not recognize this term.

In any case, a case that could fit with what is understood by composite sentences could be the situation included in our Criminal Code (*Código Penal*) in Article 80(5) in all those cases in which the convicted person is a drug addict and entails the suspension of the prison sentence or custodial sentence conditional on the internment of the prisoner as long as “[...] provided a public centre or service or a duly accredited or recognised private centre or service attests that the convict is no longer addicted or is undergoing a treatment with such an aim at the time of deciding on the suspension.”. One of the paragraphs of Article 80(5) CP indicates the condition required for the suspension of the sentence: “the suspension of the serving of the sentence may also be conditioned to not abandoning the treatment until the conclusion thereof.”.

3.1. Applicability of the instruments or conventions according to EU law

In this first part, we will proceed to study in greater detail the application of both the instruments of mutual recognition and the main Conventions signed and ratified by Spain on judicial cooperation in criminal matters. The section will be divided into two parts, depending on whether or not the person concerned is in the issuing MS or in the executing or requested MS. Also, as the title indicates, this chapter will be developed taking into account European legislation.

At this stage, within the instruments of mutual recognition studied here, the EAW becomes relevant, since one of its objectives is the arrest and surrender of the convicted person for the execution of the sentence or custodial security measure that has been filed against him (Art. 1 (1) FWD EAW).

(a) Person concerned is present in issuing MS



- FWD 2008/909/JHA
 - FWD 2008/947/JHA
 - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters
- It is possible under EU law to ‘divide’ composite sentences and to deal with the unconditional part under FWD 2008/909/JHA and with the conditional part under FWD 2008/947/JHA?

As we have already indicated in previous sections, this situation is not possible in the field of judicial cooperation. If the person concerned is in the MS itself that is supposed to be the issuer, then there is no transnational element that justifies the implementation of the judicial cooperation mechanisms and/or the mutual recognition instruments analysed here.

On composite sentences we refer to what is prior stated in Section 3.

(b) Person concerned is present in another MS

- FWD 2002/584/JHA
 - FWD 2008/909/JHA
 - FWD 2008/947/JHA
 - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters
- It is possible under EU law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under FWD 2008/909/JHA and with the conditional part under FWD 2008/947/JHA?

With regard to the possibility, under EU law, of "splitting" compound sentences and dealing with the unconditional part under FWD 2008/909/JHA and the conditional part under FWD 2008/947/JHA, the professionals we have been able to interview have replied that "No" and "Never". Even José de la Mata²⁴⁴, a magistrate and national member of Spain at Eurojust, warns that "it is profoundly inadvisable to do that". However, we have to admit that most of the professionals interviewed did not recognize the concept of composite sentences, so on many occasions they did not answer the question. As we have indicated in the introduction to this section, the concept of composite sentences does not

²⁴⁴ Interview conducted by video call on 23 February, 2024 at 9:00 a.m.



exist as such in Spain. We understand that this practice is typical of northern European countries. In general terms, we refer to what is prior stated in para. 3.

3.2 Application of the instruments according to national law

(a) Person concerned is present in issuing MS

(ee) enforcement in another MS²⁴⁵

- FWD 2008/909/JHA

Enforcement of a custodial sentence

- FWD 2008/947/JHA

Enforcement of an alternative sanction/a probation decision

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters (?)

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to recognise the sentence?

It is possible under national law to 'divide' 'composite sentences' and to deal with the unconditional part under the national transposition of FWD 2008/909/JHA and with the conditional part under the national transposition of FWD 2008/947/JHA?

As we have repeatedly pointed out in previous sections, since the person concerned is present in the issuing MS, enforcement in the issuing MS does not require judicial cooperation since there is no transnational element that requires it. It is for this reason that it is not possible to develop this part.

An EIO can be issued with an eye on investigate measures when the accused person is in the issuing State, but these measures have no impact (directly or indirectly)

²⁴⁵ As the person concerned is present in the *issuing* MS, enforcement in the *issuing* MS does not require judicial cooperation.



on the liberty of the suspect. This situation is outside the scope of the EIO as the instrument of the European Investigation Order is primarily designed to facilitate cross-border cooperation in the collection of evidence. When the suspect is already present in the issuing state and investigative measures do not require intervention affecting his or her personal liberty, the use of the EIO may be considered unnecessary. In such cases, the national authorities of the issuing state have full jurisdiction to proceed with the investigation using the legal instruments available at national level, without the need to resort to international cooperation under the EIO²⁴⁶.

(b) Person concerned is present in another MS

(ee) enforcement in another MS

- FWD 2008/909/JHA

Enforcement of a custodial sentence

- FWD 2008/947/JHA

Enforcement of an alternative sanction/a probation decision

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to surrender the person concerned and refuses to recognise the sentence?

It is possible under national law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under the national transposition of FWD 2008/909/JHA and with the conditional part under the national transposition of FWD 2008/947/JHA?

(ff) enforcement in issuing MS

- FWD 2002/584/JHA

Execution-EAW with regard to a custodial sentence

²⁴⁶ Furthermore, it is important to emphasise that the EIO aims to ensure the efficiency and effectiveness of criminal investigations in a cross-border context by minimising bureaucratic complications and promoting cooperation between the judicial authorities of the Member States. However, when investigations can be conducted entirely within national borders without interfering with the freedom of the suspect, issuing an EIO would not only be inappropriate, but could also represent an inefficient use of judicial resources.



In this section, we will delve into the analysis of the execution of a custodial sentence when the person concerned is in another MS.

The execution of a sentence (usually deprivation of liberty) usually takes place following an EAW, and is regulated by FWD 2008/909/JHA, in particular by Article 25 et seq. Article 25, which refers to the enforcement of sentences following an EAW, reads as follows:

“Without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State under takes to enforce the sentence in cases pursuant to article 4(6) of that Framework Decision, or where, acting under article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned”.

It should be recalled that one of the purposes of the EAW is to place the detained person at the disposal of the judicial authorities requesting the issuing MS, for the execution of a custodial sentence or security measure (Art. 1(1) FWD EAW). However, with regard to the execution of a custodial sentence imposed on a person convicted in another MS, FWD 2002/584/JHA in its Article 4(6) states that the executing judicial authority may refuse on an optional (but not mandatory) basis the execution of an EAW when “[...] 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 under takes to execute the sentence or detention order in accordance with its domestic law [...]”.

This gives the executing MS the competence to execute by itself the sentence or security measure to which the person concerned has been sentenced by the MS and which justifies the issuance of an EAW. In line with the above, the LRM in its Article 48(2)(b) allows the judicial authority to refuse the execution of an EAW “[...] 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, except if he consents to serve the same in the issuing State. Otherwise, he must serve the sentence in Spain”.

On the other hand, in the event that the requested MS decides to execute the EAW requested by the issuing MS, Article 5(3) FWD EAW conditions the issuing MS to grant a series of guarantees: “[...]where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State,



surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State”.

In relation to the execution of resolutions/measures that do not involve the deprivation of liberty or which are alternatives to pre-trial detention, we can find the ESO and the measures that it contemplates through FWD 2008/947/JHA, such as, for example, probation and/or conditional release, where appropriate, as well as other alternative penalties. Thus, and in accordance with Article 13(1) of the aforementioned European legislation, “the supervision and application of probation measures and alternative sanctions shall be governed by the law of the executing State”. In the same vein, Article 14(1) gives the Enforcement Department the competence to “take all subsequent decisions relating to a suspended sentence, conditional release, conditional sentence and alternative sanction, in particular in case of non-compliance with a probation measure or alternative sanction or if the sentenced person commits a new criminal offence”²⁴⁷.

Finally, with regard to the possibility, under Spanish domestic law, of transferring the proceedings once the conviction is final and enforceable and the executing MS refuses to surrender the convicted person and to recognise the sentence, José de la Mata, a Spanish magistrate and national member of Eurojust, considers that “this is not possible”²⁴⁸, just as it is also not possible from their point of view to divide the composite sentences and deal with the unconditional part under FWD 2008/909/JHA, and the conditional part under FWD 2008/947/JHA when the person concerned is in the issuing MS. In contrast, an anti-drug prosecutor with 16 years of experience in Spain says the opposite: “Yes, it can be

²⁴⁷ A real case illustrating the enforcement of non-custodial measures between EU Member States is that of Carles Puigdemont. Although these are not probation measures in the strict sense of Framework Decision 2008/947/JHA, the case involves judicial cooperation and the application of the principle of mutual recognition of judicial decisions within the EU. Carles Puigdemont, former president of the Generalitat of Catalonia, was the subject of an EAO issued by Spain following Catalonia's unilateral declaration of independence in 2017. The EAO included charges such as rebellion and embezzlement of public funds. Following the issuance of the first EAW in 2017 by Spain, Puigdemont moved to Belgium. Belgian authorities considered the EAW but ultimately did not execute it, mainly due to the lack of an equivalent offence under Belgian law (rebellion). In March 2018, Puigdemont was arrested in Germany under the EAW while en route from Finland to Belgium. The German authorities agreed to process the EAW but only on the charge of embezzlement, not rebellion, as rebellion had no clear equivalent in the German criminal code. In July 2018, the Schleswig-Holstein regional court decided that Puigdemont could be extradited to Spain only on charges of embezzlement of public funds, not rebellion. Spain decided not to proceed with the extradition under these conditions and withdraw it.

During the process, Puigdemont was released on bail in Germany, under conditions that included the obligation to report regularly to the authorities and not to leave the country without permission. Eventually, Puigdemont returned to Belgium where he has continued his residence and political activities. The case has been a prominent example of the challenges and complexities in the implementation of the EAW and related measures among EU Member States. See Rivera Rodríguez, *La influencia del caso Puigdemont en la cooperación judicial penal europea* (CEU ediciones, 2019), and W López, “El procedimiento de entrega de Carles Puigdemont: estado actual y perspectivas”, No. Extra-1, *Revista de Estudios Europeos* (2023), 279-309.

²⁴⁸ Interview conducted by video call on February 23, 2024 at 9:00 a.m.



transferred so that it can be executed in another member state. When the judgment is final. And if the convicted person is in that MS. A transfer of conviction occurs. Italy, Germany, France, for example, transmit the final sentence and sign so that the Spanish citizen (for example) would serve the sentence in national territory if he had been tried in Italy"²⁴⁹.

4.ANTICIPATING THE APPLICATION OF INSTRUMENTS: SENTENCING

This Chapter is the odd one out. It concerns a stage in which cooperation is not yet necessary. However, at the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. Unlike the previous two chapters, the focus is on a stage of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish whether in sentencing an accused person who is a national of another Member State or who resides in another Member State, judges take into account the (im)possibilities of judicial cooperation with regard to enforcement of that sentence, should the need arise. In other words, whether in sentencing judges anticipate possible needs and problems related to judicial cooperation,²⁵⁰ as well as whether national law allows them to do so.

At least two issues are of interest here:²⁵¹

- *Conditional sentences and probation decisions*²⁵² and *alternative sanctions*.²⁵³ Is the fact that the accused person resides in another Member State a factor in

²⁴⁹ Interview conducted by video call on February 26, 2024 at 9.00 a.m.

²⁵⁰ So this chapter is, unlike the chapters 2 and 3, not about applying instruments itself but about anticipating possible problems in the future with applying instruments.

²⁵¹ We invite the NARs to identify and include other issues.

²⁵² See the definition of both in Art. 2(3) and (5) FWD 2008/947/JHA.

²⁵³ See the definition in Art. 2(4) FWD 2008/947/JHA.



determining whether to impose a specific sanction, especially if a person residing in the issuing Member State would receive a similar sanction for comparable offences?

- *composite* sentences (see the introduction to Chapter 3). Does the fact that such sentences are governed by two different judicial cooperation regimes – and, consequently, that enforcing such sentences in another Member State may cause difficulties – play a role in deciding whether or not to impose such a sentence?

This is an under-recognized "stage." Judicial cooperation is not required because it is not yet necessary. For this reason, it is not possible to analyse judicial cooperation and mutual recognition instruments at this stage, as they do not apply at this stage. The relevance of this phase lies in the decisions that are taken, i.e. the sentence and its content. Subsequently, these decisions will give rise to the need for judicial cooperation.

The aim of this chapter is to identify certain aspects and issues, such as the assessment by the competent judicial authorities of the possibilities or limitations of judicial cooperation with regard to the execution of the sentence that they intend to impose on the accused person²⁵⁴. Basically, it is a question of knowing whether judges foresee in advance the potential problems that may arise at later stages with respect to the execution of a sentence they intend to impose and whether this influences the modification or alteration of the sentence. All of this will be analysed in the light of whether Spanish domestic law permits this to be done.

Given the subjective and somewhat personal nature of the aspects that are intended to be studied in this chapter, we have resorted mainly to interviews with professionals to answer all these questions. Of course, all this will be complemented by the legislative provisions of the Spanish legal system in this area²⁵⁵.

The imposition of a penalty in the context of judicial cooperation can give rise to many problems, even if it does not seem so. Although all EU MS share a common area of freedom, security and justice, and the EU authorities are striving to progressively unify a variety of issues that affect all European citizens, there are still aspects specific to each MS that differ from one state to another. An example of this is the length of sentences. Two MS may provide for radically different penalties for the same type of crime. Apparently, there is no room for conflict. However, in the event of having recourse to

²⁵⁴ See generally on this topic Fernández Gaztea, *Cooperación procedimental en la Unión Europea: límites jurisdiccionales* (Tirant lo Blanch, 2019).

²⁵⁵ In Spanish domestic law, judges have at their disposal a series of normative provisions that allow them to foresee and handle problems that may arise during the execution of sentences. These regulations give them the necessary flexibility to adapt and modify sentences according to the individual circumstances of each case, ensuring a fair and effective application of criminal justice.



judicial cooperation in relation to the enforcement of a sentence, significant problems may arise which prevent or hinder the execution of that sentence in another MS²⁵⁶.

This is confirmed by several professionals in the area of judicial cooperation in Spain. In the words of an anti-Directiveug prosecutor with 16 years of experience in Spain, "There are problems that arise with respect to the length of the sentence, for example, a State provides very long sentences for a crime that in Spain contemplates a lesser penalty for the same crime, or vice versa." In this regard, the prosecutor indicates that "it involves a review and readjustment of sentences that may give rise to problems in terms of the State of issuance of that request". However, he informs us that "We are in the process of trying to find out how this type of imbalance can be solved, or through what instrument"²⁵⁷. In the same vein, the response of José de la Mata, Spanish magistrate and national member of Eurojust, is maintained, confirming that "[the potential problems that may arise as a result of judicial cooperation] are weighed, but sometimes the judge does not opt for one way or the other freely. It has to do with the circumstance or the case. Depending on this, it can be complicated, for example, when a person has to be transferred, there are problems. Judges have to deal with problems that need to be solved [...] And then solve the problems through the use of the instruments and dialogue"²⁵⁸.

The case of *Inés del Río Prada* highlights how differences in the interpretation and application of criminal laws can lead to conflicts in European judicial cooperation.

Inés del Río Prada, a member of ETA²⁵⁹, was convicted in Spain for multiple acts of terrorism. Her case reached the European Court of Human Rights (ECHR) because of issues related to the application of the *doctrina Parot* ("Parot doctrine")²⁶⁰, which affected

²⁵⁶ See as great example of difficulties comment on famous Melloni case by García Sánchez, "Tribunal de Justicia de la Unión Europea - TJUE - Sentencia de 26.02.2013, Melloni, 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 el que el interesado no ha comparecido - Ejecución de una pena impuesta en rebeldía - Posibilidad de revisión de la sentencia". ¿Homogeneidad o estándar mínimo de protección de los derechos fundamentales en la eurorden europea?", 46 *Revista de Derecho Comunitario Europeo* (2013), 1137-1156.

²⁵⁷ Interview conducted by video call on February 26, 2024 at 9:00 a.m.

²⁵⁸ Interview conducted by video call on February 23, 2024 at 9:00 a.m.

²⁵⁹ As example of literatura on the topic Cuerda Riezu, *El Derecho Penal ante el fin de ETA* (Tecnos, 2016).

²⁶⁰ The *doctrina Parot* is a legal interpretation developed by the Supreme Court of Spain that affected the way in which prison benefits were computed in the serving of prison sentences. It is named after Henri Parot, a member of the terrorist organisation ETA, whose legal situation gave rise to this doctrine. According to this doctrine, prison benefits (such as the redemption of sentences for work) were to be applied to the total of the sentences imposed and not to the maximum effective limit of 30 years' imprisonment. This meant that, instead of applying the benefits over the legal maximum of 30 years, they were applied over the total sum of the sentences, resulting in longer effective service for prisoners with multiple long sentences, such as ETA terrorists. The Parot doctrine was applied to a number of ETA members and other prisoners convicted of serious and multiple offences, significantly extending their time in prison. On the topic, Cámara Arroyo, "La doctrina Parot", in Bustos Rubio and Abadías Selma (Eds.), *Una década de reformas penales: análisis de diez años de cambios en el Código Penal (2010-2020)*, (Bosch, 2020), pp. 145-178 as well as, Ríos Martín and Sáez Rodríguez, "Del origen al fin de la doctrina Parot", No. 3, *Indret: Revista para el Análisis del Derecho* (2014), <https://inDirectiveet.com/del-origen-al-fin-de-la-doctrina-parot/> (last visited 2



the length of her sentence.

On the one hand, *Inés del Río Prada* was sentenced in Spain to sentences totalling more than 3,000 years in prison for her involvement in numerous terrorist attacks. On the other hand, the Parot doctrine, applied in Spain, consisted of calculating prison benefits not on the maximum limit of the sentence (30 years) but on the total of the sentences imposed, which increased the actual time spent in prison.

The ECtHR judgment of 21 October 2013, *Case Del Río Prada v. Spain*²⁶¹, found that Spain had violated Article 7 (no punishment without law) and Article 5 (right to liberty and security) of the European Convention on Human Rights. The ruling also ordered Spain to pay 30,000 euros to the ETA member and called for her release ‘as soon as possible’²⁶².

Following the ECtHR ruling, *Inés del Río Prada* was released in 2013. The ECtHR ruling forced Spain to review the application of the Parot doctrine to other similar cases, affecting several ETA members and other convicted prisoners²⁶³. This decision generated considerable debate and controversy in Spain, particularly among victims of terrorism and their families, who saw the of the Court (Grand Chamber) doctrine as a tool to ensure that terrorists served longer sentences²⁶⁴.

In line with the above, it is worth highlighting other problems detected by more professionals that we have been able to interview, such as the case of the liaison magistrate in the United Kingdom, who has provided us with his own perspective and experiences in this matter when the United Kingdom was still part of the European Union, but also current problems that occur between the UK and Spain and that are likely to occur between the UK and other MS. In this sense, he told us that "In the new framework of cooperation between the UK and Spain and the EU States there are certain penalties that are impossible

Jan. 2025).

²⁶¹ ECtHR, *Del Río Prada v. España*, Appl. No. 42750/09. judgment of the Court (Grand Chamber) of 21 October 2013, ECLI:CE:ECHR:2013:1021JUD004275009.

²⁶² See comments by Del Pozo Pérez, “Sentencia del Tribunal Europeo de Derechos Humanos (n.º 42750/09), de 21 de octubre de 2013, Caso Del Río Prada c. España”, 2 *Ars Iuris Salmanticensis* (2013), 361-363 as well as Figueruelo Burrieza, “Diálogo entre Tribunales: La sentencia del Tribunal Europeo de Derechos Humanos de 21-X-2013 (caso sra. Del Río Prada contra el Reino de España)”, No. 23, *Revista Europea de Derechos Fundamentales*, (2014), 107-125.

²⁶³ The ECtHR judgment in the case of *Del Río Prada v. Spain* is a clear example of how differences in the enforcement of sentences can lead to significant conflicts in European judicial cooperation. This case underlines the importance of respecting fundamental rights and European standards in the enforcement of sentences and judicial cooperation between Member States. See Elia, “El caso Del Río Prada v. España: El Tribunal Europeo de Derechos Humanos y la definición del alcance de la pena”, No. 32, *Civitas Europa*, (2014), 261-264.

²⁶⁴ See discussion by Landa Gorostiza, “El control de legalidad de la ejecución de penas por el TEDH: nuevas perspectivas tras el caso Del Río Prada (doctrina Parot) c. España 2013”, in De la Cuesta Arzamendi, Pérez Machío and Ugartemendía Eceizabarrena (Eds.), *Armonización penal en Europa*, (Instituto Vasco de Administración Pública - IVAP), 2013), pp. 486-513.



to enforce, for example, the pecuniary penalty at EU level is relatively simple because there is an instrument, a transposed Framework Decision, but there is nothing like it. If a court imposes a fine on a British citizen who has no assets in Spain or does not live in Spain, that penalty will be unenforceable, because there is no instrument that allows enforcement. It is convenient that they put an alternative sentence that is more easily executed"²⁶⁵.

In addition, in an attempt to reduce the obstacles and impediments in the area of criminal enforcement, a prosecutor of a Prison Supervision Court in Spain points out that "the surveillance judges who have been assigned jurisdiction as the requesting authority, always prior to formalizing the request, initiate a communication, usually via email, with the counterpart of the country to which it is urged"²⁶⁶.

We must also mention the response of a magistrate who has been practicing in Spain since 2002 and recently joined the European Public Prosecutor's Office who, unlike the vast majority, appreciates that "When a person is convicted, there should be no problem in cooperation in the future. In any case, if there is a problem, the judge makes homologations of sentences, couples the request for the sentence from the country of issue to the country of execution to avoid problems of execution", although he admits that "I am not a specialist in the field". At the same time, he wanted to highlight the importance of reciprocal and prior communications in this matter, arguing that "It is very important to establish a communication channel between the issuing authority and the executing authority, the main reason is because, although the instruments are based on mutual trust, there is a lot of disparity of criteria between what is requested and what is going to be executed, due to the legislations that are different from one state to another, that is why it is necessary to talk by video call or email to properly channel the request for EIO, EAW or whatever instrument it is"²⁶⁷.

And, also, in the same line of this magistrate has been the opinion of another magistrate, Rebeca Huertos²⁶⁸, indicating that she does not believe that in general the problems that judicial cooperation may cause are assessed: "No, the corresponding penalty is imposed in each criminal process and in the execution phase we will try to overcome the obstacles that hinder execution. The penalties in Spain are specific, imprisonment, fine, etc., they do not give many problems when it comes to execution, unlike sentences in Holland, for example."

In addition, another common response of all the professionals interviewed is that at no time are the possible economic costs that may be incurred by judicial cooperation in

²⁶⁵ Interview conducted on March 12, 2024 at 12:30 p.m.

²⁶⁶ Interview conducted on February 26, 2024 at 17:00 p.m.

²⁶⁷ Interview conducted by video call on February 27, 2024 at 12:30 p.m.

²⁶⁸ Interview in person on March 11, 2024 at 9:00 a.m.



the execution of a sentence taken into account or influenced. Basically, because they are not even aware of the amount of the costs and are not responsible for them. This was confirmed to us by a liaison magistrate in the US, "she does not believe that [the economic cost] is in the mind of a Spanish prison supervision judge because he does not manage budgetary costs, he does not see it nor is it his competence, in any case it is penitentiary institutions"²⁶⁹.

Likewise, and as a curiosity, another prosecutor with 20 years of experience in Spain and who has worked temporarily for Eurojust, clarifies that at least as far as he is concerned in Spain "the execution of resolutions has mainly been worked with Latin American countries such as Brazil or Colombia, in the EU more work is done in the Prison Supervision Courts"²⁷⁰.

The response of the professionals is unanimous: the problems that may arise as a result of judicial cooperation are valued and taken into account. There has not been a single professional who has denied it. As can be seen, most of the professionals who have been interviewed prefer to make use of dialogue with their counterparts in other MS, as well as to try to obtain solutions through mutual recognition instruments²⁷¹. At the same time, they also inform us that they are aware of the existing problems in the matter and that they are trying to find a way to minimize and/or solve them.

5. MISCELLANEOUS: WHEREABOUTS UNKNOWN AND IN ABSENTIA

This Chapter is also an odd one out. It concerns stages in which cooperation is not sought or in which it is not necessary yet. When making decisions about going to trial and informing the suspect of the date and place the whereabouts of the accused may be unknown. When the whereabouts are known and he is abroad, whatever a Member State does may have consequences for asking for cooperation now or at a later stage. At the sentencing stage decisions will be made that subsequently will lead to a need for

²⁶⁹ Interview conducted by video call on March 12, 2024 at 12:30 p.m

²⁷⁰ Interview conducted by video call on February 19, 2024 at 12:00 p.m.

²⁷¹ As example on the use of mutual recognition instruments in Spain De Liaño Fonseca Herrero, "El principio de reconocimiento mutuo como fundamento de la cooperación judicial penal y sus efectos en los ordenamientos de los Estados miembros", No. 10, *Revista de derecho de la Unión Europea* (2006), 155-178.



cooperation, either automatically or on the basis of a specific decision. As in the previous Chapter, the focus of this last one is on stages of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the stage of preparations for the trial and the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish what decisions authorities take in seeking the whereabouts of the accused. Not knowing the whereabouts of the suspect is a problem, because it means that the authorities do not know what measures are possible and with whom cooperation must be sought. Do they ask for information from other states, do they introduce a Schengen-alert, do they issue an EAW or do they simply wait? There is very little known at this early stage and especially not on whether and if so, what instruments of cooperation are used.

Depending on national criminal procedure, a Member State may or may not have the possibility to conduct trials in the absence of the accused. It would be relevant to know to what extent judges consider the pros and cons of asking for cooperation when taking a decision on the summons of the accused as well as on whether or not to proceed to trial without the accused present.

At least two issues are of interest here:²⁷²

The summons to an accused abroad may be sent directly by mail without any assistance from the Member State in which the accused resides. It may also be sent with the assistance of its authorities. The former may be faster, the latter may give more certainty about whether the accused received the summons and wishes to be present at the trial. Is this a matter that is considered by courts? To what extent does the choice for one or the other relate to the (im)possibility the national system may have to conduct proceedings in the absence of the accused? Is it considered that if the accused is in the other Member State, whether a transfer of proceedings might be more appropriate in this case?

²⁷² We invite the NARs to identify and include other issues.



There is a follow-up question to that. When taking the decision to allow *in absentia* proceedings to be held, does the judge consider that the *in absentia* character of the proceedings may have consequences when later international cooperation is needed? For example: FWD 2002/584/JHA applies other, more severe, conditions to such judgements than to other judgments.

Like the previous chapter, we are in a somewhat "strange" or rather unusually recognized phase. This is due to the fact that these are stages in which the intervention of judicial cooperation is not yet necessary.

In the course of criminal proceedings, especially at the stage of notifications and summons to the parties as to the date and place of the trial, it may happen that the accused person is not located. This means that the whereabouts of the accused person are unknown. As a consequence, they are sometimes searched for at a transnational level, if it is suspected that the person concerned is outside the MS that intends to prosecute them. This whole process will give rise to judicial cooperation, which will be necessary for the location and arrest, if any, of the accused person. For this reason, this stage, even if it does not require judicial cooperation immediately, may require it later. This is what is known as a sub-stage, the trial preparation phase and the sentencing phase.

Ignorance of the whereabouts of the accused person is an impediment to the continuation of the criminal proceedings. The purpose of this chapter is to ascertain the decisions taken by the competent authorities in an attempt to discover the whereabouts of the accused person. At the same time, it is important to know whether Spanish law allows the trial to be held in the absence of the accused person and under what conditions. This issue will also be addressed in this chapter. As well as, in the event that the trial is allowed to take place without the presence of the accused person, if the competent authority assesses the problems that may arise from this when subsequently requesting judicial cooperation.

In relation to what has been said in the previous paragraphs about the summons and the corresponding notifications, an investigation will also be carried out on the means used to ensure that the summons and notifications reach the appropriate person, as well as all those aspects that have to do with this issue.

5.1 Summons and notifications

In this section, we will focus on everything related to summonses and notifications

addressed to the accused person when the defendant's whereabouts are unknown²⁷³. Specifically, we have tried to find out whether the competent authority contemplates the possibility of summoning electronically and/or digitally (email, video call, phone call) or whether another form of summons is preferable. We have also asked professionals whether the choice of one or the other form of summons is linked to the possibility or impossibility of carrying out the procedure in the absence of the accused person.

In Spain, all matters relating to summonses and notifications in the course of criminal proceedings are regulated in Title VII of the LECrim (Arts 166 to 182)²⁷⁴. And, as indicated in second paragraph of Article 166 LECrim: "When the Clerk of the Court deems it appropriate, they may be made by registered mail with acknowledgement of receipt [...]". Later on, however, the article itself refers to the LEC in everything that refers to the practice of these practices. It should be noted that a variety of jurisprudence, including the Provincial Court of *Gipuzkoa*, in judgment No. 199/2022, of 30 September²⁷⁵, take a somewhat stand against summonses by telephone, among others: "summoning the parties by telephone and orally is certainly not an ideal means for summons and summons to trial".

A Lawyer of the Administration of Justice (LAJ, hereinafter) of a Spanish Court of Instruction with 30 years of experience²⁷⁶ points out that, throughout the procedure of locating and arresting the accused person, they were in constant communication with Interpol²⁷⁷, and in this regard she stresses that "Interpol works wonderfully, she informed us of everything in very detail, what institution the detainee was in (Calais), the prison, etc. Everything was by email, although they still attend by phone without problems." Such is his satisfaction with Interpol's work and attention that he wants to highlight "the great work of Interpol in international legal cooperation", and add that "Interpol works perfectly". This same professional, regarding the summons of the person under investigation present abroad, states that, for them, it is admissible "any way in which we have evidence that that person has received it. That's enough for us. They do this by email normally. And if not, then it is sent to an address with acknowledgement of receipt as in the past" although he stresses that "the declaration is made by video call, but it is not cited".

On the other hand, a European prosecutor delegated and magistrate in Spain for

²⁷³ On the topic Larráyoiz Sola, "La emisión de una Orden Europea de Detención paraliza la prescripción del delito aunque el reclamado esté en paradero desconocido: STS (Sala de lo Penal) 41/2021, de 21 enero (RJ 2021, 113)", No. 4, *Revista Aranzadi Doctrinal* (2021), <https://tienda.aranzadilaley.es/revista-aranzadi-doctrinal> (last visited 2 Jan. 2025).

²⁷⁴ Specifically Gómez Recio, "Notificaciones y citaciones al imputado en el proceso penal", No. 8454, *Diario La Ley* (2015), <https://diariolaley.laleynext.es> (last visited 2 Jan. 2025).

²⁷⁵ ECLI: EN: APSS:2022:938.

²⁷⁶ Interview conducted on March 19, 2024 by video call at 10:00 a.m.

²⁷⁷ On his role see for example Segura Rodrigo, "La cooperación policial y judicial penal en el ámbito de la Unión Europea", *LVI Boletín de Información del Ministerio de Justicia* (2002), 2969-2991, at 2974.



decades informs²⁷⁸ us that "The second Protocol to the 2000 Convention allows it to be done by international mail with acknowledgement of receipt. In these cases, it can be done by international acknowledgment. There's a widespread practice of doing it by email, but it doesn't guarantee that the person who received it is that, but that doesn't recommend email." In this context, this professional warns us of the risks of using email as a means of citation. It does not guarantee receipt by the recipient. This is one of the disadvantages of integrating new technologies and digitalization into the criminal process and, in this case, into summonses and notifications. Although the new technological means offer a greater degree of agility and facilitate the comfort of those involved in the process, they also entail risks, especially in the area of the rights and procedural guarantees of the person under investigation and/or accused²⁷⁹. This position is also held by the Spanish liaison magistrate in the UK, who has explained in more detail the problems posed by the summons by e-mail as opposed to the summons by post, which is older, but more secure: "a summons by post with acknowledgement of receipt implies that the postman in charge requires the person to whom it is addressed (person under investigation and/or accused) to sign and record that it has been sent to the appropriate person". In the UK it doesn't work like that, it is sent to the person's postal address and if there is no incident it is assumed that the mail has been made and received, but there is no figure of the postal agent or written proof that the mail has been received. There is no written record and that is a problem for Spanish legal operators, summonses or notifications are being made by the classic judicial aid route, rogatory commissions are being sent to the central authority of the UK for the execution of the summons measure, it is requested that it be done personally, on the part of Spain. In both the UK and Ireland the summons is through the police (not the Public Prosecutor's Office) and so it is practiced personally. Also on this, a magistrate of the National Court²⁸⁰ confirms that "We are now replacing postal mail with international acknowledgement of receipt, more guaranteeing but slower, with electronic formulas". And he also warns that postal mail has its disadvantages because "the affected person did not take the summons, sometimes it was the neighbor or relative."

However, the Spanish anti-drug prosecutor²⁸¹ cited in this report above, differs markedly from this opinion in that she maintains that "With respect to summonses, they can be made by mail with acknowledgement of receipt, via email, provided that there is reliable evidence that he or she has received the summons, that is, that the person under investigation is aware that he or she has been summoned for a specific judicial act. Different forms are envisaged. There is also room for face-to-face training, but always with that condition." This means that it is always a matter of ensuring receipt by the

²⁷⁸ Interview conducted on February 27, 2024 by video call at 12:30 p.m.

²⁷⁹ See as example in the literature Jimeno-Bulnes, "The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama", 8 NJECL (2017), 171-191.

²⁸⁰ Interview conducted on February 26, 2024 by video call at 1:00 p.m.

²⁸¹ Interview conducted on February 26, 2024 by video call at 9:00 a.m.



recipient. This avoids the risk of non-reception referred to by the UK liaison magistrate, although the prosecutor does not specify how they can be certain that such reception has occurred. However, it is possible to refer to Spanish legislation, specifically to the Criminal Procedure Act or LECrim, which provides a lot of information on this issue, clearing up all these doubts that arise. By way of example, Article 170 states that the receipt of the notification must be recorded in a succinct document at the bottom of the original document²⁸². Article 171 LECrim goes on to state that "The date and time of delivery shall be noted in the document and shall be signed by the person to whom the service is made and by the official who serves it." In this way, the Spanish legislator has wanted to ensure that the receipt of the notification is personal, and thus there is reliable evidence that it has been delivered to the person to whom it is addressed, thus avoiding any type of risk that their right to effective judicial protection will be violated (Art. 24(2) CE).

Another professional has also commented on this, warning that "The notification must be made directly. In the case of the OEI: in order to hear the person, the technology for video calls in a legal and direct way is not possible, a suitable instrument has to be used. Mail or videoconferencing does not correspond to the instruments that fall within the Conventions."

Consequently, we find a plurality of perspectives and opinions when it comes to summonses and notifications addressed to the accused person. Regardless of the different points of view of the professionals interviewed, it has become clear, in accordance with Spanish law, that all summonses and notifications must be received by the person to whom they are addressed, and ensure that they have been received, that is, in a reliable manner.

5.2. Locating the accused person through judicial cooperation

In relation to this issue, we have asked a variety of professionals in the judicial area specialized in the field of judicial cooperation. Specifically, we have asked them about the procedures that are carried out in cases where the person under investigation and/or accused is missing. In this regard, José de la Mata²⁸³ responds that "It depends on the case. We assume that the suspect is outside of Spain [...]. [It will depend on] the severity of the cause and the circumstance; if there is suspicion of flight of the person and there is a risk to the victim, the appropriate thing to do is to issue the EAW, if this is not

²⁸² Litterally: "The notification will consist of reading the decision to be notified in its entirety, handing over a copy of the writ to the person being notified and making a record of delivery by a short note at the foot of the original writ".

²⁸³ Interview conducted on February 23, 2024 by video call at 9:00 a.m.

the case, first the police information is used and if it is not possible, the EIO will be useful." On the latter, that is, the possibility of issuing an EIO, a prosecutor has ruled, who maintains that "In these cases, the applicant would be the investigating judge with whom he works, and what the investigating judge does is to request an EIO, or delegate to Interpol or Europol in the case of EIO, to carry out the formalities."

However, the anti-drug prosecutor with 16 years of experience in Spain²⁸⁴ cited here on several occasions points out, on the contrary, that "a national search and arrest warrant is requested in case you are in Spain and also of an international nature. And the alarm is activated in the SIRENE system and the Schengen system at the European level, or in a non-member state extradition is requested, as long as we do not know by any means (for example, through the police authority) where the person under investigation can be found (he could be in Spain or abroad)". He also insists that "Everything is done nationally and internationally to cover all possibilities."

On the other hand, and with an alternative answer, a Spanish magistrate in a Spanish Provincial Court with more than 30 years of experience²⁸⁵ points out that he requests both an EAW and also inserts a Schengen alert, all at the same time. And, regarding requesting an EAW in these cases, a Spanish magistrate who is a member of the CGPJ with 36 years of experience²⁸⁶ warns that "EAWs are issued incorrectly, that is not possible, there has to be a car, and in these cases the information is usually police, we recommend SIRENE or the SCHENGEN system, with groups to locate people in search. Information must be requested prior to issuing the EAW. The location of people is through the police." In this sense, and in line with the response of the Spanish magistrate cited in this paragraph, the LAJ²⁸⁷ that we have cited in previous sections, corroborates what has been stated in relation to the police route, indicating that "Last year they had an affair, they set up an EAW in Sept. 2022 and in January 2023 they were informed from France through an email and through SIRENE, the Interpol office, that the person is in custody; they communicate with whoever corresponds to see the delivery time, the form, etc. In that case, it was for detention: taking a statement and, if necessary, going to prison. France advised that on February 15 he was placed at the disposal of Interpol at the border with Spain, here he was picked up by the Spanish police and sent to the Guard Court of Madrid (at this time they gave him instructions on the procedure), there they took his statement and put him in prison because the Prosecutor considered that it was appropriate to enter prison. [Insists on the following] Interpol works wonderfully."

To conclude, and by way of curiosity, the Spanish liaison magistrate in the UK²⁸⁸

²⁸⁴ Interview conducted on February 27, 2024 by video call at 12:30 p.m.

²⁸⁵ Interview conducted on February 15, 2024 in writing via email.

²⁸⁶ Interview conducted on April 18, 2024 by video call at 1:30 p.m.

²⁸⁷ Interview conducted on March 19, 2024 by video call at 10:00 a.m.

²⁸⁸ Interview conducted on March 12, 2024 by video call at 12:30 p.m.



cited in previous chapters of this report, tells us that "The central authority of the UK has no recourse to find out the whereabouts unknown, so what is done is to communicate that they cannot execute the request. The solution is to encourage police cooperation to establish whereabouts. This cooperation could be done through two channels of judicial cooperation, Interpol offices Spain can relate to Interpol UK or Interpol Ireland and do the address check, or they can also request police cooperation from the Interior Concierge of the Spanish embassy in the UK, which has the Civil Guard and national police that carry out these coordination tasks". It also warns that "In serious cases of serious crime there is no alternative but to issue an arrest warrant to the UK, for unknown whereabouts. If the person is in the UK, extradition is then envisaged. There is also room for a recommendation from the magistrate, always as a subsidiary route in serious cases, rape, homicide, etc."

5.3 Celebration of the trial without the presence of the accused person

Regarding the holding of the oral trial in the absence of the accused person, *a priori*, the LECrim in its Article 786(1)²⁸⁹ requires that the trial be held in the presence of the accused person and also his defense attorney. However, this requirement ceases to be perceptual when certain very specific situations are met. For example, the Article itself, in its second paragraph, states that "The unjustified absence of the accused who has been summoned personally or at the domicile, [...] will not be a cause to stay the oral trial if 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", provided that "the punishment requested does not exceed two years imprisonment or, if of a different type, where it does not last more than six years." Article 971 LECrim is also in line with this article, stating that "Unjustified absence of the accused will not stay the trial being held or the decision, as long as there is a record that they were summoned with the formalities provided for in this Act, unless the Judge, ex officio or at the request of a party, believes that it is necessary that they declare".

In Spain, the unjustified absence of the accused person (or their inability to be located) is known as the condition of "*rebeldía*"²⁹⁰. Rebellion is the result of three possible

²⁸⁹ Litterally: "1. Attendance by the accused and the defence lawyer is compulsory at the oral trial. Nevertheless, if there are several accused and one of them does not appear without, in the opinion of the Judge or Court, a legitimate reason, the latter may, having heard the parties, order the trial to continue against the others". See explicitly Pérez Tortosa, "The hearing, the use of evidence in court, the termination of proceedings and res iudicata", in De Lucchi López-Tapia, Jiménez López and Spada Jiménez (Eds.), *The criminal justice system in Spain*, op. cit., pp. 233-258, at pp. 237-238.

²⁹⁰ See specifically and extensively for example Téllez Aguilera, "La rebeldía penal", 74 *Anuario de Derecho Penal y Ciencias Penales* (2021), pp. 253-431.



assumptions:

- a) The person under investigation when he or she is served with a court decision has not been found at his or her home, his or her whereabouts are unknown or he or she has no known address.
- b) The person under investigation has escaped from the establishment in which he or she was being held as a detainee or prisoner.
- c) The person under investigation, being on provisional release, fails to attend the court on the day appointed for that purpose or when he is summoned.

And some professionals have spoken out about this concept of procedural nature, such as a liaison magistrate in the United States,²⁹¹ highlighting the restrictive and limited nature of holding a trial in absentia in this country: "The holding of a trial in absentia is very restrictive in Spain, only for crimes with a maximum sentence of two years. Therefore, the assumptions are very restricted. There are going to be very few cases in which they have that possibility. Proceedings in absentia are very rare. Anything over two years, they need the presence of the accused."

The anti-drug prosecutor in Spain responds in relation to the question of whether the continuation of the trial in absentia could have consequences on future judicial cooperation that "when a conviction is handed down in a case of absentia, then an instrument of international judicial cooperation is issued for the enforcement of that sentence. What is essential is that that person has been aware of that trial and that he or she has been able to defend himself or to appeal that judgment. In the EAW, for example, it is established in several sections, both the date of the sentence, as well as whether the convicted person has been defended by a lawyer and whether the sentence can be appealed and thus defended in person or argued in person". Another prosecutor specializing in international judicial cooperation responds to the same question, saying: "Yes, it could have consequences. Spain has made an effort to adapt to other legislations, especially after the ruling in the Meloni case. Finally, a fairly successful and balanced regulation has been reached and Spain has incorporated this legislation into its legal system. The consequences that international judicial cooperation can have are well focused from a legal point of view. " In this sense, this professional continues to insist that "Due to the type of investigations they carry out, in no case can they hold trials in the absence of the accused when the custodial sentence exceeds two years. You must always be summoned and have your presence before the judicial body. With respect to other judicial bodies with different penalties, the possibility of summoning the accused is always with reliability that he has received it, in order to respect his effective judicial protection (that he is aware that such a trial is going to be held and a conviction can be issued) and so that if he does not appear

²⁹¹ Interview conducted on March 20, 2024 by video call at 16:00 p.m.



it is clear that it is the result of his will and not of ignorance."

We can conclude that the cases of holding the oral trial without the presence of the accused person are very limited in Spain. Specifically, it is only allowed in cases of minor offences, with custodial sentences of less than two years. This means that they are not usual cases, and even less so in the field of judicial cooperation, which is reserved for crimes of greater magnitude and gravity. It is for this reason that, if a trial is held in absentia, it is unlikely, if not impossible, that judicial cooperation will subsequently be required.

6. MEMORANDUM

The purpose here, is to provide a brief summary of the main aspects of the report and, in essence, of the assessment of Spanish regulation and practice in the area of judicial cooperation in criminal matters within the framework of the EU²⁹². In this regard, the following facts can be highlighted and assessed, positively or negatively, as follows:

- 1) The transposition of the various criminal procedural instruments of mutual recognition in criminal matters is carried out in Spain in a single special law and thus *Act 23/2014, of 20 November on the mutual recognition of judicial decisions in criminal matters in the European Union*, henceforth LRM²⁹³, which is reformed if necessary as a result of the corresponding European legislation being adapted. As stated in the preamble of the regulation itself with this unification embodied in a single rule regulatory dispersion is avoided, thus achieving greater specificity and agility for those who have to make use of such regulation as they are the judicial authorities and legal professionals involved (clerks of the courts, lawyers, police forces...). As also indicated, its structure facilitates the future incorporation of directives that may be progressively adopted on these issues as it has been the case of *Law 3/2018, of 11 June, amending Law 23/2014, of 20 November, on the mutual recognition of criminal*

²⁹² Footnotes related to legislation sources and other information shall be included even repeated in order to make possible to manage this chapter as separated document.

²⁹³ *Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea*, BOE of 21 November 2014, n. 282, pp. 95437-95593, ELI: <https://www.boe.es/eli/es/l/2014/11/20/23/con> (last visited 2 Jan. 2025); English version available at <https://www.ejn-crimjust.europa.eu/ejnupload/InfoAbout/English%20version%20LAW%2023%20of%202014.pdf> (last visited 2 Jan. 2025).



*decisions in the European Union, to regulate the European Investigation Order*²⁹⁴. This legislative technique in favour of special legislation instead of the incorporation of the different regulations in this area in ordinary criminal procedural legislation such as the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*²⁹⁵ or LECrim) or, even the dispersion of regulations existing to date as a result of previous regulations in this area (for example, the repealed Law 3/2003, of 14 March, on the European Arrest Warrant or EAW²⁹⁶), is thus positively valued as facilitating its put into practice and knowledge.

- 2) As a rule, the competent judicial authorities in Spain for issuing and enforcing mutual recognition instruments in criminal matters are judges and courts with criminal jurisdiction, which therefore have the necessary judicial independence, and this has been the case since the adaptation of the first instrument of mutual recognition in criminal matters such as the EAW according to prior law. The only exception in this respect is precisely the European Investigation Order, the first instrument of mutual recognition in criminal matters, which gave the Public Prosecutor's Office the possibility of both issuing and executing such European Investigation Orders, provided that they do not entail the restriction of fundamental rights, in which case competence is transferred to the appropriate judge or court²⁹⁷. For this reason,

²⁹⁴ *Ley 3/2018, de 11 de junio por la que se modifica la Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea*, para regular la Orden europea de Investigación, BOE of 12 June 2018, n. 142, pp. 6061-60206, ELI: <https://www.boe.es/eli/es/l/2018/06/11/3> (last visited 2 Jan. 2025).

²⁹⁵ *Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*, Official State Gazette of 17 Sept. 1882, n. 260, ELI: [https://www.boe.es/eli/es/rd/1882/09/14/\(1\)/con](https://www.boe.es/eli/es/rd/1882/09/14/(1)/con) (last visited 2 Jan. 2025). English version available at <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf> (last visited 2 January 2025). The date of the law should be taken into account, bearing in mind that in recent years attempts have been made to carry out its reform and thus Directiveafts in 2011 and 2013 without success; to date there is a Preliminary Directiveaft of the Criminal Procedure Law approved by the Council of Ministers on 24 November 2020, whose processing is unknown but which is still published on the official website of the Ministry of Justice and thus <https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf> (last visited 2 Jan. 2025).

²⁹⁶ *Ley 3/2003, de 14 de marzo sobre la orden europea de detención y entrega*, BOE of 17 March 2003, n. 65, pp. 10244-10258, ELI: <https://www.boe.es/eli/es/l/2003/03/14/3/con> (last visited 2 Jan. 2025).

²⁹⁷ It should also be remembered that the European Delegated Prosecutors have now acquired the status of competent judicial authority as part of the European Public Prosecutor's Office to issue and execute the instruments of mutual recognition with the corresponding modification of the LRM operated by the law applying the Regulation of the European Public Prosecutor's Office (EPPO) as it is *Ley Orgánica 9/2021, de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017*, BOE of 2 July 2021, n. 157, pp. 78523-78571, ELI: <https://www.boe.es/eli/es/lo/2021/07/01/9/con> (last visited 2 Jan. 2025), which introduces a new seventh additional provision in Law 23/2014, of 20 November, on the



Spain has not been the focus of European jurisprudence in the wake of preliminary rulings handed down by the CJEU on the interpretation of the concept of judicial authority, especially with regard to the issuing of European arrest warrants²⁹⁸. This jurisdictional reservation undoubtedly derives from the judicial investigation model still in force for Spanish criminal proceedings under the survival of the Judge of the Investigative, unlike the common model in neighbouring European countries, which assigns the direction of the investigative phase to the Public Prosecutor's Office, as is also, it must be said, the proposal of the latest drafts of new procedural legislation in Spain. This fact, even if it is less problematic in the frequent discussion in Luxembourg, can also be seen in a positive light.

- 3) In relation to the application of the instruments of recognition itself, it must be said that Spain is a very cooperative and proactive country, since it is truth that it inevitably needs the practice of mutual legal assistance with other Member States, given the large volume of cross-border crimes that either reach Spanish courts and tribunals or are brought to Spain by the accused or investigated persons from other countries. It must be remembered that several of the instruments of mutual recognition have been promoted by Spain in their day; the best example is the European protection order (EPO), projecting in this case the Spanish criminal regulation to this point²⁹⁹. This is also largely reflected in judicial practice and thus, although there is still room for improvement, as will be explained below in the corresponding proposals for best practices, the judicial cooperation carried out and provided by Spain can be considered of a high, medium or at least adequate quality. Likewise, the judicial authorities in charge (mainly judges and magistrates, but also now prosecutors as well as lawyers and legal practitioners in general) have a wealth of experience in the use of such mutual recognition instruments. This is due in large part to the centralisation that legally operates, especially with regard to the competence

mutual recognition of criminal decisions in the EU. However, the modification is more formal than material in that the same law requires judicial authorisation by the corresponding Judge of Guarantees in order to adopt investigative measures restrictive of fundamental rights as well as personal precautionary measures in accordance with the provisions of the law (Art. 8 LO 9/2021).

²⁹⁸ Recall that from the Judgment of the Court (Grand Chamber) of 27 May 2019, Joined cases C-508/18 and C-82/19, *Minister for Justice and Equality v. OG and PI*, ECLI:EU:C:2019:456, para 47 et seq. to the most recent ones such as Judgment of the Court (Second Chamber) of 28 April 2022, case C-804/21, *C and CD v. Syyttäjä* ECLI:EU:C:2022:307, para 61-62.

²⁹⁹ In Spain the protection order foreseen as a personal precautionary measure for victims of domestic violence for Art. 544 ter LECrim in the field of domestic violence introduced by *Ley 27/2003, de 31 de julio, reguladora de la Orden de protección de las víctimas de violencia doméstica*, BOE of 1 August 2003, n. 183, 29881-29883, ELI <https://www.boe.es/eli/es/l/2003/07/31/27> (last visited 2 Jan. 2025), The EPO initiative was launched by 12 Member States during the Spanish presidency in 2010.



for the execution of such instruments, which lies with the jurisdictional bodies based in Madrid, such as basically the Central Judges of the Investigative (*Juzgados Centrales de Instrucción*) attached to the National Court (*Audiencia Nacional*)³⁰⁰. Thus, this interest in the practice of judicial cooperation by the Spanish judicial authorities also deserves a positive assessment.

- 4) Finally, with regard to the criteria used for the request and/or implementation of the judicial cooperation requested by other countries, the following should be said, as has been recognized by practically all of the legal professionals interviewed, that only legality criteria operate and not “opportunity” criteria or any other type (specifically, economic costs, etc.); of course, this is mainly due to the application of the principle of legality in Spanish criminal procedure in accordance with ordinary procedural rules³⁰¹. In this context it is understood that this is an expense that must be assumed by the Spanish government and institutions where appropriate; as said, Spanish government and institutions are quite receptive to the practice of judicial cooperation by Spanish judicial authorities and they do not place special restrictions on expenses derived from such legal assistance according to the opinion expressed by the legal professionals themselves during the interviews carried out. Greater complaints, however, are addressed against the personal and/or technical resources (especially telematic due to lack of connection sometimes) granted to the Spanish judges and courts, which they consider to be sometimes precarious and which logically affect both the development and processing of national and cross-border proceedings. They also regret the delay sometimes derived from the requirement to practice notifications even on paper by certified mail derived from the lack of adequate accreditation or certification by telematic means to ensure the authenticity of the communication (i.e., email); however, it is expected that the generalization in this sense of the digitalisation measures operated by the EU in the context of judicial cooperation³⁰² will contribute to

³⁰⁰ As example Art. 35(2) LRM, textually: “The competent judicial authority to execute a European arrest warrant shall be the Central Judge of Criminal Investigation of the National High Court. When the order refers to a minor, jurisdiction shall lie with the Central Judges for Minors”.

³⁰¹ In this context the general rule of mandatory prosecution instead of the discretionary prosecution; see Art. 124 (1) CE available at https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=158_Constitucion_Espanola
The Spanish Constitution & modo=2 (last visited 2 Jan. 2025). English version for example available at <https://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html?lang=en> (last visited 2 Jan. 2025).

³⁰² Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalization



solving this and other problems because otherwise this particular fact would merit a negative assessment. This is without prejudice to the fact that this same digitalisation and use of telematic means, together with their undeniable advantages, also have disadvantages in judicial cooperation itself and, even more so, in general terms, in the development of cross-border proceedings themselves, as it will be addressed in our recommendations.

7. LITERATURE, LEGISLATION AND CASE-LAW

LITERATURE

Aguilera Morales, “Nuevas competencias para el Ministerio Fiscal con ocasión de la orden europea de investigación”, in González Cano (Ed.), *Orden europea de investigación y prueba transfronteriza en la Unión Europea* (Tirant lo Blanch, 2019), pp. 457-471.

Alesci, “La competenza funzionale all’emissione del mandato d’arresto europeo processuale”, No. 4, *Processo Penale e Giustizia: Rivista di dottrina e giurisprudenza* (2014), 109-115.

Alonso Moreda, “Eurojust, a la vanguardia de la cooperación judicial en materia penal en la Unión Europea”, 16 *Revista de Derecho Comunitario Europeo* (2012), 119-157.

Arangüena Fanego, “La orden europea de detención y entrega: análisis de las leyes 2 y 3 de 14 de marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la ‘euroorden’”, No. 10, *Revista de Derecho Penal* (2003), 11-95.

Arangüena Fanego, “Eficacia transnacional de medidas de vigilancia y de protección”, in De Hoyos Sancho (ed.), *Garantías y derechos de las víctimas especialmente vulnerables en el marco jurídico de la Unión Europea* (Tirant lo Blanch, 2013), pp. 327-352.

Arangüena Fanego, “Reconocimiento mutuo de resoluciones sobre medidas alternativas a la prisión provisional: análisis normativo”, in Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre* (Aranzadi, 2015), pp. 207-241.

Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley*

of judicial cooperation, O.J., 27 Dec. 2023, L, <http://data.europa.eu/eli/dir/2023/2843/oj> (last visited 2 Jan. 2025) and Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, O.J., 27 Dec. 2023, L, ELI: <http://data.europa.eu/eli/reg/2023/2844/oj> (last visited 2 Jan. 2025).



23/2014, de 20 de noviembre (Aranzadi, 2015).

Armenta Deu, *Derecho Procesal penal*, 15th ed. (Marcial Pons, 2024).

Arroyo Jiménez and Nieto Martín (Eds.), *El reconocimiento mutuo en el derecho español y europeo* (Marcial Pons, 2018).

Bachmaier Winter, “Cross-border Investigation of tax Offences in the EU: Scope of Application and Grounds for Refusal of the European Investigation Order”, 7 EuCLR (2017), 46-66.

Bachmaier Winter, *Orden Europea de Detención y Entrega, doble incriminación y reconocimiento mutuo a la luz del caso Puigdemont*, in Arroyo Jiménez, Nieto Martín and Muñoz de Morales Romero (Eds.), *Cooperar y Castigar: el caso de Puigdemont* (Ediciones de la Universidad de Castilla-La Mancha, 2018), pp- 29-40.

Bachmaier Winter, “La orden europea de investigación desde la perspectiva española”, in Jimeno Bulnes and Miguel Barrio (Eds.), *Espacio judicial europeo y proceso penal* (Tecnos, 2018), pp. 133-162.

Barona Vilar, *Prisión provisional y medidas alternativas* (Bosch, 1988).

Barona Vilar, “En busca de un nuevo modelo procesal penal español”, in González Granda, Damián Moreno and Ariza Colmenarejo (Eds.), *Variaciones sobre un tema: el ejercicio procesal de los derechos. Libro homenaje a Valentín Cortés Domínguez* (Colex, 2022), pp. 153-178.

Bautista Samaniego, *Aproximación crítica a la orden europea de detención y entrega* (Comares, 2015).

Biasiotti and Turchi, *European Investigation Order* (Springer, 2023).

Böse, “Mandatory and optional refusal grounds in mutual recognition instruments”, in Luchtman, *Of swords and shield: due process and crime control in times of globalization. Liber amicorum prof. dr. J.A.E. Vervaele* (Eleven, 2023), pp. 425-432.

Buchhalter Montero, “La remisión de procesos penales en la Unión europea: examen de la propuesta de Reglamento de 5 de abril de 2023”, No. 62, *Revista General de Derecho Procesal* (2024), <https://www.iustel.com>

Cacciatore, “European Investigation order as an instrument for the fight against organised crime”, in *The Significance of EU Criminal Law in the 21 Century: The Need for Further Harmonisation or New Criminal Policy?* (Vilnius University Press, 2021), pp. 34-38.

Cacciatore, “La aplicación práctica de la orden europea de investigación como mecanismo de obtención transnacional de pruebas”, in Jimeno Bulnes and Ruiz López (Eds.), *La evolución del Espacio judicial europeo en materia civil y penal: su influencia en el*



proceso español (Tirant lo Blanch, 2022), pp. 293-313.

Cacciatore, “El reconocimiento mutuo como principio clave para la lucha contra el crimen organizado”, in Garrido Carrillo and Faggiani (Eds.), *Lucha contra la criminalidad organizada y cooperación judicial en la UE: instrumentos, límites y perspectivas en la era digital* (Aranzadi, 2022), pp. 171-186.

Cacciatore, “Orden de Detención Europea y motivo para la no ejecución y suspensión basado en la salud del interesado: Sentencia del Tribunal de Justicia, Gran Sala, de 18 de abril de 2023, asunto C- 699/21: E.D.L”, (2023), No. 115, *La Ley Unión Europea*.

Cacciatore, “Concepto de «juicio del que derive la resolución» y la interpretación del principio de primacía del Derecho de la Unión Sentencia del Tribunal de Justicia, Sala Séptima, de 21 de diciembre de 2023, asunto C-398/22 Generalstaatsanwaltschaft Berlin”, (2024), No. 122, *La Ley Unión Europea*, <https://tienda.aranzadilaley.es/revista-union-europea-aranzadi>

Caianello, “La nuova direttiva UE sull'ordine europeo d'indagine penale tra mutuo riconoscimento e ammissione reciproca delle prove”, (2015), No. 3, *Processo penale e giustizia*, 1-11.

Cagossi, “Una comparación entre dos instrumentos de mutuo reconocimiento: la Orden de detención y la Orden europea de protección”, in Burgos Ladrón de Guevara (Ed.), *La cooperación judicial entre España e Italia: la orden europea de detención y entrega en la ejecución de sentencias penales* (Instituto Vasco de Derecho Procesal, 2017), pp. 107-113.

Cámara Arroyo, “La doctrina Parot”, in Bustos Rubio and Abadías Selma, García (Eds.), *Una década de reformas penales: análisis de diez años de cambios en el Código Penal (2010-2020)*, (Bosch, 2020), pp. 145-178.

Campaner Muñoz, “La orden europea de vigilancia: statu quo y perspectivas de futuro. Hacia una necesaria armonización de las medidas cautelares personales en la UE”, No. 30, *Revista Derecho y Proceso Penal* (2013), 161-187.

Casaleiro, Roach Anleu and Dias, “Introduction. Empirical research with judicial professionals and courts: methods and practices”, 13 *Oñati Socio-Legal Series* (2023), S1-S9.

Cataldi, “Un processus de ratification lent et complexe: les zones grises de la convention”, in Sobrino Heredia (Ed.), *La contribución de la convención de las Naciones Unidas sobre el derecho del mar a la buena gobernanza de los mares y océanos*, (Editoriale Scientifica, 2014), pp. 21-31.

Chelo, “Solo un provvedimento del giudice può trovare esecuzione con il mandato di arresto europeo”, No. 1, *Processo Penale e Giustizia* (2018), 53-59.

Cuerda Riezu, *El Derecho Penal ante el fin de ETA* (Tecnos, 2016).



De Liaño Fonseca Herrero, “El principio de reconocimiento mutuo como fundamento de la cooperación judicial penal y sus efectos en los ordenamientos de los Estados miembros”, No. 10, *Revista de derecho de la Unión Europea* (2006), 155-178.

Del Pozo Pérez, “Sentencia del Tribunal Europeo de Derechos Humanos (n.º 42750/09), de 21 de octubre de 2013, Caso Del Río Prada c. España”, 2 *Ars Iuris Salmanticensis* (2013), 361-363.

Denza, “The 2000 Convention on Mutual Assistance in Criminal Matters”, 40 *CMLRev.* (2003), 1047-1074.1047-1074.

Domínguez Ruiz, *La orden europea de investigación. Análisis legal y aplicaciones prácticas* (Tirant lo Blanch, 2019).

Domínguez Ruiz, “Obtención de prueba penal transfronteriza en la Unión Europea, la orden europea de investigación”, in Hernández López and Laro González (Eds.), *Proceso penal europeo: últimas tendencias, análisis y perspectivas* (Aranzadi, 2023), pp. 177-196.

Elia, “El caso Del Río Prada v. España: El Tribunal Europeo de Derechos Humanos y la definición del alcance de la pena”, No. 32, *Civitas Europa* (2014), 261-264.

Escalada López, “La Cooperación judicial en la UE. Especial referencia a Eurojust y a las novedades normativas que le afectan”, No. Extra 1, *Revista de Estudios Europeos* (2023), 475-502.

Fauchon, “La Fiscalía como autoridad de ejecución de una orden europea de investigación no es un órgano jurisdiccional, Comentario de la STJUE, XK, 2 de septiembre de 2021, C-66/20”, *IUDICIUM: Revista de Derecho Procesal de la asociación iberoamericana de la Universidad de Salamanca* (2021), 125-132.

Fernández Gaztea, *Cooperación procedimental en la Unión Europea: límites jurisdiccionales* (Tirant lo Blanch, 2019).

Figueruelo Burrieza, “Diálogo entre Tribunales: La sentencia del Tribunal Europeo de Derechos Humanos de 21-X-2013 (caso sra. Del Río Prada contra el Reino de España)”, No. 23, *Revista Europea de Derechos Fundamentales* (2014), 107-125.

Florez Miranda, “Orden europea de detención”, No. 9719, *Diario La Ley* (2020), <https://diariolaley.laleynext.es/>

Fontestad Portalés, “El procedimiento de transmisión de la orden europea de detención y entrega en la nueva ley de reconocimiento mutuo de resoluciones penales en la Unión Europea”, in Robles Garzón (Ed.), *Reflexiones jurídicas sobre cuestiones actuales* (Aranzadi, 2017), pp. 389-426.

Fontestad Portalés, *Perspectiva crítica de la orden europea de detención y entrega a la luz de la Decisión Marco 2002/584/JAI y la Ley 23/2014 de reconocimiento mutuo de*



resoluciones penales en la Unión Europea (Análisis comparativo con la Ley 3/2003) (Aranzadi, 2022).

Fontestad Portalés, “Initiation of the criminal prosecution. Different stages of the proceedings”, in De Lucchi López-Tapia, Jiménez López and Spada Jiménez (Eds.), *The criminal justice system in Spain* (Atelier, 2022), pp. 123-146.

García Moreno, “El impacto del Brexit en la Cooperación Jurídica Internacional en materia penal entre España y el Reino Unido”, No. 8-9, *Unión Europea Aranzadi* (2021), <https://tienda.aranzadilaley.es/revista-union-europea-aranzadi>

García Moreno, “El concepto de autoridad judicial emisora en la jurisprudencia del TJUE relativa a la orden europea de detención y entrega”, No. 103, *Jueces para la democracia*, (2022), 119-138.

García Rodríguez, “La orden europea de protección a la luz de la Ley 23/2014, sobre reconocimiento mutuo de resoluciones penales en la Unión Europea: emisión y ejecución en España”, No. 41, *La Ley Unión Europea* (2016), <https://www.aranzadilaley.es/revistas/revista-laley-unioneuropea.html>

García Sánchez, “Tribunal de Justicia de la Unión Europea - TJUE - Sentencia de 26.02.2013, Melloni, 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 el que el interesado no ha comparecido - Ejecución de una pena impuesta en rebeldía - Posibilidad de revisión de la sentencia". ¿Homogeneidad o estándar mínimo de protección de los derechos fundamentales en la eurorden europea?”, 46 *Revista de Derecho Comunitario Europeo* (2013), 1137-1156.

García-Varela Iglesias, *Herramientas y mecanismos para la consecución del auxilio judicial internacional* (Centro de Estudios Jurídicos, 2022).

Garcimartín Montero, “Resoluciones penales que imponen medidas alternativas a la prisión provisional” in Mar Jimeno Bulnes and Cristina Ruiz López (Eds.), *La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español* (Tirant lo Blanch 2022), pp. 239-263.

Gascón Inchausti and Villamarín López, “Criminal procedure in Spain”, in Vogler and Huber (Eds.), *Criminal procedure in Europe* (Duncker & Humblot, 2008), pp. 542-653.

Gáspár-Szilágyi, “Joined Cases Aranyosi and Caldáru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant”, 24 *Eur.J.Crime Cr.L.Cr.J.* (2016), 197-219.

Geraci, “Il mutuo riconoscimento dei provvedimenti di congelamento e confisca: il Regolamento (UE) 2018/1805”, No. 5, *Processo Penale e Giustizia: Rivista di dottrina e giurisprudenza* (2021), <https://www.processopenaleegiustizia.it/>

Gómez Campelo, “Orden de detención europea y extradición”, in Jimeno Bulnes (Ed.),



Justicia versus seguridad en el espacio judicial europeo: orden de detención europea y garantías procesales (Tirant lo Blanch, 2011), pp. 19-59.

Gómez Colomer and Barona Vilar (Eds.), *Proceso penal. Derecho Procesal III*, 2nd ed. (Tirant lo Blanch, 2022).

Gómez Recio, “Notificaciones y citaciones al imputado en el proceso penal”, No. 8454, *Diario La Ley*, (2015), <https://diariolaley.laleynext.es>

González Cano, “Algunas consideraciones sobre el reconocimiento mutuo de resoluciones firmes en materia penal”, No.7, *Tribunales de justicia: Revista española de derecho procesal* (2001), 19-39.

González Vega, *La cooperación judicial penal en Europa: de la asistencia judicial al reconocimiento mutuo* (Consejo General del Poder Judicial, 2023).

Guerra and Janssens, “Legal and practical challenges in the application of the European investigation order”, No 1, *Eucrim the European Criminal Law Associations' forum*, (2019), 46-53.

Guerrero Palomares, “La reforma de los instrumentos de reconocimiento mutuo a la luz de la jurisprudencia del TJUE”, in Hernández López and Laro González (Eds.), *Proceso penal europeo: últimas tendencias, análisis y perspectivas* (Aranzadi 2023), pp. 291-314.

Guerrero Palomares, “Presunción de Inocencia: (tres) cuestiones sin resolver”, in Arangüena Fanego and De Hoyos Sancho (Eds.), *Hacia un Derecho Procesal europeo* (Atelier, 2024), pp. 25-61.

Harkin, “The case law of the court of Justice of the European Union on ‘judicial authority’ and issuing European arrest warrants”, 12 NJECL (2021), 508-530.

Hernández López, “El equipo conjunto de investigación como instrumento en la lucha contra el crimen organizado en la era de la digitalización”, in Garrido Carrillo and Faggiani (Eds.), *Lucha contra la criminalidad organizada y cooperación judicial en la UE: instrumentos, límites y perspectivas en la era digital* (Aranzadi 2022), pp. 263-289.

Hernández López, *Conflicts of criminal jurisdiction and transfer of proceedings in the EU* (Springer, 2022).

Hernández López, “El procedimiento de entrega de Carles Puigdemont: estado actual y perspectivas”, No. Extra-1, *Revista de Estudios Europeos* (2023), 279-309.

Jiménez López, “La orden europea de investigación”, in Fontestad Portalés and Caro Catalán (eds.), *La globalización del derecho procesal* (Tirant lo Blanch, 2020), pp. 237-254.

Jiménez-Villarejo Fernández, “Cooperación de la Fiscalía Europea con Eurojust, Europol



y OLAF”, in Palomares, Fontestad Portalés, Hernández López and Suárez Xavier (Eds.), *Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021, de 1 de julio* (Aranzadi, 2023), pp. 675-718.

Jimeno Bulnes, “European judicial cooperation in criminal matters”, 9 ELJ (2003), 614-630.

Jimeno Bulnes, “La orden europea de detención y entrega: aspectos procesales”, No. 5979, *Diario La Ley* (2004), 1-7.

Jimeno Bulnes, “The European Arrest Warrant as a measure against terrorism. Spanish implementation on the EAW: a procedural view”, in Gruszczak (Ed.), *European Arrest Warrant – Achievements and dilemmas*, Working paper 3/06 (European Centre Natolin, 2006), pp. 43-70.

Jimeno Bulnes, “Capítulo V.2. Orden de detención europea” in Jimeno Bulnes (Ed.), *La cooperación judicial civil y penal en el ámbito de la Unión Europea: instrumentos procesales* (Bosch, 2007), pp. 299-339.

Jimeno-Bulnes, “Spain and the EAW – A view from a ‘key user’”, in Guild (Ed.), *Constitutional challenges to European Arrest Warrant* (Wolf Legal Publishers, 2006), pp. 163-185.

Jimeno Bulnes, “The enforcement of the European Arrest Warrant: a comparison between Spain and the UK”, 15 Eur.J.Crime Cr.L.Cr.J. (2007), 263-307.

Jimeno Bulnes, “Jurisdicción y competencia en materia de violencia de género: los Juzgados de Violencia sobre la Mujer. Problemática a la luz de su experiencia”, No. 1-2, *Justicia* (2009), 157-206.

Jimeno-Bulnes, “American criminal procedure in a European context”, 21 *Cardozo Journal of International and Comparative Law* (2021), 429-459.

Jimeno Bulnes “La orden europea de detención y entrega: análisis normativo”, in Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre* (Aranzadi, 2015), pp. 35-76.

Jimeno Bulnes, “Orden europea de investigación en materia penal”, in Jimeno Bulnes (Ed.), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar* (Bosch, 2016), pp. 151-208.

Jimeno Bulnes, “Perspectiva de la orden de detención y entrega: el principio de reconocimiento mutuo y la cooperación judicial en la Unión Europea”, in Burgos Ladrón De Guevara (Ed.) *La cooperación judicial entre España e Italia. La orden europea de detención y entrega en la ejecución de sentencias penales* (Instituto Vasco de Derecho Procesal, 2017), pp. 5-33.



Jimeno Bulnes, “Brexit and the future of European Criminal Law – a Spanish perspective”, 28 *Crim.L.F.* (2017), 325-347.

Jimeno-Bulnes, “The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama”, 8 *NJECL* (2017), 171-191.

Jimeno Bulnes, “La prueba transfronteriza y su incorporación al proceso penal español”, in González Cano (Ed.), *Orden europea de investigación y prueba transfronteriza en la Unión Europea* (Tirant lo Blanch, 2019), pp. 719-766.

Jimeno Bulnes, “La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español”, in Jimeno Bulnes and Ruiz López (Eds.), *La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español* (Tirant lo Blanch, 2022), pp. 27-81.

Jimeno Bulnes, *La orden europea de detención y entrega* (Tirant lo Blanch, 2024).

Kantorowicz-Reznichenko, “Cognitive biases and procedural rules: Enhancing the use of alternative sanctions”, 23 *Eur.J.Crime Cr.L.Cr.J.* (2015), 191-213.

Kleizen, Wynen, and Junjan, “Between Aims and Execution: Value Trade-Offs in the Practical Implementation of the European Arrest Warrant?”, 15 *EJRR* (2024), 737-756.

Kostoris (Ed), *Manual de Derecho procesal penal europeo* (Marcial Pons, 2022).

Landa Gorostiza, “El control de legalidad de la ejecución de penas por el TEDH: nuevas perspectivas tras el caso Del Río Prada (doctrina Parot) c. España 2013”, in De la Cuesta Arzamendi, Pérez Machío and Ugartemendía Eceizabarrena (Eds.), *Armonización penal en Europa*, (Instituto Vasco de Administración Pública - IVAP, 2013), pp. 486-513.

Larráyoiz Sola, “La emisión de una Orden Europea de Detención paraliza la prescripción del delito aunque el reclamado esté en paradero desconocido: STS (Sala de lo Penal) 41/2021, de 21 enero (RJ 2021, 113)”, No. 4, *Revista Aranzadi Doctrina* (2021), <https://tienda.aranzadilaleys.es/revista-aranzadi-doctrinal>

Loibl, “Arrest and Pre-Trial Detention”, in Klip (Ed.), *Comparative Perspectives of Criminal Procedure* (Intersentia, 2024), pp.79-103.

López Gil, “Criminal courts and the classification of mode trials”, in De Lucchi López-Tapia, Jiménez López and Spada Jiménez (Eds.), *The criminal justice system in Spain* (Atelier, 2022), pp. 53-80.

López Ortega, “La orden de detención europea: legalidad y jurisdiccionalidad de la entrega”, No. 45, *Jueces para la democracia* (2002), 28-33.

Lozano Gago, “El proceso de emisión de la orden europea de detención. Referencia a la orden europea de investigación. La intervención del letrado de la administración de justicia”, No. 8, *Revista Acta Judicial* (2021), 44-59.



Mangiaracina, “La orden europea de investigación: desde la perspectiva europea”, in Jimeno Bulnes and Miguel Barrio (Eds.), *Espacio judicial europeo y proceso penal* (Tecnos, 2018), pp. 115-131.

Mapelli Caffarena and Posada Pérez (Eds.), *Análisis empírico y doctrinal de la Ley 23/2014 de reconocimiento mutuo de resoluciones penales* (Aranzadi, 2022).

Martínez García, “La orden europea de investigación”, in González Cano (Ed.), *Integración europea y justicia penal* (Tirant lo Blanch, 2018), pp. 403-435.

Montaldo and Grossio, “La riforma della disciplina di recepimento del mandato d’arresto europeo: il nuovo assetto dei limiti all’esecuzione della richiesta di consegna”, No. 3, *Freedom, Security & Justice: European Legal Studies* (2021), 95-135.

Montero Pérez de Tudela and García Ruiz, “The underutilisation of the European Supervision Order: Framework decision 2009/829/JHA as just a scrap of paper”, 46 *EL Rev.* (2021), 306-324.

Morán López, “La orden europea de investigación desde la perspectiva práctica”, in Jimeno Bulnes and Miguel Barrio (Eds.), *Espacio judicial europeo y proceso penal* (Tecnos, 2018), pp. 163-186.

Muñoz Aunión and León Silva, “La detención de extranjeros en situación de vulnerabilidad vs. derechos humanos”, No. 23, *Anuario Hispano-Luso-Americano de derecho internacional* (2017), 285-301.

Muñoz de Morales Romero, “Dime cómo son tus cárceles y ya veré yo si coopero”: Los casos Caldararu y Aranyosi como nueva forma de entender el principio de reconocimiento mutuo”, No. 1, *Indret: Revista para el Análisis del Derecho* (2017), <https://www.indret.com>

Neira Pena, “The reason behind the failure of the European Supervision Order: The defeat of Liberty Versus Security”, 5 *European Papers* (2020), 1493-1510.

Neira Pena, “La orden europea de vigilancia. Las razones de su escaso nivel de aplicación”, in Arangüena Fanego and De Hoyos Sancho (Eds.), *Hacia un derecho procesal europeo* (Atelier, 2024), pp. 435-448.

Negri, “Nuove tecnologie e compressione della libertà personale: la sorveglianza con dispositivi elettronici dell’imputato sottoposto a misure cautelari”, 5 *Revista Brasileira de Direito Processual Penal* (2019), 1255-1275.

Nieva Fenoll, “Orden europea de investigación: autoridades competentes en el Estado emisor y de ejecución. Especial consideración del papel del Ministerio Fiscal”, in González Cano (Ed.), *Orden europea de investigación y prueba transfronteriza en la Unión Europea* (Tirant lo Blanch, 2019), pp. 437-456.



Nistal Burón, “El reconocimiento mutuo de resoluciones penales en la Unión Europea. El cumplimiento en España de penas privativas de libertad impuestas en otros estados miembros de la Unión Europea”, No. 114, *La ley penal: revista de derecho penal, procesal y penitenciario* (2015), <https://tienda.aranzadilaley.es/la-ley-penal>

Nogueroles Llinares, “La Orden Europea de Detención y la Decisión Marco 909/2008 sobre aplicación del reconocimiento mutuo de sentencias penales que imponen penas o medidas privativas de libertad”, No 1, *Revista del Centro de Estudios Jurídicos y de Postgrado CEJUP* (2023), pp. 386-401.

Öberg, “Trust in the Law? Mutual recognition as a justification to domestic criminal procedure”, 16 Eur. Const. Law Rev. (2020), 33-62.

Pando Echeverría, “Cuestiones prácticas relativas al reconocimiento de resoluciones sobre medidas alternativas a la prisión provisional”, in Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre* (Aranzadi, 2015), pp. 249-268.

Páramo Montero, “La ejecución transfronteriza de sanciones penales y administrativas, asistencia y reconocimiento mutuos en los procedimientos sancionadores en el ámbito de la Unión Europea: especial referencia a los supuestos del orden social”, No. 78, *Revista del Ministerio de Trabajo y Asuntos Sociales: Revista del Ministerio de Trabajo e Inmigración* (2008), 323-344.

Pascual Rodríguez, “La escasa actividad del tribunal europeo de derechos humanos con relación a España en el ámbito de la privación de libertad”, No. 37, *Revista General de Derecho Penal* (2022), 1698-1189.

Pastor Motta, “Las medidas alternativas a la prisión provisional”, in Dorrego de Carlos (Ed.), *Régimen jurídico de la prisión provisional* (Sepin, 2004), pp. 305-332.

Pérez Gil, “El Convenio de Asistencia Judicial en Materia Penal entre los Estados Miembros de la UE: ¿un instrumento anclado en coordenadas superadas?”, No. 6208, *Diario La Ley* (2005), 1-5.

Pérez Marín, “Dos ejemplos de medidas cautelares penales en el espacio judicial europeo: las medidas alternativas a la prisión provisional y el embargo preventivo previo al decomiso de los efectos procedentes del delito”, in Gutiérrez-Alviz, *El derecho procesal en el espacio judicial europeo* (Atelier, 2013), p. 377.

Pérez Marín, “El procedimiento para el reconocimiento y la ejecución de resoluciones de embargo y decomiso basado en el principio de reconocimiento mutuo: acercamiento a la propuesta para una nueva regulación en la Unión Europea”, in Cachón Cadenas, Franco Arias and Ramos Méndez (Eds.), *Derecho y proceso: Liber Amicorum del profesor Francisco Ramos Méndez* (Atelier, 2018), pp. 2017-2042.



Pérez Tortosa, “The hearing, the use of evidence in court, the termination of proceedings and res iudicata”, in De Lucchi López-Tapia, Jiménez López and Spada Jiménez (Eds.), *The criminal justice system in Spain* (Atelier, 2022), pp. 233-258.

Ríos Martín and Sáez RoDirectiveíguez, “Del origen al fin de la doctrina Parot”, No. 3, *InDirectiveet: Revista para el Análisis del Derecho* (2014), Ríos Martín and Sáez RoDirectiveíguez, “Del origen al fin de la doctrina Parot”, No. 3, *InDirectiveet: Revista para el Análisis del Derecho* (2014), <https://indret.com/del-origen-al-fin-de-la-doctrina-parot/>

Roach Anleu and Mack, “Empirical research with judicial officers: The biography of a research project”, 13 *Oñati Socio-Legal Series* (2023), S30-S57.

Rodríguez, “Los conflictos entre jurisdicciones nacionales en el ámbito penal: vías para su prevención y resolución”, in Gutiérrez-Alviz, *El derecho procesal en el espacio judicial europeo* (Atelier, 2013), pp. 421-433.

Rivera Rodríguez, *La influencia del caso Puigdemont en la cooperación judicial penal europea* (CEU ediciones, 2019).

Rodríguez García, “Los conflictos entre jurisdicciones nacionales en el ámbito penal: vías para su prevención y resolución”, in Martin Ostos (Ed.), *El Derecho Procesal en el espacio judicial europeo* (Atelier, 2013), pp. 421-439.

Rodríguez-Piñero and Bravo-Ferrer, “La agilización del proceso penal, el procedimiento de decomiso autónomo y la ampliación de la apelación en el proyecto de reforma de la Ley de Enjuiciamiento Criminal”, No. 8527, *Diario La Ley* (2015), <https://diariolaley.laleynext.es/>

Rombi, “Il mandato d'arresto europeo: tra teoria e prassi”, No. 11, *Giurisprudenza Italiana* (2022), 2513-2527.

Ruiz Albert, “La orden europea de detención y entrega” in Jimeno Bulnes and Miguel Barrio (Ed.), *Espacio judicial europeo y proceso penal* (Tecnos, 2018), pp. 81-114..

Ruz Gutiérrez, “Cuestiones prácticas relativas a la orden europea de detención y entrega”, in Arangüena Fanego, De Hoyos Sancho and Rodríguez-Medel Nieto (Eds.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea: análisis teórico-práctico de la Ley 23/2014, de 20 de noviembr*, (Aranzadi, 2015), pp. 77-104.

Saez Zambrana, “Principio de reconocimiento mutuo y de cooperación en la Unión Europea, la orden europea de investigación como su exponente”, 5 *Spanish Journal of Legislative Studies* (2023), 1-17.

Salom Lucas and Llambés Sánchez, “Mutual legal assistance on criminal matters: when theory meets practice”, 22 *ERA Forum* (2021), 337-349.

Satzger, “Mutual recognition in times of crisis - Mutual recognition in crisis? An analysis



of the new jurisprudence of the European Arrest Warrant” No. 3, *EuCLR* (2018), 317-331.

Segura Rodrigo, “La cooperación policial y judicial penal en el ámbito de la Unión Europea”, *LVI Boletín de Información del Ministerio de Justicia* (2002), 2969-2991.

Spagnolo, “La nuova cooperazione giudiziaria penale: mutuo riconoscimento e tutela dei diritti fondamentali”, 60 *Cassazione penale* (2020), 1290-1301.

Szijártó, “The Interplay Between the European Investigation Order and the Principle of Mutual Recognition”, 8 *European papers* (2023), 1575-1597.

Tarallo “Unicità dell’impugnazione”, “giudicato cautelare” e tutela dei latitanti: qualche perplessità sulle scelte della Corte e.d.u.”, No. 2, *Processo Penale e Giustizia: Rivista di dottrina e giurisprudenza* (2020), 418-437.

Téllez Aguilera, “La rebeldía penal”, 74 *Anuario de Derecho Penal y Ciencias Penales* (2021), pp. 253-431.

Tinoco Pastrana, “La transposición de la orden europea de investigación en materia penal en el ordenamiento español”, No. 3, *Freedom, Security & Justice: European Legal Studies* (2018), 116-145.

Urcelay Lecue “Los fiscales de un Estado miembro pueden emitir una orden europea de investigación, en el marco de un proceso penal, pero no una orden de detención europea: Sentencia de 8 de diciembre de 2020 (PROV\2020\349291) (Gran Sala)”, No. 3, *Revista Aranzadi Doctrinal* (2021), <https://tienda.aranzadilaley.es/revista-aranzadi-doctrinal>

Uriarte Valiente “El Convenio de Asistencia Judicial en Materia Penal entre los Estados miembros de la Unión Europea, hecho en Bruselas el 29 de mayo de 2000 (BOE 15 octubre 2003)”, in González-Cuéllar Serrano, Jiménez -Villarejo Fernández, Zaragoza Aguado, Uriarte Valiente and Tirado Estrada, *Mecanismos de cooperación judicial internacional*, (Aranzadi, 2006), pp. 111-142.

Villamarín López, “Recent European Court of Justice case-law on Directive 2016/343 on the presumption of innocence (Milev, RH & DK): are pretrial detentions covered by this instrument?”, No. 22, *ERA Forum* (2021), 137-146.

LEGISLATION AND REGULATORY PROVISIONS

THE COUNCIL OF EUROPE

European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, ETS No. 30, available at official website <https://rm.coe.int/16800656ce>



European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, ETS No. 73, available at official website <https://rm.coe.int/1680072d42>

EU

Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. 2000, C 197/3; consolidated version at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02000A0712%2801%29-20000712>

Charter of fundamental rights of the European Union. O.J. 2000, C 364/391, ELI: http://data.europa.eu/eli/treaty/char_2012/oj

Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. 2001, C 326/2.

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. O.J. 2002, L 190/1, ELI: http://data.europa.eu/eli/dec_framw/2002/584/oj

Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 2009, L 294/20, ELI: http://data.europa.eu/eli/dec_framw/2009/829/oj

Council Framework Decision of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. 2009, L 328/42, ELI: http://data.europa.eu/eli/dec_framw/2009/948/oj

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. O.J. 2014, L 130/1, ELI: <http://data.europa.eu/eli/dir/2014/41/oj>

Directive (EU) 2016/343 of the European Parliament and of the Council 9 March 2016 on strengthening of the certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, O.J. 2016, L 65/1, ELI: <http://data.europa.eu/eli/dir/2016/343/oj>

Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalization of judicial cooperation, O.J., 27 Dec. 2023, L, <http://data.europa.eu/eli/dir/2023/2843/oj>



Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, O.J., 27 Dec. 2023, L, ELI: <http://data.europa.eu/eli/reg/2023/2844/oj>

Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, O.J., 18 Dec. 2024, L, ELI: <http://data.europa.eu/eli/reg/2024/3011/oj>

SPAIN

Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal, *Gazeta de Madrid* n. 260, ELI: [https://www.boe.es/eli/es/rd/1882/09/14/\(1\)/con](https://www.boe.es/eli/es/rd/1882/09/14/(1)/con) English version available at <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documentos/Criminal%20Procedure%20Act%202016.pdf>

Constitución Española, ratified in the referendum of December 6, 1978, BOE of 29 Dec. 1978, n. 311, pp. 29313-29424, [https://www.boe.es/eli/es/c/1978/12/27/\(1\)](https://www.boe.es/eli/es/c/1978/12/27/(1)) English version at <https://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncomp leta/index.html?lang=en>

Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria. BOE of 05 Oct. 1979, n. 239, pp. 1-24. ELI: <https://www.boe.es/eli/es/lo/1979/09/26/1/con>

Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE of 2 July 1985, n. 157, pp. 20632-20678, ELI: <https://www.boe.es/eli/es/lo/1985/07/01/6/con> English versión available at https://www.poderjudicial.es/portal/site/cgpj/menuitem.0cb0942ae6fbda1c1ef62232dc432ea0/?vgnextoid=631fcc5352ef3310VgnVCM1000006f48ac0aRCRD&vgnextlocale=en&perfil=1&vgnextfmt=default&vgnextchannel=c07f35c5a977e210VgnVCM1000006f48ac0aRCRD&lang_chosen=en

Ley Orgánica 6/1987 de 1 de julio, del Poder Judicial. BOE of 2 July 1985, n. 157, pp. 20632-20678, ELI: <https://www.boe.es/eli/es/lo/1985/07/01/6/con>

Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. BOE of 24 Nov. 1995, n. 281. ELI: <https://www.boe.es/eli/es/lo/1995/11/23/10/con>

Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, BOE of 13 Jan. 2000, n. 11, pp. 1422-1441, ELI: <https://www.boe.es/eli/es/lo/2000/01/12/5/con>



Ley Orgánica 2/2003, de 14 de marzo, complementaria de la Ley sobre la orden europea de detención y entrega, BOE of 17 March 2003, n. 65, pp. 10244-10258, ELI: <https://www.boe.es/eli/es/lo/2003/03/14/2>

Ley 3/2003, de 14 de marzo sobre la orden europea de detención y entrega, BOE of 17 March 2003, n. 65, pp. 10244-10258, ELI: <https://www.boe.es/eli/es/l/2003/03/14/3/con>

Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, BOE of 21 Nov. 2014, n. 282, ELI: <https://www.boe.es/eli/es/l/2014/11/20/23/con> ; English version available at <https://www.ejn-crimjust.europa.eu/ejnupload/InfoAbout/English%20version%20LAW%202023%20of%202014.pdf>

Ley 3/2018, de 11 de junio, por la que se modifica la Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, para regular la Orden Europea de Investigación, BOE of 12 June 2018, n. 142, pp. 6061-60206, ELI: <https://www.boe.es/eli/es/l/2018/06/11/3>

Ley Orgánica 9/2021, de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, BOE of 2 July 2021, n. 157, pp. 78523-78571, ELI: <https://www.boe.es/eli/es/lo/2021/07/01/9/con>

CASE-LAW

ECtHR

ECtHR, *Del Río Prada v. España*, Appl. No. 42750/09. judgment of the Court (Grand Chamber) of 21 October 2013, ECLI:CE:ECHR:2013:1021JUD004275009.

CJEU

Judgment of the Court of Justice (Grand Chamber), of 26 February 2013, C-399/11, *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

Judgment of the Court of Justice (Grand Chamber) of 5 April 2016, Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, ECLI:EU:C:2016:198.

Judgment of the Court of Justice (Fourth Chamber) of 24 May 2016, C-108/16 PPU, *Dworzecki*, EU:C:2016:346.

Judgment of the Court of Justice (Second Chamber) of 1 June 2016, C-241/15, *Bob-Dogi*,



EU:C:2016:385

Judgment of the Court of Justice (First Chamber) of 25 July 2018 ML C-220/18 PPU, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, EU:C:2018:589.

Judgment of the Court (Grand Chamber) of 27 May 2019, Joined cases C-508/18 and C-82/19, *Minister for Justice and Equality v. OG and PI*, ECLI:EU:C:2019:456.

Judgment of the Court of Justice (Fourth Chamber) of 17 December 2020, C-416/20 PPU, *Generalstaatsanwaltschaft Hamburg*, ECLI:EU:C:2020:1042.

Judgment of the Court of Justice (Fourth Chamber) of 2 September 2021, C-66/20, *Finanzamt für Steuerstrafsachen und Steuerfahndung Münster*, ECLI:EU:C:2021:670

Judgment of the Court of Justice (Eighth Chamber), of 24 March 2022, *European Commission v Ireland*, case C-126/21, ECLI:EU:C:2022:214.

Judgment of the Court (Second Chamber) of 28 April 2022, case C-804/21, *C and CD v. Syyttäjä* ECLI:EU:C:2022:307.

Judgment of the Court of Justice (Third Chamber) of 2 March 2023, C-16/22, *Staatsanwaltschaft Graz v MS*, ECLI:EU:C:2023:148.

Judgment of the Court of Justice (Second Chamber) of 6 July 2023, C-142/22, *OE v Minister for Justice and Equality*, ECLI:EU:C:2023:544.

Judgment of the Court of Justice (Seventh Chamber) of 21 December 2023, Case C-398/2, *Generalstaatsanwaltschaft Berlin*, ECLI:EU:C:2023:1031

Judgment of the Court of Justice (Sixth Chamber) of 6 June 2024, Case C-255/23 and C-285/23, *Rīgas tiesas apgabala prokuratūra*, ECLI:EU:C:2024:462

Judgement of Court of Justice (First Chamber) of 4 July, 2024, Case C-760/22, *Procès par visioconférence*, ECLI:EU:C:2024:574.

Spanish Courts

Judgment No. 630/2023 of 11 of December of 2023, *National Court* (Ch. crim.), ECLI: ES: AN:2023:11626A.

Provincial Court of Gipuzkoa of 30 September 2022, No. 199/2022, ECLI: EN: APSS:2022:938

8. ANNEXES: INTERVIEWS



CAJI
Cooperación Judicial Civil y Penal
en el Ámbito de la Unión Europea:
Instrumentos Procesales
uba.es



UNIVERSIDAD DE BURGOS



MutualRecognition2.0
RESEARCH PROJECT

01

Interviews

*Judiciary, Prosecutor's office
and LAJ*

Project MR 2.0



UNIVERSIDAD DE BURGOS

Final version

Preparation Date: February 10, 2024

Authors: Serena Cacciatore, Mar Jimeno Bulnes and M. Isabel Merino Díaz.

Approved by the Controller: February 14, 2024

INTERVIEW WITH THE JUDICIARY, THE PROSECUTOR'S OFFICE AND THE LAJ

Interview conducted by:

Date:

Information: The interview carried out in the following lines has a research purpose, specifically for the European project *Mutual Recognition 2.0* (MR2.0 onwards). This project, led by AnDirectiveé Klip (Rechtbank Amsterdam), seeks to analyse the degree of effectiveness, coherence, integration and proportionality in the application of judicial cooperation instruments in criminal matters in order to diagnose their potential weaknesses and deficiencies in order to prescribe a list of solutions aimed at eradicating them.

The data from the interview will be used anonymously for the preparation of the Spanish report within the framework of the European project MR 2.0 ("Mutual Recognition 2.0: Effective, Coherent, Integrative and Proportionate Application of Judicial Cooperation Instruments in Criminal Matters", more information on the website, see link: <https://mutualrecognitionnextlevel.eu/>).

Request for permission to record the interview:

Embrace of anonymity:

I. GENERAL QUESTIONS

1. What profession or trade do you currently practice in the legal field? What institution do you work for?
2. What other legal professions have you practiced in the past? Years of experience.
3. What are your main functions in that office belonging to such an institution.
4. Do you include or deal with cases in criminal matters where it is necessary to use European judicial cooperation instruments?



UNIVERSIDAD DE BURGOS



YES NO

a. If so, what specific transnational criminal cases have you handled? With which countries?

- EU:
- Other:

5. Have you received or have you received any training from any institution or tribunal for which you work in order to carry out tasks in the field of European judicial cooperation?

a. If so, what did this training consist of?

b. Is it continuous or is it rather sporadic and punctual?

c. Are we talking about superficial training or comprehensive and exhaustive training?

d. Has it been adequate enough to help you in your day-to-day work on judicial cooperation?

6. On how many occasions have you held the role of requesting or executing authority in the field of judicial cooperation?

II. INSTRUMENTS OF MUTUAL RECOGNITION IN JUDICIAL COOPERATION IN CRIMINAL MATTERS

7. What are the instruments of mutual recognition in judicial cooperation in criminal matters that you have used the most and for what reason?

8. What instruments can they use that offer a less intrusive alternative to measures of deprivation of liberty?

9. What is your view on Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 as regards the digitalisation of judicial cooperation³⁰³? What about Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023³⁰⁴ also on the digitalisation of judicial cooperation?

And above all, have you had the time to read and understand this new regulation?

III. EFFECTIVE AND COHERENT IMPLEMENTATION OF MUTUAL RECOGNITION INSTRUMENTS FROM A NATIONAL PERSPECTIVE

National competent authorities

10. How is the right to effective judicial protection of the person under investigation guaranteed when the competent authority is not a court? What is your opinion on this assumption?

11. In the same case, how is the condition of equivalence satisfied³⁰⁵, if at all, according to your point of view?

12. Have mechanisms been established in Spain for cooperation and coordination between judicial authorities responsible for issuing and enforcing the different mutual recognition instruments and/or conventions? How does this coordination work?

³⁰³ Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Council Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, with regard to the digitalisation of judicial cooperation, O.J. of 27 Dec. 2023, L, ELI: <http://data.europa.eu/eli/dir/2023/2843/oj> (last visited 2 Jan. 2025).

³⁰⁴ Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain legal acts in the field of judicial cooperation, O.J. of 27 Dec. 2023, L, ELI: <http://data.europa.eu/eli/reg/2023/2844/oj> (last visited 2 Jan. 2025).

³⁰⁵ It refers to those cases in which a Member State designates a non-judicial authority as competent, on the basis of the provisions of Art. 3.2 of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition of probation judgments and decisions with a view to the supervision of probation measures and alternative sanctions (O.J. 2008, L 337/102, ELI: http://data.europa.eu/eli/dec_framw/2008/947/oj, (last visited 2 Jan. 2025) and Art. 6.2 of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as a substitute for provisional detention O.J. 2009, L 294/20, ELI: http://data.europa.eu/eli/dec_framw/2009/829/oj, (last visited 2 Jan. 2025).

13. In cases where the suspect is unaccounted for, what steps are taken in the area of judicial cooperation? Do you request information from other states / do you enter a Schengen alert / do you issue a European Arrest Warrant (EAW) / others, etc.?

14. When the person under investigation is to be summoned and is abroad, is the possibility of summons by electronic means (e-mail, video call, etc.) contemplated, or is another form of summons preferred? Which one?

i. To what extent is the choice of one or the other form of summons linked to the possibility or impossibility that the national judicial authority may have of conducting the proceedings in the absence of the accused?

15. And, if the trial in absentia were to continue, could it have consequences if judicial cooperation were subsequently required?

a. If so, what kind of consequences? Give examples.

Procedure

16. At the trial stage, have you ever held a videoconference for the sole purpose of ensuring the presence of the accused at the trial (without the intention of gathering any evidence)? What about a videoconference for the purpose of questioning the accused person at trial by the competent judge or court?

17. With regard to temporary transfers, could you, under Spanish law, order them at the trial stage for the sole purpose of ensuring the presence of the accused at the trial? And for the purpose of questioning the defendant at trial by the competent judge or court?

a. If so, under what conditions?

18. In accordance with Spanish legislation, do you consider that the composite sentences could be divided³⁰⁶ and dealt with the unconditional part under Council Framework Decision 2008/909/JHA of 27 November 2008³⁰⁷ and the conditional part under Council Framework Decision 2008/947/JHA of 27 November 2008³⁰⁸, where the person concerned is located in the issuing Member State? And when is the person in another Member State?

19. Do you consider that it is possible for the procedure for the enforcement of the sentence to be transferred once the judgment has become final and enforceable and the other Member State refuses to recognize the sentence, if the person concerned is in the issuing Member State? And when is the person in another Member State? And is it possible to transfer such proceedings at the trial stage and under what conditions?

IV. EFFECTIVE AND COHERENT IMPLEMENTATION OF MUTUAL RECOGNITION INSTRUMENTS FROM A EUROPEAN PERSPECTIVE

About European legislation

20. On 5 April 2023, the European Commission presented a proposal for a regulation of the European Parliament and of the Council on the referral of proceedings in criminal matters³⁰⁹, to what extent is this proposal relevant for the effective and consistent implementation of mutual recognition instruments?

³⁰⁶ Penalties consisting of unconditional deprivation of liberty and conditional deprivation of liberty. In the Netherlands, for example, a sentence of four years' deprivation of liberty may be imposed, whereby two years will not be executed as long as the person in question fulfils certain conditions during a three-year probation period.

³⁰⁷ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or other measures involving deprivation of liberty for the purposes of their enforcement in the European Union, O.J. 2008, L 327/27, ELI: http://data.europa.eu/eli/dec_framw/2008/909/oj (last visited 2 Jan. 2025).

³⁰⁸ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition of probation judgments and decisions with a view to the monitoring of probation measures and alternative penalties. O.J. 2008, L 337/102, ELI: http://data.europa.eu/eli/dec_framw/2008/947/oj (last visited 2 Jan. 2025).

³⁰⁹ Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, COM(2023)185 final, available at: <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52023PC0185> (last visited 2 Jan. 2025) and today Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, O.J. 18 Dec. 2024, L, ELI: <http://data.europa.eu/eli/reg/2024/3011/oj> (last visited 2 Jan. 2025).

21. To what extent does EU and Council of Europe legislation speed up, or conversely, not facilitate effective and consistent implementation of the instruments? What are the elements of this obstacle: terminology, the legal concepts mentioned that do not exist in some Member States, their limitations in relation to the powers granted to the executing Member State, etc.?

22. What elements of the most practical content do you consider to facilitate the coherent and effective implementation of mutual recognition instruments?

Procedural aspects

23. And is a temporary transfer possible, according to the above-mentioned directive, for the sole purpose of ensuring the presence of the accused at the trial (without the intention of gathering evidence)? What about a temporary transfer for the purpose of cross-examining the defendant at trial?

V. DECISIVE ASPECTS FOR JUDICIAL COOPERATION IN CRIMINAL MATTERS

24. Do the competent national judicial authorities take into account less intrusive alternatives when requesting judicial cooperation and when deciding which instruments to apply?

25. Do you assess the impact that the application of these instruments may have on the right to liberty or freedom of movement of the accused person, both in the pre-trial phase and in the execution of the sentence?

26. Are you also aware of potential alternatives to pre-trial detention?

27. Is the fact that a previous request for judicial cooperation has been refused a significant factor for the competent authority when assessing in the future whether to apply for judicial cooperation again or to take new decisions in this area?

i. If so, how?

28. Do the requesting (issuing) competent judicial authorities engage in prior discussions with the requested authority before taking a final decision on this matter?

i. If so, how? Is videoconferencing or another audio-visual medium such as telephone used for this purpose?

29. With regard to the execution of an individual's sentence, do you consider that the judicial authorities weigh up the potential problems that may arise as a result of judicial cooperation?

30. To what extent do you take into account the advantages and disadvantages of seeking judicial cooperation when deciding whether the accused is summoned and whether the trial is admissible without the defendant's presence?

VI. GLOBALIZATION AND DIGITALIZATION vs PRINCIPLES OF LAW AND FUNDAMENTAL RIGHTS.

31. Do you think globalisation and new technologies have influenced European judicial cooperation?

a. How did they do it?

b. What effects do you consider to have on the greater efficiency of the prosecution of crime?

c. What impact do they have on the fundamental and procedural rights of the person under investigation or detention?

32. Has European judicial cooperation in criminal matters improved as a result of this digitalisation of the process? Is "procedural economy" taking precedence over effective judicial protection?

33. To what extent are the procedural rights of the person under investigation affected by Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 as regards the digitalisation of judicial cooperation³¹⁰ and on Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in civil cross-border cases, commercial and criminal law³¹¹?

VII. OTHER.

34. Would you like to add, comment or clarify anything else on this subject?

³¹⁰ Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023# amending Council Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, with regard to the digitalisation of judicial cooperation, O.J. of 27 Dec. 2023, L, ELI: <http://data.europa.eu/eli/dir/2023/2843/oj> (last visited 2 Jan. 2025).

³¹¹ Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters and amending certain legal acts in the field of judicial cooperation, Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain legal acts in the field of judicial cooperation, O.J. of 27 Dec. 2023, L, ELI: <http://data.europa.eu/eli/reg/2023/2844/oj> (last visited 2 Jan. 2025).



CAJI
Cooperación Judicial Civil y Penal
en el Ámbito de la Unión Europea:
Instrumentos Procesales
uba.es



UNIVERSIDAD DE BURGOS



MutualRecognition2.0
RESEARCH PROJECT

**THANK YOU FOR YOUR
COOPERATION!**



CAJI
Cooperación Judicial Civil y Penal
en el Ámbito de la Unión Europea:
Instrumentos Procesales
ubu.es



MutualRecognition2.0
RESEARCH PROJECT

02

Interviews

Legal Professionals

Project MR 2.0



UNIVERSIDAD DE BURGOS

Final version

Preparation date: February 14, 2024

Authors: Mar Jimeno Bulnes, Serena Cacciatore and M. Isabel Merino Díaz.

Approved by the Controller on: February 14, 2024

INTERVIEW WITH LEGAL PROFESSIONALS

Interview conducted by: Serena Cacciatore and Isabel Merino Date: February 20, 2024

Information: The interview carried out in the following lines has a research purpose, specifically for the European project *Mutual Recognition 2.0* (MR2.0 onwards). This project, led by AnDirectiveé Klip (Rechtbank Amsterdam), seeks to analyse the degree of effectiveness, coherence, integration and proportionality in the application of judicial cooperation instruments in criminal matters in order to diagnose their potential weaknesses and deficiencies in order to prescribe a list of solutions aimed at eradicating them.

The data from the interview will be used anonymously for the preparation of the Spanish report within the framework of the European project MR 2.0 ("Mutual Recognition 2.0: Effective, Coherent, Integrative and Proportionate Application of Judicial Cooperation Instruments in Criminal Matters", more information on the website, see link: <https://mutualrecognitionnextlevel.eu/>).

Request for permission to record the interview:

Embrace of anonymity:

I. GENERAL QUESTIONS

1. What profession or trade do you currently practice in the legal field? What institution do you work for?

2. What other legal professions have you practiced in the past? Years of experience. 30 years of work experience in the field.

3. What are your main functions in that office belonging to such an institution?

4. Do you include or deal with cases in criminal matters where it is necessary to use European judicial cooperation instruments?
YES NO



a. If so, what specific transnational criminal cases have you handled? With which countries?

- EU:
- Other:

5. Did you receive or receive any type of training from any institution or entity for which you work (law firm, university, etc.) in order to carry out functions in the field of European judicial cooperation?

- a. If so, what did this training consist of?
- b. Is it continuous or is it rather sporadic and punctual?
- c. Are we talking about superficial training or comprehensive and exhaustive training?
- d. Has it been adequate enough to help you in your day-to-day work on judicial cooperation?

6. On how many occasions have you held the role of requesting or executing authority in the field of judicial cooperation?

II. MUTUAL RECOGNITION INSTRUMENTS AND SCOPE

7. What are the mutual recognition instruments that you have used the most and why?

8. What relationship would you say exists between these three instruments of mutual recognition, the European Arrest Warrant³¹², the European Investigation Order³¹³ and the European Supervision Order³¹⁴? Is there any kind of dependence, subsidiarity, any other characteristic...?

About the European Supervision Order (ESO)

9. At the pre-trial stage, do you think that a European Supervision Order (ESO) could be issued when pre-trial detention is not possible?

10. Is the ordering of provisional imprisonment a *sine qua non* condition for issuing an ESO?

11. Do you think it is possible, under EU law, to apply for an ESO if the person concerned has already returned to the State in which he or she resided? And would it be possible to issue an ESO when it is possible to order pre-trial detention but it is not ordered?

12. At the trial stage, do you consider that it would be possible, under Spanish law, to request an ESO, in the event that pre-trial detention is possible but has not been ordered?

- If so, under what conditions?

13. Do you think that an ESO could be issued when the person is in the requesting Member State and it is not possible to order pre-trial detention, according to Spanish law?

³¹² Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States. OJ of 18 July 2002, n. L. 190, pp. 1 - 18. ELI: http://data.europa.eu/eli/dec_framw/2002/584/oj

³¹³ Directive 2014/41/EC of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters. OJ of 1 May 2014, n. L. 130, pp. 1 - 36. ELI: <http://data.europa.eu/eli/dir/2014/41/oj>

³¹⁴ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to resolutions on supervision measures as a substitute for provisional detention. OJ of 11 November 2009, n. L. 294, pp. 1 - 21, available at: <https://www.boe.es/doue/2009/294/L00020-00040.pdf>

14. Do you consider that it could, under Spanish national law, issue an ESO where the person is in the Member State where he or she is legally and habitually resident and no arrest warrant has been issued?

*The European Arrest Warrant (EAW)*³¹⁵

15. At the pre-trial stage, what is your opinion that a European Arrest Warrant (EAW) should be issued, under EU law, for the sole purpose of questioning the person under investigation/suspect? And according to Spanish law, do you think that would be possible?

16. In Spanish criminal proceedings, do you consider that it is possible, under Spanish law, to issue an EAW solely for the purpose of carrying out investigative measures, such as an interrogation³¹⁶? What is your opinion of this assumption?

*About the European Investigation Order (EIO)*³¹⁷

17. At the trial stage, under Spanish national law, could a European Investigation Order (EIO) be used in order to ensure the presence of the accused at the trial (either by videoconference or by means of a temporary transfer)? And according to European regulations?

III. GLOBALISATION AND DIGITALISATION VS PRINCIPLES OF LAW AND FUNDAMENTAL RIGHTS

18. To what extent have globalisation and new technologies changed the application of the procedural instruments for European judicial cooperation in criminal matters? (Videoconferences, telephone calls, digital transmission of personal data of the person under investigation or confidential police actions, etc.)

³¹⁵ Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States. OJ of 18 July 2002, n. L. 190, pp. 1 - 18. ELI: http://data.europa.eu/eli/dec_framw/2002/584/oj

³¹⁶ It is known that some judicial authorities in Member States issue the EAW for the sole purpose of questioning the person under investigation. He is then released.

³¹⁷ Directive 2014/41/EC of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters. OJ of 1 May 2014, n. L. 130, pp. 1 - 36. ELI: <http://data.europa.eu/eli/dir/2014/41/oj>

19. Are these new digital mechanisms a tool at the service of justice or a threat if neglected? Why? Give a real-life example to support your answer.

- a. To what extent do you consider that these modern technological tools have jeopardized the fundamental rights of the person under investigation or accused?

20. What is your view of the view that the EAW is an invasive instrument in the sphere of the fundamental rights of the person under investigation or accused?

- a. If the answer is an opinion that supports the position, what solution do you propose?
- b. If the answer is a view that denies the position, why do you think these positions on the EAW gain support in the EU?

21. Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation³¹⁸, in Article 3.3 states that the use of means of communication between the competent authorities must be carried out in a "safe and reliable" manner, terms used on numerous occasions in the legislation. However, do you think that we can ensure that our IT systems in the field of European judicial cooperation are secure and reliable in relation to the confidentiality or processing of personal data shared or transmitted digitally, among others?

- a. If no, what do you think are the main threats facing our technological judicial systems in cyberspace?

IV. EFFECTIVE AND CONSISTENT IMPLEMENTATION OF MUTUAL RECOGNITION INSTRUMENTS.

22. To what extent do you consider EU and Council of Europe legislation to hinder the effective and consistent implementation of the instruments? What are the elements of this obstacle: legislative wording, limitations on the powers granted to the executing Member State, etc.?

³¹⁸ Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain legal acts in the field of judicial cooperation. OJ of 27 December 2023, n. L. 2844, pp. 1-29. ELI: <http://data.europa.eu/eli/reg/2023/2844/oj>



23. What elements of more practical content do you consider to facilitate the coherent and effective application of mutual recognition instruments, such as adequate language skills, prior knowledge of the competent judicial authorities, etc.?

24. Which mutual recognition instrument do you consider to be the most complex at present in terms of implementation? Why? What would be a possible solution?

25. Which instrument do you think will be the most widely used in the future? Why? And the least? Why?

V. OTHER.

26. Would you like to add, comment or clarify anything else on the subject matter?



THANK YOU FOR YOUR COOPERATION!