

Social Fieldwork Research (FRANET)

European Arrest Warrant proceedings –
safeguards for requested persons

Spain,

2022

Contractors: Universidad Pontificia de Comillas, Madrid

Authors: Ángela Trujillo del Arco

DISCLAIMER: This document was commissioned under contract as background material for a comparative analysis by the European Union Agency for Fundamental Rights (FRA) for the project: [European Arrest Warrant – safeguards for requested persons](#). The information and views contained in the document do not necessarily reflect the views or the official position of FRA. The document is made publicly available for transparency and information purposes only and does not constitute legal advice or legal opinion.

List of Tables	5
EXECUTIVE SUMMARY	1
INTRODUCTION	4
RESEARCH FINDINGS	7
• 1.Right to information	7
a. Legal overview	7
• Legal standards	7
• Rights about which a requested person has to be informed.....	8
• Information about the procedure: The role of consent and the speciality rule	9
• Safeguards in law to ensure that the information is understood by a requested person.....	10
• Remedies available in case requested persons are not provided with information about the EAW and about their rights	11
b. Right to information in practice.....	12
• Provision of information (when, how by whom)	12
• Information about rights.....	13
• Information about the EAW – content and procedure.....	14
• Information on consenting to surrender	16
• Understanding of information	17
c. Discussion of findings.....	18
• 2. Right to interpretation and translation	19
a. Legal overview	19
• Legal standards	19
• On who has the right to the assistance of an interpreter.....	20
• On which parts of the procedure are to be interpreted	20
• On which documents need to be translated.....	21
• On deciding on the necessity of interpretation and translation and the verification of the quality of interpretation	21
• Interpretation in person or via digital tools	22
• Remedies available for a requested person in case they are not provided with interpretation or translation during the EAW proceedings.....	22
b. Interpretation and translation in practice	22
• Provision of interpretation (decision and means)	22
• Translation of documents	24
• Interpretation of consultations with lawyers	25
c. Discussion of findings.....	26
• 3. Right to access to a lawyer	27

a.	Legal overview	27
•	Legal provisions governing access to a lawyer, including legal aid.....	27
•	Spain as an executing State.....	28
•	Spain as an issuing State	29
•	Available remedies when a requested person is not informed about their right to dual legal representation or access to a lawyer is delayed or denied.....	29
b.	Right to access to a lawyer in practice.....	30
•	Information about legal assistance (including on dual representation).....	30
	Information about legal assistance.....	30
	Information about dual legal representation	31
	Information on available remedies.....	33
•	Legal assistance in executing state (access, consultations, lawyer’s tasks).....	33
	Access to legal assistance in Spain as an executing State.....	33
	Lawyer’s tasks and consultations with clients	34
	Assistance provided in appointing a lawyer in the issuing State	36
	Challenges relating to legal representation in EAW proceedings.....	37
•	Legal assistance in issuing state (access, consultations, lawyer’s tasks)	38
	Assistance provided by lawyers in the issuing State.....	38
•	Communication between the lawyers in both States.....	39
•	Free of cost access to a lawyer (or legal aid)	40
c.	Discussion of findings.....	41
•	4. Issuing and Execution of the EAW.....	43
a.	Legal overview	43
•	Legal provisions governing the issuing of the EAW	43
•	Legal avenues to challenge the issuing of the EAW or request its withdrawal	45
•	Legal provisions governing the executing of the EAW.....	46
b.	Issuing and Execution of the EAW in practice.....	48
•	Factors considered when issuing the EAW	48
	Legal requirements and proportionality.....	48
	Challenging the issuing of the EAW	50
•	Factors considered when executing the EAW.....	50
	Legal requirements and proportionality.....	50
	Conditions of detention	52
	Procedural rights of the requested person, rights to a fair trial and trials in absentia	54
	The individual situation of a requested person	55

c.	Discussion of findings.....	56
•	Factors considered when issuing the EAW	56
•	Factors considered when executing the EAW.....	56
•	5. Use of digital and technological tools in EAW proceedings	58
a.	Legal overview	58
b.	Interview findings	59
	On the use of digital tools to appoint a lawyer.....	59
	On the use of digital tools during the assistance of interpreters	60
	Role played by digitalisation during the pandemic.....	60
	Views on the role of digitalization in EAW proceedings	61
c.	Discussion of findings.....	62
	CONCLUSION.....	63
	List of abbreviations.....	72

List of Tables

Table 1 Sample professionals.....	4
Table 2 Are persons arrested on an EAW informed about their procedural rights?.....	14
Table 3 Are persons arrested informed of the contents of the EAW against them?	15
Table 4 Are the requested persons informed about what consenting to their surrender entails?	17
Table 5 Dual representation (in law)	30
Table 6 Cost-free legal assistance (in law)	30
Table 7 Are persons informed of their right to access a lawyer?	31
Table 8 Information on dual representation, interview findings.....	32
Table 9 Facilitating dual legal representation, interview findings (executing MS).....	37
Table 10 Cost-free legal assistance, interview findings	41
Table 11 Use of technological tools (in law)	59
Table 12 Use of digital tools, interview findings.....	62

EXECUTIVE SUMMARY

The European Arrest Warrant (EAW) procedure in Spain is governed by a regulation that reflects the standards established by European Union (EU) legislation. However, the transposition of such legal standards into the national legal system and their application by the relevant practitioners has not prevented a review of the practice on this procedure from revealing the existence of potential areas for improvement.

Indeed, the experience of practitioners familiar with this procedure has shown that some aspects need to be implemented in order to ensure its full effectiveness. Furthermore, existing good practices are highlighted, as well as challenges to be taken into account in order to achieve improvements in the day-to-day use of the procedure in relation to each of the fields examined. Namely, the right to information, the right to interpretation and translation, the right to access to a lawyer, the factors considered in the issuing and execution of the EAW and the use of digital and technological tools in EAWs.

Right to information

This section illustrates that in the realm of the right to information, legal requirements are observed. Additionally, the results of the analysis of the practice have identified some good practices and some barriers.

Among the former, in relation to the provision of information on the role of consent and the principle of specialty, it is assumed in favour of the requested person that they do not give their consent or waive the rule of specialty when they show signs of hesitation as to its implications. Among the latter, existing obstacles to the understanding of the information include the inconsistent quality of the interpretations, the difficulty for the requested person to understand the consequences of the choices made in the EAW procedure and the rapidity of the procedure. Moreover, attention has been drawn to a gap in the implementation of this aspect of the right to information. In particular, in practice, there is a lack of mechanisms to deal with cases in which the issuing State has failed to respect the lack of waiver of the principle of specialty by the requested person.

Furthermore, on the right of the requested person to have access to the EAW, it has been noted that it is the practice of the police, although not provided by law, to allow the requested person's lawyer access to the Schengen Information System (SIS) form at the time of the arrest. However, it will be reiterated that the initial content of the EAW is insufficient and more details would be necessary for a complete understanding on the facts.

Right to interpretation and translation

Practitioners agree that, in practice, requested persons under an EAW are provided with interpretation and translation where needed. However, on occasion, some hindrances to its full effectiveness are found.

In the field of interpretation, it has been stressed that the quality of the interpretation service is sometimes uneven and that more specialized interpreters are required. In these cases, it is considered to be difficult to argue that an interpretation is not of high quality when the interpreter is certified and authorized. With regard to the translation of documents, some practitioners claim that those considered essential are translated, and others maintain never having seen essential documents translated, but rather interpreted –although this possibility is envisaged by law. On this

topic, disagreement has been expressed that –although contemplated by law– it is up to the judge to decide whether a document is to be qualified as essential to be translated when the defence needs it, being the filing of an appeal the alternative to the refusal.

Right to access to a lawyer

In this arena the results of the analysis of legislation and practice have identified established criteria in practice and some of the main barriers.

The right to access to a lawyer –of one’s choice or appointed *ex officio*– in Spain as the executing State is guaranteed as to any detainee. The Spanish authorities –police or court– together with the Bar Association will facilitate the appointment. The authorities will not provide the person with access to a phone or internet to contact lawyers or with a list of lawyers and, in fact, practitioners indicate that under no circumstances can the arrested person be provided with a list of lawyers. Challenges identified in this area include the speed of the proceedings for lawyers to gather relevant documentation or evidence; the shortcomings of the initial content of the EAW as a barrier for legal representation; the overuse of EAW in non-serious crimes and its lack of flexibility, not being possible to withdraw it for administrative sanctions, notably, in the case of fines.

However, the main obstacles have been highlighted when the right to dual legal representation is at stake. In practice, practitioners’ views on whether information on the right to a lawyer in the issuing State is provided are not aligned. Moreover, the effectiveness of that right corresponds to the requested person, as there is no mechanism for appointing one. In this regard, it is noted that this right is not properly regulated at the European level. Even if the executing authority requests a lawyer from the issuing authority, this process may not result in the issuing State appointing one – with no mechanism in place to do anything about it either– and there are no lists of lawyers from which a practitioner can be contacted, nor are access to a telephone or internet granted for this purpose. Inevitably, this has repercussions on the scope of the applicable remedies. Thus, an appeal is only possible in cases where the person was not informed of their right to dual legal representation, but not when a lawyer is not actually appointed in the issuing State.

Issuing and execution of the EAW – factors considered

An assessment of the factors considered in practice when issuing or executing an EAW reveals some debates about existing practices and some challenges to overcome.

On the one hand, some difficulties are reported on the application of the proportionality criterion when issuing an EAW in Spain. It is noted that criteria other than the legal requirements are not taken into account, such as the personal or working situation of the requested person, and that there is an abuse in the issuance of EAWs to the detriment of other instruments, such as the European Investigation Order (EIO). Moreover, although challenging the issuing of the EAW is possible, difficulties may arise when the person does not have a lawyer appointed in that country.

On the other hand, the assessment of an EAW that presents potential proportionality problems by the executing State is not an uncontroversial issue. Some stress that the executing judge cannot assess proportionality; others maintain that proportionality is addressed when there is a lack of double criminality, particularly, when the EAW is based on what is an administrative offense in Spain. As to the outcome of this, the possibility of the executing authority contacting the issuing authority to withdraw the EAW or apply other measures has been suggested. However, practitioners do not consider this possible or legally foreseen, or are not aware of this happening or see it as a difficult option because the channels of communication between States are not well established.

In addition, it is found that proving that the conditions of detention in the issuing State violate the requested person's human rights is not easy at the European Union level. Similar difficulties are found to prove a potential violation of the right to a fair trial by an independent tribunal. Furthermore, on trials conducted *in absentia*, although Spain endeavours to guarantee access to an appeal or retrial, cases have been reported where the issuing State has not upheld such guarantee once the person is surrendered. Moreover, when information in the EAW is insufficient, practitioners find it difficult to assess if the legal requirements for trials *in absentia* were met.

Lastly, the stands of practitioners as to whether the individual situation of a requested person is taken into account when executing an EAW are not homogeneous. Some maintain that the personal situation is considered only to decide about their personal status till the surrender and to assess their ties in Spain to serve the sentence in this country, but not for deciding on the execution. Others stress that an EAW could be suspended. Specifically, the EAW can be suspended on humanitarian grounds, although it is noted that these are difficult to prove at the EU level and, moreover, when faced with a permanent situation it is complex, as the law provides for temporary suspension and for the EAW to be executed as soon as the obstacle disappears.

The use of digital and technological tools in EAW

In this last section, practice shows that digital and technological tools are being used in Spain in some aspects of the EAW proceedings. For example, the communication with the issuing authorities is by e-mail, the file is digital, the admission of documents is done through a digital platform, the assistance of the interpreter can be provided by videoconference and there is a system for recording the hearings. Nonetheless, it has been pointed out that the sound of the recordings of the hearings is not good and digital tools, such as internet access, are not provided to the requested person to search for a lawyer, nor are used in this respect as the right of access to a lawyer in the issuing State is not developed.

To conclude, practitioners highlight the benefits of further digitization of EAW procedure as it would expedite proceedings and make it easier for lawyers to access the file; it would facilitate a more complete access to data since forms require sometimes additional information; and it would be an opportunity to establish a compatible and agile communication system at the European level, since there are no communication channels that work effectively with all countries. However, in general terms, they do not believe that digitization will lead to fewer EAWs being issued. Practitioners point out that there is an overuse of the EAW and that other mechanisms that allow the authority to question defendants remotely, such as the EIO, could be used. Nonetheless, some practitioners argue that digitalization will be essential to appear before the issuing judge, via videoconference, assisted by lawyers from both States.

INTRODUCTION

The following country report describes the law and practice of the EAW procedure in Spain. The practice has been reflected by two groups of professionals. On the one hand, a group of five criminal lawyers specialized in EAW and, on the other hand, a group of five practitioners, both judges and prosecutors, with vast experience in EAW proceedings. Each practitioner was interviewed individually.

All interviews were conducted via electronic means of communication. This has facilitated the possibility of adjusting the interviews to the availability of the professionals' tight schedules.

○ PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

The process of identifying and selecting interviewees depended on the group of practitioners. The lawyers were mainly contacted through the internet since they advertise their services and expertise in EAW. A decisive criterion in their selection was the extent of their experience practicing in EAW proceedings and, in some cases, the fact that they had articles published on the subject or had participated in specialized congresses. Judges and prosecutors, although their experience was easier to assess, were difficult to contact as there is no direct contact mechanism available. Likewise, in both cases, the availability of professionals in terms of time was one of the main challenges due to their busy schedules.

○ SAMPLE AND DESCRIPTION OF FIELDWORK

Defence lawyers:

Requested: 5, completed: 5

Judges/prosecutors:

Requested: 5, completed: 5

Table 1 Sample professionals

Code	Group	Expertise on EAW	Gender
1	Defence lawyer	Criminal lawyer specialized in EAW proceedings.	F
2	Defence lawyer	Criminal lawyer specialized in EAW proceedings.	M
3	Defence lawyer	Criminal lawyer specialized in EAW proceedings.	M
4	Defence lawyer	Criminal lawyer specialized in EAW proceedings.	M
5	Defence lawyer	Criminal lawyer specialized in EAW proceedings.	M
6	Prosecutor/Judge	Practitioner with vast expertise in the execution of EAW.	F

7	Prosecutor/Judge	Practitioner with vast expertise in the execution of EAW.	F
8	Prosecutor/Judge	Practitioner with vast expertise in the execution of EAW.	F
9	Prosecutor/Judge	Practitioner with vast expertise in the execution of EAW.	F
10	Prosecutor/Judge	Practitioner with vast expertise in the execution of EAW.	M

The interviews lasted an average of one hour. In general terms, all the professionals were most willing to answer all the questions, to highlight areas of concern, areas that work well, and to point out some suggestions that could improve the EAW procedure.

○ **DATA ANALYSIS**

Data has been analysed section by section. For this purpose, a comparison has been made between the EAW regulation in the Spanish legal system and the practitioners' views on how all the issues under examination are implemented in practice. The different sections have been completed following such a comparison of regulation and practice in a systematic way. The questions contained in the interview template have served as a guide to give structure to each of the general sections of the report. Once the fundamental issue was defined in each of the questions, a sub-section was generated on that topic in which the responses of all the practitioners on that specific question were collected. The outcome has been a dialogue between the different practitioners that illustrates the practices established on each of the topics in the different sections, the obstacles encountered and the needs identified in their day-to-day experience with the EAW procedure.

○ **BRIEF OVERVIEW OF THE REPORT'S CONTENTS**

This report seeks to reflect the current status in Spain of the EAW procedure *de jure* and *de facto*, focusing on specific areas. Specifically, five domains are analysed and from all of them some findings will be identified.

First, the law and practice of the right to information of a person requested under an EAW is reviewed. There, questions such as when, how and who informs the requested person, what rights they are informed about and to what extent, and whether they understand such information, will be addressed.

Second, the right to interpretation and translation is examined. This section discusses when and how the requested person can be assisted by an interpreter, either at the hearing or in consultation with a lawyer. It also addresses the effectiveness of this service and evaluates the practice of the translation of documents.

Third, the report focuses on the right to access to a lawyer. This part includes questions on information on legal assistance, information on dual legal representation, on available remedies, on access to legal assistance in Spain as an executing State, on the lawyer's tasks and consultations with

clients, on the assistance provided in the appointment of a lawyer in the issuing State, on what such assistance consists of and on legal aid.

Fourth, the report focuses on the issuance and execution of the EAW. The practice in this section will highlight the factors that judicial authorities take into account in both the issuance and the execution of an EAW. It will explore, *grosso modo*, the role played, where appropriate, by legal requirements, proportionality, conditions of detention in the issuing State, the right to a fair trial by an independent tribunal, trials *in absentia*, the personal situation of the requested person or the concurrence of humanitarian grounds.

Fifth, the current and future use of technological and digital tools in EAW procedures is discussed.

Finally, the report outlines the conclusions drawn from the comparison between law and practice, presenting the latest challenges, practices and needs identified by practitioners in Spain in the EAW procedure.

RESEARCH FINDINGS

1. Right to information

a. Legal overview

- Legal standards

The European Arrest Warrant regulation in Spain was initially provided for in Organic Law 2/2003 and later by Law 23/2014 on the mutual recognition of criminal decisions in the European Union (hereinafter, LRM)¹. The LRM provides that, in the absence of specific provisions, the legal regime provided by the Criminal Procedure Act (hereinafter, LECrim)² shall apply –Art. 4.1.

The transposition of both, Directive 2012/13/EU on the right to information in criminal proceedings³ and Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings⁴, was done through Organic Law 5/2015, of 27 April, which amended the LECrim⁵. According to the preamble of Law 5/2015: "The transposition of these Directives, which develop two essential aspects of the defence in criminal proceedings, requires the partial modification of the Criminal Procedure Act".

However, the Organic Law 5/2015 did not introduce any specific provision on arrest carried out for the purpose of executing an EAW. The Circular 3/2018, of June 1, on the right of information of the investigated persons in criminal proceedings⁶ (hereinafter, Circular 3/2018), issued by the State Attorney General's Office, explains that the reason lies in the fact that Articles 50 and 51 of the LRM refer to the LECrim for the practice of detention and the first hearing of the detainee⁷. Indeed, according to Article 50 paragraph 1 LRM, the arrest of a person concerned by an EAW shall be carried out in the manner and with the requirements and guarantees provided by the LECrim and the legislation on criminal responsibility of minors.

¹ Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea.

At: <https://www.boe.es/buscar/act.php?id=BOE-A-2014-12029>

² Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal. At: <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036&p=20210702&tn=1#tx>

³ , Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. At: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0013&from=EN>

⁴ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. At: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0064&from=EN>

⁵ Ley Orgánica 5/2015, de 27 de abril, por la que se modifican la Ley de Enjuiciamiento Criminal y la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, para transponer la Directiva 2010/64/UE, de 20 de octubre de 2010, relativa al derecho a interpretación y a traducción en los procesos penales y la Directiva 2012/13/UE, de 22 de mayo de 2012, relativa al derecho a la información en los procesos penales. At: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4605

⁶ Circular 3/2018, of June 1, on the right of information of the investigated persons in criminal proceedings. At: <https://www.boe.es/buscar/doc.php?id=FIS-C-2018-00003>

⁷ *Ibid*, section 10.

- Rights about which a requested person has to be informed

The rights about which the person must be informed are provided for in both the LECrim and the LRM.

On the one hand, given that through Organic Law 5/2015 no specific modification was made to the LECrim with respect to detention for the purpose of executing an EAW, it is understood that rights set forth in Article 520 LECrim are applicable to any person under investigation or accused who is deprived of liberty and so to the requested person⁸. According to the second paragraph of that provision, the requested person shall be informed in writing of the facts attributed to them and the reasons for their deprivation of liberty, as well as of the rights to which they are entitled. In all cases the detainee shall be allowed to keep the written letter of rights in their possession during the entire time of detention. Thus, the requested person shall be informed of, especially, the following rights:

(a) Right to remain silent by not testifying, to not answer, or to state that they will only testify before the judge.

b) Right not to testify against themselves and not to confess guilt.

The requested persons are informed of these rights even though the proceedings are not aiming at establishing guilt.

c) Right to appoint a lawyer and to be assisted without undue delay. In the event that, due to geographical distance, the assistance is not immediately possible, the detainee shall be provided with telephone or videoconference communication, unless such communication is impossible.

d) Right to access the elements of the proceedings which are essential to challenge the legality of the detention or deprivation of liberty.

According to Circular 3/2018, this right on the access to the elements of the proceedings generically regulated by Art. 520.2.d) must be specified, in this case, in the right of access to the EAW itself.⁹

⁸ This reference to the LECrim is indicated, *e.g.*, in the aforementioned Article 50.1 LRM; in Circular 3/2018 which states: "(...) the person arrested for the execution of a European Arrest Warrant, like any other detainee, must be informed of the facts and reasons for his detention and, in this case, in particular, of the European arrest warrant that has led to his deprivation of liberty. The right of access to the proceedings generically regulated by Art. 520.2.d) should be specified, in this case, in the right of access to the European arrest warrant itself. On this point, the regulation of the LECrim is complemented by Law 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union which, in its Art. 50.3, states that "once the arrested person is brought before the court, he/she shall be informed of the existence of the European arrest warrant, of its content, of the possibility of consenting to the surrender to the issuing State in the hearing before the judge and irrevocably, as well as of the rest of their rights" (*Ibid*). Likewise, that reference can be found in the aforementioned article 50.1 or in the doctrine (See, *e.g.*, "(...) in relation to Spanish legislation, Article 50.1 LRM acts as a blank procedural rule, referring, for these purposes, to the LECrim and, more specifically, to the provisions of Article 520 (...)") (BAUTISTA SAMANIEGO, C. M., "Estudio Sistemático de la Orden Europea de Detención y Entrega. Doctrina y Jurisprudencia", Ed Comares, 2022, p. 364)).

⁹ *Op. cit.*, 6.

e) Right to inform a relative or person of their choice, without undue delay, of their deprivation of liberty and the place of custody at any given moment. Foreigners shall have the right to communicate these circumstances to the consular office of their country.

f) Right to communicate by telephone, without undue delay, with a third party of their choice. This communication shall take place in the presence of a police officer or, where appropriate, of the officer designated by the judge or the public prosecutor.

g) Right to be visited by the consular authorities of their country, to communicate and correspond with them.

h) Right to be assisted free of charge by an interpreter, in the case of foreigners who do not understand or do not speak Spanish or the official language of the action in question, or deaf or hearing impaired persons, as well as other persons with language difficulties.

i) Right to be examined by the forensic doctor or a legal substitute and, in their absence, by the doctor of the institution where they are, or by any other doctor depending on the State or other Public Administrations.

j) Right to request free legal assistance, procedure to do so and conditions to obtain it.

On the other hand, the LECrim regulation is complemented by article 50.3 LRM¹⁰ which states that, once the arrested person is brought before the court, they shall be informed of the existence of the EAW, its content, their right to appoint a lawyer in the State issuing the EAW whose function will be to assist the lawyer in Spain by providing information and advice, the possibility of consenting to the surrender to the issuing State at the hearing before the judge and irrevocably, as well as the rest of the rights to which they are entitled. In the event that they request the appointment of a lawyer in the issuing State, the competent authority will be informed immediately.

- Information about the procedure: The role of consent and the speciality rule

A number of provisions in the LRM refer to different aspects related to the EAW procedure as regards consent to surrender and the rule of speciality¹¹. Broadly speaking, the law establishes the procedure on these matters as follows.

The hearing of the arrested person shall be held no later than seventy-two hours after the person has been brought to the court. In Spain, the body in charge of executing EAWs is the *Juez Central de Instrucción* –hereinafter, referred to as Central Preliminary Examining Judge– at the *Audiencia Nacional* –hereinafter, referred to as the National Court. Once before the judge, the requested person shall be heard on the giving of their irrevocable consent to the surrender. If they consent to their surrender, a record shall be made of this, which shall be signed by the detainee, their lawyer

¹⁰ *Ibid.*

¹¹ In addition to what will be explained further on, see, Article 61 paragraph 1 LRM, on the case of surrenders subsequent to an extradition; and Article 92 (paragraph 1, 2 f) and 4) LRM on the application of the principle of speciality to the enforcement of a decision imposing a custodial sentence or measure involving deprivation of liberty.

and, where appropriate, the interpreter, as well as the prosecutor and the judge. The waiver of the principle of speciality, if any, must also be included therein. The Central Preliminary Examining Judge at the National Court will verify whether the consent to surrender has been given freely and with full knowledge of its consequences, especially its irrevocable nature. The same shall apply to the waiver of the principle of speciality –Article 51 paragraphs 1-3. At the time of surrender, the court clerk shall inform the issuing judicial authority whether or not the detainee waived the principle of speciality –Article 58.6 LRM.

In addition, the law establishes some standards about the notification to the Secretary General of the Council of Europe about the possibility of prosecution of other offences. In this respect, when Spain is the issuing State, consent for the prosecution, conviction or detention, for any offence committed prior to the surrender of a person and which is different from that which motivated such surrender to the Spanish State, shall be presumed to exist provided that the State of the executing judicial authority has notified the General Secretariat of the Council of the European Union of its favourable disposition in this regard, unless in a particular case the executing judicial authority declares otherwise in its surrender decision. If that declaration has not been notified, the Spanish issuing judicial authority shall submit to the executing judicial authority a request for authorization – Article 60 paragraphs 1 and 2 LRM.

When Spain is the executing State, as long as the notification to the General Secretariat of the Council is not made, the issuing State shall request the authorization. The Central Preliminary Examining Judge will resolve and the authorization will be granted if the conditions for executing an EAW were given, none of the causes for refusing the execution were present and none of the grounds foreseen for exclusion of the specialty rule apply –Article 60 paragraphs 3 and 4 LRM.

- Safeguards in law to ensure that the information is understood by a requested person

In Spain, some standards have been foreseen to ensure that the information provided is understood by the requested person. In this regard, transposition of Directive 2012/13/EU and Directive 2010/64/EU through Organic Law 5/2015 introduced a new paragraph 2 bis in article 520 LECRim to regulate this matter¹². This provision states that the information shall be provided in a language that is understandable and accessible to the addressee. To this end, the information shall be adapted to the age, degree of maturity, disability and any other personal circumstance that may result in a limitation of the capacity to understand the information provided. Further on, the article states that if the detainee had their capacity judicially modified, the information on their rights shall be communicated to those who exercise the guardianship or *de facto* guardianship, informing the Public Prosecutor –paragraph 4.

¹² *Op. cit.*, 5. See, “Article two. Amendment of the Criminal Procedure Act for the transposition of Directive 2012/13/EU of the European Parliament and of the Council of 22 May on the right to information in criminal proceedings” which in its 4th paragraph introduces article 520.2 bis (Artículo segundo. Modificación de la Ley de Enjuiciamiento Criminal para la transposición de la Directiva 2012/13/UE, del Parlamento Europeo y del Consejo, de 22 de mayo, relativa al derecho a la información en los procesos penales).

In addition, Circular 3/2018 establishes that "[p]rosecutors shall ensure that any person detained in execution of a European Arrest Warrant, has knowledge of the reasons for their detention and can access the proceedings that have been processed on the occasion of the European Warrant that is executed and that are essential for the effective appeal against their personal situation"¹³.

- Remedies available in case requested persons are not provided with information about the EAW and about their rights

According to Circular 3/2018: "As a general criterion it should be established that the Public Prosecutors, when they find any infringement of the rights of information or access to the proceedings of the investigated, arrested or deprived of liberty in a criminal proceeding, will promote the relevant remedies or procedures or will adhere to those already promoted, with the purpose of guaranteeing the infringed or limited rights. It should be remembered, however, that in order for a decision to be null and void, it is required that a material and effective defencelessness has occurred, which is also impossible to repair, and that in order to be appreciated on the occasion of an appeal, it must be requested (Article 240.2 Organic Law 6/1985, of July 1, 1985, of the Judiciary (LOPJ))^{14/15}.

In this regard, an action for annulment of the proceedings –*incidente de nulidad de las actuaciones*, in Spanish– may be brought on the grounds of infringement of a fundamental right –Article 241 LOPJ. Likewise, the LECrim establishes that a *recurso de apelación* –an appeal– may be lodged against the orders of the *Juez de Instrucción* –hereinafter, Preliminary Examining Judge– that are not exempt from appeal –Article 766 LECrim. This possibility of lodging a direct appeal –*recurso de apelación*– against the order of the Central Preliminary Examining Judge before the *Sala de lo Penal* –hereinafter, Criminal Chamber– at the National Court, under the terms provided for in the LECrim, has been foreseen in the law –*vid*, Article 51.8 LRM and Article 65, 5th LOPJ. In this regard, the LECrim provides that an appeal –*recurso de apelación*– may be filed, among others, on the grounds that the procedure or sentence has violated the procedural rules and guarantees causing defencelessness, implying the violation of a constitutionally guaranteed fundamental right –*vid*, Article 846 bis c) LECrim.

In relation to the lodging of appeals, the doctrine has pointed out that the fact that article 51.8 LRM states that a *recurso de apelación* –an appeal– "may" be lodged, as in Article 766 LECrim, implies that other type of appeal, namely, a *recurso de reforma* –hereinafter, appeal for reform–, may be lodged beforehand. In effect, according to a 2020 Order of the Criminal Chamber of the National Court –Auto 23/2020, de 31 de enero, de la Sección 3ª, de la Sala de lo Penal de la Audiencia Nacional: "... the interpretation that the *Juzgados Centrales de Instrucción* (hereinafter, Central Preliminary Examining Courts) have been making of the provisions of Articles 51.8 and 53.4 of Law 23/2014 is erroneous, in the sense of considering... (that) they are only subject to direct appeal before the Criminal Chamber and excludes the appeal for reform before the court itself... Such an

¹³ *Op. cit.*, 6, paragraph 10.

¹⁴ Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. At: <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666>

¹⁵ *Op. cit.*, 6, paragraph 13.

interpretation is contrary to the literal wording of Art. 217 LECrim, which provides that an appeal for reform may be lodged against all the orders of the Preliminary Examining Judge... Art. 766 does not eliminate the possibility of lodging an appeal for reform, but rather eliminates the need to do so"¹⁶.

b. Right to information in practice

- Provision of information (when, how by whom)

Overall, in Spain, standards related to the right to information appear to be well established. In this sense, it can be argued that people arrested on a European Arrest Warrant are informed about their rights. All practitioners emphasized that the requested person is informed at two points in time, by the police and once they are brought before the court.

Thus, in practice, initially, when the police arrest the requested person, they inform them of their rights as any detainee in Spain. Specifically, at this time, the police inform the requested person about the rights set forth in Article 520 LECrim. A lawyer commented on the effectiveness of the provision of this first information to the requested person stating that, it should be taken into account that, the specific law on EAW, the LRM, establishes a parallelism with the LECrim and, through the latter, the issue of informing detainees of their rights is well introduced in Spain and, therefore, there is no problem with it.

Regarding the way in which this information is communicated, the practitioners commented that the information is provided orally and in writing. A lawyer has noted that, at this initial stage, when the members of the National Police or the Civil Guard, who are normally the ones who receive the order from the Central Preliminary Examining Court at the National Court, arrest the person, they inform the requested person very succinctly of the facts for which they are being arrested. The person is told the reason for the arrest, namely that they are requested on the basis of an EAW, from which country, and for what crime, and they are informed about their rights under Article 520 LECrim. At the police station, in the presence of their lawyer, those rights –Article 520 LECrim rights– are read to them and they are given a letter of rights. When this occurs, the requested person is assigned an interpreter if necessary, so that they can understand their rights. The form is signed by the requested person and their lawyer.

Afterwards, the police place the person at the disposal of the Central Preliminary Examining Court at the National Court where the requested person is informed again. It is noted that information is provided both orally and in writing. A lawyer points out that, in the past, traditionally, the judge informed orally but, following a reform, it has been established the need to provide the information in writing prior to the hearing, and this has also been incorporated into the EAW procedure where it is done in writing and orally.

As to the exact procedure, a judge has pointed out that, at the courthouse, the requested person is given a written document in advance and if they do not speak Spanish, it is given to them in the

¹⁶ *Op. cit.*, 8, BAUTISTA SAMANIEGO, p. 384.

language they indicate. There are forms prepared in several languages. In addition, the court clerk reads the rights to the person with the assistance of an interpreter. This process is recorded because on occasions the reading of rights has not been sufficiently reflected in the record and has resulted in the Chamber having to declare the nullity of the proceedings when the person claimed that it was not clear that they had been informed. The judge states that, in the event that a person is not informed of these rights, it is appropriate for them to file an incident of nullity. The lawyer could file an incident of nullity in the appeal against the surrender order. However, if the lawyer requests an incident of nullity on the course of the proceedings before the court, this is admitted and resolved because the judge considers that, if it may be affected by nullity, it is absurd to go ahead since they will have to reverse the proceeding. Based on the *pro actione* principle, the judge prefers to incorporate the incident beforehand if it is requested instead of waiting for the appeal.

Thus, at this stage, the requested person is informed of the rights set forth in article 520 LECrim and of the specific rights granted by the LRM regarding the EAW –article 50.3 LRM– and, as will be seen below –see, sections 2 and 3–, they are assisted by a lawyer and, if necessary, accompanied by an interpreter.

"The question of interpreters is always a delicate one. Some interpreters work very well, but others are not so good, and the requested person may miss information. In Spain, this service is somewhat irregular, even in a body as specialized as the Audiencia Nacional. When the crime is a bit more complex, such as, for example, an economic crime, the translations are not so obvious and an effort should be made to have more specialized interpreters".

Lawyer, Spain.

"La cuestión de los intérpretes es siempre delicada. Algunos intérpretes trabajan muy bien, pero otros no tanto, y a la persona reclamada se le puede escapar información. En España, este servicio es algo irregular, incluso en un organismo tan especializado como la Audiencia Nacional. Cuando el delito es un poco más complejo, como, por ejemplo, un delito económico, las traducciones no son tan evidentes y habría que hacer un esfuerzo por contar con intérpretes más especializados".

- Information about rights

As introduced above, persons arrested on an EAW are informed about their rights as any other detainee –and, thus, under article 520 LECrim– but also about rights specifically linked to the EAW procedure under Article 50.3 LRM. By virtue thereof, once the arrested person is brought before the court, they shall be informed of the existence of the EAW, its content, their right to appoint a lawyer in the issuing State, the possibility of consenting to the surrender and irrevocably. In the event that they request the appointment of a lawyer in the issuing State, the competent authority will be informed immediately.

"Some countries 'cheat' and, even if the person has not waived the principle of specialty, once in the issuing State, they investigate them through a new procedure and there is no real mechanism to prevent this abuse".

Lawyer, Spain.

"Algunos países 'hacen trampa' y, aunque la persona no haya renunciado al principio de especialidad, una vez en el Estado emisor, la investigan mediante un nuevo procedimiento y no hay ningún mecanismo real para evitar este abuso".

From the results of the interviews emerges that as a standard the requested person is informed of such rights orally and in writing. A prosecutor summarized the entire process in a simple manner: "At the time of the police arrest, in addition to being informed orally, the person is given a form in the language of their choice. In court, the person is informed orally –at the hearing– which is recorded and, in any case, the person is informed in writing".

On this topic, a judge has emphasized the importance of the hearing phase. There, in addition to informing the person on the specificities of Article 50.3 LRM –such as the existence of the EAW, its content, their right to appoint a lawyer in the issuing State, the possibility of consenting to the surrender and irrevocably–, they can question about the ties the requested person may have in Spain. If they are residents or Spanish nationals, they are asked if they prefer to serve the sentence in Spain, or if the EAW is for prosecution, they are asked if they want to be surrendered under the condition that they are returned to serve the sentence in Spain.

The following table highlights the homogeneity of standards on the field of information about rights.

Table 2 Are persons arrested on an EAW informed about their procedural rights?

	Lawyer 1	Judge 1	L2	J2	L3	J3	L4	J4	L5	J5	Total
YES	X	X	X	X	X	X	X	X	X	X	10
In writing (letter of rights)	-	-	-	-							0
Orally		-	-	-							0
In writing (letter of rights) and orally	X	X	X	X	X	X	X	X	X	X	10
NO	-	-	-	-							0
Don't know/remember	-	-	-	-							0
Did not answer	-	-	-	-							0

- Information about the EAW – content and procedure

There is consensus in maintaining that, initially, when the police arrest the requested person, they are informed orally –in addition to the rights contained in Article 520 LECrim– of the fact that there is an EAW against them. In this sense, the person is told the reason for their arrest, namely, that they have been requested on the basis of an EAW. A judge points out that the police only have the obligation to inform on the rights of Article 520 LECrim, what happens is that the police give the lawyer access to the requested person's file and, therefore, to the SIS form that has been sent. However, it is noted that this initial information is very concise.

At a later stage, in court, the appointed lawyer –either privately or *ex officio*– is given a copy of the information of the SIS form. The lawyer has the possibility to check this content and orally explain it to the requested person during their private meeting prior to the hearing. A judge indicates that at

that time only the information of the SIS form is available, and when the complete information arrives, the lawyer of the requested person will also have access to it.

In this regard, a lawyer emphasizes that, on many occasions, the initial content of the EAW is clearly insufficient. The practitioner notes that “the initial form is often unsatisfactory since it complies with the formalities but, in reality, the EAW has been sent with very little content and it is not known if there is something conclusive or not. There are even judges of the National Court who have released people before because of an insufficient content of the EAW”.

At the hearing, the Central Preliminary Examining Judge also informs the person about the contents of the EAW before asking whether they consent to the surrender. However, a judge points out that, while they are always informed, the degree to which they are informed can vary. Some judges provide more succinct information and others more complete. Either way, as a general rule, the requested person is informed about which country has issued the EAW and about the facts with which they are charged or the content of the conviction, where applicable. On this topic, a lawyer stresses that the information is brief and concise and more nuances and details would be necessary for a complete understanding on the facts. Specifically, the practitioner comments that a very brief description of the EAW is given and the EAWs are already brief in content. Namely, it is explained what crime it is, what specific facts and on what date, without too many details. “In any case, it is enough to identify what it is about, although it is lacking the evidence that would exist against the person and for which the EAW has been issued”.

Thus, in view of the above and as reflected in the following table, it can be affirmed that there are certain standards in terms of information on the content of the EAW. In this sense, there is agreement on the fact that the police offer initial information orally –not formally foreseen– on the content of the SIS form. Subsequently, in court, the requested person's lawyer receives the form in written and discusses the content with their client in private. Finally, the judge at the hearing will inform the requested person of the available contents of the EAW. In all of this, it is noted that the information contained in the SIS form is in many cases insufficient and that, in some cases, more details on the content of the EAW should be available.

When interpreting the results of the following table, it is important to bear in mind that where practitioners did not expressly state that the information was provided orally and in writing, this does not necessarily imply a deviation from the standard, but rather that the interviewee focused on answering other nuances of the question.

Table 3 Are persons arrested informed of the contents of the EAW against them?

	Lawyer 1	Judge 1	L2	J2	L3	J3	L4	J4	L5	J5	Total
YES	X	X	X	X	X	X	X	X	X	X	10
In writing	-	-	-	-							0
Orally	-	X	-	-						X	2
In writing and orally	X	-	X	X	X	X	X		X		7
NO	-	-	-	-							0
Don't know/remember	-	-	-	-							0
Did not answer	-	-	-	-				X			1

- Information on consenting to surrender

In Spain, requested persons under an EAW are informed about what consent to their surrender entails and they are specifically informed about renouncing the “speciality rule”, meaning that if they consent to surrender, they might be prosecuted or detained for previous offences not specified in the current EAW. The following table illustrates the existing consensus on the fact that requested persons are informed on this topic.

"When the requested person is in doubt about the meaning of the consent to the EAW, I prefer to tell them that I assume they do not consent."

Judge, Spain.

"Cuando la persona reclamada tiene dudas sobre el significado del consentimiento a la orden de detención europea, prefiero decirle que asumo que no da su consentimiento".

This information phase is relevant in the judicial field and not in the police one. A judge describes the entire process, explaining that when the requested person is brought before the judicial authority, they are told they will not be questioned about the facts of the case. Right after, they are asked whether or not they consent to the surrender. At that moment, the judge explains the implications of the consent and that it is irrevocable, which have been previously explained by the lawyer. The person is also informed about the principle of specialty. Depending on whether the person consents or not, the procedure will be more or less simple. If consenting, the order authorizing the surrender is issued immediately. If not consenting, the judge asks the requested person about their knowledge of the procedure with a view to determining whether there is any procedural obstacle that would imply an objection to the execution, particularly, regarding judgments conducted *in absentia* and the concurrence of all legal requirements –both those of the LRM and those of the Framework Decision¹⁷. Subsequently, the judge will question about the person ties, to decide on their personal situation.

"Sometimes what the requested person does not understand is the consequence of what they are accepting or not accepting. They don't understand that what they decide at that moment is going to have consequences later on in the execution of the sentence".

Prosecutor, Spain.

"A veces lo que la persona reclamada no entiende es la consecuencia de lo que está aceptando o no. No entienden que lo que deciden en ese momento va a tener consecuencias después en la ejecución de la sentencia".

About this part of the procedure, a lawyer has stated that judges at the hearing make a special effort to ensure that the requested persons understand what consent to surrender entails and what the

¹⁷ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). At: https://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF

principle of speciality is, and they even explain to them that they do not have to waive it. It is also generally understood that, prior to the hearing, lawyers explain privately to their clients the implications of consenting to surrender and the principle of speciality. Interestingly, it has been noted that, given the experience of judges and lawyers in the field of extradition, on this subject, in the field of EAW both the lawyer and the judge inform the person about the rule of speciality. However, another lawyer points out that “this is not where the challenge lies. There have been cases where, although the requested person had not waived the speciality rule, once in the issuing State, they have been investigated in a new proceeding and, in these cases, there is no mechanism against this abuse”.

Table 4 Are the requested persons informed about what consenting to their surrender entails?

	Lawyer 1	Judge 1	L2	J2	L3	J3	L4	J4	L5	J5	Total
YES	X	X	X	X	X	X	X	X	X	X	10
NO	-	-	-	-							0
Don't know/remember	-	-	-	-							0
Did not answer	-	-	-	-							0

- Understanding of information

When identifying whether requested persons under an EAW understand the information provided to them about the role of consent and the principle of speciality, it is found that there is agreement but nuanced by the circumstances. In this regard, it is stressed that judges do their best to communicate this information, but some obstacles to effective understanding are identified.

In effect, on the one hand, it has been highlighted, by judges, prosecutors and lawyers, that judges verify that the requested person has understood the information and that, when the person shows signs of hesitation, the practice is to assume that they are not giving their consent and they are not renouncing to the speciality rule. On this matter, the opinion has been expressed that this action by the judge is probably very internalized in the Spanish judicial system through the concept of "conformity" on a conviction since, in such cases, the judge must verify that the person understands and freely consents. This does not, however, prevent it from being emphasized that the principle of speciality is not easy to understand for a layman and, therefore, it has been stated that the general rule followed in the defence by the lawyer is to recommend to the client not to waive the speciality principle, since they do not know if in the issuing State there are other offenses on which they might be prosecuted.

“The percentage of people who consent to being surrendered is not high”.

Judge, Spain.

"El porcentaje de personas que consienten en ser entregadas no es alto".

On the other hand, various barriers to the understanding of the information have been reported. Thus, it has been stressed that when it comes to understanding the information, the requested person faces the "delicate matter" of interpretation. In this regard, a lawyer noted that the interpretation service is irregular, even in a body as specialized as the National Court, and that some interpreters do their job very well but, unfortunately, this is not always the case. The particular

importance of this issue in EAW procedures has been highlighted since short deadlines leave no room for rectifying potential errors.

Precisely in relation to the latter nuance, a lawyer has stated that requested persons understand what they are being told, but it is such a quick procedure –by virtue of the idea of simple collaboration– that they are not really aware of it and it is not uncommon to find that they convey to their lawyer the fear of being surrendered, of being defenceless and feeling helpless. This last remark is not an isolated case. Indeed, it has been emphasized that, although the judicial authority checks whether the person has understood the information, the speed of the procedure lends itself to confusion. In this sense, it may not help the fact that, as a judge commented, the Central Preliminary Examining Judges are generally overloaded with work and, because of that, they could go rather quickly.

“It is a procedure that has a structure of legality, but everything is too fast and it does not give time to implement it”.

Lawyer, Spain.

"Es un procedimiento que tiene una estructura de legalidad, pero todo es demasiado rápido y no da tiempo a aplicarlo".

Finally, a prosecutor has warned that requested persons understand the information provided to them, but not so much the consequences of what they are accepting or not accepting, i.e., the consequences on the second part, what would come later, in the execution of the sentence issued in the foreign country outside the EAW procedure. The prosecutor emphasizes that, *a priori*, it is very difficult to know the second procedure because it is necessary to be familiar with the law of both countries so, when the requested persons make the decision about whether or not to consent to the surrender, although they understand the information, they are not necessarily understanding the repercussions of their choice.

c. Discussion of findings

In the realm of information on rights, findings demonstrate that the law is implemented in practice as all practitioners agree that the legal requirements are observed. In some of the areas examined, there are practices to be highlighted and, in others, barriers to be overcome.

- On the information of rights to the requested person

In Spain, as required by law, in practice the requested person under an EAW is informed of their rights as any other detainee –Article 520 LECrim– and of the particularities regarding EAWs –Article 50.3 LRM. Information on the former is carried out both by the police and at the courthouse, and information on the latter in court.

It has been emphasized that in practice, the hearing phase is of great importance since, in addition to informing the person on the specificities of Article 50.3 LRM, judges can ask about the ties the requested person may have in Spain.

- On information regarding the role of consent and the principle of speciality

The legal standards on information regarding the role of consent and the speciality rule are respected in practice. As required by law, judges verify that consent to surrender has been given in a free and informed manner.

In this field, there is a practice that consists in that when the person shows signs of hesitation, the judge assumes that the requested persons are not giving their consent and they are not renouncing to the speciality rule.

Moreover, in practice, prior to the hearing, lawyers explain privately to the requested person the implications of consent to surrender and the principle of speciality.

However, despite the fact that the legal standards on the verification of the understanding of the information are met, since judges do verify it, there seem to be some barriers in practice for the information to be fully understood or its consequences to be comprehended.

According to the practitioners the main barriers in Spain are: 1. The inconsistent quality of the interpretations; 2. The rapidity of the procedure; 3. The difficulty for the requested person to understand the consequences of the choices made in the EAW procedure in the subsequent procedure in the issuing State.

It has also been highlighted that an additional challenge has been identified. Namely, there have been cases where, although the requested person had not waived the speciality principle, once in the issuing State, they have been investigated in a new proceeding and, in these cases, there is no mechanism against this abuse.

- On the right of the requested person to have access to the EAW

This right is understood to be included in the right of any detained person to access the elements of the proceedings which are essential to challenge the legality of the detention or deprivation of liberty –Art. 520.2.d).

The practitioners have generally stated that there is a practice whereby the police, although they only have the obligation to inform about the rights of Art. 520 LECrim, allow the lawyer of the requested person to have access to the SIS form.

Subsequently, in court, the requested person has access to the SIS form through their lawyer and the judge also informs them of its contents. However, obstacles have been identified in this regard by pointing out that the initial content of the EAW, the information of the SIS form, is clearly insufficient. The information is brief and concise and more nuances and details would be necessary for a complete understanding on the facts.

2. Right to interpretation and translation

a. Legal overview

- Legal standards

Spanish's specific EAW legislation contains some provisions that refer to the assistance of an interpreter at different points in the procedure. On this matter, the LRM establishes that the hearing of the requested person will be carried out with, where appropriate, the assistance of an interpreter and in accordance with the provisions of the LECrim on the statement of the detainee –Article 51.1 LRM. It also provides that, where appropriate, if the arrested person consents to their surrender, the interpreter shall sign the record of this fact –Article 51.3 LRM– and that, if they do not consent to their surrender, the requested person shall attend the hearing with an interpreter –Article 51.5 LRM. Likewise, if the authority of the issuing State requests to take a statement from the requested person, this will be done with the assistance of an interpreter –Article 52.2 LMR. Finally, the LRM provides that when the Spanish judicial authority transmits a decision on a custodial measure to another Member State for its execution, in some cases it must first obtain the consent of the sentenced person before the competent judicial authority, who, where appropriate, must be assisted by an interpreter –Article 67.1 LMR.

However, these provisions do not exhaust the interpretation and translation standards applicable to EAW proceedings. The aforementioned transposition of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, through the Organic Law 5/2015, introduced a new Chapter II in Title V "on the right to translation and interpretation" in the LECrim.

Additionally, the doctrine has emphasised that the possibility for the detainee to have the assistance of an interpreter provided for in Article 51.1 LRM is a corollary of the right to legal assistance and that the right to be assisted by an interpreter is not satisfied with the simple designation of an interpreter, but requires that the performance of their function be real and effective. In Spain, a ruling of the Constitutional Court –STC 71/1988 of 19 April 1988– recognised the need for prior communication with a lawyer to be made with the assistance of an interpreter, if necessary. This prior communication takes place before the hearing referred to in Article 51 LRM. This procedure is not provided for in the LRM, but the LECrim must be understood as applicable.¹⁸

- On who has the right to the assistance of an interpreter

Article 118.1 f) LECrim provides for the right of any person to whom a punishable act is attributed to free translation and interpretation in accordance with Articles 123 and 127. These provisions stipulate that the right to the assistance of an interpreter is conferred on "defendants or accused persons who do not speak or understand Spanish or the official language in which the proceedings are conducted" –Article 123 LECrim– and that persons with sensory disabilities may be provided with means to support oral communication –Article 127 LECrim.

- On which parts of the procedure are to be interpreted

As noted above, any detained person must be informed of their rights in writing. In this regard, when a letter of rights is not available in a language understood by the detainee, they shall be

¹⁸ *Op. cit.*, 8, BAUTISTA SAMANIEGO, p. 369.

informed of their rights by means of an interpreter as soon as possible. In this case, the letter of rights in a language they understand shall be given to them subsequently and without undue delay – Article 520.2 LECRim.

However, the right to the assistance of an interpreter is obviously not limited to this. When the requested person does not speak or understand Spanish or the official language, they have the right to be assisted by an interpreter using a language which they understand during all proceedings in which their presence is required, including questioning by the police or by the Public Prosecutor and all court hearings. This right includes to be assisted by an interpreter in conversations with their lawyer that are directly related to their subsequent questioning or taking of a statement, or which are necessary for the lodging of an appeal or for other procedural applications. Likewise, the requested person has the right to the interpretation of the proceedings of the oral trial –Article 123.1 letters a), b), and c) LECrim.

Where simultaneous interpretation is not available, the interpretation of the proceedings of the oral trial shall be provided by consecutive interpretation in such a way as to ensure that the defence of the person is sufficiently safeguarded –Article 123.2 LECrim.

- On which documents need to be translated

In accordance with the provisions of the LECrim, the requested person who do not speak or understand Spanish or the official language in which the proceedings are conducted shall have the right to written translation of the documents that are essential to guarantee the exercise of the right to defence. This law establishes that, in any case, the resolutions that agree to the imprisonment of the accused, the indictment and the sentence must be translated –Article 123.1 d) LECrim.

However, the translation of those passages of essential documents which, in the opinion of the judge, are not necessary for the accused or defendant to know the facts with which they are charged may be dispensed with. Moreover, exceptionally, the written translation of documents may be replaced by an oral summary of their content in a language which the requested person understands, where this also sufficiently guarantees their defence –Article 123.3 LECrim.

In this regard, the LECrim provides for the right to submit a reasoned request for a document to be considered essential. The costs of translation and interpretation arising from the exercise of these rights shall be borne by the Administration, irrespective of the outcome of the proceedings – Article 123.1 e) LECrim–, and the translation shall be carried out within a reasonable time and as soon as it is agreed by the judge, the applicable procedural time limits shall be suspended –Article 123.4 LECrim.

- On deciding on the necessity of interpretation and translation and the verification of the quality of interpretation

When circumstances become apparent from which the need for the assistance of an interpreter or translator may arise, the judge, either *ex officio* or at the request of the lawyer of the requested person, shall verify whether the latter knows and sufficiently understands the official language in which the proceedings take place and, if necessary, shall order that an interpreter or translator be appointed and shall determine which documents must be translated –Article 125.1 LECrim.

Once the need for a court interpreter or translator has been identified, they shall be appointed from among those included in the lists drawn up by the competent Administration. Exceptionally, in those cases that require the urgent presence of a translator or interpreter, and the intervention of one included in the lists is not possible, another person with knowledge of the language who is considered qualified to carry out this task may be authorised as a temporary court interpreter or translator. In any case, the appointed interpreter or translator shall respect the confidential nature of the service provided. If the judge or the public prosecutor, *ex officio* or at the request of a party, considers that the translation or interpretation does not offer sufficient guarantees of accuracy, it may order the appointment of a new translator or interpreter. In this regard, deaf or hearing-impaired persons who consider that the interpretation does not offer sufficient guarantees of accuracy may request the appointment of a new interpreter –Article 124 paragraphs 1, 2 and 3 LECrim.

- Interpretation in person or via digital tools

According to LECrim, the assistance of the interpreter may be provided by videoconference or any means of telecommunication, unless the judge or the prosecutor, *ex officio* or at the request of the interested party or their defence, agrees to the physical presence of the interpreter in order to safeguard the rights of the requested person –Article 123.5 LECrim.

Oral or sign language interpretations, with the exception of the conversations held with their lawyer, may be documented by means of an audiovisual recording of the original statement and the interpretation. Where the content of a document is translated orally or into sign language, a copy of the translated document and the audiovisual recording of the translation shall be attached to the minutes. If recording equipment is not available or is not deemed appropriate or necessary, the translation or interpretation and, where appropriate, the original statement shall be documented in writing –Article 123.6 LECrim.

- Remedies available for a requested person in case they are not provided with interpretation or translation during the EAW proceedings

Remedies are available in Spain in the event that the requested person is not provided with interpretation or translation during the EAW proceedings.

In this respect, Article 125.2 LECrim establishes that the decision of the judge denying the right to interpretation or translation of any document or passage that the defence considers essential or rejecting the complaints of the defence in relation to the lack of quality of the interpretation or translation, shall be documented in writing. If the decision was taken during the oral proceedings, the defence of the accused may register its protest in the record. Such court decisions may be appealed against in accordance with the provisions of the LECrim.

b. Interpretation and translation in practice

- Provision of interpretation (decision and means)

There is consensus among practitioners that, in practice, requested persons under an EAW are provided with interpretation and translation where needed.

“If the person is a foreigner, the interpreter will always be present. The person renounces to it if they consider it necessary, but interpretation is always provided”.

Prosecutor, Spain.

"Si la persona es extranjera, el intérprete estará siempre presente. La persona renuncia a él si lo considera necesario, pero siempre se proporciona la interpretación".

It has been pointed out by lawyers that the right to an interpreter is linked to the right of defence and this is a service that is offered. An interpreter is provided from the moment the requested person is arrested and no limit to this right has ever been perceived. From the moment someone requests an interpreter, either for a statement or the reading of a document, it is provided. In the same vein, a judge emphasized how, *a priori*, satisfying this right should not be problematic since in Spain the entire process is centralized in a single body, the National Court, and all the necessary means are available there, including interpreters, who are at the disposal of the Central Examining Judges and, later, on appeal, of the judges of the Criminal Chamber. In addition, it is noted that a particular effort is made in this regard and that on those occasions where the requested person spoke a dialect, a dialect interpreter has been provided.

However, despite these efforts, some lawyers have highlighted the fact that the interpretation service is irregular. On the one hand, it is pointed out that when the crime is complex, as in an economic crime, interpreting is not easy and an effort should be made to ensure that the interpreters are more specialized. This is particularly so in EAW proceedings where “deadlines are so short that there is little room to correct potential errors”. On the other hand, it has been stressed that with languages such as English or French there is no problem, but with other languages the interpretation is not always of high quality, even sometimes –stresses the lawyer– with other European Union languages such as Bulgarian. In this last regard, a lawyer noted that it is sometimes difficult to argue that an interpretation is not of high quality when the interpreter is certified and authorized, which is important in a procedure where nuances matter.

“As a general rule, an interpreter is always present. Even if the requested person speaks Spanish, there may always be nuances or there may always be a word about which they have doubts”.

Judge, Spain.

"Como norma general, siempre hay un intérprete presente. Aunque la persona reclamada hable español, siempre puede haber matices o siempre puede haber una palabra sobre la que tenga dudas".

The law provides that when it appears from the circumstances that the person may need an interpreter or translator, the judge, *ex officio* or at the request of the lawyer of the requested person, must verify that the latter understands the language and, if necessary, must order that an interpreter or translator be appointed. As reported by practitioners, the practice does not deviate from this standard.

“The problem is not usually in providing the interpretation, but in its quality since, generally speaking, it leaves much to be desired”.

Lawyer, Spain.

"El problema no suele estar en proporcionar la interpretación, sino en su calidad ya que, en general, deja mucho que desear".

In effect, there is general agreement on the fact that requested persons are always asked if they need an interpreter. The need for an interpreter is first assessed by the police and then by the judge and, even if the requested persons understand Spanish, one will be provided. In the latter sense, a judge noted that, normally, interpretation is always facilitated when the person is not Spanish. Then, depending on the degree of understanding expressed by the person –as some detainees speak Spanish–, the interpreter may simply assist. In addition, the court records both what is said in Spanish and the interpretation so that it can be reviewed, if necessary, whether the interpretation was adequate. The requested person is not asked if they need an interpreter but the interpretation is offered directly by the interpreter who is already there, since even though they sometimes speak Spanish, some technicalities need to be translated.

As to the manner in which the interpreters normally assist the requested person, there is consensus in stating that the interpreters are at the National Court and that, therefore, they provide their service in person when the requested person is there. However, exceptionally, when the requested person is in the islands –in the Canary Islands or in the Balearic Islands– and there is not enough time to bring them, or in the case that the person is serving a final sentence in a Spanish prison, the assistance of the interpreter is carried out by videoconference from the National Court. In this regard, it has been highlighted by both judges and lawyers that, especially since the pandemic, videoconferencing is used. In any case, the general rule is that both the requested person and the interpreter will be at the National Court.

- Translation of documents

As introduced above, the law establishes that the requested person who do not speak or understand Spanish or the official language of the proceedings shall have the right to written translation of the documents that are essential to guarantee their right to defence. The law also provides that the translation of documents may be dispensed with if, in the judge's opinion, they are not necessary for the requested persons to know the facts with which they are charged. In addition, exceptionally, the written translation of the documents may be replaced by an oral summary of their contents. Consistent with these standards, practitioners have emphasized that the information contained in EAW proceeding documents is provided to the requested person in a language they understand, either through translation or interpretation.

In particular, it has been noted that, in practice, the EAW is normally provided in the language of the issuing State. If it does not match the language of the requested person, an attempt is made to provide a translation as quickly as possible. It is also stated that the EAW is translated into Spanish so that the lawyer can understand it. Regarding the letter of rights, it is highlighted that when the person is brought before the court, the clerk of the court reads them their rights and the interpreter interprets them and then the same occurs with the content of the EAW.

With regard to the file, a lawyer stated that what is not in the language of the requested person – since some of the information comes from the issuing State in a language that the person normally understands–, and is deemed convenient for the detainee to understand, is interpreted at the time. A prosecutor emphasizes that the content of the file will not necessarily be initially in their language but that, if necessary, the lawyer will be able to use the appropriate mechanisms to translate it.

A judge explains that the content of the file is not translated, it is in Spanish, except for those essential documents that have to be transmitted, being understood as essential those documents that affect the personal situation, freedom or not, and the final document that agrees or denies the surrender. Thus, if precautionary measures are adopted, they are translated, because Spanish law so provides. Regardless of whether it can be communicated to the person through oral interpretation, a translation is made into a language the person understands. In the same vein, a judge clarifies that the operative part of the surrender decision and the operative part of a decision subjecting them to provisional arrest are translated, but only as regards the operative part and the offenses for which they are requested. Likewise, the fact that it is pursuant to an EAW is also translated and the authority is indicated.

Despite all of the above, it is worth noting the fact that, perhaps, there have been occasions in which the translation standard has not been the rule and the interpretation of the documents has been more commonly applied as a standard –although this possibility is envisaged by law. In this regard, a lawyer has strongly pointed out that all the judicial decisions are in Spanish; these are not translated into any language. In their experience, at the time of notification of the decision in the penitentiary centre, the judicial agent goes there with an interpreter to explain the content to the requested person and help them understand it.

A judge has considered this matter unproblematic since, apparently, no one has raised this issue on appeal. However, a lawyer points out that a distinction must be made between essential and non-essential documents. Those considered essential are translated –such as the indictment, the sentence, the EAW. But beyond these, there may be documents that are vital to be translated for the defence and the client may not have the financial means for it. The practitioner feels that, in such cases, it is complicated that it is the judge who decides what is essential and what is not since, if the decision goes in the latter direction, the document will not be translated and the decision will have to be appealed. Nevertheless, as introduced in the previous section –see, previous subsection iv– this is the procedure established in the law.

- Interpretation of consultations with lawyers

There is consensus among practitioners on the fact that lawyers have the possibility, if they so wish, to request that consultations with their client be interpreted by an interpreter appointed by the State.

"Interpretation is available to the requested persons from the outset. In Spain, as the process is centralized in the National Court, all the necessary means are available, including interpreters".

Judge, Spain.

"La interpretación está a disposición para las personas reclamadas desde el principio. En España, al estar el proceso centralizado en la Audiencia Nacional, se dispone de todos los medios necesarios, incluidos los intérpretes".

Specifically, different lawyers have highlighted that, if requested, the consultations with a lawyer are interpreted by a state-appointed interpreter and that interpreters are available. The judges also affirmed that, at the courthouse, interpreters are available to the lawyer to meet privately with the requested person and that it is left to the lawyer's initiative. In addition, it has been emphasized that in exceptional cases in which the requested person is not yet at the National Court –see above– the

interpreter may be present at the private meeting between the lawyer and the client through videoconference.

On this topic, a lawyer reported that, in the first consultation –referring to the one that takes place in the courthouse cells–, an interpreter is provided so that lawyer and client can communicate. However, the lawyer expresses doubts on how to use this service when the person is transferred to a penitentiary centre and notes that they always use a private one. In fact, the practice of the various practitioners shows that the use of private interpreters is not uncommon or that some of them do not make use of this possibility since they speak the language of their clients.

c. Discussion of findings

There is consensus among practitioners that, in practice, requested persons under an EAW are provided with interpretation and translation where needed.

- Provision of interpretation

Specifically on interpretation:

- An interpreter is provided from the moment the requested person is arrested and no limit to this right has ever been perceived.
- When an interpreter is requested, one is provided, either for a statement or for a reading of documents.
- The need for an interpreter is first assessed by the police and then by the judge and, even if the requested persons understand Spanish, one will be provided in their language.
- Interpretation is always facilitated when the person is not Spanish.
- The interpreters are at the National Court and they provide their service in person when the requested person is there.
- Exceptionally, when it is no possible to bring the requested person to the National Court, the interpreter's assistance is provided by videoconference.

However, some practitioners have stressed that the quality of the interpretation service is sometimes uneven and that more specialized interpreters are required. In particular, inconsistencies have been highlighted when the offense is complex and therefore more difficult to explain, and when the language to be interpreted is different from English and French. In such cases, it has been observed that it is sometimes difficult to argue that an interpretation is not of high quality when the interpreter is certified and authorized.

- Translation of documents

In accordance with legal regulations, practitioners have emphasized that the information included in the documents of the EAW procedure is provided to the requested person in a language that they understand, either through translation or interpretation. Specifically:

- The EAW is normally provided in the language of the issuing State. If the requested person does not understand that language, an effort is made to provide a translation as soon as possible.
- When the court clerk reads the rights to the requested person, an interpreter interprets them and then the same happens with the content of the EAW.
- The content of the file is not translated, it is in Spanish, except for the documents considered essential.

On the latter matter, it has been highlighted the experience of not seeing these essential documents translated, but rather interpreted –although this possibility is envisaged by law.

Likewise, a defence lawyer has expressed disagreement with the fact that –although contemplated by law– it is up to the judge to decide whether a document has to be qualified as essential to be translated in cases where the defence needs a document that the latter considers essential to be translated, being the filing of an appeal the alternative to the refusal.

- Interpretation of consultations with lawyers

There is consensus among practitioners on the fact that lawyers have the possibility to request that consultations with their client be interpreted by an interpreter appointed by the State.

Specifically, in the consultation which takes place in the courthouse cells, an interpreter is provided so that lawyer and client can communicate privately.

In general, practitioners reported using private interpreters outside the court context, and doubts were expressed about how to use the interpretation service when the requested person is transferred to the penitentiary centre.

3. Right to access to a lawyer

a. Legal overview

- Legal provisions governing access to a lawyer, including legal aid

In Spain, with the transposition of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings¹⁹, Articles 118, 509, 520 and 527 LECrim were amended and a new Article 520 ter was introduced with the provisions provided for in European Union law, including the system of legal aid for detainees. In addition to the LECrim, the LRM applies, specifically, Articles 22.1, 50.1, 50.3, 50.4, 51.1, 51.5, 52.1, 52.2 and 39.4 LRM are noteworthy.

¹⁹ Directive 2013/48/EU of the European Parliament and of the Council, of 22 October 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

As explained above, the LRM establishes that the detention of a person under an EAW shall be made with the requirements and guarantees of the LECrim –Article 50.1 LRM. Under Article 118 of the LECrim, any person to whom a punishable act is attributed may exercise the right to a defence and shall have the “right to freely appoint a lawyer” and the “right to request free legal aid”, including the information on the procedure for doing so and conditions for obtaining it –Article 118(1)d) and e). The right of defence includes the legal assistance of a freely appointed lawyer or, failing that, of an appointed *ex officio* lawyer –Article 118.2 LECrim–, which, in the latter case, does not necessarily imply that the legal assistance is free of charge –see, e.g., Article 121 LECrim²⁰.

According to the law, in order to act in the proceedings, the persons under investigation must be represented by a *procurador* –legal representative in Spanish law– and defended by a lawyer, who shall be appointed *ex officio* when they have not appointed one themselves and they request it, or when they do not have the legal capacity to do so. If the person has not appointed any of them, they will be requested to do so or will be appointed *ex officio* if, upon request, they do not appoint them, when the case reaches a stage in which their advice is needed or an appeal has to be lodged which makes their action indispensable –Article 118.3 LECrim.

- Spain as an executing State

It has been pointed out that the right to legal assistance begins with the right to the appointment of a lawyer of one's choice. In EAW proceedings, as in other proceedings, the detainee enjoys this right, without being able to be imposed an *ex officio* lawyer, as stated by the jurisprudence of the Constitutional Court –STC 81/2006, of 13 March.²¹

In the EAW procedure, on the one hand, the law establishes that the requested person has the right to communicate and meet in private with their lawyer –with the exceptions stipulated by law²²–, freely appointed or *ex officio*, even before the police, prosecutor or judicial authority takes their statement –Articles 118.1 and 520.6 d) LECrim. When the detainee has been brought to court, the hearing of the requested person shall be held with the assistance of a lawyer and the right to defence shall be guaranteed and, where legally appropriate, the free legal aid – Article 51.1 LRM.

If the requested person has not consented to be surrendered to the issuing State, the Central Preliminary Examining Judge shall summon the parties to a hearing, which shall be held within a maximum of three days, and there, too, the requested person must be assisted by a lawyer –Article 51.5 LRM. The law also provides that the detainee must be assisted by a lawyer in other procedural steps, such as when the EAW was issued for the purpose of criminal proceedings and the issuing judicial authority requests to take a statement from the requested person or their temporary transfer to the issuing State. In these cases, if the Central Preliminary Examining Judge decides favourably about it, when having agreed to take the statement of the requested person, several guarantees are applicable and, among them, the right to legal assistance –Article 52 LRM.

²⁰ "All those who are party to a case, if they have not been granted the right to free legal aid, shall be obliged to pay (...) the fees of the lawyers who defend them (...)"

²¹ *Op. cit.*, 8, BAUTISTA SAMANIEGO, p. 364.

²² See Articles 509 and 527 LECrim.

On the other hand, in the EAW procedure, the figure of the lawyer in the issuing State is foreseen. The specific EAW regulations provide that, when Spain is the executing State, once the detained person is brought before the court, they will be informed of the existence of EAW, its content and their right to appoint a lawyer in the issuing State, whose function will be to assist the lawyer in Spain by providing them with information and advice. In the event that they request the appointment of a lawyer in the issuing State, the competent authority shall be informed immediately –Article 50.3 LRM. There is no further guidance regulating this cooperation which normally takes place on a private basis between the lawyers of the issuing and executing State.

Additionally, the requested person shall be informed in writing in a clear and sufficient manner, and in plain and intelligible language, of their right to waive the right to a lawyer in the issuing State, of the content of that right and its consequences, as well as of the possibility of its subsequent revocation. Such a waiver must be voluntary and unequivocal, in writing, stating the circumstances of the waiver and may be revoked –Article 50.4 LRM.

- Spain as an issuing State

In addition to the general regime on the right of a detained person to a lawyer, the law specifies that when the requested person exercises in the executing State their right to appoint a lawyer in Spain to assist the lawyer in the executing State, the exercise of this right and, where appropriate, the right to free legal aid shall be guaranteed, under the terms legally applicable under Spanish law. The request shall be processed by the Spanish judicial authority immediately and the appointment of professionals by the Bar Association –Colegio de Abogados– shall be of a preferential and urgent nature –Article 39.4 LRM.

- Available remedies when a requested person is not informed about their right to dual legal representation or access to a lawyer is delayed or denied

The Organic Law of the Judiciary (LOPJ) –Ley Orgánica del Poder Judicial²³– establishes when judicial acts can be declared null and void. According to this law, it is possible to request the nullity of the proceedings when essential procedural rules are disregarded, provided that, for that reason, defencelessness could have been caused and when they are carried out without the intervention of a lawyer, in cases where the law establishes it as mandatory –Article 238 3º and 4º LOPJ. Article 241 LOPJ establishes that a written request may be made, by those who are or should have been legitimate parties, to declare the nullity of the proceedings based on any violation of a fundamental right of Article 53.2 of the Spanish Constitution²⁴ –and, thus, on the right to legal assistance under its Article 17.3– and that, if the nullity is upheld, "the proceedings shall be reversed to the state immediately prior to the defect that caused it and the legally established procedure shall be followed".

²³ Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. At: <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666>.

²⁴ Constitución Española. At: <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>

In this sense, for example, the applicability of the nullity procedure in EAW proceedings when a fundamental right is affected is highlighted in the jurisprudence of the Constitutional Court –STC 81/2006, of 13 March–, which states that the appeal brought had its origin in that: "(d) (...) the appellant filed a writ in which, (...) they also urged the nullity of the hearing (...) [and it was agreed] that the nullity incident did not proceed, arguing that the aforementioned hearing was carried out with the due assistance of an *ex officio* lawyer (...)".

Table 5 Dual representation (in law)

Does the law of the executing MS foresee that the person arrested has a right to have the assistance of a lawyer in the issuing Member State and informed of this right?	
Spain	YES

Table 6 Cost-free legal assistance (in law)

Free of cost lawyer provided in law	When your country is an executing state	When your country is an issuing state (e.g. to assist the lawyer in the executing state)
Spain	YES	YES

b. Right to access to a lawyer in practice

- Information about legal assistance (including on dual representation)

Information about legal assistance

In the previous sections it has been seen how, in Spain, when a person is arrested –whether it is under an EAW or not– they are informed of their rights granted by law and, among them, of their right to be assisted by a lawyer.

As explained above, under the law, any person to whom a punishable act is attributed may exercise the right to a defence and shall have the right to freely appoint a lawyer. In practice, as far as it pertains here, this means that when a person is arrested in Spain on an EAW issued by another European Unión Member State, that person is informed about their right to be assisted by a lawyer in the proceedings in the former country.

In the experience of practitioners, there is no deviation from this standard in practice. As has been explained by them, when a person is arrested on the basis of an EAW there is an automatic application of what happens when a person is arrested in the context of regular criminal proceedings. Thus, the police inform them at the time of arrest, orally and in writing, that they have the right to a lawyer of their trust or to a lawyer appointed *ex officio*. Likewise, they are informed by the clerk of the court again.

Table 7 Are persons informed of their right to access a lawyer?

	L1	J1	L2	J2	L3	J3	L4	J4	L5	J5	Total
YES	X	X	X	X	X	X	X	X	X	x	10
In writing	-										
Orally	-	-									0
In writing and orally	X	X	X	X	X	X	X	X	X	x	10
NO	-	-									0
Don't know/remember	-	-									0
Did not answer	-	-									0

Information about dual legal representation

The situation is not as homogeneous with regard to dual legal representation. The law specifically regulating the EAW procedure in Spain provides that the requested person must be informed of their right to appoint a lawyer in the issuing State. As will be seen, the recognition of this right is not without controversy as to its potential implications. Thus, in the present case, the fact of informing about this right does not seem to have been regarded as a standard until recently. This is evidenced, for example, by the appeals that practitioners report having both received and filed on this matter.

“I believe that the appointment of an attorney in the issuing State is quite uncommon”.

Judge, Spain.

"Creo que el nombramiento de un abogado en el Estado emisor es bastante infrecuente".

In effect, when assessing whether the requested persons in Spain are informed that they can benefit from the assistance of a lawyer in the Member State that issued the EAW, three lawyers have stated that they have never seen this information being provided. Conversely, judges maintain that, once the person is brought before the court, they are informed of their right to appoint a lawyer in the issuing State. From an intermediate perspective, a lawyer has pointed out that although, in their experience, the requested persons are informed about this right, some clients have expressed that they were not informed about it. What is certain is that the stances on this right are not peaceful, since both sides admit the existence of appeals filed in this respect.

“The lawyers in Spain contact the lawyers in the issuing country on their own in order to follow the procedure, see what stage it is at and coordinate with them”.

Lawyer, Spain.

"Los abogados en España se ponen en contacto por su cuenta con los abogados del país emisor para seguir el procedimiento, ver en qué fase se encuentra y coordinarse con ellos".

The discrepancy in positions could be explained through the remarks of some practitioners. On the one hand, a lawyer noted that, more recently, the requested persons are being informed about the right to dual legal representation and that, in the beginning, this was not done because the authorities were not familiar with it. On the other hand, at the national level, the scope of the State obligation on this right is under discussion. In this regard, judges explained that the requested person is informed of their right to appoint a lawyer in the issuing State and if they wish to exercise that right, the executing court contacts the issuing court for the latter to communicate the name of a lawyer in the issuing State. Beyond this contact, the executing State does not carry out any further procedures with the issuing State in this regard.

Concerning this process, a prosecutor points out that it is a right that is not properly regulated at the European level because the preamble of Directive 2013/48/EU, in its paragraph 46, does talk about how to facilitate the dual legal representation, but it was not transferred to the articles of the instrument in order to guarantee its effectiveness. In other words –the practitioner adds–, although the preamble foresees that a list of lawyers will be provided, that has not been developed either at the European level or at the level of any country in the European Union. There is no mechanism for the person to appoint a lawyer in the other country if they do not know one. Consequently, in practice, it is found that the requested person has a right to appoint a lawyer in the issuing country, but the effectiveness of this right corresponds to the person. In addition, the practitioner shows dissatisfaction when assessing that the Directive (EU) 2016/1919 provides for free legal aid as regards EAW in which the person is requested to be prosecuted and not when it is to serve a sentence.

“The right to appoint a lawyer in the issuing State means that the person has to be informed, and there have been some cases in which the EAW procedure has been overturned because the person was not informed. But the fulfilment of this right is not foreseen, it has to be done by the requested person”.

Prosecutor, Spain.

"El derecho a designar un abogado en el Estado emisor significa que la persona tiene que ser informada, y ha habido algunos casos en los que se ha anulado el procedimiento de la ODE porque la persona no fue informada. Pero el cumplimiento de este derecho no está previsto, tiene que hacerlo la persona requerida".

Table 8 Information on dual representation, interview findings

	L 1	J 1	L2	J2	L3	J3	L4	J4	L5	J5	Total	
Are persons arrested on an EAW informed by authorities on their right to have the assistance of a lawyer in the issuing Member State?												
YES	-	X	X	X		X		X	X	X	7	
NO	X	-			X		X				3	
Don't know/remember	-	-									0	
Did not answer	-	-									0	

Information on available remedies

It has been previously presented that in Spain the law foresees remedies available when a requested person is not informed about their right to dual legal representation. In fact, it has just been stated that the difficulties associated with the recognition of the right to dual legal representation are evidenced by the fact that the practitioners reported the filing of appeals in this area.

In this regard, one prosecutor has highlighted how in a 2021 Order of the National Court –Auto 544/2021, de 24 de septiembre, de la Sección 4 de la Audiencia Nacional– the proceeding was declared null and void due to the lack of information to the detainee of their right to appoint a lawyer in the issuing State. Likewise, highlighting that this is not an unknown avenue for practitioners, a lawyer noted having raised the violation of the right of defence in a case in which the requested person was not informed about their right to access to a lawyer in the issuing State and the court declared the nullity of the whole procedure and reversed it to the moment immediately prior in order to inform the person.

"The wording of the provision on the right to a lawyer in the issuing State is confusing and each lawyer understands it in their own way and some try to extend it to extremes that are not included in the European legislation".

Judge, Spain.

"La redacción de la disposición sobre el derecho a un abogado en el Estado emisor es confusa y cada abogado la entiende a su manera y algunos intentan extenderla hasta extremos que no están recogidos en la legislación europea".

In this regard, a judge points out that, in Spain, it is possible to file an appeal for nullity and an appeal for protection, if the nullity is dismissed, for violation of fundamental rights, and one could even go to the Constitutional Court and there ask for protection alleging that such a right has been infringed. However, the practitioner stresses that such infringement of rights does not include the appointment or non-appointment of a lawyer by the issuing State. There are no mechanisms to control what the issuing State does, and neither the legislation nor the directives provide for the possibility that, for example, an EAW may not be executed because there has been an infringement by the issuing State.

- Legal assistance in executing state (access, consultations, lawyer's tasks)

Access to legal assistance in Spain as an executing State

In practice, in Spain, the process through which the requested person can choose and get in touch with a lawyer is systematized. It is the same process that is followed with any person arrested for a crime in Spain. Thus, when the person is arrested, the police inform them of their right to appoint a lawyer of their choice or to opt for a lawyer appointed *ex officio*. If the person provides the identity of a specific lawyer, the police contact the Bar Association to notify the lawyer and if the person needs an *ex officio* lawyer, the police will take the same steps to request the Bar Association to appoint a lawyer from the specific shift. A lawyer has suggested that improvements could be made at the stage when the requested person is at the police headquarters. Specifically, the practitioner considers that the person could be given more information and more access to the lawyer, since

they are only entitled to one call and the lawyer has never perceived that it is a priority for the police officers that the detainee contacts a lawyer of their trust.

“It is a procedure that is intended to be so agile that sometimes it is too fast for lawyers to gather documentation or evidence that may be relevant to the procedure”.

Judge, Spain.

"Es un procedimiento que pretende ser tan ágil que a veces es demasiado rápido para que los abogados reúnan documentación o pruebas que puedan ser relevantes para el procedimiento".

It is also noted that the requested person may be able to contact a lawyer through a family member they have reached out to or even through their lawyer in the issuing State. On this point, a lawyer has pointed out that it is not uncommon for the law firm in the issuing State to contact the lawyer in the executing State to initiate the defence and request permission to give the lawyer's contact to the requested person's family members.

Lastly, when the person is brought before the Central Preliminary Examining Judge at the National Court, they are again informed of their right to appoint a lawyer, and if they do not have a private one, they will be assigned an *ex officio* appointed lawyer.

Throughout this process, authorities will not provide the person with a list and contact details of available lawyers, or with access to a phone or internet to contact lawyers. In the Spanish system, access to a lawyer is carried out in the manner described above. The practitioners have expressly indicated that under no circumstances can the arrested person be provided with a list of lawyers. In fact, practitioners have expressly indicated that it is not allowed, it is a prohibited action, and that it would be like recommending the person, so it is a practice that is discouraged and considered undesirable.

A lawyer explains that no list is given to the requested person. A different matter is that the consulate may have a list of lawyers who speak the person's language and can therefore choose, but this would be when the person is not arrested or when relatives contact the consulate. What the authorities can do is to arrange for the appointment of an appointed *ex officio* lawyer. This should not be mistaken with free legal aid, which only occurs when the person is entitled to free legal aid. Related to this, a lawyer has expressed that, in the event the person has no private lawyer, there may be a situation of defencelessness, since the lawyer appointed by the Madrid Bar Association may be a generalist with poor expertise in EAW proceedings.

Throughout this process, the requested person does not have access to a telephone or the internet to contact a lawyer. At the time of arrest, like all detainees, the person is entitled to a police-controlled call to be able to communicate with someone to inform them that they are arrested, but then they have no further possibility to communicate. They will communicate with their lawyer in person.

Lawyer's tasks and consultations with clients

The assistance of a lawyer in EAW proceedings in the executing State may be provided from the moment the person is arrested. The practitioners indicated that the lawyer provides assistance at the police headquarters and at the judicial headquarters. In this type of proceedings, a lawyer explains that they assist the requested person both on the substance of the matter –i.e. on whether

or not to consent to surrender and the implications of waiving the principle of speciality– and on their personal situation –i.e., what will happen to that person while their surrender is being decided, namely, whether they will be remanded in custody or released under some alternative measure to imprisonment.

"There is a kind of grey area from the moment a person is arrested until they are brought before a court. The detainee could be guaranteed greater access to a lawyer. I have never perceived that it is a priority for the police that the detainee is quickly in contact with a lawyer they trust".

Lawyer, Spain.

"Hay una especie de zona gris desde el momento en el que se detiene a una persona hasta que es puesta a disposición judicial. Se podría garantizar al detenido un mayor acceso a un abogado. Nunca he percibido que sea una prioridad para la policía que el detenido esté rápidamente en contacto con un abogado de su confianza".

Lawyers have stated that they fully review the situation. They examine the EAW documentation with a view to identifying whether it complies with the formal requirements of the law and whether there are any grounds for opposing surrender. Likewise, they will explain to the requested person the different possibilities that exist in terms of the procedure. In this regard, the requested person and the lawyer are free to meet privately, which may occur at the police station or in the courthouse cells, prior to the initial appearance before the judge. In this private meeting, the requested person will be informed about the reasons for the detention as stated in the EAW sent by the issuing State, about what the EAW is, the implications of consent and the principle of specialty, and about the fact that the executing State will not deal with the merits of the case but with the transfer to the issuing State and with the potential grounds for refusal.

This meeting prior to the appearance before the judge, between the lawyer and the requested person, is the norm nowadays, but a lawyer points out that this was not always the case and that this has been a victory on the part of the lawyers. There used to be a tendency for the person arrested to go to testify without having spoken to their lawyer, but this issue has been resolved, and they no longer have a problem meeting with clients to explain the situation and develop a strategy according to the circumstances of the case.

The assistance of the lawyer extends to the hearings. Requested persons are entitled to have their lawyer present at the hearings and no obstacle is found in this regard. In fact, in Spain, this is mandatory and these hearings cannot take place if the requested person is not assisted by a lawyer. According to the judges, no judge in Spain would allow it because the procedure would be null and void and would have to be repeated. It is an obligation for the judicial body that the person is assisted by a lawyer.

Lastly, judges explain how, in court, once the person will be informed of their rights, the reasons for the arrest, the principle of specialty and the consequences of their consent to be surrendered, the requested person is questioned about their personal situation, in consideration of which, the Public Prosecutor's Office may request that the person be remanded in custody or released on bail or with designation of domicile for the duration of the proceedings. In the latter matter, the assistance of the lawyer is of importance and, furthermore, later on, this assistance will be essential to present possible grounds for refusal of surrender and to present evidence to that effect.

Assistance provided in appointing a lawyer in the issuing State

The law provides that the requested person must be informed of their right to appoint a lawyer in the issuing State and that, in the event that they request such appointment, the competent authority shall be informed immediately. There is no further guidance governing this cooperation, and practice does not deviate from the norm.

“Spain will maintain that fulfils its obligation by informing the person on their right to appoint a lawyer in the issuing State, but it is the person or their relatives who will have to look for a lawyer by their own means”.

Lawyer, Spain.

"España mantendrá que cumple con su obligación informando a la persona sobre su derecho a designar un abogado en el Estado emisor, pero es la persona o sus familiares quienes tendrán que buscar un abogado por sus propios medios".

The practice shows that when the person expresses the wish to appoint a lawyer in the issuing State, the judicial authorities communicate this request to the issuing State. Spain, as the executing State, is simply informing the issuing State. No further action is taken. A judge explains that if the issuing court communicates the name of a lawyer in that country, the lawyer in the executing State is provided with the identity of the lawyer in the issuing country. However, this is not always the outcome and the question of appointing a lawyer generates conflicts. For example, the practitioner notes that, before leaving the European Union, there were some difficulties with the United Kingdom because, at times, the country said it could not appoint a lawyer, and this falls out of the reach of the Spanish court. In this respect, one judge states that they inform the issuing State, but that if they do not appoint a lawyer, the judge cannot compel the issuing State to do so. Conversely, a judge notes that in an EAW case in which France was the executing State, the French court requested a lawyer from Spain as the issuing State. In that case, the person had a lawyer in the proceedings in Spain and the contact details of the lawyer were provided to the French authorities.

On this issue, the lawyers state that neither the appointment of a lawyer in the issuing State nor the communication with a lawyer there is facilitated. There is no assistance in this regard or procedure, and it is the lawyer in the executing state who will search the internet for a lawyer in the issuing State. A lawyer refers to an appeal filed in this regard in a case where the United Kingdom, as the issuing State, had failed to appoint a lawyer. The country had responded that the requested person was not entitled to court-appointed lawyer and, therefore, no further action would be taken to facilitate the appointment of a lawyer or to recommend one. In the decision on the appeal, the Spanish court considered that Spain had fulfilled its obligation to inform about the right and that, from there on, this was a strictly domestic issue pertaining to United Kingdom regime.

As previously discussed – see above the section on *information about dual legal representation*–, the right to dual legal representation is not without controversy. In fact, one prosecutor considered that it was not well regulated at the European level and that, in the event that the person wants to appoint a lawyer in the issuing State, the court can do nothing, it is up to the person or their relatives to do so. The effectiveness by the executing State is not foreseen, the effectiveness of this right is up to the person. Differently, if the requested person expressly provides the contact details of a lawyer, communication would be facilitated.

Table 9 Facilitating dual legal representation, interview findings (executing MS)

Is assistance provided in appointing a lawyer in the issuing Member State when execution proceedings are ongoing? (When your country is an executing state)			
Interviewees	YES	NO	Didn't know/answer/remember
Lawyer 1		X	
Judge 1		X	
L2			X
J2		X	
L3		X	
J3		X	
L4		X	
J4		X	
L5		X	
J5		X	
Total		9	1

Challenges relating to legal representation in EAW proceedings

"More information would be needed as sometimes it is an oversimplified procedure and there may be cases where there may be a res judicata exception or the matter may have some open proceedings in Spain, and with the data that is transmitted it is sometimes difficult to identify these circumstances that could lead to the denial of the EAW".

Judge, Spain.

"Haría falta más información, ya que a veces es un procedimiento demasiado simplificado y puede haber casos en los que puede haber una excepción de cosa juzgada o el asunto puede tener algún proceso abierto en España, y con los datos que se transmiten a veces es difícil identificar estas circunstancias que podrían llevar a la denegación de la ODE".

Different practitioners have emphasized that one of the main challenges relating to legal representation in EAW cases is the speed of the proceedings. A judge considers that it is a procedure that is intended to be so agile that sometimes it is too fast for lawyers to gather the relevant documentation or evidence. Spain has opted for a very agile and very fast procedure and, sometimes, the problem is that a lawyer cannot gather all the relevant documentation in such a short period of time. Pointing out the same matter, a lawyer underlines the lack of time for the lawyer to see the case file in depth, prepare a strategy and talk to their client, as everything is done in the court quickly and on the day of the hearing. For this reason, the practitioner considers that, in Spain, the rights of the individual are not fully guaranteed in the EAW procedure because requested persons are not allowed an adequate defence due to the lack of time lawyers have to prepare.

"It is a challenge for the courts to be more flexible in admitting allegations on the merits of the case, as mutual recognition and trust between Member States are one thing and blind decision making is another".

Lawyer, Spain.

"Es un reto para los tribunales ser más flexibles a la hora de admitir las alegaciones sobre el fondo del asunto, ya que una cosa es el reconocimiento mutuo y la confianza entre los Estados miembros y otra la toma de decisiones a ciegas".

Additionally, the fact that the procedure is sometimes oversimplified is pointed out as a challenge for legal representation. More specifically, a judge commented that perhaps more information would be necessary because with the data that is transmitted it is sometimes difficult to identify those circumstances that could lead to the denial of the EAW.

A lawyer highlights that the preparation of the defence is complicated due to the spirit of mutual recognition. The practitioner stresses that "Europe is not a homogeneous continent, and legal systems are not homogeneous, respect for fundamental rights is not homogeneous, and yet we want to make judicial decisions homogeneous". In a similar vein, another lawyer notes that if there is an element that evidences a breach of essential guarantees in an EU Member State, then the national court of the executing State should be open to analysing these issues. Close to this, a lawyer emphasizes the lack of flexibility of the EAW, as it cannot be withdrawn in cases where it is clear that it should be. The practitioner gives as an example those cases where the EAW has been issued on the basis of a fine and where the requested person is not given the alternative of paying the fine. Similarly, a practitioner states that the EAW procedure should be limited to truly serious crimes because "sometimes some procedures are absurd".

- Legal assistance in issuing state (access, consultations, lawyer's tasks)

Assistance provided by lawyers in the issuing State

Practice shows that, at present, the role of the assistance provided by lawyers in the issuing State is not consistent. Some practitioners indicate that in Spain the lawyer in the issuing State does not provide any assistance. In fact, a lawyer has pointed out that it is difficult to see how such assistance can be practically developed in view of the speed of the procedure. Given the short deadlines, it is not easy for them to locate a lawyer in the other country to gather information about the case.

"The EAW is merely a cooperation mechanism to surrender the requested person to the issuing State".

Lawyer, Spain.

"La orden de detención europea no es más que un mecanismo de cooperación para entregar a la persona reclamada al Estado emisor".

Other practitioners describe the nature of such assistance. A lawyer explains that, currently, the lawyer of the issuing State is the one who has access to the file from which the EAW comes from and has knowledge of the procedural system and, consequently, advises the lawyer of the executing State on whether there may be any breach of any procedural rule or any substantive rule and, therefore, substantiates what to argue during the defence in the EAW proceedings, since the lawyer of the executing State does not usually know the law of the issuing State. In this context, the lawyer of the issuing State is an advisor. On that subject, a prosecutor noted that assistance is provided exclusively in relation to causes of refusal or conditional surrender. The lawyer of the issuing State reports on the notifications made during the proceedings, on whether the judgement was *in absentia*, on whether the person was aware of the judgement rendered against them and whether they were defended in the proceedings by an appointed lawyer. The practitioner states that this

lawyer is useful in the formal aspects since the lawyer in the executing State does not enter into the merits of the case. Nonetheless, when there is communication and there is an appointed lawyer in the issuing State, it is easier to know how the proceedings have developed from a purely formal point of view and to ascertain whether there are grounds for refusal or conditional execution, especially in trials *in absentia*, or in statutes of limitations. A practitioner corroborates the dynamics of this assistance through their experience by commenting that, when acting in Spain as a lawyer of the issuing State, the role played has been to communicate with the lawyer of the executing State to find a reason to refuse surrender, such as *res judicata*, minority of age, or optional reasons such as pending case or lack of dual criminality.

On the current status of cooperation with the issuing State's lawyer, a practitioner considers this assistance to be the future. This assistance should be developed in order to enable the lawyer to appear before the issuing court to exercise the right of defence in a practical and real way in that country, for example, by having the capacity to deactivate the EAW, when appropriate.

“In the appeal phase, additional information is admitted, and, in many cases, certain deficiencies are solved and more complete information about what happened in the issuing State is obtained, which may eventually justify the denial of the EAW”.

Judge, Spain.

"En la fase de apelación se admite información adicional y, en muchos casos, se resuelven ciertas deficiencias y se obtiene información más completa sobre lo ocurrido en el Estado emisor, lo que puede acabar justificando la denegación de la ODE".

At present, the lawyer of the issuing State does not gather additional evidence on the merits of the case that has a repercussion on the proceedings in the executing State. Spain as an executing State does not get into the merits of the case. A prosecutor points out that dual assistance is only provided for conditionality or refusal formalities. Additionally, a judge explains that if the lawyer of the issuing State gathers evidence on the merits, it will be up to the issuing court to assess it and will have to communicate whether it is still interested in the surrender. The executing State acts in cooperation and does not really assess the evidence that exists in the issuing State.

- Communication between the lawyers in both States

In Spain there is no mechanism in place to practically choose and get in contact with a lawyer in the issuing Member State. As previously explained, the executing court merely transmits the request for the appointment of a lawyer to the issuing court. The formalities are carried out in accordance with the domestic law of the issuing State. A judge explains that if the person has requested a specific lawyer, their name is transferred to the issuing State, but if not, the practitioner assumes that a lawyer will be appointed *ex officio* according to their law. The executing judge cannot influence or decide on this.

This being the case, there is agreement on the fact that, in practice, the contact details of available lawyers are not provided, nor are access to a telephone or internet for this purpose. A judge comments that it is not possible to provide the person with contact details of lawyers available in the issuing State, just as it was not possible to provide the details of lawyers in Spain. Likewise, regarding the use of the phone and internet, the practitioner explains that this is not possible at the time of the arrest, but if the person is subsequently released, they would be free to do so, however,

if the person must remain in prison, they could make the calls that correspond according to the penitentiary system, and with no internet access.

“Requested persons are never informed of the details of lawyers available in the issuing State. That would be tantamount to recommending”.

Judge, Spain.

"Las personas reclamadas nunca son informadas de los datos de los abogados disponibles en el Estado emisor. Eso equivaldría a recomendar".

In such circumstances, it is understood that the communication between the lawyers of both countries is initiated by the lawyer of the executing State. Thus, a lawyer explains that, if the person has not already a lawyer in that State, they always contact practitioners in the issuing State through relatives or friends of the requested person. Similarly, another lawyer points out that there is no procedure for this. The lawyer of the executing State can search for a lawyer in the issuing State on the internet, via a search engine. The authorities do not provide assistance in this regard, including free legal aid.

“It is for the requested person's lawyer to contact the lawyer of the issuing State, not the executing judge, who is only responsible for forwarding the request to the issuing State”.

Judge, Spain.

"Corresponde al abogado de la persona reclamada ponerse en contacto con el abogado del Estado emisor, no al juez de ejecución, que sólo es responsable de transmitir la solicitud al Estado emisor".

- Free of cost access to a lawyer (or legal aid)

It has been well established that when a person is arrested in Spain under an EAW, both in law and in practice, the standard is clear, namely that the requested person is informed of their rights, including their right to appoint a lawyer, either privately or *ex officio*. This information covers the free of cost access to a lawyer, which will apply if the person qualifies for legal aid. This information is provided both by the police once the person is arrested and later in the courts.

A prosecutor describes the process in a plain manner: “If the requested person does not have a lawyer, one will be appointed *ex officio*, and if they do not have the financial means to pay for it, the assistance will be free of charge, and if they have the financial means, the Bar Association will charge for the legal assistance”. In this regard, a lawyer points out that in the National Court there is a specific duty *rota* for *ex officio* defence lawyers and these lawyers can work on EAW cases and, if the person is entitled to legal aid, the access to that lawyer will be free of cost.

The provision of information on this right and the assistance provided by the State to appoint an *ex officio* lawyer and, where appropriate, legal aid lawyer, is a well-established standard in Spain. However, consistent with what has been outlined in previous sections, in the current system, the situation of State assistance to facilitate the appointment of a legal aid lawyer in the Member State that issued the EAW is different.

In Spain no assistance is provided in this respect. A judge stresses that this is not a matter for the executing State. The rules for the appointment of a lawyer in the issuing State are governed by the

domestic law of that State. Doubts are expressed as to how this could be achieved in practice. For example, a prosecutor does not see how this assistance could materialise in practice. In Spain, the procedure is centralized in a single body, but in other countries, such as Germany, it is not. Thus, the prosecutor wonders how it would be handled in order to facilitate the contact of on duty legal aid lawyers. In this regard, it is also stressed that the Directive 2013/48/EU contemplated this issue but the Directive 2016/1919/EU has not gone into the question of how to develop dual representation, and that no one says how. In the same vein, a lawyer bluntly stated that “no assistance is provided because legal aid is a matter for the issuing State”. Conversely, a judge has pointed out that when Spain is the issuing State, if the person does not have a lawyer and an *ex officio* lawyer is requested, the issuing court would communicate the identity of the practitioner to the executing court.

Table 10 Cost-free legal assistance, interview findings

Free of cost lawyer provided	When your country is an executing State		
LAWYER 1	YES		
JUDGE 1	YES		
L2			NR
J2	YES		
L3	YES		
J3	YES		
L4	YES		
J4	YES		
L5	YES		
J5	YES		
TOTAL	9		1

c. Discussion of findings

- Access to legal assistance in Spain as an executing State

In Spain, the requested persons are informed of their right to appoint a lawyer in this State. The process through which the requested person can choose and get in touch with a lawyer is systematized and it is the same that is followed with any person arrested for a crime in Spain. The Spanish authorities –police or court– together with the Bar Association will facilitate the appointment of a lawyer, of their choice or an appointed *ex officio* lawyer.

In the Spanish system, authorities will not provide the person with a list of lawyers or with access to a phone or internet to contact lawyers. Practitioners have indicated that under no circumstances can the arrested person be provided with a list of lawyers.

On the right to legal assistance, it has been suggested that:

- Improvements could be made at the stage when the requested person is at the police headquarters facilitating greater access to their lawyer.
- It would be desirable that among the lawyers of the duty rota of the National Court there were lawyers specialized in EAW matters.

- One of the main challenges relating to legal representation in EAW cases is the speed of the proceedings. It is a procedure that is intended to be so agile that sometimes it is too fast for lawyers to gather the relevant documentation or evidence.
- The fact that the procedure is sometimes oversimplified is a challenge for legal representation. A practitioner commented that perhaps more information would be necessary because with the data that is transmitted it is sometimes difficult to identify those circumstances that could lead to the denial of the EAW.
- The EAW procedure should be limited to truly serious crimes.
- There is a lack of flexibility of the EAW, as it cannot be withdrawn. For example, in those cases where the EAW has been issued on the basis of a fine and where the requested person is willing to pay the fine.

- Information on the right to dual legal representation

The law specifically regulating the EAW procedure in Spain provides that the requested person must be informed of their right to appoint a lawyer in the issuing State.

However, in practice, the views of practitioners on whether this information is provided are not aligned. It has been reported that informing on the right to dual legal representation does not seem to have been regarded as a standard until recently, resulting in this information not always being provided, leading to the filing of appeals.

A reason for the lack of homogeneity of opinions on this issue could be that the fulfilment of this right is not foreseen in Spain.

- The fulfilment of the right to access to a lawyer in the issuing State

In Spain, the requested person is informed of their right to appoint a lawyer in the issuing State and if they wish to exercise that right, the executing court contacts the issuing court for the latter to communicate the name of a lawyer in the issuing State. This process may not result in the issuing State appointing a lawyer.

Likewise, no list of lawyers exists from which a lawyer can be contacted.

Consequently, in practice, it is found that the requested person has a right to appoint a lawyer in the issuing country, but the effectiveness of this right corresponds to the person. There is no mechanism for the person to appoint a lawyer in the other country if they do not know one.

A practitioner points out that this right is not properly regulated at the European level, as it is not established how to facilitate dual legal representation or how to develop such a list of lawyers. This also applies to legal aid, which is provided by the issuing State according to its domestic legislation.

- Remedies available and the right to dual legal representation

In Spain the law foresees remedies available when a requested person is not informed about their right to dual legal representation. Proceedings can be declared null and void due to the lack of information to the requested persons of their right to appoint a lawyer in the issuing State.

However, consistent with the aforementioned, this right only includes the fact of being informed of having the right to access to a lawyer in the country that issued the EAW. Currently, the breach of this right does not include the actual appointment or non-appointment of a lawyer by the issuing State.

A prosecutor has pointed out that European legislation does not provide for a mechanism in the event that the issuing State fails to appoint a lawyer.

- Assistance provided by lawyers in the issuing State

Practice shows that, at present, the role of the assistance provided by lawyers in the issuing State is not consistent. Some practitioners indicate that in Spain the lawyer in the issuing State does not provide any assistance. However, practitioners emphasize the importance of developing this collaboration.

In Spain there is no mechanism in place that allows the requested person to practically choose and get in contact with a lawyer in the issuing Member State. The contact details of available lawyers are not provided, nor are access to a telephone or internet for this purpose. It is understood that the communication between the lawyers of both countries is initiated by one of the lawyers.

4. Issuing and Execution of the EAW

a. Legal overview

- Legal provisions governing the issuing of the EAW

In Spain, the competent authority to issue an EAW is the judge or court hearing the case in which the warrant is issued – Article 35.1 LRM. In general, the principle of proportionality should apply throughout this process. This principle is only referred to in a generic manner in the preamble of the LRM (section VI), where it is established in general terms that legal safeguards have been strengthened, "in particular with the introduction of the criterion of proportionality".

Prior to issuing an EAW, the law provides for the possibility for the judge to request authorisation from the State in which the requested person is located to take their statement –Article 38 LRM. Otherwise, the Spanish judicial authority may issue an EAW for the exercise of criminal proceedings or in order to proceed with the enforcement of a sentence of deprivation of liberty –Article 39 LRM. In the first case, the judge may issue an EAW when Spanish criminal law provides for a custodial sentence or a detention order for a maximum period of at least twelve months, or a detention order for a minor for the same period –Article 37 a) LRM. In addition, the requirements foreseen in the LECrim for remanding the defendant in custody, or those of Organic Law 5/2000, of January 12, 2000, regulating the criminal responsibility of minors, on the precautionary detention of a minor, must be met – Article 39.1 LRM. In the second case, the issuance of an EAW is foreseen to serve a sentence of not less than four months' imprisonment or a detention order for a minor for the same period of time –Article 37 b) LRM–, and only if neither substitution –Article 88 et seq. of the Criminal Code– nor suspension of the custodial sentence –Article 80 et seq. of the Criminal Code– to which they have been sentenced –Article 39.2 LRM– is possible.

In any case, before issuing the EAW, the judge shall inform the Public Prosecutor's Office and, where appropriate, the private prosecution for a report, within two days, unless reasons of urgency require

a shorter period. Only if the Public Prosecutor's Office or the private prosecution is interested in the issuing of the EAW for the exercise of criminal actions, may the judge agree to it, by means of a reasoned order –Article 39.3 LRM.

In response to the issuance of the EAW, the executing judicial authority could condition the surrender of their national or resident to be returned to the executing State to serve the custodial sentence or security measure or the detention measure of a minor. In such cases, when the issuing Spanish judicial authority is requested to commit itself in this sense, the judge or court will hear the parties for three days and will then issue an order accepting or not the condition. The order shall be binding on all judicial authorities having jurisdiction in the subsequent stages of the Spanish criminal proceedings –Article 44.

In addition, it is interesting to note that the law provides for the possibility of requesting the temporary surrender of the requested person even before the executing authority has ruled on the final surrender, in order to carry out criminal proceedings or the holding of the oral hearing. The temporary surrender of the person may only be requested for the exercise of criminal proceedings against them, without it being possible for the requested person to serve in Spain a sentence already imposed. For the same purpose, temporary surrender may be requested if the executing authority decides to suspend the surrender on the ground that a trial is pending in the executing State or that a sentence imposed for an act other than the one giving rise to the EAW is to be served – Article 43 LRM.

Importantly, it is worth noting that it is possible to withdraw the issued EAW. In this regard, the Supreme Court –ATS of 5 December 2017, issued in the special case 20907/2017– has said that, once the EAW has been issued, the judge may, at any time, ponder on the convenience of withdrawing it:

"(...) Law 23/2014, of November 20, on the mutual recognition of criminal decisions in the European Union, does provide in its Article 11 –for all instruments of mutual recognition– that the issuing Spanish judicial authority shall immediately inform the executing authority, on the adoption of any resolution or measure that aims to render ineffective the enforceable nature of the order or decision whose compliance has been previously transmitted, requesting the return of the form or certificate. And it is also evident that, being the European Arrest Warrant a pure instrument of judicial collaboration, once issued, the judge may at any time ponder on the convenience or opportunity of its maintenance, taking into account the circumstances that support it in accordance with its domestic law and the effects that the arrest warrant may have on the criminal proceedings in progress in the issuing State²⁵".

The doctrine has pointed out, in coherence with the *Handbook on how to issue and execute a European arrest warrant*²⁶, that the guiding criterion for issuing an EAW is proportionality, which is the rule that the Constitutional Court has established as an element of decision when adopting any measure restricting fundamental rights. In one of its judgments, the Constitutional Court –STC 39/2016, of March 3– ruled that "the constitutionality of any measure restricting fundamental rights

²⁵ *Op. cit.*, 8, BAUTISTA SAMANIEGO, p. 296.

²⁶ At: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006\(02\)&from=SL](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=SL)

is determined by strict observance of the principle of proportionality. For the purposes that matter here, it is sufficient to recall that in order to check whether a measure restricting a fundamental right passes the test of proportionality, it is necessary to ascertain whether it meets the following three requirements or conditions: whether such measure is likely to achieve the proposed objective (assessment of suitability); whether, in addition, it is necessary, in the sense that there is no other more moderate measure for the achievement of such purpose with equal effectiveness (assessment of necessity); and, finally, whether it is weighted or balanced, since it derives more benefits or advantages for the general interest than harm to other goods or values in conflict (proportionality assessment in the strict sense)". The proportionality criterion makes it possible to determine whether the issuance of the EAW is justified on a case-by-case basis, given the consequences that its execution has for the freedoms of the defendant. On this issue, it has been pointed out that the introduction of the principle of proportionality in the preamble of the LRM results in the introduction of alternatives to its issuance²⁷.

- Legal avenues to challenge the issuing of the EAW or request its withdrawal

The LRM establishes that: "The substantive grounds on which the order or decision was adopted may only be challenged by an appeal lodged in the Member State of the issuing judicial authority" – Article 24.3 LRM. In this respect, in Spain, against the orders issued by the Juez de Instrucción –judge on the initial phase of criminal proceedings– and the Juez de lo Penal (Criminal Judge) two appeals, the *recurso de reforma* and the *recurso de apelación*, may be used –Article 217 and 766 LECrim.

On this matter, the doctrine currently states that the national jurisprudence has been modified by the influence of the jurisprudence of the European Court of Human Rights, which considers that the voluntary failure of the accused to appear does not justify the absolute limitation of the right to defence. It is in this sense that the Constitutional Court –STC 198/2003, of December 11– ruled in a case involving the possibility of appeal by the representation of the absent defendant, emphasizing the absence of a literal rule that justifies its exclusion and the principle of proportionality. More specifically, the Constitutional Court –STC 132/2011, of July 18–, on a case examining the possibility of appeal against a prison order issued against a person who was not at the disposal of the judicial body issuing the EAW, has considered that the circumstance of the defendant not being at the disposal of the judicial authority cannot legitimately justify the judicial decision not to hear the appeals and writs submitted by the representation of the defendant, since this requirement lacks legal coverage. In another ruling –STC 24/2018, of March 5–, the same body has reiterated the need of a legal basis to sustain the rejection of the rebellious person's appearance and has recalled the required application of proportionality criteria. In conclusion –the author points out–, the requested person *in absentia* can appear and fight both the national decision agreeing their search and arrest and the subsequent issuance of the EAW. "It would not make sense for Directive 2013/48/EU of 22 October to provide in Article 10 for the possibility of appointing a lawyer in the issuing State and for such lawyer not to have access, at least, to the possibility of lodging an appeal²⁸".

²⁷ *Op. cit.* 8, BAUTISTA SAMANIEGO, pp. 296, 297, 108.

²⁸ *Ibid*, pp. 305-307.

- Legal provisions governing the executing of the EAW

In Spain, the competent judicial authority to execute an EAW is the Central Preliminary Examining Judge of the National Court and, when the warrant concerns a minor, the *Juez Central de Menores* (Central Judge for Minors) –Article 35.2 LRM. The execution of the EAW is regulated in Articles 47 to 59 of the LRM. In this field, it is interesting to look at some standards on proportionality that govern the execution of an EAW.

The LRM provides that surrender without control of double criminality shall be agreed when the EAW is issued for an offence falling under one of the thirty-two categories of offences listed –Article 20.1LRM– and when the offence is punishable in the issuing State by a custodial sentence or detention order or a detention order for a juvenile for a maximum period of at least three years – Article 47.1.

In the remaining cases, as in the case of issuance, the Spanish judicial authority may agree to surrender taking into account the seriousness of the facts. Such surrender may be subjected to the condition that the facts justifying the issuance of the EAW constitute an offence under Spanish law – irrespective of the constituent elements or the qualification of the offence– when they are punishable in the issuing State by a custodial sentence or security measure or by a measure of internment in a closed regime of a minor for a maximum period of, at least, twelve months or when the purpose of the request is to serve a sentence to a penalty or security measure of not less than four months' deprivation of liberty –Article 47.2 LRM.

On the possibility for the executing judicial authority to apply the principle of proportionality in the surrender of persons, the most recent doctrine²⁹ has identified that this should never be used within the 32 categories exempt from the control of double criminality. That would imply an indirect control of criminality. Its use should be limited to the rest of the offenses, as the Criminal Chamber of the National Court has already done in a 2009 Order –Auto 109/2009, de 31 de julio, dictado por la Sección 4ª de la Sala de lo Penal de la Audiencia Nacional:

"In the case under analysis, the European warrant contains the information required by Art. 3 of the Law and is issued for the commission of a crime of abusive behaviour contemplated in Article 1250, paragraph 2, of the Romanian Penal Code, with the stipulations of Article 13, not being included in the list contained in [the LRM] so it is necessary to examine whether or not, in the case at hand, the requirement of double criminality is met (...). In the strict sense of the word, the facts described by the Romanian authorities would constitute, from the perspective of our criminal code, a simple misdemeanour of injury (...) and it would seem absolutely disproportionate to agree to their surrender to the authorities of their country to serve a two-year prison sentence".

²⁹ *Ibid*, p. 113, footnotes 109, 110.

In general terms, the Criminal Chamber is often reluctant to apply the principle of proportionality in the surrender of persons. This was the approach taken by the court in an Order issued in 2020 –Auto del Pleno de la Sala 74/2020, de 18 de diciembre– where it stated that³⁰:

"[R]egarding the alleged disproportionality of the penalty, we indicate that the different punitive response provided by law is not an argument that hinders the surrender and that in extradition matters, the principle of proportionality referred to the maximum punishment operates in relation to the death penalty and life imprisonment. Even in this case, extradition is authorized as long as the issuing State guarantees that a penalty will be imposed that does not necessarily and unfailingly mean deprivation of liberty for life; concluding that the penalty envisaged in the abstract does not allow to consider that it violates the principle of proportionality. And in this same sense the order of Plenary of this Chamber 81/2019, of November 22 (Auto de Pleno de esta Sala 81/2019, de 22 de noviembre), clarifies that the difference in punishment does not affect the principles of double criminality and minimum punitive and cannot hinder the surrender, unless the foreseen penalty was inhuman or degrading and contravenes the principles established in Articles 15 and 25 of the Spanish Constitution".

Beyond these cases, the execution of the EAW may be denied –on a mandatory basis in some cases and on an optional basis in others– as indicated by law. Several provisions of the LRM refer to the different options available.

In this sense, the execution of an EAW will be denied on a mandatory basis when –Article 48.1 LRM:

The execution would violate the principle of *non bis in idem*, even if the convicted person has been pardoned; the Spanish authorities have jurisdiction over the facts and, had the conviction been pronounced in Spain, the statute of limitations for the offence or penalty imposed had expired under Spanish law; where the certificate accompanying the application is incomplete or manifestly incorrect or does not correspond to the measure, or where the certificate is missing, without prejudice to the provisions of Article 19 on rectification; or, there is immunity from execution – Article 32.1 LRM. The same applies when the requested person has been pardoned in Spain from the sentence imposed for the same facts of the EAW and was prosecutable in Spain; the case has been dismissed in Spain for the same facts; in another EU Member State a final decision has been taken against the requested person which definitively prevents further criminal proceedings; the requested person cannot be held criminally responsible for the facts due to his or her age, according to Spanish law; or in the cases of judgements *in absentia*.

In the latter case, the execution of an EAW will be refused in cases where the trial was held *in absentia*, unless certain circumstances are present. *Grosso modo*, the person had to be informed of the date and place of the trial, had actual knowledge of the trial and was informed that a decision may be issued in case of non-appearance. They appointed a lawyer who defended them at the trial and after being notified of the decision they expressly stated that they did not contest the decision, nor did they request a new trial or an appeal –Article 33 LRM. Moreover, the Spanish judicial authority may also refuse the execution of the EAW when the trial *in absentia* was not notified,

³⁰ *Ibid.*

unless the EAW states that the person will be informed without delay of their right to a new trial or to file an appeal, indicating the deadlines foreseen for this, with the possibility that from this new process in which they would have the right to appear, a resolution contrary to the initial one would derive –Article 49 LRM.

Furthermore, the enforcement of an EAW shall be refused on a discretionary basis where –Article 48.2 LRM:

The requested person is in criminal proceedings in Spain for the same act; the person requested for a custodial sentence or measure involving deprivation of liberty is a Spanish national or resident in Spain, unless they consent to serve the sentence in the issuing State; and the acts have been committed outside the issuing State and Spanish law does not permit prosecution of the offence when committed outside its territory.

In addition, enforcement of the EAW may be refused where it is imposed for an offence other than those of Article 20.1 and 2 LRM not typified in Spanish law, and when it refers to facts that Spanish law considers having been committed in whole or in a significant or fundamental part in Spanish territory. In this case, a new investigation will be opened and forwarded to the competent judicial body to hear the case –Articles 32.2 and 3 LRM. Furthermore, the law foresees two cases in which a conditional surrender decision is possible. Where the offence is punishable by a penalty or security measure involving life imprisonment, the surrender may be conditional upon the issuing State's legislation providing for a review of the sentence or the application of clemency measures to which the person is entitled. Where the requested person is a Spanish resident or national, the surrender may be conditional on the person being returned to Spain to serve the sentence –Article 55 LRM.

In all of this, two general principles apply. Namely, on the one hand, the judicial authority may provisionally suspend the surrender when serious humanitarian grounds exist, but the surrender must be carried out as soon as these grounds disappear –Article 58.3 LRM. On the other hand, it must be considered that the law provides for a general clause on respect for fundamental rights and freedoms –Article 3 LRM– which governs all mutual recognition procedures and which, therefore, clarifies that fundamental rights and fundamental legal principles should be respected in the context of the EAW and, thus, fundamental rights considerations must be taken into account by the judicial authorities dealing with EAWs.

- b. Issuing and Execution of the EAW in practice
 - Factors considered when issuing the EAW

Legal requirements and proportionality

“Spain is a very prison-like country. The first reaction is to issue the EAW, have a person arrested and then taken to the airport, with all the costs and inconvenience that entails. In most cases, this can be arranged in a more civilized manner”.

Lawyer, Spain.

"España es un país muy carcelario. La primera reacción es emitir la orden de detención europea, hacer que una persona sea detenida y llevada al aeropuerto, con todos los costes y

molestias que ello conlleva. En la mayoría de los casos, esto se puede arreglar de forma más civilizada".

The factors that, on paper, a judge would take into account when issuing a European Arrest Warrant were previously addressed. In this respect, the LRM establishes the cases in which the judge or court hearing a case may issue the EAW.

In practice, the legal requirements foreseen for the issuance of an EAW are respected. As a judge indicated, judges take into account the legal requirements of European Union law and the LRM, i.e., that the crime meets the minimum punitive threshold or that it is one of the specifically foreseen offenses, that the person is in an EU Member State and the necessity to trade the rights of freedom, free residence and movement in the EU, for the person to come to Spain. In summary, the judge takes into consideration the fulfilment of the legal requirements, its necessity and that it is requested by the Public Prosecutor's Office.

In this regard, a prosecutor stated that "there is not much room for subjectivity". Similarly, a judge pointed out that Spanish judges work under the principle of legality, rather than the principle of opportunity and that the EAW will be issued when it is necessary to resort to international assistance.

Precisely on this idea of necessity, jurisprudence and doctrine have established that the proportionality criterion makes it possible to determine whether the issuance of the EAW is justified on a case-by-case basis, given the consequences that its execution has for the freedoms of the defendant. On this matter, a judge emphasized that "proportionality comes first" and that its purpose is to determine whether the limitation of the right is justified. For that, the seriousness of the crime and the fact that the presence of the person in Spain is indispensable are assessed. For example –a judge explains–, if the investigation is just beginning, the issuing judge waits until having solid evidence, since there must be indicators of that person's responsibility.

"There is an abuse of the issuance of EAW to the detriment of the European Investigation Order".

Lawyer, Spain.

"Hay un abuso en la emisión de la orden de detención europea en detrimento de la orden de investigación europea".

Notwithstanding the foregoing, practitioners have reported potential pitfalls in practice with respect to the application of such proportionality. Thus, some practitioners have pointed out that the EAW is issued on the basis that the minimum severity and legal requirements are met, without further consideration. A lawyer noted that other requirements are not taken into account, nor are the personal or the working situation of the requested person. Proportionality should be taken into account when issuing the EAW but it is not. On this point, a judge notes that proportionality is taken into account, but the ideas of mutual trust and that the other State will not easily reject the EAW prevail. Importantly, they warn about an abuse in the issuance of EAWs to the detriment of the European Investigation Order. On this, a lawyer and a judge report having experienced how the EAWs are often issued without any prior attempt to summon the person or even issue an EIO in order to interrogate them by videoconference.

"When issuing an EAW what is taken into account is just that there is a person who has evaded justice and who must be arrested and brought to justice. I don't think anything else is considered".

Lawyer, Spain.

"Cuando se emite una orden de detención europea lo que se tiene en cuenta es simplemente que hay una persona que ha eludido la justicia y que debe ser detenida y puesta a disposición judicial. No creo que se tenga en cuenta nada más".

Challenging the issuing of the EAW

The law states that the substantive grounds on which the EAW was adopted may only be challenged by an appeal lodged in the issuing State. A prosecutor explains that if the person has a lawyer in the State issuing the EAW, they can appeal the issuance of the EAW and, in fact, this has been done. When the person has already been prosecuted, they always have a lawyer and challenging the issuing is possible. However, difficulties may arise in the event that the EAW is issued for prosecution because, if the person was not in the proceedings from the beginning, they will not have a lawyer appointed until they appear.

"States would do well to provide lists of lawyers with some expertise in the EAW, not just any lawyer who wants to join. This information should be made available to third parties, to make it easier to find a specialized lawyer, in a given country".

Lawyer, Spain.

"Los Estados harían bien en facilitar listas de abogados con cierta especialización en la ODE, y no de cualquier abogado que quiera incorporarse. Esta información debería ponerse a disposición de terceros, para facilitar la búsqueda de un abogado especializado, en un país determinado".

In connection with this last remark, a lawyer considers that challenging the issuance of the EAW can be complicated, as the person has to know that there is a case against them and then the lawyer has to find out in which court the case is at, which can be difficult depending on the region where the EAW was issued, given the large number of courts. Once this is done, the issuance can be challenged on proportionality or other grounds. Specifically on the latter, a judge notes that the appeal of the issuance will be more frequently based on reciprocity than on proportionality, that is, where the case is not about any of the offences listed in the catalogue of 32 and recourse to the principle of reciprocity is necessary.

- Factors considered when executing the EAW

Legal requirements and proportionality

The LRM provides that surrender without control of double criminality shall be agreed when the EAW is issued for an offence falling under the list of 32 categories. In the remaining cases –as shown above– the Spanish judicial authority may agree to surrender taking into account the seriousness of the facts. However, the assessment in practice of an EAW that presents potential proportionality problems is not an uncontroversial issue in the executing State.

“Judges do not get in touch with authorities of the issuing State to discuss the withdrawal of the EAW. This is neither possible nor foreseen, the grounds for refusal are listed”.

Judge, Spain.

"Los jueces no se ponen en contacto con las autoridades del Estado emisor para discutir la retirada de la ODE. Esto no es posible ni está previsto, los motivos de denegación están enumerados".

On the one hand, some practitioners do not consider that it is up to the executing judge to assess the proportionality of the EAW. In this regard, a judge notes that when authorities are called to execute an EAW, an assessment on proportionality can only be applied when precautionary measures are granted. When an EAW is executed –the practitioner continues– there is no assessment. The judge can only check if the offense is listed in the catalogue of Article 20.1LRM, if it is not, the double criminality and, where appropriate, the length of the sentence according to the LRM. Any other assessment of proportionality will not be adequate. If there is no legal obstacle –for example, the person being sentenced to life imprisonment–, beyond the cases of refusal established in the law, the judge does not consider that they can assess.

Confirming that assertion, a lawyer points out that if the legal requirements are met the executing judge will not consider other aspects. Similarly, another lawyer claims never to have seen the Spanish authorities consider proportionality, having seen only the British authorities to consider proportionality.

On the other hand, a prosecutor considers that proportionality concerns are addressed in some cases. Particularly, proportionality related to double criminality is taken into account. The practitioner illustrates this by recalling a case in which a person was requested on a drug self-consumption offense –namely, possession of 20 grams of marijuana– which is not a crime in Spain. In that case, the minimum punitive threshold was met in the issuing State, but this was considered to raise proportionality concerns and Spain did not surrender the person. Some matters that are crimes in other countries are administrative offenses in Spain, so it is very difficult to agree to such surrenders. If there is no double criminality, but there is the minimum penalty, it is up to the Spanish authority to decide whether, despite the lack of double criminality, to surrender or not to surrender. And it is in these cases that surrender has been refused to some countries. For example, in Bulgaria, non-compliance with confinement during the pandemic constitutes a crime by decision of an administrative authority –not a crime of disobedience– and some people have been requested on this ground. Although these cases met the minimum punitive threshold, Spain has not surrendered them because, in addition, proportionality factors are taken into account. Outside this scenario, mutual recognition is a principle of mutual trust. Thus, the executing State cannot assess indications of criminality or evidence in another country, as it would jeopardize the system of mutual trust.

"Judges could contact the authorities of the issuing State to discuss the possibility of withdrawing the EAW, but this is not frequent. The truth is that the channels are not well established. It is not frequent because it requires a communication channel that is not sufficiently explored yet".

Judge, Spain.

"Los jueces podrían ponerse en contacto con las autoridades del Estado emisor para discutir la posibilidad de retirar la orden de detención europea, pero esto no es frecuente. La verdad

es que los canales no están bien establecidos. No es frecuente porque requiere un canal de comunicación que aún no está suficientemente explorado".

The difference in positions between those who believe that proportionality cannot be assessed when the State is executing an EAW and those who see a way to do so, has been explained by a judge: "There is currently a debate in this regard". In effect, the practitioner emphasizes that "some judges are more legalistic and defend mutual trust to the hilt and if a judge of a Member State requests the surrender of a person, they do so". Others follow a different criterion and believe that it must be examined whether the surrender is proportionate. This is a topic of current debate that equally touches extradition procedures. In fact –the judge points out–, a recent debate on this issue in an extradition case ended up with the person not being surrendered because in Spain the offense was not a crime but a mere administrative sanction.

In connection to this whole issue, a prosecutor has pointed out that, interestingly, the authorities have tried to contact the authorities of the issuing State to discuss the possibility of withdrawing the EAW or using other measures. Specifically, this communication has been attempted in cases where individuals were requested on the basis of a prison sentence for failure to pay a fine. These persons, once arrested, were willing to pay the fine as long as they did not go through the EAW procedure. Therefore, the Spanish authority contacted the issuing State to propose the withdrawal of the EAW, but they do not dare to do so without having the money deposited and, for that, the EAW is not valid. Another mechanism of mutual recognition different from the EAW would be needed. The Spanish judge cannot collect the money from this fine.

In fact, this attempt to communicate in order to try the withdrawal of an EAW or the proposal of alternative measures is rare, and some practitioners are not aware of this happening, although lawyers express their desire for this to occur. The issue does not seem simple. In this regard, one judge states not considering that this is possible or legally foreseen, another says that, although it can be done, "the truth is that the channels of communication are not well established" and that the Central Preliminary Examining Judges are overloaded with work with major cases.

Conditions of detention

It was previously stated that the LRM contains a general provision –Article 3– which clarifies that fundamental rights and fundamental legal principles must be respected in the context of EAW. In this regard, the considerations of fundamental rights by the executing judicial authority in the context of the conditions of detention in the issuing State have been raised.

"It is not up to the judge to investigate conditions of detention in other countries. It is the work of the monitoring bodies of the EU and the decisions of the CJEU, which determine what the judge must take into consideration".

Judge, Spain.

"No corresponde al juez investigar las condiciones de detención en otros países. Es el trabajo de los órganos de control de la UE y las decisiones del TJUE lo que determina lo que el juez debe tener en cuenta".

As has been emphasized by several practitioners, the EAW procedure is a mutual trust procedure. However, this does not mean that national executing judicial authorities do not consider the conditions of detention in the issuing State if they are in possession of evidence of a real risk of

inhuman or degrading treatment of individuals detained in that country. In this regard, a judge has pointed out that in principle, the conditions of detention are not investigated or questioned. Nevertheless, if the requested person's lawyer claims that there could be any inconvenience or risk for the detainee, the conditions of detention could be assessed. Otherwise, the authorities rely on a principle of mutual trust and on the assumption that the common standards are met. As explained by other judges, this is a requirement that is being introduced by the Court of Justice of the European Union (CJEU) and they follow the requirements of its case law.

On this topic, a prosecutor emphasizes that, if the lawyer claims the conditions of detention as a ground for refusing the surrender of the requested person, a generic allegation –which in any case would have to be supported by reports from international bodies or others– would not suffice, but the treatment must be applicable to the specific case of the requested person. Even in this case, surrender will not necessarily be refused if it can be executed along with a series of guarantees and conditions that will be subsequently monitored to ensure compliance. For example, it may be required that the person does not go to a certain prison where there have been complaints of this nature.

"I think that if there are any circumstances that need to be asserted because the conditions of detention are not the most appropriate in the issuing country, it is a matter for the lawyer to raise".

Lawyer, Spain.

"Creo que si hay alguna circunstancia que deba hacerse valer porque las condiciones de detención no son las más adecuadas en el país emisor, es una cuestión que debe plantear el abogado".

A lawyer explains that this issue is exceptionally raised in EAW proceedings, and sometimes in extradition proceedings. In an EAW case with Romania, the requested person's lawyer raised the conditions of detention as a ground for refusal of surrender, but they were rejected. The lawyer considers it difficult for such cases to succeed in the EU area. Other lawyer notes that the EAW operates in countries that are reasonably harmonized and therefore the basic conditions, such as the conditions of detention, should be standardized. Hence, if there is any circumstance to be asserted regarding detention conditions, it is a matter that has to be raised by the lawyer and with hard evidence. However, another practitioner stresses that there is a gap in the European Union because the legal systems are not the same, the quality of prisons is not homogeneous and a Spanish prison is not the same as a Bulgarian, Romanian or Polish one.

"It will be ascertained whether there is really a problem with the prison situation in the country through reports from international organizations. It will also be seen if the situation affects them in their specific case and, even so, there is no reason to refuse the surrender, since it can be subjected to guarantees".

Prosecutor, Spain.

"Se comprobará si realmente existe un problema con la situación penitenciaria en el país a través de los informes de los organismos internacionales. También se verá si la situación les afecta en su caso concreto y, aun así, no hay razón para rechazar la entrega, ya que puede ser objeto de garantías".

Indeed, the issue is not free from controversy as it takes place in EU countries. In this regard, a judge comments that this is one of the major debates and allegations made by lawyers against some

Member States, i.e. on the possible violation of fundamental rights due to the conditions of detention in the issuing State. In general terms, the requested person is surrendered because the problem usually comes when establishing the possible violation in their specific case.

On this subject, practitioners emphasize that when they need to check data on detention conditions, both judicial authorities and lawyers resort to information provided by international bodies, international courts or non-governmental organizations (NGO) through their reports or jurisprudence. The State does not have any data on this topic so practitioners resort to reliable institutions and supranational bodies. Thus, some refer to the European Court of Human Rights (ECtHR) and the case law of the CJEU, United Nations resolutions, internationally recognized NGOs reports or the FRA, although, with regard to the latter, many have not heard of its database on detention conditions.

Procedural rights of the requested person, rights to a fair trial and trials in absentia

The manner in which national authorities consider the procedural rights of the requested person in the issuing State when deciding on the execution of an EAW is a matter of interest.

It is generally understood that the issuing State is competent to assess its own procedural safeguards and procedural framework, except in the case of human rights violations. In effect, a judge points out that the countries of the European Union form a community guided by the rule of law in which national laws recognize fundamental rights. The countries are governed by the same international conventions and it is therefore possible to apply mutual recognition instruments. Similarly, a lawyer comments that the authorities do not consider procedural rights within the EU space. It is assumed that there is a mutual trust stemming from a certain homogeneity between legislations, which implies that there is a minimum standard of respect for the most essential rights and guarantees.

Notwithstanding the above, practitioners stress that if there is any problem related to a fair trial, the situation is assessed, or if the judgment was rendered *in absentia*. A judge notes that it is in the latter sense that most problems tend to occur and Spain makes an effort to guarantee access to an appeal or retrial and, in fact, there have been refusals to surrender on that ground. In this sense, a lawyer adds that the Spanish judges will pay attention if the defence claims that, for example, the conditions for a fair trial are not met. Nevertheless, the lawyer will have to provide evidence which can be difficult, specially, depending on which was the issuing State –for example, France or Italy– because it is understood that some countries are completely homologous to Spain. Far from being an empty concern, a judge illustrates this difficulty through a specific case involving an appeal alleging a violation of the right of defence in the issuing State in relation to a case in which there was a conviction. However, the documentation provided indicated that the person was assisted by a lawyer and, in these cases, the practitioner stresses that, due to the principle of mutual trust, the fact that the issuing judge indicates that a person was assisted by a lawyer and that one was appointed *ex officio* prevails.

In any event, the right to a fair trial by an independent tribunal has been considered. In particular, a prosecutor comments that this has been considered with Poland, where EAWs are not suspended but are examined on a case-by-case basis. A generic allegation about the potential violation of the right to a fair trial is not enough, but must also be proven in each case. For example, it would not be the same if Poland is requesting a person to be prosecuted for a crime of political corruption than for robbery. In fact, one lawyer has mentioned only having seen this issue arise because of the news about the possible lack of independence of judges in Poland. Related to this, a judge has commented

that although this is a problem that has been alleged in appeal, it is very difficult for the requested persons to prove it in their particular case, that is, to establish that in the court related to their case some member is not independent and, furthermore, that this could affect their particular situation.

In spite of all of the above, a judge reports having only had to consider trials conducted *in absentia*, "since in many European countries trials are conducted *in absentia* which would be inconceivable in Spain". In Spain it is not possible to try *in absentia* crimes with sentences of more than two years' imprisonment, while in other countries it is possible. The requirements that the authorities consider assessing the execution of an EAW on a conviction for a person tried *in absentia* are those established in the LRM. A judge explains that the requested persons must have known that they were going to be prosecuted, the date and place of the trial, have waived their right and have been represented by a lawyer in that trial, in order to be able to defend their interests. Practitioners pointed out that the key factor is whether or not the person had the opportunity to exercise their right of defence at the trial.

Nonetheless, it does not always appear to be a simple task. In this respect, a judge notes that sometimes the information contained in the form from other States is insufficient and it is not possible to know with certainty whether the requested person had received a summons and had actually been aware of the trial, or of the possible remedies. The majority of the cases in which authorities have had to request additional information are when EAW about judgments *in absentia* have had to be executed. If legal requirements were not met, the Spanish authority will request that a new trial be guaranteed or, at least, an appeal of the conviction to reassess the facts, and if it is guaranteed, the person will be surrendered. However, a lawyer emphasizes that in cases before Romania the person has been surrendered and, afterwards, that guarantee given by the issuing State was not upheld.

The individual situation of a requested person

It has been noted that it is common for the lawyer of the requested person to make allegations about their personal situation –whether they have a family, children or dependent family members– to be taken into account by the judge when deciding on their situation of liberty until the surrender is resolved. A lawyer has stated that the individual situation is taken into account in relation to the personal status, i.e. imprisonment or release until surrender. But in terms of deciding to execute or not to execute the EAW, the individual situation is not considered. In this sense, a judge notes that this personal situation is taken into account when executing the EAW and, although these are not grounds to refuse the surrender, it could be suspended or a way could be found to adapt to the person's circumstances. A prosecutor points out that the family situation, for example, would be taken into account to demonstrate that the requested person has ties in Spain and that the sentence would be served here, but not to deny the surrender. The same is true if the person is a Spanish national.

The LRM establish that, exceptionally, the judicial authority may provisionally suspend the surrender for serious humanitarian reasons, but the surrender shall be carried out as soon as such reasons cease to exist. In this regard, a judge points out that, indeed, if there are humanitarian reasons, the EAW can be suspended. However, the practitioner comments that when it is a permanent situation it is more difficult to suspend the surrender, since the legislator was thinking of suspending the surrender with a view to have it executed as soon as the obstacle that makes the execution of the EAW impossible or disproportionate disappears. Similarly a prosecutor maintains that personal

situation may result in suspensions on humanitarian grounds –emphasizing health grounds. For example, if a person is nine months pregnant the surrender would not take place at that time or if the person has major mobility problems, the surrender will not take place.

Despite this, a lawyer states that, in practice, there would be a problem of evidence before the judge to establish this exceptional humanitarian situation since the EAW is coming from a judge of the European Union. On this, another lawyer comments that if there is not a very active defence by the requested person’s lawyer this is not going to be decisive on the EAW. In a similar fashion, a judge noted not having seen any cases and pointed out the difficulty of proving such a situation at the EU level.

c. Discussion of findings

- Factors considered when issuing the EAW

Legal requirements and proportionality

It has been found that in practice the judge that issues an EAW takes into consideration the fulfilment of the legal requirements, its necessity and that it is requested by the Public Prosecutor’s Office.

However, on the application of the proportionality criterion to determine whether the issuance of the EAW is justified some challenges have been reported:

- Practitioners have reported that the EAWs are issued on the basis that the minimum severity and the legal requirements are met, without further consideration. Other requirements are not taken into account, nor are the personal or the working situation of the requested person.
- There is considered to be an abuse in the issuance of EAWs to the detriment of the European Investigation Orders.
- The EAWs are often issued without any prior attempt to summon the person or even issue an EIO in order to interrogate them by videoconference.

Challenging the issuing of the EAW

Although challenging the issuing of the EAW is possible, this issue goes hand in hand with the question of the effectiveness of the appointment of lawyer in the issuing State. Thus, it has been noted that difficulties to challenging the issuing may arise when the person was not in the proceedings from the beginning and they do not have a lawyer appointed in the issuing State.

- Factors considered when executing the EAW

Legal requirements and proportionality

The assessment in practice of an EAW that presents potential proportionality problems is not a peaceful issue in the executing State and it has been pointed out that there is currently a debate in this regard.

On the one hand, some practitioners do not consider that it is up to the executing judge to assess the proportionality of the EAW and that if the legal requirements are met the executing judge will not consider other aspects. On the other hand, it has been stressed that proportionality concerns are addressed related to the lack of double criminality. Particularly, some matters that are crimes in other countries are administrative offenses in Spain. In these cases it has been noted that surrender has been refused.

In addition, it has been reported that the authorities have attempted to contact the authorities of the issuing State to discuss the possibility of withdrawing the EAW or using other measures, specifically, in cases where the EAW was issued on the basis of a prison sentence for non-payment of a fine. Nevertheless, the EAW is not considered as a valid mechanism for making a payment, so the issuing country did not withdraw it.

However, this attempt to communicate in order to suggest the withdrawal of an EAW or the proposal of alternative measures does not seem to be common. Some practitioners are not aware of this occurring, or do not consider it possible or legally foreseen, or state that, although it can be done, the channels of communication are not well established and, moreover, the Central Preliminary Examining Judges are overloaded with work with major cases to do so.

Conditions of detention

By law, fundamental rights and fundamental legal principles must be respected in the context of EAW. In this field, the issue of the executing judicial authority taking into account the fundamental rights in the context of the conditions of detention in the issuing State is not free from controversy as it takes place in EU countries, and the EAW procedure is a mutual trust procedure. In relation to this topic it is found that:

- In principle, the conditions of detention are neither investigated nor questioned.
- If the lawyer claims that there could be a risk for that specific requested person, the conditions of detention could be assessed.
- Surrender will not necessarily be refused if it can be executed together with a series of safeguards.
- This is one of the more common allegations made by lawyers against some Member States, i.e. on the possible breach of fundamental rights due to the conditions of detention in the issuing State. However, the requested person is often surrendered because the problem usually comes in establishing the possible violation in their specific case.
- Practitioners find it is difficult for such cases to succeed in the EU area, even though the quality of prisons is not homogeneous.

Procedural rights of the requested person, rights to a fair trial and trials in absentia

In Spain, if a problem is alleged in relation to a fair trial or if the judgment was rendered *in absentia* the situation is assessed.

- The right to a fair trial by an independent tribunal is considered on a case-by-case basis. A generic allegation of a possible violation of the right to a fair trial is not sufficient, but must also be proven in each case.
However, this is a problem that is considered very difficult to prove in the particular case, that is, to establish that in the court dealing with the case some member is not independent and, furthermore, that this could affect the requested person's particular situation.
- In the event of trials conducted *in absentia*, Spain endeavours to guarantee access to an appeal or retrial in the issuing State and, in fact, there have been refusals to surrender on that ground.
Nonetheless, it has been reported that, in cases conducted *in absentia*, the person has been surrendered and, afterwards, that guarantee given by the issuing State has not been upheld. Moreover, it has been reported that sometimes the information contained in the EAW is insufficient and it is not possible to know with certainty whether the requested person had received a summons and had actually been aware of the trial, or of the possible remedies.

The individual situation of a requested person

The stances of practitioners are not always homogeneous in this field.

Some have noted that the individual situation is taken into account in relation to the personal status, i.e. imprisonment or release until surrender, but not for deciding on the execution of the EAW. Furthermore, the personal situation would be considered to demonstrate that the requested person has ties in Spain and that the sentence would be served here, but not to deny the surrender. The same is true if the person is a Spanish national.

Conversely, others stress that the personal situation is taken into account when executing the EAW and, although these are not grounds to refuse the surrender, it could be suspended or a way could be found to adapt to the person's circumstances.

Similarly, if there are humanitarian grounds – emphasizing health grounds – the EAW can be suspended. However, it is stated that when it is a permanent situation the issue is more complex since the legislator intended to suspend the surrender with a view to its execution as soon as the obstacle disappears.

In this respect, it is added that in practice:

- There would be a problem of evidence before the judge to establish this exceptional humanitarian situation since the EAW is coming from the European Union.
- The recognition of these circumstances will require a very active defence by the lawyer.

5. Use of digital and technological tools in EAW proceedings

a. Legal overview

Some provisions of the LRM refer to the use of digital tools in EAW procedures. Specifically, with respect to the practice of communications, the law establishes that the Spanish judicial authorities will admit the sending of documents by registered mail or by computer or digital means if the documents are electronically signed and allow their authenticity to be verified. Communications

made by fax will also be admitted and, subsequently, the original documentation will be required to be sent to the issuing judicial authority, the receipt of which will determine the start of the calculation of the time limits provided for in the law.

In addition, communications to the issuing authority by the Spanish judicial authority will be direct and may be made in Spanish by registered mail, reliable digital means or fax –Article 18 LRM. Likewise, the LRM establishes that the "right of the accused to be heard throughout the proceedings may be carried out through the application of instruments of international or European Union law that provide for the possibility of hearings by telephone or videoconference" –Article 22.3 LRM.

The LECRim also contains some relevant provisions that may be involved in EAW proceedings. Particularly, with respect to the assistance of an interpreter, the law establishes that such assistance may be provided by means of videoconferencing or other digital means, unless the Judge or the Prosecutor, *ex officio* or at the request of the interested party or their defence, agrees to the physical presence of the interpreter in order to safeguard the rights of the requested person –Article 123.5 LECrim. Likewise, with regard to the right to appoint a lawyer, in the event that, due to geographical distance, it is not immediately possible to obtain the assistance of a lawyer, the detainee will be provided with telephone or videoconference communication with the lawyer, unless such communication is impossible –Article 520.2 letter c).

Table 11 Use of technological tools (in law)

National laws providing for:	Conducting EAW hearings (when an executing state)	Facilitating the provision of interpretation	Remote examination of witnesses or the person arrested (when an issuing state).	Communication with involved foreign authorities (both executing – issuing states).	Facilitating transmission of documents (issuing - executing)	Facilitating access to a lawyer in the issuing Member State (when an executing state)	Facilitating access to a lawyer in the executing Member State (when an issuing state)
Country	YES/NO	YES/NO	YES/NO	YES/NO	YES/NO	YES/NO	YES/NO
Spain	YES	YES	NO	YES	YES	NO	NO

b. Interview findings

On the use of digital tools to appoint a lawyer

Practitioners agree that digital tools have not played a role in enabling access to information on the appointment of a lawyer in the issuing State. A prosecutor points out that, in practice, no digital tools are used to appoint a lawyer since the right to access to a lawyer in the issuing State is not

developed. The fact that digital tools exist helps to request complementary information on the EAW, but not with regard to the appointment of a lawyer or legal aid. A judge commented having had the experience of the United Kingdom, as the issuing State, sending by e-mail the contact details of the lawyer there so that the lawyer in Spain could establish contact in order to transmit information to each other. However, the practitioner admits that this is not frequent.

“The system of dual legal representation must be developed. It is a system foreseen in theory but the European legislator has not provided how to develop it in practice. The execution of the right is left in the hands of the requested person and, there, the system fails”.

Prosecutor, Spain.

"Hay que desarrollar el sistema de doble representación legal. Es un sistema previsto en teoría pero el legislador europeo no ha previsto cómo desarrollarlo en la práctica. La ejecución del derecho se deja en manos de la persona requerida y, ahí, el sistema falla".

Similarly, a lawyer stresses that there is no assistance in this regard or procedure and that digital tools have played no role in facilitating access to information about the appointment of lawyer in the issuing state, beyond the requested person's lawyer searching for one in a search engine. Likewise, no digital tools, such as internet access, are provided to the requested person to search for a lawyer. In Spain, the procedure is conducted as previously explained.

On the use of digital tools during the assistance of interpreters

It was previously explained that the interpreters normally assist in person when the requested person is at the National Court. However, exceptionally, if the person is in a remote location and there is not enough time to bring them, or if the person is serving a final sentence in a Spanish prison, the assistance of the interpreter is carried out by videoconference, from the National Court. In this regard, both judges and lawyers highlighted that, especially since the pandemic, videoconferencing is used. In any case, the general rule is that both the requested person and the interpreter will be at the National Court.

Likewise, in exceptional cases in which the requested person is not yet at the National Court, the interpreter may be present at the private meeting between the lawyer and the client through videoconference, providing the interpretation of the consultation.

Role played by digitalisation during the pandemic

In fact, practitioners point out that because of the pandemic, the fear of using digital tools was overcome and digitalization has speed up. For them, that period showed the benefits of digital tools in the court proceedings, such as the remote access, the use of digital signature and the possibility of conducting hearings by videoconference. In contrast, a lawyer notes that there has just been some increase in speed of access to the file, but not much more.

Views on the role of digitalization in EAW proceedings

"Digitalization should be used as an opportunity for more direct communication. It would be ideal to have an intermediary who can be contacted in case of doubt, instantly and directly without the need for excessive paperwork".

Prosecutor, Spain.

"La digitalización debería utilizarse como una oportunidad para una comunicación más directa. Sería ideal contar con un intermediario con el que se pueda contactar en caso de duda, de forma instantánea y directa, sin necesidad de excesivo papeleo".

According to practitioners, digitization in the EAW proceedings could speed up the procedures and there would be no need to depend on the authorities to send the relevant documents on paper. It would also simplify the process by making it easier for lawyers to access the file.

A judge highlights the extent to which the procedure is digitized by explaining that communication with the issuing authorities is always by e-mail, the file is digital, and the admission of documents is done by *Lexnet* –the digital notification system used in the Spanish Administration of Justice. However, another judge underlines that digitalization could facilitate a more complete access to data since, for example, "the forms are sometimes confusing or require additional information". The practitioner believes that it would be very positive if every country had compatible and agile systems to communicate with other EU States. Likewise, a prosecutor notes that digitalization should be used as an opportunity to establish a more direct communication. More specifically, a communication system should be established at the European level that allows immediate judicial communication to solve problems and doubts, and not depend on voluntarism, since there are no communication channels that work effectively with all countries. Finally, a judge wished to point out that, despite the fact that digital files are currently used in the appeal phase, there is still room for improvement in the digital systems that are already in place. Thus, the practitioner noted that the sound of the recordings of the hearings is not good and cannot be heard well at the appeal stage, and sometimes it is even worse when the interpreter and the requested person are not in the same place.

"I consider myself critical of the EAW because its use is abused. I could not point to anything beneficial because the EAW is too easily resorted to and we forget that the EIO exists".

Lawyer, Spain.

"Me considero crítico con la ODE porque se abusa de su uso. No podría señalar nada beneficioso porque se recurre a la ODE con demasiada facilidad y nos olvidamos de que existe la OEI".

The digitization of the EAW procedure is perceived as an advantage, with lawyers in particular pointing to the faster access to the file as a benefit. Nevertheless, some practitioners stress the importance of ensuring that fundamental rights are not compromised. For example, safeguards must be adopted in the area of data protection.

Although practitioners believe that digitization can facilitate the EAW procedure as indicated, they nevertheless emphasize that this will not lead to fewer EAWs being issued. Indeed, a practitioner has emphasized the fact that the EIO allows interested authorities to question defendants remotely rather than requesting their arrest with an EAW, and yet very little use is made of this mechanism.

The use of the EAW is generalised. In that sense, prosecutors and judges have commented that if authorities want to question a person remotely they have to issue the EIO and that, even without knowing the whereabouts of the person, an EIO can be issued requesting a preliminary inquiry into the person's whereabouts, rather than issuing an EAW. Nevertheless, some lawyers believe that digitalization will be essential to appear before the issuing judge, via videoconference, assisted by lawyers in both States.

Table 12 Use of digital tools, interview findings.

Interviewees per Country	Conducting EAW hearings (when an executing state)	Facilitating the provision of interpretation	Communication with involved foreign authorities (both executing – issuing states).	Facilitating transmission of documents (issuing - executing)	Facilitating access to a lawyer in the issuing Member State (when an executing state)	Facilitating access to a lawyer in the executing Member State (when an issuing state)
L 1	YES	YES	---	YES	NO	NO
J1	YES	YES	YES	YES	NO	NO
L2	YES	YES	---	YES	NO	NO
J2	YES	YES	YES	YES	NO	NO
L3	YES	YES	----	YES	NO	NO
J3	YES	YES	YES	YES	NO	NO
L4	YES	YES	---	YES	NO	NO
J4	YES	YES	---	YES	NO	NO
L5	YES	YES	---	YES	NO	NO
J5	YES	YES	---	YES	NO	NO
TOTAL	10/10	10/10	3/3	10/10	10/10	10/10

c. Discussion of findings

- *On the use of digital tools to appoint a lawyer*

In practice, digital tools are not used to appoint a lawyer, as the right of access to a lawyer in the issuing State is not developed, nor are digital tools used in respect of legal aid.

It has been noted that, as infrequent experience, the issuing State has sent by e-mail the contact details of a lawyer in that country.

Likewise, digital tools, such as internet access, are not provided to the requested person to search for a lawyer.

- *On the use of digital tools during the assistance of interpreters*

As established by law, exceptionally, if the person is in a remote location or serving a final sentence in a Spanish prison, the assistance of the interpreter is provided by videoconference, from the National Court.

Moreover, the interpreter may be present at the private meeting between the lawyer and the client via videoconference

- *Role played by digitalisation during the pandemic*

For some, that period showed the benefits of digital tools in the court proceedings, such as the remote access, the use of digital signatures and the possibility of conducting hearings by videoconference. For others, since then, there has been some increase in the speed of access to the file, but not much more.

- *Views on the role of digitalization in EAW proceedings*

Digital tools in EAW proceedings help to request complementary information on the EAW and it has been said that, currently, the communication with the issuing authorities is by e-mail, the file is digital, and the admission of documents is done through a digital platform –Lexnet. In addition, there is a system for recording the hearings, but it has been reported that it should be improved because the sound of the recordings of the hearings is not good and cannot be heard well in the case of an appeal is filed.

Particularly, it has been stressed that further digitization in the EAW proceedings could:

- Expedite proceedings as there would be no need to send the relevant documents on paper. It would also simplify the procedure by making it easier for lawyers to access the file.
- Facilitate a more complete access to data since, for example, the forms are sometimes confusing or require additional information.
- Be an opportunity to establish a compatible and agile communication system at the European level that allows immediate judicial communication to resolve problems and doubts, and not depend on voluntarism, since there are no communication channels that work effectively with all countries.

Nonetheless, although practitioners believe that digitization can facilitate the EAW procedure, they stress that this will not lead to fewer EAWs being issued. In this regard it has been emphasized that there is an overuse of the EAW to the detriment of other mechanisms that allow the interested authority to question defendants remotely, such as the EIO. Although some practitioners argue that digitalization will be essential to appear before the issuing judge, via videoconference, assisted by lawyers from both States.

CONCLUSION

Overall, the EAW has been described as a beneficial procedure to the extent that it is more agile and simple than the traditional extradition procedure. In this sense, practitioners have emphasized that the tool is on the right track.

However, the experience of practitioners familiar with this tool has shown that some aspects need to be implemented in order to ensure its full effectiveness, both from the perspective of the rights of the requested person during the process and from the point of view of establishing channels of cooperation between Member States of the European Union. From the practice of practitioners, the following conclusions can be drawn:

First.- In the realm of the **right to information on rights**, findings demonstrate that the law is implemented in practice as all practitioners agree that the legal requirements are observed.

As required by law, the requested person is informed of their rights as any other detainee –Article 520 LECrim– and of the particularities regarding EAWs –Article 50.3 LRM.

In some of the areas examined, there are practices to be highlighted and, in others, barriers to be overcome. Particularly:

- On information regarding the role of consent and the principle of specialty

The legal standards on information regarding the role of consent and the specialty rule are respected in practice. As required by law, judges verify that consent to surrender has been given in a free and informed manner.

In this field, **there is a practice that consists in that when the person shows signs of hesitation, the judge assumes that the requested persons are not giving their consent and they are not renouncing to the specialty rule.**

Moreover, in practice, prior to the hearing, lawyers explain privately to the requested person the implications of consent to surrender and the principle of specialty.

However, despite the fact that the legal standards on the verification of the understanding of the information are met, since judges do verify it, there seem to be some barriers in practice for the information to be fully understood or its consequences to be comprehended.

According to the practitioners **the main barriers in Spain are: 1. The inconsistent quality of the interpretations; 2. The rapidity of the procedure; 3. The difficulty for the requested person to understand the consequences of the choices made in the EAW procedure in the subsequent procedure in the issuing State.**

It has also been highlighted that an additional **challenge has been identified. Namely, there have been cases where, although the requested person had not waived the specialty principle, once in the issuing State, they have been investigated in a new proceeding and, in these cases, there is no mechanism against this abuse.**

- On the right of the requested person to have access to the EAW

This right is understood to be included in the right of any detained person to access the elements of the proceedings which are essential to challenge the legality of the detention or deprivation of liberty –Art. 520.2.d).

The practitioners have generally stated that **there is a practice whereby the police, although they only have the obligation to inform about the rights of Art. 520 LECrim, allow the lawyer of the requested person to have access to the SIS form.**

In court, the requested person has access to the SIS form through their lawyer and the judge also informs them of its contents. However, **obstacles have been identified in this regard by pointing out that the initial content of the EAW, the information of the SIS form, is clearly insufficient. The information is brief and concise and more nuances and details would be necessary for a complete understanding on the facts.**

Second.- In the field of the **right to interpretation and translation** there is consensus among practitioners that, in practice, requested persons under an EAW are provided with interpretation and translation where needed.

- On interpretation
 - An interpreter is provided from the moment the requested person is arrested and no limit to this right has ever been perceived.
 - When an interpreter is requested, one is provided, either for a statement or for a reading of documents.
 - The need for an interpreter is first assessed by the police and then by the judge and, even if the requested persons understand Spanish, one will be provided in their language.
 - Interpretation is always facilitated when the person is not Spanish.
 - The interpreters are at the National Court and they provide their service in person when the requested person is there.
 - Exceptionally, when it is not possible to bring the requested person to the National Court, the interpreter's assistance is provided by videoconference.

However, some practitioners have stressed that the quality of the interpretation service is sometimes uneven and that more specialized interpreters are required. In particular, inconsistencies have been highlighted when the offense is complex and therefore more difficult to explain, and when the language to be interpreted is different from English and French. In such cases, it has been observed that it is sometimes difficult to argue that an interpretation is not of high quality when the interpreter is certified and authorized.

- On translation of documents

In accordance with legal regulations, practitioners have emphasized that the information included in the documents of the EAW procedure is provided to the requested person in a language that they understand, either through translation or interpretation. Specifically:

- The EAW is normally provided in the language of the issuing State. If the requested person does not understand that language, an effort is made to provide a translation as soon as possible.
- When the court clerk reads the rights to the requested person, an interpreter interprets them and then the same happens with the content of the EAW.
- **The content of the file is not translated, it is in Spanish, except for the documents considered essential.**

On the latter matter, it has been highlighted the experience of not seeing these essential documents translated, but rather interpreted –although this possibility is envisaged by law.

Likewise, a practitioner has expressed disagreement with the fact that –although contemplated by law– it is up to the judge to decide whether a document has to be qualified as essential to be translated in cases where the defence needs a document that the latter considers essential to be translated, being the filing of an appeal the alternative to the refusal.

- Interpretation of consultations with lawyers

Lawyers have the possibility to request interpretation of consultations with their client by an interpreter appointed by the State.

In the consultation which takes place in the courthouse cells, an interpreter is provided so that lawyer and client can communicate privately.

In general, practitioners reported using private interpreters outside the court context, and doubts were expressed about how to use the interpretation service when the requested person is transferred to the penitentiary centre.

Third.- Different areas of **the right to access to a lawyer** show established practices and challenges to overcome.

- Access to legal assistance in Spain as an executing State

In Spain, the requested persons are informed of their right to appoint a lawyer in this State. The process through which the requested person can choose and get in touch with a lawyer is systematized and it is the same that is followed with any person arrested for a crime in Spain. The Spanish authorities –police or court– together with the Bar Association will facilitate the appointment of a lawyer, of their choice or an appointed *ex officio* lawyer.

The authorities will not provide the person with a list of lawyers or with access to a phone or internet to contact lawyers. Practitioners have indicated that under no circumstances can the arrested person be provided with a list of lawyers.

On the right to legal assistance, it has been suggested that:

- Improvements could be made at the stage when the requested person is at the police headquarters facilitating greater access to their lawyer.
- It would be desirable that among the lawyers of the duty rota of the National Court there were lawyers specialized in EAW matters.
- One of the main challenges relating to legal representation in EAW cases is the speed of the proceedings. The procedure is intended to be so agile that sometimes it is too fast for lawyers to gather the relevant documentation or evidence.
- The fact that the procedure is sometimes oversimplified is a challenge for legal representation. A practitioner commented that perhaps more information would be necessary because with the data that is transmitted it is sometimes difficult to identify those circumstances that could lead to the denial of the EAW.
- The EAW procedure should be limited to truly serious crimes.

- **There is a lack of flexibility of the EAW, as it cannot be withdrawn. For example, in those cases where the EAW has been issued on the basis of a fine and where the requested person is willing to pay the fine.**

- Information on the right to dual legal representation

The law specifically regulating the EAW procedure in Spain provides that the requested person must be informed of their right to appoint a lawyer in the issuing State.

However, **in practice, the views of practitioners on whether this information is provided are not aligned.** It has been reported that informing on the right to dual legal representation does not seem to have been regarded as a standard until recently, resulting in this information not always being provided, leading to the filing of appeals.

A reason for the lack of homogeneity of opinions on this issue could be that the fulfilment of this right is not foreseen in Spain.

- The fulfilment of the right to access to a lawyer in the issuing State

In Spain, **the requested person must be informed of their right to appoint a lawyer in the issuing State and if they wish to exercise that right, the executing court contacts the issuing court for the latter to communicate the name of a lawyer in the issuing State. This process may not result in the issuing State appointing a lawyer.**

Likewise, **no list of lawyers exists from which a lawyer can be contacted.**

Consequently, **in practice, it is found that the requested person has a right to appoint a lawyer in the issuing country, but the effectiveness of this right corresponds to the person. There is no mechanism for the person to appoint a lawyer in the other country if they do not know one.**

A practitioner points out that **this right is not properly regulated at the European level, as it is not established how to facilitate dual legal representation or how to develop such a list of lawyers. This also applies to legal aid, which is provided by the issuing State according to its domestic legislation.**

- Remedies available and the right to dual legal representation

In Spain the law foresees remedies available when a requested person is not informed about their right to dual legal representation. Proceedings can be declared null and void due to the lack of information to the requested persons of their right to appoint a lawyer in the issuing State.

However, consistent with the aforementioned, this right only includes the fact of being informed of having the right to access to a lawyer in the country that issued the EAW. Currently, the breach of this right does not include the actual appointment or non-appointment of a lawyer by the issuing State.

A practitioner has pointed out that **European legislation does not provide for a mechanism in the event that the issuing State fails to appoint a lawyer.**

- Assistance provided by lawyers in the issuing State

Practice shows that, at present, **the role of the assistance provided by lawyers in the issuing State is not consistent.** Some practitioners indicate that in Spain the lawyer in the issuing State does not

provide any assistance. However, practitioners emphasize the importance of developing this collaboration.

In Spain, **there is no mechanism in place that allows the requested person to practically choose and get in contact with a lawyer in the issuing Member State. The contact details of available lawyers are not provided, nor are access to a telephone or internet for this purpose.** It is understood that the communication between the lawyers of both countries is initiated by one of the lawyers.

Fourth.- Different aspects related to **the issuing and the execution of the EAW** reveal existing practices and challenges to overcome.

- When issuing the EAW
 - *On the consideration of legal requirements and proportionality*

It has been found that in practice the judge that issues an EAW takes into consideration the fulfilment of the legal requirements, its necessity and that it is requested by the Public Prosecutor's Office. However, **on the application of the proportionality criterion to determine whether the issuance of the EAW is justified some challenges have been reported:**

- **Practitioners have reported that the EAWs are issued on the basis that the minimum severity and the legal requirements are met, without further consideration. Other requirements are not taken into account, nor are the personal or the working situation of the requested person.**
- **There is considered to be an abuse in the issuance of EAWs to the detriment of the European Investigation Orders.**
- **The EAWs are often issued without any prior attempt to summon the person or even issue an EIO in order to interrogate them by videoconference.**

- *On the possibility of challenging the issuing of the EAW*

Although **challenging the issuing of the EAW is possible, this issue goes hand in hand with the question of the effectiveness of the appointment of a lawyer in the issuing State. Thus, it has been noted that difficulties to challenging the issuing may arise when the person was not in the proceedings from the beginning and they do not have a lawyer appointed in the issuing State.**

- When executing the EAW
 - *On the consideration of legal requirements and proportionality*

The **assessment in practice of an EAW that presents potential proportionality problems** is not a peaceful issue in the executing State and it has been pointed out that **there is currently a debate in this regard.**

On the one hand, some practitioners do not consider that it is up to the executing judge to assess the proportionality of the EAW and that if the legal requirements are met the executing judge will not consider other aspects. **On the other hand, it has been stressed that proportionality concerns are addressed related to the lack of double criminality. Particularly, some matters that are crimes**

in other countries are administrative offenses in Spain. In these cases it has been noted that surrender has been refused.

In addition, **it has been reported that the authorities have attempted to contact the authorities of the issuing State to discuss the possibility of withdrawing the EAW or using other measures,** specifically, in cases where the EAW was issued on the basis of a prison sentence for non-payment of a fine. Nevertheless, the EAW is not considered as a valid mechanism for making a payment, so the issuing country did not withdraw it.

However, **this attempt to communicate in order to suggest the withdrawal of an EAW or the proposal of alternative measures does not seem to be common. Some practitioners are not aware of this occurring, or do not consider it possible or legally foreseen, or state that, although it can be done, the channels of communication are not well established and, moreover, the Central Preliminary Examining Judges are overloaded with work with major cases to do so.**

○ *On the assessment of the conditions of detention*

By law, fundamental rights and fundamental legal principles must be respected in the context of EAW. In this field, the issue of the executing judicial authority taking into account the fundamental rights in the context of the conditions of detention in the issuing State is **not free from controversy as it takes place in EU countries,** and the EAW procedure is a mutual trust procedure. On this topic it is found that:

- **In principle, the conditions of detention are neither investigated nor questioned.**
- **If the lawyer claims that there could be a risk for that specific requested person, the conditions of detention could be assessed.**
- **Surrender will not necessarily be refused if it can be executed together with safeguards.**
- **This is one of the more common allegations made by lawyers against some Member States, i.e. on the possible breach of fundamental rights due to the conditions of detention in the issuing State. However, the requested person is often surrendered because the problem usually comes in establishing the possible violation in their specific case.**
- **Practitioners find it is difficult for such cases to succeed in the EU area, even though the quality of prisons is not homogeneous.**

○ *On the procedural rights of the requested person, rights to a fair trial and trials in absentia*

In Spain, if a problem is alleged in relation to a fair trial or if the judgment was rendered *in absentia* the situation is assessed.

- The **right to a fair trial by an independent tribunal** is considered on a case-by-case basis. A generic allegation of a possible violation of the right to a fair trial is not sufficient. However, **this is a problem that is considered very difficult to prove in the particular case, that is, to establish that in the court dealing with the case some member is not independent and, furthermore, that this could affect the requested person particular situation.**
- In the event of **trials conducted in absentia,** Spain endeavours to guarantee access to an appeal or retrial in the issuing State and, in fact, there have been refusals to surrender on

that ground. Nonetheless, it has been reported that, **in cases conducted *in absentia*, the person has been surrendered and, afterwards, that guarantee given by the issuing State has not been upheld.** Moreover, it has been reported that **sometimes the information contained in the EAW is insufficient** and it is not possible to know with certainty whether the requested person had received a summons and had actually been aware of the trial, or of the possible remedies.

- *On the consideration of the individual situation of a requested person*

The stances of practitioners are not always homogeneous in this field.

Some have noted that the **individual situation is taken into account in relation to the personal status, i.e. imprisonment or release until surrender, but not for deciding on the execution of the EAW.** Furthermore, the personal situation would be considered to demonstrate that **the requested person has ties in Spain and that the sentence would be served here, but not to deny the surrender.** The same is true if the person is a Spanish national.

Conversely, others stress that **the personal situation is taken into account** when executing the EAW and, although these are not grounds to refuse the surrender, **it could be suspended or a way could be found to adapt to the person's circumstances.**

Similarly, **if there are humanitarian grounds** –emphasizing health grounds–, the EAW **can be suspended.** However, it is stated that **when it is a permanent situation the issue is more complex since the legislator intended to suspend the surrender with a view to its execution as soon as the obstacle disappears.** In this respect, it is added that **in practice:**

- There would be a **problem of evidence before the judge to establish this exceptional humanitarian situation since the EAW is coming from the European Union.**
- The recognition of these circumstances will require a **very active defence by the lawyer.**

Fifth.- Some aspects related to **the use of digital and technological tools in EAW** have been highlighted and are worth mentioning.

- On the use of digital tools to appoint a lawyer

In practice, **digital tools are not used to appoint a lawyer, as the right of access to a lawyer in the issuing State is not developed, nor are digital tools used in respect of legal aid.**

It has been noted that, **as an infrequent experience, the issuing State has sent by e-mail the contact details of a lawyer in that country.**

Likewise, **digital tools, such as internet access, are not provided to the requested person to search for a lawyer.**

- On the use of digital tools during the assistance of interpreters

As established by law, **exceptionally,** if the person is in a remote location or serving a final sentence in a Spanish prison, **the assistance of the interpreter is provided by videoconference,** from the National Court.

Moreover, the interpreter may be present at the private meeting between the lawyer and the client via videoconference

- About the role played by digitalisation during the pandemic

For some, that period showed the benefits of digital tools in the court proceedings, such as the remote access, the use of digital signatures and the possibility of conducting hearings by videoconference. For others, since then, there has been some increase in the speed of access to the file, but not much more.

- Views on the role of digitalization in EAW proceedings

Digital tools in EAW proceedings help to request complementary information on the EAW and it has been said that, currently, the communication with the issuing authorities is by e-mail, the file is digital, and the admission of documents is done through a digital platform –Lexnet. In addition, there is a **system for recording the hearings**, but it has been reported that it **should be improved because the sound of the recordings of the hearings is not good** and cannot be heard well in the case of an appeal is filed.

Particularly, it has been stressed that **further digitization in the EAW proceedings could:**

- **Expedite proceedings** as there would be no need to send the relevant documents on paper. It would also simplify the procedure by **making it easier for lawyers to access the file**.
- Facilitate a **more complete access to data since, for example, the forms are sometimes confusing or require additional information**.
- Be an **opportunity to establish a compatible and agile communication system at the European level** that allows immediate judicial communication to resolve problems and doubts, and not depend on voluntarism, **since there are no communication channels that work effectively with all countries**.

Nonetheless, although practitioners believe that digitization can facilitate the EAW procedure, they stress that **this will not lead to fewer EAWs being issued**. In this regard it has been emphasized that **there is an overuse of the EAW to the detriment of other mechanisms that allow the interested authority to question defendants remotely, such as the EIO**. Although **some practitioners argue that digitalization will be essential to appear before the issuing judge, via videoconference**, assisted by lawyers from both States.

List of abbreviations

Art.	Article
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
EIO	European Investigation Order
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
LECrIm	Criminal Procedure Act
LOPJ	Organic Law 6/1985, of July 1, 1985, of the Judiciary
LRM	Organic Law 23/2014 on the mutual recognition of criminal decisions in the European Union
NGO	Non-governmental organization
SIS	Schengen Information System