

Social Fieldwork Research (FRANET)

European Arrest Warrant proceedings –
safeguards for requested persons

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EXECUTIVE SUMMARY

This report is based on the results of nine semi-structured interviews with judges, public prosecutors, and lawyers, as well as desk research. The interviewees made a positive overall assessment of the legal framework that safeguards the rights of requested persons in European Arrest Warrants proceedings. Nonetheless, interviewees also pointed out some discrepancies between the legal framework foreseen and the practice. These discrepancies undermine the full safeguarding of the rights of the requested person in EAW proceedings, and consequently, hinder the position of the requested persons.

Right to information

Regarding the right to information, according to the interviewees, in general, the requested persons are provided with information regarding their rights and the EAW contents. However, despite the legal requirements regarding the requested persons' right to be informed about their rights and the contents of the EAW, there are some divergences between law and practice, especially in matters regarding written documents. Additionally, the information provided is complex, which can lead to requested persons not understanding their rights. This has an impact on the right to information of the requested persons because it directly affects their understanding of the information provided.

Right to interpretation and translation

The interviewees recognise that the right to interpretation and translation is always guaranteed, when needed or requested. Depending on their nationality and fluency in Portuguese, requested persons are assisted with an interpreter on EAW proceedings. However, according to two lawyers and a public prosecutor interviewed here are challenges concerning the quality of the interpretation and translation provided, mainly because the interpreters and translators do not need to have judicial training. Additionally, although the law foresees the possibility of two interpreters - one for the hearing, other for the consultations with the lawyer - one interviewee explained that the judicial authorities are not receptive to this situation since it is something that takes time and costs money.

Right to access to a lawyer

The interviewees acknowledged that requested persons are informed about their right to a lawyer and the system of legal aid. However, the opinions were diverse on issues of dual representation. These discrepancies can be explained by the lack of a legal provision on the possibility of requested persons being assisted by a lawyer in both countries. Another issued raised was the fact that the state-appointed lawyer is randomly chosen, and they may or may not have EAW experience. Regarding the right to consult with a lawyer, none of the interviewees identified any obstacle.

Issuing and execution of the EAW – factors considered

The positions of the interviewees about the factors considered when issuing and executing an EAW were varied, especially regarding the proportionality. According to two lawyers and two public prosecutors interviewed, the EAW is issued with the purpose to arrest a person, in the sense that it is only for those situations in which a coercive measure of pre-trial detention can be applied and there is the likelihood that it will be applied. If the request for pre-trial detention cannot be sustained, the EAW should not be issued. When it comes to executing proceedings, the national executing authorities consider the principle of mutual trust. However, when it comes to if

proportionality issues were raised, the majority of interviewees didn't know or answered that they never had a case where such issue was raised. A lawyer even stated that assessing the proportionality of an EAW isn't a competence of the executing authorities. If the crime is foreseen in the Portuguese legislation and in the legislation of the issuing state, the issue of proportionality may not even be considered due to the principle of mutual trust.

INTRODUCTION

The fieldwork research, consisting of interviews with lawyers, judges and public prosecutors, achieved the objective of providing evidence-based analysis on the practical application of the safeguards for requested persons in EAW proceedings. The interviewees were selected according to their profile and practical experience. This fieldwork research benefited from the collaboration of all interviewees, both in scheduling the interviews and answering the questions according to their perspectives and professional experience.

In total, nine interviews were carried out within the timeframe of 13 April to 8 July 2022. According to the research guidelines, eight interviews were expected to be conducted. However, the research team proposed conducting an additional interview to ensure the diversity of prosecutors' practical experience of EAW cases.

The first two interviews were carried out via electronic means of communication. These interviews were essential to understanding the application of the interview script in practice, according to the views and experiences of the interviewees (a lawyer and a judge). The remaining interviews were conducted online and in person, depending on the availability of the interviewees. Seven interviews were carried out online and two interviews were face-to-face. There were no difficulties in scheduling and conducting interviews since all interviewees were very willing to participate.

The nine interviews were as follows. As regards the group of lawyers, the team members had an explicit concern to interview lawyers with experience in EAW proceedings. Overall, four lawyers were interviewed (three online and one face-to-face interview). The selection of two judges was based on their experience in EAW proceedings, especially in the execution of the EAW. Both judges were interviewed via electronic means. Concerning the public prosecutors, the three interviewees have experience in criminal law, including EAW proceedings. The reason for conducting an additional interview within this professional group was that according to the legal framework, the competent authorities for issuing and execution of the EAW are different. The public prosecutors who work at DIAP (Department for Criminal Investigation) and DCIAP (Central Department for Criminal Investigation) are competent and have experience in issuing and the prosecutors at the courts of appeal have experience in execution of the EAW. Thus, two public prosecutors interviewed have extended experience in matters related to the execution of the EAW, and one has experience regarding the issuing of the EAW. Two interviews with public prosecutors were conducted online and one was face-to-face.

○ PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

● *Preparation of fieldwork*

The collaboration of the Permanent Observatory for Justice of the Centre for Social Studies (OPJ/CES) with judicial authorities and lawyers, as well as the involvement of all team members from the beginning of the project, contributed to the preparation and implementation of the fieldwork research. First of all, the team members who had conducted interviews actively participated in the translations of the interview reporting templates, in accordance with the national legal framework and relevant concepts of the Portuguese criminal law. After the FRA had approved the translation of the interview reporting templates, there was a team meeting to guarantee that everyone was fully attuned about how to proceed and what was intended with each question. Then, the first two interviews were conducted by a team member with relevant experience in conducting interviews

with judicial authorities. After the first two interviews, there was a team meeting to share the result of those interviews, particularly with regard to the approach and the dynamics of the interviews (duration, order of questions, reaction of the interviewees, etc.). This procedure was very productive, and it made it possible to anticipate some important aspects in conducting the interviews. As planned, the interview questions were not sent to the interviewees before the interview. All interviews were audio-recorded without setbacks, with the agreement of the interviewees, after being informed (prior to the interview) about the anonymity guarantee.

- *Identification and recruitment of participants*

The identification and selection of the interviewees was carried out according to the FRA’s guidelines and the approved profile, without difficulties. The main selection criterion was the practical experience of judges, public prosecutors, and lawyers concerning the application, in practice, of the safeguards provided to requested persons in EAW proceedings. The other selection criteria concerned the gender of the interviewees, and their geographical location. The selection, according to the profile approved by FRA, was made directly by the team, so that they were always in direct contact with each interviewee. After identifying and contacting the interviewees, they expressed their willingness to collaborate with this fieldwork research.

However, during the interviews with public prosecutors, the interviewees revealed a lack of knowledge regarding the questions of the interview reporting template on the execution of EAW, since they had experience only in issuing. This is because, according to the Portuguese legal framework, the competent authorities for issuing and execution of the EAW are different. Since interviews with two public prosecutors with experience in issuing were already conducted, it was suggested to the FRA that an additional interview with a public prosecutor working at a court of appeal with experience in the execution of the EAW should be conducted. This suggestion was accepted, and the interviewee was carried out.

In addition, it should be noted that the lawyers interviewed are lawyers whose experience in EAW cases stems from situations where they are lawyers appointed by the requested person and not state-appointed lawyers (free legal aid).

- **SAMPLE AND DESCRIPTION OF FIELDWORK**

Defence lawyers:

Requested: 4, completed: 4

Judges/prosecutors:

Requested: 5, completed: 5

Table 1: Sample professionals

Code	Group	Expertise in EAW cases	Gender
Lawyer/Portugal	Defence lawyer	Lawyer, from Lisbon practising throughout the country (since this is allowed by the Portuguese law). She has more than 10 years’ experience and has been a criminal defence lawyer in several high-	Female

		profile cases, including experience in representing requested persons with an EAW.	
Lawyer/Portugal	Defence lawyer	Lawyer, from Lisbon, practising throughout the country, with more than 10 years' experience. He is a criminal defence lawyer in high-profile cases, namely transnational and economic crimes, and has experience in representing requested persons with EAW.	Male
Lawyer/Portugal	Defence lawyer	Lawyer, from Lisbon, practising throughout the country. She has more than 15 years' experience in criminal law due to his competence in defending individuals and organisations that have been charged in criminal cases, including complex ones. With experience in representing requested persons with EAW.	Female
Lawyer/Portugal	Defence lawyer	Lawyer, from Porto, practising throughout the country, as a criminal defence lawyer in high profile cases. He has more than 10 years' experience, including representing requested persons with EAW.	Male
Judge/Portugal	Judge	Judge with more than 15 years' experience. She is currently performing at the Court of Appeal of Lisbon, with experience in EAW cases.	Female
Judge/Portugal	Judge	Judge with more than 15 years' experience. He is currently performing at the Court of Appeal of Porto, with experience in EAW cases.	Male
Public Prosecutor/Portugal	Prosecutor	Public Prosecutor, with more than 15 years' experience in criminal law. He is currently performing in the DIAP of Coimbra (Department for Criminal Investigation), with regional extended competence.	Male
Public Prosecutor/Portugal	Prosecutor	Public Prosecutor, with more than 15 years' experience in criminal law. He is working at DCIAP, in Lisbon (Central Department for Criminal Investigation), responsible for the investigation and prevention of violent and complex	Male

		crime.	
Public Prosecutor/Portugal	Prosecutor	Public Prosecutor, with more than 15 years' experience in criminal law. She is working at a Court of Appeal of Lisbon with experience in the execution of the EAW.	Female

The average length of the interviews was about 1 hour and 25 minutes (85 minutes), varying between the shortest interview lasting about one hour and the longest interview lasting almost 2 hours. The interviewers were able to achieve an appropriate level of trust with all interviewees, which was essential to obtain information about their experience and general knowledge about EAW proceedings. In general, the interviewees were clear on the differences between what is provided by the law and what happens in practice and identified some challenges but also good practices and recommendations on what can be done to further safeguard the rights of requested persons in EAW proceedings. For instance, one lawyer mentioned the advantages of digital tools and also suggested their use to create a mechanism for the appointment of a lawyer in cases of EAW to enable the right of dual representation.

○ DATA ANALYSIS

The results of the nine interviews were particularly illustrative and clear about the perceptions of the lawyers, judges, and prosecutors regarding the safeguards for requested persons in EAW proceedings.

The methodological approach used was qualitative content analysis. The purpose of this approach was to identify the common elements that emerged from the information collected during the interviews and carry out an in-depth analysis based on the interviewees' perceptions in order to detect similarities and differences relevant to understanding the practical implementation of the safeguards for requested persons. Thus, once the interviews were concluded, we transcribed all of them and prepared the interview reporting templates. The next step was to analyse their contents and discuss the results gathered which was performed according to the structure and contents of the country report template provided by FRA to find differences and common aspects among and within professional groups, etc. This approach was strategically followed to develop a critical understanding from the interviews, using various techniques for synthesising qualitative data into a structured thematic analysis.

Besides the interview analysis, desk research was also carried out through the methodological approach of qualitative content analysis. Thus, the following sections of this country report present an analysis that cross-references the results of the fieldwork and desk research.

○ BRIEF OVERVIEW OF THE REPORT'S CONTENTS

This report aims at exploring the safeguards for requested persons in EAW proceedings and is structured into five sections. Three of these five sections explore the rights considered more important in EAW proceedings: the right to information, the right to interpretation and translation, and the right to a lawyer. Furthermore, there is a section that explores the factors considering when issuing and executing an EAW, while the last section regards the use of digital and technological tools in EAW proceedings.

Overall, the interviewees made positive assessments regarding the safeguards provided to protect the rights of requested persons in EAW proceedings. However, some discrepancies were also noted, which shows gaps between the law and practice. Although requested persons are generally informed about their rights, this information can be complex and make it difficult to fully understand their rights and the consequences of consenting to their surrender. That is why the role of lawyers in EAW proceedings is very important. In EAW cases, lawyers have a role in informing requested persons, however, there is also a gap in the training and specialisation of lawyers in these matters, which can be seen as something that undermines the right to information of the requested person. Another gap between the law and the practice identified concerns the right to interpretation and translation. According to the interviewees, requested persons are assisted by an interpreter and have the right to be provided with translations. However, two lawyers and a public prosecutor interviewed mentioned that in some cases the quality of the interpretation and translation is not ensured, namely because some interpreters and translators do not have specialised training. Nevertheless, a good practice was identified in this regard: the statement of defendant's constitution (*constituição de arguido*) – a document that states the rights and duties of the defendant in criminal proceedings – is one of the documents usually translated to a language that the requested person understands, and criminal authorities even have copies of this document translated.

Another right about which the requested persons are informed is the right to legal representation and legal aid. However, the requested persons are not always informed about the right of dual representation. Another challenge is the fact that state-appointed lawyers are randomly chosen, and, therefore, they may not have a deep knowledge of EAW proceedings.

When it comes to the issuing and executing proceedings, the interviewees have different opinions regarding the consideration of the proportionality when issuing or executing an EAW. When executing EAW proceedings, the national executing authorities consider the principle of mutual trust. Another topic that did not meet with consensus among the interviewees is the consideration of the detention conditions in the issuing state when executing an EAW.

Lastly, regarding the use of digital and technological tools in EAW proceedings, it should be noted that there is some reluctance in using digital and technological tools, even when, generally, it was agreed that the use of such tools have major advantages.

RESEARCH FINDINGS

1. Right to information

a. Legal overview

As a preliminary remark, it should be noted that, in Portugal, the legal framework of the European Arrest Warrant (EAW) was approved, in compliance with Council Framework Decision 2002/584/JHA¹ of 13 June, through Law 65/2003², of 23 August (EAW Law). This law was subsequently amended by Law 35/2015³, of 4 May, and Law 115/2019⁴, of 12 September. Article 34 of the EAW Law provides that the Code of Criminal Procedure, approved by Decree-Law 78/87⁵, of 17 February (amended several times, most recently by Law 94/2021⁶, of 21 December), shall apply in a subsidiary manner to the execution of the EAW. In addition to this general reference to the Code of Criminal Procedure, the EAW Law has other specific references to the application of the Code of Criminal Procedure, especially when it comes to matters relating to the rights of detainees. This introductory clarification is important to better understand the references to the application of the Code of Criminal Procedure in EAW cases throughout the report.

Regarding the right to information, Article 17 of EAW Law (Law 65/2003, of 23 August)⁷, specifically refers to Articles 57 to 67 of the Code of Criminal Procedure⁸, rendering them applicable to EAW cases. This set of articles (entitled “The defendant and the defence lawyer”) includes provisions on various procedural rights, including the right to a lawyer and the right to information. Moreover, the

¹ [Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States](#), OJ 2002 L 190/1.

² Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003, which approves the legal framework of the European Arrest Warrant), 23 August 2003.

³ Portugal, [Lei n.º 35/2015, que estabelece a primeira alteração à Lei n.º 65/2003, de 23 de agosto, que aprova o regime jurídico do mandado de detenção europeu, em cumprimento da Decisão-Quadro 2009/299/JAI, do Conselho, de 26 de fevereiro de 2009, que reforça os direitos processuais das pessoas e promove a aplicação do princípio do reconhecimento mútuo no que se refere às decisões proferidas na ausência do arguido](#) (Law 35/2015, that establishes the first amendment to Law 65/2003, which approves the legal regime for the European Arrest Warrant, in compliance with Council Framework Decision 2009/299/JHA of 26 February 2009, that reinforces the procedural rights of individuals and applies the principle of mutual recognition with regard to decisions rendered *in absentia*), 4 May 2015.

⁴ Portugal, [Lei n.º 115/2019, que altera o regime jurídico do mandado de detenção europeu](#) (Law 115/2019, that amends the legal regime of the European Arrest Warrant), 12 September 2019.

⁵ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, approving the Code of Criminal Procedure), 17 February 1987.

⁶ Portugal, [Lei n.º 94/2021, que aprova medidas previstas na Estratégia Nacional Anticorrupção, alterando o Código Penal, o Código de Processo Penal e leis conexas](#) (Law 94/2021, which approves measures provided for in the National Anti-Corruption Strategy, amending the Criminal Code, the Code of Criminal Procedure and related laws), 21 de December 2021.

⁷ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003, which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁸ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, approving the Code of Criminal Procedure), 17 February 1987.

applicability of the Portuguese Constitution⁹ should also be noted, since its Article 27 (4) states that “Everyone who is deprived of their freedom must be immediately informed in an understandable manner of the reasons for their arrest or detention and of their rights”. This fundamental right is applicable, without distinction, in all criminal proceedings, including EAW proceedings. The duty to provide immediate and comprehensible information serves as a guarantee of the rights of defence (and, where appropriate, resistance), the prohibition of arbitrary arrest and detention¹⁰ and comprises two dimensions: knowing the reasons for your arrest and knowing your rights.

- Information about rights

As explained above, the Constitution imposes the right to information in all situations of arrest, as essential for the defendant to be able to exercise one of the guarantees of the criminal procedure (Article 32): the right of defence. Moreover, Articles 57 to 61 of the Code of Criminal Procedure¹¹ (applicable by virtue of Article 34 and Article 17 of the EAW Law) establish that the procedural rights and duties are communicated and explained to the defendant, such as: being present in acts that directly concern to them; being informed of the facts that are imputed to them before making a statement before any authority; appoint a lawyer or request a state-appointed lawyer; being assisted by a lawyer (state-appointed or not) in all procedural acts and consult with them; and being able to appeal decisions that are unfavourable.

Article 17 of the EAW Law¹² states that the requested person is informed, when arrested, about the existence and content of the European Arrest Warrant and the possibility of consenting to surrender to the issuing judicial authority (Article 17 (1)). In addition, the arrested persons have the right to be assisted by a defence lawyer (Article 17 (2)), which is also a way of safeguarding the effectiveness of the right to information. When the arrested persons don't know or speak the Portuguese language, an interpreter will be appointed, without any charge to them (Article 17 (3)).

Moreover, Article 18 (5) of the EAW Law states that the judge who conducts the hearing of the arrested person, informs them about the existence and content of the EAW, their right to oppose or consent to the execution of the warrant and the terms on which they may do so, and the possibility of renouncing the ‘speciality rule’.

The requested person, when arrested, shall be provided with a document stating their rights (Article 17(4) of the EAW Law). As explained above, these are the right to know the existence and content of the EAW, to consent or not to be surrendered to the issuing judicial authority, to be assisted by a lawyer, and, if they are not fluent in Portuguese, to have an interpreter appointed. The EAW Law does not specify the type of document, as it does not refer to the Letter of Rights in the execution of the EAW, provided for in Article 5 of Directive 2012/13/EU of the European Parliament and of the Council, of 22 May 2012, on the right to information in criminal proceedings¹³. Portugal has not

⁹ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

¹⁰ Canotilho, Gomes & Moreira, Vital (2007), *Constituição da República Portuguesa Anotada*, Vol. I, 4ª edição revista (*Annotated Portuguese Constitution, Vol. I, 4th revised edition*). Coimbra: Coimbra Editora, pp. 484.

¹¹ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

¹² Portugal, [Lei n.º 65/2003, aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹³ [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings](#), OJ 2012 L 142/1.

transposed this Directive, as it considers that the Code of Criminal Procedure guarantees clearly and sufficiently all the rights foreseen in the Directive and has informed the Commission thereof¹⁴. However, doctrine and jurisprudence consider that the rules provided for in the Directive have a direct effect (vertical effect) on the Portuguese legal framework and an interpretation must be made in accordance with national law, especially about conflicting rights. One example of this is the recent judgment of the Évora Court of Appeal 53/19.8 GACUB-B.E1, of 08 March 2022¹⁵.

The indicative model of the Letter of Rights for persons arrested on an EAW (provided for in Annex II of the Directive 2012/13/EU) does not exist in Portugal. However, Article 58 (5) of the Code of Criminal Procedure, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, states that a document must be provided with the identification of the case and the lawyer (if already appointed), as well as defendant's procedural rights and duties. The provision of such written information is established in the procedural practice of all judicial authorities. The information provided is similar to all defendants in criminal proceedings and has not been adapted to the EAW. However, neither the doctrine nor the Courts have questioned the inadequacy of such document. In practice, this document is considered a Letter of Rights. According to applicable law, a copy of the EAW must always be provided to the arrested person, by subsidiary application of the Code of Criminal Procedure (Article 258 (3)).

The mere indication of the legal provisions is not enough to fulfil the requirement of knowing the reasons for arrest, consider the detention legal and to allow the possibility to exercise the right of resistance or request *habeas corpus*¹⁶. As a result of this understanding, Article 61 (1) (c) of the Code of Criminal Procedure, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, determines that information on the facts charged must be provided prior to the person arrested making a statement before a judicial authority. According to the Courts, at the time of arrest, the reason must be explained to the person, including a minimum of facts and the legal norms that criminalise them. In this sense, the decision of the Court of Appeal of Lisbon 0041203, of 7 June 2000¹⁷, stated that the requirements with which arrest warrants should comply "(...) are not satisfied with the mere indication of the 'legal type of crime indicated" but should also "(...) contain a summary of the specific facts and circumstances justifying pre-trial detention".

- Information about the contents of the EAW

Article 17 of the EAW Law provides that the requested person shall be informed, when arrested, of "the existence and content of the European Arrest Warrant", among other information. Thus, the

¹⁴ Silva, Júlio Barbosa e (2017), "[A Directiva 2012/13/UE do Parlamento Europeu e do Conselho de 22 de Maio de 2012 relativa ao direito à informação em processo penal \(Perspectivas portuguesas\)](#)" (Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (Portuguese perspective)), *Julgar Online*; and Sousa, João Gomes de (2019), "[Interpretar, Traduzir e Informar: "incómodos" da modernidade?](#)" (Interpreting, Translating and Informing: "nuisances" of modernity?), *Julgar Online*.

¹⁵ Portugal, [Acórdão do Tribunal da Relação de Évora – Processo 53/19.8 GACUB-B.E1](#) (Decision of the Évora Court of Appeal – Case 53/19.8 GACUB-B.E1), 8 March 2022.

¹⁶ Silva, Germano Marques da (2002), *Curso de Processo Penal II (Criminal Procedure Course II)*, 3ª edição. Lisboa: Verbo, pp. 245.

¹⁷ Portugal, [Acórdão do Tribunal da Relação de Lisboa – Processo 0041203](#) (Decision of the Court of Appeal of Lisbon - Case 0041203), 7 June 2000.

effective implementation of the first dimension of the right to information (knowing the reasons for arrest) concerns the content of the EAW.

According to the EAW Law, the EAW must contain a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person (Article 3 (1) (e)). It aims to ensure that the requested persons understand what is at stake and that they can defend themselves, because without the necessary information, although presumed innocent, they face a “guessing game¹⁸”. Moreover, Article 3 (1) of EAW Law also states that the EAW must contain the following information: identity and nationality of the requested person; name, address, telephone, fax number and e-mail address of the issuing judicial authority; indication of the existence of an enforceable judgment, an arrest warrant or any other judicial decision; nature and legal classification of the offence; penalty imposed, if there is a final judgment, or the punishment provided for the offence under the law of the issuing Member State; if possible, the other consequences of the offence.

In this sense, the decision of the Supreme Court of Justice 07P4855, of 09 January 2008¹⁹, considers that “knowledge of the content of the EAW - specifically the description of the nature and legal classification of the offence, as well as the circumstances in which it was committed, including the time, place and degree of participation of the requested person – is also essential to enable the requested person to decide whether to renounce the benefit of the speciality rule and whether they wish or must consent to the execution of the arrest warrant or, on the contrary, oppose its execution”.

Nonetheless, the absence of the content and form requirements of the EAW, referred to in Article 3 of the EAW Law²⁰, is not among the grounds for mandatory or optional refusal, provided for, respectively, in Articles 11 and 12. The EAW Law also does not indicate what the consequences are if the EAW does not contain these requirements of form and content referred to in Article 3.

Despite this gap in the law, according to the jurisprudence, the lack of these requirements constitutes an irregularity that can be remedied under the terms of Article 123 of the Code of Criminal Procedure, applicable subsidiarily to the EAW by virtue of Article 34 of EAW Law²¹. Article 123 (2) of the Code of Criminal Procedure provides that “The repair of any irregularity may be ordered *ex officio* when it becomes known, when it may affect the value of the act performed”. This means that, in EAW cases, any insufficiencies regarding the content and form requirements could be remedied by requesting complementary information. This position is based on the idea of the requirement for the competent court in the execution State to have all the necessary information at the time of taking a decision.

¹⁸ Pinto, Inês Horta (2006), [O significado de informar "imediatamente e de forma compreensível" no art. 27º, n.º 4 da Constituição](#) (*The meaning of informing "immediately and in an understandable manner" in Article 27(4) of the Constitution*), Revista da Ordem dos Advogados, Vol. III.

¹⁹ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 07P4855](#) (Decision of the Supreme Court of Justice - Case 07P4855), 09 January 2008.

²⁰ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

²¹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

One example of this is the decision of the Supreme Court of Justice 750/13.1YRLSB.S1, of 9 August 2013²². In this case, the requested person appealed to the Supreme Court of Justice, against the decision of the Court of Appeal that had ordered the execution of the warrant. The appellant argued that there was in the case file a document issued by the Belgian Government stating that “persons sentenced to life imprisonment, enjoy the following rights, which they may invoke in their own request”. The appellant considered that this sentence was not properly translated, and was equivalent to a lack of translation, in view of the procedural importance of the declaration of the Belgian Government. The decision considered that the translation was null (Article 92 of the Code of Criminal Procedure, applicable subsidiarily to the EAW by virtue of Article 34 of the EAW Law). It was also considered that this nullity was extended to the decision, and therefore the decision was also null. The Supreme Court of Justice concluded, with regard to the nullity of the translation of the EAW, by application of Article 92 of the Code of Criminal Procedure that, as has been previously understood by other courts, the absence of the content and form requirements of the EAW, referred to in Article 3 of the EAW Law, were not a cause for mandatory refusal or optional refusal, provided for, respectively, in Articles 11 and 12. According to the Supreme Court of Justice, the lack of those requirements constituted a remediable irregularity, in accordance with Article 123 of the Code of Criminal Procedure (applicable subsidiarily by virtue of Article 34 of the EAW Law), which, in this case, should be remedied.

The Court must deal with the duty to inform the detainee as to their rights, so that the requested person can ensure they have a right of defence, including allowing them to challenge the legality of the arrest or detention. According to the decision of the Supreme Court of Justice 06P3758, 4 October 2006²³, “(...) knowledge of the content of the warrant is a *conditio sine qua non* for the proper exercise of the right to defence, as laid down in Article 32 (1) of the Constitution²⁴. It is only by knowing the contents of the warrant that one can know, for example, if the offence has been amnestied (Article 11 (a) [of the EAW Law]), if the person has been definitively judged for the same facts and whether the sentence has been served in full, is being executed or can no longer be served (Article 11, (a)), [of the EAW Law] [...], to mention only the most significant cases”. Since this information was not provided to the arrested person, the decision considers that Articles 17 (1) and 18 (3) of the EAW Law had been violated and, in this way, the fundamental right of defence enshrined in Article 32 (1) of the Constitution and the correlative violation of Article 21. The conclusion was that, as this is a violation of a fundamental right, the nullity should always be considered irreparable, in the same way as provided for in Article 119 (d) of the Code of Criminal Procedure. And, although this rule refers to the “lack of investigation”, its application in this case concerns the lack of an [essential] act of the investigation – the lack of information – with the consequent absolute nullity of the “statement of hearing”.

- Information about the procedure

There are no specific rules to ensure that all information is provided to and understood by the requested person. However, there are several rules requiring that information is provided. Article 61 (1) (h) of the Code of Criminal Procedure (applicable to EAW by express reference of Article 17(4) of

²² Portugal, [Acórdão do Supremo Tribunal de Justiça - Processo 750/13.1YRLSB.S1](#) (Decision of the Supreme Court of Justice - Case 750/13.1YRLSB.S1), 9 August 2013.

²³ Portugal, [Acórdão do Supremo Tribunal de Justiça - Processo 06P3758](#) (Decision of the Supreme Court of Justice – Case 06P3758), 4 October 2006.

²⁴ Portugal, [Constituição da República Portuguesa \(Constitution of the Portuguese Republic\), 10 April 1976.](#)

the EAW Law) states that the duty to provide information on the rights granted shall be provided by the judicial authority or the criminal police who arrests the requested person. For specific conditions, the Code of Criminal Procedure, applicable to EAW proceedings by virtue of Article 34 of the EAW Law also imposes some specific obligations to strengthen this guarantee of information. Thus, if the arrested person is a minor, that information should also be made available by those entities to the holders of parental responsibilities, the legal representative or the person who has their guardianship or, if it is impossible to contact these persons, or when special circumstances based on their interest or the needs of the proceedings so require, and only while these circumstances persist, by another suitable person indicated by the minor and accepted by the competent judicial authority (Article 61 (3) of the Code of Criminal Procedure). If the person arrested is blind, with disabilities, illiterate, does not know Portuguese, is under 21 years of age, or if the issue of their lack of responsibility or reduced responsibility is raised, in addition to the right to be assisted by a lawyer (Article 17 (2) of the EAW Law), the Code of Criminal Procedure states that the assistance of a lawyer is mandatory in any procedural acts (Article 64 (1) (d) by reference to Article 17 (2) (d) of the EAW Law).

It is also important to consider Order 12786/2009, of 29 May²⁵, which approves the Regulation on the Conditions of Detention in the Facilities of the Criminal Police and in Places of Detention existing in the Courts and in the Services of the Public Prosecutor's Office. Article 3 provides that every person deprived of their liberty shall be informed immediately and comprehensibly of the reasons for their arrest and of their rights. It also establishes the duty to display in places of detention, in a clearly visible way, the rights of the arrested persons, and imposes the publication of this information in leaflets in several languages to be delivered to the arrested persons (Article 4). Additionally, Circular Letter 40/2011, of 14 June²⁶, of the Directorate-General for the Administration of Justice, of the Ministry of Justice, ordered the display of an information panel on the rights and duties of the arrested persons in a clearly visible manner in places of detention, and ordered this information to be made available in leaflets in Portuguese, English, French and Spanish.

- The renunciation of the 'speciality rule'

The 'speciality rule', set out in Article 7 (1) of the EAW Law²⁷, prevents a person surrendered on an EAW from being subjected to criminal proceedings, being sentenced, or deprived of liberty for an offence prior to surrender and different from the one that gave rise to it. However, the law admits some exceptions where Article 7 (1) does not apply:

²⁵ Portugal, [Despacho 12786/2009, que aprova o Regulamento das Condições de Detenção em Instalações da Polícia Judiciária e em Locais de Detenção Existentes nos Tribunais e em Serviços do Ministério Público](#) (Order 12786/2009, which approves the Regulation on the Conditions of Detention in the Facilities of the Criminal Police and in Places of Detention existing in the Courts and in Services of the Public Prosecutor's Office), 29 May 2009.

²⁶ Portugal, [Ofício Circular n.º 40/2011, relativo ao folheto e painel obrigatórios com informação sobre os direitos e deveres dos detidos nos tribunais com zonas de detenção](#) (Circular Letter 40 /2011, regarding the mandatory leaflet and panel with information on the rights and duties of detainees in courts with detention areas), 14 June 2011.

²⁷ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

- Tacit consent of the person: the person surrendered, having had the possibility to leave the territory of the issuing Member State, doesn't do so within a period of 45 days from the definitive extinction of their criminal responsibility or return (voluntarily) (Article 7 (2) a) of the EAW Law²⁸).
- Inapplicability of a custodial sentence: the offence is not punishable by a custodial sentence or security measure (Article 7 (2) (b) of the EAW Law²⁹).
- Insusceptibility of certain procedural measures [meaning that certain procedural measures have no legal basis to be applied]: the criminal procedure doesn't give rise to the application of a measure restricting individual freedom (Article 7 (2) (c) of the EAW Law³⁰).
- Application of non-detention sentence: the person surrendered is subjected to a non-custodial penalty or measure, namely a sanction likely to restrict their individual freedom (Article 7 (2) d) of the EAW Law³¹). The cases of Article 49 of the Penal Code³² (conversion of unpaid fine into subsidiary imprisonment) are covered.
- Renounce of the requested person, who consented to surrender, to the speciality rule before being surrendered in front of the executing judicial authority (Article 7 (2) e) of the EAW Law³³. In these cases, the consent to surrender and the renouncing to the "speciality rule" have to be done in a way which demonstrates that the requested person has expressed them voluntarily and in full awareness of its consequences. To ensure that the requested person is fully aware of the consequences of their decision, they have the right to be assisted by a lawyer (under the terms of Article 13 by reference to Article 27 (3) (e) of the Council Framework Decision 2002/584/JHA³⁴). Therefore, consenting to surrender does not automatically mean that the requested person has renounced to the speciality rule³⁵.
- Consent of the person after being surrendered: the person, after being surrendered, has expressly renounced the benefit of the specialty rule, a renunciation that, in this case, concerns certain

²⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

²⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

³⁰ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

³¹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

³² Portugal, [Decreto-Lei n.º 48/95, que aprova o Código Penal](#) (Decree-Law 48/95, which approves the Penal Code), 15 March 1995.

³³ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

³⁴ [Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States](#), OJ 2002 L 190/1.

³⁵ Article 7 (2) e) of the EAW Law states that: "The provisions of the previous number [speciality rule] do not apply when: the person, prior to delivery, has consented to and renounced the benefit of the specialty rule before the enforcement judicial authority.

unlawful acts committed before delivery and included therein or another or other existing judicial cases in Portugal (Article 7 (2) (f) of the EAW Law³⁶).

- Consent of the judicial authority: the executing judicial authority that issued the surrender decision consents to the surrender (Article 7 (2) (g) and (4) of the EAW Law³⁷). Furthermore, Article 7 (6) of the EAW Law also establishes that the request for consent must be submitted by the issuing Member State to the executing Member State and will have to contain the information mentioned in an EAW and a translation, under the terms of Article 3 of the EAW Law. It should be noted that, the request for the consent of the executing judicial authority, under these terms, presupposes the absence of consent of the requested person. Since one of the exceptions to the application of the 'speciality rule' is the existence of the consent of the executing judicial authority which issued the surrender decision, the following specific aspects of the law must be considered: if the executing Member State is Portugal, consent will be given by the Court of Appeal which issued the decision to surrender; it must be given whenever the offence at issue is one which permits surrender, by application of the legal framework of the EAW; it must be refused on the reasons provided for in Article 11 (Reasons for non-execution of the EAW) and may also be refused only on the reasons provided for in Articles 12 and 12-A (Reasons for optional non-execution of the EAW; Decisions rendered following a trial at which the requested person was not present); the guarantees referred to in Article 13 (2) must be given in respect of the situations provided for therein. Further, the law provides that the request for consent referred to in Article 7 (2) (g) shall be submitted by the issuing Member State to the executing Member State accompanied by the information referred to in Article 3 (1) and a translation in accordance with Article 3 (2). In this sense, according to jurisprudence, it can only be refused due to one of the reasons for mandatory or optional refusal foreseen in Articles 11, 12 and 12-A of the EAW Law. One example of this is the decision of the Supreme Court 144/13.9YRLSB.S1³⁸, stating that if none of these reasons exist, the Portuguese State, in fulfilment of the general obligation to comply with the EAW, has the duty to give consent.

Lastly, it should be noted that Portugal has not notified the Council of its intent to renounce the 'speciality rule' and stated at the time of implementation of the EAW Directive that it did not intend to make such a notification under Article 27(1)³⁹.

- Violations of the right to information: legal remedies

According to the Constitution, everyone has the right of access to the law and to the courts in order to defend their legally protected rights and interests (Article 20 (2) of the Portuguese Constitution⁴⁰). The right of access to the law and to effective judicial protection is a fundamental right and, therefore, related to the idea of the Rule of Law. It is, therefore, "a norm that recognises several

³⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

³⁷ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

³⁸ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 144/13.9YRLSB.S1](#) (Decision of the Supreme Court of Justice – Case 144/13.9YRLSB.S1), 22 January 2014.

³⁹ European Commission (2017), [Commission Notice - Handbook on how to issue and execute a European arrest warrant \(2017/C 335/01\)](#), 2017/C 335/01, Brussels, 6 October 2017.

⁴⁰ Portugal, [Constituição da República Portuguesa \(Constitution of the Portuguese Republic\)](#), 10 April 1976.

related rights”⁴¹. Whenever it is considered that the right of access to effective judicial protection has been restricted in any way, namely because the right to information has not been ensured in such a way as to harm the right to defence, the provisions of Article 32 (1) of the Constitution which states that “the criminal process ensures all guarantees of defence” are also being violated.

As mentioned above, knowledge of the content of the warrant is indispensable for an adequate exercise of the right of defence (Article 32 (1) of the Constitution⁴²). If the arrested person is not provided with information, Articles 17 (1) and 18 (3) of the EAW Law⁴³ are violated, as well as the fundamental defence enshrined in Article 32(1) of the Constitution. As such, it may be an irreparable nullity in the terms of Article 119 (d) of the Code of Criminal Procedure, applicable to EAW proceedings by virtue of Article 34 of the EAW Law. Failure to provide information or refusal of access to it may lead to the insufficiency of the investigation, which determines a correctable nullity, in the terms of Article 120 (2) (d) of the Code of Criminal Procedure. The assessment on the degree of the violation and its impact on the EAW procedure are always up to the judge.

Therefore, non-compliance in an effective way in which the right to information may lead to a situation of irregularity or nullity which, depending on the seriousness of the violation, may or may not be remediable (Articles 119 to 123 of the Code of Criminal Procedure, applicable subsidiarily to the EAW by virtue of Article 34 of the EAW Law).

Irreversible nullities must be declared *ex officio*, that is, judges must be aware of them and declare them at any stage of the proceedings (Article 119 of the Code of Criminal Procedure⁴⁴, applicable subsidiarily to the EAW by virtue of Article 34 of the EAW Law). According to Article 119 of the Code of Criminal Procedure, the lack of the number of judges or jurors who should constitute the court, or the violation of the legal rules regarding the manner of determining the respective composition; the failure by the Public Prosecutors Office to promote the case, as well as its absence from acts in relation to which the law requires its attendance; the absence of the accused or of their lawyer, in cases where the law requires the respective attendance; the lack of investigation or enquiry, in cases where the law determines that they are compulsory; the violation of the rules of jurisdiction of the court; and the use of a special procedure outside the cases provided for by law, are irreversible nullities.

In turn, the remaining nullities, as well as the irregularities, have to be raised by the interested parties at a certain stage of the proceedings or within a certain period of time, as provided in Articles 120 and 123 of the Code of Criminal Procedure⁴⁵. According to Article 120 (2) of the Code of Criminal Procedure, the use of one form of proceeding when the law determines the use of another; the absence, for failure to notify, of the assistant and civil parties, in cases where the law requires their attendance; the failure to appoint an interpreter, in cases where the law considers it mandatory; the inadequacy of the investigation or instruction phase, for not having carried out acts that are legally

⁴¹ Canotilho, Gomes & Moreira, Vital (2007), *Constituição da República Portuguesa Anotada*, Vol. I, 4ª edição revista (*Annotated Portuguese Constitution, Vol. I, 4th revised edition*). Coimbra: Coimbra Editora, pp. 409.

⁴² Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

⁴³ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁴⁴ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

⁴⁵ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

mandatory, and the subsequent omission of steps that could be considered essential for the discovery of the truth are considered nullities. Moreover, the violation or observance of the provisions of the law that are not considered as nullities are irregularities (Article 118 (1) (2) of the Code of Criminal Procedure). If these nullities or irregularities are not challenged at the time the law sets for that purpose, they cannot be challenged afterwards. According to Article 120 (3) of the Code of Criminal Procedure, the nullities not considered to be irreversible must be challenged: before the act is finished, in the case of a nullity of an act attended by the interested party; up to five days after notification of the order appointing the date for the hearing, in situations where there is the absence, for failure to notify, of the assistant and civil parties, in cases where the law requires their attendance; until the end of the debate on the investigation or, if there is no instruction, until five days after notification of the order closing the enquiry, in cases of the inadequacy of the investigation or instruction phase; and immediately at the beginning of the hearing in special forms of procedure (such as the EAW). For example, in EAW proceedings, the law requires that an interpreter is appointed when the requested person does not understand Portuguese (Article 17 (3) of the EAW Law⁴⁶). Therefore, if an interpreter isn't appointed, the requested person has to raise the issue at the beginning of the hearing for it to be considered as a nullity. In case of an irregularity, Article 123 establishes that the act is only considered to be invalid if the irregularity has been argued by the interested party in the act itself or, if they were not present at the act, within three days following the day on which they were notified of any term of the process or intervened in any act performed in it. A declaration of any nullity shall not affect the entire proceeding.

According to Article 122 of the Code of Criminal Procedure⁴⁷, any nullity renders the act in which they occur invalid, as well as the other acts that it may affect. When declaring a nullity, the judge determines which invalid acts must be repeated, whenever possible, and which may still be considered. Less serious cases of violation may constitute an irregularity. In this case, for an irregularity to affect the validity of the act, certain requirements must be fulfilled, namely, it must be requested by the interested parties in the act itself, whose remedy, when possible, may be ordered by the judicial authority (Article 123 of the Code of Criminal Procedure).

In EAW proceedings, the existence of a nullity or irregularity does not mean that the EAW itself will be considered invalid. It just means that the act in which they occur is invalid and has to be repeated. Furthermore, it should also be noted that when applying this regime to EAW proceedings, the rules have to be adapted to the procedural proceedings foreseen for the execution of an EAW.

When it comes to the right of information in EAW proceedings, if this right was violated, the requested person may appeal on the reasons of the violation of the fundamental right of defence (Article 32 (1), and Article 21 of the Constitution) and argue the nullity of the act. According to jurisprudence, failure to inform the requested person of the contents of the warrant, as this is a violation of a fundamental right, constitutes an irreversible nullity.

An example of this interpretation is the decision of the Supreme Court of Justice 06P3758⁴⁸, which is also a good example of how the rules foreseen in the Code of Criminal Procedure are adapted to EAW proceedings. In this case, following the decision to execute an EAW, the requested person

⁴⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁴⁷ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

⁴⁸ Portugal, [Acórdão do Supremo Tribunal de Justiça - Processo 06P3758](#) (Decision of the Supreme Court of Justice – Case 06P3758), 4 October 2006.

appealed the decision, arguing that they had not been made aware of the content of the EAW, and, in turn, the requested person had not been able to fully exercise his right to defence. In this case and taking into account the factuality, the Court considered that the requested person has in fact not been informed of the content in the EAW, violating Article 17 of the EAW Law, and the fundamental right of defence foreseen in Articles 21 and 32 of the Constitution. The Court also considered that the violation of the fundamental right to defence constituted an irreversible nullity in the terms of Article 119 (d) of the Code of Criminal Procedure, that states that the lack of investigation or instruction, in cases where the law determines that it is compulsory, is an irreversible nullities, by considering that the "failure to investigate" was restricted, in this case, to the lack of an [essential] act of the enquiry. In this case, the Court annulled the proceedings and order that the requested person was informed about the content of the EAW and that a new hearing would be scheduled.

On the other hand, the Supreme Court of Justice has expressed the position that if the EAW form contains content and form flaws (i.e., insufficient data – such as no translation, no description of the underlying facts – or contradictory information, etc.), but nonetheless these are correctable, or further information may be or is effectively requested to the issuing authority, such matters cannot be a cause for non-execution. Examples of this understanding are the decisions of the Supreme Court of Justice 06P2835, of 19 July 2006⁴⁹; 07P002, of 10 January 2007⁵⁰; and 07P4855, of 9 January 2008⁵¹.

In the decision of the Supreme Court of Justice 06P2835⁵² the requested person appeal the decision to execute the EAW by arguing, among other reasons, that the execution should be refused on the ground of non-compliance with the requirements for execution of the EAW, meaning uncertainty as to the suitability of the translation. In this case, the Court pointed out that the EAW does not present any specific rule regarding translation, that is, who should translate, where it should be translated and how it should be translated, and that such question does not constitute a cause for non-execution. In addition, the Court further found that none of the rights of the requested person had been violated, since the requested person had been assisted by a lawyer and an interpreter who had explained to them the existence and content of the EAW and the right to oppose to its execution. Therefore, the appeal was rejected.

In the decision of the Supreme Court of Justice 07P002⁵³, the requested person appeal the decision to execute the EAW by arguing that the EAW issued by the French judicial authority was not filled correctly, since it did not clearly specified the purpose of the arrest and surrender was, i.e. whether it was to ensure that criminal proceedings were carried out against the requested person or to enable them to serve a prison sentence. And, if it was the case to carry out criminal proceedings, the EAW also did not refer the possible consequences, which violated the EAW Law and the principle of the presumption of innocence and the right to liberty. In this case the Court found that the warrant

⁴⁹ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 06P2835](#) (Decision of the Supreme Court of Justice – Case 06P2835), 19 July 2006.

⁵⁰ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 07P002](#) (Decision of the Supreme Court of Justice – Case 07P002), 10 January 2007.

⁵¹ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 07P4855](#) (Decision of the Supreme Court of Justice - Case 07P4855), 9 January 2008.

⁵² Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 06P2835](#) (Decision of the Supreme Court of Justice – Case 06P2835), 19 July 2006.

⁵³ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 07P002](#) (Decision of the Supreme Court of Justice – Case 07P002), 10 January 2007.

issued complied with the requirements of Article 3 of the EAW Law, and that the forms submitted by the French judicial authority had specified that the warrant was for the purpose of conducting criminal proceedings. Furthermore, the Court also considered that the requested person was provided with all the legal information that enabled them to exercise their right of opposition. Moreover, the Court also noted that the irregularities invoked would never lead to the annulment of the decision to execute the decision but to a request for clarification by the Portuguese Court to the issuing authorities. However, as stated, the Court considered that the invocation of formal irregularities was not relevant in this case, and therefore, it dismissed the appeal.

Finally, in the decision of the Supreme Court of Decision 07P4855⁵⁴, the requested person appeal the decision to execute the EAW by arguing, among others, that the EAW that was handed to them did not contain any reference to the enforceability of the judgement issued by the Dutch authority, in particular whether the judgement had already become final (*res judicata*), nor had the Dutch issuing authority given any legal guarantees which could be invoked by the requested person within the Dutch legal system, and the trial had taken place without the person having been heard, without any decision having been communicated or any charge brought against them. Therefore, according to the requested person, such an absence implied non-compliance with the formal requirements of the EAW. In this case, the Court considered that the EAW contained all the information required by Article 3 (1) of the EAW Law, with the exception of an indication of the enforceability of the judgment. However, the Court also pointed out that that information appeared in another EAW subsequently joined to the case. Therefore, the Court explained that according to the understanding of other cases, the lack of requirements of content and form of the EAW constituted a mere irregularity remediable under Article 123 of the Code of Criminal Procedure, applicable subsidiarily by force of Article 34 of the EAW Law. Moreover, given the content of the EAW attached to the case file, this irregularity was considered to have been corrected, and the Court ended up dismissing not only this claim but the entire case.

b. Right to information in practice

- Provision of information (when, how by whom)

All interviewees considered that persons arrested on an EAW are informed about their procedural rights. The information is provided in the same terms as persons arrested within the context of criminal proceedings. As they are arrested by police officers, these are the first professionals who inform them about their rights. This information is provided orally and in written form, through the statement of defendant's constitution (a document conferring the status of a defendant to the arrested person). This written document provides the identification of the case and of the lawyer (if already appointed) and the procedural rights and duties.

The persons can be arrested by the Criminal Police, the National Republican Guard, the Public Security Police or the Immigration and Borders Service, depending on where they are found, and they explain to them, within the limitations they have, their rights. I think it is orally. (...) The rights are all those contained in the Code of Criminal Procedure and in the statement of defendant's constitution. (Public Prosecutor/Portugal)

⁵⁴ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 07P4855](#) (Decision of the Supreme Court of Justice - Case 07P4855), 9 January 2008.

As pessoas são detidas pela Polícia Judiciária, pela GNR, pela PSP ou pelo SEF, depende do local onde forem encontradas e sim, eles explicam-lhes, dentro das limitações que têm, quais são os seus direitos. Eu penso que será oralmente. (...) Os direitos, são os direitos que constam do Código de Processo Penal e da constituição de arguido. (Public Prosecutor/Portugal).

In this regard it should be noted that three lawyers and two public prosecutors mentioned that, in Portugal, there is no Letter of Rights exactly as foreseen in the Directive 2012/13/EU of the European Parliament and of the Council, of 22 May 2012, on the right to information in criminal proceedings⁵⁵. Nonetheless, the statement conferring the status of defendant (known as the statement of defendant's constitution) provided for has information regarding the rights set out in the Letter of Rights. So, this document, when relating to an EAW, is considered a Letter of Rights. It should also be noted that according to two lawyers, and one public prosecutor interviewed this document is translated into a language that the requested person understands.

It starts orally and it's in writing upon delivery of the statement of defendant's constitution, which sets out all the rights and obligations. Considering my most recent experience, in line with my previous experiences, SEF [Immigration and Borders Service] gave him a copy of the statement of defendant's constitution, which has the enunciation of the rights and duties and, I can say, to my positive surprise, the rights and duties were translated into French, because he was a Belgian citizen. In my experience, the Letter of Rights is replaced by the statement of defendant's constitution [a document conferring the status of a defendant to the arrested person, with the identification of the case and of the lawyer (if already appointed) and where their rights and duties are explained]. In the specific case, what I know is that the statement of defendant's constitution is delivered, which states the rights and duties. (Lawyer/Portugal)

Começa por ser oralmente e é por escrito aquando da entrega do termo de constituição de arguido, onde vem enunciados todos os direitos e todas as obrigações. Pegando na minha experiência mais recente, alinhada com as minhas experiências anteriores, o SEF entregou-me cópia do termo de constituição de arguido, onde tem a enunciação dos direitos e deveres e, posso dizer, para minha surpresa positiva, os direitos e deveres estavam traduzidos para francês porque se tratava de um cidadão belga. Pela minha experiência, a Carta de Direitos é substituída pelo termo de constituição de arguido. No caso concreto, o que eu sei é que é entregue é o termo de constituição de arguido, onde vêm enunciados os direitos e deveres. (Lawyer/Portugal)

Two lawyers, the judges and two public prosecutors interviewed also confirmed that the requested persons are also informed about their rights by the judge during the hearing. After the requested person being arrested, they must be presented to a judge within 48 hours, so that the validity of the EAW can be discussed, and the judge can make a decision about the execution of the EAW. During this hearing, the judge orally informs the arrested person of their rights, the content of the EAW and the possibility of consenting to surrender or not and its consequences.

According to one lawyer interviewed, judges are very clear in their explanations and really committed to ensuring that the requested persons fully understand their rights. In fact, in the opinion of this interviewee, the hearing is the ideal moment to explain to the requested person their rights, since in some cases police officers explain very briefly the rights of the requested person.

⁵⁵ [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings](#), OJ 2012 L 142/1.

They are informed, initially in a very preliminary way, I would say, and very superficially, by the police body that makes the arrest. (...) As soon as they are presented to the judicial authority, in this case at the Court of Appeal, in all the cases I have been to, the judges are very clear and very concerned that the person should understand perfectly what their rights are. (...) Obviously, they are given a "paper" in a language close to or equal to their own, but I would say that the fundamental moment is when they are presented to the judge. Of all the cases that I've had, I don't have complaints from the [requested] persons at that part, that's not the part where complaints arise. The [requested] persons understand, they may not have an exact notion of everything that is going on, obviously, nor do they have to, but when they meet the judge, I would say that this is the right and fundamental moment when all the rights and duties are explained to the persons and if they don't understand something, they ask and the judge explains. (...) (Lawyer/Portugal)

São informadas, inicialmente de uma forma muito liminar, diria eu, e muito superficial pelo órgão de polícia que procede à detenção. (...) Assim que são presentes a autoridade judiciária, neste caso, no tribunal da Relação, em todos os casos onde eu estive, os juizes são claríssimos e são muito preocupados em que a pessoa perceba perfeitamente quais são os seus direitos. (...) Obviamente que lhes entregam um "papel" numa língua próxima ou igual à deles, mas eu diria que o momento fundamental é quando são presentes ao juiz. De todos os casos que eu já tive, não tenho queixas das pessoas nessa parte, não é nessa parte que surgem as queixas. As pessoas percebem, podem não ter a noção exata de tudo o que se está a passar, evidentemente, nem têm de ter, mas quando chegam ao juiz, eu diria que é o momento certo e fundamental onde às pessoas são explicados todos os direitos e deveres e se não percebem alguma coisa perguntam e o juiz explica. (...) (Lawyer/Portugal)

However, in the opinion of another lawyer, the information provided by the judge is done in a very superficial and formal way. According to this lawyer's opinion, it is not up to the judge to advise the requested person on how they should exercise their rights.

In the oral hearing, the subject is explained in general terms and asked whether they want to consent to surrender and about the benefit of the speciality rule, but it is all very formal and superficial. In principle, it is not up to the judge to advise the defendant on how they should exercise their rights, the lawyer should do that. In other words, there is information, but I don't think there is any awareness of what that might mean. (Lawyer/Portugal)

Na audiência oral é explicado genericamente o assunto e perguntado se querem consentir ou não na entrega e quanto ao benefício da especialidade, mas é tudo muito formal e superficial. Em princípio, não compete ao juiz aconselhar a pessoa de como é que deve exercer os seus direitos, deveria ser o advogado. Há a informação, acho é que não há toda a consciência do que significa dizer uma coisa ou outra. (Lawyer/Portugal)

Two main challenges were pointed out regarding the written information provided to the requested persons. Although three lawyers and one public prosecutor considered that the statement of defendant's constitution enunciates all the rights and duties of the requested person included in the Letter of Rights, one of the lawyers interviewed mentioned that the statement of defendant's constitution isn't adapted to the specific rights of the EAW cases, since it does not include all of the rights of the requested person, namely the right to be assisted by a lawyer in the issuing state. Moreover, one public prosecutor interviewed mentioned that even though the information provided in the statement conferring the status of defendant's constitution is similar to the information included in the Letter of Rights, and translated, it is extensive and provided in a very complex legal language. So, it is possible that the requested person may not understand the full spectrum of their rights.

(...) Now, there are some difficulties depending on the language of the requested person. Everything is translated into English, but if the person does not understand English [...], the information is given when the translator arrives. Regarding the common European languages, the police already have the translations. Persons are informed orally and by signing documents with information. They give a written document [...], either to a Portuguese or a non-Portuguese person. It's exactly the same, it's just a matter of translation. It may happen that foreigners think they don't understand anything, but the difficulty comes from the fact that it is not well drafted, there's too much information that doesn't matter at all. [...] The problem is not in the translation. The problem is that it is not understandable in the original. The police, the Public Prosecutor and the judges always try to inform the requested person. In the warrant they are [informed] of all the [rights] that are in the Code of Criminal Procedure [...], the same rights as the defendants. (Public Prosecutor/Portugal)

(...) Agora, há algumas dificuldades dependendo da língua das pessoas em questão. Está tudo traduzido em inglês, mas se a própria pessoa não domina o inglês [...], a informação é dada quando chega o tradutor. Em relação às línguas europeias comuns, as polícias já têm as traduções. As pessoas são informadas oralmente e através da assinatura de documentos contendo informação. Dão um documento escrito, quer a um português, quer a um estrangeiro. É exatamente igual, é só uma questão de tradução [...]. Pode suceder que os estrangeiros achem que não percebem nada, mas a dificuldade é originária porque aquilo está mal feito, é demasiada informação que não interessa nada. [...] O problema não está na tradução. O problema é que não se compreende na origem. As polícias, o Ministério Público e os juízes tentam sempre informar a pessoa. No mandado são [informados] de todos os [direitos] que vêm no Código de Processo Penal, [...] os mesmos direitos dos arguidos. (Public Prosecutor/Portugal)

- Information about rights

According to all interviewees, persons arrested on an EAW are informed about their procedural rights, namely the rights contained in the Code of Criminal Procedure and in the statement of defendant's constitution. The rights mentioned by the interviewees were the right to a lawyer, the right to interpretation and translation, the right to be heard by a judge within 48 hours, the right of appeal, but also specific rights of EAW cases, such as the right to know the content of the EAW and the right to renounce the speciality rule.

All detainees are immediately informed of their rights. At the beginning of the interrogation, we also read them their rights again and explain. I don't just read; I also try to explain what a European arrest warrant is. First, I explain why they are being detained and only then do I explain what their rights are as a result of having been arrested under the European Arrest Warrant. (...) none of the rights are forgotten because they are listed in the form. (Judge/Portugal)

Todos os detidos são imediatamente informados dos direitos que lhes assistem. Sendo certo que depois, também no início do primeiro interrogatório, porque quando eles são presentes a tribunal nós também lhes lemos novamente os direitos e explico-lhes, não limito a ler-lhes os direitos, tento-lhes explicar e também explicar o que é que é isto de um mandado de detenção europeu. (...) não escapa nenhum dos direitos porque eles estão num elenco, digamos assim. (Judge/Portugal)

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

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Total
YES	X	X	X	X	X	X	X	-	X	8
In writing (Letter of Rights)	X (Through the statement of defendant's constitution)	-	-	-	-	-	-	-		1
Orally	-	-	-	-	X	X	-	-	-	2
In writing (Letter of Rights) and orally		X	X	X	-	-	X	-	X	5
NO	-	-	-	-	-	-	-	-	-	0
Don't know/remember	-	-	-	-	-	-	-	-	-	0
Did not answer	-	-	-	-	-	-	-	X	-	1

- Information about the EAW – content and procedure

With exception of two public prosecutors, all interviewees confirmed that requested persons are informed about the EAW content, although some variation is perceived in this matter. According to two lawyers, the two judges and one public prosecutor interviewed the judge informs the requested persons about the content of the EAW, orally, when they are brought before the Court. The most important information is, in the opinion of one public prosecutor interviewed, the reason why the person has been arrested and the contents of the EAW, namely the type of crime. The judge informs the requested person about the reason why the issuing State requested their arrest, the reason why it issued the EAW and whether the EAW is for criminal proceedings or to serve a sentence. Because this information is given orally, if the requested persons do not understand Portuguese, the interpreter translates it.

There is no one there who doesn't know what the warrant says. Normally, beforehand, the lawyer knows about it and has spoken with him/her [the requested person], but they [the judge] always take care to explain what the warrant is about. (Public Prosecutor/Portugal)

Não há ali ninguém que não saiba o que consta do mandado. Normalmente, antes disso, o advogado teve conhecimento e falou com ele [a pessoa procurada], mas há sempre o cuidado de lhe explicar devidamente o que está em causa no mandado. (Public Prosecutor/Portugal)

According to one lawyer's experience, courts have a variety of practices in this regard and access to detailed information about the content of EAW depends mainly on the proactivity of lawyers. In

their experience, a copy of the EAW is only provided if the lawyer requests it. However, other Courts have taken upon the practice of uploading a copy of the EAW in Citius (the case management IT platform used in Portugal by judges, prosecutors, court clerks and lawyers in judicial proceedings), thus making it accessible to lawyers. In the interviewee's opinion, this can be seen as a good practice.

(...) It depends on the proactivity of the lawyer who must request a copy of the EAW. My experience is that the information provided in writing is the same as in Portuguese criminal proceedings. In the information provided orally, the difference is that it says, "here is an EAW, we are not going to judge the facts, you have the right to oppose or consent to the surrender and you can waive the benefit of the speciality rule". (Lawyer/Portugal)

Sim, mas depois tudo depende do advogado. No momento da detenção, elas são simplesmente informadas de nada. São informadas de que há um mandado de um país. Poderá variar do OPC que fez a detenção, mas nos casos que encontrei as pessoas não sabem exatamente qual é o assunto. (...) Depende da proatividade do advogado que deve pedir uma cópia do MDE e consultar o processo. A minha experiência é que a informação que é prestada por escrito é igual à do processo penal português. A informação oral a diferença que tem é dizer "aqui é um MDE, não vamos julgar os factos, tem o direito a opor-se ou a consentir na entrega e pode renunciar ao benefício da especialidade". (Lawyer/Portugal)

The practical experience of the lawyer having to ask for a copy of the EAW to have access to the EAW was also mentioned by another lawyer who explained that otherwise the requested person only knows what the judge informs them. However, according to this interviewee's experience, the judge reads the content of the EAW in full.

(...) Normally, what I do when I arrive at the Court of Appeal is talk to the clerk: "I want to see the file". And, usually, I go to see the case file with the requested person. Even so, during the hearing, if the judge does not read it, he/she gives a very detailed summary of its contents. They are never given a written document with a copy of the EAW. It is given to us [...]. If people ask for it, I think it is given, but it is not usual for them to ask for it. (Lawyer/Portugal)

(...) Normalmente, aquilo que eu faço quando chego ao Tribunal da Relação é falar com a funcionária: "quero ver o processo". E, normalmente, vou ver o processo para junto da pessoa procurada. Mesmo assim, chegado à respetiva audiência, se a juiz não lê, faz um resumo muito detalhado do que lá está. Nunca lhes é entregue um documento escrito com uma cópia do MDE. É-nos entregue a nós [...]. Se as pessoas pedirem, penso que é entregue, mas não é normal pedirem. (Lawyer/Portugal)

The variety of situations was also mentioned by another lawyer interviewed. In some cases, the requested person is well informed, and in other cases is even necessary for the lawyer to request a translation of the EAW. This lawyer mentioned a specific case of an EAW issued by the French State concerning a Portuguese citizen, where the EAW was only translated after the lawyer's request, when the requested person was brought to court.

The experience I have is based on my clients' criticism since what was transmitted to them would have been very vague and not translated. We have a "mix" of situations, in some cases the person is well informed, the EAW is translated, and duly detailed, but in other cases this doesn't happen and it's necessary to have the translation. I have also heard this remark from other colleagues. A copy of the EAW is usually given and what is transmitted to the detained person is a general reference. (Lawyer/Portugal)

A experiência que eu tenho é de críticas dos clientes no sentido de que o que lhes foi transmitido teria sido muito vago e de que não estava traduzido. Temos um “mix” de situações, nuns casos, a pessoa é bem informada, o MDE vem traduzido, e devidamente pormenorizado, mas noutros casos isso não acontece e é preciso mandar fazer a tradução. Este reparo tenho-o também ouvido a outros colegas. Normalmente é entregue uma cópia do MDE e o que é transmitido ao detido é uma referência genérica. (Lawyer/Portugal)

Regarding the information about the EAW content, one of the challenges identified is that the information provided is incomplete since the information contained in the EAW is also incomplete. Therefore, one lawyer interviewed is of the opinion that, when an EAW is issued, the issuing State should annex a copy of the charge so that the executing state can fully explain to the requested person why an EAW was issued.

(...) Even if the charge exists in the issuing state, they normally do not receive a charge. So, it has to do with the requirements of the Framework Decision and therefore is not required. I think it should be, but it isn't. (...) this [providing a copy of the charge] would give the (...) requested State and the person who was found and who is subject to the European arrest warrant the impression that he/she would have to defend himself/herself with regard to the execution of the warrant by reference to the subject matter of the criminal proceedings. (Lawyer/Portugal)

(...) Mesmo que a acusação exista no Estado requerente, normalmente não recebem uma acusação. Portanto, isso tem que ver com os requisitos da própria decisão-quadro e, portanto, isso não é exigido. Eu acho que devia ser, mas não é. (...) isso [providenciar uma cópia da acusação] dava a entender ao (...) Estado requerido e à pessoa que era encontrada e que é sujeita ao mandado de detenção europeu, que teria de deduzir a sua defesa quanto à execução do mandado por referência ao objeto do processo-crime. (Lawyer/Portugal)

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

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Total
YES	X	X	X	X	X	X	-	-	X	7
In writing	-	-		-	-	-	-	-	-	0
Orally	X		X (The police and the lawyer inform)	X (Occasionally)	X	-	-	-	X	5
In writing and orally	-	X (The lawyer can request a written)	-	X (Occasionally)	-	X (Lawyer can access the written)	-	-	-	3

		n copy of the EAW)				n EAW)				
NO	-	-	-	-	-	-	-	-	-	0
Don't know/remem ber	-	-	-	-	-	-	X	-	-	1
Did not answer	-	-	-	-	-	-	-	X	-	1

- Information on consenting to surrender

The majority of interviewees (two lawyers, the two judges and two public prosecutors) considered that the requested persons are informed about what consenting to their surrender entails. According to a judge, this is a key element that must be explained to ensure that the requested person is capable of making an informed decision. Because of that, this judge also highlighted the key role that lawyers play in these matters.

(...) They are informed, enlightened, it is explained to them what that means. The lawyer also in this part has an essential and crucial role there as well in explaining and helping in understanding what it means if they renounce or do not renounce it and usually, they do not renounce it. There have been cases in which they renounced the 'speciality rule' because [...] they knew that there are other cases and [...] they preferred to renounce it, but generally they do not renounce it, it is only because of those facts that they accept to be judged. (Judge/Portugal)

(...) São elucidadas, esclarecidas, é-lhes explicado o que é que isso significa. O defensor também nesta parte tem um papel aí essencial e crucial também em explicar e a ajudar em entender o que é que significa se renuncia ou não renuncia e, regra geral, eles não renunciam. Já aconteceu haver renúncia por causa de [...] saberem que há outros processos e [...] preferem fazer a renúncia, mas regra geral não renunciam, é só por aqueles factos que eles aceitam ser apreciados. (Judge/Portugal)

However, according to one lawyer interviewed requested persons are not properly informed about what consenting to their surrender entails. In their experience, the judge always asks if the requested person wants to surrender without explaining in full what the consequences of consenting entail.

They ask if they want to accept the surrender. In the cases where I was present, I never heard it said, "then you can't oppose, you can't appeal, it's irrevocable". Maybe there are judges who say that, usually they just ask, "do you want to consent?" (...) I don't think there is such detailed information. It's just "consent to surrender? Do you want to surrender?" and people say yes or no. (Lawyer/Portugal)

É-lhes perguntado se querem aceitar a entrega. Nos que estive presente nunca ouvi dizerem "olhe que depois não se pode opor, não pode recorrer, é irrevogável". Se calhar há juízes que dizem isso, normalmente só perguntam "quer consentir?" (...) Eu acho que não há uma informação tão detalhada. É só "consente na entrega? Quer ser entregue?" e as pessoas dizem sim ou não. (Lawyer/Portugal)

Therefore, to this lawyer and to other lawyer interviewed, explaining the consequences of consenting to surrender is something that the lawyer should do. However, sometimes, lawyers do

not do it, because there is a gap in their training and specialisation in matters related to EAW. Due to this lack of knowledge and experience, lawyers tend to think that consent is the best direction and advise the requested person to consent to their surrender. According to another lawyer, this happens more in cases where the lawyer is state appointed, since they are randomly chosen, and the lawyer appointed may not have experience in EAW proceedings.

(...) sometimes it's even advised, it may not be during the hearing, but when they are taken aside, saying "maybe you'd better go there and solve the problem because we can't solve anything here... you are saying you're innocent and we can't decide that here, it is better to go there and settle there". (Lawyer/Portugal)

(...) às vezes até são aconselhadas a consentir, pode não ser durante a audiência, mas à margem dizendo "se calhar para você é melhor ir lá resolver o problema porque nós aqui não podemos resolver nada... está a dizer que é inocente e nós isso aqui não podemos decidir, é melhor ir para lá e resolver lá". (Lawyer/Portugal)

(...) Obviously, we have to realise that many of these processes may be followed by State-appointed lawyers who have a slightly different experience. (Lawyer/Portugal)

(...) Obviamente temos de perceber que muitos destes processos podem ser seguidos por advogados oficiosos que têm uma experiência um bocadinho diferente. (Lawyer/Portugal)

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

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Total
YES	-	X	-	X	X	X	X	-	X	6
NO	X	-	X	-	-	-	-	-	-	2
Don't know/remember	-	-	-	-	-	-	-	-	-	0
Did not answer	-	-	-	-	-	-	-	X	-	1

- Understanding of information

Most of the interviewees (one lawyer, the two judges and 2 public prosecutors) considered that the requested persons understand the information provided to them. All of them highlighted that judges are very concerned about ensuring that the requested persons understand everything that it is explained. According to one judge, even if it takes time, usually judges take measures to make sure it happens, by using more common language instead of technical language, to ensure that the requested person understands everything that it is being said to them.

It takes a long time to explain to a requested person because they need to take a decision that can be decisive for them, and they have to know how to make it. (...) One of the judge's obligations is to make themselves understood to the person in front of them. We are not making a sentence that will be handed over to a lawyer. We question that person and for them to be able to answer us, they have to understand the question being asked. We have to give them a lot of information for the question to be understood. (Judge/Portugal)

Demoramos muito tempo a explicar porque a pessoa procurada tem que conseguir tomar uma decisão que pode ser decisiva para ela e ela tem que saber como tomá-la. (...) Uma

das obrigações do juiz é fazer-se entender pela pessoa que está diante de si. Não estamos a fazer uma sentença para entregar a um advogado. Questionamos a pessoa mas para que ela nos possa responder, tem que entender a pergunta que está a ser feita. Temos que lhe dar muitas informações para que a pergunta seja compreendida. (Judge/Portugal)

Another interviewee, a public prosecutor, also mentioned that even if the requested person does not understand all of the information provided, at least they understand the essential information, namely the right to a lawyer and the right to be heard by a judge.

(...) Looking at the system, I would dismiss the other information because that is not so important. The essential rights that persons have are to be presented to the judge within a very short time and to have access to a lawyer. (Public Prosecutor/Portugal)

(...) Olhando para o sistema, eu dispensava todo o resto da informação porque não é tão importante. Os direitos essenciais que as pessoas têm é ser apresentadas num prazo muito curto ao juiz e ter acesso a um advogado. (Public Prosecutor/Portugal)

The lawyers interviewed expressed more diversified opinions. For example, one lawyer explained that some requested persons understand the information provided and others do not. According to this lawyer, judicial authorities usually inform the arrested persons and check whether they understand the information about the EAW and their rights, but the interviewee is aware of other cases where this did not happen, since, usually, the requested person does not understand why they are being arrested.

Many times, the lack of understanding - with the exception of when the person does not know the Portuguese language - is due to the moment, the arrest, what is behind the arrest, not expecting the arrest. Therefore, many times they do not understand, but I would guess that they do not understand for that very reason. (Lawyer/Portugal)

Muitas das vezes, a falta de compreensão – com exceção de quando a pessoa não conhece a língua portuguesa – é decorrente do momento, da detenção, do que está subjacente à detenção, o não estar à espera da detenção. Por isso, muitas vezes não compreendem, mas intuo que não compreendem por isso mesmo. (Lawyer/Portugal)

According to another lawyer's experience, requested persons do not always understand the information provided, since they don't know what they can argue to defend themselves. They have no idea about the alternatives to surrender and their lawyers do not have in-depth knowledge of EAW cases to assist them accordingly. For example, according to the interviewee, most requested persons don't know about their right to a lawyer in the issuing state. And some lawyers don't know it either. Although there are lawyers who analyse the cases carefully, most of them read the law and since the law doesn't give great possibilities for refusal, they simplify the whole procedure.

I don't think they always understand. I've had a few cases of persons coming to me for legal advice after they've had their first hearing. They had a lawyer, but they didn't understand exactly everything because they come to ask me what can still be done. First, I think people don't understand exactly what arguments they can use to defend themselves. They realize that they cannot defend their innocence and that is something that the courts emphasize but have no idea of the alternatives that may exist to surrendering or what they can do, for example, contact a lawyer in the issuing state. (Lawyer/Portugal)

Acho que não compreendem sempre. Já tive vários casos de pessoas que vieram consultar-me e que já fizeram a primeira audiência, tiveram um advogado oficioso ou até advogado mandatado e não perceberam exatamente tudo. Perguntam o que é que se pode fazer ainda. Acho que as pessoas não percebem exatamente, primeiro, com que argumentos se

podem defender exatamente. Percebem que não se podem defender quanto à sua inocência e isso é uma coisa que os tribunais sublinham, mas depois não têm a noção das alternativas que podia haver à entrega ou o que podem fazer, por exemplo, contactar um advogado no estado de emissão. (Lawyer/Portugal)

In the opinion of other lawyer interviewed, requested persons do not understand the information provided due to the vulnerability associated with being arrested, especially when the requested person does not understand the language or even why they are being arrested.

The requested persons get very scared, and they become very dependent on the relationship of trust [with the lawyer] in that very short space of time to resolve all these issues. (Lawyer/Portugal)

Não, não compreendem. As pessoas ficam muito assustadas e ficam muito dependentes da relação de confiança [com o advogado] que naquele curtíssimo espaço de tempo têm para resolver estas questões todas. (Lawyer/Portugal)

This interviewee also added that the Portuguese judicial authorities, in general, do not check if the requested person understands the information in the EAW and their rights, because, due to the principle of mutual trust, the authorities have more confidence in EAW cases than in extradition cases, for example. Moreover, the interviewee also noted that another factor that may have some influence on this matter is the fact that Portugal wants to maintain a certain image before other European Union countries.

(...) I think there is still a lot of subservience to the requesting authorities because there is always this thing that is very Portuguese, which is that we do not want to look bad in front of foreigners. (Lawyer/Portugal)

(...) Eu acho que ainda há muita subserviência às autoridades requisitantes porque há sempre esta coisa que é muito portuguesa, que é nós não queremos ficar mal perante os estrangeiros. (Lawyer/Portugal)

c. Discussion of findings

The interviewees are unanimous in the evaluation that the requested persons are provided with general information regarding their rights and the EAW contents. However, the interviewees also pointed out some divergences between the legal framework and practice as regards to the requested persons' right to be informed of their rights and the contents of the EAW. According to a lawyer interviewed, one of the most relevant challenges is that the statement of defendant's constitution (the written document provided to the arrested persons with information regarding their rights) isn't adapted to EAW cases, since it does not list all of the requested persons' rights, namely the right to a lawyer in the issuing state, and lists rights not applicable, like the right to be heard by the investigating judge. Additionally, because the legal system is complex and the information provided in the statement of defendant's constitution is also complex (it reproduces the law and is not written in clear language), it is difficult for requested persons to understand their rights.

According to the interviewees' answers, there is a certain variation in practice concerning the information provided by judges to the requested persons on their rights. One lawyer, the judges and

two public prosecutors said that the information provided by the judge is usually clear, but others considered that it is provided in a superficial manner. Additionally, while the judges and prosecutors interviewed believe that requested persons understand the information provided, lawyers were not unanimous on this issue. One of the lawyers even stated that, in some cases, judicial authorities do not check if the requested persons understand the information about EAW and their rights.

Furthermore, two lawyers pointed out problems regarding the information provided about the EAW content and even some difficulty of obtaining immediately a copy of the EAW. Although the law states that the requested persons have the right to know the content of the EAW, three lawyers interviewed said that it depends on the lawyer. Nonetheless, some Courts have taken upon the practice of upload a copy of the EAW in Citius (the case management IT platform used in Portugal by judges, prosecutors, court clerks and lawyers in criminal proceedings), thus making it immediately accessible to lawyers.

Most of the interviewees (two lawyers, the two judges and two public prosecutors answered that the requested persons are usually informed about what consenting to their surrender entails by judges and lawyers, as well as regarding the speciality rule. Besides the information provided by the lawyer, during the hearing, the judge explains it in general terms and asks whether the requested persons want to consent to surrender and about the benefit of the speciality rule. Nonetheless, two of the lawyers interviewed said that sometimes lawyers do not do it, because there is a gap in the training and specialisation of lawyers in matters related to EAW and the small number of EAW cases makes it difficult to gain experience in this area.

2. Right to interpretation and translation

a. Legal overview

- The right to interpretation and translation: the legal framework and legal requirements

When it comes to the right to interpretation and translation, these two rights must be distinguished even though they have the same underlying intention. Both rights are explicitly mentioned in Article 1(1) of Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings⁵⁶, which lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of an EAW. Although this directive hasn't been transposed into Portuguese law, it is understood to be in force in the Portuguese legal system due to the direct vertical effect of directives, since the jurisprudence of the Court of Justice of the European Union considers that a directive which has not been transposed may have direct effect if: it has not been transposed into national law or has been incorrectly transposed; the provisions are unconditional and sufficiently clear and precise; the provisions confer rights on individuals; and the deadline for transposition has passed⁵⁷. Thus, it can be understood that the validity in the Portuguese legal system of the Directive 2010/64/EU will confer to the requested person the right to interpretation and translation. It should be noted that this directive establishes in point 15 of its preamble that the rights provided for in the directive should also apply, as necessary accompanying measures, to the execution of an EAW within the limits provided for by the directive itself. Therefore, executing Member States should provide and bear the costs of interpretation and translation for the benefit of the requested persons who do not speak or understand the language of the proceedings. These rights are reinforced by Article 2 (7) and Article 3 of the Directive.

The EAW Law⁵⁸ states that “the arrest warrant must be translated into one of the official languages of the executing Member State or into another official language of the institutions of the European Community accepted by this State, by means of a declaration deposited with the General Secretariat of the Council” (Article 3(2)). According to Article 7(6) of the EAW Law, the request for consent submitted by the issuing Member State to the EAW executing Member State is translated by the issuing judicial authority. The same situation applies in the case of surrender or subsequent extradition, according to Article 8(5) of the EAW Law.

It should be noted that the EAW Law⁵⁹ doesn't indicate that the warrant must be translated into the language understood by the requested person or that any other procedural acts or documents must

⁵⁶ [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](#), OJ 2010 L 280/1.

⁵⁷ Gomes de Sousa, João (2019), [“Interpreting, Translating and Informing: “nuisances” of modernity?” \(Interpretar, Traduzir e Informar: “incómodos” da modernidade?\)](#), *Julgar Online*, March 2019.

⁵⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁵⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

be translated. Nor does the Code of Criminal Procedure⁶⁰ (applicable to the EAW by effect of Article 34 of the EAW Law) have an explicit provision directly indicating a catalogue of procedural acts or documents that must be translated into the language that the person understands. Articles 92 (6) and 166 of the Code of Criminal Procedure only refer that documents written in a foreign language must be translated into Portuguese.

However, some doctrine and jurisprudence, applicable to criminal proceedings in general, has been specifying the acts and documents that must be translated if the requested person does not understand Portuguese. This is in accordance with the direct application of Directive 2010/64/EU, which foresees that Member States should ensure that accused persons who do not understand the language of the criminal proceedings in question are provided with written translations of documents essential for the exercise of their right of defence. This also applies in conjunction with Article 113(10) of the Code of Criminal Procedure, which determines which acts must be notified to the defendant. According to some doctrine and jurisprudence, all acts which the law expressly states must be notified to the defendant, namely that the charge, the date for the trial and sentences should be translated into a language that the person understands. However, there is also the understanding that depending on the case, *ex officio* or at the request of the defendant, other documents can also be translated if considered essential to the right of defence.

The article entitled “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”⁶¹ states that other documents beyond the charge, the date for the trial and sentences, can be translated if they are considered to be essential to the right of defence, such as documentary evidence or testimonials. Since these “are considered essential for the purposes of conviction/influencing the judge, it makes sense that they should also be considered essential for an effective defence”.

The same understanding can be found in jurisprudence. One example of this is Case 331/08-1 of the Court of Appeal of Évora⁶². It established that the provision of Article 113(9) of the Code of Criminal Procedure⁶³ “requires, in the case of an accused who does not understand Portuguese, that the notifications concerning the charge, the decision on the preliminary investigation, the date for the trial and the sentence, as well as those concerning the application of coercive measures, the guarantee of property and the presentation of the request for civil compensation, should be duly translated”. Another example is Case 256/16.7PAPVZ-B.P1 of the Court of Appeal of Porto⁶⁴, which considered the act of house search to be null and void, when it was carried out in a house inhabited by a foreigner who does not know or speak Portuguese, as no interpreter was appointed and the signed authorisation was not translated into his native language.

⁶⁰ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁶¹ Barbosa e Silva, Júlio (2018), [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](#) (A Directiva 2010/64/UE do Parlamento Europeu e do Conselho, de 20 de Outubro de 2010, relativa ao direito à interpretação e tradução em processo penal), Julgar Online, March 2018.

⁶² Portugal, [Acórdão do Tribunal da Relação de Évora – Caso 331/08-1](#) (Decision of the Court of Appeal of Évora – Case 331/08-1), 1 April 2008.

⁶³ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁶⁴ Portugal, [Acórdão do Tribunal da Relação do Porto– Caso 256/16.7PAPVZ-B.P1](#) (Decision of the Court of Appeal of Porto – Case 256/16.7PAPVZ-B.P1), 29 March 2017..

However, it should be noted that other decisions have ruled that the translation of documents is not mandatory. One example of this is the Case 98/12.9P6PRT.P1 of the Court of Appeal of Porto⁶⁵ which decided on whether the translation of sentences was obligatory or not. It decided that it was not mandatory to provide a written copy translated into the language that the defendant had mastered, considering that it was sufficient to provide an oral translation made by the interpreter when the sentence was read.

With regard to the right to interpretation, Article 6(2) of the EAW Law⁶⁶ establishes that the conditions under which the hearing of the requested person shall take place must comply with the provisions foreseen in Law 88/2017 that establishes the legal framework for the issuance, transmission, recognition and enforcement of European investigation decisions in criminal matters⁶⁷, stating that the execution State must ensure that the person must be assisted by an interpreter, if necessary (Article 36). In addition, Article 17(3) of the EAW Law states that, “when the detainee does not know or speak the Portuguese language, a suitable interpreter is appointed, without any charge to him/her”.

Article 92 (2) of the Code of Criminal Procedure⁶⁸ which establishes rules about the language of acts and appointment of an interpreter - applied on a subsidiary basis to the EAW Law⁶⁹ (Article 34) - in addition to equivalent wording to that in the EAW Law⁷⁰, gives some more detail on the enforcement of the right to interpretation. This rule states that, if the person who has to intervene in the process doesn't know or doesn't speak the Portuguese language, a suitable interpreter is appointed, free of charge, even if the entity that presides over the act or any participant, speaks the language in question (Article 92(2) of the Code of Criminal Procedure). The person is also given the possibility to choose, free of charge, a different interpreter to translate the conversations with their lawyer (Article 92(3) of the Code of Criminal Procedure). It is also established that the evidence that could be produced by a violation of Article 92(3) may not be used in proceedings (Article 92(5) of the Code of Criminal Procedure). The interpreter is appointed by a judicial authority or criminal police authority (Article 92(7) of the Code of Criminal Procedure⁷¹). With regard to the provision of statements by a deaf, hearing impaired or mute person, all stages of the proceedings must observe the rules established in Articles 93(1) of the Code of Criminal Procedure, that states that if the person is deaf, an interpreter of sign language will be appointed or lip reading or written expression

⁶⁵ Portugal, [Acórdão do Tribunal da Relação do Porto– Caso 98/12.9P6PRT.P1](#) (Decision of the Court of Appeal of Porto – Case 98/12.9P6PRT.P1), 11 June 2014.

⁶⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁶⁷ Portugal, [Lei n.º 88/2017, que estabelece o regime jurídico da emissão, transmissão, reconhecimento e execução de decisões europeias de investigação em matéria penal](#) (Law 88/2017, that establishes the legal framework for the issuance, transmission, recognition and enforcement of European investigation decisions in criminal matters), 21 August.

⁶⁸ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁶⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁷⁰ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁷¹ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

will be applied, depending on the situation of the person concerned; if the person is mute and can write, the questions will be asked orally and they will answer in writing, or, if not and whenever requested, an interpreter will be appointed. It also should be noted that, the absence of an interpreter, in cases of deaf, hearing impaired or mute persons, implies the postponement of the proceedings, according to Article 93(2) of the Code of Criminal Procedure.

Furthermore, according to Article 92(4) of the Code of Criminal Procedure⁷², applicable to EAW proceedings by virtue of Article 24 of the EAW Law, “the interpreter is subject to legal confidentiality and cannot reveal the conversations between the accused and their defence lawyer, whatever the stage of the process in which they occur, under penalty of breach of professional secrecy”. The Code of Criminal Procedure⁷³ also states that the evidence obtained through a breach of professional secrecy cannot be used (Article 92(5)).

However, Article 92(8) of the Code of Criminal Procedure⁷⁴ states that “the provisions of Articles 153 and 162 are correspondingly applicable to the performance of the interpreter”. These are rules that regulate the performance of the expert's function. Therefore, according to Article 153(2) and (3) of the Code of Criminal Procedure, the translator or interpreter can request an excuse based on the lack of indispensable conditions, as well as being refused for the same reasons by the defendant or by the prosecutor. The authority that appointed them may also request their replacement when they do not meet the deadlines imposed or if they perform their duties in a negligent manner. This decision is irrevocable.

- Violations of the right to interpretation and translation: legal remedies

The EAW Law⁷⁵ doesn't expressly foresee any remedy available in the event that the requested person isn't provided with interpretation or translation during the EAW proceedings, so the rules foreseen on the Code of Criminal Procedure⁷⁶ are the ones to be applied by force of Article 34 of the EAW Law.

According to Article 92(2) of the Code of Criminal Procedure⁷⁷, and as referred above, in both written and oral procedural acts, when a person who does not know or speak Portuguese intervenes in the process, a suitable interpreter should be appointed, so that they fully understand the content and scope of all the procedural acts in which they are involved, thereby making it possible to fully exercise their right to defence. The procedural law also states that in the case of deaf, hearing

⁷² Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

⁷³ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

⁷⁴ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

⁷⁵ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁷⁶ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁷⁷ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

impaired or mute persons (Article 92(2) of the Code of Criminal Procedure⁷⁸), the lack of an interpreter at the time of rendering statements (whatever the stage of the process) “implies the postponement of the proceedings” (Article 93(3) of the Code of Criminal Procedure⁷⁹).

In addition, as explained above, the deaf, hearing impaired or mute person or a person who does not understand or speak Portuguese can also choose another interpreter to be able to confer with their lawyer (free of charge) and any interpreter, appointed or chosen, is subject to judicial confidentiality and may not disclose conversations between the accused and their lawyer. If these rules are violated, the evidence obtained cannot be used, according to Article 93(4) of the Code of Criminal Procedure⁸⁰. In addition to these provisions, the Code of Criminal Procedure also considers that the failure to appoint an interpreter, in cases where the law considers it mandatory, constitutes a nullity (Article 120(2)(c) of Code of Criminal Procedure).

As already explained, this is a nullity that can be remediable and is dependent on a pleading of the interested party within the time limits provided for in Article 120(3) of the Code of Criminal Procedure⁸¹, that is, in the event of failure to appoint an interpreter, the nullity has to be claimed before the act for which the interpreter was appointed is completed. According to Article 121 of the Code of Criminal Procedure, applicable to EAW proceedings by virtue of the EAW Law⁸², these kinds of nullities shall be remedied if the procedural participants expressly renounce their right to contest them; they have expressly accepted the effects of the voidable act; or they have exercised the power to which the annulable act was addressed.

Regarding the nullities, a recent case of the Supreme Court of Justice exemplifies the direction that the jurisprudence has been following in this matter. In Case 1211/20.8YRLSB.S1⁸³, the requested person, of German nationality, was heard with the assistance of a lawyer, preceded by the appointment of an interpreter, and was informed of the purpose of the hearing, the consequences of consenting to the execution of the EAW and the possibility of renouncing the speciality rule and its meaning. The requested person claimed opposition to the EAW claiming nullity of the arrest, in the terms of Article 120(c) of the Code of Criminal Procedure⁸⁴ because, at the time of the arrest, the warrant was not read and explained to the requested person, as it was written in Portuguese, a language that they do not understand, either in written or spoken form. Furthermore, the copy of the warrant delivered to the requested person and their lawyer was not translated or accompanied by a translation into Portuguese, so that in addition to not complying with Article 3(2) the EAW

⁷⁸ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁷⁹ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁸⁰ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁸¹ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁸² Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁸³ Portugal, [Acórdão do Tribunal Supremo Tribunal de Justiça – Caso 1211/20.8YRLSB.S1](#) (Decision of the Supreme Court of Justice – Case 1211/20.8YRLSB.S1), 21 August 2020.

⁸⁴ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

Law⁸⁵, Article 8(2) of the Framework Decision⁸⁶ and Articles 1(1) and (2), (7) and (8) and Article 3 of Directive 2010/64/EU⁸⁷, the warrant should have been in Portuguese, translated from English, so the warrant should have been rejected. The Supreme Court considered that the appellant did not raise any irregularity when they were heard by the judge, namely the lack of appointment of an interpreter or (linguistic) difficulty in understanding the form and the reasons for the content of the EAW justifying the detention. The Court also considered that the lack of translation of the EAW was remedied in due time, so that the appellant's allegation lacks any foundation. On the other hand, at the time of the hearing of the appellant, the contents of the warrant were explained with the presence of an interpreter and the lawyer, so that any lack of information in this regard could and should have been raised at that time, which did not happen. As the appellant was made aware, during the respective hearing, of the order contained in the EAW, they were then in possession of the necessary elements to exercise their right of defence and having been granted a period of 10 days to oppose the order, there was no restriction to their rights of defence.

It should be noted that, regarding the violation of the obligation to translate the EAW pursuant to Article 3(2) of the EAW Law⁸⁸, this may lead not to a nullity but to an irregularity that renders it invalid. In this case, and according to Article 123 of the Code of Criminal Procedure⁸⁹, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, any irregularity in the proceedings shall only determine the invalidity of the act to which it refers and of the subsequent terms it may affect when it has been challenged by the interested parties during the act itself or, if they were not present during the act, within three days following the day on which they were notified of any term of the proceedings or intervened in any act performed during the proceedings. When detected, the correction of any irregularity is automatically ordered. This understanding has been followed by the jurisprudence. One example is Case 750/13.1YRLSB.S1 of the Supreme Court of Justice⁹⁰. In this case, the requested person challenged the decision to execute an EAW by, among other reasons, claiming that the translation sent by the issuing State, in this case Belgium, was deficient, and because of that, the requested person considered the insufficiency to be equivalent to a lack of translation, which rendered the decision to execute the EAW null and void in the terms of Article 92 of the Code of Criminal Procedure. The Court decided that the absence of the requirements of content and form of the EAW, referred to in Article 3 of the EAW Law, wasn't a cause for mandatory or optional non-execution of the EAW, but it constituted a remediable irregularity, in the terms of Article 123 of the Code of Criminal Procedure, which, in this specific case, should be considered as having been remedied since the appellant did not adopt any position on it in due time.

⁸⁵ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁸⁶ [Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States](#), OJ L 190/1.

⁸⁷ [Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings](#), OJ 2010 L80.

⁸⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁸⁹ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁹⁰ Portugal, [Acórdão do Tribunal Supremo Tribunal de Justiça – Caso 750/13.1YRLSB.S1](#) (Decision of the Supreme Court of Justice – Case750/13.1YRLSB.S1), 9 August 2013.

Another question raised among legal scholars is if nullity may be grounds for appeal. Article 24(1) of the EAW Law⁹¹ establishes that an appeal can only be lodged to the Supreme Court of Justice regarding decisions that uphold the arrest or replaces it with a measure of coercion; or regarding the final decision on the execution of the EAW, and does not establish, therefore, a right of appeal in cases where nullity is claimed on the grounds of lack of translation or interpretation, which raises the problem: what can be done if the right to translation or interpretation is denied in the execution of an EAW? There is a doctrinal understanding that in these cases the appeal cannot be denied. Therefore, the EAW Law has to be read in conjunction with Directive 2010/64/EU⁹², and an appeal shall be admissible under the general terms⁹³.

b. Interpretation and translation in practice

- Provision of interpretation (decision and means)

All the interviewees, with the exception of a public prosecutor who did not have experience in the execution of an EAW, are unanimous in the evaluation that, in EAW proceedings, generally, requested persons are provided with interpretation. In their experience, the criminal police body who arrests the requested person communicates to the Court the need for an interpreter. However, it should be noted that criminal police bodies can appoint an interpreter and recommend that interpreter to the Court.

Usually, it is always made available when necessary. In practice, when the criminal police body detains the person, in the text of the email [to the court] it says whether a translator is needed and what language he/she understands or whether a translator is not needed (...). If not Portuguese, a translator is appointed for the language of origin or for English when the language is more difficult, and they understand English well. No hearing may begin until this is guaranteed. (Public Prosecutor/Portugal)

Normalmente, é sempre disponibilizado quando é necessário. Na prática, quando o órgão de polícia criminal o detém, no texto do email [para o tribunal] diz logo se é necessário tradutor (...). Se não for português, é nomeado um tradutor para a língua de origem ou para inglês quando a língua é mais difícil e eles percebem bem o inglês. Não se começa nenhuma audição sem isso estar garantido. (Public Prosecutor/Portugal)

As to the criteria used to assess if interpretation is needed, in the interviewees' experience, the nationality of the requested person and their knowledge of the Portuguese language are the main criteria used in this assessment. Even if the requested persons slightly understand the Portuguese language, it is common practice to appoint an interpreter to make sure that they understand everything related to the case.

⁹¹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁹² [Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings](#), OJ 2010 L80.

⁹³ Barbosa e Silva, Júlio (2018), [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](#) (A Directiva 2010/64/UE do Parlamento Europeu e do Conselho, de 20 de Outubro de 2010, relativa ao direito à interpretação e tradução em processo penal), *Julgar Online*, March 2018.

Often, they may be in Spanish and sometimes they understand, but even so, it is still needed to have some security and I always ask for an interpreter because sometimes there are words they don't understand, or they don't understand the meaning of words, and I always try to ensure there is an interpreter. There has never been a case where there was no interpreter. (Judge/Portugal)

Muitas vezes pode ser de língua castelhana e às vezes eles entendem, mas mesmo assim é preciso ter alguma segurança e eu peço sempre um intérprete para assegurar porque às vezes há palavras que não percebem, há o sentido das palavras que não entendem e eu procuro sempre assegurar um intérprete. Nunca tive nenhum caso em que não houvesse intérprete. (Judge/Portugal)

According to an interviewed judge, the need for interpretation is only waived in cases where the requested person did not ask for an interpreter and the Court also understands that the person is fluent in Portuguese. (...) *We cannot risk a person being handed over to serve a sentence (because the European Arrest Warrant is not just for going to trial), when they have not even properly understood what was at stake. But, if the requested person is Russian or Vietnamese who has lived in Portugal for ten years and speaks Portuguese fluently, they understand Portuguese well and an interpreter isn't appointed. (Judge/Portugal)*

(...) Não podemos arriscar que uma pessoa seja entregue para cumprir pena (porque o Mandado de Detenção Europeu não serve apenas para ir a julgamento), quando nem sequer compreendeu fielmente o que estava em causa. Mas, se a pessoa for, por exemplo, um russo ou vietnamita que vive em Portugal há dez anos e fala português fluentemente, entende bem português e não é nomeado intérprete. (Judge/Portugal)

Although all of the interviewees, with the exception of a public prosecutor, mentioned that requested persons are generally provided with interpretation, one interviewed lawyer has experiences where that didn't happen. This lawyer also considers that the decision to appoint an interpreter should not be subjected to a decision of the judicial authorities and it should be immediate upon arrest whenever a non-national is arrested.

I have two kinds of experience. On the one hand, yes, in a more recent case - yesterday's - there was a translator and he translated into French and clarified my client, and all the questions and answers. (...) I have already had, two years ago, an awkward case where an interpreter was not provided [to the requested person]. So, there were some difficulties, but which were overcome. (Lawyer/Portugal)

Tenho dois tipos de experiência. Por um lado, sim, num caso mais recente – o de ontem – estava um tradutor e traduziu para francês e esclareceu o meu cliente, e todas as perguntas e respostas. (...) Já tive, há dois anos, num caso com alguma notoriedade, em que não foi apresentado um intérprete [à pessoa procurada]. E, portanto, houve algumas dificuldades, mas que foram ultrapassadas. (Lawyer/Portugal)

- Translation of documents

As explained before, the law does not state that the warrant must be translated into a language understood by the requested person or that any other procedural acts or documents must be translated. Therefore, there's no explicit provision directly indicating a catalogue of procedural acts or documents that must be translated into the language that the person understands. Moreover, the fieldwork highlighted the existence of a variety of situations regarding the translation of documents. According to the interviewees, some documents are translated, but that varies from case-to-case.

According to most of the interviewees (three lawyers, one judge and one public prosecutor), the statement of defendant's constitution is one of the documents that, usually is translated to a language that the requested person understands. Moreover, the criminal police bodies already have translated versions of the statement of defendant's constitution into the most common languages (for instance German or English). However, if a written translation is not provided, the information is usually provided orally by the interpreter at the hearing when the judge explains the requested persons their rights.

(...) When this doesn't happen, then a verbal explanation is given. The interpreter translates the rights that the judge explains. It depends on the languages. For the most common languages, criminal police bodies typically have a translation (German, English). (Lawyer/Portugal)

(...) mas nesse caso depois é feita a explicação verbal. Depende das línguas. Para as línguas mais comuns, o órgão de polícia criminal tem, tipicamente, uma tradução e fornece logo em alemão, inglês. Se não fornecer, na audição o intérprete traduz os direitos que o juiz explicar. (Lawyer/Portugal)

The opinions of the interviewees regarding the translation of the EAW are not unanimous. According to the interviewees, the EAW is not always translated (in writing) to a language that the requested persons understand. Nonetheless, the oral explanation of the EAW content is always explained orally in a language that the requested persons understand. According to the findings, this can be done orally, where the judge presents the content and the interpreter translates it or in writing, where the necessary parts are translated.

The EAW is usually in an official language, most of the times in English, and then it may be translated orally when the judge summarises what is in the system. At that time, the interpreter or translator does the translation (...). (Lawyer/Portugal)

O MDE normalmente vem numa língua oficial, que a maior parte das vezes é o inglês, e depois pode, eventualmente, ser traduzido, mas depois é evidente que oralmente, quando a juíza faz o resumo daquilo que está no sistema, o intérprete ou o tradutor faz a tradução (...). (Lawyer/Portugal)

Other two interviewees, both public prosecutors, also agreed that the EAW is translated, however, contrary to other interviewees who were not sure if the content of the EAW was always translated, these two public prosecutors mentioned that the content of the EAW is translated into a language that the requested person understands.

The EAW is already translated, otherwise, it has to be translated into the defendant's language. Other documents are also translated whenever possible, or whenever it is relevant. I think they don't even ask the person, they translate the content of the warrant right away. (Public Prosecutor/Portugal)

O mandado já vem traduzido, caso contrário, tem mesmo que ser traduzido na língua do arguido. Outra documentação, sempre que é possível, também é traduzida, ou sempre que é relevante. Acho que nem perguntam à pessoa, traduzem logo o conteúdo do mandado. (Public Prosecutor/Portugal)

In the experience of one judge interviewed, the information regarding the requested persons' rights is provided orally. Everything is explained to the requested person orally and the interpreter translates it. It should be noted that the two interviewed judges both mentioned this matter.

In my experience, it is always orally, there is no translation of those rights, that is the lawyer ensures that, as is usually done when there is a Portuguese detainee, there is a reading of his/her rights and the lawyer ensures that he/she understands those rights. They are always asked, "did you understand?", sometimes they have some doubts, (...) and the lawyer and also the judge explain again and again until they understand what their rights are, but there is no translation of that document. (Judge/Portugal)

Pela minha experiência é sempre verbal, não é feita uma tradução desses direitos, ou seja, o defensor assegura, aliás, como se costuma fazer quando há um detido português é feita uma leitura dos seus direitos e o defensor assegura que ele compreende esses direitos, é sempre perguntado, "percebeu?", às vezes eles têm alguma dúvida, [...] e o defensor e também através do juiz presente explica novamente e volta a repetir até o senhor perceber quais é que são os seus direitos, mas não é feita uma tradução desse documento. (Judge/Portugal)

- Interpretation of consultations with lawyers

All interviewees, with the exception of one public prosecutor that does not have experience in the execution proceedings of an EAW, stated that the interpretation of consultations with lawyers is provided. Every time that a lawyer needs to consult with the requested person, and they need an interpreter, a state-appointed interpreter is provided. It also should be noted that the consultations are done in a confidential manner.

If the lawyer wants to meet with the requested person (detainee), they won't do it in front of us. During the interrogation, if they need to meet, they leave the room where we are or we leave so they can talk. This is part of the right to a fair and equitable trial. It does not only apply to the European Arrest Warrant. (Judge/Portugal)

Quando o advogado chega e se quer reunir logo com a pessoa procurada, que está detida, como é óbvio não vai reunir à nossa frente. Mesmo durante o interrogatório se precisarem de conferenciar, ausentam-se da sala onde nós estamos ou, às vezes, ausentamo-nos nós para que possam conferenciar aí. Isso faz parte do direito a um processo justo e equitativo. Não se aplica só ao mandado de detenção europeu. (Judge/Portugal)

One lawyer explained that, when necessary, the lawyers can use the interpreter who is in the Court (assisting the requested person during the proceedings) or ask for another interpreter who will only be present at the consultations. However, in the experience of this lawyer, this right to ask for a different interpreter is never used.

(...) Usually, it is with the interpreter who is there in court, and it is the same, but the law provides for this right and the appointment of another interpreter for conversations with the lawyer. What happens is that lawyers never invoke this. (Lawyer/Portugal)

(...) Normalmente é com o intérprete que está lá no tribunal e é o mesmo, mas a lei prevê esse direito e a nomeação de outro intérprete para as conversas com o advogado, mas os advogados nunca o invocam. A prática é aproveitar o intérprete que está ali no tribunal. (Lawyer/Portugal)

One reason for lawyers waiving their right to ask for a different interpreter for consultations is that they already know several languages and can find common ground with the requested person. This is the experience of one of the lawyers interviewed. They explained that as they are fluent in other EU official languages, they never felt the need to request a state-appointed interpreter. However, they also added that if they ever felt that need, they would work with interpreters that they already know and work with them at their office.

Clients come from countries whose language I can maintain a conversion. Normally, I like to work with the interpreters who usually accompany us here in the office. They already know us, they know what we want and, therefore, if I need an interpreter, I tend to ask those who work in the office and not the State. (Lawyer/Portugal)

Os clientes que têm sido detidos são oriundos de países cuja língua eu consigo manter uma conversão. Normalmente, eu gosto de trabalhar com os intérpretes que habitualmente nos acompanham aqui no escritório. Já nos conhecem, já se bem o que nós queremos e, portanto, num dia em que eu precise de um intérprete, a tendência será de pedir apoio àqueles que acompanham o escritório e não propriamente ao Estado. (Lawyer/Portugal)

The idea of preferring to work with a non-state-appointed interpreter is also supported by another lawyer, who explained, that in their case, if they ever needed an interpreter, they would ask their office to hire an interpreter. However, this interviewee did not identify any problem regarding state-appointed interpreters.

Another lawyer showed some concern about the state-appointed interpreter present at the consultations with the lawyer being the same one that will be present during the hearing of the requested person. Therefore, the lawyer feels that this does not respect the confidentiality between the lawyer and the requested person.

(...) For example, if I am agreeing some kind of procedural strategy with the person, and then it is the same interpreter who is going to do the interpretation for the court. That doesn't make sense, but that's how it happens. There are three possibilities: either we ignore it and go ahead, take an interpreter [chosen by us] or (and this possibility is foreseen in the Code of Criminal Procedure) ask for an interpreter to be appointed for the conversations with the lawyer. But the judicial authority does not welcome this because it takes time and costs money. (Lawyer/Portugal)

(...) Não é muito agradável, nem respeita muito a privacidade entre a conversa do advogado e o procurado se eu estiver a combinar algum tipo de estratégia processual com a pessoa e depois ser o mesmo intérprete que vai fazer a mesma interpretação para o tribunal. Isso não faz sentido, mas é assim que acontece. Há três hipóteses: ou se ignora e avança-se, leva-se um intérprete [escolhido por nós] ou (e isso está previsto no Código de Processo Penal português) pede-se a nomeação de um intérprete para as conversas com o advogado. Mas aí não há uma grande receção por parte da autoridade judiciária nessa parte porque demora tempo e tem custos. (Lawyer/Portugal)

c. The challenge of the quality of the interpretation and translation

Although the law establishes the right to interpretation and translation, the quality of translation and interpretation isn't assessed. The law provides that experts must be persons included in lists of experts existing in each Court or, in their absence or impossibility of a timely response, by a person of good standing and recognised competence in the matter in question. This means that state-appointed interpreters are either included in a list of interpreters or are appointed because they are considered to be interpreters of good standing and recognised competence. This is supported by an interviewee, a judge, who explained that sometimes the Court asks the collaboration of embassies to appoint a reliable interpreter.

We often contact embassies to get an interpreter, especially for complicated languages such as Chinese. In this way, we are sure that the translation is reliable. Chinese is a language where we can't know if the translation is faithful or not and for that reason, I

can't put the man from the Chinese shop to do a translation, there has to be a minimum of trust. Sometimes we don't have official translators, so we ask embassies to refer them to us. (Judge/Portugal)

Frequentemente, contactamos as embaixadas para obter um intérprete, especialmente para idiomas complicados, como o chinês. Desta forma, temos a certeza de que a tradução é fidedigna. Chinês é uma língua que não podemos saber se a tradução é fiel ou não e por isso não posso indicar o senhor da loja do chinês do lado para fazer uma tradução, tem que haver um mínimo de confiança. Às vezes não temos tradutores oficiais, então pedimos às embaixadas que nos encaminhem. (Judge/Portugal)

However, the quality of interpretation or translation is not assessed. The law does not require that the interpreters and translators have any kind of judicial training or specialisation and there's no state body or office that evaluates the quality of the interpretation and translation. Therefore, this could lead to problems of communication, wrecking the safeguards put in place by law to protect the procedural rights of the requested person, since they cannot fully understand their situation and their rights.

There is no assessment of the merit of the interpreters. [...] It's a question of luck, in my experience. [...] I think it's a major weakness in the way we treat non-nationals, because we don't pay attention to the quality and reliability of the interpreter, which is crucial. Not only because that person has to know the legal terms well, but because he/she has to be able to explain exactly what the person is saying to the judge. Even the intonation, the way he/she says it. (Lawyer/Portugal)

Não há a mínima avaliação de mérito dos intérpretes. [...] É uma questão de sorte, pela minha experiência. [...] Acho que é uma falha grande da forma como nós tratamos os estrangeiros, é não se ter a mínima atenção à qualidade e fiabilidade de um tradutor e que é fulcral. Não só porque aquela pessoa tem que conhecer bem os termos jurídicos, mas porque tem de ser capaz de explicar exatamente aquilo que a pessoa está a dizer ao juiz. Até a entoação, a forma como o diz. (Lawyer/Portugal)

On this matter, overall, the lawyers interviewed had a more critical position when compared with the judges and public prosecutors interviewed. Judges and public prosecutors highlighted the measures taken to ensure interpretation (for example, contacting embassies to ask for a reference on interpreters, not starting a hearing without an interpreter present, ensuring that the requested person understands that what is being said to them). The lawyers interviewed highlighted the inexistence of assessment on the skills of the interpreters, since they are not required to have judicial training or to have specialisation.

It also should be pointed out that only one interviewee, a lawyer, mentioned the quality of the written translations. According to this lawyer, there is a certain difference between the interpretation, which, in their opinion, is generally well done, and the translation of procedural documents, where some errors are often found.

In court, my experience is that the interpreters, as a rule, are good. These persons speak the language very well [but] then when it comes to translating the procedural documents it's a disaster. (Lawyer/Portugal)

No tribunal, a minha experiência é que os intérpretes, regra geral, são bons. Estas pessoas falam muito bem a língua [mas] depois na tradução das peças processuais é uma catástrofe. (Lawyer/Portugal)

d. Discussion of findings

Overall, it is generally recognised by the interviewees that the right of interpretation is always provided, when needed or requested. Depending on the requested persons' nationality and knowledge of the Portuguese language, they are assisted with an interpreter on EAW proceedings. However, the interviewees identified some challenges regarding the quality of the interpretation provided.

The interviewed judges and public prosecutors have a generally positive view of the quality of the interpretation provided by state-appointed interpreters, and even highlighted measures that they undertake to ensure the right to interpretation. However, the interviewed lawyers have a more critical view of the interpretation provided by the state-appointed interpreters. Thus, one of the challenges identified is the lack of a state body or office to assess the quality of the interpretation. In addition, the law does not establish that the interpreters and translators must have specialised training or even judicial training, they just must be persons of a good standing and be considered as good interpreters.

Another aspect that emerged from the interviews is that, although the law foresees the possibility of two interpreters (one for the hearing, other for the consultations with the lawyer), according to one interviewee, the judicial authorities are not receptive to this situation since it is something that takes time and costs money. These concerns contribute to the preference of some lawyers interviewed for non-state-appointed interpreters.

Regarding translation, two main challenges were identified: the documents that are translated and the quality of the translation. Because the law does not foresee what documents should be translated and in what language they must be translated into, the translation is done on a case-by-case basis. However, according to three lawyers, one judge and one public prosecutor, the statement of defendant's constitution is translated into a language that the requested person understands. Moreover, the criminal police bodies already have translated versions of this document in the more common languages (for instance, German or English).

Furthermore, as with the quality of interpretation, one lawyer also showed some concern about the quality of translated documents, since translations are not done by translators without legal training or specialisation and there are no evaluation and monitoring mechanisms, which, in their opinion undermines the right to translation.

3. Right to access to a lawyer

a. Legal overview

The Constitution⁹⁴ establishes that every person has the right of access to the courts to defend their legally protected rights and interests, and justice cannot be denied to anyone on the grounds of insufficient financial means (Article 20(1)). In criminal proceedings, this guarantee is especially reinforced by Article 32(3) of the Constitution. In the event of arrest, the right to speak privately with their lawyer is also foreseen by Article 61(1)(f) of the Code of Criminal Procedure⁹⁵, applicable to EAW proceedings by virtue of Article 34 of the EAW Law⁹⁶.

When it comes to EAW proceedings, the right to access to a lawyer is stated by Article 17(2) of the EAW Law⁹⁷, establishing that “the detainee has the right to be assisted by a defence lawyer”. And according to Article 18(4) of the EAW Law, for the hearing of the detainee, if there is no lawyer appointed, the judge must first appoint one.

Furthermore, the EAW Law⁹⁸ also establishes certain situations where assistance from a lawyer is mandatory: when the issuing State is the Portuguese State and the requested person, after being surrendered, has expressly renounced entitlement to the speciality rule with regard to certain offences committed prior to his/her surrender (Article 7(3)(c)); when the requested person consents to his/her surrender to a Member State other than the executing State pursuant to an EAW (Article 8(2)(c)); and during the opposition to the surrender to the issuing State (Article 21).

- The right to a lawyer in Portugal as issuing and execution State: legal aid and dual representation

Although Council Framework Decision 2002/584/JAI⁹⁹ establishes that the requested person has the right of access to a lawyer in the issuing State, and that the role of that lawyer is to assist the lawyer in the executing State by providing that lawyer with information and advice with a view to the effective exercise of the rights of the requested person, that possibility wasn't transposed into the Portuguese EAW, thus making the possibility of dual representation an omission in Portuguese legislation. Moreover, the EAW Law does not foresee a legal framework for appointing a lawyer. Therefore, in EAW proceedings, when Portugal is the issuing State, the right to access to a lawyer is

⁹⁴ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

⁹⁵ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

⁹⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁹⁷ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁹⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

⁹⁹ [Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States](#), OJ L 190/1.

foreseen in the Code of Criminal Procedure¹⁰⁰, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, in conjunction with the Legal Aid Act¹⁰¹.

According to Article 7 of the Legal Aid Act¹⁰², nationals and citizens of the European Union, as well as foreigners and stateless persons with a valid residence permit in a Member State of the European Union, who prove to be in a situation of financial insufficiency, have the right to legal protection. Foreigners without a valid residence permit in a Member State of the European Union are recognised as having the right to legal protection, to the extent that this right is granted to Portuguese nationals by the laws of their respective States. This means that everyone has the right to legal protection if they can prove that they are in a situation of financial insufficiency.

Article 61(1) of the Code of Criminal Procedure¹⁰³, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, states that any defendant has the right to appoint a lawyer on their own initiative. However, if that person can't appoint a lawyer by themselves, they can request the appointment of one by the State in order to be assisted in all acts of the process (Article 61(1)(e) and Article 62 of the Code of Criminal Procedure¹⁰⁴). It should be noted that according to Article 64 of the Code of Criminal Procedure¹⁰⁵ the assistance of a lawyer is mandatory for the practice of some acts, namely in questioning an accused person in custody or detention; during questioning by a judicial authority; or in the trial hearing held in the absence of the accused. Moreover, according to the Code of Criminal Procedure, a lawyer may be appointed, at the request of the court or of the accused person, whenever the circumstances of the case demonstrate that it is necessary or convenient for the accused person to be assisted (Article 64 (2)).

Access to a lawyer is regulated by the Legal Aid Act¹⁰⁶, to guarantee that no one is prevented from being informed, or from exercising or defending their rights due to their social or cultural status, or

¹⁰⁰ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987

¹⁰¹ Portugal, [Lei n.º 34/2004, de 29 de julho, que altera o regime de acesso ao direito e aos tribunais e transpõe para a ordem jurídica nacional a directiva 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciário no âmbito desses litígios](#) (Law 34/2004, amending the system of access to law and courts and transposing into national law Council Directive 2003/8/EC of 27 January 2003 on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes), 29 July 2004.

¹⁰² Portugal, [Lei n.º 34/2004, de 29 de julho, que altera o regime de acesso ao direito e aos tribunais e transpõe para a ordem jurídica nacional a directiva 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciário no âmbito desses litígios](#) (Law 34/2004, amending the system of access to law and courts and transposing into national law Council Directive 2003/8/EC of 27 January 2003 on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes), 29 July 2004.

¹⁰³ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹⁰⁴ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹⁰⁵ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹⁰⁶ Portugal, [Lei n.º 34/2004, de 29 de julho, que altera o regime de acesso ao direito e aos tribunais e transpõe para a ordem jurídica nacional a directiva n.º 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do](#)

lack of financial means (Article 1 of the Legal Aid Act¹⁰⁷). The Legal Aid Act (Article 8 and 8-A) establishes the criteria defining that a person is in a situation of financial insufficiency and also defines the terms and procedures for legal protection, including the appointment and payment of legal representation. The application is assessed and granted by the Social Security Institute (*Instituto da Segurança Social*) (Article 20 of the Legal Aid Act). If free legal aid covers the appointment of a lawyer, the decision is referred to the Portuguese Bar Association (*Ordem dos Advogados*) that appoints a lawyer from those registered with the legal aid system according to their preferred areas of practice (Article 30 of the Legal Aid Act). While this is the general legal framework, the Legal Aid Act has a specific feature in the event of criminal proceedings (Article 39). If, when a person is appointed as a defendant, they do not appoint a lawyer, they must submit a statement of their income and charges to the court office. If the court office concludes that the person has insufficient funds, a lawyer will be provisionally appointed to them until the legal aid evaluation process has been completed by the competent entity (Social Security Institute). In the acts in which the presence of a lawyer is mandatory or the assistance of a lawyer is considered necessary or convenient and the person has not retained a lawyer, despite having been warned to do so, the lawyer is appointed, even if the court office does not consider that there is financial insufficiency, but the person to whom it was appointed remains responsible for the respective payment to the State.

An EAW may be issued at any phase of the criminal proceedings or during the execution of the sentence. Furthermore, according to Article 62 of the Code of Criminal Procedure¹⁰⁸, applicable to EAW proceedings by virtue of Article 34 of the EAW Law¹⁰⁹, the appointment of a lawyer can be done at any time of the criminal proceedings and as explained, there are acts for which the appointment of a lawyer is mandatory.

Therefore, there are two situations to consider regarding access to a lawyer when an EAW is issued by Portugal. Because the EAW can be issued at any phase of the criminal proceedings or during the execution of the sentence, and a lawyer can also be appointed at any time of the criminal proceedings, there could be a case where the requested person already has a lawyer. This lawyer

[acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciário no âmbito desses litígios \(Law 34/2004, amending the system of access to law and courts and transposing into national law Council Directive 2003/8/EC of 27 January 2003 on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes\)](#), 29 July 2004.

¹⁰⁷ Portugal, [Lei n.º 34/2004, de 29 de julho, que altera o regime de acesso ao direito e aos tribunais e transpõe para a ordem jurídica nacional a directiva n.º 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciário no âmbito desses litígios \(Law 34/2004, amending the system of access to law and courts and transposing into national law Council Directive 2003/8/EC of 27 January 2003 on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes\)](#), 29 July 2004.

¹⁰⁸ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹⁰⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

could be appointed on their own initiative or be appointed by the State in the terms foreseen in the Legal Aid Act¹¹⁰ explained above.

Another situation is when the requested person doesn't have a lawyer in Portugal as the issuing state. This situation isn't clearly foreseen by the law or jurisprudence. However, because the Code of Criminal Procedure¹¹¹ is the subsidiary law of the EAW Law¹¹², the rules foreseen for a defendant in Portugal can be applied to this situation, where, according to Article 61(1)(e) of the Code of Criminal Procedure, the defendant has the right to appoint a lawyer on their own or request the appointment of one by the state in the terms foreseen in the Legal Aid Act¹¹³.

As explained above, according to Article 17(2) of the EAW Law¹¹⁴, when Portugal is the executing State and the requested person is arrested, they have the right of access to a lawyer.

Moreover, as already explained, and according to Article 18 (4) of the EAW Law¹¹⁵, for the hearing of the detainee, if there is no lawyer appointed, the judge must first appoint one. The assistance of a lawyer is also required when the requested person consents to their surrender to a Member State other than the executing Member State, by virtue of an EAW (Article 8(2)(c) of the EAW Law) and when the requested person, prior to their surrender, has consented to it and renounced the benefit of the speciality rule before the executing judicial authority (Article 7(3)(c) of the EAW Law).

Pursuant to Article 21 EAW Law¹¹⁶, if the requested person doesn't consent to their surrender to the issuing Member State, their defence lawyer is granted the floor to file an opposition. Both the opposition and the evidence must be presented during the hearing of the defendant, but at the request of the defence lawyer, the court may - by order that cannot be appealed – set a deadline for this purpose, whenever such period is necessary for the preparation of the defence or for the presentation of evidence, considering the need to comply with the deadlines set out in Article 26 of

¹¹⁰ Portugal, [Lei n.º 34/2004, de 29 de julho, que altera o regime de acesso ao direito e aos tribunais e transpõe para a ordem jurídica nacional a directiva n.º 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciário no âmbito desses litígios \(Law 34/2004, amending the system of access to law and courts and transposing into national law Council Directive 2003/8/EC of 27 January 2003 on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes\)](#) 29 July 2004.

¹¹¹ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹¹² Portugal, [Lei n.º 65/2003, aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹¹³ Portugal, [Lei n.º 34/2004, de 29 de julho, que altera o regime de acesso ao direito e aos tribunais e transpõe para a ordem jurídica nacional a directiva n.º 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciário no âmbito desses litígios \(Law 34/2004, amending the system of access to law and courts and transposing into national law Council Directive 2003/8/EC of 27 January 2003 on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes\)](#) 29 July 2004.

¹¹⁴ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹¹⁵ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹¹⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

the EAW Law. After the production of evidence, and according to Article 21(5) of the EAW Law, the prosecutors and the lawyer of the requested person will be granted the floor for oral arguments.

- The violations of the right to a lawyer: legal remedies

According to Article 119(c) of the Code of Criminal Procedure¹¹⁷, applicable by virtue of Article 34 of the EAW Law¹¹⁸, the absence of the defendant's [requested person] or their lawyer, in cases where the law requires their presence, constitutes an irremediable nullity. Furthermore, according to Article 119 of the Code of Criminal Procedure, irreversible nullities must be declared *ex officio*, that is, judges must be aware of them and declare them at any stage of the proceedings.

As for the absence of the defendant's lawyer, in cases where the law requires their presence, that constitutes an irremediable nullity. Therefore, Article 122(1) of the Code of Criminal Procedure¹¹⁹ establishes that the act is invalid as well as those that depend on it and those that may be affected by it. However, according to Article 122(2) of the Code of Criminal Procedure, the declaration of nullity must establish which acts are to be considered invalid and order, whenever necessary and possible, their repetition.

As already explained, in EAW proceedings establish that at the time of the hearing of the requested person, the judge shall appoint a lawyer if the person does not have a lawyer. It also indicates specific acts that always require the presence of a lawyer: for the hearing of the detainee; when the requested person consents to their surrender to a Member State other than the executing Member State, by virtue of an EAW; and when the requested person, prior to their surrender, has consented to it and renounced the benefit of the speciality rule before the executing judicial authority. If during one of these occasions, the right to access to a lawyer is delayed or denied, the judge has to declare the act invalid and, whenever necessary and possible, order its repetition. However, that doesn't mean that the EAW itself is rendered invalid. It just means that the act considered invalid as well as those that depend on it and those that may be affected by it, have to be repeated, if considered necessary and possible.

As an example, although not directly concerning a situation that involves an EAW, judgement 54/19.6PFMTS.P1¹²⁰ clearly illustrates the legal regime behind the declaration of nullity when the right to a lawyer is affected. In this judgement the Court starts by explaining that within the scope of the irremediable nullities expressly typified in Article 119 of Code of Criminal Procedure¹²¹ - which constitutes the most serious form of invalidity of the act, since they represent a violation of procedural provisions that irremediably affect part or all of the proceedings, and are therefore declared *ex officio*, that is, judges must be aware of them and declare them at any stage of the

¹¹⁷ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹¹⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹¹⁹ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987

¹²⁰ Portugal, [Acórdão do Tribunal da Relação do Porto - Processo 54/19.6PFMTS.P1](#) (Decision of the Court of Appeal of Porto – Case 54/19.6PFMTS.P1), 11 September 2019.

¹²¹ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

proceedings - paragraph (c) provides for, "the absence of the accused or his/her defender [lawyer], in cases where the law requires the respective attendance". Thus, in view of the above, the Court considers that the failure to appoint a lawyer affects the informed exercise of the defendant's rights. This judgement also considers that the expression "the absence of the defender [lawyer] in cases where the law requires their appearance" includes the absence of a lawyer when the accused, having been previously informed about their right to be assisted by a lawyer, requests it and the lawyer is not appointed.

- The use of digital and technological tools in accompanying guidance regulating cooperation between lawyers dealing with a case in an executing and issuing Member State

Regarding communication between lawyers dealing with a case in an executing and issuing Member State, this issue isn't clearly established by Portuguese legislation. However, some rules can be found in the Code of Ethics for European Lawyers, approved by Deliberation 2511/2007 of the Portuguese Bar Association¹²². This Code provides in paragraphs 5.2 and 5.3 that, where lawyers from two different Member States work together, they both have a duty to consider the differences that may exist between their legal systems and Bar Associations, and between the competencies and duties of the lawyer, in their respective Member States. Furthermore, a lawyer who wishes to send a communication to a colleague in another Member State that they wish to be of a "confidential" or "restricted" nature should clearly express that intention before sending that communication. Should the recipient of the communication be unable to ensure its 'confidential' or 'subject matter' character, they must immediately inform the sender of the situation.

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?		
Portugal	-	NO (The law does not foresee this possibility)

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)
Portugal	YES (The legal aid	NO (The law does not foresee this possibility)

¹²² Portugal, [Deliberação 2511/2007, que aprova a tradução na língua portuguesa do Código de Deontologia dos Advogados Europeus, originalmente adoptado na sessão plenária do Conseil des Barreaux européens \(CCBE\) de 28 de Outubro de 1988 e subsequentemente alterado nas sessões plenárias do CCBE de 28 de Novembro de 1998, de 6 de Dezembro de 2002 e de 19 de Maio de 2006. Revoga o Regulamento 25/2001, de 22 de Novembro](#) (Deliberation 2511/2007, which approves the Portuguese translation of the Code of Deontology for European Lawyers, originally adopted at the plenary session of the Council of European Bar Associations (CCBE) on 28 October 1988 and subsequently amended at the plenary sessions of the CCBE on 28 November 1998, 6 December 2002 and 19 May 2006. It repeals Regulation 25/2001 of 22 November 2001), 27 December 2007.

	system does apply to EAW proceedings in the same conditions foreseen for other cases)	
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b. Right to access to a lawyer in practice

- Information about legal assistance (including on dual representation)

The interviewees are unanimous in the evaluation that requested persons arrested in Portugal on an EAW issued by another EU member state are informed about their right to access to a lawyer. According to the interviewees, the requested persons are informed orally by the criminal police body that made the arrest and in writing, through the statement of defendant's constitution (statement conferring the status of defendant).

When the police arrest him/her, they provide this information immediately. He/she doesn't need to deal with anything or ask for a lawyer. The lawyer is appointed to the case. He/she has the right to legal aid assistance. (Public Prosecutor/Portugal)

A polícia quando o detém presta logo essa informação. Ele não precisa de tratar de nada, nem de pedir advogado. O advogado é nomeado para o processo. Ele tem direito a um defensor oficioso. (Public Prosecutor/Portugal)

These rights are always guaranteed to the defendant. The Police immediately inform them that if they don't know any lawyer or don't want to appoint any lawyer, that there is legal aid assistance (state-funded legal assistance). (Judge/Portugal)

Esses direitos são sempre garantidos ao arguido. A Polícia informa-os que se não conhecerem nenhum advogado ou não quiserem mandar nenhum advogado, existe a assistência judiciária e que é patrocinada pelo Estado. (Judge/Portugal)

According to the experience of a lawyer and a judge, judges are very committed to protect the right of requested persons to be assisted by a lawyer. A lawyer interviewed even recall a situation where the requested person already had a state-appointed lawyer, and during the hearing with the judge, the requested person said that wanted to be assisted by a lawyer from the interviewee's office. In that case, the judge waited for the lawyer to arrive and continue with the hearing of the requested person. This not only shows how judges are committed to protecting the right to be assisted by a lawyer but also that judges do inform the requested person of their rights. This idea was also corroborated by a public prosecutor interviewed that emphasized that no court hearing starts without the presence of a lawyer.

I have already had one case, just to understand how seriously judges take at least that part of the rights. I even remember one time when a lawyer had already been appointed, the hearing of the suspect was in progress, and the requested person said, "I want to call this lawyer". The court clerk called our office to say that the requested person wanted to be assisted by us and the judge was waiting. And we went to the court. (Lawyer/Portugal)

Já me aconteceu um caso, só para perceber como é que os juizes levam a sério pelo menos essa parte dos direitos. Até me recordo de uma vez ter sido já nomeado defensor e estar a decorrer a diligência de audição do procurado e a pessoa dizer, "eu quero chamar este advogado". O funcionário ligou para o nosso escritório a dizer que o senhor estava a dizer que queria que nós fôssemos e que o juiz esperava. E nós fomos. (Lawyer/Portugal)

Regarding the information on legal assistance, the interviewees identified practical difficulties in choosing and getting in touch with a lawyer in Portugal as an executing state. For example, one public prosecutor interviewed pointed out that the information provided orally by criminal police bodies is vague, because they don't know the most important information to be provided to the requested persons – who is the lawyer and when will they be able to talk to them – and, therefore, can't provide it.

Moreover, most of the interviewees, with the exception of two public prosecutors interviewed, indicated that no list with contact details of lawyers is provided to the requested persons. So, except in cases where the requested persons already know a lawyer and have their contact details, it is difficult for them to choose and get in touch with a lawyer in Portugal as an executing state.

That's the complicated part for several reasons. [...] They don't provide a list of lawyers, or access to the Internet [...]. A State-funded lawyer is appointed, and it is part of our law that this lawyer is chosen at random. (Lawyer/Portugal)

Essa é que é a parte complicada por várias razões. [...] Não lhes dão uma lista de advogados, nem acesso à internet [...]. É nomeado um defensor público e faz parte da nossa lei que esse defensor é à sorte. (Lawyer/Portugal)

As to whether requested persons are informed about their right to dual representation, the lawyers interviewed consider that requested persons are not informed about this right and that the national authorities do not provide any assistance in this regard. Usually, it is up to the lawyer to inform the requested persons about this right. According to one lawyer interviewed, this happens because the law does not foresee that requested persons have to be informed of this possibility of being assisted by a lawyer in both countries.

From what I know, they [the requested person] are never informed of this. I have to inform them of this need. This information is not in our law and no judge has time to read the directive. The law should be well made because it is not practical to have to read the directive. The judge typically uses a ready-made draft and then adapts. Then the bad practice is reproduced. If someone has the patience to make a minute adapted to the directive, then other judges copy it, but that never happened, as far as I know. Therefore, they follow the law. (Lawyer/Portugal)

Nos casos que tive, nunca foram [as pessoas procuradas] informados disso. Eu é que informei dessa necessidade. Essa informação não consta da nossa lei e nenhum juiz tem tempo para ler a diretiva. A lei é que tem que estar bem feita. Não é prático ter que ler a diretiva. O juiz tipicamente vai buscar uma minuta de casos anteriores e a má prática reproduz-se. Se alguém teve a paciência de fazer uma ata adaptada à diretiva, depois os outros juízes copiaram, mas isso nunca aconteceu, pelo menos eu nunca apanhei isso, caso contrário seguem o que está na lei. (Lawyer/Portugal)

Nonetheless, according to a public prosecutor interviewed, requested persons are informed about their right to dual representation. But it is up to the lawyer or to the requested person to contact the lawyer in the issuing state since national authorities do not provide any help in this regard.

If it is for serving a sentence, he/she had a lawyer in the process in the issuing state and that is stated there in the warrant. This is when there has already been a trial and conviction and it is for serving a sentence. We usually inform them about the right to defend themselves in the issuing State through a lawyer, whether they are serving a sentence or for criminal proceedings. From what I see, there are situations where it is the Portuguese lawyer who contacts the lawyer from the issuing state who is appointed to the case. (Public Prosecutor/Portugal)

Se é para cumprimento de pena, ele teve um advogado no processo no país de emissão e isso consta lá no mandado. Isto quando já houve julgamento e condenação e é para cumprimento de pena. Nós costumamos informar que ele tem direito a defender-se no estado de emissão através de advogado, quer na situação de cumprimento de pena, quer nos casos para procedimento criminal. Do que eu vejo, há situações em que é o próprio advogado português que contacta o advogado do estado de emissão que está nomeado no processo. (Public Prosecutor/Portugal)

From the interviewees' experience, it is very difficult for requested persons to choose and get in contact with a lawyer in the issuing state, because many of them are not informed about this right (except in cases where the lawyer of the executing state informs them) and the national authorities do not provide any assistance in this regard. This is identified by the lawyers interviewed as a deficiency, because having a lawyer in the issuing state would be beneficial since they could assist in some relevant respects, like providing information about the case and the legal system of the issuing state.

It's either for the family or they ask us to act for a lawyer there, but they are not clearly told that they can benefit from a lawyer or that they can even have a State-funded lawyer when they get there. This would be very important [...] if we had someone in the issuing state who would immediately go to the court to check what is happening, I think it would be extremely valuable and would even facilitate justice because it would help the authorities themselves, should there be any change to the issuing warrant, because it has already happened to me. (Lawyer/Portugal)

Ou é pela família ou pedem-nos para diligenciar por um colega lá, mas não lhes é dito claramente que podem beneficiar de um advogado ou que até podem ter um advogado público quando lá chegarem. Isso seria muito importante [...] se tivéssemos alguém no país de emissão que imediatamente fosse verificar ao tribunal o que se está a passar, acho que seria extremamente válido e facilitaria até a justiça porque ajudava as próprias autoridades, caso houvesse alguma alteração ao mandado de emissão, porque já me aconteceu. (Lawyer/Portugal)

The judges interviewed recognised the difficulty for the requested person in choosing and contacting a lawyer in the issuing state unless they already know a lawyer there or they ask the lawyer in Portugal to find a lawyer in the issuing state. One of the judges interviewed also considers that it would be difficult for a lawyer from the issuing State to help, because the deadlines for compliance with the EAW are very strict and the requested persons may not even have any connection with the issuing State.

(...) it is also difficult for a lawyer from the issuing state to be able to come immediately to exercise their functions. It is much more complicated given the very tight deadlines we have to comply with EAW. [...] To my knowledge, it is not stated that they can choose a lawyer from the [issuing] State. In fact, they may not even have any connection with the State that issued the European Arrest Warrant, they only committed the acts there and came. [...] (Judge/Portugal)

(...) mas também é difícil que um advogado do Estado emitente possa vir logo exercer as funções. É muito mais complicado, dado os prazos tão curtos que nós temos para cumprir o MDE. [...] Agora, não lhe é indicado, que eu tenha conhecimento, que ele pode escolher um advogado do Estado [de emissão], aliás, ele pode até nem ter ligação nenhuma com o Estado que emitiu o mandado de detenção europeu, só lá praticou os factos e veio. [...] (Judge/Portugal)

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

	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Total
YES	X	X	X	X	X	X	X	-	X	8
In writing	X	-	X	-	-	-	-	-	-	2
Orally	-	-	-	-	X	X	X	-	-	3
In writing and orally	-	X	-	X	-	-	-	-	X	3
NO	-	-	-	-	-	-	-	-	-	0
Don't know/remember	-	-	-	-	-	-	-	-	-	0
Did not answer	-	-	-	-	-	-	-	X	-	1

Table 8: Information on dual representation, interview findings

Are persons arrested on an EAW informed by authorities on their right to have the assistance of a lawyer in the issuing Member State?										
	Lawyer 1	Lawyer 2	Lawyer 3	Lawyer 4	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Total
YES	-	-	-	-	X	-	X	-	-	2
NO	X	X	X	X	-	-	-	-	-	4
Don't know/remember	-	-	-	-	-	X	-	-	-	1
Did not answer	-	-	-	-	-	-	-	X	X	2

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

Regarding legal assistance in the executing state, one lawyer interviewed mentioned that the requested person only acquires this right after being constituted as a defendant (through the statement of defendant's constitution - the document stating that the person is a defendant in criminal proceedings). In the opinion of this lawyer this is a fault of the system because if the requested person does not know a lawyer, they have to wait for the state-appointed lawyer and that can take some time, leaving the requested person in a vulnerable position, without legal assistance, and unable to be advised until just before the hearing.

In Portugal there is a big problem. We should have a system in which each person who is accused is obligatorily assisted by a lawyer, but this is not the case. (...) In the act of constituting the accused there is no lawyer. (...) the system by default is not bad, what is bad is that in principle there is no lawyer once the accused is constituted. (Lawyer/Portugal)

Em Portugal há um grande problema. Nós devíamos ter um sistema em que cada pessoa que tivesse que ser constituída arguida estivesse obrigatoriamente assistida de advogado, mas não é assim. (...) No ato da constituição do arguido não há advogado. (...) o sistema por defeito, não é mau, o que é mau é ao princípio não ter advogado, a partir da constituição do arguido. (Lawyer/Portugal)

When asked about how requested persons can choose and get in touch with a lawyer in Portugal as an executing state, the interviewees described that after being arrested, the requested persons

remain in detention until being presented to a judge and they have the right to a phone call. If the requested person knows a lawyer, they can contact this lawyer and appoint them, or contact a family member or someone known and ask them to contact a lawyer that will assist the requested person. Usually, the family members of the requested persons help them to find a lawyer. That is, since the requested persons have the right to make a phone call after their arrest, usually, this phone call is to their relatives, who make the arrangements to choose and get in touch with a lawyer.

When the persons are arrested [...], they have the right to make a phone call and that phone call is usually to the family. In other words, it's usually the family that contacts the lawyer. Otherwise, if the requested person already has a contact, as has happened to me, the judge or the police call us and say, "I have a person here who wants to be assisted by yourself, can you come?"(Lawyer/Portugal)

Uma pessoa quando é detida [...], dão-lhes direito a fazer um telefonema e esse telefonema normalmente é para a família. Ou seja, normalmente é a família que depois faz esse contacto com o advogado. De resto, se a pessoa tiver já um contacto, também já me aconteceu, o juiz ou a polícia liga-nos a dizer "tenho aqui uma pessoa que quer que o represente, pode vir?" (Lawyer/Portugal)

One lawyer interviewed also mentioned that requested persons are aware of their services because they searched on the internet, or because they saw the lists of lawyers that speak their language that some embassies have.

They can ask for a lawyer to be appointed and in my understanding, they can even ask while they are at the police station [...] People who come to us are through private contacts or because they looked on the internet... they can also look on the website of the bar association, but forty thousand lawyers appear and may not be interesting. It is possible to write to the bar association, but I never received any requests that way. The requests I receive are through the embassies that have a list of lawyers who speak the language of a particular country, sometimes it is through contacts from colleagues in the person's country. (Lawyer/Portugal)

Eles podem pedir a nomeação do advogado e a meu ver até podem pedir enquanto estão na esquadra [...] As pessoas que chegam a nós é por contactos privados, porque procuraram na internet... também podem procurar no site da ordem dos advogados, mas aparecem quarenta mil advogados e pode não ter interesse. Também podem escrever à ordem dos advogados, mas nunca recebi nenhum pedido por aí. Recebo alguns pedidos através das embaixadas que às vezes têm lista de advogados que falam a língua daquele país. (Lawyer/Portugal)

The requested person has the right to a state-appointed lawyer. In this case the process is automatic. A lawyer is randomly appointed through the SINOA system (the IT system of the Portuguese Bar Association). A judge explained that when a requested person is arrested, the case is sent to the Public Prosecutor's Office, who will analyse and verify that the detention was carried out in accordance with the law. If it has not been carried out in accordance with the law, the detainee is released. If the detention is considered to be legal, the Public Prosecutor's Office makes a request for the requested person to be presented to the judge and the case file is assigned to a judge of the court of appeal. It is at this moment that the court clerk enters the SINOA and randomly appoints a lawyer. When the requested person arrives at the Court to be presented to a judge, the lawyer is waiting for them. At this stage, the requested person meets with the lawyer who has already been given access to the file. If the lawyer needs more time to review the case, they can ask for it and the

hearing of the requested person by the judge does not begin until the lawyer has finished meeting with the requested person.

However, if the requested person has already appointed a lawyer, they can communicate this information to the judge and the state-appointed lawyer is replaced. Two of the interviewees, a lawyer and a judge, confirmed that this substitution is done even if the judge has to wait for the lawyer to continue the hearing.

I even remember one time when a lawyer had already been appointed, the hearing of the suspect was in progress, and the requested person said, "I want to call this lawyer". The court clerk called our office to say that the requested person wanted to be assisted by us and the judge was waiting. And we went to the court. (Lawyer/Portugal)

Até me recordo de uma vez ter sido já nomeado defensor e estar a decorrer a diligência de audição do procurado e a pessoa dizer, "eu quero chamar este advogado". O funcionário ligou para o nosso escritório a dizer que o senhor estava a dizer que queria que nós fôssemos e que o juiz esperava. E nós fomos. (Lawyer/Portugal)

When the detainee already has a lawyer, this happened to me with a German lady, they communicate this to the court and the lawyer appointed (state-funded legal assistance) leaves the case. These rights are always guaranteed to the defendant. (Judge/Portugal)

Quando o próprio detido já tem advogado, isso aconteceu comigo com uma senhora alemã, ele comunica isso e o advogado nomeado sai. Esses direitos são sempre garantidos ao arguido. (Judge/Portugal)

According to the interviewees, the authorities do not provide requested persons with a list and contact details of available lawyers. This happens because, as already explained, state-appointment lawyers are randomly chosen. However, one judge, mentioned that in the past, court clerks had a list of lawyers on call.

In the past, there was a list of lawyers who were on call and that list was in the courts. This situation gave rise to less-than-ideal situations because the order that was on the list was not always followed and the nicest lawyers or those most favoured by some employees were always appointed. That doesn't happen now. There is still a scale, but no one knows this scale, it is random. Court officials enter SINOVA, which is the digital system of the Bar Association, write what they need, and a previously registered lawyer is randomly assigned. Neither the judges nor the detainee can choose a lawyer through this system. If they want a different lawyer, they must attach a power of attorney and bear the respective costs. [...] (Judge/Portugal)

Antigamente havia uma lista de advogados que estavam de escala e essa lista estava nos tribunais. Esta situação deu origem a situações menos corretas porque nem sempre a ordem que constava da lista era seguida e eram sempre nomeados os advogados mais simpáticos ou os mais queridos por alguns funcionários. Isso não acontece agora. Ainda existe uma escala, mas ninguém conhece essa escala, é aleatória. Os funcionários do Tribunal entram no SINOVA, que é o sistema digital da Ordem dos Advogados, escrevem o que precisam e um advogado previamente inscrito é designado aleatoriamente. Nem nós juízes nem o detido pode escolher um advogado através desse sistema. [...] (Judge/Portugal)

It also should be noted that one lawyer suggested that, in order to effectively ensure the right to a lawyer, a list of lawyers with experience in EAW proceedings, prepared by the Bar Association, should be available in all courts.

In terms of obstacles, I think that the way to effectively ensure the exercise of this right would be to have a list of lawyers available with lawyers with experience in this area. That list could eventually be prepared by the Bar Association, approved by the Court or by the Public Prosecutor's Office, and, in that way, whoever was arrested knew that there was, from A to Z, a lawyer with experience in this area who could represent them. (Lawyer/Portugal)

Em termos de obstáculos, eu penso que a forma de assegurar efetivamente o exercício desse direito seria estando disponível uma lista de advogados com experiência nesta área. Essa lista poderia eventualmente ser preparada pela Ordem dos Advogados, homologada pelo Tribunal ou pelo Ministério Público, e, nessa medida, quem fosse detido, sabia que estava ali, de A a Z, um advogado com experiência nesta área que o poderia representa-lo. (Lawyer/Portugal)

According to the lawyers interviewed, the tasks of the lawyers in EAW proceedings include gathering information about the case, and consulting with the requested person, their family and the lawyer in the issuing state (if there is one) in order to prepare the requested person's defence. One lawyer added that, in their experience, they first try to gather elements in order to support the idea that the requested person should not be in pre-trial detention and then they try to gather information in order to better advise the requested person as to whether they should give their consent to surrender or not.

If we are contacted immediately after the arrest, the first thing that is done is to meet with the person or family members to gather information relevant to the coercive measure. Basically, to gather elements that support that he should not be in preventive detention. Equally, check if there is a lawyer in the issuing state and contact him to understand the circumstances of the EAW issuance and analyse if anything can be done in the issuing state. This is the essential. Afterwards, if there is time, the detainee is visited. The time frame is very short. There are cases where I don't have time for this and I try to get all the information from the family, prepare the duly substantiated and documented application and then we meet with the person only in court. If I don't have any information, I have to go to the police station where the detainee is to try to talk to him before the hearing and understand what is relevant or not and what I have to collect to help him, after advising the person to consent or not to the surrender. However, I would never advise consenting to surrender without having consulted with the issuing state's lawyer. Normally the person doesn't consent, the process continues and then what I will try to do is resolve the issue of consent, check if it is relevant but within the opposition period so that I do not have to present the opposition and the process is resolved quickly. (Lawyer/Portugal)

Se formos contactados logo após a detenção, a primeira coisa que é feita é reunir com a pessoa ou familiares para recolher informação pertinente para a medida de coação. No fundo, recolher elementos que sustentem que a pessoa não deve ficar em prisão preventiva. Por outro lado, perceber se já há advogado no estado de emissão e contactá-lo para perceber as circunstâncias da emissão do MDE e ver se há alguma coisa para fazer no estado de emissão. Isto é o essencial. Depois se houver tempo, visita-se a pessoa. O espaço de tempo é muito curto. Há casos em que eu não tenho tempo para isso e tento obter a informação toda da família, preparar o requerimento devidamente fundamentado e documentado e depois reunimos com a pessoa só no tribunal. Se não tiver informação nenhuma tenho que ir à esquadra onde a pessoa está detida para tentar falar com ela antes da audição e perceber o que é relevante ou não e o que tem que ser recolhido. Depois de aconselhar a pessoa a consentir ou não, mas a minha perspetiva é nunca aconselhar a consentir sem ter consultado o advogado do estado de emissão. Normalmente a pessoa não consente, o processo prossegue e depois o que eu vou tentar fazer é resolver a questão

do consentimento, ver se é pertinente, dentro do prazo de oposição para não ter que apresentar a oposição. Porque se for para consentir é melhor para a pessoa e já não tem que se fazer a defesa e o processo é resolvido mais rápido possível. (Lawyer/Portugal)

In this regard, it should be noted that one judge mentioned that sometimes lawyers confuse what type of defence they should make.

[...] Lawyers confuse the defence to be presented under the European Arrest Warrant with the defence they must present in the main proceedings. Lawyers should only focus on grounds for refusing execution and they don't. (Judge/Portugal)

[...] Os advogados confundem a defesa a apresentar ao abrigo do mandado de detenção europeu com a defesa que devem apresentar no processo principal. Os advogados devem se concentrar apenas nos fundamentos de recusa do mandado de detenção, mas às vezes não o fazem. (Judge/Portugal)

Additionally, another lawyer interviewed highlighted the importance of creating a support network, since, requested persons tend to be alone in the country when they are arrested. Therefore, it is important to provide for anything that the requested person may need. Usually, in order to achieve this, this lawyer contacts family members or a lawyer that the requested person knows in the issuing state.

We have to support these persons. We have to do our legal work and we have to make sure that this person is stable within the situation they are in. And we usually have to arrange a second contact, which is either the family or a lawyer who knows the person from the issuing country and knows me or is part of a network of contacts of an associate of mine, so, we always have to have a network of contacts in case something is needed, things as basic as clothes, it has happened that I have had to go and buy clothes for them to wear. I have also had to give money to these persons. (Lawyer/Portugal)

Nós temos que apoiar estas pessoas. Nós temos de fazer o nosso trabalho jurídico e temos de garantir que esta pessoa está estável dentro da situação em que se encontra. nós temos normalmente de arranjar um segundo contacto, que é ou a família ou um advogado que conheça a pessoa do país de origem e que me conheça a mim ou faça parte de uma rede de contactos de um sócio meu, portanto, nós temos que ter sempre uma rede de contactos para o caso de ser necessário alguma coisa, coisas tão básicas como roupa, já me aconteceu ter de ir comprar roupa para eles vestirem. Também já me aconteceu dar dinheiro a estas pessoas. (Portugal/Lawyer)

Regarding the right to consult with a lawyer, none of the interviewees identified any obstacle. According to them, the lawyer can consult with the requested person at the police station or at the courthouse, during the hearing. According to the interviewees this is always done in private. One lawyer interviewed even highlighted the value that the judge and public prosecutors place in the intervention of the lawyer.

When we arrive, we ask for as much time as necessary to speak with the requested person and we can see the case file. If the person is arrested today and will only appear before the judge tomorrow, he/she has to stay overnight in the prison. I can go at any time to see that person, even at five in the morning. There is no timetable for lawyers in the case of a person who is at the stage before being brought before a judge. And it has happened to me. We are free to speak with the arrested persons at any time. The prison has adequate facilities for this. We will talk to the person in private and have as much time as is necessary. In court, the issue is the same. We speak to the court clerk and ask to speak to the person in private and it happens. I don't see any obstacles. Fortunately, in Portugal, the hearings take

place before a higher court, which is the Court of Appeal, where there is a judge and a public prosecutor, who are persons with some training, experience and maturity, who place great value on the intervention of the lawyer and want the person to leave the hearing perfectly convinced that everything was done in accordance with the law and with their rights. I see no obstacle in this regard. (Lawyer/Portugal)

Nós quando chegamos conversamos com as pessoas e pedimos o tempo que for necessário para falar com as pessoas, podemos ver o processo. Imagine que a pessoa é detida hoje e só vai ser presente ao juiz amanhã. Tem que pernoitar hoje no estabelecimento prisional. Eu posso ir a qualquer hora ver essa pessoa, mesmo às cinco da manhã. Não há horário para os advogados no caso de uma pessoa que esteja no momento anterior a ser presente a um juiz. E já me aconteceu. Temos liberdade para falar com a pessoa depois de detida em qualquer momento. A prisão tem instalações adequadas para isto. Vamos falar com a pessoa em privado e temos o tempo que é necessário. No tribunal, a questão é igual. Falamos com o funcionário e pedimos para falar com a pessoa em privado e isso acontece. Não identifico obstáculos. Em Portugal, felizmente, as audiências decorrem perante um tribunal superior, que é o tribunal da relação, há um juiz desembargador e procurador-geral adjunto e que são pessoas com algum treino, experiência, maturidade e, portanto, dão um valor grande à intervenção do advogado e querem que a pessoa saia dali perfeitamente convencida de que tudo foi feito de acordo com a lei e com os seus direitos. Não vejo nenhum obstáculo nesse aspeto. (Lawyer/Portugal)

Lastly, none of the interviewees identified any obstacle to the presence of the lawyer during the hearing. Although, one judge mentioned that sometimes the hearings do not start on schedule.

[...] Sometimes we don't start at the scheduled time, we start half an hour later because of the traffic. It's the only obstacle that sometimes happens. (Judge/Portugal)

[...] Às vezes nao começamos logo à hora marcada, começamos meia hora mais tarde por causa do trânsito. É o único obstáculo que às vezes acontece. (Judge/Portugal)

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	-
Lawyer 2	-	X	-
Lawyer 3	-	X	-
Lawyer 4	-	-	X
Judge 1	-	X (Is unsure)	
Judge 2	-	-	X
Judge 3			X
Judge 4	-	-	X
Judge 5	-	-	X
Total	0	4	5

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

Regarding the access to a lawyer in the issuing state when executing proceedings are ongoing in another member state, one of the findings is that despite the situation of dual representation is the ideal situation, it occurs in few cases.

What would be perfect is for a person to have a lawyer here and a lawyer there to oversee the case (...) but this is not always done. (...) the two situations I had (...) where the cases were at the beginning. Therefore, the two persons were being requested to appear before the authorities to have coercive measures applied and one of them also had a request to seize property here in Portugal, and at that time they didn't even have a lawyer there, they had no idea they had a case there. (Lawyer/Portugal)

O que é perfeito é a pessoa ter um advogado cá e um advogado lá para ver o processo (...) mas isso nem sempre é feito. (...) as duas situações que eu tive (...) em que os processos estavam no início e, portanto, as duas pessoas estavam a ser procuradas para comparecerem perante as autoridades para aplicação de medidas de coação e um deles tinha também um pedido de arresto de bens cá em Portugal, apreensão, e nessa altura ele não tinha advogado lá sequer, ele não fazia ideia que tinha um processo lá. (Lawyer/Portugal)

According to a public prosecutor interviewed, sometimes requested persons do have dual representation, however they do not know the process behind that. Furthermore, they also suggested that in order to assure dual representation when Portugal in the issuing state, the mechanisms of legal aid assistance could be triggered, i.e. as soon as the public prosecutor has news that the requested person has been found in another state, they could suggest to the investigating judge the appointment of a lawyer funded by the state.

Sometimes what happens is that as the person has already been arrested for a few days [...] in the Member State where he/she was found, he/she has already appointed a lawyer, that is, he/she has this lawyer who may have already spoken with the arrested person, and lawyers appear in Portugal, in the Portuguese proceedings.[...] Perhaps we could think about a solution: as soon as I have news here that the person was found in another Member State, I suggest to the investigating judge to appoint a lawyer. I believe that even if they are informed that a lawyer has already been appointed, despite the power of attorney revoking the appointment of legal aid assistance, I doubt that, even if the state-funded lawyer has already collected some documents, they will talk to each other. It would be possible to provide an additional guarantee to the future defendant that there is already someone here who is defending him/her. (Public Prosecutor/Portugal)

Por vezes o que acontece é que como o indivíduo já está detido há alguns dias [...] no país onde foi encontrado, ele já terá constituído advogado, ou seja, terá esse advogado que inclusive já terá falado com o indivíduo detido, e aparecem advogados em Portugal, no processo português. [...] Se calhar podia-se pensar naquela solução: logo que eu tenha aqui notícia de que ele foi encontrado noutra país, sugerir ao juiz de instrução que lhe nomeassem um defensor. Acredito que mesmo que sejam informados que já foi nomeado defensor, apesar de procuração revogar a nomeação oficiosa, duvido que mesmo que o defensor oficioso já tenha recolhido alguns elementos, falem uns com os outros. Podia-se dar aqui mais uma garantia ao futuro arguido de que aqui já há alguém que o está a defender. (Public Prosecutor/Portugal)

With regard to the lawyer's tasks in the issuing state, the lawyers interviewed agreed that having a lawyer in the issuing state can be beneficial to the requested person and to their lawyer in the executing state. Furthermore, according to one interviewee, the lawyer in the issuing state can

consult the case file to confirm the validity of the EAW, and, if not valid, contest it; discuss the case file with the lawyer in the executing state; bring some evidence to the case that could lead to the revocation of the EAW or its replacement; provide legal assistance to the requested person, and, depending on the grounds that will be invoked, even gather some additional evidence related to the merits of the case.

In my opinion, consult the file more quickly - but if it is under investigation, there may be difficulties - in order to verify the validity of the warrant and if it is not valid, challenge it. For example, there were several cases of default in which an automatic warrant had been issued and then an EAW based on a national warrant in cases that did not even admit pre-trial detention. This was illegal in my understanding. Provide the attorney in the executing state with information that may be pertinent to the defence there; advise the person whether or not to consent to the surrender and this may imply having to see more information, in addition to consulting the process, discussing with the colleague or with the customer, since sometimes it is only possible to discuss with the colleague because the customer is stuck and we don't have access to the client. Check the possibility of changing the EAW, for example, bringing some evidence about the person's situation and getting a change, in which case either the EAW is revoked, or replaced by a request for a hearing... it depends on the cases. Then it's like in the normal criminal process, defend the person. (Lawyer/Portugal)

A meu ver, o mais rapidamente possível pode consultar o processo – pode haver dificuldades se estiver em fase de inquérito - com vista a verificar a validade do mandado e se não for válido, impugnar, por exemplo, havia vários casos de contumácia em que tinha sido emitido mandado automático e depois um MDE com base num mandado nacional em casos que nem admitiam prisão preventiva, por exemplo, e eram ilegais a meu ver. Fornecer ao advogado no estado de execução informação que possa ser pertinente para a defesa lá; aconselhar a pessoa se deve consentir ou não na entrega e isso pode implicar ter que ver mais informação, para além e consultar o processo, discutir com o colega ou com o cliente sendo que às vezes só é possível discutir com o colega porque o cliente está preso e não temos acesso ao cliente. Verificar a possibilidade de alterar o MDE, por exemplo, trazendo-se alguma prova sobre a situação da pessoa e conseguir-se uma alteração e nesse caso ou o MDE é revogado, ou substituído por um pedido de audição... depende dos casos. Depois é como no processo penal normal, defender a pessoa. (Lawyer/Portugal)

It should also be noted that one judge pointed out that regarding the gathering of additional evidence as to the merits of the case, in Portugal, the lawyers just have to create reasonable doubt.

[...] In Portugal the accused does not have to prove anything and, therefore, here the lawyer is not responsible for collecting evidence on the merits, but only to create some reasonable doubt. So, I think it also depends on the system that is in place in each of the States. (Judge/Portugal)

[...] Em Portugal o arguido não tem que fazer prova de que nao cometeu os factos e, portanto, aqui o advogado não é responsável por recolher provas relativamente ao mérito, mas, pelo menos, por criar alguma dúvida. Então, eu acho que depende também do próprio sistema que estiver em vigor em cada um dos Estados. (Judge/Portugal)

Moreover, another judge also pointed out that they are not aware of a situation where the requested person requested the assistance of a lawyer in the issuing state. Furthermore, in the opinion of this judge, the idea of appointing a lawyer in the issuing state, would only create delays in a process that should be quick.

I've never seen it (...) taking into account the speedy procedure that this requires, it's very complicated because it creates delays. (Judge/Portugal)

Nunca vi (...) tendo em conta a tramitação célere que isto exige é muito complicado porque cria demoras. (Judge/Portugal)

As to consultations with a lawyer in the issuing state, none of the interviewees mention this issue.

Table 10: Providing dual legal representation, interview findings (issuing MS)

Is assistance provided in appointing a lawyer in the issuing Member State when execution proceedings are ongoing in another MS? (When your country is an issuing state)			
Interviewees	YES	NO	Didn't know/answer/remember
Lawyer 1	-	-	X
Lawyer 2	-	-	X
Lawyer 3	-	-	X
Lawyer 4	-	-	X
Judge 1	-	-	X
Judge 2	-	-	X
Judge 3	-	-	X
Judge 4	-	-	X
Judge 5	-	-	X
Total	0	0	9

- Communication between the lawyers in both states

When requested persons want to have dual representation, they can get the contact details of a lawyer through contacts of their lawyer, contact networks of lawyers or through the family. Therefore, this is done in an informal way, as national authorities do not assist in this matter. As to how this is done in practice, the interviewees didn't offer much information. However, one lawyer underlined the importance of teamwork between the lawyers of the two-member states involved in the EAW proceedings.

[...] Teamwork is a virtue and an advantage. And in these cases, it is essential. Whether Portugal is the issuing State or the executing State, it is essential that there is joint work with the respective lawyers, specifically between the lawyer of the issuing State and the lawyer of the executing State. (Lawyer/Portugal)

[...] O trabalho em equipa é uma virtude e uma vantagem. E nestes casos é imprescindível. Seja quando Portugal é Estado emissor, seja quando Portugal é Estado de execução, é imprescindível que haja um trabalho conjunto com os respetivos advogados, concretamente, entre o advogado do Estado emitente e do Estado executante. (Lawyer/Portugal)

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

When it comes to the provision of information about cost-free legal assistance with Portugal as an executing state, it should be noted that the interviewees who mentioned this issue confirmed that the requested person is informed about their right to cost-free legal assistance (legal aid). However,

a lawyer added that in Portugal, this has no practical implication because EAW processes do not have costs.

Usually there is the information that they can have legal aid, but in Portugal this has no practical implication because these processes do not have costs. A lawyer is automatically appointed, and the person never pays. For the requested person, these are processes without costs. I have never received a bill for costs. I have already had cases that went to the Constitutional Court and did not pay any costs. In EAW cases I think that they apply costs at the Constitutional Court. (Lawyer/Portugal)

Normalmente há a informação de que podem ter apoio judiciário, mas em Portugal isso não tem implicação prática porque estes processos não têm custos. Automaticamente é nomeado um advogado e a pessoa nunca paga. Para a pessoa procurada são processos sem custas. Eu nunca recebi uma conta de custas. Na extradição isso é evidente até já tive casos que foram ao Constitucional e não pagaram custas. No MDE acho que aplicam custas no tribunal constitucional. (Lawyer/Portugal)

As to the provision of information about cost-free legal assistance with Portugal as an issuing state, none of the interviewees mentioned this issue.

Table 11: Cost-free legal assistance, interview findings

Free of cost lawyer provided	When your country is an executing state		When your country is an issuing state for the purposes of procedures in the executing MS (e.g. to assist the lawyer in the executing state)	
LAWYER 1	YES			DID NOT ANSWER
LAWYER 2	YES			DID NOT ANSWER
LAWYER 3	YES			DID NOT ANSWER
LAWYER 4		NO		DID NOT ANSWER
JUDGE 1		DID NOT ANSWER		DID NOT ANSWER
JUDGE 2		DID NOT ANSWER		DID NOT ANSWER
JUDGE 3		DID NOT ANSWER		DID NOT ANSWER
JUDGE 4		DID NOT ANSWER		DID NOT ANSWER
JUDGE 5		DID NOT ANSWER		DID NOT ANSWER
TOTAL	3	1	0	0

c. Additional challenges

Some additional challenges were identified by the interviewees, namely: the specialisation of lawyers; the legal time constraints; and the difficulty in finding grounds for the non-executing of the EAW. The specialisation of lawyers was the most common challenge identified by the interviewees, three lawyers and one public prosecutor. According to them, because there is no specialisation in EAW proceedings, and state-appointed lawyers are randomly chosen, this creates a system where the right to be assisted isn't completely assured. However, this could be solved by implementing a list of lawyers with EAW experience.

We don't have specialised lawyers here in Portugal, so it's a matter of luck. We don't have a public defence system; we don't have supervision. (Public Prosecutor/Portugal)

Nós não temos especialização de advogados cá em Portugal, portanto é uma questão de sorte. Não temos um sistema de defesa público, não temos fiscalização. (Public Prosecutor/Portugal)

The second challenge was identified by three lawyers and regards the legal time constraints. According to these lawyers, because EAW proceedings have short deadlines, this can be a problem in ensuring the quality of the defence.

[...] The second challenge is, even though I have knowledge about the matter, and this is my case, I have to defend the client in a very short time. The normal deadline for defence is between 5 to 10 days. It is normal for the courts to give 10 days, but 10 days is nothing... (Lawyer/Portugal)

[...] O segundo desafio é, mesmo tendo conhecimento sobre a matéria, e é o meu caso, conseguir defender o cliente num espaço de tempo que é muito curto. O prazo normal para a defesa são entre 5 a 10 dias. É normal os tribunais darem 10 dias, mas 10 dias não é nada... (Lawyer/Portugal)

The third challenge is related to the difficulty of finding grounds for not executing an EAW. This challenge was identified by a lawyer who considers that because the grounds for justifying the non-execution of an EAW are very few, this task requires a very careful and thorough analysis of the EAW and the collaboration with the lawyer in the issuing State. If this is not achieved, the next step is to try to find a way, also with the collaboration of the lawyer of the issuing state, to reopen the proceedings in the issuing state to ensure that the requested person presents themselves voluntarily.

A very careful and thorough analysis of the EAW and whether we have any way of ensuring that the EAW is not executed. To that end, once again, from my own experience, collaboration with the issuing State lawyer is fundamental. That is the great challenge. As a lawyer in the issuing State, the challenge is, first of all, to find a way of being able to reopen the case by means of a review appeal. (Lawyer/Portugal)

A análise muito cuidada e minuciosa do MDE e perceber se temos alguma forma de poder fazer com que esse MDE não seja executado. Para esse efeito, mais uma vez, por experiência própria, é fundamental a colaboração com o colega do Estado emissor. Esse é o grande desafio. Como advogado no Estado emissor, o desafio é, primeiro, conseguir encontrar forma de poder reabrir o processo através de recurso de revisão. (Lawyer, Portugal)

d. Discussion of findings

The interviewees agreed that requested persons are informed about their right to access a lawyer and the mechanisms of legal aid. This information is provided orally, but also in writing, as part of the statement of defendant's constitution. Additionally, it was also pointed out that judges are committed to protecting the right of legal representation.

Regarding the appointment of a lawyer in the executing state, the requested persons have the right to a state-appointed lawyer. In this case the process is automatic. A lawyer is randomly appointed through the SINOVA system (the IT system of the Portuguese Bar Association). However, if the

requested person already has appointed a lawyer, they can communicate this information to the judge and the state-appointed lawyer is replaced.

According to the interviewees, the authorities do not provide requested persons with a list and contact details of available lawyers. In order to effectively ensure the right to a lawyer, it was suggested that a list of lawyers with experience in EAW proceedings, prepared by the Bar Association, should be available in every Court to facilitate the identification of a lawyer for requested persons who intend to appoint a lawyer (and not to benefit from a State appointed lawyer).

Regarding the right to consult with a lawyer, none of the interviewees identified any obstacle. According to them, the lawyer can consult with the requested person at the police station or at the courthouse, during the hearing, and it is always done in private. It should also be noted that none of the interviewees identified any obstacle to the presence of the lawyer during the hearing.

Some different opinions were collected regarding the right to dual representation. These differences may be due to the fact that the law does not foresee the right of the requested persons to be informed about being assisted by a lawyer in both Member states. The lawyers interviewed consider that requested persons are not informed about their right to dual representation by the judicial authorities, since it is up to the lawyer to inform them about the right to be assisted by a lawyer in the issuing State. Thus, they are informed of this right only if the lawyer informs them. Additionally, if the requested person does not have or does not know a lawyer in the issuing Member State, it's very difficult to choose and get in contact with a lawyer there. The national authorities do not provide any assistance in this regard.

One of the interviewees, a lawyer, highlighted that dual representation is the ideal situation. However, it occurs in few cases. Furthermore, another interviewee, a public prosecutor, suggested that in order to assure dual representation when Portugal is the issuing state, the mechanisms of legal aid assistance could be triggered, i.e. as soon as the public prosecutor has news that the requested person has been found in another state, they could suggest to the judge of the process the appointment of a lawyer funded by the state.

Additional challenges were identified by the interviewees, namely: the specialisation of lawyers; the legal time constraints; and the difficulty in finding grounds for the non-execution of the EAW.

4. Issuing and Execution of the EAW

a. Legal overview

- Issuing a EAW: the legal framework

The principle of mutual trust brought the removal of intervention by political entities in favour of direct contact between judicial authorities: hence the rule that a judicial authority has to be a legitimate issuing authority. According to the EAW Law¹²³ (Article 36), Portuguese issuing authorities are all courts with criminal competence, and judicial investigation departments, which are the competent judicial authorities to order the arrest or detention of the requested person. Therefore, an EAW may be issued during the phase of inquiry (investigation), for which the public prosecutor in charge of the investigation is competent in accordance with criminal procedural law, applicable to EAW proceedings by virtue of Article 34 of the EAW. Note that if the issuing takes place during the subsequent procedural phases and during the execution of the sentence, the EAW may only be issued by a judge.

When it comes to the process of issuing an EAW, it may be issued for acts punishable by Portuguese law (law of the issuing Member State), by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months (Article 2 EAW Law¹²⁴). Although the EAW is issued under the principle of mutual trust, when issuing an EAW, the public prosecutors or judges have also to consider the principle of proportionality. Although this is a principle foreseen in Council Framework Decision 2002/584/JAI¹²⁵, this is also a principle foreseen in Article 18(2) of the Portuguese Constitution¹²⁶ establishing that the law can restrict rights, freedoms and guarantees but those restrictions are limited to what is necessary to safeguard other constitutionally protected rights or interests. This means that when issuing an EAW, the competent entity has to assess if the EAW is the most appropriate and necessary mechanism to be applied to that particular case.

Apart from assessing if the type of crime committed is foreseen in Article 2 of the EAW Law¹²⁷ and that the legal requirements are established by Article 3, the EAW Law doesn't foresee what concrete factors have to be taken into account when assessing if the issuing of an EAW is proportional to a particular case. This leads to the conclusion that this assessment complies with the principle of proportionality in a broad sense (*lato sensu*), meaning that the evaluation falls within the discretionary power of the entity that is issuing the EAW. This has been the understanding followed by jurisprudence.

¹²³ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹²⁴ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹²⁵ [Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States](#), OJ L 190/1.

¹²⁶ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

¹²⁷ Portugal, [Lei 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

One example of this is case 612/08.4GBOBR-A.P1¹²⁸. In 2012, B was charged with one crime of damage to property, one crime of housebreaking, one crime of simple theft and two crimes of aggravated theft. Because B couldn't be located, he was declared *in absentia* (act of after being notified by every means possible and not appearing in court). After B was declared *in absentia*, he was located in Spain a few years later. Since the issuing of a rogatory letter was not possible, the Public Prosecutor's Office asked for an EAW to be issued for the purpose of arresting the defendant and applying the coercive measure of term of identity and residence, in order to end the *in absentia*. This request was refused by the first instance court, on the understanding that the execution with the EAW would necessarily involve detaining B for a minimum of 10 days, without bringing him before a judge, and that such a period of detention, only to be subjected to a term of identity and residence, seemed manifestly disproportionate, violating the principle of proportionality foreseen in Article 18 of the Portuguese Constitution¹²⁹. In view of this, the Public Prosecutor's Office filed an appeal only to raise the question of whether if a defendant, who has been declared *in absentia* by the Court, is found abroad, it is possible or not to issue an EAW in order to arrest that defendant and apply the coercive measure of term of identity and residence for the purpose of ending the *in absentia* situation. This appeal gave rise to case 612/08.4GBOBR-A.P1¹³⁰, where the Porto Court of Appeal explained that since the execution of an EAW constituted a major restriction on a fundamental right such as the right to liberty, and bearing in mind the length of time that the detention would potentially last without a final decision being taken, it followed that the decision to issue the EAW had to comply with, among others, the principle of proportionality *lato sensu*, which in turn unfolds into 3 sub-principles that can be interpreted as a test: adequacy (is this measure the most appropriate to the case?), necessity (is this measure that would bring the least burden?), and proportionality in the strict sense (is the measure the fairest?). The Court considered that the intention of the Public Prosecutor's Office in issuing an EAW was disproportionate.

The Public Prosecutor's Office (*Procuradoria-Geral da República*) is the designated Central Authority for the purposes of the EAW Law, especially to assist, if necessary, the judicial authorities in the transmission procedures. To this end, the Public Prosecutor's Office's Documentation and Comparative Law Office (the department that performs these functions) is responsible for facilitating international communications when required and maintaining a centralised archive of issued and incoming EAW proceedings (Article 9 of the EAW Law¹³¹). There are two Circulars from the Public Prosecutor's Office (4/2004, 18 March; and 15/2004, 18 November¹³²) that help their performance, containing concrete indications on those procedures.

According to EAW law, when Portugal is the issuing state, the warrant must be accompanied by a translation into the language of the executing State, or into another official language of the institutions of the European Community, accepted by that State by means of a declaration deposited

¹²⁸ Portugal, [Acórdão do Tribunal da Relação do Porto – Processo 612/08.4GBOBR-A.P1](#) (Decision of the Porto Court of Appeal – Case 612/08.4GBOBR-A.P1), 18 March 2015.

¹²⁹ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

¹³⁰ Portugal, [Acórdão do Tribunal da Relação do Porto – Processo 612/08.4GBOBR-A.P1](#) (Decision of the Porto Court of Appeal – Case 612/08.4GBOBR-A.P1), 18 March 2015.

¹³¹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹³² For more information, see the [website of the Public Prosecutor's General's Office](#).

with the General Secretariat of the Council. Obtaining the translation is the responsibility of the issuing court (Article 3(2) of the EAW Law¹³³).

Moreover, regarding the form, it must be filled out in a rigorous, detailed and complete manner, covering all fields. In the specific case of the crimes included in the list of Article 2(2) EAW Law¹³⁴, in relation to which the control of double criminality is renounced, the list contained in the form must be maintained, highlighting the crime that justifies the specific request for surrender, underlining it in the list or highlighting it in bold. In the case of crimes not included in the list of Article 2(2), they must be added in the form.

Whenever the requested person is detained in a Member State of the European Union by application of the EAW, the detention will be immediately communicated to the requesting authority and to the Public Prosecutor's Office, by the National Offices SIRENE or INTERPOL (in the case of the United Kingdom and Ireland).

- *Challenging the issuing of an EAW: legal remedies*

The EAW Law¹³⁵ foresees some rules relating to the appeal process regarding the issuing of an EAW. However, Article 24 the EAW Law¹³⁶ only applies to decisions that maintain the detention or replace it by a coercive measure; or final decisions on the execution of the EAW, which means that it does not provide for an appeal on other grounds, nor on the decision to issue an EAW. However, the general rules of appeal foreseen in the Code of Criminal Procedure (Article 399 *et seq.*)¹³⁷, can be applied to decisions that do not fall into those categories, since this is the subsidiary law to the EAW Law. When issued by a judge, it is possible to appeal the decision to issue an EAW request. As explained above, since this type of decision is not foreseen in Article 24 of the EAW Law¹³⁸, it falls within the categories that have to follow the general rules of appeal foreseen in the Code of Criminal Procedure. This means that even if this possibility is not directly provided for in the EAW Law¹³⁹, the right to an appeal is provided in Article 399 of the Code of Criminal Procedure¹⁴⁰ (and also Article 32(1) of the Portuguese Constitution¹⁴¹), according to which it is always allowed to appeal sentences issued by a court (single or collegial), as well as intermediate decisions when otherwise is not foreseen by law.

¹³³ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹³⁴ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹³⁵ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹³⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹³⁷ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹³⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹³⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁴⁰ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹⁴¹ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

However, as already addressed above, an EAW request in Portugal may be issued by a public prosecutor – if the issuing occurs during the phase of inquiry (investigation), for which they are the competent figure – or by a judge – if the issuing occurs during the phase of inquiry, they can also issue the warrant, and exclusively during the subsequent procedural phases and during the execution of the sentence.

From this perspective, depending on the procedural stage in which the request is issued, the competence to issue an EAW will be that of a judge or a public prosecutor. If the EAW request is issued by a judge, the decision to address such a request is appealable, since it is a judicial decision, following the referred procedural principle foreseen in Article 399 of the Code of Criminal Procedure¹⁴², applicable to EAW proceedings by virtue of Article 34 of the EAW Law¹⁴³. If the request is issued by a public prosecutor, the decision to address such a request is not appealable in court, since it is not a judicial decision. In this case, this decision can only be contested through the hierarchical chain of the Public Prosecutor's Office, and it is up to the Attorney General to decide this hierarchical objection (Article 19 (2) of the Statute of the Public Prosecutor's Office¹⁴⁴). The Courts of Appeal (and the Supreme Court if the EAW is issued by a judge of an Appeal Court) are competent for the appeals against the judge's decision to issue an EAW request. In such cases, Article 401 (1) of the Code of Criminal Procedure¹⁴⁵ establishes who is entitled to appeal.

However, it should be noted that in 2019, the European Court of Justice, in the joint cases C-508/18 and C-82/19 PPU¹⁴⁶, ruled that public prosecution offices could no longer issue European Arrest Warrants since they were found not to have a sufficiently independent status. The Court ruled that "The concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant."

- *Executing an EAW: the legal framework*

Chapter II of the EAW Law¹⁴⁷ (that foresees Articles 11 to 35) establishes the rules for executing an EAW when Portugal is the executing State. Firstly, it is important to note that the EAW execution underlies the principle of mutual recognition or mutual trust, meaning that the Member States trust that all the other Member States comply with European Union law and, in particular, with the

¹⁴² Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

¹⁴³ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁴⁴ Portugal, [Lei 68/2019, que aprova o Estatuto do Ministério Público](#) (Law 68/2019 approving the Statute of the Public Prosecutor's Office), 27 August 2019.

¹⁴⁵ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

¹⁴⁶ Court of Justice of the European Union (CJEU), [C-508/18 and C-82/19 PPU, Minister for Justice and Equality v O.G. and P.L.](#), 27 May 2019

¹⁴⁷ Portugal, [Lei n.º 65/2003, aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 approves the legal framework of the European Arrest Warrant), 23 August 2003.

fundamental rights recognised by that law. In practice this means that a judicial decision taken by a judicial authority in one Member State based on its domestic law will be recognised and enforced by the judicial authority of another Member State, producing effects at least equivalent to a decision taken by a Portuguese judicial authority. Therefore, as explained before, the decision to issue an EAW must comply with the principle of proportionality, but it is up to the judicial authority of the issuing State to make the judgment on proportionality, not for the judicial authority of the executing State to make any judgment on this matter when it concerns the decision of the judicial authority of the issuing State to prosecute the requested person and order his arrest. This has been the understanding of courts when it comes to proportionality concerns in the execution process of an EAW. One example of that is Case 546/17.1YRLSB-5¹⁴⁸.

In 2017, the Public Prosecutor's Office at the Lisbon Court of Appeal allowed the execution of an EAW, issued by the judicial authority of France against K. The defendant was arrested on 14 March of 2017 and presented to a judge. After being informed of the existence and content of the EAW, K. declared that he did not renounce the principle of speciality and that he did not consent to surrender to the issuing authorities. He also requested time in which to lodge a written objection, which was granted. In that objection, the defendant declared that he was integrated into Portuguese society and that he had applied for asylum in Portugal, for which reason any measure "of deportation", even if provisional, could call into question his personal safety. The Court found that there was no obstacle to the execution of an EAW on the grounds that an international protection request was pending, which in no way was related to the facts on which the warrant was based. Within its argumentation, the Court also explained that it has been an understanding of Portuguese jurisprudence that the decision to issue an EAW must obey the principle of proportionality, but the judgement on proportionality is up to the judicial authority of the issuing State, while it is only up to the executing State to execute the mandate, in the name of the principle of mutual trust.

Following the issue of an EAW, the executing proceeding of an EAW by a Portuguese judicial authority differs if the request was directly issued to said authority, or if it is a request which is part of the Schengen Information System (SIS). The latter, which appears to be far more common, starts with the detention of the requested person, and (only) subsequently with their surrender by the Public Prosecutor, while the former starts directly on the initiative of the Public Prosecutor's Office. In those situations, this request will produce the same effects as the EAW, since it contains the information required in the EAW Law (Article 4(2) and (4) of the EAW Law¹⁴⁹). The EAW Law established a transitional regime, during which the SIS requests have the same effect as an EAW form, until the original is received in due and proper form (Article 39 of the EAW Law¹⁵⁰).

According to Article 16 of the EAW Law¹⁵¹, once an EAW is received, the Public Prosecutor's Office at the competent court shall execute it within 48 hours. The competent judge issues an initial ruling within five days on the sufficiency of the information accompanying the EAW. If the information

¹⁴⁸ Portugal, [Acórdão do Tribunal da Relação de Lisboa – Caso 546/17.1YRLSB-5](#) (Decision of the Lisbon Court of Appeal – Case 546/17.1YRLSB-5), 7 April 2017.

¹⁴⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵⁰ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵¹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

communicated by the issuing Member State is insufficient to decide on surrender, the necessary supplementary information will be requested as a matter of urgency and a deadline may be set for its receipt. However, the issuing judicial authority may at any time transmit, on its own initiative, any additional information it deems useful or necessary. After the initial ruling on adequacy is issued and the EAW is translated, it is forwarded to the Public Prosecutor's Office so that they may proceed with the arrest of the requested person. According to Article 18 of the EAW Law¹⁵², after the arrest is made, the entity that makes the arrest has to immediately communicate it, by the most expeditious means that allow a written recording, to the Public Prosecutor's Office. Immediately or as soon as possible, within 48 hours, the detainee is presented to a judge of the Public Prosecutor's Office for a hearing. At the hearing, the judge will identify the requested person and inform them of the warrant's content and their rights, as well as the possibility of renouncing entitlement to the speciality rule – the detainee can renounce the principle of speciality according to which a person surrendered pursuant to an EAW shall not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which the warrant was issued (Article 7 of the EAW Law¹⁵³). If the requested person consents to surrender, it is understood that they renounce the judicial EAW process, and the court makes a final decision within ten days from the date consent was given (Articles 20 and 26(1) of the EAW Law¹⁵⁴). The requested person may oppose surrender, which can only be based on an error in the person's identity or the existence of grounds for non-execution (Article 21 (2) of the EAW Law). The process follows, culminating with a decision of acceptance or refusal of EAW execution (Article 21 of the EAW Law).

If the detainee opposes surrender, Article 21 of the EAW Law¹⁵⁵ also states that their lawyer is given the opportunity to make allegations before the court, based on the mistaken identification of the defendant or the existence of grounds for refusing execution, to which the Public Prosecutor's Office can respond. Evidence can be submitted at the hearing. At request of the lawyer, the judge can set a later date to file opposition and submit evidence. Following this hearing, the court shall make a reasoned decision on the execution of the EAW within five days of the date on which the requested person was heard (Article 22 of the EAW Law¹⁵⁶). The decision maintains the arrest or replaces it with a coercive measure, or this is the final decision on the execution of the warrant (Article 24 of the EAW Law¹⁵⁷). However, this can also be appealed.

As to the deadline for the surrender of the requested person, after the final decision on the execution of the EAW, according to Article 29 of the EAW Law¹⁵⁸, they have to surrender as soon as

¹⁵² Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵³ Portugal, [Lei n.º 65/2003, aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵⁴ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵⁵ Portugal, [Lei n.º 65/2003, aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵⁷ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁵⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

possible, on a date previously established by the court and the competent issuing entity of the issuing State, but within ten days after the final decision on the execution of the warrant. If it is not possible to surrender the detainee for reasons of force majeure, the period is extendable for another ten days. The surrender can also be temporarily suspended on serious humanitarian grounds, particularly where there are serious grounds for believing that surrender would manifestly endanger the requested person's life or health. Once these reasons have ceased to exist, a new date for the surrender has to be set, within the following 10 days after the humanitarian reasons have ceased to exist. As established before, the execution of an EAW can be denied by the executing state; however, this denial has to be justified by one of the reasons established by law.

In Portugal, the reasons for denial, or non-execution, are established by Articles 11 (mandatory non-execution), 12 and 12-A (optional non-execution) of the EAW Law¹⁵⁹. These reasons (mandatory and optional), even if applied in an exceptional way, represent an important safeguard of fundamental rights, and guarantees in EAW proceedings, since they stop any advances in a punitive and repressive criminal process. In this way, when faced with a delivery request via an EAW, in addition to verifying the general formalities of the request, the executing judicial authority must pay attention to the lack of reasons for mandatory non-execution. Furthermore, it must pay attention to the reasons for optional non-execution, which gives the executing judicial authority a free *potestas decidendi* in the face of the almost automatic binding process associated with the execution of an EAW, which allows a much fairer judgment¹⁶⁰.

With regard to the grounds for mandatory non-execution, the Portuguese EAW Law, in Article 11¹⁶¹, establishes that the execution of an EAW is denied when the offence on which the arrest warrant is based is covered by amnesty in Portugal, provided that the Portuguese courts have jurisdiction over the offence; when the requested person has been definitively tried for the same facts by a Member State provided that, in the event of conviction, the sentence has been fully served, is being executed or can no longer be served under the law of the Member State where the decision was rendered; the requested person cannot be held responsible on account of age in relation to the facts that give rise to the issuance of the EAW; and the fact that motivates the issuance of the EAW does not constitute an offence punishable by accordance with Portuguese law, provided that it is an offence not included in Article 2(2) of the EAW Law¹⁶².

The grounds for optional non-execution of an EAW are foreseen by Articles 12 and 12-A of the EAW Law¹⁶³. These grounds are related to a principle of criminal sovereignty and establish that the warrant can be denied in situations when criminal proceedings are pending in Portugal against the requested person for the fact that has led to the issuance of the EAW; when the facts that cause the issuance of the EAW are known to the Public Prosecutor, and it has not been initiated or it has been decided to terminate the respective process by filing it; the requested person has been definitively

¹⁵⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁶⁰ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

¹⁶¹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁶² Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁶³ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

tried for the same facts by a Member State under conditions that prevent the further exercise of criminal proceedings, outside the cases provided for in Article 11(b) of the EAW Law; the statute of limitations for the criminal procedure or sentence has expired, in accordance with Portuguese law, in the event that the Portuguese courts are competent to hear the facts that lead to the issuance of the EAW; the requested person has been definitively tried for the same facts by a third State, provided that, in the event of conviction, the sentence has been fully served, is being executed or can no longer be served under the law of the sentencing State; the requested person is on Portuguese territory, has Portuguese nationality or resides in Portugal, provided that the arrest warrant has been issued to fulfil a penalty or security measure and the Portuguese State has agreed to carry out that penalty or measure, in accordance with Portuguese law; and the EAW has as its object an offence that according to Portuguese law has been committed, in whole or in part, on Portuguese territory or on-board a Portuguese ship or aircraft; or it has been committed outside the territory of the issuing Member State, provided that Portuguese criminal law is not applicable to the same acts when committed outside the national territory.

Article 12-A of the EAW Law¹⁶⁴ further defines grounds for non-execution of an EAW surrounding decisions rendered following a trial at which the requested person was not present. Therefore, the execution of an EAW issued for the purpose of executing a custodial sentence or detention order can also be refused if the requested person did not appear in person at the trial resulting in the decision, unless the warrant states that the person, in accordance with the law of the issuing Member State was either summoned in person for the scheduled date and place of the trial which led to the decision, or received official information about the scheduled date and place of that trial in such a manner that it was unequivocally established that they were aware of the scheduled trial, and that a decision may be handed down if they did not appear for the trial; or was aware of the scheduled trial and had given a mandate to a lawyer, who was either appointed by the requested person or by the State, to defend them, and was indeed defended by that lawyer at the trial; or that after being served with the decision and being expressly informed about the right to a retrial or an appeal which allows the merits of the case, including fresh evidence, to be re-examined, which may lead to the original decision being reversed, expressly stated that they did not contest the decision or request a retrial or appeal within the applicable time frame; or was not personally served with the decision but following its delivery to the issuing State was expressly informed about the right to a retrial or to an appeal allowing the merits of the case, including the consideration of new evidence, which may lead to the original decision being reversed, and the time limits applicable.

Although not expressly foreseen in the reasons for denying the execution of an EAW, the probability of cruel or degrading treatment or punishment of the person must also be considered a sufficient reason not to execute an EAW, for it is impossible to think about building a common European penal space without safeguarding the fundamental rights and guarantees, which have been hard won over the course of society's evolution. It is correct that the principle of mutual trust means that the Member States trust that all the other Member States comply with European Union law and, in particular, with the fundamental rights recognised by that law. However, this principle finds a limitation (which is intrinsic) in the obligation that Member States have to ensure fundamental rights and guarantees. Thus, as explained before, a proportionality judgment is applied by the issuing State and the executing judicial authorities have a free *potestas decidendi* when applying the non-

¹⁶⁴ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

execution clauses in order to safeguard fundamental rights and guarantees, especially those related to human dignity.

When the Council Framework Decision 2002/584/JAI¹⁶⁵ was transposed into Portuguese legislation, the Portuguese legislator did not list the possibility of violations of fundamental rights as a reason for non-execution of the EAW. That remains a constitutional safeguard since the text of the Constitution prevails over infra-constitutional law. In the Portuguese case, the constitutional text¹⁶⁶ is categorical, noting in Article 25 (2) that “no one may be subjected to torture or to cruel, degrading or inhuman treatment or punishment”. Moreover, Article 204 of the Portuguese Constitution¹⁶⁷ reinforces this safeguard by expressly providing that the Courts are invested with the constitutional duty to supervise and not to apply a certain rule when they find that rule disagrees with the rules and principles safeguarded by the Constitution.

It should be noted that to execute an EAW, the issuing State has to provide certain guarantees to the executing State. Those guarantees are foreseen in Article 13 of the EAW Law¹⁶⁸, which establishes that the EAW shall be executed only if the issuing State gives one of the following guarantees: where the offence on the basis of which the arrest warrant has been issued is punishable by a life sentence or life-time detention, the surrender decision shall be issued only if there is provision in the legal system of the issuing State for a review of the penalty imposed, on request or at the latest within 20 years, or for the application of the measures of clemency to which the requested person is entitled under the law or practice of the issuing State, with a view to ensuring that such penalty or measure is not executed; or where the requested person is a Portuguese or resident of the executing State, the decision on surrender may be subject to the condition that the requested person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order there to which they have been sentenced in the issuing State.

On this issue, it is the understanding of the jurisprudence that, since mutual recognition is based on mutual trust of the Member States' legal systems, the executing State is obliged to execute the warrant if it satisfies the legal requirements, with the executing judicial authority having a limited role in supervising execution and issuing the surrender decision. This may be refused only if any of the grounds for mandatory or optional non-execution apply or in certain circumstances in the case of decisions rendered following a trial at which the requested person was not present. Based on this understanding, case 2/21.3YRGMR:S1¹⁶⁹ of the Supreme Court of Justice held that the fact that the surrender of a wanted person to the Spanish State might endanger his health and physical integrity and the existence of a previous decision of the sentencing court setting out concrete rules of conduct for him - arguments put forward by the appellant - was not relevant grounds to justify his non-surrender, since they were situations not provided for in Articles 11 and 12 of EAW Law, constituting specific causes for refusal of the EAW. There is consequently a full obligation on the Portuguese State, as the executing State, to comply with and respect the judicial decision contained

¹⁶⁵ [Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States](#), OJ L 190/1.

¹⁶⁶ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

¹⁶⁷ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

¹⁶⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁶⁹ Portugal, [Acórdão do Supremo Tribunal de Justiça – Caso 2/21.3YRGMR.S1](#) (Decision of the Supreme Court of Justice – Case 2/21.3YRGMR.S1), 24 March 2021.

in the EAW. The same understanding can be found in the judgement 94/18.2YRPRT.S3¹⁷⁰ also from the Supreme Court of Justice.

Finally, it should be noted that, within this process of execution, the detainee also has all the rights and guarantees associated with criminal proceedings, including the right to a fair trial. In Portugal, this right is enshrined in Articles 20 and 32 of the Portuguese Constitution¹⁷¹, which established that everyone has the right to have any case in which they are involved decided within a reasonable period of time by means of a fair trial; that criminal proceedings must ensure all the guarantees of defence, including appeal; and, that every accused person is presumed innocent until the sentence of conviction has become final and shall be judged in the shortest period of time compatible with the guarantees of defence. Within the context of the EAW¹⁷², Article 17 enshrines the right to a fair trial by establishing the right to information and the right to access a lawyer, while Article 24 establishes a right to appeal.

In the event of an appeal, the ruling can be subjected to an ordinary appeal to the Supreme Court, and if constitutional issues are raised, to the Constitutional Court. Portuguese law also enables the detainee to be kept in detention pending the surrender decision and subsequent appeals for 60 days in the absence of appeals, 90 days with an appeal to the Supreme Court of Justice, and 150 days with an appeal to the Constitutional Court.

It should be noted that, in the case of an illegal detention, the existing legal institutions to combat this illegal invasion of the right to liberty are habeas corpus (Article 220(1)(a) of the Code of Criminal Procedure¹⁷³) and the right to compensation (Article 225 and 226 of the Code of Criminal Procedure¹⁷⁴).

b. Issuing and Execution of the EAW in practice

- Factors considered when issuing the EAW

Regarding the factors considered when issuing an EAW, the interviewees had somewhat varied positions, especially regarding if the proportionality factor is considered when issuing an EAW. According to one public prosecutor, an EAW is issued when the requested person is in Europe, and it is considered important to arrest them. If the EAW is admissible, the national authorities have to assess whether this is the most proportional measure, by assessing the probability of the requested person being convicted. If the probability is low, no EAW is issued.

We have to make [this assessment], it is mandatory within the law. We look at the warrants on those issues of the penalties, whether it is a crime or not. Otherwise, we don't. In an investigation, we see whether it is a crime or not and not much else, whether it

¹⁷⁰ Portugal, [Acórdão do Supremo Tribunal de Justiça – Caso 94/18.2YRPRT.S3](#) (Decision of the Supreme Court of Justice – Case 94/18.2YRPRT.S3), 26 June 2019.

¹⁷¹ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

¹⁷² Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁷³ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

¹⁷⁴ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

offends the internal constitutional order, but normally there are no major problems in this matter. (Public Prosecutor/Portugal)

Temos que fazer [essa avaliação], é obrigatório dentro da lei. Olhamos para os mandados naquelas questões de prescrições, penas, se é crime ou não. De resto não. Em inquérito, vemos se é crime ou não e pouco mais, se ofende a ordem interna constitucional, mas normalmente não há grandes problemas nesta matéria. (Public Prosecutor/Portugal)

According to another public prosecutor, other factor considered is the type of crime (it has to be a crime considered as significant). This interviewee also explained that the criteria of proportionality, subsidiarity and exceptionality are applied, in the sense that there must be strong indications that the crime was committed and there has to be a risk of escape or the risk of continued criminal activity. The EAW is issued with the purpose to arrest a person, in the sense that it is only for those situations in which a coercive measure of pre-trial detention can be applied and there is the likelihood that it will be applied. If the request for pre-trial detention cannot be sustained, the EAW should not be issued. This interviewee also highlighted that the existence of the guidelines from the EUROJUST and SIRENE manuals can help public prosecutors when filling in the EAW form.

[...] we have to consider even so, the principles of proportionality and exceptionality. [...] If the proportionality criteria are not met, I will never be able to justify a pre-trial detention, there is no sense in issuing an arrest warrant. We usually follow the good rules. There are manuals that explain to public prosecutors how to fill in warrants, manuals from EUROJUST and SIRENE [...]. If the evidence is not strong, if it is mere evidence, suspicion, it is not enough to issue the arrest warrant for that person [...]. There must be strong evidence of a crime, and then we have to apply the criteria of proportionality, subsidiarity and exceptionality. [...] (Public Prosecutor/Portugal)

[...] temos que ponderar, ainda assim, os princípios da proporcionalidade e exceção. Normalmente seguimos as boas regras. Há uns manuais que ensinam os procuradores a fazerem os mandados, manuais esses da EUROJUST e SIRENE [...]. Se os indícios não forem fortes, se forem meros indícios, suspeitas, não é suficiente para emitir o mandado de detenção daquela pessoa [...]. Tem de haver fortes indícios da prática de um crime, depois temos que aplicar os critérios da proporcionalidade, subsidiariedade, exceção. [...] (Public Prosecutor/Portugal)

The idea that one of the elements considered when issuing an EAW is the type of crime was also supported by a judge who further explained that the legal provision of issuing an EAW for some types of crimes is an expression of the principle of proportionality. Issuing an EAW for a “criminal trifle” would not be proportionally justified when taking into account the resources that such an action would require.

[...] Proportionality is also a factor, but it underlies the very seriousness (of the crime). The European legislator itself in the directive has already considered this (proportionality), which is why it listed certain crimes that justify the issuance of the European arrest warrant to the detriment of others. The crimes considered criminal trifles are not on the list because they do not justify the expenditure of resources. (Judge/Portugal)

[...] A proporcionalidade também é um fator, mas está subjacente à própria gravidade. O próprio legislador europeu na diretiva já ponderou isso (proporcionalidade), por isso é que elencou determinados crimes que justificam a emissão do mandado de detenção europeu em detrimento de outros. Os crimes considerados bagatelas penais não estão no elenco porque não justificam o dispêndio de meios. (Judge/Portugal)

Regarding the factors considered when issuing an EAW, the lawyers interviewed have diverse opinions. One lawyer interviewed stated that it is difficult to know if national authorities consider the question of proportionality, because there is no decision or document with information regarding that issue. Another lawyer interviewed said that the factors that are taken into account are the existence of strong evidence that a crime has been committed, the existence of grounds for arrest outside of the act of committing an offence, and that the criminal police body has information that the requested person is not in Portugal. Regarding proportionality, this is a factor associated with the existence of strong evidence that a crime has been committed, and therefore, since there is a strong possibility of the requested person being arrested, an EAW can be issued.

When there is no EAW, it is because they took this into account [the principle of proportionality], but there is no decision to say this. I have situations where it is clearly admissible to issue an EAW and the judges did not. Maybe because they thought it wasn't justified, but there's no decision to say that. (Lawyer/Portugal)

Os casos em que não emitem, é porque tiveram isso em conta [o princípio de proporcionalidade], mas não há nenhuma decisão a dizer isso. Eu tenho casos em que claramente é admissível emissão de MDE e os juízes não emitiram, é porque acharam que não se justificava, mas não há uma decisão a dizer isso. (Lawyer/Portugal)

The factor is, there are strong indications of the crime having been committed, justifying an arrest outside of the act of committing an offence [...] the issuing of the EAW can be justified when there is, for example at the inquiry stage a need for a warrant out of flagrante. The requirements are usually the same. The prosecutor doesn't think "that person is too far away, we'll have a lot of work, we'll spend a lot of money...", no, this is not pondered. (Lawyer/Portugal)

O fator é, existem fortes indícios da prática do crime, justifica-se uma detenção fora de flagrante delito [...] a emissão do MDE pode ser justificada quando há, por exemplo em fase de inquérito, uma necessidade de mandado fora de flagrante. Os requisitos, normalmente são os mesmos. O procurador não pondera "aquela pessoa está muito longe, vamos ter muito trabalho, vamos gastar muito dinheiro...", não, isso não é ponderado. (Lawyer/Portugal)

Nonetheless, according to some lawyers interviewed, when issuing an EAW, the national authorities do not always assess the issue of proportionality.

Proportionality should be a key element, but it is not always. It should be a preponderant factor because, in fact, when fundamental rights are involved, proportionality and adequacy are criteria that must necessarily be considered. This is what is being discussed and sometimes it does not happen. [...] (Lawyer/Portugal)

A proporcionalidade deveria ser um elemento-chave, mas nem sempre o é. Deveria ser um fator preponderante porque, aliás, quando estão em causa direitos fundamentais, a proporcionalidade e adequação são critérios que têm, necessariamente, de ser tomados em consideração. É isso que está em causa e, por vezes, não acontece. [...] (Lawyer/Portugal)

On whether national authorities consider the individual situation of the requested person when issuing an EAW, an interviewed lawyer answered that it depends on the practice of the authorities, but that doesn't usually happen. A Public Prosecutor explained that the situation of the person is not considered since national authorities aren't aware of the personal situation of the requested person.

It depends on the authorities' practice. [...] In Portugal, only if the person is hospitalised, the humanitarian reason for Portugal is this, to be hospitalised, it has to be an extreme

case. For example, issues of the right to family life are not given much consideration. (Lawyer/Portugal)

Depende prática das autoridades. [...] Em Portugal só se for a pessoa estar internada no hospital, as razões humanitárias para Portugal é isto, está internado, é mesmo um caso extremo. Por exemplo, as questões do direito à vida familiar não são muito consideradas. (Lawyer/Portugal)

Usually, we don't even know. [...] We don't know if he/she is married, if she/he has children, what kind of life he/she leads, we don't have that information and therefore we don't consider it, but even if we did, it would be difficult for his/her personal situation to change all the reasoning of proportionality and seriousness of the crime and not issue the warrant. But information about the person, usually, we don't have much. [...] (Public Prosecutor/Portugal)

Normalmente não temos sequer conhecimento. [...] Não sabemos se é casado, se tem filhos menores a seu cargo, que tipo de vida faz, não temos essa informação e por isso não a ponderamos, mas mesmo que tivéssemos dificilmente a situação pessoal dele levaria a alterar os raciocínios todos da proporcionalidade, gravidade do crime e levaria a não emitir o mandado. Mas informação sobre a pessoa, normalmente, não temos muito. [...] (Public Prosecutor/Portugal)

It should be noted that regarding the order to issue an EAW, one lawyer pointed out that some judges order the court clerks to fill in the EAW form instead of filling it in for themselves. This situation causes some EAW to be rejected by SIRENE and have to be corrected.

[...] The judge does not issue the EAW, the judge tells the court clerk to issue it, and this is an aberration because then everything is wrong and it is very common [...] for the SIRENE office to say that it is badly filled in and to demand corrections, saying that the crime is not well explained, or the article is wrong. Because the judges make an order like "issue an arrest warrant for this person" and the court clerk has to fill it in. In my opinion, and I have even argued this in public forums, the judge should be the person responsible for writing and filling in the EAW because he/she has an enormous responsibility. If this were the case, there would not be, at least in the cases that I see, an EAW rejection rate of more than 50%, and I am not exaggerating. (Lawyer/Portugal)

[...] O juiz não emite o MDE, o juiz manda o funcionário emitir e isto é uma aberração porque depois sai tudo ao contrário e é frequentíssimo [...] o gabinete SIRENE dizer que está mal preenchido e exigir correções, a dizer que o crime não está bem explicado ou o artigo está trocado. Porque os juízes proferem um despacho do género "emita-se mandado de detenção para esta pessoa" e o funcionário é que tem que o preencher. O juiz na minha opinião, e até já o defendi em fóruns públicos, deve ser a pessoa responsável por escrever e preencher o MDE porque tem uma responsabilidade enorme. Se assim fosse, não tinha, pelo menos nos processos que eu vejo, uma taxa de rejeição do MDE diria que superior a 50% e não estou a exagerar. (Lawyer/Portugal)

The opinions about whether the issuing of an EAW could be challenged on the grounds of proportionality were also somewhat equal. It should be noted that not all interviewees mention this issue, however, the lawyers and the public prosecutor that did, did confirmed the option of challenging the issuing of an EAW on the grounds of proportionality.

We can use that reason to challenge it. If Portugal is an issuing state, we can challenge it when we know there is an EAW. When we are in an executing state, we cannot use these

grounds. We can try, but it is usually refused because these grounds have to be invoked in the issuing state. (Lawyer/Portugal)

Podemos usar esse motivo para contestar. Se Portugal for um Estado emissor, podemos contestá-lo quando soubermos que existe um EAW. Quando estamos em estado de execução, não podemos usar esse motivo. Podemos tentar, mas normalmente é recusado porque este motivo tem de ser invocado no Estado emissor. (Lawyer/Portugal)

[...] I don't think that has any chance of success. What is the alternative? It's saying, it's not proportional. So, what was the appropriate means of cooperation? You come here voluntarily to consent. That question leads to a dead end here. (Lawyer/Portugal)

[...] acho que isso não tem hipótese alguma de sucesso. Qual é a alternativa? É dizer, não é proporcional. Então qual era o meio de cooperação adequado? O senhor vem cá voluntariamente para consentir. Essa questão leva aqui a um beco sem saída. (Lawyer/Portugal)

Still regarding this possibility of contesting the issuing of an EAW, it should also be noted that two public prosecutors expressed their opinion on the decision of the Court of Justice of the European Union, concerning the judicial authorities with competence to issue EAW. According to one of these interviewees, in Portugal, the Public Prosecutor's Office is an authority with competence to issue the EAW, because it is a judicial authority. Nonetheless, the order to issue the EAW is not subject to appeal, because decisions of the Public Prosecutor's Office may not be appealed. This is why some countries may refuse to execute an EAW if it is not issued by a judge. The interviewees even admit that public prosecutors may lose this competence in the future. However, they also mentioned that public prosecutors have not received guidelines on this issue. At the same time, one public prosecutor interviewed also mentioned that some colleagues have taken the practice of asking judges to issue the EAW.

[...] It was considered that due to the nature of the Public Prosecutor's Office, being a constitutional body, our status of independence, objectivity, not being a party in the process, representing the State. At the EUROJUST level, we were able to argue that we are the competent judicial authority for issuing the EAW. Our decision to issue the warrant cannot be appealed and this can cause problems in the light of the case law of the Court of Justice, and one day the Public Prosecutor's Office will lose this competence. We are aware of this. (Public Prosecutor/Portugal)

[...] Considerou-se que devido à natureza do Ministério Público, ser um órgão constitucional, o nosso estatuto de independência, objetividade, não sermos uma parte no processo, representarmos o Estado. Nós a nível da EUROJUST conseguimos defender essa informação de que somos autoridade judiciária competente para emissão do MDE. O nosso despacho de emissão do mandado não é recorrível e aí pode trazer problemas face à jurisprudência do Tribunal de Justiça e qualquer dia o Ministério Público perde essa competência. Estamos cientes disso. (Public Prosecutor/Portugal)

In Portugal, we have ignored all this jurisprudence, in an ominous way. In other words, from the point of view of issuing warrants, against my opinion, because I have always maintained that the Public Prosecutor's Office should continue to issue warrants and the other countries if they did not want to comply because it was the Public Prosecutor's Office, they could keep them [...] and guarantee that they would not enter Portugal. Most of my colleagues are more lenient and ask to the judge. There are judges who refuse because they say that they don't have to be dispatching and there are others who issue them. (Public Prosecutor/Portugal)

Em Portugal nós temos ignorado olímpicamente e bem toda esta jurisprudência, ou seja, do ponto de vista de emissão, contra a minha opinião porque eu sempre defendi que o Ministério Público deveria continuar a emitir mandados e os outros países se não quisessem cumprir por ser o Ministério Público, que ficassem com eles [...] e garantiam que não entravam em Portugal. A maior parte dos meus colegas são mais brandos e vão ao juiz. Há juízes que recusam porque dizem que não têm de estar a despachar e há outros que emitem. (Public Prosecutor/Portugal)

- Factors considered when executing the EAW

Regarding the factors considered when executing an EAW, the general position of the interviewees was that the proportionality issues are not raised. A lawyer noted that assessing the proportionality of an EAW isn't a competence of the executing authorities. And a judge further explained that if the crime is foreseen in the Portuguese and the issuing state's legal framework, the issue of proportionality is automatically resolved due to the principle of mutual trust.

These issues are usually already dealt with by the Prosecutor's Office, so my contact is not justified. I've never had any such situation. I check that all the elements are in the case file to better understand the situation, nothing else. In my opinion, proportionality turns out to be in the crime itself. If the crime is in the catalogue or if it is a crime in both countries, I understand that this issue of proportionality is resolved. (Judge/Portugal)

Essas questões geralmente já são tratadas pelo Ministério Público, por isso, o meu contato não se justifica. Nunca tive tal situação. Verifico se todos os elementos estão no processo para compreender melhor a situação, nada mais. Na minha opinião, a proporcionalidade acaba por estar no próprio crime. Se o crime está no catálogo ou se é crime nos dois países, entendo que essa questão de proporcionalidade está resolvida. (Judge/Portugal)

It should also be noted, that, in line with this opinion, a lawyer and the two judges also mention that the issues of proportionality are not grounds for optional non-execution, much less grounds for mandatory non-execution. One of the judges even stated that when the legislator decided what reasons should be used to justify a non-execution of the EAW (either optional or mandatory), they did not leave margin for subjectivity.

In the law there is no open clause as grounds for refusal because otherwise there would be a lot of uncertainty. What could be proportionate to me, would not be to another judge... There is no room for subjectivity. It is intended that European standards should be more certain so that there is uniformity at European level in their implementation. The grounds for refusing to comply with the warrant are the same because they are formal requests. It's in the law. This tells people, "your defence will only be successful on these grounds, otherwise not". SoSo, it is the same, whether for one thing or for another. (Judge/Portugal)

Na lei não há uma cláusula aberta como motivo de recusa, porque senão havia muita incerteza. O que poderia ser proporcional para mim, não seria para outro juiz... Não há espaço para o subjetivismo. Pretende-se que as normas europeias sejam mais seguras para que haja uniformidade a nível europeu na sua aplicação. Os motivos para a recusa do mandado são os mesmos por se tratar de pedidos formais. Está na lei e diz às pessoas: "a sua defesa só será bem sucedida por esses motivos, caso contrário, não". Portanto, é indiferente, seja por uma coisa ou por outra. (Judge/Portugal)

Regarding the conditions of detention, most of the lawyers intervieweed agreed that, according to the principle of mutual trust, the executing authorities do not consider the detention conditions in the issuing state. Thus, it depends on the lawyer of the requested person to raise that question, but even if raised, usually, the Courts do not consider the question.

[...] In my experience, there may be exceptions, but as a rule they always say that everything is fine, that the other state is a member of the European convention and the European Union. They also say that our prisons are not good, so they don't have to criticise. (Lawyer/Portugal)

[...] De acordo com a minha experiência, há uma exceção ou outra, mas dizem sempre que está tudo ótimo que o outro estado é membro da convenção europeia e da União Europeia, também dizem que as nossas prisões não são boas e, por isso, não têm que andar a criticar. (Lawyer/Portugal)

[...] I had an Italian citizen who had been sentenced to 16 years in prison in an Italian case and it was an "anti-mafia" case. At the time, together with my Italian colleague, we were looking, and, in fact, Italy had been condemned several times in the European Council for poor prison conditions, prison overcrowding and we used all that, but the court didn't care. That issue then went to the supreme court of justice, which upheld [the decision]. However, I would say it is a concern of the defence, but it is not of the courts. The courts don't have a clue. They don't want to know anything. We try to integrate that as an optional cause of action. (Lawyer/Portugal) [...]

Já me aconteceu um cidadão italiano que tinha sido condenado a 16 anos de prisão num processo em Itália e era um processo de "anti máfia", na altura, em conjunto com a colega italiana, andámos à procura e, de facto, Itália já tinha sido condenada várias vezes no conselho europeu por más condições prisionais, excesso de população prisional e usámos isso tudo, mas o tribunal não quis saber. Essa questão depois foi levada ao supremo tribunal de justiça, que manteve. Contudo, diria que é uma preocupação da defesa, mas não é dos tribunais. Os tribunais não fazem a mínima ideia. Não querem saber nada. Tentamos integrar isso como uma causa facultativa. (Lawyer/Portugal)

From another perspective, the judges and public prosecutors, overall, answered that the detention conditions are considered when executing an EAW. However, due to the principle of mutual trust, this is done only if the issue is raised. One judge also mentioned that they do not see this as a particular obstacle to the surrender, since the detention conditions are only investigated if there is a suspicion. It should also be noted that one public prosecutor answered that the conditions are only considered when the issuing state has life imprisonment for the crime mentioned in the EAW.

Generally, we are informed about these situations and if there are any State violating human rights, we are always informed of these types of situations. This situation has never happened to this day. The European Union joined the Council of Europe, and this Council has a body that monitors the conditions of prisoners and the conditions for the execution of prison sentences in the Council of Europe States. These reports are public. We know perfectly well what doesn't work so well in Portugal, for example, overcrowded situations, but not more than that. We are not aware of inmates being mistreated and assaulted. (Judge/Portugal)

Geralmente, somos informados sobre essas situações e se houver algum Estado que viole os direitos humanos, somos sempre informados sobre esses tipos de situações. Essa situação nunca aconteceu até hoje. A União Europeia aderiu ao Conselho da Europa e este Conselho tem um órgão que fiscaliza as condições dos reclusos e as condições de execução das penas de prisão nos Estados do Conselho da Europa. Esses relatórios são públicos. Sabemos perfeitamente o que não funciona tão bem em Portugal, por exemplo, situações de sobrelotação, mas não mais do que isso. Não temos conhecimento de presos maltratados ou agredidos. (Judge/Portugal)

[...] If the requested person comes to say that the prisons are bad, terrible and that there are no decent conditions, it's usual to ask. It does not mean that it is something that can be a major obstacle to surrender, but we ask, this is done only if there is a suspicion of the State. If it's a Member State like Germany or France or Spain, we trust that the authorities have the conditions to receive people serving a sentence. (Judge/Portugal)

[...] Se ele vem dizer que os estabelecimentos prisionais são maus, são terríveis, não há condições dignas, é normal perguntar-se. Não quer dizer que seja uma coisa que possa ser um impedimento grande à entrega, mas pergunta-se só se desconfiarmos um bocadinho do Estado. Se for um Estado como a Alemanha ou como a França ou Espanha, nós confiamos que as autoridades têm condições para acolherem pessoas em cumprimento de pena. (Judge/Portugal)

Regarding the matter of whether national authorities consider the procedural rights of the requested person in the issuing state, lawyers were consensual regarding the perception that procedural rights of the requested person in the issuing state are not considered when executing an EAW. In their opinion, the Courts tend to be very formal and strictly follow the law, which means that they consider only what is written in the EAW form. The Courts believe that the issuing state will safeguard the rights of the requested persons according to the principle of mutual trust. Therefore, raising this issue, even in cases of *trial in absentia*, is a task of the lawyer.

[...] Our authorities are formalistic, that's what the law requires. The law only provides for judgment in their absence, but if we say that the process does not meet some aspect of the due process guarantees, the answer is "of course it does, it is a member of the European Convention and the Union European", that is, it is a theoretical assessment. They don't accept that kind of argument. (Lawyer/Portugal)

[...] As nossas autoridades são formalistas, é o que está previsto na lei. A lei só prevê o julgamento na ausência, mas se dissermos que o processo não cumpre algum aspeto das garantias do processo equitativo, a resposta é "claro que cumpre, é membro da convenção europeia e da união europeia", ou seja é uma apreciação teórica. Não aceitam esse tipo de argumentos. (Lawyer/Portugal)

Moreover, the judges and public prosecutors interviewed argued that, under the principle of mutual trust, they trust that the issuing state safeguards the procedural rights of the requested person in the same way that the Portuguese law does. When asked about the procedures in case of an EAW involving a situation of *trial in absentia*, they answered that what is done is trying to ensure that the person was represented by lawyer or if they were aware of the sentence issued against them, i.e. if they were notified.

[...] many times, we do not know the procedural regime, but the principle of trust prevails here [...] there is confidence here that all people will be entitled to a fair and equal trial under Article 6 of the Convention on Human Rights. The principle of trust is the basis of the European Arrest Warrant Directive and serves to trust other judicial systems. I don't know the other systems, but I trust that fundamental rights are respected. I trust the other Member States, because I know that the processes comply, at least, with the principles of a fair and equitable process. [...] We can only judge in absentia if that person has been personally notified and has not appeared. Otherwise, if this does not happen, it is declared to be contumacious, but cannot be judged. There's always a personal notification. (Judge/Portugal)

[...] muitas vezes não conhecemos o regime processual, mas aqui prevalece o princípio da confiança [...] há a confiança de que todas as pessoas terão direito a um processo justo e igual nos termos do artigo 6.º da Convenção sobre Direitos Humanos. O princípio da

confiança é a base da Diretiva do Mandado de Detenção Europeu e serve para confiar nos outros sistemas judiciais. Não conheço os outros sistemas, mas confio que os direitos fundamentais serão respeitados. Eu confio nos outros Estados-Membros porque sei que os processos obedecem, pelo menos, aos princípios de um processo justo e equitativo. [...] Nós só podemos julgar à revelia se essa pessoa foi notificada pessoalmente e não compareceu. De outra maneira, se assim não acontecer, é declarado contumaz, mas não pode ser julgado. Tem sempre uma notificação pessoal. (Judge/Portugal)

Regarding the consideration of the individual conditions when executing an EAW, the positions of the interviewees also varied, in the sense that some heterogeneity of situations was mentioned. For example, one lawyer mentioned that although they never had a case when this issue was raised, usually, "the persons are well treated". One judge explained that judges never forget that EAW proceedings involve human beings and that there are possible situations that may incapacitate a requested person for the execution of the EAW. So, the individual situation of a requested person is considered in a case-to-case basis. In the case of exceptional humanitarian reasons, this judge also said that the surrender procedure may be suspended, or the executing State may contact the issuing State to find alternative solutions, in the spirit of mutual cooperation.

It depends on the authorities' practice. In domestic criminal proceedings there is no difference. In Portugal, only if the person is hospitalised, the humanitarian reason for Portugal is this, to be hospitalised, it has to be an extreme case. For example, issues of the right to family life are not given much consideration. (Lawyer/Portugal)

Depende prática das autoridades. Nos processos penais internos não há qualquer diferença. Em Portugal só se for a pessoa estar internada no hospital, as razões humanitárias para Portugal é isto, está internado, é mesmo um caso extremo. Por exemplo, as questões do direito à vida familiar não são muito consideradas. (Lawyer/Portugal)

The issue of pregnancy I can't even answer because I've never had a situation like that. I think that persons are generally treated well [...] (Lawyer/Portugal)

A questão da gravidez nem lhe consigo responder porque nunca tive uma situação dessas. Eu acho que as pessoas geralmente são bem tratadas [...] (Lawyer/Portugal)

If they have, for example, a serious illness, it can be a situation in which the execution of the EAW can be suspended for some time. If it is a less serious situation, even with a disability, if all the preconditions for traveling are ensured, the surrender is then made in the issuing State to the competent authorities. We then leave it to the issuing authority and the issuing State to ensure all the conditions to the detainee. If it is, for example, a pregnant woman, unless it is to have the baby, that will be respected and will be considered for the execution of the warrant. But, if it is at the beginning of pregnancy, for example, it will no longer be considered, unless there is a situation of risk in flying, or there is a medical certificate stating that there is some risk [...]. We can never ignore the human being that is in front of us and the possible situations that may be incapacitating at the moment for the fulfilment of the warrant. (Judge/Portugal)

Se tiver, por exemplo, uma doença grave pode ser uma situação em que pode de alguma forma suspender-se o cumprimento do MDE por algum tempo. Se for uma situação menos grave, mesmo com deficiência, se forem asseguradas todas as condições de transporte, a entrega depois é feita no Estado emitente junto das autoridades competentes, deixamos que seja depois a autoridade emitente e o Estado emitente a assegurar todas as condições ao detido. Se for, por exemplo, uma grávida, a não ser que seja para ter o bebé, isso vai ser respeitado e vai-se ter isso em consideração para o cumprimento do mandado. Agora, se for no início de gestação, por exemplo, já não será, a não ser que haja uma situação de

perigo no transporte de avião, haja algum atestado médico que venha dizer que há algum perigo (...). Nunca nos podemos abstrair do ser humano que está à nossa frente e das prováveis situações que possam incapacitar no momento para o cumprimento do mandado. (Judge/Portugal)

A public prosecutor interviewed also mentioned that the individual conditions are considered if they are known. In cases of exceptional humanitarian reasons, the EAW cannot be executed if there is an understanding that executing the EAW can endanger the requested person's life.

Usually this is mentioned, when there is a danger to life it is not executed, even if there is a warrant. This is considered in the process [execution], but not exactly before issuing because it is not very usual to know. The person's situation itself has a direct influence, as it does in a normal warrant or maybe more. My idea is that sensitivity is greater. (Public Prosecutor/Portugal)

Normalmente isso é referido, quando há um perigo para a vida, não é executado, mesmo havendo mandado. Isso é ponderado no processo (de execução), mas não propriamente antes da emissão porque não é muito normal saber-se. A situação da pessoa em si tem influência direta, como tem num mandado normal ou talvez mais. A minha ideia é que a sensibilidade é maior. (Public Prosecutor/Portugal)

c. Discussion of findings

The opinions of the interviewees regarding the consideration of the proportionality when issuing an EAW was varied. According to the interviewees, the most relevant factors considered when issuing an EAW is the type of crime committed and the assessment whether the issuing of an EAW is adequate and justified. The consideration of the real prospect of the requested person being sentenced to imprisonment after a trial is closely related to the assessment of strong evidence that the crime was committed by the requested person. The interviewees were not unanimous about the grounds for challenging the issuing of an EAW based on proportionality issues, since they do not consider the proportionality a reason for the non-executing of the EAW.

As to whether the individual situation of the requested persons is considered when issuing an EAW, according to the lawyers' perspective, it depends on the practice of the authorities. A Public Prosecutor interviewed explained that the individual situation of the requested person is not considered because national authorities aren't aware of that situation, and the matter is only assessed if the question is raised.

About the possibility of contesting the issuing of an EAW, two public prosecutors interviewed expressed their opinion on the decision of the Court of Justice of the European Union concerning the judicial authorities with competence to issue EAW. In Portugal, many EAWs are issued by the Public Prosecutor's Office without the intervention of the judge. Since the Public Prosecutor's Office is a judicial authority, it is considered to have competence to issue the EAW. Nonetheless, in EAWs issued by the Public Prosecutor's Office, there is a question that is beginning to arise: the order to issue the EAW is not subject to appeal, because decisions of the Public Prosecutor's Office may not be appealed. As a result of this circumstance, some Member states may refuse to execute an EAW if it is not issued by a judge.

Regarding the factors considered when executing the EAW, most of the interviewees said that the proportionality issues are not raised, namely because of the principle of mutual trust and because this is not a cause for non-execution.

According to the experience of two lawyers, a judge and two public prosecutors, the detention conditions are considered when executing an EAW. However, due to the principle of mutual trust, this is done only if the issue is raised. A similar perception was expressed by the interviewees regarding the procedural rights of the requested person in the issuing state. For example, lawyers were consensual regarding the perception that procedural rights of the requested person in the issuing state are not considered when executing an EAW, namely because the Courts believe that the issuing state will safeguard the rights of the requested persons according to the principle of mutual trust.

The interviewees' positions regarding the consideration of the individual conditions when executing an EAW denote some heterogeneity of situations. Nonetheless, most of the interviewees recognised that the individual situations are considered if they are known. For example, according to one judge, judges never forget that EAW proceedings involve human beings and that there are possible situations that may incapacitate a requested person for the execution of the EAW.

5. Use of digital and technological tools in EAW proceedings

a. Legal overview

- *The use of digital and technological tools during EAW proceedings: the transmission procedure*

The transmission of an EAW may be carried out through the security telecommunications system of the European Judicial Network (Article 5(1) of the EAW Law¹⁷⁵). If this is not possible, the issuing judicial authority may use INTERPOL services to transmit the European Arrest Warrant (Article 5(2) of the EAW Law¹⁷⁶). Furthermore, according to Circular 6/2000¹⁷⁷ from the Public Prosecutor's Office, in the event of difficulty in contacting the executing judicial authority, the contact points of the European Judicial Network may be contacted. To promote a timely and efficient coordination and within the scope of its competences, the Portuguese Member at EUROJUST may also be contacted to carry out the transmission.

The issuing judicial authority may transmit the EAW by all secure means that make it possible to obtain a written record of the same, under conditions that allow the Member State to verify its authenticity (Article 5(3) of the EAW Law¹⁷⁸). Any difficulty related to the transmission or authenticity of any document necessary for the execution of the European arrest warrant must be resolved through direct contacts between the judicial authorities concerned or, where appropriate, through the intervention of the central authorities of the Member States (Article 5(4) of the EAW Law¹⁷⁹). The entity that carries out the arrest must immediately communicate it, by the most expeditious way that enables it to be registered in writing, to the Public Prosecutor's Office at the appeal courts (situated in the cities of Coimbra, Évora, Guimarães, Lisbon and Porto) (Article 18(1) of the EAW Law¹⁸⁰).

The request for transit, for the purpose of surrendering the requested person, may be communicated to the central authority by any means that allows a written record to be kept (Article 38(3) of the EAW Law¹⁸¹). The decision on the transit request is communicated by the same

¹⁷⁵ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁷⁶ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁷⁷ Portugal, [Circular 6/2000, sobre a rede Judiciária Europeia, pontos de Contacto Nacionais e boas Práticas do Auxílio Judiciário Mútuo em Matéria Penal](#) (Circular 6/2000 on the European Judicial Network, national contact points and good practice in mutual legal assistance in criminal matters), 5 June 2000.

¹⁷⁸ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁷⁹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁸⁰ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁸¹ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

procedure (Article 38(4) of the EAW Law¹⁸²). The law provides the possibility of using electronic/digital channels.

In turn, Article 111 of the Code of Criminal Procedure¹⁸³, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, establishes that the communication of procedural acts between justice services and between judicial authorities and criminal police bodies may be carried out by telegram, telex, fax, telephone communication, electronic mail or any other means of telecommunications when a notification request or any other type of message transmission is involved. In the event of telephone communication, this must always be followed by confirmation by any written means.

- *The use of digital and technological tools in conducting hearings and facilitating the provision of interpretation and remote examinations*

In 2020, with the onset of the COVID-19 pandemic, several changes were introduced in judicial proceedings. Among these changes were those that concern the way hearings were held. With the introduction of Law 1-A/2020¹⁸⁴, it was established that urgent cases, such as cases involving EAW due to their short deadlines, should continue to be processed without suspension or interruption of time limits, acts or proceedings. According to Article 7 of this law, to ensure the security and health of all of those involved, it was established that proceedings that did require the physical presence of the parties, their representatives or other procedural actors, should take place through appropriate means of distance communication, namely teleconference, video call or other equivalent. Article 7 also established that when was not possible to carry out the proceedings that require the physical presence of the parties, their representatives or other procedural intervenient, under the terms explained above, and where the life, physical integrity, mental health, liberty or immediate subsistence of the intervenient was at stake, the proceeding could be carried out in person provided that it did not imply the presence of a number of persons greater than that provided for by the recommendations of the health authorities and in accordance with the guidelines set by the competent higher councils. Only if it was not possible or appropriate to ensure the practice of acts or the performance of proceedings under the terms foreseen above, did the proceeding in question have to be suspended.

As stated before, neither the EAW Law¹⁸⁵ nor the Code of Criminal Procedure¹⁸⁶, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, foresee specific regulation on the activity of translators and interpreters (apart from the code of ethics) before the courts, or on quality control

¹⁸² Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁸³ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

¹⁸⁴ Portugal, [Lei 1-A/2020, que aprova medidas excecionais e temporárias de resposta à situação epidemiológica provocada pelo coronavírus SARS-CoV-2 e da doença COVID-19](#) (Law 1-A/2020 approving exceptional and temporary measures in response to the epidemiological situation caused by the SARS-CoV-2 coronavirus and the COVID-19 disease), 19 March 2020.

¹⁸⁵ Portugal, [Lei n.º 65/2003, que aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 which approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁸⁶ Portugal, [Decreto-Lei n.º 78/87, que aprova o Código de Processo Penal](#) (Decree-Law 78/87, which approves the Code of Criminal Procedure), 17 February 1987.

provided for within the scope of this activity. Article 92 of the Code of Criminal Procedure¹⁸⁷ only expressly states that a "suitable interpreter" should be appointed and that the accused may choose a different interpreter to translate conversations with his/her defence lawyer. The remaining rules foreseen on the Code of Criminal Procedure regarding the right to interpretation are about ethical matters.

Regarding the use of digital tools, neither the EAW Law¹⁸⁸ nor the Code of Criminal Procedure¹⁸⁹, applicable to EAW proceedings by virtue of Article 34 of the EAW Law, foreseen provisions as to the possibility of an interpreter intervening in the proceedings using digital tools or these tools being used to allow remote examinations of witnesses. However, the law enables the judge to decide that experts, technical advisers or witnesses who do not reside in the municipality where the court is based may make statements via digital tools, provided that there are no reasons why their presence is essential and serious functional or personal difficulties or inconveniences are foreseeable in their travel (Article 318 of the Code of Criminal Procedure).

Table 12: 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
Portugal	YES (Only for urgent proceedings)	YES (For interpreters who do not reside in the municipality where the court is based,	YES (For witnesses on the same terms as interpreters)	YES (As long there is a written record)	YES	NO	NO

¹⁸⁷ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

¹⁸⁸ Portugal, [Lei n.º 65/2003, aprova o regime jurídico do mandado de detenção europeu](#) (Law 65/2003 approves the legal framework of the European Arrest Warrant), 23 August 2003.

¹⁸⁹ Portugal, [Decreto-Lei n.º 78/87, aprova o Código de Processo Penal](#) (Decree-Law 78/87, approves the Code of Criminal Procedure), 17 February 1987.

		provided certain requirements are met)					
TOTAL	1/0	1/0	1/0	1/0	1/0	0/1	0/1

b. Interview findings

As explained above, the law foresees the use of digital and technological tools in EAW proceedings to conduct hearings, providing interpreting services and for remote examinations of a witness or the requested person. However, for this to happen certain requirements have to be met. Regarding the issue of conduct hearings, when Portugal is the executing state, one lawyer recognised that the use of digital and technological tools could be beneficial in some cases, but they also mentioned that the requested person should always have the right to be present in person in hearings.

[...] It is a reinforcement of the defence guarantees. [...] But I see potential, clearly, unless the person says, "I want to be present" and then we should not withdraw that right. (Lawyer/Portugal)

[...] É um reforço das garantias de defesa. [...] Mas vejo potencial, claramente, a não ser que a pessoa diga "eu quero estar presente" e aí não devemos retirar esse direito. (Lawyer/Portugal)

According to one judge interviewed, conducting hearings via digital and technological tools would be a violation of the requested person's right to a fair and equitable trial because it would violate the principle of immediacy. Nonetheless, if the requested person was properly informed and ended up agreeing to conduct their hearing using digital tools, then there would be no problem.

[...] What I've always understood is that this has to be explained to the defendants. As long as they are properly informed and end up agreeing to this limitation on the principle of immediacy, that's fine. It will no longer be like that if it is a trial because it can override the right to defence. (Judge/Portugal)

[...] O que eu sempre entendi é que isso tem que lhe ser explicado. Desde que eles, devidamente informados, acabem por concordar com a limitação ao princípio da imediação, tudo bem. Mas já não será assim se for um julgamento porque pode pôr em causa o direito de defesa da pessoa. (Judge/Portugal)

In this regard, one public prosecutor mentioned that, during the pandemic, the use of communication platforms was encouraged. Additionally, one judge interviewed confirmed that during the pandemic, there were some cases where the hearing of the requested person was conducted through videoconference. However, they did not note much change regarding EAW proceedings.

[...] During the pandemic it was crucial because we were prevented from having contacts and it encouraged us to use these communication platforms. [...] In the EAW processes, as we have few of them, I didn't notice anything. (Public Prosecutor/Portugal)

[...] Durante a pandemia foi crucial porque ficámos impedidos de contactos e incentivou-nos ao uso destas plataformas de comunicação. [...] Nos processos de MDE, como temos poucos, não notei nada. [...] (Public Prosecutor/Portugal)

Although the interviewees showed some reluctance in the issue of conducting hearings through digital and technological means, they were more open to the idea of conducting remote examination of witnesses or the person arrested. It also should be mentioned that one public prosecutor confirmed that, during the pandemic, some examinations of the request person were done remotely, without compromise their rights.

I am a fan of new technologies and I think we could learn from the pandemic. For example, there are situations of dangerous arrested persons where it would be safer if hearings were held by video conferencing. Rights would be guaranteed, as they were during the pandemic. (Public Prosecutor/Portugal)

Eu sou fã das novas tecnologias e acho que podíamos aprender com a pandemia. Por exemplo, há situações de detidos perigosos em que era mais seguro que as audições se fizessem por videoconferência. Os direitos seriam garantidos, como foram durante a pandemia. (Public Prosecutor/Portugal)

When it comes to the issue of providing interpretation, as already explained, the law does allow for the interpreter, when certain requirements are met, to assist the requested person remotely. However, the interviewees agreed that usually the interpreter should assist the requested person in person. Nevertheless, one public prosecutor interviewed mention that during the pandemic, there were exceptions, but they happened on a case-by-case basis.

It is face-to-face. During the pandemic, it varied a little. In this exceptional period, we did it by videoconference, but it depended on each situation. I had some cases where the translator was with us in court and the lawyer was with the arrested person in the prison, and sometimes the translator was also there. (...) Now it's all face-to-face. They bring the detainee to court. (Public Prosecutor/Portugal)

É presencialmente. Quando estivemos em pandemia, as questões variavam um bocadinho. Nesse período excepcional, fazia-se por videoconferência, mas dependia de cada situação. Fiz alguns em que o tradutor estava connosco no tribunal e o advogado estava com o detido no estabelecimento prisional sendo que, às vezes, também chegou a estar lá o tradutor. (...) Agora é tudo presencial. Trazem o detido ao tribunal. (Public Prosecutor/Portugal)

A judge interviewed mentioned that even during the pandemic there are situations where the interpreter assisted the requested person in person, but in a large courtroom and with everyone wearing a mask.

In person. Even during the pandemic, I heard people in person, in a larger court room and with masks. The interpreter is usually closer to the person, but I have not heard any defendants by videoconference. (Judge/Portugal)

Presencialmente. Mesmo durante a pandemia ouvi pessoas pessoalmente, numa sala de tribunal maior e com máscara. O intérprete costuma estar mais próximo da pessoa, mas não ouvi nenhum detido por videoconferência. (Judge/Portugal)

While lawyers highlighted the use of digital and technological tools to facilitate communications and the transmission of documents between lawyers in the issuing and executing state, judges and public prosecutors highlighted the advantages of using these tools to facilitate communications between the issuing and executing state, especially when the national authorities need to submit documents and provide more information to the executing state.

We sometimes find that the European Arrest Warrant is incomplete, lacking information. (...) In the 48 hours we managed, through the digital system and communication with the issuing court, to get the information that we are missing. (Judge/Portugal)

Por vezes verificamos que o Mandado de Detenção Europeu está incompleto e que faltam informações. (...) No espaço das 48 horas conseguimos, através do sistema digital e comunicação com o tribunal de emissão, obter as informações que estavam em falta. (Judge/Portugal)

There is always a benefit because I have everything digitalised and if a Member State asks for certain information I can reply immediately by email. (Public Prosecutor/Portugal)

Benefício há sempre porque eu tenho tudo digitalizado e se um determinado Estado pedir determinada informação eu consigo através de email responder imediatamente. (Public Prosecutor/Portugal)

Regarding the use of digital and technological tools in EAW proceedings to facilitate the access to a lawyer in the issuing state, the positions of the lawyers were diversified. One of the lawyers considered that digital and technological tools do not play a role in accessing a lawyer in the issuing state or even to information about legal aid schemes. According to this lawyer, the easiest option is to contact lawyers who know other lawyers in other countries or go through embassies.

I think it's all bureaucratic and complex, even for lawyers. Systems are complex. Unless by contacting lawyers, who know other lawyers in another country or colleagues who may know.... I receive several contacts through the Embassy, perhaps it is an effective method because it has the advantage of you already knowing that it is a lawyer who speaks the person's language, although that is not a guarantee of quality. (Lawyer/Portugal)

Acho que é tudo burocrático e complexo, mesmo para os advogados. Os sistemas são complexos. Se não for por contactos de advogados que conhecem outros advogados noutra país ou colegas que possam conhecer. Eu recebo vários pela embaixada, talvez seja um método eficaz porque tem a vantagem de já se saber que é advogado que fala a língua da pessoa, apesar de não ser garantia de qualidade [...] (Lawyer/Portugal)

Two lawyers expressed their negative positions about digital and technological tools. One of them considered that digital and technological tools may have a negative effect and gave the examples that if the requested person tries to use the internet to gather information, they will end up in online forums that can provide wrong information. Therefore, in the opinion of this interviewee, it is important to create a network of contacts and a relationship of trust between the requested person and the lawyer. Moreover, other lawyer, while conceding that digital and technological tools could play a relevant role, this was not their experience. In fact, all of the requested persons assisted by them did not request legal aid and the contacts with lawyers in the issuing state are made through the network or partnerships of their law firm.

However, another lawyer mentioned that digital and technological tools could have a role in matters relating to information about the access to a lawyer and legal aid schemes and the appointment of a lawyer in the issuing state. For that, the lawyer suggested the creation of a European mechanism that in an autonomous way appointed a lawyer in the issuing state. The interviewee gave the national example that appoints lawyers in the context of legal aid, the SINOA (the IT system of the Bar Association).

I think the EAW is already quite digitalised. If there was a digital nomination mechanism in Schengen like there is for example in Portugal with the SINOA, if there was a European mechanism that would be useful. [...] (Lawyer/Portugal)

Acho que o MDE já é bastante desmaterializado. Se houvesse um mecanismo de nomeação digital em Schengen como há, por exemplo, em Portugal com o SINOA, se houvesse um mecanismo europeu isso seria útil. [...] (Lawyer/Portugal)

The possibility of using digital and technological tools in EAW proceedings leads to the question as to whether digitalisation could lead to fewer EAW being issued. One lawyer considered that there are limits to the benefits of using digitalisation to limit the number of EAW issued, especially the EAW issued for the purpose of interrogating the requested person. However, according to this lawyer, using digital and technological tools in EAW proceedings for the purpose of interrogating the requested person could even put an end to EAW already issued.

It would be helpful to have more videoconferences that avoid EAW or during the EAW for the videoconference interrogation that can then lead to the change of the coercive measure that has been applied. I think that further investigations can be carried out at a distance, especially the interrogation of the defendant while a case is pending, and these steps can avoid the EAW or reverse what is already being carried out. (Lawyer/Portugal)

O que eu acho que pode ajudar é haver mais videoconferências que evitem MDE ou mesmo quando já houve MDE, durante o processo haver interrogatório por videoconferência que possa depois levar a alteração da medida de coação que tenha sido aplicada. Acho que podem ser feitas mais diligências à distância, sobretudo interrogatório de arguido na pendência de um processo, e que possam evitar o MDE ou reverter o MDE que possa já estar a ser executado. (Lawyer/Portugal)

Another lawyer explained that, in their experience, there aren't many advantages in using digital and technological tools in EAW proceedings due to the limited number of EAW issued. According to this lawyer, to decrease the number of EAW issued, the issuing state could, as a first step, require the declarations of the requested person under the rules of international cooperation in criminal matters.

To give a concrete example, if the French authority, instead of immediately issuing an EAW, asked the judicial authority, under the rules of international cooperation in criminal matters, to notify him to be present. So, the person would be notified to appear before a judicial authority and would be there in the presence of a lawyer and a judge or prosecutor to make a statement. This seems to me to be a desirable solution, especially when, after considering the proportionality and appropriateness of issuing an EAW, it is said that it does not make sense. (Lawyer/Portugal)

Dando um exemplo concreto, se a autoridade francesa, em vez de emitir imediatamente um MDE, solicitasse à autoridade judiciária, ao abrigo das regras da cooperação internacional em matéria penal, que notificasse o senhor para estar presente. Portanto, a pessoa ser notificada para se apresentar perante uma autoridade judicial e aí estar na presença de um advogado e na presença de um juiz ou de um procurador para prestar declarações. Parece-me evidentemente uma solução desejável, principalmente quando, feita a ponderação que deve ser feita quanto à proporcionalidade e à adequação da emissão de um MDE, se diga que não faz sentido. (Lawyer/Portugal)

Along the same lines of using other mechanisms of cooperation in order to decrease the number of EAW issued, both the judge and the public prosecutor that mentioned this issue, suggested the mechanism of the European Order of Investigation. According to the interviewees, this could be used in cases where the EAW is issued for the purpose of being interrogated or for the purpose of knowing where the requested person is. The public prosecutor even mentions that in their case,

they only consider the issuing of an EAW if the purpose is to apply pre-trial detention as a coercive measure.

In fact, this is already foreseen in the European investigation procedures (EIO), the possibility of people being heard either as defendants or witnesses by videoconference, for example, or by other digital means, like WhatsApp, Skype, whatever. Of course, it always requires the consent of the person. But there is already legislation allowing the use of these means and I think that it will probably reduce the issuing of arrest warrants. (Judge/Portugal)

Aliás, isso já está previsto nas diligências de investigação europeias, a possibilidade de as pessoas serem ouvidas quer como arguidos, quer como testemunhas por videoconferência, por exemplo, ou por outro meio digital, WhatsApp, Skype, o que for. É claro que exige sempre o aval da pessoa em causa. Mas já há legislação que permite utilização desses meios e eu acho que sim, que vai diminuir em muito se calhar a emissão de mandados de detenção. (Judge/Portugal)

Additionally, a public prosecutor mentioned that there is some resistance from public prosecutors and judges regarding the use of digital and technological tools in EAW proceedings. Overall, the lawyers interviewed were receptive to the use of digital and technological tools in EAW proceedings, while judges and public prosecutors interviewed were only more open to the use of digital and technological tools when talking about facilitating the communications and the transmission of documents between the issuing and executing state.

[...] On our side there is still a little resistance [to the use of videoconferencing in questioning]. (Public Prosecutor/Portugal)

Do nosso lado ainda há um bocadinho de resistência [uso de videoconferência no interrogatório]. (Public Prosecutor/Portugal)

Table 13: Use of digital tools, interview findings.

Interviewees per Country	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)
LAWYER 1	NO	NO	NO (Only when Portugal is the executing State)	DID NOT ANSWER	DID NOT ANSWER	NO	DID NOT ANSWER

LAWYER 2	NO	NO	YES (As long there's consent)	DID NOT ANSWER	YES	DID NOT ANSWER	DID NOT ANSWER
LAWYER 3	DID NOT ANSWER	NO	DID NOT ANSWER	DID NOT ANSWER	DID NOT ANSWER	NO	DID NOT ANSWER
LAWYER 4	DID NOT ANSWER	NO	DID NOT ANSWER	DID NOT ANSWER	DID NOT ANSWER	NO	DID NOT ANSWER
JUDGE 1	NO	NO	YES (If the requested person consents to it)	YES	YES	DID NOT ANSWER	DID NOT ANSWER
JUDGE 2	YES	NO	DID NOT ANSWER	YES	DID NOT ANSWER	NO	DID NOT ANSWER
JUDGE 3	DID NOT ANSWER	NO	YES	DID NOT ANSWER	DID NOT ANSWER	NO	DID NOT ANSWER
JUDGE 4	DID NOT ANSWER	DID NOT ANSWER	DID NOT ANSWER	DID NOT ANSWER	YES	NO	DID NOT ANSWER
JUDGE 5	DID NOT ANSWER	YES	YES	DID NOT ANSWER	YES	NO	DID NOT ANSWER
TOTAL	1/3	1/7	4/0	2/0	4/0	0/7	0/0

c. Discussion of findings

Regarding the use of digital and technological tools in EAW proceedings, the existing legal framework isn't very extensive or explicit. At the same time, the interviewees, especially between the judges and public prosecutors, there was some lack of interest in using digital and technological tools. However, overall, the interviewees agreed that the use of such tools can have advantages. While the lawyers highlighted the advantage of accelerating communications between lawyers in the issuing and executing state (when there is dual representation), the judges and public prosecutors emphasised the advantage of facilitating and accelerate communications and the transmission of documents between the judicial authorities involved. Regarding the issue of conduct hearings, when Portugal is the executing state, one interviewed lawyer recognised that the use of digital and technological tools could be beneficial in some cases, provided that the requested person should always have the right to be present in person in hearings.

Another issued raised was the use of digital and technological tools to facilitating access to a lawyer in the issuing state. The perspectives of lawyers were diverse. While two lawyers consider that these tools do not play a role in accessing a lawyer in the issuing state or even to information about legal aid schemes, other lawyers mentioned that digital and technological tools could have a role in matters related to information about access to a lawyer and legal aid schemes and the appointment of said lawyer in the issuing state if a European mechanism was created to do it.

About the possibility of using digital and technological tools in EAW proceedings to decrease the number of EAW issued, one lawyer considered that there are limits to the benefits of using digitalisation, since their use could limit the number of EAW issued, especially EAW issued for the purpose of interrogating the requested person. Other interviewees, specifically a judge and a public prosecutor, considered that instead of issuing an EAW for the purpose of interrogating the requested

person or knowing where they are, there are other mechanisms that could be used, like, the European Order of Investigation.

CONCLUSION

Overall, the interviewees made positive assessments about the safeguards provided to protect the rights of requested person in EAW proceedings. However, some discrepancies between the law and practice were noted. Diverse opinions were also identified among interviewees from the different professional groups (lawyers, judges, and public prosecutors).

According to the findings, in general, requested persons on an EAW in Portugal are formally informed about their rights. The information is provided orally and in a written form. However, due to the complexity of the legal system and the way this information is given, some information may not be clearly understood, which can lead to the requested persons not fully understanding their rights. A document similar to a “Letter of Rights” is provided (the statement of defendant’s constitution), but it is not adapted to EAW proceedings (for example, it does not provide information about dual representation). The information is the same that it is provided to persons arrested within the context of criminal proceedings in general, and therefore it can also foresee rights not applicable to EAW proceedings. Although the law states the requested persons’ right to know the content of the EAW, some lawyers interviewed said that knowing information beyond than contained in the warrant depends on the proactivity of the lawyer, whereas the action of the courts in this regard is varied.

The answers to the questions regarding the information about consenting to surrender and renouncing the “speciality rule” revealed some heterogeneity. Generally, judges and public prosecutors interviewed believe that requested persons understand the information provided, but lawyers were not unanimous on this issue. The experience of some lawyers interviewed suggests that the information provided by the judge is usually clear, while others have the opinion that it is provided in a superficial manner. According to some interviewees, lawyers also have a fundamental role in this matter. Nonetheless, some lawyers, namely state funded lawyers are not able to provide the necessary explanations because there is a gap in their training and specialisation regarding EAW and many lawyers have limited experience in this area, considering the existence of few cases of EAW.

Some difficulties in the effectiveness of the right to interpretation and translation were mentioned by the interviewees. It was generally recognised that these rights are always provided, when needed or requested. However, some interviewees have a critical view of the interpretations provided by the state-appointed interpreters, considering their skills adequacy and the inexistence of control mechanisms. For this reason, some interpretations and translations are of poor quality, undermining the level of understanding of the requested persons and their right to interpretation and translation. This question may arise at any phase of the proceedings, namely at the hearing or at the time of arrest. It should be noted that one good practice regarding the moment of detention is that the statement of defendant’s constitution is a document already translated in several languages (for example, German, English, Chinese). When the requested person does not speak any of the languages in which the document is translated, the translation is done orally. Additionally, although the law foresees the possibility of two interpreters (one for the hearing, another for the consultations with the lawyer), this rarely happens because the judicial authorities are not receptive to this situation since it is something that takes time and costs money.

Another problem identified is regarding the translation, specifically what documents besides the EAW form are translated, because the law does not foresee what documents should be translated

besides the EAW form and in what language they have to be translated in, the translation is done on a case-by-case basis.

The right to access to a lawyer (different from the quality of the lawyer's performance) is a right that is always guaranteed when Portugal is an executing State. Interviewees did not identify access to a lawyer in the issuing state (right to dual representation) as common practice, although it is considered that this would be the ideal situation. Regarding the access to a lawyer in the issuing state when executing proceedings are ongoing in another member state, it was highlighted by one lawyer interviewed that dual representation is the ideal situation. However, it is rare because there are cases where the requested persons do not know the existence of an EAW against them or even a judicial investigation/process. Although the interviewees agreed that requested persons are informed, orally and in writing, about their right to a lawyer and the mechanisms of legal aid, they are not informed about their right to dual representation. Moreover, the legal framework is not clear as to whether requested persons should be informed of this possibility. Some interviewees consider it to be a task of the lawyer to inform the requested person of this possibility and it is up to the lawyer or to the requested person to contact the lawyer in the issuing state.

While all requested persons have access to a lawyer in the execution state, interviewees highlighted two challenges to the effective exercise of these rights. The first concerns the right to choose and contact a lawyer. No list with contact details of lawyers is provided to the requested persons, nor access to the Internet to consult a list of lawyers of the Bar Association. The requested persons have to do this through contact with other persons (family members or other known persons) by the phone call they are entitled to make after being arrested. So, except in cases where the requested persons already know a lawyer and have their contact details, it is difficult for them to choose and get in touch with a lawyer in Portugal as an executing state.

The other issue concerns the technical competence of the state-appointed lawyer. State-appointed lawyers are randomly identified. This appointment does not consider the specialisation of lawyers and the lawyer chosen may not have experience in EAW proceedings. In both cases, it is considered that there is no effective right of access to a lawyer.

The principle of mutual trust was particularly emphasised by the interviewees. When executing an EAW, proportionality issues are not considered by the national authorities, since, according to the judges, if the crime is foreseen in the Portuguese legislation and also in the legislation of the issuing state, the issue of proportionality is automatically resolved due to the principle of mutual trust. It was also possible to conclude that, also due to the principle of mutual trust, the conditions of detention in the issuing state are also not considered, unless the problem is raised by the requested person or their lawyer.

It is also due to the principle of mutual trust that national executing authorities do not consider the procedural rights of the requested person in the issuing state. Judges and public prosecutors interviewed trust that the issuing state safeguards the procedural rights of the requested person in the same way that the Portuguese law does. However, the lawyers interviewed are of the opinion that this happens because the Courts tend to be very formal, following only what it is provided by the law, only considering what it is written in the EAW form, making them a little insensitive to matters of safeguarding the procedural rights in the issuing state.

Regarding the use of digital and technological tools in EAW proceedings, a lawyer expressed some reluctance in using it to conduct hearings with the arrested persons and other involved parties (lawyers, interpreters), especially judges and public prosecutors. The hearing being conducted in a

language foreign to the requested person and via digital tools may weaken their defence rights. However, the interviewees recognise the potential advantages of such tools, but in different ways, such as for sending documents between judicial authorities and communication between lawyers.