Beyond Surrender

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Rights International Spain

The documentary and empirical research in Spain was carried out by Rights International Spain.

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1. Introduction

This report has been developed within the context of the "Beyond Surrender" project. The aim of the project is to study the experiences of people following their surrender to another country through the use of the European Arrest Warrant (EAW) in order to document its impact on their lives and the lives of their families. The project has a regional dimension and has been carried out in four Member States of the European Union (Romania, Poland, Lithuania and Spain) under the coordination of Fair Trials Europe based in Belgium, in partnership with Apador-CH (Romania), Helsinki Foundation for Human Rights (Poland), Human Rights Monitoring Institute (Lithuania) and Rights International Spain (Spain).

The simplified system of surrender established by the European Arrest Warrant Framework Decision has undoubtedly had success in preventing the EU's open borders from being exploited by those seeking to evade justice. However, over the years significant problems have been observed related to: (i) the disproportionate use of EAWs; (ii) excessive and unjustified use of pre-trial detention; (iii) the failure of the issuing States when it comes to ensuring appropriate protection of the human rights of the persons sought; and (iv) the failure on the part of judges, prosecutors and lawyers in the executing States to follow-up what happens after surrender, including whether assurances (if given) were upheld.

A series of measures have been adopted in order to resolve these problems: (i) in 2009, the Framework Decision on supervision measures as an alternative to provisional detention was approved (2009/829/JHA); (ii) in 2010, the Council modified its guidelines on EAWs recommending that the issuing state carry out a proportionality assessment; and (iii) the adoption of procedural rights Directives on the right to interpretation and translation in criminal proceedings (2010/64/EU), the right to information (2012/13/EU) and the right of access to a lawyer (2013/48/EU) (the Roadmap Directives). The aim of these measures is to safeguard the fairness of criminal proceedings in the EU and, at the same time, enhance mutual trust. However, there is little information available on the impact (if any) of these measures on the protection of the human rights of the requested and surrendered person. In general, little is known of the actual impact of the EAW system on the lives of requested persons following their surrender.

It is worth highlighting that the Court of Justice (Grand Chamber) of the EU, in the *Aranyosi* and *Caldararu* judgment (Cases C-404/15 and C-659/15 PPU, of 5 April 2016) places the protection of human rights at the heart of the EAW system's operation. The decision refers to the detention conditions (both pre-trial and custodial) in the issuing State, and the Court instructs the Member States to conduct a human rights assessment before taking a decision on surrender. A person should not be surrendered if there are objective, reliable, precise and up-to-date elements that demonstrate the existence of systemic or generalised breach of human rights in the issuing State and there is a genuine risk, in the specific case, that the requested person may be impacted by that violation. Therefore, it is necessary to analyse

the issues related to the EAW and the protection of human rights taking into consideration the specific circumstances of each case.

The overall objective of the activities involved in the “Beyond Surrender” Project is to: (i) provide a human perspective and insight into the treatment received by people after their surrender under accusation EAWs; (ii) raise awareness among judicial actors and legal professionals of the practical relationship between the minimum standards of the Roadmap Directives, the alternative measures to pre-trial detention (ESO) and the operation of the EAW Framework Decision; (iii) identify and illustrate good and bad practice in post-surrender treatment to support effective implementation of the EAW Framework Decision, the ESO and the Roadmap Directives; and (iv) inform the EU's work in the field of justice, with a view to creating sound and accurate minimum standards for mutual recognition.

2. Research methodology

The research was carried out pursuant to a common methodology also used by the rest of the partner organisations and which took into account what monitoring activities were possible in different national legal contexts. That methodology included:

2.1. Desk review

The research team carried out extensive documentary research that covered Spanish procedural legislation, a review of case law and the doctrine of legal scholars as well as the analysis of statistical data and reports.

2.2. Identification and monitoring of individual cases

In addition to the desk review, the research team carried out substantive work in order to identify cases, and monitor them, of persons surrendered to Spain pursuant to EAWs issued by Spanish judicial authorities.

Prior to this, on the one hand, an information pack for lawyers was prepared with the objectives and methodology of the Project, including an informed consent form for surrendered persons who wanted to participate in the Project. On the other hand, project partners designed a range of monitoring research tools to document the cases: a questionnaire for the interview with the lawyer in the issuing State; a questionnaire for the interview with the surrendered person; a questionnaire for the interview with family members of the surrendered person; a case file review form; and a form for recording the hearings and trials; with the completion of one of these methods of documentation being sufficient for the research. These tools were developed by the regional coordinator and provided to all the partners. Moreover, they were first translated from English to Spanish and subsequently adapted to the specific conditions of each category and the particularities of Spanish legislation and practice.

2.3 Documentation of human stories

The information obtained from the interviews and in the review of case files is documented in detail in the case studies, with a view to demonstrating the human impact of surrender and placing the protection of human rights in the context of real cross-border cases. The human stories include: (i) a summary of each case, patterns of good and bad practices and the comments of the surrendered person and/or the lawyers in the issuing and/or executing States, and (ii) a short video featuring personal testimony.

2.4 Ethical issues

The investigation has been guided by the following principles: (i) informed consent: both the surrendered persons interviewed and their lawyers and/or family members were informed of the content of the Project, having to give prior, written authorisation for the interviews and granting access to the case files; (ii) data protection: the data obtained in the course of the investigation was treated in a confidential manner and stored safely; (iii) improper use of data: the data obtained during the monitoring and documentation of the cases will only be used in the context of the Project.

2.5 National report

The information and results obtained from the performance of the activities of the Project have been set out in this national report that addresses the problems encountered, the human impact of these problems, the good and bad practices and includes a series of recommendations. This and the other national reports will serve as a basis for the drafting of a regional report that is also a part of the Project.

3. Identification and monitoring of cases following surrender to Spain: difficulties encountered

First of all, personal interviews and meetings with
contacts from the research team were used to gather practical information and get an idea of the degree of difficulty that the identification of individual cases would entail. A small group of lawyers who are close to the organisation were interviewed, albeit none of them had participated in an EAW procedure issued by Spanish judicial bodies. The following step was to meet prosecutors and judges, also from the network of professionals related to the organisation, from different jurisdictional areas, such as the Madrid investigating courts. This was because, in general, any person surrendered pursuant to an EAW issued by a Spanish judge or court, upon arrival by air, is brought before the acting Duty Court for Procedures (*Juzgado de Guardia en funciones de Diligencias*) in Madrid, regardless of the location of the issuing court. It was through these personal contacts that the cases of *Sara* and *Gabriel* were identified and documented.

The research team then went on to consult with the legal aid department at the Madrid Bar Association; we met with the Criminal and Human Rights divisions of the Association and organised an information seminar with the latter in order to disseminate the Project among the collective of lawyers and thus promote their participation in it.[1] These meetings did not enable us to identify specific cases for monitoring purposes.[2] Finally, letters were sent to the Ministry of Justice, the General Council for the Judiciary, the Directorate General of the Police– International Cooperation Division (which comprises the National Central Bureau of Interpol, the Europol National Unit and the Sirene Bureau) and the International Legal Cooperation Network of Court Clerks (*RECILAJ* in Spanish).

The Sirene Bureau supplied global data on the number of EAWs issued by Spanish judicial bodies (see section 5.2), without specifying the issuing authority or the case file number. The Ministry of Justice notified us indirectly, via the RECILAJ, that they would not be able to help in the identification of cases, or supply any data, due to the Spanish Personal Data Protection Act (*Ley Orgánica 15/1999, de 13 de diciembre, sobre protección de datos de carácter personal*). This stance also made it impossible for the RECILAJ to collaborate, even though its general coordinator had initially been prepared to contribute to the Project, as

[1] The meeting with the Madrid Bar Association led to the organisation of the seminar entitled "Jurisdictional practice regarding EAWs in Spain" http://rightsinternationalspain.org/es/campanias/20/beyond-surrender-/63/seminarios in which around 100 lawyers participated. Moreover, we also had the opportunity to participate in the IV Seminar on International Criminal Law – Mutual recognition of criminal decisions in the EU and other cooperation issues, organised by the Malaga Bar Association in order to also present the "Beyond Surrender" Project and invite the lawyers to participate by identifying cases http://formacion3.tirant.com/tirant/pdfs/CTF00187.pdf .

[2] While 22 lawyers initially contacted the research team indicating their interest in collaborating, the cases in which they had been involved were EAWs issued by other Member States (Spain as the executing State) or ultimately did not work out (for example, because it was not possible to locate the surrendered person as he/she had been released on bail following surrender).

the Ministry of Justice did not authorise the collaboration. Meanwhile, the General Council for the Judiciary (the Judicial Council) had no issue with the organisation being granted access to the documentation in the judicial case files processed by the judicial bodies[3], and to that end its Permanent Committee issued a resolution providing a list of courts that issued EAWs (see section 5.2), and authorising the "*exhibition or issue of copies of the judicial decisions handed down, observing at all times the rules on the protection of personal data and the secrecy of judicial procedures*"[4].

The circumstance that the lists provided by the Judicial Council and by Sirene did not include any case file numbers meant, in practice, that the research team had to contact all the courts on the list (with the exception of the Juvenile Courts and the Gender Violence Courts)[5]. Therefore, the research team contacted 207 courts throughout Spain[6], requesting access to case files, the proceedings number and the name of the lawyer.

We did not receive any reply from 111 courts (54%). The research team did obtain a response from 96 courts with some information on 142 case files; 3 of which concluded with the documentation of the *Ronaldo, Benjamin*[7] and *L. Alberto* cases.

It is worth indicating that the research team, after informing the regional coordinator of the project, decided not to monitor cases involving serious offences, such as terrorism, membership of a criminal organisation, drug trafficking (in the context of organised crime), the possession of and/or trafficking in weapons, human trafficking, murder, manslaughter, or violence against women or children. This meant that 20 case files (14%) were excluded from the research.

Not having the judicial case file number made it very difficult for the issuing courts who were prepared to collaborate to identify the cases. In three 3 instances, the Court Clerk was unable to identify the EAW case file. For example, Investigating Court no. 1 in Marbella said that "*it did not have a specific list of EAWs issued and was unable to locate anything without the case file number*"[8]. In fact, several Court Clerks stated that the Judicial Council data was

[3] This is in accordance with the formalities and procedures established in Article 4 of Regulation 1/2005 of 16 September on ancillary aspects of judicial procedures (in relation to Articles 2 and 3 of the same). This Regulation is based on the principle that the Administration of Justice is public and is only secret in the cases envisaged by law. The information requested referred to the specific data of the courts issuing the EAWs, as well as the number of the case file or proceedings, data that, due to its content and nature, did not constitute data eligible for protection as far as we understand.

[4] Resolution of 13 June 2016 attaching a list with all the courts (Investigating Courts, Criminal Courts, Gender Violence Courts, Provincial Courts, the Special National Court – Criminal Division, Central Criminal Court, Central Investigating Courts -, Central Youth Court and Youth Courts) which had issued EAWs in 2015. On 4 May 2017 a list of the EAWs issued by Spanish courts in 2016 was provided by the Council's Judicial Statistics Department.

[5] We contacted the courts on the list for 2015 and 2016. On the list corresponding to 2016, of the 55 issuing Investigating Courts, 11 were already on the 2015 list; of the 24 Criminal Courts, 9 were already on the 2015 list and of the 31 Provincial Courts, 15 were already on the 2015 list.

[6] We were able to go the courts located in the province of Madrid in person.

[7] Benjamin is a fictitious name as we were requested to maintain his identity confidential.

[8] Investigating Court no. 1 in Guadalajara and Section 9, Málaga Provincial Court also told us they did "*not have a separate or independent registry*" of EAWs issued and Section 2 of the Santa Cruz de la Tenerife Provincial Court stated that it did "*not have separate statistics for EAWs issued*". See footnote 44, on the gathering of data.

erroneous, such as Investigating Court no. 2 in Alcoy, which told us that there were not 11 EAWs, as the Council's list maintained, but just 1 EAW[9]. After speaking to the court clerks from 8 courts who told us that they would send information, they ultimately failed to do so. In 4 cases, the court clerks directly refused to provide any information whatsoever.

In 28 cases (20%) of the 142 case files on which we obtained information, the EAWs had not been executed, mostly because the requested person had not been located: in two cases, the persons sought were located via other means or in Spain; in 1 case, the Spanish court cancelled the EAW because the surrender of the requested person for trial would take too long as the person in question was serving a long-term sentence in another Member State[10]; in another case, surrender was postponed until the sentence being served in the executing State had been completed[11]; and, in 4 cases, the EAW for serving a sentence was withdrawn as authorisation was granted for the sentence to be served in the executing State[12].

Moreover, in 2 cases, the executing State refused to execute the Spanish EAW, because it had failed to notify the requested person of the judgment convicting them in person (in addition to applying the time limit subsequently)[13] as well as because they were nationals of the executing State[14]. In another case, the Court Clerk informed us that, following surrender, the court considered that the offence had expired[15]. Finally, after reviewing the information provided in 5 of the replies received, we were able to ascertain that they were not actually EAWs, but other instruments of international judicial cooperation (mostly extraditions).

[9] Criminal Court no. 9 in Barcelona told us that, even though we identified 2 EAWs, it was only able "*to find the trail*" of 1 and that they would speak to the "*public servants to see if they could remember anything*" in order to obtain the case file. Section 6 of the Zaragoza Provincial Court also told us that it was only able to identify 1 EAW of the 6 appearing on the Judicial Council's list.

[10] Reply from Section 1 of the Córdoba Criminal Court.

[11] The person sought (a Spanish national) requested to serve his Hungarian sentence in Spain, but Hungary did not authorise the transfer to Spain. The EAW had been issued by Section 2 of the Madrid Provincial Court.

[12] The Court Clerks have not specified whether the modification of the EAW to SDL was formally documented.

[13] The EAW had been issued by Section 3 of the Madrid Provincial Court.

[14] The EAW had been issued by Section 3 of the Criminal Chamber of the National Court. Finally, the Italian judicial authority agreed to hold the trial, with the persons sought (who were in prison) declaring via video-conference and ultimately being acquitted.

[15] The Court Clerk from Central Investigating Court no. 6 of the National Court.

Once the case file number and identify of the defence lawyer had been obtained from the courts, the next obstacle, no less challenging, was to obtain the collaboration of the lawyers. In 19 cases (13%), the investigating team was unable to locate[16] or contact the lawyer[17]. In 27 cases (19%), the researchers spoke to the lawyers and sent the information pack together with the consent form. No reply was obtained despite follow-up calls and emails. On 13 occasions (9%), the lawyers were unable to contact their clients[18]. In 3 cases, the research team contacted the requested person directly, but was unable to obtain a response or consent.

[16] It was not possible to obtain the contact details.

[17] There was no reply to either the phone calls or emails, and it may have been the case that the contact details were incorrect.

[18] The replies given by the lawyer(s) were: the matter was from some time ago, contact with the client was lost, they were legal aid lawyers or, after being released or immediately after the conviction following a guilty, the execution suspended, and the client had left Spain.

4. The legal framework

4.1. Instruments of mutual recognition in Spain

Spain initially incorporated Framework Decision 2002/584/JHA, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW FD) into the domestic legal system by virtue of Act 3/2003, of 14 March and the supplementary Organic Law 6/2014, of 29 October. Both acts were derogated by the act on mutual recognition of criminal decisions in the European Union (*Ley 23/2014, de 20 de noviembre de reconocimiento mutuo de resoluciones penales en la Unión Europea*[19] - the, Mutual Recognition Act) and the supplementary Organic Law 6/2014, of 29 October, which amends the Judiciary Act (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*). The Mutual Recognition Act modifies the legislative technique used until now to transpose mutual recognition instruments in order to "*reduce the regulatory dispersion and complexity*" of the legal system, as affirmed in the Preamble of the Mutual Recognition Act. The Act is presented, therefore, as a text that codifies all the instruments for the mutual recognition of criminal decisions.

In addition to the EAW, the Mutual Recognition Act incorporated Framework Decision 2009/829/JHA, of 23 October, on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (ESO FD), as well as Framework Decision 2008/909/JHA, of 27 November 2008, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (the CSDL FD).

Both Framework Decisions are relevant for the application of the EAW. The ESO FD is conceived as a less harsh alternative, in cases of less serious offences, as it allows a person residing in one Member State, but subject to criminal action in another Member State, to be supervised by the authorities of the State in which he/she resides until the trial commences. The surveillance measures are established by the State in which the trial is to be held (Issuing State) and supervised by the State of origin or residence, thus seeking to avoid the use of pre-trial detention, by virtue of the principle of proportionality[20]. As for the

[19] It also incorporates the amendments introduced by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. The Mutual Recognition Act entered into force on 11 December 2014.

[20] The types of supervision measures include: a) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; b) an obligation not to enter certain localities, places or defined areas in the issuing or executing State; c) an obligation to remain at a specified place, where applicable during specified times; d) an obligation containing limitations on leaving the territory of the executing State; e) an obligation to report at specified times to a specific authority; f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed; g)

CSDL FD, it is applied as an alternative to the EAW when the latter refers to the enforcement of the sentence and the requested person is a citizen or resident of the executing State, or has close links to that country, thus being able to serve the sentence imposed by another State in the former State, facilitating his/her reinsertion into society.

The Preliminary Title of the Mutual Recognition Act establishes that mutual recognition will have to apply with respect to the fundamental rights and freedoms and the principles contained in the Spanish Constitution, in Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union, and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3). According to Article 4, "*in the absence of specific provisions, the legal regime envisaged by the Criminal Procedure Act will apply*". Title I of the Act (Articles 7 to 33) contains a general regime to all instruments of mutual recognition, both concerning the transfer of those issued by Spanish authorities and in relation to the recognition of those received in Spain for execution.

Thereafter, the Mutual Recognition Act regulates each of the instruments of mutual recognition, of interest for the purposes of this research are: the EAW, in Title II (Articles 34 to 62), the decisions for which an CSDL is imposed, in Title III (Articles 63 to 92) and the ESO in Title V (Articles 109 to 129). One of the main new developments and improvements with regard to EAWs is the introduction of the principle of proportionality[21].

4.2 The procedure for issuing an EAW in Spain

The competent authorities in Spain for issuing an EAW are "*the Judge or Court hearing the case in which this kind of order is required*" (Article 35 Mutual Recognition Act). In accordance with the principle of proportionality, Article 38 Mutual Recognition Act establishes a preliminary phase to the issuing of an EAW, of an optional nature: taking the statement of the requested person, requesting authorisation from the State where he/she is located, by means of judicial cooperation or assistance (letter rogatory[22]). The outcome of this procedure could avoid the subsequent arrest and detention.

Also in application of the principle of proportionality, the Mutual Recognition Act introduces stricter requirements for issuing an EAW. In the event that the purpose of the EAW is to conduct a criminal prosecution: (i) the requirements set out in the Criminal Procedure Act for ordering the pre-trial detention of the requested person or those contained in Organic

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an obligation not to engage in specified activities in relation with the offence(s) allegedly committed, which may include involvement in a specified profession or field of employment; h) an obligation not to drive a vehicle; i) an obligation to deposit a certain sum of money or to give another type of guarantee, which may either be provided through a specified number of instalments or entirely at once; j) an obligation to undergo therapeutic treatment or treatment for addiction; k) an obligation not to carry arms and to avoid contact with specific objects in relation with the offence(s) allegedly committed (Article 110 Mutual Recognition Act, Article 8 ESO FD).

[21] Another new development contained in Article 34 Mutual Recognition Act (definition of the EAW), is that the purposes of execution of the same expressly include "*a measure of internment in a youth offenders centre*".

[22] Although it has not yet been transposed to the Spanish legal system, Directive 2014/41/EU of 3 April regarding the European Investigation Order in criminal matters has been in force since May. This is the mechanism that can be used to obtain the statement from the investigated persons.

Law 5/2000, regulating the criminal responsibility of minors, for ordering the provisional internment of a minor (Article 39.1) must be met. As such, it will no longer be possible to issue an EAW merely in order to locate or interview or take the statement of a person[23]; (ii) the accusatory principle is introduced, as the Judge will only be able to issue the EAW, in a reasoned ruling, at the request of the Public Prosecutor or the accusers (Article 39.3). While the Mutual Recognition Act only mentions the private prosecution (*acusación particular*), legal scholars consider that it should also include citizens' actions (*acusación popular*)[24]. Moreover, the intervention of the defence in this procedure should not be overlooked[25]. Neither the derogated Act 3/2003 nor the Mutual Recognition Act now clearly and expressly establish the need for there to be a prior national judicial decision ordering the pre-trial detention or imprisonment. According to legal scholars,[26] Article 825 of the Criminal Procedure Act (for extradition), in relation to Articles 829 and 830, should be applied by analogy, that is, first a reasoned ruling ordering imprisonment or a final judgment must be handed down. In any event, as a result of the judgment of 1 June 2016 from the Court of Justice of the European Union in Case C-241/15, *Bob-Dogi*, there is no longer any doubt as it confirms that there must first be a prior national detention order separate from the EAW, in the absence of which the executing State should not execute the EAW.

In the event that the purpose of the EAW is to serve a custodial sentence, the replacement or suspension of the sentence of deprivation of liberty should not be possible (Article 39.2 Mutual Recognition Act)[27]. In this case, the Judge will, of his/her own motion, decide to issue the EAW, in the form of a reasoned decision or ruling.

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[23] See Pablo Ruz Gutiérrez, *Cuestiones prácticas relativas a la Orden Europea de Detención y Entrega (Título II de la Ley 23/2014)*, in "Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar". In an interview with Judge Ruz, he stated that "*It is also a common problem to have to justify to the United Kingdom authorities why an EAW is issued before "formal charges" have been delivered. A formal charge in the UK is similar to a Spanish decision to prosecutor (indictment) or the decision to continue the investigation in the abbreviated procedure. In these circumstances, Spanish judges or courts are required to explain, through additional information reports, that in Spanish proceedings, formal charges can only be brought after the investigated person has been heard. Spain needs to issue EAW before formal charges because Spain would not be able to press formal charges unless the investigated person appears in court voluntarily or if the taking of testimony cannot be possible by videoconference.*"

[24] In this regard, Pablo Ruz Gutiérrez, *Cuestiones prácticas relativas a la Orden Europea de Detención y Entrega (Título II de la Ley 23/2014), doc. cit*; Mar Jimeno Bulnes, *La orden europea de detención y entrega: análisis normativo*, in "Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar". There is no case law on this matter.

[25] According to Senior Judge Pablo Ruz, "*neither can we overlook the possibility of allegations being made by the defence of the accused at the stage in question, who may have appeared in the proceedings previously and* (...) *demand that its reasons be taken into account* (...). *Although this possibility of a hearing for the accused via his/her representative in the proceedings has not been expressly envisaged by the law, we believe there is nothing to prevent it* (...)", en *doc. cit*. There is no case law on this matter.

[26] Pablo Ruz Gutiérrez, *doc. cit*; Carlos Miguel Bautista Samaniego, *Cuestiones varias relacionadas con la aplicación de la OEDE en la Ley 23/2014, de reconocimiento mutuo*, in La Ley Penal nº 122, September-October 2016; José Ricardo de Prada Solaesa, *La orden europea de detención y entrega*, in Estudios de Derecho Judicial, JUDICIAL COUNCIL, nº 61, 2004.

[27] Account should be taken of the reforms introduced in the regulation of the system of suspension of execution of sentences of deprivation of liberty by Organic Law 1/2015, of 30 March, which amends Organic Law 10/1995, on the Criminal Code, which entered into force on 1 July 2015. In this regard, see Pablo Ruz Gutiérrez, *Cuestiones prácticas relativas a la Orden Europea de Detención y Entrega (Título II de la Ley 23/2014)*, *doc. cit*.

Although the Mutual Recognition Act makes no mention of the participation of the defence lawyer in the EAW issue process, as the Criminal Procedure Act is subsidiary, the terms of Article 118.1 apply, "*Anyone to whom a punishable act is attributed will be permitted to exercise his/her right of defence, intervening in the actions, as soon as they are notified of its existence* (…)"[28]. The ruling ordering the issue of the EAW can be appealed (Article 13.1 Mutual Recognition Act[29]) in accordance with the terms of the Criminal Procedure Act (Articles 216 et seq).

With regard to the transmission of the EAW, when the whereabouts of the requested person are known, the Spanish judicial authority directly contacts the competent authority in the executing State (Articles 8.1 and 40.1 Mutual Recognition Act). When his/her whereabouts are unknown, a description of the requested person can be introduced into the Schengen Information System (Article 40.2 Mutual Recognition Act). Once the person has been located, the Spanish judicial authority will once again send the EAW form, duly completed and translated into the language of the State where the requested person is located (Article 7.3 Mutual Recognition Act), within the time period established by the executing authority.

Article 43 Mutual Recognition Act envisages the possibility of applying for temporary surrender (in the case of EAW for the exercise of criminal actions), for the adoption of measures or for holding the oral hearing. Another new development in the Mutual Recognition Act is conditional surrender (Article 44) of the national or resident to be returned to the executing State to serve the sentence or internment measure handed down in Spain.

Article 45 Mutual Recognition Act regulates the procedure to be followed after the surrender of the requested person. With regard to EAWs issued (i) for conducting a criminal prosecution, the surrendered person will have to be brought before the judicial authority that issued the EAW, which will call a hearing in order to decide on the personal situation of the arrested person, in the form and with the timeframes envisaged by the Criminal Procedure Act[30] or the Criminal Responsibility of Minors Act; (ii) for serving a sentence, the issuing judicial authority will order immediate imprisonment. In both cases, the maximum term of pre-trial detention or sentence will be reduced by the time the requested person was deprived of liberty during the EAW execution procedure. The judgment of 28 July 2016 from the Court of Justice of the European Union in Case C-294/16 PPU, *JZ*, clarifies that the time in which the requested person was subject to measures restricting his/her liberty in the executing State, other than pre-trial detention, should be deducted from the total period of deprivation of liberty, provided that the type, duration, effects and manner of implementation of such measures are so restrictive as to give rise to a deprivation of liberty of the person concerned in a way that is comparable to imprisonment.

[28] See also Article 520 Criminal Procedure Act if the person is in detention.
[29] The Mutual Recognition Act does not say whether a decision rejecting the EAW can be appealed.
[30] Article 505 Criminal Procedure Act, in the shortest period of time possible within the seventy-two hours following when the arrested person is brought before the court.

Finally, by virtue of the principle of speciality, the surrendered person will only be tried or deprived of liberty for the facts for which he/she was surrendered[31]. If the requested person waives the speciality principle following surrender, he/she must do so before the competent judicial authority and assisted by a lawyer who explains the consequences of this waiver to him/her[32].

4.3 The Roadmap Directives and the regulations in force on the right to interpretation and translation, the right of information and the right of access to a lawyer in criminal proceedings and in EAW procedures

In 2015, important legislative reforms were approved designed to transpose the European Directives on the right to interpretation and translation in criminal proceedings (2010/64/EU), the right to information in criminal proceedings (2012/13/EU), and the right of access to a lawyer in criminal proceedings and in EAW proceedings (2013/48/EU) into the domestic regulatory framework. The successive reforms of the Criminal Procedure Act were introduced consecutively and in a very short period of time by Organic Laws 5/2015, 13/2015 and Act 41/2015, which supplements and implements the foregoing. In particular, Organic Law 5/2015, of 27 April, transposed the Directives on interpretation and translation (almost two years past the deadline) as well as on the right to information (over a year behind schedule)[33]. The transposition of the Directive on access to a lawyer was addressed initially by Organic Law 5/2015 and subsequently amended by Organic Law 13/2015, of 5 October[34].

Articles 123, 124, 125 and 126 Criminal Procedure Act envisage the essential aspects of the rights to interpretation and translation in a similar manner to that set out in the 2010 Directive[35]. The main problems have to do with the lack of interpreters specialising in minority languages, the quality of the service and the lack of quality control processes to verify the reliability of the interpretations and translations,[36] as well as the absence of a

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[31] Article 60.2 Mutual Recognition Act: "(…) *the person surrendered to Spain will not be tried, sentenced or deprived of liberty for an offence committed prior to his/her surrender other than the one that gave rise to the same, unless the executing State authorises it.*"

[32] Article 60.4 Mutual Recognition Act "(…) *a record will be taken of the same in accordance with the internal law of the same. The waiver will be made in conditions that make it clear that the person has done so voluntarily and while fully aware of the consequences that it entails.*"

[33] The amendments that Organic Law 13/2015 introduced to the wording envisaged in Organic Law 5/2015 in the articles governing the right to information were of a purely formal rather than a substantive nature.

[34] Organic Law 5/2015 , although designed to transpose the 2010 and 2012 Directives, also took advantage to introduce some amendments that affected the Directive on access to a lawyer that was subsequently addressed by the reform of Organic Law 13/2015.

[35] In the context of an EAW execution procedure, the person sought will be assisted by an interpreter, if necessary, at the hearing and the interview or statement (Articles 51 and 52 Mutual Recognition Act); also when the sentenced person must give his/her consent to an CSDL (Article 67 Mutual Recognition Act), as well as the notification of the CSDL (Article 70 Mutual Recognition Act).

[36] In the context of the "PRO JUS Procedural rights of children suspected or accused in criminal proceedings in the EU" research project, carried out by Rights International Spain in Spain, we were able to verify that the greatest difficulty that prevents the full enjoyment of this right is the lack of professionality among the collective of processionals provided by the private companies contracted by the Ministries of Justice and the Interior who "lack the necessary qualifications and quality". Available at http://rightsinternationalspain.org/uploads/publicacion/e020506ec6f312da100eccf77f7483998f624cf0.pdf

registry of duly qualified independent translators and interpreters[37]. All of this can hinder the effective application of this right in practice. A deficient interpretation or the failure to translate certain documents can have a genuine impact on the life of foreigners who are suspected or accused in criminal proceedings and in EAW procedures, if they are not able to understand their rights and defend themselves effectively. The Supreme Court, in its judgment no. 18/2016, of 26 January 2016, established that, in order for a defect in interpretation or translation to be considered a violation of the right to effective judicial protection,

> "*the decisive factor is not that there has been an imprecision or generic error in the translation process, something that is sadly frequent and practically inevitable, but that the appellant emphasizes that this alleged error could have been relevant in terms of the decision because it undermined the appellant's defence by misleading the Court or because it prevented him from properly presenting his version of the facts or from setting out his defence properly*".

With regard to the right to information[38], it is worth highlighting the following relevant changes introduced in the Criminal Procedure Act as a result of Directive 2012/13/EU: (i) the right of the investigated or accused person, and his/her lawyer, to have access to the essential elements in order to be able to challenge the lawfulness of the arrest (Articles 118.1.a and 520.2.d Criminal Procedure Act). However, the rule does not define what kind of documents or materials should be considered essential in terms of safeguarding the fairness of the trial and the preparation of the defence. The Constitutional Court has clarified the concept of "*elements of the police actions that are essential in order to be able to challenge the lawfulness of the arrest*" in judgment no. 13/2017, of 30 January, establishing that:

> "*if the arrest took place as a result of a police operation against persons identified in relation to the commission of several offences in various towns, as the Public Prosecutor's Office states in its writ of allegations, there should at least be some medium (paper or electronic) containing the reports of such offences, as well as the documentation on the searches carried out when the persons were arrested, the handover of which, the Prosecutor states 'would not appear to be a problem in terms of entailing a threat to the life or fundamental rights of another person and that it would have been advisable not to hand over for reasons of public interest'".* (Point of Law 7)

(ii) The new wording of Article 118 Criminal Procedure Act includes an exhaustive list of the rights that any person to whom a punishable act is attributed has (whether arrested or not) and of which he/she must be informed as of when notified of the proceedings against

[37] The law designed to create the registry of translators and interpreters has not yet been drafted. Moreover, the reform envisages (Article 124.1) that on an exceptional basis any person who speaks the language can act as an interpreter or translator, even if not recorded in the registry, without specifying what these "urgent" circumstances leading to this situation would be, or who would take the decision, or how the quality of the service would be guaranteed in these exceptional cases.

[38] In the context of the EAW execution procedure, Article 50 Mutual Recognition Act establishes that the arrested person will be informed of all of his/her rights, with the provisions of the Criminal Procedure Act applying (Article 118 and 520). For a more detailed analysis, see "Report on the implementation of Directive 2012/13/EU, on the right to information in criminal proceedings. Spain", in the context of the research project carried out by Rights International Spain in Spain and coordinated by Justicia European Rights Network and Open Society Justice Initiative (in the process of publication).

him/her. Meanwhile, Article 520.2, which regulates the rights of arrested persons, has been amended to include the right to be informed in writing, in simple and accessible language, both of the acts attributed to them and the reasons that have led to their arrest as well as their rights. However, in practice, the information on rights is not supplied in simple or accessible language, but in the form of a quick and formal reading in excessively technical language that, together with the circumstances of stress and tension, do not favour effective understanding of the rights by the arrested person[39]. Moreover, although the Criminal Procedure Act envisages that the arrested person may keep the written letter of rights in his/her possession throughout the detention, in practice this is not the case.

Finally, and with regard to the right of access to a lawyer[40], the transposition of Directive 2013/48/EU has made it possible to introduce the following relevant changes to the Criminal Procedure Act: (i) in the catalogue of rights of which the investigated (Article 118.1) and arrested (Article 520.2) person must be informed, in a simple language and without undue delay, so that they can be exercised, the right to appoint[41] a lawyer and the application for legal aid have been included; (ii) the obligation to respect the confidential nature of the communications between the investigated or arrested person and his/her lawyer (Articles 118.4 and 520.7); (iii) the right to communicate and hold a private interview with the lawyer before the interview with the police, the prosecutor or the judge and for the lawyer to be present whenever his/her client is interviewed (Articles 118.2 and 520.6.d)); and the (iv) waiver of access to a lawyer (Article 520.8) for road safety offences.

The current wording of the Mutual Recognition Act does not contain any reference to the right to appoint a lawyer in the issuing State of the EAW (Article 10.5 Directive 2012/13/EU)[42]. This right was not included in Organic Law 13/2015 either when the Directive was transposed. At present, there is a bill (*Proyecto de ley*) that amends Act 23/2014[43], in order, among other things, to correct and update some matters, such as: (i) include a section 4 in Article 39 (on the requirements for issuing an EAW in Spain),

> "*when the requested person exercises his/her right, in the executing State, to designate a lawyer in Spain to assist the lawyer in the executing State, the exercise of this right will be guaranteed and, if applicable, that of the right to legal aid, in the terms that apply in accordance with Spanish legislation*";

[39] For more detailed information, see the Report "Accessible letters of rights in Europe 2017", prepared in the context of a European research project carried out by Rights International Spain. Available at: http://rightsinternationalspain.org/uploads/publicacion/e68d42597589ccbae2eceefa5fe4a5282a966c80.pdf

[40] For a more detailed analysis, see "Report on the implementation of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. Spain", in the context of a research project carried out by Rights International Spain in Spain and coordinated by Justicia European Rights Network and OSJI (in the process of publication).

[41] Article 520.5 introduces amendments to the rules on the process of appointing a lawyer including the term of three hours for the lawyer to attend the place of custody.

[42] The right of access to a lawyer during the hearings of the arrested person before the executing judicial authority is set out in Article 51 Mutual Recognition Act and in the interview envisaged in Article 52 (temporary surrender) and respect for the speciality principle (Article 60).

[43] Available at: http://www.congreso.es/public_oficiales/L12/CONG/BOCG/A/BOCG-12-A-14-1.PDF

and (ii) amend Article 50 (on the arrest and surrender to the executing judicial authority), section 3:

> "*Once the arrested person has been brought before the judicial body, he/she will be informed of the existence of the European arrest warrant, of its content, of his/her right to appoint a lawyer in the issuing State of the European arrest warrant whose role will consist of providing assistance to the lawyer in Spain, supplying information and advice, of the possibility to consent at the hearing before the Judge and on an irrevocable basis to his/her surrender to the issuing State, as well as the rest of his/her rights. In the event he/she asks to appoint a lawyer in the issuing State, the competent authority will be notified immediately.*"

The bill does not explain how the exercise of this right will be guaranteed in practice, as there is no procedure for appointment, for example, if there is a specific term for designation or the effectiveness of the procedure in the absence of an appointment.

Section 4 of Article 50 has also been amended in order to expressly establish the right of the arrested person to be *"informed in writing in a clear and sufficient manner, and in clear, simple and understandable language, of his/her right to waive access to a lawyer in the issuing State, on the content of said right and its consequences, as well as the possibility of subsequent revocation."* It is understood that the written letter of rights, which must be given to the requested person when arrested, containing information on all their rights, would also have to be amended in order to include an express reference to the right to appoint, and indeed waive, a lawyer in the issuing State.

5. The practice of issuing an EAW

5.1 Data on EAWs issued by Spain

According to the information supplied by the Sirene Office (see table 1), the total number of EAWs issued by Spanish judicial authorities in 2015 was 867. However, Sirene warns that the data is "*approximate*" because "*some entries may be duplicated*". The figure is, as we say, total, meaning that we cannot ascertain the specific issuing court or the case file number.

Table 1. Data on EAW issued by Spanish judicial authorities and executed[44]

Year	EAWs issued	Active surrenders
2010	378	-
2011	578	121
2012	693	124
2013	738	158
2014	834	209
2015	867	208

Source: the author, based on data supplied by Sirene

In relation to the active surrenders, that is, the EAWs actually executed, the data available is only from 2011 onwards. Table 2 provides information on surrenders by offence, taking into account that this data is recorded only as of 2012.

Table 2. Data on active surrenders by offence[45]

Offence	2012	2013	2014	2015
Sexual abuse	1	-	-	2
Child abduction	-	4	2	-
Sexual assault	7	7	6	11
Gender violence	-	1	-	-
Rape	-	-	2	1
Kidnapping	-	1	-	1
Offences against sexual freedom	-	1	-	-
Threats and blackmail	-	3	-	2
Murder (including attempted)	5	4	6	9
Assault of a public official	-	-	-	2
Unlawful detention	-	1	6	5
Unlawful association	1	1	3	-
Money laundering, forgery and fraud	4	4	-	-
Offences against the rights of foreign citizens	2	1	1	-
Trafficking in human beings	-	7	9	8
Public health offences	3	17	32	38
Offences against citizens' rights	2	-	-	-

[44] Information on 2016 was requested but not provided.
[45] The list of offences was supplied by Sirene.

Corruption of minors, exhibitionism	2	-	-	-
Offences related to prostitution	1	1	7	-
Offences against the administration of justice / Inland Revenue	-	2	1	-
Environmental offences	-	-	-	1
Road safety offences	-	1	-	2
Concealment	-	1	-	-
Swindling	7	18	6	19
Fraud and forgery	9	-	-	-
Embezzlement / with fraud	-	2	1	-
Membership of a criminal organisation	1	-	25	7
Forgery	4	6	13	9
Breach of sentence	-	2	1	-
Manslaughter (including attempted)	10	9	13	12
Manslaughter and injury	2	-	-	-
Theft	1	-	1	1
Failure to pay child support	1	-	-	-
Pimping	1	-	-	-
Injury	5	7	9	11
Mistreatment	1	1	5	1
Housebreaking	-	1	-	1
Robbery	2	3	1	3
Burglary	10	13	9	14
Aggravated robbery	9	11	14	10
Terrorist offences	1	3	4	12
Unlawful possession / trafficking of arms	-	2	-	-
Drug trafficking	32	23	32	26
TOTAL	**124**	**158**	**209**	**208**

Source: the author, based on data supplied by Sirene

However, discrepancies can be observed[46] between the Sirene data and that of the Judicial Council[47]. According to the data supplied by the Judicial Council, the total number of EAWs issued by Spanish courts in 2015 was 507[48]. In any event, it was not possible to cross-check

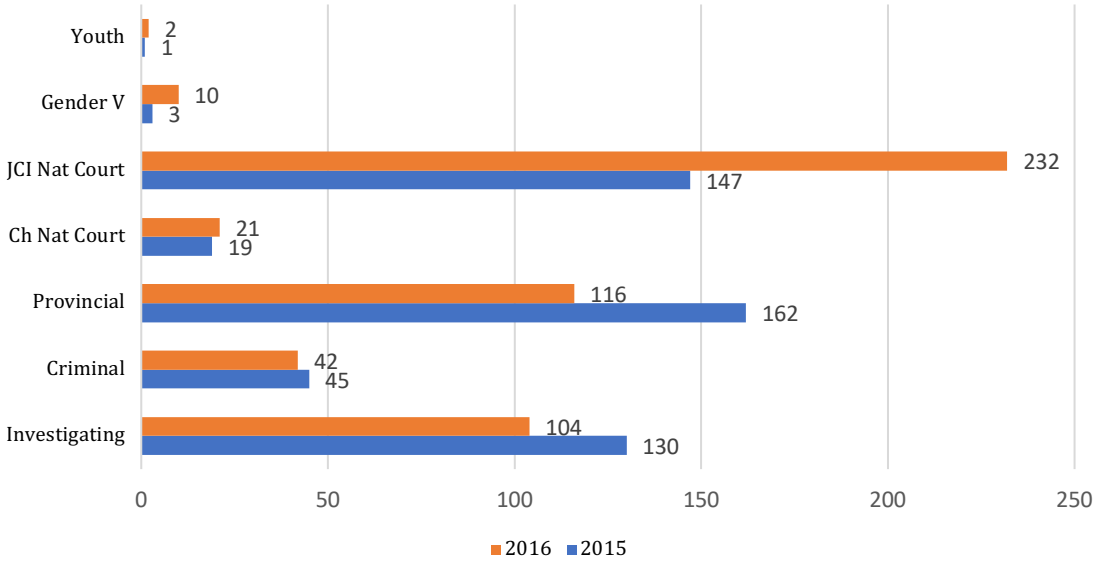
[46] One factor that may have an effect here is the manner in which the data is gathered and classified in the courts. Quarterly statistical bulletins are compiled and sent to the Judicial Council. The Court clerks include the information in the bulletins based on the information supplied by the procedural managers, that is the officials responsible for handling the proceedings. There is no specific methodology for the collection of data by these procedural managers. Neither is there a control or supervision mechanism, meaning that the information supplied may be incomplete. In the case of the Region of Madrid in particular, there is a new procedural management system called "Sistema de Gestión Procesal (GESPRO)". However, the categories for identifying each kind of case file are different and do not coincide with the management programme used by the Judicial Council. Moreover, the GESPRO is apparently a complex tool to use and the court personnel have only received a 2-hour information briefing on its use. Another possibility is that, by virtue of the law, the introduction of a description of a person sought in the Schengen Information System is equivalent to the issue of an EAW, when an international arrest warrant is issued for someone is counted as an EAW, even if it is ultimately not converted into an EAW. In fact, as the Court clerk of Section 5 of the Valencia Provincial Court stated "*several warrants are issued but until the persons are located we do not know whether it will be an EAW or extradition*".

[47] As of the entry into force of Act 23/2014 (Mutual Recognition Act), on the one hand, the Spanish judicial authority will send a copy of the EAWs issued to the Ministry of Justice (Article 40.6) and, on the other, the Ministry of the Interior will inform the Ministry of Justice of the arrests and surrenders carried out in execution of the EAWs (Article 40.7). However, as explained in the report, the Ministry of Justice has not supplied us with any data in this regard.

[48] For a total of 137 courts. The number of EAWs issued in 2016 increased to a total of 527 issued by 127 courts. The Judiciary Council does not have a breakdown of overall issued EAW by the aim of the EAW, that is, for (i) conducting a criminal prosecution and (ii) executing a custodial sentence.

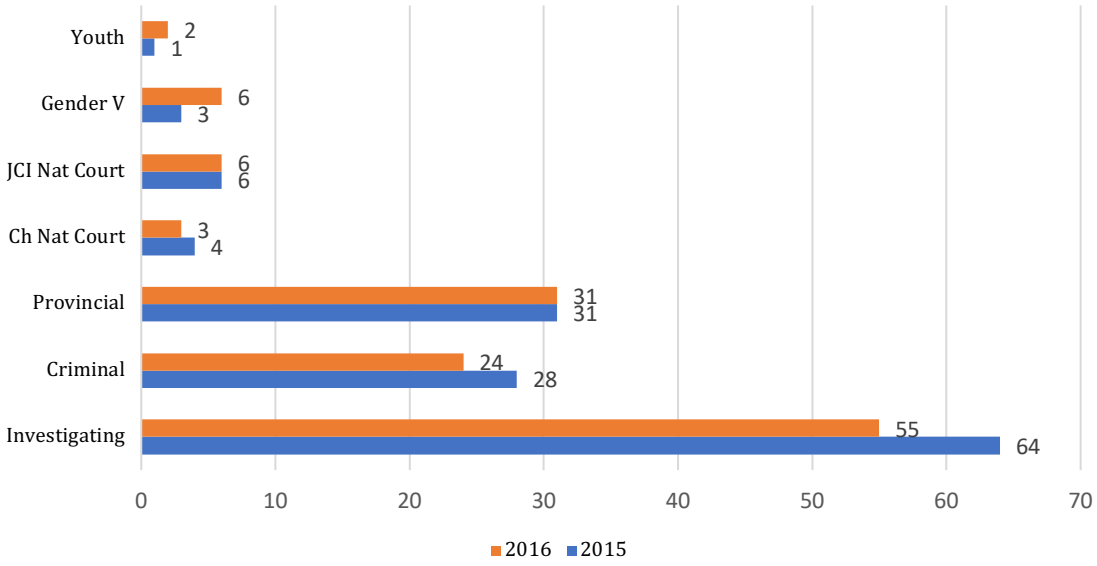
the information, because while the Sirene data did not include information on the specific issuing judicial body, the Judicial Council data did. Figure 1 shows the disaggregated data by types of judicial body[49] for 2015 and 2016 and figure 2 shows the total number of courts that issued the EAWs. The judicial bodies that issued the highest number of EAWs in 2015 were the Investigating Courts, the Provincial Courts and the Central Investigating Courts (National Court) with a total of 130, 167 and 147 EAWs, respectively. In 2016, it was the Central Investigating Courts that issued 232 EAWs. The bodies that issued the fewest EAWs both in 2015 and 2016 were the Juvenile Courts, the Gender Violence Courts and the Criminal Chamber of the National Court.

Fig.1. EAWs issued by judicial body. Souce: the author based on Judicial Council data



[49] For example, from among the investigating or first instance and investigating courts, it is the courts of Malaga, Fuengirola, Melilla, Zaragoza, Palma, Santa Cruz de Tenerife, Sant Feliu de Guixols and Alcoy that issued most EAWs in 2015 with 5 or more each. Of the Provincial Courts, those that issued the highest number of EAWs were those of Alicante, Valencia, Tarragona, Girona, Barcelona and Santa Cruz de Tenerife (77).

Fig.2. Number of issuing courts. Source: the author



5.2 Practical application: problems found

Generally speaking, one of the first basic problems is the lack of technical knowledge in relation to the functioning of the instruments of mutual recognition in Spain. In the words of one Court clerk, "*we have done nothing like that here, what is more, we wouldn't know how to do it*", in relation to the procedure to be followed in order to issue an EAW[50]. There is also confusion between such instruments, as can be seen from the explanation from another court clerks, "*it was not an arrest warrant that was requested, but a transfer for trial*", which was done using Sirene; that is, in reality it was an EAW. Or what another Court clerk recounted:

> *"it is not a real EAW, but the transfer of an accused person in criminal proceedings whose oral hearing had to be held at the criminal court. However he was serving a sentence for another offence in the United Kingdom and, as such, was an inmate in a penitentiary, meaning that said instrument of international judicial cooperation was used* ***by analogy*** *and, solely in order to make it possible to transfer him to face trial in Spain for an alleged offence of theft."*

In this case, according to the Court clerk, because they did not know how to proceed, they contacted Eurojust who advised that an EAW be issued to apply for the transfer.[51]

Greater familiarity with the instruments of mutual recognition would undoubtedly make for a more appropriate use of the ESO or the application for an EAW to be replaced with a CSDL, in cases of serving sentences. Both instruments are relatively unknown to legal operators and, as such, they are rarely used. From the information obtained in the context of the investigation, only in one case is there a record of the lawyer asking for an ESO to be issued

[50] Information supplied by Madrid Investigating Court no. 50.
[51] Information supplied by Gerona Criminal Court no. 5.

instead of the EAW, although the Court ultimately rejected the application and issued the EAW[52]. In four (4) cases, the EAW for serving a sentence was cancelled and subsequently transformed into a CSDL in the executing State [53].

5.2.1 Issuing EAW in the preliminary stages of the investigation

The use of the EAW as a means for locating the person under investigation in order to interview him/her was common practice prior to the Mutual Recognition Act. Judge Ruz says,

> "*practical experience had shown the ineffectiveness of the instrument, as well as the dissatisfaction –and even incomprehension- of the foreign legal operators, in certain cases in which, having ordered the arrest of the requested person and his/her surrender to Spain, once brought before the national judicial authority that had issued the EAW, and having received the corresponding statement as an accused person, he/she was immediately released because the necessary conditions for ordering pre-trial detention of the requested person were not met*"[54].

Indeed, we have been able to confirm, for example, from the information supplied by Section 1 of the Guipúzcoa Provincial Court, cases of EAWs being issued for the adoption of investigative measures (2012).

We have also observed that the important amendments introduced by the Mutual Recognition Act with regard to the requirements for issuing the EAW, such as the principle of proportionality and the pre-trial detention of the requested person following surrender, are not always applied. For example, in a matter heard by Terrassa Investigating Court no. 4 (2015) the persons sought were released after the surrender hearing and the interview. The Court did not order pre-trial detention because, as the matter was not ready for trial, imprisonment was not deemed necessary. The same happened in cases heard by Sant Feliu de Guixols Investigating Court no. 2 and Vigo Investigating Court no. 7 (for minor fraud): the surrendered person was immediately released after the interview, pending trial with the obligation to remain in Spain, something that is not always complied with, it sometimes being impossible to locate the person in order to summons him/her to trial. Likewise, in another case at Investigating Court no. 3 in Jaén, after interviewing the surrendered person, the judge ordered immediate release and withdrawal of the EAW. Moreover, in a case heard by Central Investigating Court no. 2 of the National Court, an EAW was issued to question the requested person because they could not find him/her at the address notified to the court, in order to interview him/her.

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[52] Information supplied by Section 1 of the Guipúzcoa Provincial Court.

[53] Information supplied by Section 6, Zaragoza Provincial Court; Vigo Criminal Court no. 1 and Zaragoza Criminal Court no. 5 and Section 2, Huelva Provincial Court.

[54] In *Cuestiones prácticas relativas a la Orden Europea de Detención y Entrega (Título II de la Ley 23/2014)*, *doc. cit*.

Benjamin, a Senegalese citizen living in France, was arrested in Belgium by virtue of an EAW issued by Tarragona Provincial Court for his trial. When arrested, he was with his young daughter, and his partner had to come and collect the child. Benjamin was surrendered to the Spanish authorities on 29 September 2015 at Madrid-Barajas airport, appeared before the Duty Judge in Madrid and was not transferred to the Tarragona Provincial Court until 15 October 2015. After his Court appearance, he was immediately released and authorised to return to France where he was working and where his family lived, though he was obliged to give the Court his address in France for the purposes of legal notifications and to respond to instructions from the Court, conditions that Benjamin has complied with.

5.2.2. Pre-trial detention

Spain has been found guilty on just five occasions by the European Court of Human Rights of violation of Article 5 of the Convention (right to freedom and safety)[55]; just one case referred to excessive duration of pre-trial detention (judgment of 1996[56]). According to a study on the practice of pre-trial detention in Spain[57], in January 2015 there were 8,544 people in pre-trial detention, representing approximately, 12.5% of the total prison population. Although there has been a progressive reduction of the persons in pre-trial detention as of 2010, the information obtained during the research indicates that "*imposing pre-trial detention is automatic*", and that "*only in 65% of the cases with pre-trial detention were the persons ultimately convicted*", with the duration of pre-trial detention exceeding 1 year. The report concludes, with certain caveats and warnings, that "*the examination of case files and observation of cases has found excessive use in the application of pre-trial detention*".[58]

[55] Most recently in 2013. Judgment of the Grand Chamber, Inés del Río Prada v. Spain, case 42750/09, 21 October 2013 due to violation of Articles 7 and 5 of the Convention. Section 3 of the ECHR passed judgment on 10 February 2012.

[56] Scott v. Spain, case 21335/93, judgment of Section 3 of 18 December 1996.

[57] "La práctica de la prisión provisional en España. Informe de investigación. Noviembre 2015." APDHE, research project supported by the Justice Programme of the European Commission and coordinated by Fair Trials International. Available at: https://www.fairtrials.org/wp-content/uploads/INFORME_LA-PRACTICA-DE-LA-PRISION-PROVISIONAL.pdf

[58] *Idem*, see pages 26, 33, 35, 41, 43 and 56. It is worth stating that 2015 saw the approval of the Reform of the Criminal Procedure Act (*Ley 41/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal*) designed to streamline criminal justice and enhance procedural guarantees and which, among other things, introduced the reduction of the maximum investigation periods to six and eighteen months, depending on whether the case was simple or complex. At present there is no data available to assess the impact of the reform on pre-trial detention.

Sara was living with the parents of her partner in Romania together with her 4-year-old daughter and a new-born baby when arrested by virtue of an EAW issued by Alicante Provincial Court. While the competent authority in the executing State was deciding on the EAW, Sara's lawyer in Spain spent "*all this time [...] requesting the Alicante Court to reconsider the possibility to withdraw the EAW and authorize Sara to voluntarily return to Spain by her own means for the trial ... They paid no attention to us*". Surrender took place on 8 April 2016 and the Alicante Court maintained pre-trial detention until the data of the trial scheduled for 1 June 2016. The trial was held via videoconference with Alicante from prison in Aranjuez (Madrid), where Sara was imprisoned with her baby; she accepted the judgment. On the same day Sara was granted conditional release and the sentence has not yet been enforced. There is no doubt that there were other alternative measures to pre-trial detention in view of the minimal flight risk with a six-month-old baby and a four-year-old daughter staying with grandparents in Alicante. According to Sara, she was "*very worried about my daughter, who had never been separated from me, (...) I did not see her while I was in prison (...) my parents came to see me once in prison, travelling from Alicante was a major issue for them*".

5.2.3 Proportionality

From the information obtained during the research, there is no record of Spanish courts using, prior to the issue of an EAW, the possibility of obtaining an interview with suspected persons via the EU cooperation channels envisaged in Article 38 Mutual Recognition Act. The cases referred to in section 5.2.1 (issue of an EAW at the early phases of the investigation or release following the interview) represent a clear disproportionate application of the EAW.

Also from the case of *Sara*. Despite being justified by her family situation and the fact that she was perfectly located, on supervised release ordered by the competent Romanian authority, the Spanish court issuing the EAW was unreceptive to the lawyer's request for the EAW to be cancelled and for Sara to travel to Spain voluntarily, by her own means, within a term of one month. Moreover, the EAW had been issued for a trial to be held. Yet the trial was held without the need for Sara to be physically present in Alicante as it was carried out via videoconference, no evidence was examined and the sentence of 1 year and 6 months' imprisonment has not yet been enforced. This highlights that less onerous alternative measures could have been adopted that would not have affected Sara's family situation.

Information has also been obtained from other cases in which the Courts have issued judgment after a plea of guilt accepting the replacement of the custodial sentence and release of the requested person the same day of the trial.[59] In one of these cases, the offence was a minor case of fraud related to a loan for the purchase of a motorcycle (Zamora

[59] Information obtained in relation to cases heard by Section 1 of Guipúzcoa Provincial Court (2-year prison sentence), Section 3 of the Valencia Court of Appeal, Malaga Criminal Court no. 9 (1-year prison sentence), Mérida Criminal Court no. 1 (public health offence), Zamora Criminal Court n. 1 (sentence of a few months) and Mataró Criminal Court no. 1 (sentence of a few months' imprisonment that the person did not have to serve and community service) and Central Investigating Court no. 3 of the Special National Court (accepted sentence of a fine and immediate release).

Criminal Court no. 1). In another, the EAW was for a trial in Spain for the alleged theft of radio CD players from two cars[60]. In one case, the surrendered person was tried and acquitted.[61] Moreover, in a case heard by Gijón Criminal Court no. 1, the EAW was requested for serving a sentence and following surrender the requested person was immediately expelled.

Tito, a Portuguese national, had been sentenced to prison in Spain and applied for a transfer to serve his sentence in his country of origin. During this time, Tito continued to serve his sentence in Spain when he became eligible for temporary release. Following his third temporary release, and without having received news of his application for a transfer, he failed to return to prison. Tito had problems with the custody of his daughters and upon leaving prison, travelled to Lisbon in order to resolve the matter. He soon regretted it: Tito went to a police station to "give himself up" and explain his situation. As at that time no EAW had been issued for him, the police simply took his contact details. A few days later, Tito was finally arrested after an EAW was issued by Madrid Provincial Court which ordered him to finish serving his sentence. The following absurd situation arose: while Tito was waiting to appear at the EAW hearing, the judicial office notified him that the Lisbon Tribunal de Relasao had approved his application for a transfer to Portugal to continue serving his Spanish sentence there. Tito notified the Portuguese judge of this, but was told that "*he couldn't do anything about it, as he had no choice but to surrender him to Spain*". After the surrender to Spain, the Prison Supervision Court, responsible for giving final approval for his surrender to Portugal, rejected it because, according to the Court, Tito was not on Spanish territory. This was not true. The Court was unaware that Tito had been surrendered to the Spanish authorities some 20 days previously: "*I have been requesting a transfer to Portugal since day one in order to be close to my family had have access to job opportunities*".

[60] Gerona Criminal Court no. 5.
[61] Section 1 of Lleida Provincial Court.

5.2.4 Right of access to a lawyer[62]

During our research we found no record of cases in which the lawyers had participated in the prior EAW issuing phase.

In the case of L. Alberto, according to the requested person "*I did not know that Malaga had issued an EAW, my lawyer in Spain said they had not notified him of anything*". Neither is there any indication that his lawyer made any representations to the Spanish Court to speed-up the surrender, despite the fact that L. Alberto had said "*that I wanted to go now, that they take me to Spain to serve my sentence*". In the case of Gabriel, in prison in Germany awaiting trial for a robbery committed there when notified of the EAW from Albacete Provincial Court, as far as we know his trusted lawyer in Spain, with whom Gabriel was in contact by phone, did not appeal the EAW or propose the possibility of serving an CSDL in Germany, where he had some family roots. This is despite the fact that Gabriel recognised that it was "*a hammer-blow as he was convinced that he would be "crucified" upon reaching Spain"*.

In the Sara and Benjamin cases, their lawyers were able to appeal the issue of the EAW, even though the appeals were rejected by the judicial authority. We are also aware of a matter heard by Section 1 of the Guipúzcoa Provincial Court in which the lawyer applied for an ESO instead of an EAW, although the application was rejected.

The fact that lawyers do not intervene in the phase prior to the issue of the EAW could, in part, justify the failure to apply for alternative measures, such as ESO and CSDL, if requested for the enforcement of the sentence.

5.3 Good practices

Taking recourse to less serious measures that imply a lesser sacrifice of the right to freedom will always be a good practice. The cases mentioned in section 3, above, where the EAW for serving a sentence was cancelled, enabling the requested person to serve their sentence in the State in which he/she was located[63], are undoubtedly good practice. In one of these cases, we are aware that the Spanish lawyer participated in the enforcement procedure, showing the importance of the right to appoint a lawyer in the issuing State to assist the lawyer in the executing State.

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[62] Of the 13 sentences against the Spanish State by the European Court of Human Rights in recent years (2013-2017) due to violation of Article 6 of the Convention, on 6 occasions it was due to violation of the right to be granted a public hearing on appeal (immediacy and adversarial principles). In the Gómez Olmeda case, 61112/12, judgment of 29 March 2016, the ECHR recalled that the facts are similar to those of other cases involving Spain in which the State was found guilty. It reiterated that, in all the cases in which in the criminal jurisdiction there is a request for a new assessment of the facts on appeal, there must be a public hearing that guarantees that the accused will be heard. Other cases finding against the Spanish state have to do with the excessive duration of the trial, the violation of the presumption of innocence, the impartiality of judges or the right to be heard.

[63] Section 6 of the Zaragoza Provincial Court, Vigo Criminal Court no. 1, Málaga Criminal Court no. 9 and Section 2, Huelva Provincial Court.

Another good practice was found in the case heard by Section 3 of the Huelva Court of Appeal. In this case, once the requested person was located, the communication between competent authorities made it possible to interview him and hold the trial via videoconference, without the need for the surrender to Spain.

Finally, in a case heard by Marbella Investigating Court no. 1, the lawyer was successful in having the EAW withdrawn and his client being able to appear voluntarily, with the investigation continuing with his participation.[64]

[64] The EAW was for Ireland, the person sought Irish and the Irish judicial authority asked for clarification. The case continued against the person sought who appeared each time the court summonsed him.

6. Enforcement and post-surrender

6.1 Detention conditions

The last public report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe, following its visit to Spain from 27 September to 10 October 2016[65], affirmed that "*the police custody cells seen by the delegation were generally in an acceptable state of repair*", although "*several cells did not provide sufficient space for the number of persons held*". With regard to prison conditions, the CPT was positive in terms of the effort made by the Spanish authorities to bring an end to overcrowding in prisons. While the material conditions for accommodation in modules in the ordinary regime are, generally speaking, good, the CPT noted deficiencies in the modules for inmates in the closed regime and in special departments[66]. Moreover, while a wide variety of occupational activities (including paid work) were offered in the ordinary regime, the conditions of the closed regime and special departments were more limited (in general, just three of four hours a day to be able to exercise in the open air)[67]. Moreover, the CPT confirmed that little had been done to promote the reintegration of inmates in ordinary regime modules.

In its final observations on Spain, the UN Torture Committee called on the Spanish state to ban solitary confinement lasting more than 15 days and recommended that it only be used "as a measure of last resort, for the shortest possible length of time and under strict judicial oversight and control".[68]

With regard to the regime of incommunicado detention (in police custody or pre-trial detention), both the CPT and the UN Committee against Torture and the UN Human Rights Committee recommended that it be abolished from Spanish legislation[69]. During said regime, the arrested or imprisoned person can be temporarily deprived of a series of rights (Article 527 Criminal Procedure Act): to appoint a lawyer he/she trusts and to have a private

[65] CPT/Inf Report (2017) 34, 16 November 2017.
[66] Likewise, while the vast majority of the ordinary regime inmates interviewed did not allege to have suffered any physical mistreatment, the CPT expressed its concern regarding the reports of mistreatment by inmates in closed regime modules and special departments. It is worth mentioning that in the last 13 years the ECtHR has found Spain in breach of Article 3 of the Convention in 9 occasions (procedural limb, that is, due to a failure to properly investigate reports of torture and mistreatment).
[67] As for the level of healthcare in prisons, the CTP found that, generally speaking, it was acceptable and that the staffing levels were generally sufficient, although access to psychiatric care remained problematic.
[68] Final observations on the sixth periodic report on Spain, Doc. UN CAT/C/ESP/CO/6, 29 May 2015. The CPT made similar remarks in its last report in 2017.
[69] See CPT/Inf Report (2017), Doc. UN CAT/C/ESP/CO/6, 29 May 2015 and Doc. UN CCPR/C/ESP/CO/6, 14 August 2015. In its 2017 Report, the CPT noted positively that application of the same "*has decreased over the past few years and that no incommunicado detention regime was ordered in 2015 and 2016*". The reform of the Criminal Procedure Act by virtue of Organic Law 13/2015 has introduced changes and restrictions in the legal regime of incommunicado detention (Articles 509, 510, 520 bis and 527 Criminal Procedure Act) and its application is limited to the offences referred in Article 384 bis ("*offence committed by a person belonging or related to armed gangs or terrorists or rebels*,") or other offences committed in concert and on an organised basis by two or more people (509).

interview with him/her; to communicate with someone other than the judicial authority, the Public Prosecutor's Office and the coroner; and to have access to the proceedings, except for those elements that are essential to be able to challenge the legality of the arrest.

There is also a special regime called "Files on Inmates under Special Surveillance" (*Ficheros de Internos de Especial Seguimiento*, F.I.E.S in Spanish) which allows special surveillance and monitoring of those prisoners considered dangerous[70]. FIES prisoners are subject to special controls in relation to their transfers, among other things, the visitors they receive, the lawyers they talk to or the other inmates with whom they interact. Their life inside prison is also subject to certain modifications: for example: control, monitoring and reporting on communications, regular searches or weekly changes of cell.

None of the persons interviewed mentioned having suffered mistreatment. From the information received, we found no record of the competent authorities in the executing States having requested safeguards[71], or additional information on the detention conditions in Spain[72], or of an EAW having been rejected on these grounds.[73]

However, Gabriel did tell us that his stay in prison had been "*very tough*" with continuous changes of module, of cellmates, and prisons because of his prison background, he was included in the FIES regime. He went on hunger strike on 3 occasions.

[70] Created on 6 March 1991, in a Circular issued by the Directorate General for Prisons. According to the Instruction of 8/95 of 28 February 1995, a FIES classification is established with five groups: FIES 1 or Direct Control (formerly Special Regime), for inmates considered particularly dangerous; FIES 2 or Organised Crime (formerly Drug Trafficking) for inmates under investigation or sentenced for organised crime offences; FIES 3 or Armed Gangs; FIES 4, for members of the state security forces; and FIES 5, for inmates with special characteristics. By virtue of a judgment of 17 March 2009, the Supreme Court abolished the FIES rules, although purely on formal grounds (the rules were not implemented by an Act or regulation, but in the form of circulars or government instructions). On 15 April 2011, the Ministry of the Interior amended some sections of the Prison Regulations in the form of Royal Decree 419/2011 in order to "legalise" the F.I.E.S. once again, updated by Instruction 12/2011, of 29 July, of the Secretariat General for Prisons which contained the area of "inmates subject to special surveillance security measures".

[71] We are aware of one case (an EAW issued by Central Investigating Court no. 3 of the National Court) in which the judicial authority of the executing State (United Kingdom) requested safeguards due to illness of the surrendered person. The person sought was terminally ill and safeguards were requested to ensure he received appropriate medical care. According to the information supplied by the lawyer, the National Court was not paying due attention to the medical care received by the surrendered person.

[72] In an interview with Judge Pablo Ruz, he stated "*it was a regular practice of some countries, essentially the United Kingdom, but also Belgium and France, in EAW for terrorism charges against members of ETA organization, to request complementary information as to the facts and evidence in the proceedings which justified the charges. These requests initially, exceed the executing State's scope of competence. In the United Kingdom, (also in Belgium) in surrender proceedings, experience shows that torture or violation of fundamental rights allegations are taken into consideration to decide about surrender*."

[73] Persons sought and surrendered under an EAW are subject to the same regime as other inmates, albeit as provisional prisoners (if surrendered by virtue of a matter for which he/she will remain in provisional prison until trial) or a sentenced person if surrendered in order to serve a sentence. The regime in which they are included depends on criteria such as danger, recidivism, whether they are first offenders or serving a lengthy sentence, age, illness, etc.

Tito was sent directly to Badajoz prison from Lisbon on 5 May 2017 and 15 days later was transferred to the Soto del Real prison in Madrid. Ronaldo was not told why he was being transferred, and moved even further away from his country and family. Ronaldo requested a transfer in order to be closer to his family and, around the month of July, was returned to Badajoz prison. He has not received any visits in the last 5 months and 2 months have gone by without him being able to speak to his family on the phone as he has no money to call or to write letters. He has been threatened by one inmate because he cannot return the money he loaned to him, "*I'm at the bottom of a well*", he says. He has been asking for work since returning to Badajoz prison, but he is not given any because his trial in Madrid is pending and, as such, he is waiting for a transfer. As will be explained later, the proceedings in progress in Madrid contravene the speciality principle.

6.2 Speciality principle

We have observed certain difficulties regarding the speciality principle by virtue of which the surrendered person can only be tried or deprived of liberty for the deeds for which he/she was surrendered.

When Gabriel breached his sentence in Spain, he was serving several sentences from different courts, which had been consolidated. However, only one of the courts issued an EAW and he was surrendered on the basis of that arrest warrant alone. However, following surrender, he received a series of successive imprisonment orders from other courts that had not requested his surrender. As a result, the Prisons Service prepared successive, different sentence calculations, with different fulfilment dates. Gabriel's lawyer challenged each of the imprisonment orders, demanding compliance with the speciality principle. This situation meant that Gabriel was unable to take advantage of any prison benefits and ended up serving his sentence in full. What is more, his release was delayed for a month while the last appeal was being processed. Since his surrender, Gabriel said that "*these three years have been a permanent struggle in both legal and prison terms*".

In the case of Sara too, who had been surrendered by virtue of an EAW issued by the Alicante Provincial Court and was already in prison in Aranjuez awaiting trial, a prison order was issued in relation to a different case, forgery of a commercial document, being heard by the Málaga Criminal Court no. 3 in relation to which the sentence was pending enforcement. Her lawyer invoked the speciality principle and the imprisonment order was revoked.

In the case of Tito, as his application for a transfer to serve his sentence in Portugal was not resolved, he took advantage of a temporary release to travel to Lisbon instead of returning to prison. After his arrest in Lisbon, the same day as the EAW hearing, the competent Portuguese court approved his transfer application. He was surrendered to Spain on 5 May 2017 and on 22 May, the Prison Supervision Court in Madrid refused to approve his transfer to Portugal on the grounds that he was not in Spain. Tito had to appeal the refusal personally, as he did not have a lawyer to represent him for his prison situation at that time. The Prison Supervision Court dismissed his appeal. The reason: He had a case pending in Spain for an offence of breach of his sentence due to his failure to return to prison following his temporary release. This was despite the fact that Tito had been surrendered by virtue of an EAW solely in order to continue serving the remainder of his sentence. This pending procedure not only worsened his chances of a transfer to Portugal, but also by extending the term of his sentence, also made it more difficult for him to have access to prison benefits.

6.3 Procedural guarantees

The persons interviewed highlighted deficiencies both in the EAW enforcement procedure and, following surrender, once in Spain.

Tito was not informed of his rights in Portugal (executing State), not even in writing, at either the police station or when brought before the court. Tito appeared with a state-appointed lawyer as he was not given the option of trying to locate his trusted lawyer in Lisbon. The lawyer made no allegations, despite the fact that Tito informed him that his transfer to Portugal had been approved. According to Tito, he did not defend his case: "*he shrugged and reread the code, he was unable to advise me, he said that I had to decide whether to agree to surrender or not … he was unfamiliar with the subject-matter …I spoke to him for 15 minutes handcuffed in a hallway in front of some builders and the police who were guarding me*". What is more: "*neither the lawyer nor the judge were able to answer my questions about my staying in Portugal in order to finish serving my sentence there as they had just notified me I could*". Following surrender, in Spain, he was transferred directly to Badajoz prison without being brought before any Spanish judicial authority. He received no assistance or explanation in prison on how to act with regard to the Portuguese decision authorising him to serve his sentence in Portugal. Tito did not have a lawyer when appealing the rejection of his transfer by the Prison Supervision Court. He did not even have a state-appointed lawyer to appeal the rejection of the transfer via administrative channels. Tito explained to the state-appointed lawyer in the proceedings for breach of sentence that he had not waived the speciality principle upon surrender to Spain. However, he does not know whether it was alleged in the proceedings, although he has been accused by the Prosecutor of that offence and is waiting for a trial date to be set.

Benjamin complains about his defence, both in the investigation proceedings in Spain and in the EAW enforcement proceedings in Belgium. Both lawyers were state-appointed/legal aid lawyers and he had to subsequently appoint private lawyers in both cases. Moreover, following surrender to Spain, at the hearing before the Duty Court in Madrid, said judicial

body requested an Arabic interpreter for Benjamin. However the interpreter was not used in the interview as Benjamin (Senegalese) does not speak Arabic. Sara was allocated a legal aid lawyer and also had access to an interpreter in Romania: "*the lawyer didn't speak to me*". There is no record of the Romanian lawyer trying to contact the trusted lawyers in the Spanish proceedings, with whom Sara was in contact. However, the Romanian lawyer appealed the pre-trial detention and Sara was released on house arrest in order to take care of her new-born baby.

L. Alberto was in prison in Offenburg serving a sentence when notified of the Spanish EAW. Neither the prosecutor nor a lawyer was present; just the judge, the court clerk and the translator. The record of the appearance notes the presence of two trainee lawyers, with whom L. Alberto did not speak. "*No, there was no one with me, just the interpreter, I did not speak to a lawyer before or during the notification, or indeed afterwards; I did not know that there was no lawyer present or that I was entitled to have a lawyer at that time*". No one informed him of his rights there. He asked insistently that his trusted lawyer in Germany be notified, but he does not know whether the court did so or at least tried to. He did not have a lawyer who could arrange a quicker surrender to Spain in order to finish serving the German sentence and serve the Spanish one. Following the surrender, at the police station when he spent the night, he was not informed of his rights. He did not speak to a lawyer, he was not allowed to call his family. The police officer told him: "*that's all a matter for the Court*". The next day, at the Madrid Duty Court, he was read his rights in the presence of the Judge. He was formally assisted by a state-appointed lawyer at the hearing, to whom he did not speak before or after the hearing. The lawyer made no allegations, not even querying the reference to an offence of robbery when the offence for which he had been surrendered was misappropriation. According to L. Alberto, the lawyer "*did not open his mouth*". The Madrid Duty Court, in the order of imprisonment, stated "*the detained person did not appear at the trial before said Provincial Court or allege any just cause that prevented him from doing so; at that trial the prosecution was asking for a sentence of 5 years and he prevented the oral hearing from taking place*". This is completely mistaken, as the EAW was issued in order to serve the sentence imposed following a trial at which L. Alberto was present. The state-appointed lawyer, who had not interviewed L. Alberto and must not have been familiar with his case file, failed to challenge the order of imprisonment.

Gabriel was notified of the Spanish EAW in prison, in German. He was not provided with an interpreter, although he did not ask for one either, as he spoke German, having lived in Germany since his youth. According to Gabriel, "*they informed me of it in a visiting booth in prison in the presence of officials that I was unable to identify as police or court officers. There was no lawyer present*". Gabriel does not remember having been brought to any other hearing apart from the notification in the visiting booth in prison: "*I was simply told that Spain was asking that I be surrendered to serve a sentence issued by the Albacete Provincial Court specifically*". Following surrender, he was taken to the Madrid Duty Court, where he was notified of the order of imprisonment without the presence of a lawyer. He did not speak to a lawyer until he entered prison and was able to call a trusted lawyer.

7. Conclusions

The instruments of mutual recognition (for the purposes of this research, Framework Decision 2002/584/JHA, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Framework Decision 2009/829/JHA, of 23 October, on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, and Framework Decision 2008/909/JHA, of 27 November 2008, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union) have been correctly incorporated into Spanish legislation in general terms.

While the ESO and CSDL Framework Decisions have an impact on the application of the EAW, they are instruments that are little-known to legal operators and, as such, they are rarely used. In this regard, one basic issue observed in the course of the research is the lack of technical knowledge in relation to the functioning of the instruments of mutual recognition in Spain. There is no doubt that greater familiarity with said instruments would allow for a more appropriate use of the ESO or the application to replace an EAW with an CSDL, in cases of serving sentences.

Another problem encountered during the research is that the available data is not completely reliable and precise. One factor behind this is the manner in which the data is collected in the courts: there does not seem to be a specific methodology, or a mechanism of control or supervision. Likewise, the management programmes used by the courts differ from one Autonomous Region to the other, while also differing from that of the General Council of the Judiciary. Neither is there an independent registry where one can ascertain the number of EAWs issued and the proceedings in which they were issued, making it impossible to locate them.

We also noted a lack of coordination between the judicial bodies and/or the Public Prosecutor's Office. Improved coordination (together with better knowledge of the EU instruments, of course) would prevent violations of the speciality principle and absurd situations such as in the case of *Tito*.

The research has highlighted that the greatest problems, tests and challenges have to do with the practical application in the issuance of an EAW. The important amendments introduced by the act on mutual recognition of criminal decisions in the European Union, with regard to the requirements for the issuance of an EAW, such as the principle of proportionality and the entry of the requested person into prison following surrender, are not always applied. EAWs are still used in the initial stages of investigations as a measure to ensure the suspected or accused person can be interviewed, when the law does not allow it. There is no record of the Spanish courts, prior to issuing an EAW, using the possibility of

obtaining an interview with suspected persons via the EU cooperation channels envisaged in the law; this could not only avoid the need for detention, but also for subsequent surrender. All of this means that, in many cases, the EAW is applied disproportionately when the courts have alternative judicial cooperation and mutual recognition measures which are less onerous in terms of the rights of the requested person and the system of administration of justice itself.

Finally, during the research we did not find any cases in which the lawyers participated in the phase prior to the issuing of an EAW. The intervention of the lawyers is fundamental when it comes to guaranteeing a practical and effective defence: this could promote the adoption of alternative measures, such as ESO and CSDL, in the case of enforcement of a sentence and also avoid recourse being taken to EAWs in preliminary phases, for example, requesting an interview or even holding the trial via videoconference.

8. Recommendations

For the General Council of the Judiciary

- Promote **specialised training** courses in EU mutual recognition instruments, with particular emphasis on the EAW, ESO and CSDL regulated in the Mutual Recognition Act, and specifically on the requirements for issue thereof, as well as the proportionality and speciality principles.

- Promote and strengthen **greater coordination** with the courts, as well as the Ministry of Justice, with regard to the **gathering of data**, including the preparation of a single methodology and the establishment of a control and supervision framework to avoid inconsistencies.

For the Ministry of Justice

- **Creation of an independent registry for following-up EAWs.** By virtue of the Mutual Recognition Act, the Ministry of Justice centralises all the information on the issuance of EAWs and surrenders thereunder. The creation of an independent registry would make it possible to ascertain the number of EAWs issued and the proceedings in which they were issued, whether they have been enforced, making it possible to locate the cases and files. This would improve coordination between the courts, enabling them to find out the circumstances of the proceedings and the surrendered person, avoiding violations of the speciality principle.

- Improve the management of case files, providing the courts with a **state-wide standardised proceedings management system** with common categories that makes it possible to analyse data without inconsistencies.

- Promote the **use of communication and cooperation technologies** with the competent authorities in the executing States.

For the Bar Associations

- Promote specialised training courses in EU mutual recognition instruments, with particular emphasis on the EAW, ESO and CSDL regulated in the Mutual Recognition Act, as well as on the EU Roadmap Directives, devoting sufficient space in all the obligatory courses for candidates to become legal aid lawyers.

For the Public Prosecutor's Office

- Promote specialised training courses in EU mutual recognition instruments, with particular emphasis on the EAW, ESO and CSDL regulated in the Mutual Recognition Act, as well as on the EU Roadmap Directives.

For the legislator

Taking advantage of the **current reform of the Mutual Recognition Act, include** the following aspects:

- Citizen's actions expressly in Article 39.3 (issuance of an EAW if the Public Prosecutor or the prosecution –private or citizen's- so request);

- Guarantee access to a lawyer, expressly establishing the possibility for the defence to make allegations at the issuing stage (granting the accused person a hearing via his/her lawyer);

- The express need for a prior national arrest warrant to have been issued as a requirement for issue;

- Clarify how the right to appoint a lawyer in Spain (issuing State) to assist the lawyer in the executing State can be guaranteed (Article 39.4 of the Bill). The urgent nature of the EAW proceedings makes it obligatory to specify precise timeframes;

- For cases of enforcement (Article 50.3 of the Bill), include a deadline for the appointment of a lawyer in the communication to the issuing State and make appointment mandatory; and

- Include al the rights of the requested person in the written letter of rights.

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