

**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**

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

Research report | Spain

Rights International Spain

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1. Introduction

On 27 November 2016, the transposition deadline for *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty* expired. By this date, the Member States were to have incorporated this Directive into their national regulatory frameworks by adopting the necessary laws, regulations and administrative provisions in accordance with the standards set in the same. Moreover, all Member States were to send the new measures to the European Commission. However, many States have failed to comply with this requirement. In other cases, although the legislation is consistent with the intention of the Directive, some States have not yet ensured implementation of the reforms introduced in practice.

This research carried out in Bulgaria, Cyprus, Slovenia, Hungary, Italy, Poland, Romania and Spain seeks to assess the degree of adaptation of the national regulations to the Directive in both legal and practical terms, in order to determine whether it has been effectively incorporated and applied in the national sphere. This research project has been coordinated by the Justicia European Rights Network with the assistance of the Open Society Initiative and the financial support of the European Commission.

The adoption of European Directives in the sphere of criminal justice procedures represents a highly significant advance which makes it possible to set new regulatory standards in relation to the rights of suspects or accused persons throughout the territory of the European Union. Therefore, we trust that, with this research, we will be able to offer both the European Commission and Member States a comparative view of the current status of implementation of the Directive on the right of access to a lawyer and foster a better understanding of the good practices identified, as well as the difficulties encountered in the transposition process.

2. Methodology

An integrated Monitoring Tool was developed based on a three consecutive level research approach. This multi-level methodology allows for both a *de jure* and a *de facto* assessment of implementation of the Directive in order to offer an in-depth view of the situation in the country. The evaluation of results is carried out by means of the indicators formulated and a traffic-light method that determines the degree of success attained by the country in question, based on the findings and conclusions that correspond to each indicator.

Level One: The first level was oriented at analysing the transposition measures of the Directive, the procedural framework and criminal procedure in Spain. These provisions include the Constitution, organic and ordinary laws, regulations, instructions, codes of conduct, manuals, protocols and case law that guides the interpretation of the norm and, thereby determine the meaning and scope of the same.

Level Two: The second level was primarily focussed on the legal profession in order to gather information on the practical implementation of the Directive from the perspective of the exercise of the right of defence by means of access to a lawyer. In order to do this it was necessary to prepare a questionnaire for legal professionals who provide legal assistance to investigated or accused persons, on a legal aid basis or privately, with a view to obtaining their opinion on the procedural changes introduced with regard to the police and the judicial authorities in the last two years since the reform of the Criminal Procedure Act in light of the transposition of Directive 2012/13/EU (right to information) and Directive 2013/48/EU (right to access to a lawyer).

Level Three: The last level of analysis allowed for broader review of those aspects of the implementation of the Directive that were identified in the final phase as factors that would hinder or limit the right of defence of the investigated or accused person; factors that are identified throughout the criminal procedure and particularly in the preliminary investigation phase in which the individual is detained by the police authorities. In order to achieve this, a focus group comprised of institutional and non-institutional actors was organised, including representatives from the regional judicial police forces of the Basque Country and Navarre, the Guardia Civil, the Ministry of Justice, the Judiciary, Public Prosecutors, the Legal Profession as well as relevant jurists specialising in the subject-matter being researched. Finally, semi-structured interviews were carried out in order to gather information from the relevant stakeholders, particularly with people who had been detained and, on a more limited basis, professionals intervening in the criminal process, including lawyers, police and judiciary.



The Monitoring Tool is based on 28 indicators identified and formulated in relation to 8 regulatory standards that correspond to Directive 2013/48/EU. Each indicator has been analysed on an individualised basis in accordance with the 3 levels cited above, which has made it possible to achieve a detailed understanding of the possible omissions, partial compliance or, if applicable, infringements of the regulatory standards referred to. The assessment of the results obtained has been carried out in detail for each indicator, facilitating the attribution of a final assessment of the transposition of the Directive globally.

This document deals with Spain and constitutes one of the national reports developed as part of the research project coordinated by the Justicia European Rights Network with the assistance of the Open Society Initiative. The information and results obtained in the national reports will provide the basis for the development of a regional comparative report that is planned as part of this project.

3. Regulatory context and background: criminal procedure in Spain

Criminal proceedings in Spain may be initiated by means of a report¹, a complaint, a police statement –with or without prior arrest–², or *ex officio* by the Public Prosecutor's Office³. The police can arrest acting on their own initiative⁴ or complying with a court order⁵. The arrest must be carried out by the judicial police⁶, which in Spain means the Nacional Police Force, the Guardia Civil, the regional police force⁷ (Ertzaintza in the Basque Country, Mossos d'Esquadra in Catalonia, Policía Foral in Navarre and local police forces).

The criminal proceedings are comprised of three different phases: (i) the investigation stage⁸, carried out by the investigating judge, which involves the procedures designed to ascertain the existence of the offence and the identity of the perpetrator (statements from the accused person and the victim, witness statements, identification procedures, etc.); (ii) the intermediate stage, in which the specific accusation is formalised⁹; and the criminal stage, by the body responsible for judging and sentencing, before which the oral hearing is held¹⁰.

With regard to the basic principles of the actions of the State Law Enforcement Agencies, Article 5.3.b) of Organic Law 2/1986, of 13 March, establishes that its members must safeguard the life and physical wellbeing of the persons in their custody. Instruction 12/2007, of 14 September, from the Secretariat of State for Security, establishes the patterns of behaviour to be followed by the custody officers while the arrested person is at the police station. These rules are set out in turn in the *“Protocol on Actions in the areas of Custody of Arrested Persons of the State Law Enforcement Agencies”* approved by virtue of Instruction 12/2015 issued by the Secretary of State for Security on 1 October 2015. In addition, the National Coordination Commission at its meeting of 3 April 2017 unanimously resolved to approve the update of the *“Criteria for the Performance of Procedures by the Judicial Police”* in accordance with the legislative amendments adopted after 4 February 1999, the date on which said criteria were approved by the same coordination body. To date, the new version of the manual containing these criteria has not yet been formally adopted.

Important legislative reforms were enacted in Spain in 2015 in order to transpose the European Directives on access to information (2012/13/EU), access to a lawyer (2013/48/EU) and the right to interpretation and translation (2010/64/EU), all related to criminal procedure, to the domestic

¹ Regulated by Articles 259-269 of the Criminal Procedure Act (CPA).

² Arrest is regulated in Articles 489-501 CPA.

³ Articles 105 and 308 CPA.

⁴ The scenarios for arrest are set out in Article 492 CPA.

⁵ Judicial arrest is regulated in Article 494 CPA.

⁶ Regulated in Article 126 of the Spanish Constitution and Articles 29 to 36 of the Law Enforcement Agencies Act (*Ley Orgánica 2/1986, de 13 de marzo, de las fuerzas y cuerpos de seguridad*).

⁷ Article 547 of the Judiciary Act states that *“when requested to provide it, all the members of the Law Enforcement Agencies, whether they answer to the central Government, regional Governments or local entities, within the scope of their respective jurisdictions”*.

⁸ Volume II, Title IV CPA, Articles 299-325.

⁹ Volume II, Title IV CPA, Articles 299-325.

¹⁰ Volume III, Title III CPA.

regulatory framework. The successive reforms of the Criminal Procedure Act (CPA) were introduced consecutively in a very short period of time in the form of organic laws LO 5/2015, LO 13/2015 and Act 41/2015 which complements and implements the foregoing ones. In particular, the Directive on access to a lawyer was transposed by means of LO 13/2015¹¹ which entered into force on 1 November 2016, before the expiry of the term for transposition envisaged for 27 November 2016.

The transposition of Directive 2013/48/EU made it possible to introduce some significant changes in the CPA, such as the following:

Right to access to a lawyer: *“Any person to whom a punishable act is attributed”* according to the current wording of Article 118.1 CPA, or *“Any person accused of a punishable act”* according to the previous wording, can exercise his/her right of defence¹² acting in the proceedings. Following the 2015 reform, section 1 of the article was amended in order to include a catalogue of rights of which the investigated person must be informed in simple language and without undue delay so that they can be exercised. Among those rights, sections e) and d) specifically provided for the free appointment of a lawyer and the application for legal aid, respectively.¹³

Meanwhile, Article 520.2 was amended, offering greater precision on the rights of which the arrested or imprisoned person must be informed. Among others, section c), on the designation of a lawyer was extended in order to specify that if the lawyer cannot attend in person due to the distance involved, the use of telephone or electronic means to ensure the mandatory access to a lawyer is available envisaged.¹⁴

The right of access to a lawyer will also be enhanced if a Bill¹⁵ is approved, designed, among other things, to adapt Law 23/2014 on the mutual recognition of criminal decisions in the European Union,

¹¹ LO 5/2015, although designed to transpose Directives 2010 (right to interpretation and translation) and 2012 (right of information), also took advantage of the opportunity to introduce some changes that affected Directive 2013, on access to a lawyer, which was addressed by the later LO 13/2015.

¹² Article 17.3 of the Spanish Constitution established that any arrested person must be informed immediately, and in an understandable manner, of his/her rights and the reasons for his/her arrest, and cannot be obliged to give a statement. The assistance of a lawyer is also guaranteed at the police station and before the court, in the terms established by law. Article 24.2 of the Spanish Constitution, meanwhile, establishes among other guarantees related to effective judicial protection, that everyone has a right to defence and to legal assistance. The Spanish State would also be bound by the terms of Article 6 of the European Convention on Human Rights which enshrines the right to legal assistance in criminal proceedings, to inform a third party of the deprivation of liberty and to be able to communicate with consular authorities for the duration of the same.

¹³ Article 118.1 CPA section d) *“The right to freely appoint a lawyer, notwithstanding the terms of section 1 a) of Article 527”* and section e) *“The right to apply for legal aid, the procedure for doing so and the conditions for obtaining it.”*

¹⁴ Article 520.2 CPA section c) *“In the event that, due to the distance involved, the lawyer cannot attend in person immediately, the arrested person will be allowed to communicate with him/her by telephone or videoconference, unless such communication is impossible.”*

¹⁵ Official Gazette of the Parliament (1 December 2017) *“Bill to amend Act 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union, in order to include the European Investigation Order.”*

specifically the European arrest warrant, to the provisions of Article 10 (right to a lawyer in the issuing State) of Directive 2013/48/EU¹⁶.

The exceptions to the right to the assistance of a lawyer have been envisaged in a new wording of Articles 509 and 527 CPA (in the event of incommunicado detention and exceptional circumstances).¹⁷

Designation of a lawyer and term for appearing: The amendment of Article 520.5 made it possible to introduce a regulation of the process for the appointment of a lawyer¹⁸, expressly establishing (i) the obligation to immediately notify the Bar Association of the arrest; (ii) the prohibition on the authority having any influence on the appointment, (iii) a new term of three hours for the lawyer to appear at the place of custody, instead of the eight hours of the previous period.

Confidentiality of communications: In accordance with the terms of Article 4 of Directive 2013/48/EU, Articles 118 and 520 were amended, introducing sections 4¹⁹ and 7²⁰ respectively, which indicate the obligation to respect the confidential nature of all communications between the investigated or indicted person and his/her lawyer.

Waiver of access to a lawyer: Prior to the changes introduced in 2015, the right of an arrested person to waive access to a lawyer when the facts attributed were liable to be classed as road safety offences, was established in Article 520.5 CPA. Following the reform, the waiver right is set out in new section 8 introduced in Article 520.²¹

Right to private communication and meeting with the lawyer: Article 118.2 CPA was amended to envisage that the lawyer, whether appointed freely or by the state, can communicate and meet with the investigated or accused person privately before being questioned by the police or the judge, and must be present whenever the questioning takes place. In the event the person is under arrest or imprisoned, this is also contemplated in Article 520. 6 d) CPA²².

In general terms, the investigation has also made it possible to confirm that, at this moment in time, there are some specific aspects that are disputed. These matters will be addressed in Part 3 of this report.

¹⁶ Article 10.5 of Directive 2013: "5. Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. [...]".

¹⁷ While it omits some general conditions of Article 8 of the Directive to apply such exceptions, such as the need that they be proportional, that they do not undermine the general guarantees of a fair trial and that they cannot be based exclusively on the type or seriousness of the alleged infringement.

¹⁸ Article 520.2 c) CPA "The right to appoint Lawyers and request their presence to provide assistance in police and judicial questioning procedures and intervene in any identification procedure to which he/she is subjected. If the arrested or imprisoned person fails to appoint a lawyer, one will be appointed for them".

¹⁹ Article 118.4 CPA "All communication between the investigated or indicted person and his/her lawyer will be confidential."

²⁰ Article 520.7 CPA "All communication between the investigated or indicted person and his/her lawyer will be confidential in the same terms and with the same exceptions envisaged in section 4 of Article 118."

²¹ Article 520.8 CPA "However, the arrested or imprisoned person may waive the mandatory assistance of a lawyer if the arrest was for acts that are liable to be categorised exclusively as road safety offences (...)".

²² Article 520.6 section d) CPA "meet in private, including before questioning by the police, the prosecutor or the judicial authority, notwithstanding the terms of Article 527 (....)".

The replies of the lawyers consulted to the question on their global evaluation of transposition of Directive 2013/48/EU can be summarised as follows:

- Positive or very positive (50% approx.): *“Although there has been a period of adaptation, the improvement has been evident”; “effective judicial protection is guaranteed, unlike what happened previously; “in general the provisions are respected.”*

- Negative or very negative (50% approx.): *“There is an ignorance regarding the existence and content of the Directives”; “the transposition is deficient insofar as it is subject to the interpretation of the National Coordination Commission on which the legal profession is not represented”; “there is still a long way to go and application is still only partial.”*

In this context, the ultimate purpose of the research is to identify those factors that are still hindering the adaptation of the rules and practice to the standards set by the Directive. This is born of a desire to make a positive contribution to the fairness of the process and the effective protection of the right of defence in criminal proceedings according to the discoveries and conclusions set out in the following section.

4. Implementation of the Directive

4.1 Standard 1: The right of access to a lawyer in criminal proceedings

Indicator 1.1: Suspects or accused persons have access to a lawyer before they are questioned by police, other law enforcement or judicial authority	
Legal transposition score	2
Practical implementation score	1
OVERALL SCORE	75%

Article 118.2 CPA, applicable to anyone to whom an offence is attributed, establishes that the right of defence includes access to a lawyer, appointed freely or by the state, as well as the right to private communication and meeting with the lawyer before and after questioning by the police, the prosecutor or the judicial authority.²³ In addition, Article 520.2 CPA indicates that no authority or agent will influence or condition the free appointment of a lawyer by the arrested person and Article 520.5 CPA adds that no authority or agent will make a recommendation on the lawyer to be appointed, beyond informing of the existence of the right. Article 520.6.d) refers to the right to meet the arrested person in private, including before questioning by the police, the prosecutor or the judicial authority. Finally, Article 520.3 CPA expressly envisages that, in order to act in the proceedings, investigated persons must be represented by a court agent and defended by a lawyer.²⁴

In relation to minor offences, access to a lawyer is not mandatory, but it is a right that can be exercised in application of general rules of defense and representation as provided for by in Article 967.1 CPA, which was amended by Organic Law 13/2015.²⁵ In addition, recommendations contained in the “Guide to good procedural practices in the proceeding of trials for minor offenses related to housing usurpation” elaborated by the Judiciary Council, are to be highlighted.²⁶ The recommendation address situations in which the plaintiff is a legal entity, i.e. a financial institution, and the defendant resides with minors, elderly, disabled, or ill people and find themselves at risk of social exclusion. The recommendation reads: “*When giving summons the Court will inform the defendant that must appear*

²³ Article 118.2 CPA “*The right of defence includes access to a freely-appointed lawyer or, failing that, a state-appointed lawyer, with private communication and meetings, including before questioning by the police, the prosecutor or the judicial authority*”.

²⁴ Article 520.3 CPA “*in order to act in the proceedings, investigated persons must be represented by a court agent and defended by a lawyer, with the court appointing a lawyer if they fail to do so themselves or so request and, in any event, when they do not have the legal capacity to do so*”.

²⁵ In court summonses for minor offences, the parties are informed that they can be assisted by a lawyer and in those cases in which the maximum fine for the punishable act is at least six months, the general rules on defence and representation will apply (Art. 967.1 CPA).

²⁶ On 15 March 2017, the President of the Judiciary appeared before the National Parliament’s Justice Commission and made reference to housing evictions as a matter of social concern to which a response should be given through adequate protection mechanism tailored to the needs of the most vulnerable families. The guidelines elaborated serve as basis to conclude agreements between the Judiciary, Public Prosecutor’s Office and public institutions.

at trial assisted by a lawyer, if within a certain period a lawyer is not designated, a legal aid attorney should be designated.. Should the party arrive in court without an attorney, the Prosecutor must request the suspension of the hearing and the Court agree on it. “

There is a Bill²⁷ which, if approved, will amend Law 1/1996, regulating Legal Aid in order to incorporate Directive 2016/1919/EU²⁸, which guarantees effective access to a lawyer for those being tried for minor offences.²⁹

No data was gathered in the context of the research from which one could infer that in the performance of the procedures at the police station or in court the right to be assisted by a lawyer before questioning is limited or hindered in any way. This affirmation is supported by 57.1% of the lawyers consulted who assure that the prior meeting is always respected, while 28.6% confirm it in relation to half or more of the cases and 14.3% who maintain it is never respected. With regard to the latter, one of the lawyers consulted stated that, *“the police often fail to inform the arrested person of this right and sometimes when the lawyer arrives the arrested person is already being questioned.”* Finally, 85.7% of the lawyers consulted affirm that in the last two years they have not heard of cases in which the police or judicial authority influenced or conditioned the free appointment of the lawyer by the arrested person.

The right to freely appoint a lawyer and to hold a private meeting can be limited in the event the judicial authority orders arrest on an incommunicado basis, in the form of a reasoned ruling, if it finds that the scenarios set out in Article 509 CPA (exceptional circumstances)³⁰ exist. This regime can also be applied to youths aged between 16 and 18 years. Article 527.1 CPA contains a list of rights that can be restricted under the incommunicado regime.³¹ By virtue of Article 509.2 CPA, the incommunicado regime will last as long as is strictly necessary to perform the procedures to avoid the risk on the basis of which it was applied³².

²⁷ Official Gazette of the Parliament (01 December 2017) *“Bill to amend law 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union, in order to include the European Investigation Order.”*

²⁸ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

²⁹ One of the best proposals of the draft bill consists of changing the wording of Article 6 section 3 of the Legal Aid Act so that where the defence and representation by a lawyer and court agent free of charge is not mandatory, one of the following circumstances arises: *“a) intervention is expressly requested by the court in a reasoned ruling in order to guarantee the equality of the parties in the proceedings or, b) in the case of minor offences, the person against whom the proceedings have been brought has exercised his/her right to be assisted by a lawyer.”*

³⁰ Article 509.1 CPA *“urgent need to avoid serious consequences that could endanger the life, liberty or physical wellbeing of a person”* and *“urgent need for immediate action by the investigating judges to prevent the criminal proceedings being seriously compromised.”*

³¹ Article 527.1 CPA *“a) Appoint a lawyer he/she trusts; b) Communicate with all or some of the persons to whom he/she is entitled, except with the judicial authority, the Public Prosecutor’s Office and the Police Doctor; c) meet in private with his/her lawyer; d) Have access, either him-/herself or through his/her lawyer, to the procedures, with the exception of those elements that are essential to be able to challenge the lawfulness of the arrest”.*

³² It will not be extended for more than five days, although it may be renewed for a further term of no more than five days if remand in custody is ordered in the scenarios envisaged in Article 384 bis CPA.

Indicator 1.2: Suspects or accused persons have the right for their lawyer to attend (as a minimum) the following evidence-gathering or investigative acts undertaken by the authorities: a) identity parades; b) confrontations; c) reconstructions of the scene of crime	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

Article 118.2 CPA establishes expressly that the lawyer will be present whenever his/her client is questioned as well as in any identification procedures, confrontations and crime scene reconstructions. In addition, the new wording of Article 520.2 CPA, contemplates the right to request the presence of a lawyer in order to (i) attend police and judicial declaration procedures and (ii) intervene in any identity parade procedures to which the person is subjected. In addition, among the activities that comprise access to a lawyer, Article 520.6 b) CPA includes (i) when the arrested person is questioned, (ii) any identification procedures to which the person is subjected and (iii) in any crime scene reconstructions in which the arrested person participates.

According to the consultations made, in practice it seems that the rule is followed as 54.3% affirm that the right of the lawyer to be present whenever his/her client is questioned and at any identification procedures, confrontations and crime scene reconstructions is respected, while 37% affirm that it is respected in half or more of cases and only 5.7% maintain that it is never respected. According to the information received, the incidents point above all to identity parades and the reconstruction of the facts.

Indicator 1.3: Suspects or accused persons have access to a lawyer without undue delay after deprivation of liberty	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

The new wording of Articles 118.1 and 520.2 c) CPA establishes that the assistance of the lawyer will be provided *“without undue delay”*. *“In the event that, due to the distance involved, the lawyer cannot attend in person immediately, the arrested person will be allowed to communicate with him/her by telephone or videoconference, unless such communication is impossible”* (art. 520.2 c) CPA).

In the exceptional scenario of application of the incommunicado regime, the judicial authority will appoint a lawyer who will also be guaranteed access to the essential elements for challenging the lawfulness of the arrest (Article 527.1 d CPA).

According to the terms of Article 520.5 CPA the lawyer will attend the place of detention within a maximum of 3 hours as of receipt of the mandate. Despite the fact that previously the maximum term

was 8 hours as of when the arrest was notified to the Bar Association, there is no record of complaints from the legal profession about being able to provide assistance within the new term. However, according to some of the replies received, the lawyers are sometimes summoned to the police station and left waiting for 2-3 hours before they can assist the arrested persons.

According to the questionnaire prepared, 65.7% of the lawyers consulted stated that they had not heard of or been involved in cases in which there was a delay in notifying the association. 17.1% stated the opposite, affirming that the delays had been as long as 24 hours or several hours due to the procedures carried out and one reply assured that, in the majority of cases, if the person is arrested later than 10 p.m., they wait until 6 a.m. to notify him.³³

In this context, it is worth highlighting the interesting Ruling from Pamplona Investigating Court no. 2 which partially upheld a writ of Habeas Corpus³⁴. The lawyer argued that the arrested person did not receive immediate access to a lawyer when it was possible to demonstrate that the lawyer did not attend because the police officers informed him that they were still carrying out procedures. For this reason, the judicial body dismissed the allegation affirming that this circumstance could not justify the failure to respect the term and that the lawyer's responsibility was to assist the arrested person from the outset. Moreover, it stated that prior to the reform of the CPA, and even more so afterwards, access to a lawyer for the arrested person was not limited to the lawyer's presence at the moment he/she was questioned. In the opinion of the judicial body, the scope of the access to a lawyer is established in Article 520.6 CPA and it can be inferred from this that the actions of the lawyer, from the beginning, within the 3-hour term envisaged, are vital to ensure the effective protection of the rights of the arrested or imprisoned person.

Therefore, and according to said Ruling, the defence of the client goes beyond this particular moment according to the function of protecting the rights of the arrested person. This implies verifying the physical and legal situation of a person deprived of liberty, which necessarily requires his/her presence at the police station.

Indicator 1.4: Suspects or accused persons have access to a lawyer where they have been summoned to appear before a court having jurisdiction in criminal matters	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

³³ In the context of the research project PRO JUS Procedural Rights of Juveniles Suspected or Accused in the European Union, carried out in Spain by Rights International Spain, some professionals interviewed also highlighted some practices that “offered few guarantees” in some towns, for example, one prosecutor affirmed: “..the youth was arrested, let's say, at one in the morning... is taken to the police station... and, well, the police call the lawyer and say, we have an arrested person here, and the lawyer asked 'are there parents there?' 'is the legal representative there?' 'No, ah, well I'm not going.'” Or one lawyer, from another town, who explained that, in the case of foreign youths arrested, his presence was postponed until the interpreter arrived (pages 41 and 42), available at: <http://rightsinternationalspain.org/uploads/publicacion/e020506ec6f312da100eccf77f7483998f624cf0.pdf>

³⁴ Ruling nº 2885/2016 from Pamplona Investigating Court nº2, of January 11, 2016.

According to the above, in the regulatory framework and the testimonies to which we have had access, the right to access to a lawyer is guaranteed in the following scenarios:

a) Arrest and remand in custody: any person arrested is entitled to the assistance of a lawyer without undue delay (Article 520.2 d CPA). Within a maximum term of 72 hours of the arrest, the arrested person will be placed at the disposal of the court (Article 520.1 CPA). It is important to highlight that, if the incommunicado regime is ordered, the restriction of this right would be limited to the free appointment, not of access to the lawyer in itself. Article 527 CPA which sets out the rights of which the arrested or imprisoned person would be deprived, specifies that this person or his/her lawyer will in any event be granted access to the essential elements in order to be able to challenge the legality of the arrest.

b) Proposal of imposition of a sentence: the investigating court must issue a ruling accepting the order proposing the imposition of a sentence issued by the Public Prosecutor's Office (Article 803 bis CPA). The indicted person must be notified of this ruling and be called to declare before the court accompanied by his/her lawyer. If the indicted person does not have a lawyer, one will be appointed by the court, with the request being made within five business days prior to the date scheduled for the court appearance.

c) Judicial summonses: By virtue of Article 967 CPA, in the summonses served on the complainant, victim and investigated person for the holding of the trial, they must be informed that they can be assisted by a lawyer.³⁵

No data was gathered in the course of the research leading one to infer that, in practice, effective access to a lawyer in the case of a summons to appear at court is limited or impeded.

Indicator 1.5: Suspects or accused persons summoned to appear before a court have sufficient time to consult their lawyer before such appearance	
Legal transposition score	1
Practical implementation score	2
OVERALL SCORE	75%

The Criminal Procedure Act envisages the right of access to a lawyer before appearing before the judicial authority, but does not make express mention of the time that must be guaranteed in order for the suspect or arrested person to make those consultations that, if applicable, he/she can make before appearing before the judicial authority.

³⁵ Article 967 CPA “they will be informed that they can be assisted by a lawyer if they wish and that they must attend the trial with all the means of evidence they intend on using”.

The protocols on action drawn up by the legal profession for assisting arrested persons do not contain any references or recommendations on the time that must be guaranteed to hold consultations with the lawyer before appearing before the judicial authority.³⁶

No cases have been identified and no testimonies received in the course of the research from which one could infer that in practice sufficient time is not given. The only relevant case worth highlighting came from one of the arrested persons who was interviewed in the context of the research. In that case, he had to appear before the National Court after having been sought by Spain by means of a European Arrest Warrant and complained about the inadequate access to a lawyer prior to appearing at court *“the first contact with the state-appointed lawyer was an improvised affair in a corridor with everyone going past, with no time to receive advice before declaring before the judge.”*

Indicator 1.6: Suspects or accused persons have the right to meet in private with their lawyer, including prior to questioning by the police or by another law enforcement or judicial authority	
Legal transposition score	2
Practical implementation score	1
OVERALL SCORE	75%

The right of an investigated or arrested person to meet in private with his/her lawyer, before questioning, is set out in Articles 118.2 and 520.6 d) CPA. This right is formally suspended by virtue of Article 527.1 c) CPA, if so determined by the judicial authority that orders the incommunicado regime, for a maximum term of five days, extendable by a further five.

On the one hand, the lawyers consulted in the context of the research, in form of interviews, a questionnaire or the focus group activity, complained about the lack of guarantees, particularly at the police station, as follows: *“Some detention centres do not allow the prior meeting citing security reasons or allow it but with the door open and supervised by an officer”* or *“in general a room is not provided and the officers of the state law enforcement agencies remain near the place of the meeting, limiting or preventing it being held in private.”*

Meanwhile, the police officers invited to participate in the focus group stated that in no way is there a desire to limit or impede the private nature of the prior meeting. At the same time they recognised that if there were incidents, they were due solely to the possible lack of appropriate spaces that, on occasion, can occur in police stations or the existence of security concerns with regard to the dangerousness of the arrested person that make it advisable that an officer be nearby.

³⁶ The documents consulted include the following: (i) *“Protocol for acting in provide assistance to arrested persons at police stations”* drawn up and adopted by the General Council of the Legal Profession in Spain -CGAE on 11 November 2015; (ii) *“Practical advice on the minimum actions of lawyers appointed to assist arrested persons”* and *“Updated code of good practices for access to a lawyer for arrested persons according to European and international regulations”*, drawn up and adopted by the Madrid Bar Association-ICAM in October 2014 and 15 September 2016 respectively; (iii) *“Criteria for access to a lawyer for arrested persons”* drawn up and adopted in 2008 (updated in 2010) by the Barcelona Bar Association-ICAB and (iv) *“Protocol on access to a lawyer for arrested persons”* drawn up and adopted by the Granada Bar Association.

The complaints made by some lawyers consulted contrasted with other opinions in which no criticism whatsoever was made of the guarantees of confidentiality that must prevail in communications between the arrested or imprisoned person and his/her lawyer. The replies to the questionnaire are proof of this. 45.7% consider that the confidential nature of the communications between the investigated or indicted person and his/her lawyer are guaranteed, while 28.6% assure that it is respected in half or more of cases.

Indicator 1.7: Suspects or accused persons have the right to communicate with their lawyer, including prior to questioning by the police or by another law enforcement or judicial authority	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

By virtue of Article 118.2 CPA any investigated or accused person to whom a punishable act is attributed is entitled to communicate with his/her lawyer and meet in private before being questioned by the police, the prosecutor or the judicial authority. Arrested persons have the same right except, pursuant to Article 509 CPA, when so determined by the judicial authority that orders the incommunicado regime for a maximum of five days, extendable for a further five. In this scenario, according to the terms of Article 527.1 CPA that enumerates the rights that can be temporarily suspended, the only persons who can communicate with the arrested person under the incommunicado regime are the judicial authority, the Public Prosecutor's Office and the Police Doctor.

The exceptionality derived from the incommunicado regime aside, this project has not identified or discovered any restrictions or conditioning factors on communications between investigated or accused persons and their lawyers.

Indicator 1.8: Suspects or accused persons have the right for their lawyer to be present and participate effectively when the suspect or accused is being questioned	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

The new wording of Article 118.2 CPA establishes the provisions in relation to communication and holding meetings with the lawyer, that he/she be present at any questioning, but it does not expressly specify the right to be present and participate effectively, as the Directive does. In any event, Article 520.6 b) CPA, which does refer to "intervening", offers a precise definition of the tasks that comprise the assistance of an arrested person by the lawyer, which includes intervention in the questioning procedures. What is more, it states that upon conclusion of the procedure, the lawyer may request "*a declaration or elaboration on the aspects he/she deems appropriate*".

According to the consultations made via the questionnaire, the perception of the legal professionals that offer assistance to the arrested person seems to me largely positive, as 54.3% affirm that the lawyer's right to be present whenever his/her client is questioned is respected, as is the right to be present at identity parades, confrontations and crime scene reconstructions, while 37% affirm that it is respected in half or more of cases and only 5.7% maintain that it is never respected.

Indicator 1.9: The participation of the lawyer when the suspect or accused is questioned is recorded	
Legal transposition score	1
Practical implementation score	1
OVERALL SCORE	50%

Article 520.6 CPA, in which a precise definition is offered of the tasks that comprise the assistance to an arrested person by the lawyer, establishes in section b) that the lawyer may ask the judge or civil servant who carried out the corresponding procedure to make a record of any incident occurring during the same.

The consultations with legal operators in the context of the research as not revealed the existence, in practice, of circumstances that limit or impede compliance with the regulatory precept in question.

Indicator 1.10: The State provides general information to facilitate the obtaining of a lawyer by suspects or accused persons	
Legal transposition score	2
Practical implementation score	1
OVERALL SCORE	75%

Articles 118.1 and 520.5 CPA contain the right of arrested and investigated persons to freely appoint a lawyer and, should they fail to do so, to be assisted by a state-appointed lawyer. This right is included in the letter of rights that is read to arrested and investigated persons.

These articles, in sections e) and j) respectively, contain in identical terms the *“Right to request legal aid, the procedure for doing so and the conditions for obtaining it.”* In both cases, the express reference to this right has been included following the reforms of the CPA in transposing Directives 2012/13/EU (right to information) and 2013/48/EU, right to access to a lawyer, respectively. However, the regulations on the right to legal aid and the conditions of access are set out in the Legal Aid Act (*Ley 1/1996 de 10 de febrero, de Asistencia Jurídica Gratuita*).

The European research project “Declarations of accessible rights in Europe – 2017” carried out by Rights International Spain, highlighted: on the one hand, that the letters of rights did not include

information or an explanation on the conditions for applying for and obtaining free legal aid; and on the other, the fact that some professionals do not know how to explain this right properly.³⁷

Indicator 1.11: The State ensures that those who are deprived of their liberty are in a position to exercise their right of access to a lawyer	
Legal transposition score	2
Practical implementation score	1
OVERALL SCORE	75%

Article 520.5 CPA establishes the right of the arrested person to freely appoint a lawyer and, should he/she fail to do so, to be assisted by a state-appointed lawyer. In the event that the incommunicado regime is ordered and a lawyer cannot be freely appointed in the period it lasts, the arrested person may receive legal advice from a state-appointed lawyer, although he/she will not be allowed to communicate with the lawyer directly while in detention.

The article cited envisaged that the authority holding the arrested person in custody should immediately notify the Bar Association of the name of the lawyer appointed or, if applicable, request that one be appointed by the state. The access to a lawyer will therefore be guaranteed even if the lawyer cannot appear at the place of detention in person as alternative measures will be put in place, such as communication via telephone or videoconference. This right also applies to the intervention of an interpreter, necessary in the case of foreigners who do not understand the language of the trial, unless the judicial authority or prosecutor, of its own motion or at the request of a party, decides that their presence in person is necessary in order to safeguard the rights of the investigated or accused person (Article 123.5 CPA).

In the course of the research we did not discover any data from which it would be possible to infer that in practice effective access to a lawyer during the time the investigated or indicted person is arrested is restricted or impeded. In the case of persons already sentenced, some deficiencies in access to a lawyer were detected. One of the arrested persons who was interviewed in the course of the research stated as follows: *“I was not able to see a lawyer in the 2 and a half years I was inside. I filled in the forms they gave me, but in the end I never got to see anyone”*.³⁸

³⁷ The persons interviewed confirmed the lack of sufficient information on this right. Pages 24 and 25 of the national report, available at <http://rightsinternationalspain.org/uploads/publicacion/e68d42597589ccbae2ecef5fe4a5282a966c80.pdf>

³⁸ Legal assistance at the enforcement stage of the sentence is not contemplated in the scenarios regulated by the Legal Aid Act and, as such, would mainly be subject to the existence of the Penitentiary Legal Guidance and Assistance Services of the Bar Association. A potential lack of funds could give rise to not all bar associations offering such services.

Indicator 1.12: The State respects the confidentiality of communication between suspects or accused persons and their lawyer. This includes respect for confidentiality of correspondence, meetings, telephone conversations and other forms of communication permitted under the law	
Legal transposition score	2
Practical implementation score	1
OVERALL SCORE	75%

Unless the incommunicado regime is ordered and, as such, as an exception, the restriction of the right to communicate and hold a private meeting with the lawyer envisaged in Article 527.1 CPA is applicable, the private nature of the communications is enshrined in Article 118.4 CPA. In accordance with this provision, full respect to the confidentiality right is not applicable when there are enough elements to believe in the participation of the lawyer in the facts under investigation or in a different offense. Additionally, Art. 520.7 CPA makes express reference to the confidentiality of communications between the lawyer and the suspect or accused persons in accordance with the terms detailed in Art.118.4 CPA.

In the penitentiary sphere, the confidentiality is guaranteed by the terms of Article 51.2 of the General Penitentiary Act (*Ley Orgánica 1/1979 General Penitenciaria*), which expressly envisages that the communications between the inmate and the lawyer will be held in appropriate places and will not be suspended or listened to unless a decision is adopted by the judicial authority and in cases of terrorism.³⁹

According to the replies to the questionnaire, only 17.4% of the lawyers consulted affirmed that the confidentiality is never respected. In relation to police stations, they state that *“the meetings held at the police station take place in the passageway, where the movement of people means there is no confidentiality”* or indicate that *“one is never sure if the place where the meeting is being held, it is being recorded”*. Some of the persons interviewed state that, in general, *“in the detention centres there are no rooms that allow for a confidential meeting, having to rely on the good faith of the officers which cannot always be counted on.”* The cells of the courts were also mentioned where often several meetings are held at once, making it necessary to shout or raise one's voice in order to speak through the glass.

³⁹ Article 51.2 of the General Penitentiary Act *“the communications between the inmate and the defence lawyer or the lawyer expressly called in relation to the criminal matters and with the court agents representing him/her, will be held in appropriate settings and will not be suspended or listened to unless an order is given by the judicial authority and in cases of terrorism.”* It should be remembered that there are “Files on Inmates under Special Surveillance” (FIES), which allow special surveillance and monitoring of those prisoners considered “dangerous”. FIES prisoners are subject to special controls in relation to their transfers, criminal, procedural and prison incidents, the visitors they receive, the lawyers they talk to, the civil servants they address or the other inmates with whom they interact. A record of these matters is kept in their file. Their life inside prison is also subject to certain modifications: for example: control, monitoring and reporting on communications (personal, written and calls), regular searches (of the person and the cell) weekly changes of cell, examination by x-ray upon each transfer outside the Prison.

According to the police officers consulted in the focus group, the confidentiality of the communications can be compromised but not because there is a manifest desire to violate this right. According to the comments of one officer who participated in the focus group, *“on occasion it can happen that there are either no appropriate spaces that ensure it or that the police officers consider it advisable to remain close to the arrested person if deemed appropriate for reasons of security.”*

Finally, in relation to prisons, among the complaints made by the lawyers consulted, it is worth mentioning the possible recordings in the visiting rooms and the fact that they do not have the possibility to give documentation directly to the person deprived of liberty and have to do so obligatorily via a civil servant.

4.2 Standard 2: The right to have a third person informed of the deprivation of liberty

Indicator 2.1: Suspected or accused person who is deprived of their liberty have the right to have at least one person, nominated by them, informed of their deprivation of liberty, without undue delay, if they so wish.	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

The right of the arrested person to inform to inform at least one person, nominated by them, of their deprivation of liberty, without undue delay is set out in Article 520.2 e) CPA. However, the exercise of this right by be limited, for example, if the investigation could be put at risk.

In practice, 80% of the lawyers consulted consider that the right of the person deprived of liberty to inform the person they designate of this circumstance is respected, while 17.1% affirm that it is respected in half or more of the cases and only 2.9% maintain that it is never respected.

4.3 Standard 3: The right to communicate, while deprived of liberty, with third persons

Indicator 3.1: Suspected or accused person has the right to communicate, without undue delay, with at least one third person, such as a relative, nominated by them	
Legal transposition score	2
Practical implementation score	1
OVERALL SCORE	75%

The right of the arrested person so communicate, without delay, by telephone with a person nominated by them is set out in Article 520.2 f) CPA. This provision envisages that *“this communication will be held in the presence of police officer or, if applicable, a civil servant designated by the judge or prosecutor”*. However, it should be remembered that this right, like the right for the person they nominate to be informed, is not absolute and unconditional.

The right of the arrested person to communicate with a person of their choice can be formally limited by means of an exception envisaged in Article 527 b) CPA when incommunicado arrest is ordered, for a maximum of five days, extendable by a further five. If so decided by the judicial authority, which must establish the extent and scope of the incommunicado regime in each case, the only persons with whom the arrested person will be entitled to communicate while held incommunicado are the judicial authority, the Public Prosecutor's Office and the Police Doctor.

One police officer contacted expressed his concern at the negative implications that the exercise of this right could have for investigations. According to this officer *“if the arrested person is speaking a language we do not understand, imagine a situation where the call can be used to destroy evidence or adopt any kind of measure that sabotages our investigation”*.⁴⁰ One of the lawyers contacted said that he understood the police's concern regarding being obliged to authorise a call when the object of the same is to obstruct or compromise the outcome of the investigation.

According to the replies from the lawyers to the questionnaire, on occasion the right to communicate with a freely appointed person is not respected or it is not authorised unless said person is shown to be the spouse or partner, although the rules do not stipulate that this should be the case. Apparently, calls were also not authorised on occasions when the person appointed is not the owner of the telephone number in question. However, the overall results of the questionnaire show that 40% of the lawyers consulted consider that this right is respected, while 22.9% maintain that it is respected in half or more cases and 14.3% say that it is never respected.

⁴⁰ In the context of the PRO JUS research project, the professionals interviewed made similar points: *“They have that right, but we do not know how to put it into practice [...] it has to do with our presence or the presence of a civil servant, but they do not say what language they are going to hold the conversation in [...] A private call cannot be allowed. It cannot be allowed because you do not know what is being communicated”* (P 11, 180, 182), see national report, page 46.

4.4 Standard 4: The right to communicate with consular authorities

Indicator 4.1: The suspected or accused person, who is a non-national and who is deprived of his/her liberty, has the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay, if s/he so wishes	
Legal transposition score	0
Practical implementation score	1
OVERALL SCORE	50%

Article 520.2 e) CPA⁴¹ contains the right of the arrested person to have the person they choose informed of the arrest and the place of custody. This section includes, in the case of foreign nationals, the right of the arrest to be notified to consulate of his/her country.

Article 520.3 CPA⁴² establishes in its new wording that the arrest will be notified to the consular authorities despite the fact that Article 7.1⁴³ of Directive 2013/48/EU contains it as an option and not an obligation.

In practice, according to the replies from the lawyers consulted, 68.8% consider that the right of persons deprived of liberty to have the consular authorities informed when he/she is a foreign national is respected, 5.7% believe it is respected in 3 out of 4 cases and only 8.6% maintain that it is never respected. 11.4% stated that they had no information in this regard.

Indicator 4.2: A suspected or accused person, who is a non-national and who is deprived of his/her liberty, has the right to communicate with the consular authorities of their State of nationality, if s/he so wishes	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

⁴¹ Article 520.2 e) CPA "(...) Foreign nationals will be entitled to have the above circumstances notified to the consulate of their country."

⁴² Article 520.3 CPA "If the arrested person is a foreign national, the consul of his/her country will be informed of the arrest and of the place of custody and will be allowed to communicate with the consular authority. In the event that the arrested person has two or more nationalities, he/she will be able to choose which consular authorities should be informed that he/she has been deprived of liberty and with whom he/she wishes to communicate."

⁴³ Article 7.1 of Directive 2013/48/EU "Member States shall ensure that suspects or accused persons who are non-nationals and who are deprived of liberty have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish."

The CPA envisages this right in the terms detailed in the foregoing paragraph.

According to the consultations made, it can be concluded that, in practice, the arrested person usually exercises this right. In light of the comments expressed in the focus group, there have been cases in which the arrested persons have rejected the option of the communication being carried out.⁴⁴

Indicator 4.3: A suspected or accused person, who is a non-national and who is deprived of his/her liberty, and who has two or more nationalities, has the right to choose which, if any, consular authorities are to be informed of deprivation of liberty.	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

Article 520.3 CPA expressly envisages that when a person holds two or more nationalities, he/she can choose which consular authorities should be informed of the fact of the arrest and with whom he/she wishes to communicate.

However, according to the consultations with the police officers who participated in the focus group, in practice, it would not seem that arrested persons have any particular interest in having the consular authorities of their country of origin contacted.

Indicator 4.4: A suspected or accused person, who is a non-national and who is deprived of liberty, has the right to: a) be visited by their consular authorities; b) converse and correspond with them; c) have legal representation arranged for them by their consular authorities	
Legal transposition score	1
Practical implementation score	1
OVERALL SCORE	75%

Article 520.2 g) CPA expressly envisages the right for the foreign national to be visited by the consular authorities of his/her country, to converse and correspond with them, but there is no express mention of the consular authorities facilitating the appointment of a lawyer.

In any event, a person charged with an offense and under arrest has all the rights contained in Article 118 CPA as well as those of Article 520 CPA. Therefore, there is nothing in the norm preventing the arrested person from freely appointing the lawyer proposed by the consular authorities. Notwithstanding the application of the incomunicado regime when the judicial authority finds that

⁴⁴ In the context of PRO JUS Project, some professionals explained that this right can cause problems for youths. One expert in immigration mentioned that notifying the consulate, depending on the administrative situation of the youth, could be prejudicial (page 46).

any of the provisions provided by article 509.1 CPA are applicable and suspends temporarily the right to the free designation of a defense lawyer as provided for by article 527.1 a) CPA.

In the context of the research, we have not gathered data on the exercise, in practice, of the right of the arrested person to (i) be visited by consular authorities, (ii) maintain conversations and correspond with them and (iii) have legal representation arranged for them by said authorities.

4.5 Standard 5: The right of access to a lawyer in European Arrest Warrant (EAW) proceeding

Indicator 5.1: The requested person has the right of access to a lawyer in the executing State upon arrest pursuant to the European arrest warrant, without undue delay	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

The regulation of the European Arrest Warrant (EAW) in Spain, initially envisaged in Organic Law 2/2003, was subsumed in Act 23/2014 on the mutual recognition of criminal decisions in the European Union (LRM). The LRM envisages that, in the absence of specific provisions, the legal regime established by the Criminal Procedure Act (Article 4.1) will apply. The right to be assisted by a lawyer was set out in Article 22 LRM, as of the moment enforcement of the foreign EAW is notified at the domicile or residence in Spain of the person sought. This notification will entail recognition of the right to intervene in the trial, in the presence of a lawyer and court agent.

The arrest will be carried out in accordance with the terms of the Criminal Procedure Act.⁴⁵ According to Article 50.3 LRM, “once the arrested person is brought before the court, he/she will be informed of the existence of the EAW, of its content, (...) as well as the rest of his/her rights”. Therefore, the rights contained in Article 520 CPA are applicable to any investigated or accused person who is deprived of liberty. In addition, the legal assistance for the person sought is mandatory at the first appearance before the Central Investigating Court which must take place within a maximum term of 72 hours, as set out in Article 51.1 LRM.

In the context of this project, several lawyers have stated that they have never been called to assist a person arrested by virtue of an EAW at a police station. They are cases in which the person sought is brought before the court after having been in police custody without having had the possibility of being assisted by a lawyer immediately.

Apart from this information, which does not lead one to conclude that there is a practice that infringes the rules, the information gathered from the professionals who intervene in the criminal procedure individually or in the focus group, does not lead one to infer that the right of the person sought to obtain legal assistance in the manner and with the guarantees envisaged in the LRM and the Criminal Procedure Act is restricted or impeded.

⁴⁵ Article 50.1 Act 23/2014 “The arrest of a person affected by a European arrest warrant will be carried out in the manner and with the requirements and guarantees envisaged in the Criminal Procedure Act.”

Indicator 5.2: The requested person has the right to meet and communicate with the lawyer representing them	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

As indicated in the foregoing section, Article 50 LRM establishes, on the one hand, that the arrest will be carried out with all the guarantees envisaged in the CPA and, on the other, that the arrested person will be informed of “all of his/her rights”. Therefore, the right of the person sought to communicate and hold a meeting in private with his/her lawyer, freely appointed or designated by the state, before and after questioning, is applicable, by virtue of the terms of Articles 118.1 and 520.6 d) CPA.

The right to communicate with the lawyer would be limited by exception, under Article 527 b) CPA, applicable when incommunicado arrest is ordered for a maximum of five days, extendable by another five. If the judicial authority ordering the incommunicado arrest so determines, the only people allowed to communicate with the person sought during such period are the judicial authority, the Public Prosecutor's Office and the Police Doctor.

In the context of the research we did not find any data pointing to the conclusion that, in the cases in which Spain enforces an EAW, the person sought has seen his/her right to communicate and hold a meeting in private with a freely nominated or state-appointed lawyer restricted either before or after questioning. In fact, the police officers present in the focus group, when consulted on the procedure followed by virtue of EAWs, did not state that there were any differences in the procedures implemented with regard to ordinary arrests.

Finally, the replies of the lawyers to the questionnaire do not enable us to clarify whether in practice the right to legal assistance is restricted or impeded. Only 17.1% ensure that they have known or been involved in cases related to EAWs and none of the replies highlighted possible incidents in this regard.

Indicator 5.3: The requested person has the right for their lawyer to be present and to participate during a hearing of a requested person by a judicial authority	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

The right to legal assistance during hearings before the judicial authority is expressly set out in Article 51 LRM. Section 1) refers to the first hearing held within a maximum of 72 hours as of when the person is brought before the court, with the assistance of the Public Prosecutor's Office, the arrested person's lawyer and, if applicable, the interpreter, in the manner envisaged in the Criminal Procedure Act, for

the questioning of the arrested person⁴⁶. It stipulates that the right of defence will be guaranteed as well as the right to legal aid, when legally appropriate.

Section 5) states, in the event consent to surrender is not given, that a hearing will be held, within a maximum term of 3 days, to examine the means of evidence accepted on the reasons for rejecting or conditioning surrender. Legal assistance is mandatory.

Article 52 LRM envisages the temporary transfer of the arrested person for the exercise of criminal actions or in order for him/her to be questioned by the issuing judicial authority, which will be sent to Spain. Section 2) envisages that the questioning will *“respect the arrested person's right to legal assistance, right not to incriminate him-/herself and not to enter a guilty plea, as well as to be assisted by an interpreter”*.

In the context of the investigation, we have not identified any factors leading to the conclusion that, in practice, the appearance and participation of the lawyer in the proceedings by virtue of a passive EAW (when Spain is the enforcing State) is limited or impeded.

Indicator 5.4: Any participation by a lawyer in a hearing regarding the European arrest warrant is recorded	
Legal transposition score	0
Practical implementation score	2
OVERALL SCORE	100%

According to Article 51.3 LRM, if the person sought consents to his/her surrender to the issuing State *“a record will be drawn up certifying this, to be signed by the arrested person, his/her lawyer and, if applicable, the interpreter, as well as the Public Prosecutor and the Judge”*. Article 52.2, on the temporary transfer of the person sought for the exercise of criminal actions or questioning of the person sought, envisages that *“the Court Clerk will also be present in this procedure, in order to take are record of compliance with the conditions envisaged in this Article and those agreed by the judicial authorities who hear the procedure”*.

In the context of the investigation, we have not identified any factors that point to the conclusion that in practice compliance with these rules is limited or impeded in practice.

⁴⁶ At this hearing, the arrested person will be given the opportunity to grant his/her irrevocable consent to surrender and waive the speciality rule (51 sections 2 and 3 LRM).

Indicator 5.5: The authorities of the executing State inform requested persons, without undue delay, of their right to have a lawyer appointed in the issuing Member State	
Legal transposition score	0
Practical implementation score	0
OVERALL SCORE	0%

The current wording of the LRM does not contain an express reference to the right, in the context of enforcement proceedings, to appoint a lawyer in the issuing State, as envisaged in Article 10 of Directive 2013/48/EU. This omission will be remedied if the Bill designed to amend the wording of Article 50 is approved⁴⁷, including the following in section 3 *“the right to appoint a lawyer in the State issuing the European arrest warrant whose function will consist of providing assistance to the lawyer in Spain, supplying information and advice”*. Moreover, the Bill mentioned above includes in Article 39, on the requirements for the issue of a European arrest warrant in Spain, a new section 4 by virtue of which *“Legal aid will be guaranteed in the terms stipulated under Spanish law, when the person sought exercises his/her right to appoint a lawyer in Spain to assist the lawyer in the executing State.”*

The activity of the focus group made it possible to highlight the doubts that still exist among legal operators on how to implement this reform, not just from a process-related perspective, but also from a technical and procedural point of view. As one of the representatives of the public prosecutor's office participating in the activity indicated, at present we are unaware how exercise of the right to appoint a lawyer in the issuing State will be ensured in practice.

Indicator 5.6: The Letter of Rights contains adequate information on all of the rights set out in Article 3 and 4 of the Directive.	
Legal transposition score	1
Practical implementation score	1
OVERALL SCORE	50%

The new wording of Article 50, section 4 of the Bill amending the LRM expressly contains the right of the arrested person to be *“informed in writing, in clear and sufficient terms, in clear, simple and understandable language, of his/her right to waive the option of a lawyer in the issuing State, on the content of said right and its consequences, as well as the possibility to revoke it subsequently.”* This entails adding information for the person sought on the right to appoint and/or waive the option of

⁴⁷ Official Gazette of the Parliament (1 December 2017) *“Bill to amend Law 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union, in order to include the European Investigation Order.”*

appointing a lawyer in the issuing State. Therefore, if approved, it is understood that the letter of rights would have to be amended to include an express reference to the appointment and waiver of the lawyer in the issuing State.

According to the information received from the police officers consulted, in practice there is no difference when it comes to EAW proceedings, meaning that the reading of rights is not different in this particular context. In this regard, it is worth mentioning that the Information Procedure in relation to the Rights of an Investigated Person who is not Arrested and the Procedure for Arrest and Information on Essential Elements of the Proceedings to be able to Challenge the Lawfulness of the arrest used by the National Police are based on the rights set out in Articles 118 and 520 CPA respectively. This standard form, whose content may differ depending on the police force, contains virtually all the rights to which reference must be made according to Articles 3 and 4 of Directive 2012/13/EU. However, it also omits some relevant aspects that are set out below:

a) *Right to interpretation and translation (Article 3.1d and 4.5 Directive 2012/13/EU)*: on the one hand, in the case of investigated persons who are not arrested, the procedure for providing information on rights differentiates between the right to interpretation and the right to translation and mentions both in accordance with the terms of Articles 123 to 127 CPA. However, it does not explain in summarised or simplified form what this right would give rise to by virtue of the articles cited. Meanwhile, the procedure for providing information on rights for arrested persons only mentions the right to be assisted by an interpreter but does not point to the right to translation at any time. This is despite the fact that Article 5.4 of Directive 2012/13/EU enshrines the right to receive a written letter in a language the person understands. This is of particular relevance in the context of an EAW, where the person sought may be from any Member State of the European Union. As a result, in both scenarios and particularly in the second one, it seems unlikely to say the least that the arrested person will understand that he/she can request a copy of the rights translated into a language he/she understands.

b) *Right to keep a written copy (Article 4.1 Directive 2012/13/EU)*: the Directive establishes the right to keep a written letter of rights throughout the time the person is deprived of liberty. However, the procedure for providing information on rights does not mention it expressly and in practice it is not possible to keep a copy.

No data has been gathered during the research which would infer the existence of a different practice when it comes to reading the rights, or in the questioning itself, in the context of EAW proceedings.

4.6 Standard 6: Waivers

Indicator 6.1: Other than in cases where the presence of a lawyer is mandatory, the suspected or accused person can waive their right of access to a lawyer	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

Section 8 of Article 520 CPA contemplates the right to waive the right of access to a lawyer only when the facts giving rise to the arrest are liable to be categorised as road safety offences. In all other cases the presence of a lawyer, whether nominated by the arrested person or the state, is obligatory.

The application of this legal provision could cause practical problems unless the conditions to ensure that the arrested person understands the consequence of the waiver and the possibility to revoke it at any time are in place. According to the information received, there are Investigating Courts that always request and ensure the presence of a lawyer, even in cases in which the option can be waived according to the law. The opinion of the legal operators consulted is unanimous in terms of the appropriateness of always having the assistance of a lawyer and there does not appear to be a practice in which the waiver is promoted, the opposite would seem to be the case.

In any event, if the arrested person states his/her wish to waive the assistance of a lawyer, he/she is entitled to do so and we have found nothing to indicate that in practice this right has been restricted, conditioned or impeded by the police or judicial authorities in practice.

Indicator 6.2: The suspected or accused person is provided, orally or in writing with clear and sufficient information in simple and understandable language about the content of the right of access to a lawyer and the possible consequences of a waiver	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

Section 8 of Article 520 CPA envisages the right of the arrested or imprisoned person to waive the assistance of a lawyer in the case of road safety offences, provided the information on the content of this right and the consequences of the waiver have been transmitted in a clear and sufficient manner and in simple and understandable language.

The consultations made via interviews, the questionnaire and in the focus group do not disclose the existence of any indication that there has in practice been an infringement of the regulatory provision in this regard.

Indicator 6.3: The waiver, whether given orally or in writing, is noted, together with the circumstances in which it was given	
Legal transposition score	1
Practical implementation score	2
OVERALL SCORE	75%

Even though there is no express mention of the waiver of the rights of the person deprived of liberty, particularly access to a lawyer, appointed either by such person or the state, it can be interpreted that this circumstances should obligatorily be stated for the record. By virtue of section 7 of Instruction 12/2009 of the Secretary of State for Security which regulates the “Book of Registration and Custody of Arrested Persons” the “Other observations” sections records any other relevant matter that does not have a specific space on the form. In addition, Instruction 12/2007 of the Secretary of State for Security establishes in section 8 that the arrested person *“is allowed state whatever he/she considers appropriate for his/her defence, with a record being made of it”* guaranteeing *“the spontaneity of the declaration in such a way as to avoid the decision-making power or judgement of the arrested person being undermined”*.

The consultations made via the interviews, the questionnaire and the focus group did not discover any incidents representing an infringement of the regulatory provisions referred to herein in practice.

Indicator 6.4: The suspected or accused person has the right to revoke the waiver at any point of the criminal proceedings and they are informed about this possibility	
Legal transposition score	2
Practical implementation score	2
OVERALL SCORE	100%

Article 520.8 CPA makes it obligatory for the arrested or imprisoned person to be informed of the content of the right in a clear and sufficient manner and in simple and understandable language. This logically includes the right to waive the mandatory assistance of a lawyer and to be informed of the consequences of such a waiver, which may be revoked at any time by virtue of the terms of the same regulatory precept.

No data was found in the course of the research leading one to infer that, in practice, the effective exercise of the right of waiver is restricted or impeded, or indeed the possibility to revoke the same in accordance with the procedures and guarantees envisaged in the legislation in force.

ANNEX 1
SCORING MATRIX

Standards	Indicators	Legal Transposition		
Standard 1: The right of access to a lawyer in criminal proceedings	Indicator 1.1: Suspects or accused persons have access to a lawyer before they are questioned by police, other law enforcement or judicial authority	2	1	75%
	Indicator 1.2: Suspects or accused persons have the right for their lawyer to attend (as a minimum) the following evidence-gathering or investigative acts undertaken by the authorities: a) identity parades; b) confrontations; c) reconstructions of the scene of crime	2	2	100%
	Indicator 1.3: Suspects or accused persons have access to a lawyer without undue delay after deprivation of liberty	2	2	100%
	Indicator 1.4: Suspects or accused persons have access to a lawyer where they have been summonsed to appear before a court having jurisdiction in criminal matters	2	2	100%
	Indicator 1.5: Suspects or accused persons summonsed before to appear before a court have sufficient time to consult their lawyer before such appearance	1	2	75%
	Indicator 1.6: Suspects or accused persons have the right to meet in private with their lawyer, including prior to questioning by the police or by another law enforcement or judicial authority	2	1	75%
	Indicator 1.7: Suspects or accused persons have the right to communicate with their lawyer, including prior to questioning by the police or by another law enforcement or judicial authority	2	2	100%
	Indicator 1.8: Suspects or accused persons have the right for their lawyer to be present and participate effectively when the suspect or accused is being questioned	2	2	100%
	Indicator 1.9: The participation of the lawyer when the suspect or accused is questioned is recorded	1	1	50%
	Indicator 1.10: The State provides general information to facilitate the obtaining of a lawyer by suspects or accused persons	2	1	75%
	Indicator 1.11: The State ensures that those who are deprived of their liberty are in a position to exercise their right of access to a lawyer	2	1	75%
	Indicator 1.12: The State respects the confidentiality of communication between suspects or accused persons and their lawyer. This includes respect for confidentiality of correspondence, meetings, telephone conversations and other forms of communication permitted under the law	2	1	75%

Standard 2: The right to have a third person informed of the deprivation of liberty	Indicator 2.1: Suspected or accused person who is deprived of their liberty have the right to have at least one person, nominated by them, informed of their deprivation of liberty, without undue delay, if they so wish	2	2	100%
Standard 3: The right to communicate, while deprived of liberty, with third persons	Indicator 3.1: Suspected or accused person has the right to communicate, without undue delay, with at least one third person, such as a relative, nominated by them	2	1	75%
Standard 4: The right to communicate with consular authorities	Indicator 4.1: Suspected or accused person, who is a non-national and who is deprived of their liberty, has the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay, if s/he so wishes	0	1	25%
	Indicator 4.2: Suspected or accused person, who is a non-national and who is deprived of their liberty, has the right to communicate with the consular authorities of their State of nationality, if s/he so wishes	2	2	100%
	Indicator 4.3: Suspected or accused person, who is a non-national and who is deprived of their liberty, and who has two or more nationalities, has the right to choose which, if any, consular authorities are to be informed of deprivation of liberty	2	2	100%
	Indicator 4.4: Suspected or accused person, who is a non-national and who is deprived of liberty, has the right to: a) be visited by their consular authorities; b) converse and correspond with them; c) have legal representation arranged for them by their consular authorities	1	1	50%
Standard 5: The right of access to a lawyer in European Arrest Warrant (EAW) proceeding	Indicator 5.1: The requested person has the right of access to a lawyer in the executing State upon arrest pursuant to the European arrest warrant, without undue delay	2	2	100%
	Indicator 5.2: The requested person has the right to meet and communicate with the lawyer representing them	2	2	100%
	Indicator 5.3: The requested person has the right for their lawyer to be present and to participate during a hearing of a requested person by a judicial authority	2	2	100%
	Indicator 5.4: Any participation by a lawyer in a hearing regarding the European arrest warrant is recorded	0	2	50%
	Indicator 5.5: The authorities of the executing State inform requested persons, without undue delay, of their right to have a lawyer appointed in the issuing Member State	0	0	0%

	Indicator 5.6: The Letter of Rights contains adequate information on all of the rights set out in Article 3 and 4 of the Directive.	1	1	50%
Standard 6: Waivers	Indicator 6.1: Other than in cases where the presence of a lawyer is mandatory, the suspected or accused person can waive their right of access to a lawyer	2	2	100%
	Indicator 6.2: The suspected or accused person is provided, orally or in writing with clear and sufficient information in simple and understandable language about the content of the right of access to a lawyer and the possible consequences of a waiver	2	2	100%
	Indicator 6.3: The waiver, whether given orally or in writing, is noted, together with the circumstances in which it was given	2	2	100%
	Indicator 6.4: The suspected or accused person has the right to revoke the waiver at any point of the criminal proceedings and they are informed about this possibility	2	2	100%

FINAL GRADE FOR IMPLEMENTATION OF THE DIRECTIVE	DIRECTIVE HAS BEEN IMPLEMENTED	80.35%
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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

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