The Enforcement of the European Arrest Warrant:
A Comparison Between Spain and the UK

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1. Introduction
If there is a ‘star’ rule on judicial cooperation in criminal matters, it is the Council
Framework Decision of 13 June 2002 on the European Arrest Warrant and the
Surrender Procedures between Member States (EAW).2 Its popularity has increased
following the deplorable attacks in the United States of America on 11 September
2001,3 because it is seen as an effective mechanism in the fight against international

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3) In this context, see S. Douglas-Scott, “The role of law in the European Union: putting the security
qualifies the EAW at p. 223 as ‘the jewel in the crown of the EU’s response to the terrorist attacks’
227-243. Also, more recent contributions in this area, e.g.; B. Dickson, ‘Law versus terrorism: can
J. Wouters and F. Naert, ‘Of arrest warrants, terrorist offences and extradition deals: an appraisal
of the EU’s main criminal law measures against terrorism after “11 September”’, 41 Common Market
terrorism. The Council Framework Decision was presented exactly 8 days after the 9/11 attacks and agreement was reached by Member States in their political negotiations after a mere three months.

The EAW is now seen as a juridical and procedural instrument of ‘surrender between judicial authorities’ in a similar way to the measure contained in the Rome Statute that applies to the International Criminal Court. It also constitutes

4) Although the EAW has been ‘thrown into the mixture of the EU road-map on terrorism’, its relevance is much wider as pointed out by S. Alegre in, ‘The myth and the reality of a modern European judicial space’, 152 New Law Journal (2002) 28 June pp. 986-989 at p. 986.


7) The ‘judicialisation’ of the surrender process is, in fact, warmly welcomed; see B. Gilmore, loc. cit., p. 145.

8) Arts. 58 and 89. See W. A. Schabas, An Introduction to the International Criminal Court (Cambridge 2004) pp. 132-136, explaining at p. 134 that this terminology ‘is to respond to objections from States that have legislation, and sometimes even constitutional provisions, prohibiting the extradition of their own nationals’; in Spain, I. Lirola Delgado and M.M. Martín Martínez, La Corte Penal internacional (Barcelona 2001) pp. 270-274 and, specifically, ‘La cooperación penal internacional en
‘the first concrete measure’ adopted on the basis of mutual recognition of judicial decisions, a principle established in October 1999 by the Tampere Council as ‘the cornerstone of judicial co-operation in the Union’. The same principle is also


10) According to this principle, ‘judicial decisions in one Member State must be recognised and enforced by judicial authorities in other Member States on the understanding that, while legal systems may differ, the results reached by all EU judicial authorities should be accepted as equivalent’ (S. Alegre and M. Leaf, European Law Journal, op. cit., pp. 200-201); brief comment on this made by the author (M. Jimeno-Bulnes) in ‘European Judicial Cooperation in Criminal Matters’, 9 European Law Journal (2003) n. 5 pp. 614-630, at p. 620. On the Tampere Summit see H. Labayle, ‘Le bilan du mandat de Tampere et l’espace de liberté, sécurité et justice de l’Union européenne’, Cahiers de droit européen (2004) n. 5 pp. 591-661.

recognized by the European Constitution\textsuperscript{11} and was recently reinforced by the European Council in the Hague Programme (2005).\textsuperscript{12}

It is foreseen in the explanatory memorandum that the EAW will replace the current system of extradition between Member States – the Convention\textsuperscript{13} – which has neither been widely ratified nor particularly successful. The same explanatory


\textsuperscript{12)  Strengthening freedom, security and justice in the European Union’, OJ 3 March 2005 C 53 pp. 1-14 at pp. 11-12 where it is stated that ‘further efforts should be made to facilitate access to justice and judicial cooperation as well as the full employment of mutual recognition’; we are also reminded that ‘the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters … should be completed and further attention should be given to additional proposals in this context’. See ‘Programme of measures to implement the principle of mutual recognition of decisions in criminal matters’, OJ 15 Jan 2001 C 12 pp. 10-22, including measures such as \textit{ne bis in idem}, recognition of final sentences, obtaining evidence.


memorandum of the ‘pan-European arrest warrant’\(^{14}\) or ‘Euro-warrant’\(^{15}\) qualifies the extradition mechanism as ‘obsolete’,\(^{16}\) a view confirmed by several Member States – Italy and Spain, and Spain and the UK, among others\(^{17}\) – which prior to its introduction had already embarked on bilateral discussions to prepare trea-


\(^{15}\) Expression used on specialized websites in this area; see for example <http://www.eurowarrant.net>. (This and all other websites quoted in this paper last accessed August 2006.)


Although the reference to extradition remains, e.g., EA in the UK and Malta under L.N.320 of 2004; also the Law on Extradition on the basis of an offence between Finland and other Member States of the European Union, issued in Helsinki on 30 December 2003 (424/2003). See M. de Hoyos Sancho, ‘Il nuovo sistema di estradizione semplificata nell’Unione Europea. Lineamenti della legge spagnola sul mandato d’arresto europeo’, XIV *Cassazione Penale* (2005) pp. 303-315. Even the term ‘simplified extradition’ is not entirely exact because, at least in Spain, it is commonly applied to extradition proceedings where the consent of the arrested person is forthcoming; see C. Ceñón González, *Derecho Extradicional* (Madrid 2003) p. 252.

Note that just as the UK contemplates EAW as a process of extradition within the meaning of the Extradition Act 2003 (EA), a law on conventional extradition proceedings remains in force in Spain, Law 4/1985, 21 March, on Passive Extradition (*Ley 4/1985, de 21 de Marzo, de Extradición Pasiva*) (LEP). Other countries also include EAW regulation within extradition legislation e.g. EAW implementation in Denmark, Law No 433 of 10 June 2003 amending the Law on the extradition of offenders and the Law on the extradition of offenders to Finland, Iceland, Norway and Sweden; in relation to these and other national implementations, see J. Vestergaard, ‘The Danish Extradition Act’ in S. Alegre and M. Leaf, *op. cit.*, pp. 91-96.


ties on simple surrender procedures of arrested persons between their respective judicial authorities.

The Council Framework Decision is intended as a juridical instrument in the field of judicial cooperation on criminal matters, and similar to the Directives, must be implemented in the national law of each member state, in this case prior to 31 December 2003. Spain promptly adapted the new rule in the form of Law e Italia para la persecución de delitos graves de 28 de noviembre de 2000. Especial referencia a la extradición de condenados en rebelión’, Anales de la Facultad de Derecho (2001) n. 18 pp. 401-418.


In literature from the UK on judicial cooperation in criminal matters during recent years see, as general works, S. Peers EU, Justice and Home Affairs (Harlow 2000) and more recently, N. Walker, ed, Européan Area of Freedom, Security and Justice (Oxford 2004). Also of interest, the consultation document provided by the Home Office on March 2001, The law on extradition: a review, (<http://www.homeoffice.gov.uk/crimpol/oic/extradition/bill/faq2.htm>) announcing a ‘fast-track extradition’ scheme for EU as well as the research updated on 13 March 2002 by the Scotland Parliament Information Centre: see A.J. McLeod and S. Dewar, EU justice and home affairs policy, paper 02/30 (Edinburgh 2002).

Although, unlike Directives, Framework Decisions are not imposed according to Art. 34(2)(b). Nevertheless, the relevant judgement in Pupino by the European Court of Justice (ECJ) on 16 June 2005, C-105/03 should not be forgotten, by which ‘the binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity’ (FJ 34). See comments by M. Fletcher on, ‘Extending ‘indirect effect’ to the third pillar: the significance of Pupino?’, 30 European Law Review (2005) n. 6 pp. 862-877.


Note that German (EuHbG- Europäisches Haftbefehlsgesetz of 2 July 2004) and Polish national legislation on EAW (Art. 607w Law on Criminal Procedure of 18 March 2004) have recently been declared unconstitutional by decisions of 18 July 2005 and 27 April 2005 respectively. Common ground in both cases is the surrender of citizens that is constitutionally forbidden but the rulings differ in effects: whereas EAW cannot be used in the future and the general judicial cooperation proceeding (IRG- Gesetz über die Internationale Rechtshilfe in Strafsachen of 23rd of December 1982) must be used until such time as a new implementation law comes into effect in Germany, a constitutional
amendment (Art. 55) is possible in Poland before the constitutional ruling comes in force and EAW implementation will remain in force there for 18 months. The Cypriot Supreme Court decision on 7 November 2005 also brings with it similar consequences to the Polish decision, insofar as it requires a further constitutional amendment; last constitutional decision at the moment comes from the Czech Constitutional Court on 3 May 2006 (No.Pl.US 66/04).


At last a new German text is enacted on 20 July 2006, in force since 2 August, available on <http://www.juris.de>; according to it, the surrender of German citizens only will take place under special conditions. But, which is even more arguable, the principle of double criminality will be generally applied.

the EAW Framework Decision was expected to be implemented by a further six member states over the first quarter of 2003. The UK has also met its obligations in good time by approving the Extradition Act 2003 (EA), on the 20 November, which has been in force since 1 January 2004.

This comparative study sets out the special regulation of the ‘Euro-warrant’, making particular reference to procedural aspects contained in Spanish and UK legislation. It makes specific reference to the competent judicial authorities that are authorised to issue and execute EAWs, to the development of judicial proceedings concerning the issue and execution of this instrument and, in addition, to the precepts of the Spanish Organic Law of the Judiciary (Ley Orgánica del Poder Judicial or LOPJ). An English translation is provided in <http://www.espaciojudicialeuropeo.com/eaw> as well as Council website <http://www.consilium.europa.eu> (Council configurations, Cooperation in the field of Justice and Home Affairs, Police and Judicial Cooperation) in provision of whole national EAW implementations.


24) EA 2003 (Commencements and Savings) Order 2003 (S.I.2003, No 3103). Note that under ss. 3 and 4, all extradition requests received before 31st December 2003 will be dealt with under the Extradition Act of 1989.


The official websites of Spanish institutions are useful practical guides for practitioners: ‘EAW protocol’ at the Ministry of Justice, available at <http://www.mju.es/euroorden/protocolo.htm>, as is the Crown Prosecution Service (CPS) in UK at <http://www.cps.gov.uk/legal/section2/chapter_c.htm>; short guidelines at <http://police.homeoffice.gov.uk/operational-policing/extradition-intro>. Also of interest, the <http://www.eurowarrant.net website> managed by T.M.C. Asser Instituut (the Hague), containing general and national information posted by correspondents on EAW-related subjects on Member States; see, for example, Spanish and British Reports online after registration.
growing number of bibliographical sources and judicial experience on the practical application of these new rules.  

2. Determination of the Competent Judicial Authorities

Quite logically, the European rule leaves the question of the competent judicial authorities responsible for issuing and executing EAWs at the discretion of each member state; the only prescription contained in EAW Article 6 is that they be ‘judicial authorities’ under national legislation. The Framework Decision does not however seek to define a judicial authority, leaving that matter to Member States whose laws do not always respect the spirit of the European rule (e.g. Denmark). In addition, Article 7 refers to the ‘interposition’ of a central judicial authority as an option for Member States – ‘when its legal system so provides’ – to assist the competent judicial authorities.

Turning now to Spain and the UK, both countries maintain similar approaches, insofar as the execution of a ‘Euro-warrant’ issued by another Member State is solely attributed to one judge and one tribunal, despite there being various competent judges and tribunals that are able to issue one. The ‘appropriate judge’ in the UK, according to section 67 (1) EA, is a District Judge (Magistrates’ Courts) designated for that purpose by the Lord Chancellor in England and Wales, the Sheriff of Lothian and Borders in Scotland and a County Judge or Resident Magistrate also appointed by the Lord Chancellor in Northern Ireland. Article 2 (2) LOEDE

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27) See Art. 18(b) Law No 433 that designates the Minister of Justice as the competent executing and issuing authority that, as pointed out, is contrary to the intentions of the FWD; see both Commission Staff Working Documents, loc. cit., p. 13 and also criticism by J.Vesterrgaard, loc. cit., p. 95.

28) At the time of writing, the Chief Magistrate, the Deputy Chief Magistrate and four other District Judges at Bow Street Magistrates’ Court have been designated for this purpose for England and Wales; see A. Jones and A. Doobay, op. cit., p. 181.

29) In this sense, the EAW in the UK is an ‘extradition to category 1 territories’ as set out in ss. 1(1) and 223(5) and (6) by order of the Secretary of State with the approval of Parliament; at the time of
states that the Spanish judicial authorities that are authorised to execute EAWs are either the Central Investigative Judges\(^3\) sitting at the Central Criminal Court – **Juzgado Central de Instrucción** – (JCI), or the Criminal Division of the National Court – **Sala de lo Penal de la Audiencia Nacional** – (AN) when the arrested person does not consent to the surrender.\(^3\) Some sort of ‘centralisation’ of the competent authorities authorised to execute the European Arrest Warrants does therefore exist -which is criticised, at least in Spain\(^3\) – with some justification, because the latter

writing Austria, Belgium, Cyprus, Denmark, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden are designated by s 2(2) EA 2003 (Designation of Part I Territories) Order 2003 (S.I.2003, No 3333) and EA 2003 (Amendment to Designations) Order 2004 (S.I. 2004, No 1898).

\(^3\) This English translation – Central Investigative Judge – is preferred to the official one (Central Preliminary Investigating Court for **Juzgado Central de Instrucción** because they are individual jurisdictional organs and not collegiate courts.

\(^3\) In the first instance, the competent authority in the execution of an EAW is the Central Investigative Judge. At present, there are 6 Central Investigative Judges (JCI) and the Audiencia Nacional (AN) or National Court, all with their respective seats in Madrid. The JCI is competent to conduct the preliminary criminal proceedings and, the AN, the trial and judgment of particular offences and felonies committed in national territory e.g. counterfeiting currency, drug trafficking, terrorist acts … most of which are included in the scope of the ‘Euro-warrant’. Also with the same seat and jurisdiction are The Central Criminal Judges, the Central Administrative Judges, the Central Minors Judge and, recently, the Central Prison Vigilance Judge.

Address, telephone and fax numbers of respective judicial offices are indicated in document number 16232/03, 17 December 2003, COPEN 129, EJN 16, EUROJUST 19 as well as in the Note from the Spanish delegation to the Working Party on Judicial Cooperation in Criminal Matters (experts on the EAW) on the implementation of the EAW Framework decision, document number 16303/03, COPEN 133, EJN 18, EUROJUST 21, p. 11; this same information is also available in Spain in the practical guide or ‘protocol’ provided by the Ministry of Justice and accessible in electronic format at <http://www.mju.es/euroorden>.

\(^3\) E.g. J. de Miguel Zaragoza ‘Algunas consideraciones sobre la Decisión Marco relativa a la orden de detención europea y a los procedimientos de entrega en la perspectiva de extradición’, *Actualidad Penal* (2003) n. 4 pp. 139-158 at p. 144, which considers this decision to attribute competence for the execution of the ‘Euro-warrant’ to both tribunals as ‘incoherent’ with the general system provided by the Council Framework Decision. A more favourable opinion is expressed by C. Arangüena Fanego, ‘La orden europea de detención y entrega. Análisis de las Leyes 2 y 3 de 14 de marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la “euroorden”’, *Revista de Derecho Penal* (2003) n. 10 pp. 11-95 at p. 59, basing its arguments on juridical grounds – competence in extradition matters, brief time limits in force -, as well as on political grounds of immediate relevance because of the recent enforcement in Spain of the law ‘fast-track’ trials (Law 38/2002, 24 Oct 24, a partial amendment of the LECr that introduces new proceedings to provide swift and immediate trials in the case of specific offences and misdemeanours and modifies the abbreviated proceeding; see M. Jimeno-Bulnes, 10 *European Law Journal*, loc. cit., p. 244).

Other authors have suggested that competence be attributed to the judge with geographical jurisdiction over the place of residence of the arrested person or that a specialized Investigative
tribunals are the only competent ones for extradition procedures in Spain and the UK. These countries are not, however, the only ones of the Member States to have worked out an equation between the EAW and extradition proceeding.

Firstly, with regard to the judicial authorities empowered to issue an EAW, both national legislations refer to particular judicial bodies. In the UK, under section 149 (1) EA, the duly authorised judge in England and Wales is a District Judge (Magistrates’ Courts), a Justice of the Peace or a judge entitled to exercise the jurisdiction of the Crown Court; in Scotland, a sheriff and in Northern Ireland, a justice of the peace, a resident magistrate or a Crown Court. In contrast, the Spanish law does not state which judge or court may issue an EAW, except rather vaguely in a general clause under Article 2.1. However, the Organic Law of the Judiciary (LOPJ), and the Spanish law on criminal procedure (LECrim) both clearly state that the Investigative Judge is authorised to adopt precautionary measures of a personal and patrimonial nature in order to proceed with the investigation of a criminal cause or matter. One of these personal measures is precisely preventive custody, referred to as ‘detención’ in Spanish legal procedures, which may now be


33 See ‘appropriate judge’ for extradition procedure to category 2 territories in s. 139 EA; also Arts. 8.2 and 12(2) LPE.

34 For instance, Court of Appeal (Corte di appello) in Italy according to Art. 701 Codice di Procedura Penale, also competent for extradition proceedings and Art. 6(5) Legge n. 69; see E.B. Liberati and I.J. Patrone, ‘Il mandato di arresto europeo’, Questione Giustizia (2002) n. 1 pp. 70-89 at p. 85 as well as F. Impalà, Le mandat d’arrêt européen et la li italienne d’implémentation: un cas exemplaire de conflit de systèmes, <http://www.eurowarrant.net> pp. 41-42.

35 Art 2.1 LOEDE: ‘In Spain, the “issuing judicial authorities” competent for the purpose of issuing the European warrant are the judge or court hearing the case in which this type of warrant is in order’ (official translation).

36 Art. 87(1)(a) Ley Orgánica del Poder Judicial (LOPJ) or the Organic Law on the Judiciary designates the Investigative Judges as having competence to conduct the preliminary criminal proceedings in causes in which trial and judgment are a matter for the Criminal Judges (Juzgados de lo Penal) and Provincial Courts (Audiencias Provinciales), and the maximum available punishments for the offence in question is up to five years of prison, or more than five years, respectively. Arts. 486-544 bis Ley de Enjuiciamiento Criminal, (LECrim) or Spanish law on criminal procedure contemplate the personal precautionary measures that can be adopted within such preliminary criminal proceedings by the latter courts.

37 Arts. 489-501 LECrim. There are two important particularities of this preventive custody in relation to other personal precautionary measures adopted in criminal causes: firstly, it can be adopted, not only by judicial authorities but by the police and even by citizens; secondly, its peremptory term
ordered from outside the national territory by a judicial authority from another European member state.

Secondly, only the aforementioned judges and courts are entitled to execute EAWs by virtue of section 67 EA and Article 2 (2) LOEDE. This may be logical in passive extradition procedures – as set out in Part 2 EA, and in Spain, in an earlier regulation, Law 4/1985, 21 March, relating to Passive Extradition (Ley de Extradición Pasiva) (LEP). It is not so logical, however, in the case of the EAW, as already pointed out. The fact is that in Spain, an EAW is not considered in quite the same light as extradition, although it is in the UK. As extradition was specifically mentioned in Articles 65 (4) and 88 of the LOPJ, those two latter articles have since been amended by Organic Law 2/2003, 14 March, which was introduced to complement the LOEDE, and which authorises the tribunals in question to execute EAWs issued by other Member States.38

It should be said that, in Spain, the Central Judge for Minors could also be included among the executing judicial authorities and, furthermore, that these Judges for Minors should also be considered among the issuing judicial authorities.39 One argument in support of this proposition is that, in the UK, the EA refers to such judges in general terms in a reference to the amendment of the Children and Young Persons Act 1969.40 For example, section 201, makes provision for the remand in local authority accommodation of minors subject to extradition pro-

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40) S. 23 of the Children and Young Persons Act 1969 (c. 54) is amended by s. 201 EA. Be notice that such Children and Young Persons Act was already amended by Children Act 1989 (c. 41), both of them available on <http://www.opsi.gov.uk/acts>.
ceedings when bail is not granted in the execution of an EAW.41 This is also the case in other Member States – in particular, the Youth Law Courts42 in Germany – where legislation refers not only to educational and corrective measures but also to general punishments imposed on minors. It is not, however, the case in Spain, where Article 7 of Organic Law 5/2000 12 of January, regulating the criminal liability of minors,43 provides only for special types of measures, none of which could be qualified under the Spanish law on the ‘Euro-warrant’ as punishments or security measures, although some (i.e. detention in a Centre for Minors) would come within the meaning of ‘custodial sentences’ or ‘detention orders’ used in the English version of Article 1 (1) EAW.44

One could also include judges and courts belonging to the special military jurisdiction as issuing judicial authorities in Spain, and the Central Military Court as an executing judicial authority, although there is no explicit reference to this either in the Spanish law or in the EAW Framework Decision. On this point, the EA contains much more explicit references such as the one in section 155,45 by which a court-martial shall take charge of EAWs that relate to offences under its jurisdiction. Returning to the Spanish scenario, although military courts have authority to judge offences listed in the Military Code of Justice, no attempt has been made to amend the Organic Law relating to the military judiciary, so as to empower it in the same way as has been done for the civil courts. However, as has been argued,46 in view of the very different and varied offences in the military codes of member states, the possibility of an EAW ever being issued by a military court is a remote one that would have to respect the principle of double jeopardy.

Thirdly and finally, the EA refers to the Secretary of State in the UK and the Scottish Ministers in Scotland as the central authority with exclusive powers to assist

41) In this case the three conditions set out in subsections (4) to (7) must be met, i.e., the young person must be over the age of 12; the offence for which extradition is sought would, if committed in the UK by an adult, receive a prison sentence of at least 14 years if the person had previously absconded; and the court is of the opinion that placing the person in the care of the local authority would be sufficient to protect the public interest and prevent the person from reoffending.

42) §§ 17 et seq Jugendgerichtsgesetz.


44) Also, both English terms are used in the translation of the Spanish text although, as explained, the meaning of the Spanish term is more restrictive.

45) Exactly, ‘the Secretary of State may by order provide for the preceding provisions of this Part to have effect with specified modifications in relation to a case where the person whose extradition is sought or ordered is subject to military law, air force law or the Naval Discipline Act 1957 (c. 53)’. At the time of writing, no order relating to this provision has been found.

46) Again, V. Moreno Catena, loc. cit., p. 154; also C. Arangüena Fanego, loc. cit., p. 41.
the relevant judicial authorities in these matters, although no specific provisions on this point are detailed.47 There are, furthermore, specially designated authorities that have to certify EAWs issued by Member States before they may be executed in the UK, as per the requirements imposed by sections 2 (7) and (8) EA.48 These are the National Criminal Intelligence Service (NCIS) and the Crown Agent of the Crown Office in Scotland, which are both referred to in section 2 EA 2003 (Part I Designated Authorities) Order 2003.49 Thus, the executive still holds a monopoly of power over the transmission of EAWs, as is also the case in other Member States;50 such ‘intermediation’, which rules out any direct exchanges between judicial authorities, does not fully respect the spirit of the European rule.51

In reference to Spain, Article 2 (3) Law 3/2003 designates the Justice Ministry in Spain as the central authority in the same way as is contemplated in many other national legislations implementing the EAW.52 It was suggested in Spain that the General Council of the Judicial Branch (Consejo General Poder Judicial, abbreviated as CGPJ) might assume these responsibilities with a similar level of authority,

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47) However, conclusions may be drawn, for example, from s. 179 that refers to the Secretary of State as the competent authority when deciding between competing extradition claims. On the role of the Secretary of State see A. Jones and A. Doobay, op. cit., p. 248 as well as J. Knowles, op. cit., p. 109.

48) According both articles, the designated authority must certify that the issuing judicial authority has this function in the respective Member State. The only exception to this certification is the provisional arrest without warrant according s. 5 EA; see J. Knowles, op. cit., pp. 31-34.

49) S. I. 2003, No 3109. As it is recognised – e.g., J. Spencer, loc. cit., p. 208 – mostly of the EAWs arrive on the desk of such NCIS. For brief comments on NCIS in relation to EAW proceedings, see J. Jones and A. Doobay, op. cit., p. 378.

50) Estonia, Hungary, Ireland and Malta according to the Commission Reports, op. cit., p. 3. See, ie, ss. 13-14 Hungarian Law CXXX of 2003 on Co-operation with the Member States of the European Union in Criminal Matters; s. 12 Irish European Arrest Warrant Law, 2003; s. 5 Maltese Extradition Law …. Also, Art 4 has recently been added to the Italian implementation law as an Amendment proposed by the Senate that designates the Justice Ministry as the central authority acting as an ‘intermediate’ organ between the Italian and European judicial authorities for the issue and reception of EAWs.

51) See Commission Reports, op. cit., p. 3. In such cases, powers conferred on central authorities exceed the simple facilitating role permitted by the EAW, suggesting that the influence of conventional extradition proceedings is still present. See also comments to Commission Report 2005 by UK in defence of the role played by NCIS, document n. 11528/05, COPEN 118, EJN 40, EUROJUST 44 at p. 10.

52) According to last Commission Staff Working Document op. cit., p. 15, fourteen Member States have indicated that the central authority is the Ministry of Justice: Austria, Belgium, Cyprus, Estonia, Greece, France, Hungary, Ireland, Italy, Poland, Finland (as well as the SIRENE Bureau), Slovenia, Spain and Sweden; Latvia and Portugal have specified the office of the Public Prosecutor as the central authority, Malta has designated the Office of the Attorney General and the others (Czech Republic, Denmark, Germany, Lithuania, Luxembourg, Netherlands and Slovakia) have not specified a central authority.
which would be upheld by Article 7 (1) EAW that contemplates the possibility of designating more than one central authority. A recent agreement adopted by the latter institution has created the Spanish Judicial Network of International Judicial Co-operation (Red Judicial Española de Cooperación Jurídica Internacional, known as REJUE) composed of judges or magistrates drawn from different jurisdictional areas in order, among its other activities, to issue the ‘Euro-warrants’.53 In the same Preliminary Declaration to Statutory Agreement 5/2003 it is acknowledged that the purpose of this new organisation is ‘the suppression of the participation of the central authority’ – i.e. the Ministry of Justice – as the number of judicial interventions as opposed to governmental procedures increase in the field of European judicial co-operation. The LOEDE is a clear example of the latter, if one is to compare it to classical extradition proceedings. Any provision that favours political authority at the expense of judicial authority goes against the spirit of the EAW Framework Decision and, all things considered, does not take into account the possible delays caused by its intervention.54

3. Issuing an European Arrest Warrant

Chapter 2 of the LOEDE and Part 3 of the EA are dedicated, respectively, to the issuing of a European Arrest Warrant by the Spanish judicial authorities and extradition to the UK (active extradition).55 In this regard, it is important to establish the interface between the ‘Euro-warrant’ and the conditions for imprisonment laid down by Criminal law56 with regard to the different offences and specifically,


55) According to the 2005 Eurojust Report, over 2,500 EAWs have been issued throughout 2005; see Eurojust website (<http://www.eurojust.eu.int>, Press&PR, Annual Reports, Annual Report 2005, p. 34). Also statistics in document n. 9005/2/06, 21 June 2006, COPEN 52, EJN 12, EUROJUST 21, according to information provided by 19 Member states; last year alone, 519 EAWs were issued by Spain and 131 by UK.

56) No reference is made to the determination of the offence, neither to the degree of participation (author, accomplice or accessory), nor to its execution (attempted, frustrated or consummated); in Spain, the same policy is followed for classical extradition proceedings according to Preliminary Recitals LEP, point 9.
those established by Article 2 EAW. Obviously, Article 5 LOEDE and section 148 EA reproduce the same tripartite division used by the European rule, making an important difference between ‘accusation’ and ‘conviction’ cases, according to the scope of each specific EAW. Although this difference is clearly defined in the UK regulation, the rule for the clarification of the European statement is odd, and the purpose of the Spanish law, which is to improve the efficiency of the Framework Decision, is not always fulfilled. The following list describes the circumstances in which the Spanish and British judicial authorities may issue an EAW:

a) To proceed with the investigation and judgement of offences punishable by imprisonment for at least 12 months, i.e., accusation cases; in Spain, according to the Criminal Code amended two years ago, the imprisonment sentence for this offence is referred to as ‘a minor imprisonment sentence’ (from 3 months to 5 years) or ‘a major imprisonment sentence’ (longer than 5 years).

b) To serve a sentence of no less than 4 months imprisonment, i.e. conviction cases; as already stated, the new Spanish criminal rule provides an even shorter term (3 months imprisonment) as opposed to the current minimum of 6 months, and abolishes ‘weekend imprisonment’, for which the minimum term is 36 hours (equivalent to 2 days of imprisonment) involving a maximum of 24 weekends.

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57) Whereas Art 2(1) states, for example, that the EAW ‘may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months’, a sentence which is literally translated in the Spanish rule, the English implementation indicates that the conduct must be punishable under the relevant UK law by imprisonment or another form of detention for a term of 12 months or a greater punishment in subs (1)(b). With regard to the UK, it seems ‘odd’ to maintain different thresholds for accusation and conviction cases; see comments to Commission Report, loc. cit., p. 102.

58) It was also pointed in the CGPJ Report that led to certain improvements in the Preliminary Draft.


60) Some national implementations require not only that the sentence be a minimum term of 4 months, but that the related offence is also punishable by at least 12 months; that is the case of Austria and the Netherlands, whose implementation is considered to be contrary to the Framework Decision according the Commission. See both Commission Staff Working Documents, loc. cit., p. 6.

61) Art 37(1) Criminal Code. This kind of punishment will be substituted by ‘home confinement’.
To take action against the offences included in the initial *numerus clausus* list presented in Article 2 (2) EAW, provided that the maximum sentence is a prison term of at least 3 years, with the obligation on the issuing judicial authority to detail such circumstance in the EAW. The same offences that allow surrender from Spain and the UK to another Member State without testing for double jeopardy are respectively listed in Article 9 (1) LOEDE and in section 215 EA, in general terms for active and passive extradition; although double jeopardy is an initial requirement for the other two groups of offences listed above under a) and b).

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62) I.e. participation in criminal organisations, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in drugs and weapons, … counterfeiting currency, computer-related crime, environmental crime … and so on. According to Art. 2(3), the addition of other offences to the list is provided for at any time by the Council ‘acting unanimously after consultation with the European Parliament under the conditions laid down in Art. 39(1) TEU’ for which reason the insertion of ‘initial’ in reference to this *numerus clausus* list. A similar provision to extend the list of offences by order of the Secretary of State is contained in s. 215(2) in relation s. 223(6)(a) EA. Also, the Draft report prepared by the Committee on Civil Liberties, Justice and Home Affairs with a proposal for a European Parliament recommendation to the Council on evaluation of the European arrest warrant (2005/2175(INI)) suggests the extension of the 32 offences list; see document PE365.111v01-00, 30 Nov 2005, n. l.

It should be pointed out that some EAW implementations by Member States have exempted certain specific legal descriptions of offences from the more general ‘positive list’; as is the case of Belgium legislation which does not categorize abortion and euthanasia as ‘murder or grievous bodily harm’ as defined in Art. 2(2), hyphen 8 EAW; see Art. 5(4) *Loi 19 decembre 2003 relative au mandat d’arrêt européen*. According to the Commission, such legislation is also presumed to contradict the provisions of the EAW.

Furthermore, Spain has declared that attempt and complicity must be also considered in the same way when applying the list of categories of offences enumerated in Art. 2(2) EAW, thereby doing away with double incrimination; see comments by Member States to Commission Report, *loc. cit.*, p. 37. The UK has also included this in its implementation law according to both Commission Reports; see Commission Staff Working Documents, *loc. cit.*, p. 7.

63) See s. 142(6) EA and Art 5(2) LOEDE. In fact, the EAW Framework Decision provides an annex to be completed by the issuing judicial authority that lists the information required for the ‘exchange’ of an EAW between Member States, and in this case it is only necessary to ‘tick’ the punishable offence; the LOEDE includes the same annex but not the EA, although the form annexed to the Framework Decision is used in practice by the issuing judicial authority in the UK.

64) In fact, Spanish law contemplates this testing of double jeopardy as optional; see Art 9(2) LOEDE, textually, ‘in all other events not included in the paragraph above … surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under Spanish legislation, whatever the constituent elements or however they are described’. Critical voices in Spain have pointed to an excess of judicial discretion because there are no guidelines for taking such judicial decisions; see A. Cuerda Riezu, *De la extradición a la ‘euro orden’ de detención y entrega* (Madrid 2003) p. 124 and J. Delgado Martín, ‘La orden europea de detención y entrega’, *Diario La Ley* (2005) 8 March pp. 1-10 at p. 9.
Dispensation of the double jeopardy principle has also been strongly criticized by some authors as being a violation of the principle *nullum crime sine lege* also guaranteed under Article 7 ECHR. It is nevertheless one of the most important developments introduced by the EAW regulation when compared with classical extradition procedures and is the result of mutual reliance on criminal legislation between Member States. In short, it implies a new ‘inter-state’ principle of

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criminal legality. Furthermore, in Spain at least, objections on the grounds of the excessive difficulty of drawing up a list of legally typified offences recognised in the legislation of all Member States that in turn refers to the offences enumerated in the EAW, have been – albeit partially – resolved by the jurisprudence of the Constitutional Court in relation to extradition proceedings. However, it may still be said that the double jeopardy principle continues to be a general rule in EAW proceedings, as reflected by the Framework Decision and its implementation within each member state.

With regard to the effective transmission of a European arrest warrant from one Member State to another and its transmission procedures, nothing new is detailed in the national rules. Consequently, as explained in the European rule, the transmission of the EAW within a particular time limit and its respective translation into any of the official languages of the executing Member State is


70) Arts. 8 and 9 EAW as well as Art 6(1) and 8 LOEDE and s. 142 EA.

71) Prescribed in Art. 8(2) EAW. See list of languages and time limits for EAW reception in each Member State in document n. 123736/1/04, 12 Oct 2004, COPEN 111, EJN 61, EUROJUST 82, according to which only Spanish is accepted by Spain and only English by the UK; in contrast, English is accepted by other Member States and several other languages for the execution of EAWs, specially in Nordic countries.

Mutual legal assistance tools for legal practitioners, such as Solon programme for the translation of juridical equivalences and others are available at <http://www.ejn-crimjust.eu.int/ejn_tools.aspx>. As pointed out by certain judicial authorities, language is an ever-present problem; in Spain, e.g., J.A. Espina Ramos, ‘La lucha contra la delincuencia organizada transnacional y su reflejo en el ordenamiento español, con especial referencia a la euroorden’, Revista del Ministerio Fiscal (2004) n. 12 pp. 9-47 at p. 32.
guaranteed between the judicial authorities of different Member States, regardless of the format in which the arrest warrant is presented. The decisions which lead to it being issued are not, strictly speaking, necessary requirements; Article 10 (4) EAW allows for all formats (fax, e-mail ...) subject to the condition that the method is safe, that it can be produced in the form of a written document and that the validity of the document can be verified. There are no specific rules on electronic communications written into the Spanish national implementation, whereas there are in sections 203-204 of the EA, which expressly permit faxed and electronic copies. In contrast, as regards the form used to issue an EAW, only the Spanish rule contains an application form in its annex that is to be completed by the issuing judicial authority and that mentions all of the legally required information. In practice, the UK uses the form annexed to the Framework Decision but a question mark still hangs over whether a request for surrender containing the required information might be refused were the form not used.

Time limits vary from one Member State to another and oscillate between 48 hours (e.g., Lithuania, Poland, Slovakia, and UK) to 40 days (Austria, Belgium, Czech Republic, Germany, and Hungary). On the contrary, the Spanish legislation does not provide for a delay for the receipt of the original of the EAW; however, Art. 10(2) LOEDE stipulates that the executing judicial authorities immediately request a translation of the EAW without delay.

Despite this, a special transmission is necessary to reach the judicial authorities in Gibraltar though the UK Government (Gibraltar Liaison Unit for EU – affairs of the Foreign and Commonwealth) according to the agreement between Spain and UK of 19 April 2000.

Some national authorities require that the EAW forms be accompanied by the national decision, however, this is not in line with the Framework Decision according to Commission Reports; see, for example, the first one on ‘practical implementation of the European arrest warrant – First overview of the State of play – Preliminary results’ presented in Brussels on 22 January 2004, JAI/D3/IJ D (2004), p. 3.

The most surprising case is the Italian legislation, which states that the EAW form shall be accompanied by additional documents such as a copy of the applicable provisions, information regarding the sources of evidence, all personal identification available … as well as the decision of the issuing judicial authority on which the EAW is based; see Art. 6(4) Legge 22 Aprile 2005 n. 69.


Documents sent by facsimile and other electronic means; see J.B. Knowles, op. cit., p. 51. On the contrary, Art. 7 LOEDE only reproduces the general text adopted in Art. 10(4) EAW.

Art. 3 LOEDE in identical terms to Art. 8 EAW.

See L. Ang, loc. cit., p. 53, in final consideration that in order ‘to reduce all risks, one should work as much as possible within the confines of the model’. See comments by UK to Commission Report, loc. cit., p. 105 in defence of an implementing law going beyond the EAW by providing more detailed information; it also confirms the use of the EAW form annexed to EAW.
The issuing judicial authority has the option of issuing an alert for the wanted person in the Schengen Information System (SIS)\textsuperscript{78} although the SIS system is as yet unavailable in UK and for this reason information is currently sent out in the form of an ‘Interpol diffusion’ to several or all Member States.\textsuperscript{79} In Spain, Interpol may be called even if it is not possible to use SIS,\textsuperscript{80} as set out in Article 10 (3) EAW; practical experience relative to this point has shown that most EAW transmissions are done automatically via Sirene.\textsuperscript{81} Nevertheless, neither of the national implementation texts on EAW make any reference to the contact points of the European Judicial Network existing in Member States as a procedure for transmitting a European Arrest Warrant when the competent executing judicial

\textsuperscript{78} Arts. 9(2) and (3) EAW according to Arts. 92-119 Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders; explicitly, Art. 95 as is indicated in s. 212 EA. See M. Jimeno-Bulnes, ‘Las nuevas tecnologías en el ámbito de la cooperación judicial y policial europea’, Revista de Estudios Europeos (2002) n. 31 pp. 97-124 at p. 117.


\textsuperscript{80} Art 6(5) LOEDE; recourse to Interpol is explicitly provided for in other national EAW implementations, e.g., § 16(2) \textit{Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union} (EU-JZG) approved in Austria on 30 April 2004. At first, it was argued that sending an EAW through Interpol using the ‘red form’ could raise difficulties because it is not recognized as a channel for a formal request in all Member States according to Art. 9 EAW; see first Commission Report on 2004, \textit{op. cit.}, p. 3. In Spain, perhaps for this reason, the EAW Protocol provided by the Minister of Justice recommends that this alert be sent to both offices, which has become current practice.

\textsuperscript{81} See official statistics; all the previously mentioned 519 EAWs issued by Spain and the 131 EAWs issued by the UK were transmitted via SIS and/or Interpol. Also, specifically on this matter, J.M. de Frutos, ‘Transmission of the European Arrest Warrant. Police aspects form a practical point of view’, \textit{International Conference: the European Arrest Warrant} (Toledo 8-11 November 2004), available at \textit{<http://www.espaciojudicialeuropeo.com/eaw>}. Just in recent days an amendment of the Sirene Manual has been taken place by Comisión Decisión of 22 September 2006, OJ 16 Nov 2006 L317 pp. 1-2.
authority is unknown, as is set out in the European rule. In Spain, the suggestion that copies be sent to the CGPJ was not accepted and at present, they are sent only to the Ministry of Justice as the sole central authority.

Finally, there are some special provisions in EAW national implementations concerning conditional and temporary surrenders. On the one hand, the EA contemplates conditional surrender as envisaged in Article 24 (2) EAW, and so makes provision in section 143 for an undertaking – given in this case by the Secretary of State instead of the British judicial authority issuing the EAW – to return wanted persons who are serving a sentence in the executing Member State. It is clearly stated that the person must be returned to serve the remainder of a sentence after ‘the conclusion of the proceedings against him for his offence’ if it is an accusation case, or, after having served the respective sentence in the UK, if it is a conviction case. The wanted person must be returned to the executing member State ‘as soon as is reasonably practicable after the sentence imposed’ and there is even the possibility in such accusation cases of the wanted person serving the sentence outside the UK, i.e., in the territory of the executing Member State. Moreover, the EA strictly guarantees the immediate discharge of the person if his return is delayed, unless there is a ‘reasonable cause’.

The Spanish law, on the other hand, regulates an aspect that is also included in the original European rule, which allows the Spanish issuing judicial authority

82) Art 10(1) EAW according to Council Joint Action 98/428 of 29 June 1998 on the creation of a European Judicial Network, OJ 7 July 1998 L 191 pp. 4-7. In Spain, the inclusion of such possibility was suggested in the CGPJ Report.

On the contrary, the national implementation on EAW provided by other Member States provides for such possibility, e.g., Art. 33(4) Belgian Law.

83) Art. 7 LOEDE. Copies are specifically sent to the Subdirectorate-general for International Judicial Cooperation (Subdirección General de Cooperación Jurídica Internacional).

84) Although the provision is in fact made in relation to the execution of EAW and surrender proceeding, the same prescription is useful for issuing EAW proceedings. In relation to this point, see H. Lensing ‘The European Arrest Warrant and transferring execution of prison sentences’, in R. Blekstoon and W. van Ballegooij, op. cit., pp. 209-216.

85) In relation to the return to the UK to serve the sentence, see J.B. Knowles, op. cit., 151-162.

86) Respectively, ss. 143(3) and (5).

87) S. 144(2) EA.

88) S. 144(4) EA.

89) Art. 18 EAW. In contrast, the UK has not transposed this point into the EA; instead, general provisions are contained in s. 47 of the Crime (International Cooperation) Act 2003 (CICA) in implementation of Art. 9 Mutual Legal Assistance Convention 2000, which shall be applied in order to make temporary transfer of prisoners held in the UK to assist investigations in other participating states. The Commission Reports point out that it is only a ‘partial implementation’ and in reply
to request a ‘temporary surrender’ while a procedure for definitive surrender is underway in the executing Member State.\textsuperscript{90} The LOEDE specifies the purpose of such a temporary surrender, exclusively envisaged to conduct criminal proceedings or the trial or hearing according to criminal law provisions in the LECrim.\textsuperscript{91} Lastly, it envisages the possible presence of the issuing judicial authority in the executing Member State in order to hear the wanted person, a suggestion that has also been reasonably criticized\textsuperscript{92} because of the delays that such displacements might cause and because of the possibility of using other resources, such as video conferences. This latter alternative was initially provided for in the first draft of the EAW\textsuperscript{93} as well as in other European and national texts, specifically in Article 10 (9) Convention on Mutual Assistance in Criminal Matters, 29 May 2000\textsuperscript{94} and now in the LECrim.\textsuperscript{95}

4. Executing a European Arrest Warrant: Surrender Procedure

The execution of an EAW by a competent national judicial authority is conditioned by the same requirements established for its issue, discussed in the previous section,

\textsuperscript{90} Art. 8(1) LOEDE.

\textsuperscript{91} In Spain, the presence of the accused is legally required during the criminal trial and only exceptionally can the hearing take place in his absence when the requested punishment is less or equal to two years of imprisonment or six years if it is of a different nature (Art. 786.1 LECrim).

\textsuperscript{92} For example, R. Castillejo Manzanares, \textit{op. cit.}, p. 4.

\textsuperscript{93} Art 34 Proposal EAW. See also a favourable opinion in F. Siracusano, \textit{loc. cit.}, p. 926.


Regarding videoconferencing provisions, see especially B. Piattoli, \textit{op. cit.}, p. 168.

which relate to the different legally available punishments. Thus, Article 5 EAW is replicated by Article 9 LOEDE in much the same way as sections 64 and 65 EA, which deal with accusation and conviction cases, respectively. By choosing to differentiate between issuing and executing authorities, the national rules employ a different system to the one described in the European Framework Decision.

4.1. Preliminary Measures

Before the proceedings for the execution of an EAW can properly get underway, preliminary steps must be taken. In the case of Spain, Article 10 LOEDE reminds us that exclusive competence to execute these ‘Euro-warrants’ falls on the JCI, or on the Criminal Division of the AN whenever the arrested person refuses to consent to the surrender process. By the same token, admission of an EAW is subject to its translation into Spanish (the absence of which is enough to adjourn the proceedings without further justification) unless its reception is through an SIS alert, in which case, the Central Investigative Judge will do the translation ex officio without interrupting the proceedings. In contrast, no translation requirements are specified in section 2 EA, except for those that relate to the information that should be contained in the statement: identity, circumstances of the offence, sentence and other matters, in implementation of Article 8 EAW. However,

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96) See above categories a), b) and c). One particularity according to s 65(2) EA for executing judicial authorities in the UK is the allowance in conviction cases to proceed against offences, where the sentence of imprisonment or another form or detention has a minimum term of 12 months instead of the usual term of 3 years prescribed in general terms in Art. 2 (2) EAW; the same term is also specified in s. 64 in the context of accusation cases. This difference stipulated in the UK implementation is not of course barred in any way by the European rule and is accepted by the Commission; see previous both Commission Staff Working Documents.

97) Art. 18.2 LOEDE. See also above chapter 2.

98) Because Spanish is the only language accepted by the Spanish Courts according to previous document n. 12736/1/04, loc. cit., p. 4. For a criticism addressing this formal requirement see R. Castillejo Manzanares, loc. cit., p. 3. Incidentally, translation is required into the Spanish but not into the other co-official languages (Basque, Catalan and Galician); also it may be presumed that these translations should be carried out by the Spanish executing judicial authority. For a contrary view, M. Montón García, ‘La ejecución en España de órdenes europeas de detención y entrega’, La Ley Penal (2005) n. 14 pp. 41-52 at p. 45 considers that a translation into Basque, Catalan and Galician by the issuing judicial authority is feasible.

99) Remember that another particularity of the EA is the transmission of two documents in an EAW, statement and certificate, the latter issued by an authority designated by the Secretary of State, i.e., the National Criminal Intelligence Service and the Crown Agent of the Crown Office in Scotland. Each EAW received in the UK must be certified by one of these designated authorities before it may be executed in the UK.

100) In Spain, Art. 3 LOEDE makes general provisions for issuing and executing EAW.
despite the provision in the same European rule that refers to translations into one or more of the official languages, both the UK and Spain have indicated that a translation deposed at the General Secretariat of the Council must be into their own national language.\textsuperscript{101}

Furthermore, the grounds for mandatory and optional non-execution of an EAW in Spain are similar to those included in the European rule.\textsuperscript{102} A quite different

\textsuperscript{101} Art. 8(2) EAW. Some other Member States have specified several official languages for the translation of the document; English, of course, is the most widely used. See previous document n. 12736/1/04.

\textsuperscript{102} Arts. 3 and 4 EAW contemplated jointly in Art. 12 LOEDE. According to the official statistics for 2005, Spain refused to execute 17 EAWs and its grounds for refusal were double jeopardy, statute-barred and \textit{ne bis in idem}; in the UK there were 12 cases of refusal in addition to 14 on the grounds of double jeopardy, expiry of the time limit for prosecution, insufficient information concerning the conduct, voluntary appearance before the issuing judicial authority, and conduct not constituting an extradition offence.

These optional aspects lead to divergent judicial opinions concerning the execution of EAWs in Member States. Some examples are given in relation to the grounds specified in Art. 7 a) EAW, i.e., ‘offences regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State’; the National Court in Spain executed an EAW issued by a Finnish judicial according to a decision rendered on 10 Feb 2004, but the French Appeal Court in Pau refused the execution of an EAW issued by judge Baltasar Garzón (JCI n. 5) in a ruling given on 1 June 2004. See both decisions \textit{Foro Italiano} (2004) n. 5 IV p. 286 and \textit{Foro Italiano} (2004) IV n. 10 p. 506 respectively, commented by G. Iuzzolino.

On the contrary, the same argument of ‘extraterritoriality’ was argued under s. 65 EA by the defence counsel in the case \textit{Office of the king’s prosecutor, Brussels v. Armas and others}; but the refusal of extradition by the commitment of part of the criminal act in UK set out by the District Judge on 26 July 2004 was reversed on appeal by the Office of the King’s Prosecutor in Brussels before the High Court in August 2004 (2004) EWHC 2019 Admin, in the consideration that ‘principal criminal activities and consequences occurred in a category 1 territory’ (n.25); a subsequent appeal by Eddison Rodrigo Cando Armas before the House of Lords was afterwards dismissed on 17 Nov 2005, (2005) UKHL 67. UK jurisprudence is also available at web pages <http://www.hmcourts-service.gov.uk/cms/judgments.htm> and <http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm> for the House of Lords judgments.

Also, some of these grounds for optional non-execution of the EAW have been transposed as mandatory ones in the different national implementations; see the comparative study in Commission Staff Working Documents. One of the most restrictive transpositions is the Italian one; Art. 18.1 Law n. 69 provides 20 mandatory grounds for non-execution of EAWs, including some some even not contemplated by the European rule (e.g., pregnancy or care of children under 3 years old).

approach is found in Section 11 of the EA under the title of ‘Bars to Extradition’, in which the supplementary grounds for non-execution of an EAW specifically refer to the following points: *ne bis in idem*, passage of time, age, speciality rule (which can afterwards be waived), earlier extradition, and two other special considerations, known as ‘extraneous considerations’ and as ‘hostage-taking’. A particular problem arises in the UK relating to the ‘double jeopardy’ clause or *ne bis in idem* principle; section 12 EA requires that the specific offence must also be an offence in the UK in fulfilment of the double jeopardy principle, which is neither found in Article 3 (2) EAW nor in ECJ jurisprudence (joined cases *Gozütok and Brügge*). The UK’s implementation of both these points has been considered

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103 S. 13 contemplates the presumption of prejudice by reason of race, religion, nationality, gender, sexual orientation or political opinion in implementation of the Preliminary Recitals, point 12, EAW. Similar clauses are provided in other national legislations, ie, s. 13(d) Cypriot Law, s. 10h Danish Law, s. 5(1)(2), Finnish Law, Art. 11(e), Greek Law, ss. 37(1)(c)(i), Irish Law, and Art 18(1) Italian Law, Art 12 (g) Slovenian Law … In Spain, however, a similar provision is only found in Art 5 (1) LPE.

Remember also Arts. II-81(1) TECE and 14 ECHR in relation to discriminatory prohibition due to these and other reasons.

104 In fact, if extradition does take place, the provisions of s. 16 might conflict with s. 1 Taking of Hostages Act 1982 when the issuing Member State is also a party to the Hostage Taking Convention signed at New York on 18 December 1979. The UK Government justifies the inclusion of s16 in order to ‘meet (UK’s) international obligations’; see Members States’ comments to Commission Report, *loc. cit.*, p. 103


as running contrary to the Framework Decision in two successive Commission Reports presented in 2005 and 2006.\textsuperscript{106}

In contrast, and perhaps even more surprising, is the Spanish implementation of Article 5 EAW. The Spanish law only echoes two of the three guarantees that are to be given by the issuing Member State in particular cases contemplated in the European rule. Put another way, Article 11 LOEDE fails to refer to the case of surrenders based on \textit{in absentia}\footnote{According to the European rule, ‘surrender \textit{may be subject} (our italics) to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European Arrest Warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment’ (Art 5.1 EAW). Faced with this optional choice, the Spanish implementation chose to implement the European rule, as did the Latvian legislation; see Commission Staff Working Documents, \textit{loc. cit.}, pp. 8 and 9 respectively. The latter provision, which is not recriminatory by the Commission, is also contemplated in s. 14 Maltese Extradition Law. Also J.R. Spencer, \textit{loc. cit.}, pp. 214-216 for a general criticism of bars to extradition identified in the UK implementation. See also arguments set out by UK in Members States’ comments to Commission Report, \textit{loc. cit.}, p. 103.} rulings made in the issuing Member State.\textsuperscript{107} Not all of the guarantees required by Article 5(1) ECHR are met, perhaps because of a political desire to proceed with the surrender of persons declared guilty \textit{in absentia}, in much the same way as EAW legislation in Italy,\textsuperscript{108} although Italy does provide

\textsuperscript{106) See Commission Staff Working Documents, \textit{loc. cit.}, pp. 8 and 9 respectively. The latter provision, which is not recriminatory by the Commission, is also contemplated in s. 14 Maltese Extradition Law. Also J.R. Spencer, \textit{loc. cit.}, pp. 214-216 for a general criticism of bars to extradition identified in the UK implementation. See also arguments set out by UK in Members States’ comments to Commission Report, \textit{loc. cit.}, p. 103.

\textsuperscript{107) For a comment on the European clause, see D. Krapac, ‘Verdicts \textit{in absentia}’ in R. Blekxtoon and van Ballegooij, \textit{op. cit.}, pp. 119-135; also, F. Siracusano, \textit{loc. cit.}, p. 915 for a critical view in relation to the right to have a trial in a ‘reasonable time’ according to Art. 6 ECHR.

\textsuperscript{108) Art. 420-quater \textit{Codice di Procedura Penale}. See also criticisms by R. Castillejo Manzanares, ‘La orden de detención y entrega europea. El sistema de garantías de los ciudadanos de la Unión’, \textit{Diario La Ley} (2004) 27 Dec n. 6155 pp. 1-5 at p. 4. For this reason, such causes argued by the defence have been dismissed by the Spanish executing judicial authority; for example, the argument used by the AN in Order n. 35/2004, 13 May (JUR 2004/241563). In such cases, the AN considered that French legislation provides a sort of ‘nullification’ appeal against judgments pronounced \textit{in absentia}. By opposite a recent constitutional decision has estimated a defence appeal on this ground in consideration of FWD dispositions according with \textit{Pupino} judgment (although this one is not mentioned); see STC 177/2006, 5 June. Same constitutional decision dismissed such defence appeal on the ground of \textit{res indicata} argued by the defence because
such guarantees\textsuperscript{109} as does Spanish legislation for classical extradition proceedings\textsuperscript{110} and so as might be expected does the EA.\textsuperscript{111} The Commission has recently pointed to the relevance of such \textit{in absentia} (or default) judgments, which will probably be the subject of a Green Paper in the near future.\textsuperscript{112}

Section 21 EA shows concern for the protection of Human Rights in that it requires a prior decision by the executing judicial authority on the compatibility of the ‘extradition’ or EAW execution and the ‘Bill of Rights’ provided in ECHR Section 21 EA shows concern for the protection of Human Rights in that it requires a prior decision by the executing judicial authority on the compatibility of the ‘extradition’ or EAW execution and the ‘Bill of Rights’ provided in ECHR.

\textsuperscript{109} Art. 19(1)(a) Italian Law.


\textsuperscript{111} s. 20 EA. According to both Commission Reports, it is argued that the UK imposes additional conditions in relation to the right to legal assistance and the examination of witness in s. 20(8) EA that are not envisaged in the EAW; see Commission Staff Working Documents, \textit{loc. cit.}, pp. 12 and 13 as well as UK response, \textit{loc. cit.}, p. 104.


within the meaning of the Human Rights Act 1998. The Spanish law includes nothing that is remotely similar, nor does it include any reference to the protection of fundamental rights, despite such concerns being echoed in other national implementations on EAW. A legal justification exists according the European rule, although it might well be a means of making up for the latter omission of the guarantee relating to in absentia trials by assuming that all Member States are also parties to the Rome Convention 1950. In contrast, UK legislation has followed the legal precedent set by Ramda v. Secretary of State for the Home Department.

113) See s. 4(2) Human Rights Act 1998 (c. 42) providing for declarations of incompatibility, but only applicable to the courts named therein; for which reason, the special provision of s. 195 EA stipulating the competence of an ‘appropriate judge’ for EAW execution. Also, s. 25 EA provides a singular clause to decide on the execution of a concrete EAW in relation to the physical and mental condition of the arrested person. Criticism of s. 21 EA is voiced by J.R. Spencer, loc. cit., pp. 216 and 217 insofar as such a provision ‘is not in accordance with the spirit of the Framework Decision’ and that ‘the inclusion of section 21 in the Extradition Act was largely inspired by the desire to protect against injustice and human rights abuses, which is good. But behind it there also lurks a smug sense of cultural superiority which is less pleasing’.


114) E.g., § 19(4) Austrian Law, s. 5(1)(2) Finnish Law, s. 37(1)(a) (a) Irish Law (n 42), Art. 11 Dutch Law, s 4(2) ch.2 Swedish Law… for a more extensive picture, see Commission Staff Working Documents, loc. cit., p. 5.

115) Explicitly, Art. 1(3) EAW. Art 49. of the former EAW Proposal included a ‘safeguard clause’ in this sense, providing for the temporal suspension of the EAW proceedings in case of a violation of human rights under Art. 6 TEU; this clause was finally suppressed. Criticism of its suppression and, specifically, the absence of provisions on the obligation not to surrender an individual in the cases referred to in Art. 3 ECHR (torture or to inhuman or degrading treatment or punishment) is regretted by the Committee on Civil Liberties, Justice and Home Affairs; see Working Document on the impact of the European arrest warrant on fundamental rights, 22 Sept 2005, PE 362.745voi-00, p. 4.

116) R v. Secretary of State for the Home Department, ex parte Ramda, judgment of 27 June (2002) EWHC 1278 (Admin), in which the High Court squashed the Secretary of State’s decision to extradite Ramda to France due to questionable evidence and, therefore, a violation of the guarantee to a fair trial provided by Art 6(1) ECHR; the High Court ruling was made on the grounds of incompatibility with ss. 4(1) and (5) HRA. Although subsequent appeals eventually led to his extradition to France; see information provided on <http://uniset.ca/other/cs5/ramda.html>.
which considers that being party to an international convention is not sufficient to guarantee the fairness of the trial and has specifically implemented Article 1 (3) EAW.117 The Soering ECtHR rationale118 should therefore be applied not only to extradition but also to surrender proceedings in states that are signatories to the ECHR and it should be used as a final reason to reject the execution of an EAW on the grounds of a violation of fundamental rights.119 In relation to the Spanish default provision, one can assume that the Constitutional Court would be prepared to quash a judicial decision to execute an EAW, were there a real risk of a breach of human rights based on an impartial reading of the facts.120

4.2. Arrest warrant practice

The procedure to exercise the arrest warrant of the requested person is also of interest because of its special provisions.121 The EAW implementations in Spain and the UK tread carefully when it comes to the enforcement of custody or ‘detention’, i.e., the execution of the arrest warrant by the police and the application of legal custody until the person is brought before the ‘appropriate judge’. As for the procedural guarantees, the most important is, without a doubt, the right of the arrested person to be assisted by a legal counsel and interpreter122 if necessary, as

117) This precept recalls the ‘obligation to respect fundamental rights and fundamental legal principles as enshrined in Art 6 TEU’; a further mention is also made in the Preliminary Recitals, point 12, EAW.
120) See S. Alegre, ‘Defence rights in implementation of the European Arrest Warrant: a comparative view between the UK and Spain’, JUSTICE briefing, at p. 4. This point will be dealt with later on.
121) Known in Spain as ‘detención’ (preventive custody). Logically, there is a reference in the LECrim as to the form and guarantees when practicing this sort of preventive custody, specifically Arts. 489-501 and 520-527 LECrim respectively, which are referred to in Art. 13(1) LOEDE. As to the form of this arrest, it may be carried out by the judicial authorities, the police or even by private citizens; which is in our view a ‘judicial detention’ of sorts, resulting from the request of the issuing judicial authority of a Member State. See M. Jimeno-Bulnes ‘La adopción de medidas cautelares de carácter personal con motivo de la ejecución de una orden europea de detención y entrega’ Revista Penal (2005) pp. 106-122 at p. 108 (a previous French text is also available at http://www.espaciojudicialeuropeo.com/eaw>, menu seminars, seminar 2004).
122) See ss. 58 and 59 Police and Criminal Evidence Act (PACE) 1984 (c. 60) and Arts. 520 c) and d) LECrim. Firstly, the right to be assisted by a legal counsel in Spain includes the presence of a lawyer, who provides legal counsel, and a ‘procurador’ or barrister-at-law, who speaks before the court; secondly, the right to be freely assisted by an interpreter has been often recognized by the jurisprudence of the Constitutional Court as part of the right to a defence; ie, STC 71/1988, 19 April, following...
as the right to be informed about the EAW and its contents. In both national implementations, however, such information is not provided by counsel but by the judicial authority. All these rights are contemplated in Article 11 EAW and assistance by counsel and an interpreter are specifically mentioned as rights in Articles 2-6 of the Council Framework Decision in the context of criminal proceedings throughout the European Union.

From the Spanish point of view, see F. Jiménez Villarejo, ‘El derecho a un abogado y a un intérprete’, International Conference: ‘La orden de detención europea, op. cit., <http://www.espaciojudicialeuropeo.com/eaw> (printed publication forthcoming), and J. Delgado Martín, ‘La orden de detención europea y los procedimientos de entrega entre los Estados miembros de la Unión Europea’, in A. Galgo Peco, ed., Derecho Penal supranacional y cooperación jurídica internacional (Madrid) 2004 pp. 281-380 at p. 340, on the general procedural guarantees for the EAW. Also M. Martín Martínez, loc. cit., pp. 196-199 and V. Moreno Catena, loc. cit., pp. 157-161, in defence of the right of freedom by the requested person too and in criticism of the Spanish regulation on this subject; such right of freedom has been already guaranteed by STC 99/2006, 27 March.

In general, on the right of the arrested person held in custody at a police station to consult a solicitor under Art. 58(1) PACE 1984 see J. Sprack, op. cit., p. 39 and S. Uglow, op. cit., p. 266; also A. V. Sheehan and Dickson, op. cit., p. 80-81 in relation to s 17(2) Criminal Procedure (Scotland) Act 1995 (c 46). Also, for a general view about procedural guarantees under police detention in Spain, S. Barona Vilar, ‘Garantías y derechos de los detenidos’ in F. Gutiérrez-Alviz Conradi, and E. López López, eds., Derechos Processales Fundamentales (Madrid 2005) pp. 51-96.

However, some national EAW implementations have not transmitted any provision in respect of the right to an interpreter and only refer to the right to legal counsel; that is the case of ss. 20 Finnish Law and ss. 11 Maltese Law.

As pointed out earlier, a constant problem is the time limit for detention, from the time of the arrest up until the appearance before the judicial authority.\(^\text{125}\) According to section 4 (3) EA, ‘the person must be brought as soon as practicable before the appropriate judge’ and, in any case, within 48 hours from the time of arrest\(^\text{126}\); also contemplated in other member state implementations of the EAW.\(^\text{127}\) A discussion took place in Spain during the adoption of Article 13 (2) LOEDE because the Preliminary Draft contemplated a maximum term of 24 hours as laid down by procedural rules in Article 496 LECrim, and the same term may be found in many other Member States’ draft implementations.\(^\text{128}\) Unfortunately, this maximum period was increased to 72 hours in the definitive text, as stipulated in the Spanish Constitution (Article 17.2), following the suggestion contained in the CGPJ Report.\(^\text{129}\)

The problem arises now because Article 13(1) LOEDE sets out EAW procedures for detention in reference to the LECrim.\(^\text{130}\) The question in domestic law had been raised once before in order to determine the maximum length of time

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\(^\text{125}\) M. Jimeno-Bulnes, *Diario La Ley*, p. 4.

\(^\text{126}\) S. 6 (3) EA. See also s 46 (2) PACE in relation to detention after charge as well as J. Sprack, *op. cit.*, p. 16. Detention without charge according to ss. 41 and 43 PACE has posed greater problems; see case ECHR *Brogan v. the U.K.*, (1988) 11 EHRR 117, on November 29, where the European Court, in defining the meaning of the term ‘promptly’ employed in Art. 5.3 ECHR, ruled that bringing the arrested person before the court more than 4 days after arrest is unacceptable.

\(^\text{127}\) Art. 695-27 *Code de procédure pénale* under the amendments brought about by Law n. 2004-204 of 9 March in France; Art. 16 Portuguese Law n. 65/2003 of 23 August; s. 15 Slovakian Law n. 403/2004 Coll. of 24 June; Art 18(2) ZENPP in Slovenia …

\(^\text{128}\) Art. 11(1) Belgian Law; s. 17(1) Cypriot Law; s. 13(3) Irish Law (n 42); Art. 11(1) Italian Law; Art. 8 Law of Luxembourg …

\(^\text{129}\) The author cannot agree with the idea expressed in the CGPJ Report that the 72 hours time limit represents a ‘pacific opinion’ as it was pointed there. Certain constitutional jurisprudence may be cited in support of the 24 hours argument; ie SSTC 76/1983, 5 August, FJ. 4, 31/1996, 27 Feb, FJ. 8 or even 224/1998, 24 Nov, qualifying police detention of 25 hours as ‘illegal’. One special exposition of different arguments, which reveals the ‘unpacific question’ (our italics) of the limit term of the police detention is made by M. de Hoyos Sancho, *La detención por delito, op. cit.*, p. 190.

The same term is provided in s. 10 Hungarian Law. Finally, there is another group of national implementations which do not specify a fixed term but require the presentation of the requested person before the judicial authority ‘without delay’, ie, s. 18(1) Finnish Extradition Law and Art. 15(1) Greek EAW Law.

\(^\text{130}\) As stated, 24 hours according to Art. 496 LECrim.
a suspect may be held in police detention because of the contradictory terms set out in LECrim (24 hours) and the Constitution (72 hours), which lies behind the amendment of the Spanish law. There is nothing to prevent lawmakers from amending procedural rules within the limits of the constitutional provision and it can only be assumed that the 24 hour time limit still be in force. On the other hand, any legal provision of a longer detention period – i.e., 73 hours – would of course be unconstitutional. Lastly, there is also a special rule on the arrest warrant relating to particular cases, such as forming part of, or aiding and abetting armed gangs or individual acts of terrorism. In these cases, preventive police detention is a straight 72-hour period, which can be extended by a further 48 hours, to make a total of 5 days in custody (Article 520 bis.1 LECrim).

As a final consideration, it should be remembered that the LOEDE sets the time limit for police detention at 24 hours when executing extradition proceedings, which is, the same as is set out in the provisions of the LECr. Specifically, Article 8 (2) LEP requires that the arrested person be taken to the Central Investigative Judge on duty within a period of no more than 24 hours, who will then take a decision regarding preventive custody. Other intermediate solutions are also possible, i.e., judicial presentation before the nearest Investigative Judge under exceptional circumstances as used in conventional extradition proceedings, which have also been suggested for EAW proceedings. In conclusion, we regret the change to Spanish law, which as suggested by the CGPJ Report, extends the maximum detention time limit for the execution of an EAW to 72 hours instead of the initial provision of 24 hours.

4.3. EAW execution procedure

The key stage in the EAW execution procedure is the hearing of the arrested person before the executing judicial authority, the nature of which will differ

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131) Also, V. Gimeno Sendra Derecho Procesal Penal (Madrid 2004) p. 274 with many constitutional jurisprudential references and, especially, M. de Hoyos Sancho, op. cit., p. 199.
132) Art. 384 bis LECrim, which stipulates the suspension from public duties of the accused while in preventive custody; this has been the case of some (former) Herri Batasuna deputies.
133) For example, due to geographical distances (police detention takes place in insular territory) structural reasons (bad communications in some peripheral areas) or even harsh weather (snowbound areas in the north of Spain). Suggestions on this point are made in the Spanish EAW Protocol prepared by the Ministry of Justice.
134) Initial and extradition hearing, respectively, in the UK implementation; see ss. 7-21 as well as 68 EA. Regulation in EAW provides explicitly just one hearing under Art. 14 EAW when there is no consent to the surrender by the requested person; but such consent (or not) must also be explicitly expressed before the executing judicial authority according to national law under Art. 15(19) EAW.
according to whether or not the arrested person consents to the surrender, as laid down in Art 14 EAW. National implementations in both Spain and the UK detail the conditions under which this initial hearing shall take place and make special provision for the assistance of legal counsel.  

The first question to be put to the arrested person must be whether he or she consents to the surrender. This is a crucial step, because according to the European rule such irrevocable\(^{136}\) consent determines future procedure on the surrender, relating more than anything else, to its time frame\(^ {137}\) and to the judicial authority that will pronounce the definitive decision on surrender in Spain.  

The second question concerns renunciation of the entitlement to the ‘speciality rule’, which

\(^{135}\) Art 14(1) LOEDE, which refers back to Art 386 LECr, and s 45 EA. In Spain, the right to legal counsel must be interpreted as the right to exercise free will in the appointment of counsel, as stressed by the Spanish Constitutional Court in a recent ruling made on 20 December 2005 (STC 339/2005). The constitutional decision makes important distinctions between the legal assistance available to those held in police custody according to ordinary procedural rules as opposed to international rules (ie, Arts. 5 and 6 ECHR), thereby establishing a superior category and additional requirements for legal counsel relating to the judicial proceedings that are underway, as part of the ‘due process of law’. The same protection must be guaranteed for judicial hearings under EAW rules, as there are no restrictions on the appointment of legal counsel written into Spanish law. A similar statement reinforcing the latter is made in STC 81/2006, 13 March. See comments by F. Calvo Pastrana, ‘Sobre la asistencia letrada por abogado de oficio en los procedimientos judiciales derivados de la Ley 3/2003, de 14 de marzo (Orden Europea de Detención y Entrega). Comentario a las recientes sentencias del Tribunal Constitucional n. 339/05, de 20/12/05 y n° 81/06, de 13/03/06’, Otrosí (2006) n. 78, pp. 14-17.

\(^{136}\) Although Art. 13(4) EAW envisages a possible renunciation of this consent, nothing in this sense is provided in the EA or in Spanish law; on the contrary, s. 45 (4)(c) EA and Art. 14(2) LOEDE insist on its irrevocable nature. Most national EAW implementations have stipulated that consent to surrender is not revocable; with the exceptions, for example, of Art. 13(4) Belgian Law as well as ss. 30 Danish Law, 15 Irish Law, 30 Finnish Law, 9 ch.4 Swedish Law.

\(^{137}\) See Arts. 17 EAW and 19 LOEDE as well as s. 46 EA.

\(^{138}\) According to Art. 18 LOEDE, JCI if consent is forthcoming, otherwise the AN. In the latter case, a real ‘trial’ takes place, as part of the hearing still before the JCI, because the parties will be heard as well as the prosecutor and all of them can propose evidence according to Arts 14(2)(IV), 14(3) and 14(4) LOEDE; such trials have been referred to as ‘detention trials’ and have been criticized by some practitioners due to the long delays they have on surrender proceedings and because competence is attributed to another court when a simple provision for an appeals process against the JCI decision on surrender would perhaps suffice; see comments by judge Garzón, loc. cit., p. 5.

On the other hand, the UK regulation also contemplates consent to other offences being dealt with after extradition, and provides a further hearing (consent hearing) within a 21-day time limit; see ss. 54-59 EA. Generally, on consent to extradition under EA, see for example J.B. Knowles, op. cit., pp. 141-149.

According to official statistics for 2005, 193 persons in Spain and 35 in UK consented to surrender; in contrast, 237 persons in Spain and 42 in UK did not consent to the surrender.
determines whether or not ‘the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered’ may be considered. A particular provision according to section 45 (3) EA is that a person who consents to extradition is considered to have waived his right to the speciality protection provided therein. However, the speciality rule is not applied where there is a specific declaration by the executing Member State or if various circumstances are present, as laid down in Articles 27 and 28 EAW.

There are legal provisions in the EAW execution procedure regarding other circumstances; for instance, concurrent EAWs issued by two or more Member States and the concurrence of an EAW and an extradition request by a third country, the respective decisions on which are taken by the judicial authority a quo and the executive in Spain and England. In this case, Article 16 EAW refers to a decision taken by the ‘competent authority of the executing state’ following due consideration of the circumstances, and indicates that the advice of Eurojust

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139) Arts. 27(1) EAW and 14(2) LOEDE as well as s. 45(3) and 54 EA. For more extensive commentary on the ‘speciality rule’, see S. Alegre and M. Leaf EAW, op. cit., p. 47 as well as, in general, A. Jones, op. cit., p. 60 and I. Stanbrook and C. Stranbrook, op. cit., p. 47; in Spain, for example, R. Bellido Penadés La extradición en Derecho español (normativa interna y convencional: Consejo de Europa y Unión Europea) (Madrid 2001) p. 91.

140) Whereas Art. 13(1) EAW and, more explicitly Art 14(2) EAW differentiate between consent to the EAW and consent to the speciality rule, as do § 20(2) Austrian EU-JZG, Art 13(1) Belgian Law, ss. 10(3) and (4) Maltese Law … As pointed out by the Commission, such a rule deriving from the application of Art. 7 1995 Simplified Extradition Convention, engenders the risk that ‘consented surrender in such countries may be less common than in other countries and thus the efficiency of the surrender procedure may be reduced’; see Commission Staff Working Documents, op. cit., pp. 19 and 20 respectively. In contrast, the UK answer estimates that there has been no ‘noticeable reduction in consent’ to EAW requests; see comments to Commission Report, loc. cit., p. 106.

141) As there is a large list of circumstances, the exceptions to the speciality rule are more often than not applied, meaning that such specialty rule is not enforced; see again S. Alegre and M. Leaf, EAW, op. cit., p. 49 and in relation with Art. 24 LOEDE, R. Castillejo Manzanares, AJA, loc. cit., p. 5. According to last Commission Report, only Austria and Estonia have used the possibility of notification under Art. 28(i) EAW; in contrast, the Commission believes that UK legislation allowing refusal of surrender on the grounds of the specialty rule if there is no special arrangement with the issuing Member State is contrary to EAW rules. See Commission Staff Working Document, loc. cit., p. 29 and comments by UK government, loc. cit., p. 112.

142) Identical content in Art. 23 LOEDE; the regulations in ss. 44, 48-53 and 179 EA is more detailed.

may be sought in the first instance. There is a further provision, which is more explicitly detailed in the Spanish regulation, concerning ‘temporary surrenders’ while a procedure for definitive surrender is being carried out, which should have the same objectives and form as the latter EAW.\footnote{144} This provision deals with the conditions for receiving the statement on persons arrested in Spain sent out by the issuing judicial authority in Europe whenever this is a viable option instead of ‘temporary surrender’ to the issuing Member State.\footnote{145} It guarantees assistance from a legal counsel and an interpreter, as well as the right to the common law privilege against self-incrimination. On the other hand, the UK regulation contemplates the withdrawal of an EAW by the issuing judicial authority,\footnote{146} a situation, which is not provided for in the Spanish law or, for that matter, in the European rule.

Also of interest is Article 12 EAW on the adoption of personal precautionary measures,\footnote{147} which is not quite the same as preventive incarceration, for instance, (referred to in Spain as ‘provisional prison’) or release on bail (‘provisional release’) in domestic law.\footnote{148} The Article in question grants a discretional faculty to the executing judicial authority to release the arrested person ‘at any time’ in accordance

\footnote{144}Art. 16 LOEDE; remember also former Art 8(1).

\footnote{145}According to Art. 16(2) Spanish law, the declaration of the arrested person will observe the Spanish law procedure; the legal basis is the Art. 19(2) EAW, which provides exactly that ‘the requested person shall be heard in accordance with the law of the executing Member State’. As has been argued, this provision is contradictory to the general provisions established by the Convention on mutual assistance in criminal matters, 29 May 2000, whose Art 4.1 provides that the requested Member State will observe the ‘the formalities and procedures expressly indicated by the requesting Member State’ (ie, its national legislation) with the sole exception that they ‘are not contrary to the fundamental principles of law in the requested Member State.’; see F. Fonseca Morillo, loc. cit., p. 89.

\footnote{146}See ss. 41-43 EA with different provisions according to whether the executing EAW proceeding is to take place before the judge a quo or the Court ad quem (more exactly, the High Court or the House of Lords in appeal cases).

\footnote{147}On the procedural requirements for their adoption – \textit{fumus boni iuris} or, more exactly, \textit{fumus commissi delicti}, and \textit{periculum in mora} or, moreover, \textit{periculum libertatis} – in relation to EAW proceedings, see specifically C. Arangüena Fanego, ‘Las medidas cautelares en el procedimiento de la euro-orden’, in C. Arangüena Fanego, op. cit., pp. 127-205 at p. 164 and M. Jimeno-Bulnes, Revista Penal, op. cit., p. 164.

\footnote{148}In relation to ordinary Spanish regulations, the personal precautionary measures provided under Arts. 486-544 bis LECrim are the summons (‘citation’), preventive custody (‘detention’), preventive prison (‘provisional prison’) and release from prison on bail (‘provisional release’); this latter may be adopted even without bail according to Art. 529 LECrim Art. 529 bis LECrim regulates a new precautionary measure which is the withdrawal of a driving licence for driving offences; also Art. 544 bis LECrim introduces a further precautionary measure banning a person from approaching or contacting the victim of domestic violence.

For a comparative view between precautionary measures contemplated in national EAW implementations see also M. Jimeno-Bulnes, Revista Penal, op. cit.
with domestic laws, provided that measures are in place to prevent ‘the person absconding’. Article 17 LOEDE more or less replicates this same rule and contains special provisions to take certain measures. The UK regulation includes the same rules on custody and bail for EAWs as for conventional extradition proceedings, but due to the seriousness of preventive custody, it also reminds the executing judicial authority, on more than one occasion, that bail may be granted instead of custody, in line with EAW procedures.

4.4. Surrender procedure and appeal

As set out in the European rule, the procedure and time frame for decisions on surrender depend on the consent of the arrested person. Firstly, if consent is forthcoming, the surrender’s decision will be adopted within a time limit of 10 days after the hearing; otherwise, the time limit for the decision will be extended a further 60 days, as from the date on which the EAW was issued. In Spain, it is also important to clarify that, in the first instance, decisions on surrender are taken by the JCI but, if consent is not forthcoming from the arrested person, competence to pronounce the judgment will be transferred to the Criminal Division of the

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149) Art. 17(1) LOEDE. In this sense, the JCI, having heard the prosecutor in each case, has the faculty to decree one or another measure in order to assure the effectiveness of the EAW execution; all such decisions are subject to appeal before the Criminal Division of the National Court. There is a special provision for preventive incarceration because of the seriousness of an offence, which could be stopped ex officio during the execution proceedings, having heard the prosecutor, subject to the application of any of the other precautionary measures available (Art. 17.3).

150) See ss. 197-201 EA, along with the amendments of the Bail Act 1976 (c. 63), s. 1 Bail (Amendment) Act 1993 (c. 26) and s. 24 Criminal Procedure (Scotland) Act 1995 (c. 46) in relation to bail. For a general comment about procedures for the granting of bail in UK see, e.g., D. Atkinson and T. Moloney, op. cit., pp. 76-86, J. Sprack, op. cit., p. 91 as well as S. Uglow, op. cit., pp. 186 and 260; also A.V. Sheehan and D.J. Dickson, op. cit., p. 92 on the situation in Scotland.

151) See, i.e, ss. 7 (10), 8 (2), 9 (5), 21 (5), 24 (3), 46 (3) … EA.

152) Arts. 17 EAW and 18-19 Spanish law. In contrast, UK implementation provides a similar period for extradition (10 days) with or without consent.

153) Certain authors fail to understand why the time limits are calculated from different steps in the surrender proceeding, from the first hearing of the case (initial hearing) and from the arrest itself when there is no consent. The same differences are adopted by the Spanish regulation: see Arts. 19 (2) and (3) LOEDE.

According to official statistics for 2005, surrender decisions take an average of 11 days in Spain and 28 in UK when the requested person agrees to the surrender, and 36 days in Spain and 65 in the UK when there is no consent. In both cases, the time is calculated between the arrest and the decision on the surrender.
AN. In both cases, as set out in Article 17 EAW, time limits may be extended by a further 30 days if the grounds are considered reasonable. In contrast, British rules have only partially transposed the Framework Decision, even though a 10-day deadline for the decision on surrender is explicitly provided where consent is forthcoming, no term is specified when it is not forthcoming.

However, the biggest difference between the Spanish and the UK implementations of the EAW relates to the appeals processes against the surrender decision by virtue of Article 14 (5) International Pact on Civil and Political Rights (IPCPR). Sections 26-34 EA contain extensive and detailed regulations on appeals procedures (factual and legal questions) against the surrender decision, which in the first instance are heard in the High Court, and subsequently in the House of Lords.

Moreover, legitimatio for such an appeal is not only provided for the benefit of the arrested person but also for the benefit of the issuing judicial authority in case of discharge at the extradition hearing, which is even more surprising. In contrast, as nothing on this matter is required under EAW regulations, Spain opted not to allow appeals against the final decision by the JCI or AN when Article 18 LOEDE was drafted, which has already received its fair share of criticism.

154) Also criticized because of the absence of a hearing before the AN in those cases on which it must rule and because of non-fulfilment of ‘the immediacy’ principle (principio de inmediación); see C. Arangüena Fanego, Revista de Derecho Penal, loc. cit., p. 79.

155) Also in Art. 19(4) LOEDE. In fact, there is not much proportionality between the ordinary time limit and its possible extension, which is indeed much longer; this extension should be half or, at least, equal to the ordinary time limit (5 or 10 days, respectively) but never longer; again C. Arangüena Fanego, loc. cit., p. 80.

156) S. 46 (6) EA under the title ‘Extradition Order following consent’. See also comments on national implementation in both Commission Staff Working Documents, loc. cit., pp. 21 and 23 as well as the reply from the UK in Member States’ comments to Commission Report, loc. cit., p. 107.

157) Specifically, the right to be sentenced by a superior court.

158) It should be noted that there is no right of appeal to the House of Lords for Scotland as we are reminded by s. 114(13) EA; thus the High Court decision will become final following the appeals procedure, as set out in s. 36(5) EA.

159) See s. 28 in relation s. 10 EA as well as, for example, Knowles’ comments, op. cit., p. 123.

160) For this reason, national EAW implementations differ on this point, ie, the Irish rule allows an appeal against decisions of the High Court to the Supreme Court on points of law only; the French rule also only provides for such an appeal on points of law (pourvoi de cassation) against the decision of the Chambre de l'instruction when there is no consent to the surrender by the arrested person.

161) For example, M. Jimeno-Bulnes, Diario la Ley, p. 4.
most national implementations of the EAW by Member States contemplate the possibility of appeal or cassation.\footnote{E.g., § 20(3) Austrian EU-JZG (n. 69), Art. 17(1) Belgian Law, s. 24 Cypriot Law, ss. 37-43 Finnish Law (n. 13), Art. 695-43 French CPP, Art. 22 Greek Law (n. 91), ss. 13(4) and (5) Hungarian Law, s. 16(4)(b) Irish Law, Art. 22 Italian Law, Art. 13 Law of Luxembourg, s. 32 Maltese Law, ss. 21 (6) and (7) Slovakian Law, Art. 23(6) ZENPP in Slovenia, Art. 24 Portuguese Law, s. 9 ch.5 Swedish Law.}

The absence of an appeals procedure against an EAW surrender decision in this restrictive Spanish implementation is all the more questionable when compared to a typical extradition process, in which, at least formally, a second appeal (`petition appeal`) is granted by the same National Court – in Spain, the Plenary of the Criminal Division – as laid down by Article 15 (2) LEP. Also, in these cases, the jurisprudence of the Constitutional Court has, on some occasions, allowed an exceptional `defence appeal`, because of the infraction of a fundamental right set out in the Spanish Constitution during the extradition proceedings. This is the case, for example, of the aforementioned detention time limit (Article 17.2) or the `effective judicial protection right` (Article 2.4)\footnote{STC 11/1985, 30 Jan; although admitted, the appeal was rejected because the Constitutional Court considered that no infraction had been committed either of Art. 17(2) SC, because the detention time limit did not exceed (this time) by a further 72 hours, or of Art. 24 SC because the foreign person (an Italian) had had the opportunity to use other legal avenues for appeals against the decisions pronounced by the Spanish Tribunals. Art 24 SC is the national prescription of Art. 6 ECHR; on this matter, see, e.g., p. Craig, 'The Human Rights Act, Article 6 and procedural rights', \textit{Public Law} (2003) pp. 753-773 and especially B. Pynor, `The relevance of Article 6 to Extradition Proceedings', 10 \textit{European Human Rights Law Review} (2005) pp. 408-418.} as has already been argued, because of the execution of an EAW by Spanish judicial authorities.\footnote{Remember previous SSTC 339/2005 and 81/2006 in relation to the right to legal counsel as the right to exercise free will in appointing counsel. Other examples of defence appeals promoted against decisions on surrender by the National Court are SSTCE 292/2005, 10 Nov, in relation with the surrender of nationals and 83/2006, 13 March, in relation with the \textit{ne bis in idem} principle.} However Article 13.3 Spanish Constitution could never be the object of protection, as it contemplates the extradition proceeding itself and the fundamental rights provided therein.\footnote{Same opinion, J. de Miguel Zaragoza, \textit{loc. cit.}, p. 146, and, more specifically, `La doctrina del Tribunal Constitucional sobre las sentencias penales en rebeldía: el caso de Italia’, \textit{Actualidad Penal} (2002) n. 1 p. 1 Fundamental rights are regulated by Arts 14-29 inclusively and 30(2) SC.}

A particular problem with the right to `effective judicial protection` or, more precisely, the right to due process of law, has stirred up some constitutional jurisprudence issues in judicial decisions on such `defence appeals`, because of the question over the right to a defence in the execution of conventional extradition requests. In some juridical regimes, such as Italy,\footnote{The above-mentioned Art 420-quater \textit{Codice di Procedura Penale}, provides for a declaration of contumacy to the accused who does not appear in court; but the right to be represented by a lawyer
sentence in absentia and, in fact, appeals on the grounds of a right to defence are raised against the specific decision, which prompts extradition proceedings from Spain to Italy in order to carry out the punishment. In this respect, the Spanish High Court has supported\textsuperscript{167} the right to constitutional protection when the requested person has not had the possibility to appeal against judgment in absentia as set out in the LECr\textsuperscript{168} and when he or she has not appeared in court at any time. On the other hand, another piece of constitutional jurisprudence from recent times has rejected such 'defence appeals' against extradition decisions on the particular grounds that the requested person still had the right to apply for an appeal before the Italian Tribunals. In this case, the reason that led to extradition was not the execution in itself of a punishment imposed by a sentencing in absentia, but the continuation of judicial proceedings in Italy, as it was still possible for the wanted person to speak in court.\textsuperscript{169}

Finally,\textsuperscript{170} the definitive surrender to the specific authority designated by the issuing judicial authority is carried out by the police authority, having previously confirmed the place and date for such a surrender that, in any case, should be no later than 10 days after the final decision on the EAW execution.\textsuperscript{171} The possibility of arranging a new surrender date between both judicial authorities also exists is always provided for as an obligatory right. Also, the same precept contemplates the possibility of nullifying such a declaration of contumacy if the accused can prove that he or she had no knowledge of the legal notification or that absence from court was grounded in any cause of 'force majeure' or 'legal impediment' (Art 420-quater 4).

\textsuperscript{167} This was the case in SSTC 91 and 162/2000, 12 June, among other previously pronounced constitutional jurisprudence, ie, SSTC 141/1998, 29 June, and 147/1999, 4 August. For a critical perspective, see F. Rey Martinez, ‘El problema constitucional de la extradición de condenados en contumacia. Comentario de la STC 91/2000 y concordantes’, Revista Jurídica de Perú (2001) n. 19, pp. 15-57, also with an interesting argument on the different regulation of the accused’s right of defence and the institution of contumacy.

\textsuperscript{168} Art 793 LECrim provides a special appeal called the ‘annulment appeal’ destined for those persons condemned by a judgment in contumacy. As explained above, this is legally provided for today in cases when the requested punishment is less or equal to 2 years imprisonment or six years if the crime is of another nature (Art 786.1 LECrim).

\textsuperscript{169} Constitutional pronouncement along these lines in SSTC 110 and 160/2002.

\textsuperscript{170} Others legal provisions of the European rule go on to contemplate postponed or conditional surrender (Art. 24), transit (Art. 25), surrender accompanied by the deduction of the detention period served in the executing Member State (Art. 26), possible prosecution for other offences (Art. 27), surrender or subsequent extradition (Art. 28) as well as handing over of property (Art. 29) and costs (Art. 30) … under the respective articles of national implementation. See also Commission Staff Working Documents, loc. cit., pp. 27 and 28 respectively.

\textsuperscript{171} Arts. 23(1) EAW and 20(1) LOEDE as well as ss. 35(4), 36(3) and 47(3) EA, the latter referring to extradition following consent.
as do exceptional and provisional postponements due to serious humanitarian reasons (i.e., illness). Such delays, however, carry with them the risk that the arrested person will have to be released upon expiry of the time limits stipulated in European and national rules. Although short-time limits to proceed with the surrender are specifically indicated, surprisingly, in the case of non-fulfilment, no kind of juridical sanction or penalty is contemplated; the European rule simply requires that the relevant information be sent to Eurojust and the Council. There is no specific provision, however, in the EA related to this last clause.

5. Final Considerations

Statistics on European Arrest Warrant proceedings point to the success of this new legislation in Europe and its Members States. It should also be recalled that in some countries similar mechanisms had been set up prior to the application of the EAW procedure, due, principally, in the Spanish context to police cooperation between France and Spain in the fight against ETA terrorism. In those cases, the

172) Arts. 23(4) EAW and 20(3) LOEDE. This clause is not specifically transposed in the UK implementation but the possibility to agree on a later date for extradition is set out in ss. 35(4)(b) and 36(3)(b) EA. Also, the UK government’s response to the Commission Report denouncing the failure to transpose this specific clause, clearly states that the UK ‘would not surrender anyone to another Member State if they were not considered to be medically fit to travel’; see Member States’ comments, loc. cit., p. 110.

173) Arts. 23(5) EAW and 20(4) LOEDE. In relation to the UK implementation, the executing judicial authority is continually reminded that bail may be granted instead of custody provision as already pointed out; see previous legislation.

174) See M. de Hoyos Sancho, Cassazione Penale, loc. cit., p. 314.

175) Arts. 17(7) EAW and 19(5) LOEDE. But this is only a political sanction as pointed out by D. Flore, 150 Journal des Tribunaux, loc. cit., p. 275.

176) Although in practice Eurojust is always informed; according to official statistics there were 57 cases in the UK, all of them notified to Eurojust. See also Eurojust Annual Reports available on Eurojust website (<http://www.eurojust.eu.int/press.htm>).

177) In 2005 alone, total amounts of between 2,500-3,000 EAWs have been issued. The lower figure is reported in the Eurojust Annual Report 2005; the higher one by S. Combeaud, ‘Implementation of the European Arrest Warrant and the constitutional impact in the Member States’, in E. Guild, op. cit., pp. 187-194 at p. 190.

178) Also in the UK through the well known Common Law system of ‘the backing of warrants’ as an informal way to execute warrants issued by different jurisdictions in the UK as well as in Ireland; this arrangement was confirmed on the UK side by the Backing of Warrants (Republic of Ireland) Act 1965 now repealed by ss. 218(a) and 220 as well as Schedule 4 of the EA 2003. See comments on J.R. Spencer, loc. cit., at p. 200.
Spanish Constitutional Court\textsuperscript{179} ruled that extradition proceedings could be bypassed while declaring the discreitional faculty of states to surrender foreign persons ‘directly’ to the Spanish police force on the border, where they would be arrested in order to continue the judicial investigation or trial in Spain. However, Law 3/2003 now represents the legal basis on which to allow such surrenders of arrested persons between Member States, and it should be welcomed for that reason alone.

In this context, the ‘new simplified system of surrender’,\textsuperscript{180} does not only imply formal amendment of terminology, but also of material and conceptual terms. The new procedure introduces important and significant changes compared to conventional extradition proceedings: for instance, direct communication between judicial authorities without the intervention of the government as well as the termination of traditional principles, i.e., double jeopardy and the speciality rule mentioned earlier, or refusal to surrender because of objective or subjective causes, respectively, ‘political’ offences\textsuperscript{181} and the surrender of nationals.\textsuperscript{182} Technical improvements may also be mentioned, such as the considerable reduction in the average time for a surrender decision, and effective surrender of the requested person in comparison to other forms of international cooperation.

\textsuperscript{179} In previously pronounced jurisprudence, i.e., SSTS 2084/2001, 13 Dec and 304/2002, 15 Feb.

\textsuperscript{180} See Preliminary Recitals EAW, point 5.

\textsuperscript{181} See, for example, Arts. 3 European Convention on Extradition and 4(1) LPE. Although some national EAW implementations such as s. 10h Danish Law provide for the refusal of its execution ‘if there is a danger that, after extradition, the person will suffer persecution … for political reasons’; see also J. Vesterrgaard, \textit{op. cit.}, p. 92.

\textsuperscript{182} Austrian nationals now being the sole exception according to Art 33(1) EAW which imposes the obligation on Austria to amend Art 12 \textit{Auslieferungs- und Rechtshilfegesetz} before 31 December 2008; also Austrian EAW national implementation, i.e., § 33 EU-JGZ. But Austria has also made exceptions to this absolute prohibition of the extradition of its own nationals in some other cases, i.e., the legislation regulating the cooperation with the International Ad Hoc Tribunals for Yugoslavia and for Rwanda or the International Criminal Court; see paper presented by H. Epp, ‘Overcoming constitutional barriers: the public law challenges for the EAW in national constitutional courts. The Austrian example’, \textit{JUSTICE Conference ‘Eurowarrant’}, \textit{op. cit.}

Bear in mind previous constitutional jurisprudence, e.g., in Germany, Poland and Cyprus. Especially, the decision of the German Constitutional Court (BverfG) on 18 July 2005 should also be mentioned in the context of the two agreements adopted in the Plenary Session of the Criminal Division of the Spanish National Court (\textit{AN}) on 21st July and 20 September 2005 in relation to all future EAWs issued by Germany, as well as the resolution of those pending and already issued to be thereupon treated as extradition requests. The unfortunate mention of the ‘reciprocity principle’ employed by the Spanish Court in the judicial pronouncement itself – and not the jurisdictional decision – in order to unify criteria adopted by the JCI in relation to future EAWs issued by Germany has been strongly criticized by scholars; see S. Combeaud, \textit{loc. cit.}, pp. 120 and 188 respectively and in Spain F. Irurzun Montoro, \textit{loc. cit.} p. 8. By opposite, it has been defended by Spanish scholars, i.e., T. Quadra-Salcedo Janini, \textit{loc. cit.}, pp. 295-321.
with conventional extradition proceedings, which move closer to fulfilling the right
to a trial within a ‘reasonable time’ set out in Article 6 ECHR.\(^{183}\)

Another important advantage of the new instrument on the working practice
surrounding the issuing of EAWs – as has been demonstrated in Spain – is that
it may be used to take precautionary measures.\(^{184}\) The arguments of the Spanish
Provincial Courts,\(^{185}\) when dealing with appeals against orders for preventive detention
issued by the Investigative Judges invariably refer to the option of an EAW
being used in the country where the accused is established or settled and to which
it is presumed he or she could flee. In brief, the existence of a fast-track detention
and surrender procedure between Member States preserves the exceptional char-
acter of precautionary measures, such as preventive custody (prisión provisional),
which must be adopted only in exceptional circumstances, in observance of the
principle of proportionality proposed for the new European Constitution.\(^{186}\) The
establishment of the EAW across the European Union has without doubt led to
other legislative initiatives by the European Commission, such as the widespread
establishment of a European model for provisional release with or without bail
(eurobail).\(^{187}\)

On the contrary, it has been argued that there is an excessive amount of judicial
discretion in Spain, especially in relation to the decision to execute an EAW and
to proceed with the surrender of the arrested person, perhaps because the Span-
ish implementation gives wider powers to judicial authorities than other national
legislations. Besides, there are no guidelines to assist with certain judicial decisions,
to wit: whether circumstances that lie outside the positive list of 32 European of-

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\(^{183}\) On this point especially, see F. Siracusano, loc. cit., e.g., p. 904.

\(^{184}\) Such advantages of EAW procedures are also underlined in the previous Commission Reports, loc. cit., at p. 7, commenting on Art. 12 EAW ‘through its effectiveness, in particular in obtaining the surrender of nationals of other Member States, it is easier to decide to release individuals provisionally irrespective of where they reside in the European Union’.


\(^{186}\) Art. II.109(3) TeCE relating to the imposition of criminal penalties. Also, principle of proportionality as mentioned in Preliminary Recital 7 in fine of EAW Framework Decision.

fences should be subject to the double jeopardy rule; whether surrender should be made subject to the return of the arrested person in order to serve a custodial sentence; or on postponement of the surrender until the trial in Spain takes place if the arrested person has a criminal cause pending before Spanish courts. All of these questions need to be resolved by the executing judicial authority as well as the possible existence of mandatory or optional causes of refusal. This judicial discretion practiced a quo by the judicial authority is if anything reinforced in Spanish legislation on the EAW because, as has already been explained, no appeals processes are contemplated. An appeal, for instance, to the Plenary Session of the AN, would not be amiss in order to unify criteria on execution to be followed by the JCI.

British and Spanish implementations of the EAW satisfactorily reproduce all the new characteristics but in relation to Spanish law at least, there is a regrettable silence on other aspects. As has been pointed out by several national and foreign commentators and institutions, Spanish legislation does not contemplate the mutual recognition of judicial decisions that is so often highlighted: the defence of fundamental rights as a safeguard and prerequisite in judicial co-operation in criminal matters, despite it being clearly mentioned in the Preliminary Recitals of the EAW Framework Decision. Perhaps the urgency to implement the EAW has caused this rather unforgivable omission of a reference to mutual recognition, no mention of which can be found in either the Preliminary Recitals or the text of Law.

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188) Remember that Spanish law contemplates this verification of the double jeopardy as optional according to Art 9(2) LOEDE above mentioned.

189) E.g., previous Arts. 11(2) and 21(2) LOEDE.

190) In criticism of the lack of judicial control over the judge a quo, S. Calaza López, El procedimiento europeo de detención y entrega (Madrid 2005) p. 266.

191) Specifically, the briefing prepared by S. Alegre, at the time Senior Legal Officer-EU Criminal Justice, for JUSTICE in criticism of the Spanish implementation on the above-mentioned point. On other hand, the Committee on Civil Liberties, Justice and Home Affairs (European Parliament) has presented initial guidelines with a view to making a recommendation to Council on the impact on fundamental rights; see Working Document of 22 Sept 2005 already quoted.

3/2003. One possible way forward in this area might perhaps be the establishment of common minimum standards between EU Member States.\footnote{To that end, the definitive approval of the expected Framework Decision on certain ‘procedural rights in criminal proceedings throughout the European Union’ in order to complement the EAW. See AI (EU Office) Report, ‘Human Rights dissolving at the borders? Counter-terrorism and EU Criminal Law’, loc. cit., p. 19; also in defence of the requirement of common and equivalent protection of human rights in the European judicial area J. Vervaele, *Utrecht Law Review*, loc. cit., p. 118, in consideration of standards developed by the EctHR as *minimum minororum* on this point.}

In conclusion, the EAW will presumably continue to have a role in the future of Europe and will foreseeably have a place in any future European Constitution. In fact, Art III-274 contemplates the possibility of Eurojust evolving into a European Public Prosecutor’s Office (EPP), which will be ‘responsible for investigating, prosecuting and bringing to judgment … the perpetrators of and accomplices in serious crimes affecting more than one Member State and of offences against the Union’s financial interests’ and will ‘exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences’.\footnote{Art III-270(2) TeCE. In relation to EPP, see Green Paper on the Criminal Law protection of the Community’s financial interests and the establishment of an European Public Prosecutor presented by the European Commission on 11 Dec 2001, COM (2001) 715 final. In the bibliography, e.g., C. van den Wyngaert, ‘Eurojust and the European Public Prosecutor in the Corpus Iuris Model: water and fire?’, in N. Walker, *op. cit.*, pp. 206-214 as well as, specifically, A. Perrodet *Étude pour un Ministère Public Européen* (Paris 2001).} If the proposals of *Corpus Iuris* are ever followed, whenever an EPP considers it to be justifiable, an European arrest warrant will be issued; in which case the arrested person should be ‘brought without delay to the Judge of Freedoms of the state where he is being held’,\footnote{Arts. 25ter (1) and (2) respectively. See second version in M. Delmas-Marty and J.A.E. Vervaele, eds, *The implementation of the Corpus Iuris in the Member States* (Antwerpen-Groningen-Oxford 2000) vol.I at p. 205 with explanations about EPP at pp. 79-92; see also the national reports on the EPP of the old 15 Member States in Part I of vol.II and III. Also at that time and about the same EPP model, W. van Gerven, ‘Constitutional Conditions for a Public Prosecutor’s Office at the European Level’, *8 European Journal of Crime, Criminal Law and Criminal Justice* (2000) n. 3 pp. 296-318. Spanish translation prepared by E. Bacigalupo y M.L. Silva Castaño, *Un Derecho Penal para Europa: Corpus Iuris 2000: un modelo para la protección penal de bienes jurídicos comunitarios* (Dykinson Madrid 2004). Also in general, J.A.E. Vervaele ‘L’Union Européenne et son espace penal européen: les défis du modèle *Corpus Iuris 2000*’, *Revue de Droit Pénal et Criminologie* (2001) pp. 775-799 at p. 787. There is also a draft of an alternative *Corpus Iuris* prepared by another academic group established in Germany; see comments by German scholars in special issue 116 Zeitschrift für die gesamte Strafrechtswissenschaft (2004).} And why, indeed, should that not be the case one day?