



# Stream

Strengthening Trust in the  
European Criminal Justice Area  
through Mutual Recognition  
and the Streamlined Application  
of the European Arrest Warrant

## Research Brief

# Spain

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This report was funded by the European Union's Justice Programme (2014-2020). It has been prepared in the context of the STREAM project (JUST AG 101007485). The content of this report represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

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## Introduction

Under Spain's law on the mutual recognition of judicial decisions in criminal matters in the EU of 2014 (LRM), Central Judges of Criminal Investigation have competence to execute a European Arrest Warrant (Article 35(2)), and the Criminal Chamber of the National High Court has jurisdiction over a claim for 'a remedy of appeal' (Article 51(8)).

Some of their rulings have already been considered in the STREAM Periodic Country Report for Spain, along with leading judgments of the Constitutional Court and Supreme Court. This STREAM Research Brief now focuses on recent case law of the Criminal Chamber of the National High Court (from 2021-2022), concerning appeals in which a mandatory or optional ground for non-execution of an EAW is usually raised by the defence. Many of those rulings include relevant case law of the Court of Justice of the European Union (the Court of Justice) in their rationale.

In particular, 19 EAW decisions issued in 2021 and 26 in 2022 – all from the Criminal Chamber – were considered, having been found via the *Aranzadi* database (also used in the Periodic Country Report). The selection of those EAW decisions focuses on the principle of mutual trust and protection of the rule of law fundamental and/or procedural rights concerning the *execution* of EAWs received from another Member State. As noted in the Country Report, not many examples of judicial practice in Spain exist in relation to the *issuing* of EAWs. All or most of the decisions analysed in this Research Brief take the form of order (*auto* in Spanish), also the type of decision challenged in such appeals according to the prior Article 51(8) of the LRM.

This topic has been of interest early on for the Spanish academy,<sup>2</sup> and interest is also growing on the international scene as a result of leading cases handed down by the Court of Justice. Thus, the analysis of the protection of fundamental and/or procedural rights no longer only takes place from the point of view of the executing authorities, but also from that of the issuing authorities, a double or 'dual level of protection' having been established.<sup>3</sup>

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2 See Alonso Moreda, N. (2006), 'La garantía de los derechos fundamentales en el sistema de detención y entrega europeo', *Curso de derechos humanos de Donostia -San Sebastián*, Servicio de Publicaciones UPV, vol. 6, pp. 349-412.

3 See Klip, A. (2022), 'The European Arrest Warrant, from mutual recognition to mutual supervision?', *European Criminal Law Review*, Vol. 12, No. 1, pp. 82-100, at p. 82.

## **Section I – Fundamental rights: primarily a matter for the issuing state?**

In general, effective judicial protection is guaranteed in Spain according to constitutional rules. Specifically, Article 24(1) of the Spanish Constitution expressly foresees: ‘Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended’. In this context, effective judicial protection must also be guaranteed when the competent judicial authority in Spain issues an EAW as ‘the Judge or Court hearing the case in which such orders are appropriate’ according to Article 35(1) LRM.

In any event, and as was anticipated at the time,<sup>4</sup> the new procedural instrument in Spain, the Spanish implementation of the European Arrest Warrant Framework Decision, grants a ‘reservation of jurisdiction’ to ‘judicial authorities’ in contrast to the former extradition procedure that was operated by an exchange between governments. This is even more so in the case of Spain, where judges and courts have exclusive competence for the issuing and execution of the EAW. Currently the judicial authority that can issue an EAW in Spain includes the Investigation Judge (also named Examining Magistrate in other official translations); the Judge of Violence against Women when dealing with the investigation of offences related to gender violence; and the Judge of Minors, when dealing with the investigation of offences allegedly committed by persons under 18 years of age. For this reason, no particular problems arise in Spain in relation to the question of the independence of the issuing judicial authority.

In addition, Spain has implemented the EU Roadmap Directives on procedural rights of suspected or accused persons in criminal proceedings that ensure the right to legal aid, interpretation and translation. Having said that, two of those Directives have yet to be transposed, even though the deadline for implementation has passed. They are Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the rights to be present at trial in criminal proceedings, and Directive (EU) 2016/800 on procedural rights for children who are suspects and accused persons in criminal proceedings. The last one to be implemented, also by specific legislation is Organic Act 5/2000 on the criminal liability of minors, where criminal prosecution of offenders under 18 years of age is envisaged.

Moreover, Article 39 LRM establishes rules that impose strict requirements to be followed by Spanish judicial authorities when issuing EAWs in order to preserve the rule of law and the observance of procedural guarantees. Those rules: (a) set conditions on provisional detention concerning a minor; (b) prevent the substitution or suspension of a custodial sentence when an EAW is issued to enforce a custodial sentence or detention order; (c) require an application or request from a prosecutor; and (d) require a reasoned order or

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4 See López Ortega, J.J. (2002), ‘La orden de detención europea: legalidad y jurisdiccionalidad de la entrega’, *Jueces para la democracia*, No. 45, pp. 28-33, at pp. 28-29.

ruling from the competent judicial authority (namely the Judge of the Investigative Chamber, or other judges mentioned above).

A general rule in Article 24 LRM provides for an appeal right ‘against all decisions handed down by the Spanish judicial authority with regard to the European mutual recognition instrument’,<sup>5</sup> which means that both types of decisions concerning mutual recognition requests, whether positive or negative, can be appealed. In relation to positive decisions in response to a mutual recognition instrument-request (the EAW included), Article 13(1) LRM specifically foresees the possibility of lodging ‘the appeals foreseen in the Spanish legal order’, i.e. those envisaged in the ordinary Criminal Procedure Act (LECrIm). Under Article 216 LECrIm these are the reform appeal, appeal, and complaint appeal before the appropriate Provincial Court.

Spanish law, in line with the silence of European law, does not specifically include respect for the principle of proportionality as a requirement for the issuance of EAW, unlike some other national legislation.<sup>6</sup> However, Spanish literature has echoed the relevance of respecting this important principle.<sup>7</sup> The principle of proportionality is in fact mentioned in the Preamble of the LRM itself, in particular in relation to the EAW.<sup>8</sup> For this reason, although it is true that it is not explicitly mentioned in subsequent articles, unlike what happens in other mutual recognition instruments such as the specific case of the European Investigation Order,<sup>9</sup> it must be considered to be contained in the requirements previously described for the issuance of an EAW contained in Article 39 of the LRM.

Judicial practice in relation to the issuing of EAWs in Spain usually emerges as a result of different appeals that have been brought before the Criminal Chamber of the National Court against a decision ordering the execution of an EAW by a Central Judge of the Investigative Chamber. But given that there is an exclusive competence of courts to issue EAWs, there are no particular problems in relation to the question of the independence of the issuing judicial authority, in accordance with the aforementioned Article 35(1) LRM.

Having made such observation, the independence of the Spanish judicial authority issuing EAWs has however been questioned by other Member States. This is shown by the well-known *Puig* case concerning Carles Puigdemont, the background to which has been set out in the Periodic Country Report for Spain (see pages 3 to 5). The Spanish issuing judicial authority (*Tribunal Supremo* or Supreme Court) in that case made a request to the Court of Justice for a preliminary ruling on 11 March 2021, for which judgment was delivered on

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5 Author’s translation.

6 Such as the Italian one; see Iuzzolino, G. (2008), ‘L’emissione del mandato d’arresto europeo tra ermeneutica e prassi’, *Cassazione Penale*, No. 5, pp. 2114-2129, at pp. 2117 et seq.

7 See Ruiz Yamuza, F.G. (2014), ‘Orden europea de detención y entrega. Proporcionalidad la cuestión esencial’, *Revista General de Derecho Europeo*, No. 34, [www.iustel.com](http://www.iustel.com), at pp. 7 et seq.

8 Para. VI, textually: ‘This (the new regulation provided by LRM) has resulted in a reinforcement of the legal guarantees, especially with the introduction of the criteria of proportionality...’.

9 New Art. 189 (1) (a) LRM after amendment by Law 3/2018, of 11 June.

31 January 2023, finding that the executing judicial authority cannot challenge the competence of the issuing judicial authority inasmuch as that is not expressly included as ground for EAW refusal except where there is infringement of a fundamental right.<sup>10</sup> The issue is all the more perplexing because of the obvious politicisation of the case, which has led to the emergence of two versions of the case.<sup>11</sup> While the questions relating to the independence of the issuing judicial authority and the risk of violation of fundamental rights were raised by Belgian courts as the executing judicial authority, the ball is again in the court of the Supreme Court, which has recently issued a new EAW against Carles Puigdemont and others after the amendment of the Spanish Criminal Code last December 2022, derogating the offence of sedition.<sup>12</sup>

Finally, the rights of the person whose surrender is requested by the Spanish judicial authority in EAW issuance proceedings must be protected in the same way as any other procedural and fundamental rights in the Spanish Constitution (Articles 14-30), which is applicable in all types of proceedings and jurisdictional orders. Procedural rights are listed in Article 24(2) of the Spanish Constitution and are, specifically: ‘the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent’.

In relation to EAWs issued for criminal prosecution purposes in Spain, Article 45 LRM requires a hearing take place before the competent judicial authority that issued the EAW ‘within the terms and in the manner foreseen in the Criminal Procedure Act or, where appropriate, the Organic Act on the criminal liability of minors, in order to decide on the personal situation of the arrested person’. This hearing must be held by the deadline and in the manner provided for in Article 505 (2) LECrim in order to move the arrest (*detención*) to the stage of pre-trial/provisional detention (*prisión provisional*) or release on bail (*libertad provisional con fianza*). These are considered as personal precautionary measures in criminal proceedings, which also can be adopted in EAW proceedings.<sup>13</sup> The hearing ‘must be held as soon as possible within 72 hours of the arrested individual appearing before the court and the accused, who must be assisted by the lawyer chosen by them or appointed *ex officio*, the Public Prosecution Service and other parties to the proceedings will be summoned to attend’. In this case, other procedural rights beyond the right to legal

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<sup>10</sup> Judgment of the Court of Justice, *Puig Gordi and Others*, C-158/21, ECLI:EU:2023:57. On the competence of the issuing judicial authority see Muñoz de Morales Romero, M. (2019), ‘Yes, we can! Or: why the reference for a preliminary ruling is not the monopoly of the executing judge in mutual recognition cases involving the surrender of requested person’, *European Criminal Law Review*, Vol. 9, No. 1, pp. 81-98.

<sup>11</sup> See Nieva Fenoll, J. (2018), ‘The examination of the executing authority on the European Arrest Warrant. The transfer of pro-independence politicians: between Politics and Law’, *European Criminal Law Review*, Vol. 8, No. 2, pp. 176-185, at p. 176.

<sup>12</sup> In particular, the Supreme Court Order of 12 January 2023, No. 20907/2017, ECLI:ES:TS:2023:2368A.

<sup>13</sup> Jimeno Bulnes, M. (2005), ‘La adopción de medidas cautelares de carácter personal con motivo de la ejecución de una orden europea de detención y entrega’, *Revista Penal*, No. 16, pp. 106-122, at pp. 114 et seq.

assistance (such as the right to an interpreter) are not expressly mentioned here, but their requirement is based on the previous wording of Article 24(2) of the Spanish Constitution as well as on the rights of defence as a whole in accordance with established constitutional jurisprudence.<sup>14</sup>

Lastly, Article 506 LECrim sets out that ‘rulings passed on the personal situation of the accused will be made in the form of an order’ with grounds expressly set out when they are the basis for the adoption of the specific personal precautionary measure. Such orders adopted by the Investigative Judges (or Judge of Minors), can be appealed before the appropriate Provincial Court under general rules in the prior Article 216 *et seq* LECrim, like any others.<sup>15</sup>

## Section II - Protecting fundamental rights in the executing state?

Neither Article 32 nor Article 48 LRM, which provide for general and specific regulations on mandatory and optional grounds for non-execution of EAWs, include a specific ‘fundamental rights’ clause; and nor does the European standard in the EAW FD, which has been, as is well known, the subject of much criticism.<sup>16</sup> Provision for refusal to surrender a person under an EAW based on a judgment rendered *in absentia* is foreseen as a ground for refusal only in (i) Article 33 LRM in relation to the set of mutual recognition instruments, and in (ii) Article 49 in specific relation to the EAW. Under the European standard, this ground for refusal in Spanish legislation is subject to the defendant's right to information and his or her wish to waive his or her presence at the trial.<sup>17</sup>

In the same way as the European standard, the Spanish standard also refers in its Preamble to ‘respect for the fundamental rights and liberties as a main criterion for action’<sup>18</sup> in the joint regulation offered by the instruments of mutual recognition in criminal matters

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14 As examples, the Constitutional Court judgments of 17 September 2018, No. 91/2018, ECLI:ES:TC:2018:91 and No. 92/2018, ECLI:ES:TC:2018:92.

15 As an example of an appeal against an order to issue an EAW precisely for the hearing provided for in Art. 505 LECrim Provincial Court of Burgos, judgment of 6 November 2019, No. 717/2019, ECLI:ES:APBU:2019:830A; in this case, the order issuing the EAW was issued by a Judge of the Criminal and not an Investigative Judge, since the criminal proceedings were already at the trial stage, and thus this judicial authority had jurisdiction. Specifically, the accused enjoyed a precautionary measure consisting of a prohibition to leave Spanish territory, which he had not complied with, hence the need to issue an EAW; in fact pre-trial detention is an exceptional measure in accordance with long-standing constitutional jurisprudence and now Article 502(2) LECrim. The latter article prescribes the adoption of pre-trial or provisional detention when ‘it is necessary’ and ‘there are no less onerous measures for the right to liberty by which the same purpose as provisional detention may be achieved’ (principle of proportionality).

16 See Schallmosser, N.M. (2014), ‘The European Arrest Warrant and fundamental rights’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 22, No. 2, pp. 135-165, at p. 161; also Fichera, M. (2017), ‘EU fundamental rights and the European Arrest Warrant’, in S. Douglas-Scott and N. Hatzis (eds.), *Research Handbook on EU Law and Human Rights*, Cheltenham, UK & Northampton, MA: Edward Elgar Publishers, pp. 418-438, at p. 423.

17 Böse, M. (2021), ‘European Arrest Warrants and minimum standards for trial in absentia – Blind trust vs. transnational direct effect?’, *European Criminal Law Review*, Vol. 11, No. 3, pp. 275-287, at p. 287.

18 Para. IV as well as Recital 12 of the EAW FD.



including EAW. For this reason, the competent Spanish judicial executing authority also takes this issue into account in an important and primordial way when deciding on the execution of the requested EAW. In this sense, there is some judicial practice to show, even if the surrender is eventually considered to be appropriate, that the competent judicial executing authority is aware of this problem as often raised by the defence.

Similarly, the criterion is fairly uniform: in Spain the judicial competence for the execution of EAWs has been centralised at the level of the Central Judge of the Investigative Chamber (the official translation is ‘Central Judge of Criminal Investigation’) and Central Judge of Minors when the order refers to a minor in accordance with Article 35 (2) LRM. In any case, as in the case when issuing EAWs, there is also a ‘reservation of jurisdiction’ in favour of courts and tribunals in accordance with the judicial investigation model that Spain still has.<sup>19</sup> This ‘judicialisation’ of the EAW procedure and here the EAW-executing proceedings is a guarantee for the protection of fundamental rights, especially when compared to other surrender procedures such as the classic example of extradition.<sup>20</sup>

In both cases, the decision issued in the first instance in the form of an order may be appealed before the Criminal Chamber of the National Court as said in accordance with Article 51 (8) LRM. Therefore, a large part of the existing Spanish case law on EAWs comes from these appeals resolved by the National Court, with the most recent case law corresponding to the years 2021 and 2022 being presented here. It is also important to remember that the processing of such appeals related to EAW executing proceedings is carried out on a preferential basis in accordance with the prior Article 51(8) LRM, and the general rules laid down in ordinary criminal procedural legislation are here applied.

An example of this is Order 445/2021 of 23 November 2021<sup>21</sup> where the requested person raised several grounds based on the violation of fundamental rights. The National Court dismissed the appeal upholding the order made by the Central Judge of Criminal Investigation on the basis that none of the grounds for refusal provided in EAW Spanish legislation was present. However, the Court examined each of the pleas in law especially in relation to the person’s roots in Spain (*arraigo*, residence and connections between the requested person and the executing Member State), treated as equivalent to persons with Spanish nationality according to the CJEU’s criterion.<sup>22</sup> Nevertheless, it must be recalled that this is not a ground for refusal to surrender as such, but only a possible cause of conditioning.

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19 Jimeno-Bulnes (2012), ‘American criminal procedure in a European context’, *Cardozo Journal of International and Comparative Law*, Vol. 21, No.2, pp. 409-459, at pp. 438-439.

20 See Alonso Moreda, *supra* n. 1, at p. 377.

21 National Court, Criminal Chamber, order of 23 November 2021, No. 445/2021, ECLI:ES:AN:2021:8760A.

22 See Judgments of the Court of Justice of 17 July 2008, *Kozłowski*, C-66/08, ECLI:EU:C:2008:437; of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616; of 5 September 2012, *Lopes Da Silva*, C-42/11, ECLI:EU:C:2012:517; of 29 July 2017, *Poplawski*, C-579/15, ECLI:EU:C:2017:503; of 13 December 2018, *Sut*, C-514/17, ECLI:EU:C:2018:437; and of 24 June 2019, *Poplawski II*, C-573/17, ECLI:EU:C:2019:517.

Order 39/2022 of 31 January 2022<sup>23</sup> was also dismissed by the National Court. The person subject to an EAW complained about the lack of a second hearing as provided for in the previous Article 51(5) LRM: but the Criminal Chamber declared that the two hearings could be consecutive given the need for haste, which was all the more necessary in the present case because the requested persons were in provisional detention ‘to ensure the execution of the surrender order’. The question of the person’s roots in Spain also arose, the Court pointing out that this is an optional ground for refusal of execution of the EAW; it should be noted that the issue of roots is frequently raised by persons subject to an EAW, but with little success to date.<sup>24</sup>

The question related to EAW-issuance based on judgments rendered *in absentia*<sup>25</sup> has also been raised by persons subject to an EAW before the national courts with the same (lack of) success. In this regard, Order 171/2022 of 8 April 2022<sup>26</sup> dismissed the appeal declaring that the applicant had not appeared in person during the criminal proceedings but he was expressly informed of his right to a retrial or an appeal, and the time limit within which a person must request such retrial or appeal according to Article 33 LRM. In a similar sense, Order 226/2022 of 19 April 2022,<sup>27</sup> where the National Court stated in addition that the requested person can exercise his or her rights concerning the review of imposed punishment in the executing Member State as part of these guarantees. On other occasions the National Court recognised that there was personal knowledge of the decision giving rise to the EAW in the country of its origin in the light of the information provided by the EAW form itself, and so Order 224/2022 of 7 April 2022.<sup>28</sup>

Last, the problem relating to the independence of the judiciary who issue EAWs in other Member States has also been raised before the Spanish courts as an additional ground for non-execution of the EAW based on the observance of ‘rule of law’.<sup>29</sup> This thorny issue concerns Poland in particular, although the case law that has been found to date has always considered surrender to be appropriate. The case law of the Court of Justice has also been considered here<sup>30</sup> taking into account that the leading case is the well-known *LM* judgment

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23 National Court, Criminal Chamber, order of 31 January 2022, No. 39/2022, ECLI:ES:AN:2022:297A.

24 See further case law: National Court, Criminal Chamber, order of 14 March 2022, No. 178/2022, ECLI:ES:AN:2022:2097A and National Court, Criminal Chamber, order of 19 April 2022, No. 226/2022, ECLI:ES:AN:2022:3195A.

25 See generally Brodersen, K.H., Glerum, V. and Klip, A. (2020), *The European arrest warrant and in absentia judgments*, The Hague: Eleven International Publishing. Publication results from the project funded by the European Commission Improving mutual recognition of European Arrest Warrants for the purpose of executing in absentia judgments (at the time available at <https://www.inabsentieaw.eu>) with a study of the legislation in this field in various Member States and a proposal for reform of the EAW form.

26 National Court, Criminal Chamber, order of 8 April 2022, No. 171/2022, ECLI:ES:AN:2022:3136A.

27 National Court, Criminal Chamber, order of 19 April 2022, No. 226/2022, ECLI:ES:AN:2022:3195A.

28 National Court, Criminal Chamber, order of 7 April 2022, No. 224/2022, ECLI:ES:AN:2022:2878A, ground 2.IV.

29 See generally Zimmermann, F. (2022), ‘Concerns regarding the rule of law as a ground for non-execution of the European Arrest Warrant: suggestions for a reform’, *European Criminal Law Review*, Vol. 12, No. 1, pp. 4-24.

30 See Judgments of the Court of Justice of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385; of 10 November 2016, *Poltorak*, C-452/16 PPU, ECLI:EU:C:2016:858; of 27 May 2019, *OG and PI*, C-508/18 and C-82/19, ECLI:EU:C:2019:456; of 27 May 2019, *PF*, C-509/18, ECLI:EU:C:2019:457; of 9 October 2019, *NJ*, C-489/19 PPU, ECLI:EU:C:2019:849; of 12



or *Celmer* case.<sup>31</sup> In this regard, it is worth noting Order 288/2021, of 18 May 2021,<sup>32</sup> where the Criminal Chamber of the National Court, recalling several cases of the Court of Justice, declared that the national public prosecutor can be considered a judicial authority for the EAW when its decision may be appealed before a judge or court and ‘has sufficient independence to enable it to act free from any external influence’. In short, the Spanish court considered that both conditions were met in the present case, since the French Public Prosecutor’s Office is independent of the Executive but, in addition that the EAW had been validated by a French judicial authority: the Court of Lille.

Also, as expected, the question of the judicial independence of the issuing authority has arisen in relation to EAWs issued by Poland, and Order 135/2022, of 25 March 2022<sup>33</sup> closely followed the judicial precedent set recently by the Court of Justice in its *X and Y* judgment of 22 February 2022.<sup>34</sup> The National Court, referring to the reasoning of the Court of Justice in the *X and Y* case, recalled the need to specify the exceptional circumstances<sup>35</sup> which, impose a two-stage examination: first, ‘it must assess the real risk of infringement of fundamental rights in the light of the overall situation in the issuing Member State; second, ‘it must verify, specifically and precisely, whether there is a real risk that a fundamental right of the requested person, having regard to the circumstances of the specific case’. In the present case, after a subsequent explanation of the content of the European resolution, the court concludes by stating that there is no violation of the right to a fair trial because a real risk of violation has not been proved by the person subject to the EAW.

The question of the judicial independence of the Polish issuing judicial authority arose on subsequent occasions, albeit with the National Court expressing a similar *rationale*. Another example is Order 190/2022, of 23 March 2022<sup>36</sup> in relation to an EAW issued by the Provincial Court of Katowice. The National Court found it is ‘a court which is part of the administration of justice in Poland’ presumed to ‘act independently in the exercise of its functions’. Here again, reference is made to the case law from Luxembourg, specifically, the *OG and PI* judgment<sup>37</sup> where the Court of Justice defines the concept of issuing judicial authority, the Spanish court concluding that the public prosecutor may acquire this status

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December 2019, Joined Cases *JR and YC*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077; 12 December 2019, *XD*, C-625/19, ECLI:EU:C:2019:1078; of 12 December 2019, *ZB*, C-627/19, ECLI:EU:C:2019:1079; and of 13 January 2021, *MM*, C-414/2020, ECLI:EU:C:2021:4.

31 Judgment of the Court of Justice of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586.

32 National Court, Criminal Chamber, order of 18 May 2021, No. 288/2021, ECLI:ES:AN:2021:3356A.

33 National Court, Criminal Chamber, order of 25 March 2022, No. 135/2022, ECLI:ES:AN:2021:2441A.

34 Judgment of the Court of Justice, Joined Cases *X and Y*, C-562/2021 and C-563/21 PPU, ECLI:EU:C:2022:100

35 To date, the ‘exceptional circumstances’ doctrine enacted by the CJEU is related to two fundamental rights: the absolute prohibition of degrading treatment and the right to an independent tribunal; as known, this doctrine developed by CJEU gives place to two steps place; see Mancano, L. (2021), ‘You’ll never work alone: a systematic assessment of the European Arrest Warrant and judicial independence’, *Common Market Law Review*, Vol. 58, No. 3, pp. 683-718, at pp. 696 and 717.

36 National Court, Criminal Chamber, order of 25 March 2022, No. 135/2022, ECLI:ES:AN:2021:2441A.

37 Judgment of the Court of Justice of 27 May 2019, Joined Cases C-508/18 and C-82/19, ECLI:EU:C:2006:610, concerning the interpretation of Art. 54 CISA.

‘if it is established that it forms part of the administration of justice and acts independently in the exercise of its functions’. Therefore, it implies, *a fortiori*, that this concept is applicable to a court in the strict sense of the word, including the Polish Court; the contrary would be contradictory to the judicial precedent set by the Court of Justice in its *OG and PI* judgment, which recognises the public prosecutor as the issuing judicial authority, and which is not a judicial body in the strict sense of the word.<sup>38</sup>

### **Section III Protecting fundamental rights through horizontal and vertical cooperation?**

According to Article 41 LRM, exactly after transmission of the EAW, the Spanish issuing judicial authority may send to the executing judicial authority complementary information either *ex officio* or at the request of the public prosecutor, private prosecutor or executing judicial authority. This rule is drafted in accordance with the EU rule, under Article 10(5) of the EAW FWD, which provides for direct contact between the executing and issuing judicial authorities for the resolution of any difficulties or questions in order to make possible the recognition and enforcement of the EAW, which is the general rule as provided for in Article 1(2) of the FWD and confirmed by the case law of the Court of Justice.<sup>39</sup> This obligation is also recalled in general terms in the Spanish regulation for all mutual recognition instruments, specifically Article 16 (1) LRM.

After the Court of Justice’s ruling in the *Aranyosi and Caldaru* case,<sup>40</sup> the Spanish judicial authorities as executing judicial authorities have started to take cognisance of ‘exceptional circumstances’ as a further ground for refusal of EAWs, in this case concerning possible inhuman and degrading treatment in the country of origin. Following this criterion, in Spain the National Court has since then also begun to carry out this examination when hearing appeals lodged against decisions granting surrender in cases where this ground is raised by the defence.

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38 See Zimmerman, *supra* n. 27, at p. 12.

39 See judgment of the Court of Justice of 30 May 2013, *Jeremy F.*, C-168/13 PPU, ECLI:EU:C:2013:358, i.e., ‘the principle of mutual recognition, which is the “cornerstone” of judicial cooperation, means that, pursuant to Article 1(2) of the Framework Decision, Member States are in principle obliged to give effect to a European arrest warrant’ (ground 36).

40 Judgment of the Court of Justice of 5 April 2016, C-404/15 and C-659/14, ECLI:EU:C:2016:198. There are favourable and unfavourable comments to this case law, e.g., respectively Weyembergh, A. and Pinelli, L. (2022) ‘Detention conditions in the issuing Member State as a ground for non-execution of the European Arrest Warrant: state of play and challenges ahead’, *European Criminal Law Review*, Vol. 12, No. 1, pp. 25-52, at p. 26 and Klip, A. (2020), ‘Eroding mutual trust in an European criminal justice area without added value’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 28, No. 2, pp. 109-119, at p. 118; an intermediate position is maintained in Ouwerkerk, J. (2018), ‘Balancing mutual trust and fundamental rights protection in the context of the European Arrest Warrant. What role for the gravity of the underlying offence in the CJEU case law?’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 26, No. 2, pp. 103-109, at pp. 103-104.

A first example is Order 419/2021, of 13 July 2021,<sup>41</sup> where the appellant submits that surrender is not appropriate on the grounds that the conditions of detention are inadequate. The National Court, citing the case law of both the ECtHR and the Court of Justice – including *Aranyosi* declared that ‘the appellant has neither specified nor accredited the specific reasons that would determine the violation of the rights of the complainant during his deprivation of liberty in that State’.

A second example is Order 116/2022 of 28 February 2022<sup>42</sup> concerning an EAW issued by Belgium. The appellant alleged there would be a real and serious risk to his life if he was surrendered to Belgium, as he was threatened with death in his country, which he submitted could be deduced from a kidnapping attempt in Spain. By contrast, the National Court estimated that this allegation of kidnapping could only be considered as posing a risk in Spain as that was the country where the appellant had to change his residence and suffered the abduction, but it was not proved to exist in Belgium, especially when in the first country the applicant is at liberty, but in is incarcerated in the second.

Spanish courts often make use of the preliminary ruling procedure before the Court of Justice as a matter of course. Several questions on the topic of AFSJ have already been raised. Some of them are on relevant issues, giving rise to important leading cases such as, for example, the *Gasparini* case<sup>43</sup> on the issue of *non bis in idem*, a request made by the Provincial Court of Málaga. On the EAW itself, it is worth highlighting the so-called *Melloni* judgment, the result of the first ever preliminary ruling requested by the Constitutional Court. It sought the interpretation and, ‘if necessary’, a ruling on the validity of Article 4a(1) of the EAW FD concerning decisions rendered *in absentia*.

As a last example of Spanish case law, by Order 979/2022 of 2 March 2022 the National Court suspended judgment on the appeal referring a question to the Court of Justice for a preliminary ruling in which it seeks the interpretation of the *non bis in idem* clause according to Article 54 CISA in order to assess if there could be reliance on a clause as a mandatory ground for refusal of the execution of an EAW. Precisely for this last reason the Order of the Central Judge of the Investigative had refused the surrender of a Spanish national but agreed that the sentence should be served in Spain in accordance with the application of Articles 48 and 91 LRM. The requested person’s defence appealed that decision before the National Court, arguing that the facts giving rise to the issuance of the EAW were the same as those for which he has already been tried in Portugal (*res iudicata*). To date the preliminary ruling promoted by National Court is still pending in Luxembourg.<sup>44</sup>

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41 National Court, Criminal Chamber, order of 13 July 2021, No.419/2021, ECLI:ES:AN:2021:5502A.

42 National Court, Criminal Chamber, order of 28 February 2022, No.116/2022, ECLI:ES:AN:2022:1383A.

43 Judgment of the Court of Justice of 28 September 2006, C-467/04, ECLI:EU:C:2019:456.

44 Ministerio Fiscal, case C-164/22, <https://curia.europa.eu/> See Gudín Rodríguez-Magariños, A.E. (2022), “Alcance y límites de la continuidad delictiva transnacional. Examen de la cuestión prejudicial C-164/22 planteada por la Sección 2ª de la Sala de lo Penal de la Audiencia Nacional”, *Diario La Ley*, 8 July 2022, No. 10106, <https://diariolaley.laleynext.es/>

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## Availability of EAW-related jurisprudence

In Spain judgments related to the issuing and execution of an EAW are public as are other judgments according to the publicity rule established in Article 120 of the Spanish Constitution. They can be accessed through public and private databases, although it is likely that none of them compiles Spanish case law as a whole. With some exceptions, they are available in Spanish.

A public source for Spanish case law is provided by the Judicial Documentation Centre (*Centro de Documentación Judicial*) depending on the General Council of Judiciary Branch: <https://www.poderjudicial.es/search/indexAN.jsp>. Initially, access was only available for Supreme Court (*Tribunal Supremo*) rulings, but the database is being extended to other lower courts. Some courts also have their own open database, as is the case of Constitutional Court (*Tribunal Constitucional*): <https://hj.tribunalconstitucional.es/>; some relevant cases are translated into English and/or French.

There are also some private databases, mostly belonging to legal publishers and subject to a fee for access:

- *Aranzadi digital*: <https://signon.thomsonreuters.com/>
- *El Derecho*: <https://elderecho.com/norma-y-criterio-jurisprudencia>
- *Noticias Jurídicas*: <https://noticias.juridicas.com/actualidad/jurisprudencia/>
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