

## Executive Summary: Spain

*Mar Jimeno-Bulnes*

### Executive Summary

#### Issuing Procedures

- In Spain, only judges and courts are recognized as judicial authorities in order to issue an EAW; this is generally the rule in Spain for the issuance of all mutual recognition instruments in criminal matters with exception of the European Investigation Order (EIO), which issuance can take also place by prosecutors when the EIO does not include any measure restricting fundamental rights.
- All Spanish judicial authorities are the appropriate judges for the issuance and transmission of an EAW according to a sort of decentralized criterium by contrast to the centralized criterium that governs the EAW's execution; currently the appropriate judicial authority to issue an EAW in Spain is the Examining Magistrate or Judge of the Investigative, with the specific exception of the Judge of Violence against Women, who deals with the investigation of causes related to gender violence.
- Judicial practice in Spain has not dealt with specific questions related to the concept of 'issuing judicial authority' under Spanish law, nor has this specific issue given rise to any pronouncements; contrary to other Member States, till now judicial independence has not been contested neither in Spain nor in Luxembourg in relation to Spanish judges and courts acting as issuing judicial authorities.
- A significant exception is represented by the questions concerning different aspects of EAW issuance by Spain's authorities in the well-known *Puigdemont* case, where the Spanish judicial system at a whole is challenged by the national executing judicial authorities in Belgium; at the moment a preliminary ruling is still pending before the Court of Justice of European Union (CJEU)
- In terms of Spanish jurisprudence, some case-law has been arisen concerning the specialty rule but mostly of the allegations based in this cause have been dismissed in appeal by National and Supreme Courts in Spain

## Executing Procedures

- In Spain only specific Spanish judicial authorities located in Madrid as they are the Central Judge of the Investigative or Central Judge of Minors if EAW concerns a minor (i.e., requested person is under 18 years old) can execute an EAW according to a centralized criterium; against this order pronounced by any of these Central Judges appeal before the Criminal Chamber of National Court is contemplated according to ordinary procedural rules.
- The Spanish law transposing the EAW does not contemplate specifically the violation of fundamental rights as cause for refusal to execute an EAW by contrast to other national legislations on EAW; only a general provision declaring the observance of fundamental rights set in Spanish Constitution as well as European and international texts is contained for all instruments on mutual recognition in criminal matters.
- In general Spain is a very cooperative country in terms of judicial cooperation in criminal matters; with the notable exception of the constitutional jurisprudence related to *in absentia* judgments and *res iudicata*, there is not a great deal of case-law concerning exceptions to the execution of EAWs.
- Nevertheless, questions relevant to Spanish judges and courts acting as executing judicial authorities refer also to the double criminality test for offences other than the listed 32 offences (euro-crimes), which in fact is the problem of thorny *Puigdemont* case and probably as well question in other Member States due to the lack of harmonization of substantive Criminal Law
- Another line of constitutional jurisprudence is the one recognizing the relevance of fundamental rights and procedural guarantees in EAW proceedings; here particular regard to the right to choose legal counsel by defendant in EAW proceedings as part of due process of law has been taken place and declared by Spanish Constitutional Court
- Last, new judicial practice on EAW has been recently arisen in Spain along period 2020-2021 in relation to the pandemic health crisis taking place the temporal postponement of the surrender on the basis of 'serious humanitarian reasons' according to CJEU jurisprudence.
- Finally, it can be argued that in Spain the application of EAW proceeding as executing Member State has improved significantly since the implementation of the directives on procedural rights of suspects and accused persons in ordinary criminal procedural law.

## Key interpretation and implementation challenges

- Regulation of proportionality rule should be included because only a general mention is provided in the Preamble of the Spanish legislation on EAW; this should be in line with the new legislation's amendments to reinforce legal guarantees in surrender proceedings according to directives on procedural rights of suspects and accused persons in criminal proceedings (also proportionality is required in other mutual recognition instruments as it is the EIO)
- Provision of specific mandatory non-execution cause related to violation of fundamental rights should be included in Spanish EAW legislation as cause for refusal to execute an EAW