This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

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SPANISH NATIONAL REPORT

Grant Agreement nº:	<101089634>
Project Acronym:	FACILEX
Project Title:	Facilitating mutual recognition: Analytics and Capacity building Information LEgal eXplainable tool to strengthen cooperation in the criminal matter
Website:	FACILEX - Facilitating mutual recognition: Analytics and Capacity building Information LEgal eXplainable tool to strengthen cooperation in the criminal matter (unibo.it)
Contractual delivery date:	M20
Contributing WP	WP2
Dissemination level:	OPEN ACCESS
Deliverable leader:	UNIBO
Contributors:	Ana-María Neira-Pena - University of A Coruña

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Document History

Version	Date	Author	Partner	Description
1.0		Anna Maria Neira Pena		First draft
2.0		Anna Maria Neira Pena		Second draft
3.0		Antonio Pugliese		Feedback
4.0		Anna Maria Neira Pena		Final survey

1 Contributors

Partner	Name	Role	Contribution
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2 Table of Contents

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3 Executive Summary

In Spain, all the mutual recognition instruments, in the field of criminal proceedings, are regulated by a single act. This is Law 23/2014, of November 20, on the mutual recognition of criminal decisions in the European Union (hereinafter, LRM), which brings together the regulation of all instruments. This regulation was accompanied by Organic Law 6/2014, of October 29, complementary to the Law on mutual recognition of criminal resolutions in the European Union, which amends Organic Law 6/1985, of 1 July, of the Judiciary, to complete the regime of competence of the Spanish Courts with international cooperation functions.

Both the EAW and the EIO, as well as the freezing and confiscation resolutions, are reflected in the aforementioned legal act. The OEDE was regulated in the first version of the LRM. The Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters was expressly incorporated through Law 3/2018, of June 11, amending Law 23/2014, of November 20, on the mutual recognition of criminal decisions in the European Union, to regulate the European Investigation Order. For its part, Regulation (EU) 1805/2018 of the European Parliament and of the Council, of 14 November 2018, on the mutual recognition of freezing orders and confiscation orders, being directly applicable, has not entailed any amendment to the LRM.

4 The implementation of criminal mutual recognition instruments in Spain

4.1 Introduction

4.1.1 Overview of the criminal procedural system

The Spanish criminal system is characterized by the existence of the figure of the examining judge, who is in charge of directing the criminal investigation and adopting real and personal precautionary measures necessarily needed for the securing of the property and persons subject to criminal action. The examining judge is a judicial authority who enjoys, therefore, all the guarantees of independence. In addition, in order to guarantee his/her impartiality, the legislation expressly establishes that the authority that assumes

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duties in the investigation may not intervene in the trial phase, in which jurisdiction is attributed to the Criminal Courts and the Provincial High Courts.

For its part, the Public Prosecutor's Office acts as the defender of legality and is responsible for bringing criminal action when it considers that a crime has been committed, its actions being guided by the principle of mandatory prosecution. Along with the national Public Prosecutor, it is necessary to briefly refer to the role of the European Public Prosecutor's Office, responsible for investigating and exercising criminal action before the competent prosecution body in the first instance and by way of appeal against the perpetrators and other participants in crimes that harm the financial interests of the European Union in which, in accordance with Council Regulation (EU) 2017/1939 of 12 October 2017, it effectively exercises its competence.

Regarding the issuance and execution of the instruments of mutual recognition of criminal judgments, Spain has naturally assumed the direct relationship between judicial authorities of the different member States, characteristic of the mutual recognition system, as opposed to other cooperation systems. This feature implies immediate and direct communication between the judicial and prosecutorial authorities designated as competent to decide on the transmission, recognition and execution of European orders, standardizing consultations and exchange of information between the competent authorities of the States involved. The intervention of the central authorities, which are administrative in nature, is minimal.

In general, the competence for both the transmission and the execution of the various instruments of mutual recognition is distributed among the Judges and Courts and the Public Prosecutor's Office. The latter has acquired a greater role in the EIO, as it is the exclusive receiving authority for all EIOs received by Spain and has the power to decide on the transmission and execution of those that do not affect fundamental rights. On the other hand, the LRM generalizes the prior hearing of the Prosecutor when a Judge or Court is deciding on any of the referred instruments.

Additionally, it should be noted that the Seventh Additional Provision of the LRM -introduced by Organic Law 9/2021, of July 1, implementing Council Regulation (EU) 2017/1939 of October 12, 2017, establishing enhanced cooperation for the creation of the European Public Prosecutor's Office- indicates that the references to judicial authorities and prosecutors shall be understood to refer to the delegated European prosecutors with

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respect to those functions within their competence, with respect to which they shall be considered competent authority.

Finally, it is important to point out that, for all matters not expressly regulated in the LRM, the Criminal Procedure Act (hereinafter, LECrim) will be of supplementary application, which regulates relevant issues for the application of the referred instruments, such as the competence in criminal proceedings, the procedure for the taking of evidence, the rights of the accused or the general regime of appeals, among other aspects.

4.1.2 Overview of the implementation roadmap

In Spain, all the instruments of mutual recognition of criminal decisions are regulated in a single legal text - Law 23/2014, of November 20, on the mutual recognition of criminal decisions in the European Union (hereinafter, LRM) - which has been modified as new normative instruments have been incorporated into European Union law.

As indicated in the Explanatory Memorandum of the LRM , in view of the prolific regulatory task of the institutions of the European Union in this field, in 2014 it was decided to modify the regulatory technique used in the incorporation of these European rules on mutual recognition of criminal decisions, pursuing both to ensure a better transposition, and to reduce the regulatory dispersion and complexity of an order that, in the end, should enable legal operators to act in an already complex field.

Thus, with the approval of the LRM, the technique of incorporating each framework decision or European directive individually in an ordinary law and its corresponding complementary organic law is considered to be amortized, and a joint text is presented in which all the framework decisions and directives approved in the field of mutual recognition of criminal decisions are brought together. In addition, the law is articulated through a scheme in which the incorporation of future directives that may be adopted in this area is easily accommodated.

The LRM starts with a brief preliminary title and is then structured in a series of titles. The Preliminary Title contains the basic provisions that make up the legal regime of mutual recognition of criminal decisions in the European Union. It lists the judicial decisions that will later be regulated, establishes respect for fundamental rights and freedoms as the main criterion for action, the supplementary application of the LECrim in this area, as well as what is to be understood by the issuing and executing State.

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Title I contains the general rules on the transmission, recognition and execution of all instruments of mutual recognition in the European Union. An effort is made here to identify the common elements found in the various rules on mutual recognition of judicial decisions in criminal matters. Thus, this Title recognizes the basic characteristics of the new system of judicial cooperation based on mutual recognition. For example, those derived from the direct relationship between judicial authorities of the different States. Thus, in each specific case, the operators are called upon to follow both these general rules, which ensure the coherence of the whole system, and the specific provisions of each of these instruments.

The articles of this Title I regulate, among other aspects, the common rules governing both the transmission of European orders and judicial decisions to other Member States and their enforcement in Spain, the general grounds for refusal of recognition and execution, the rules on appeals and the general rules on costs, compensation and reimbursement.

The competence for both the transmission and the execution of the different instruments of mutual recognition is distributed among the Judges and Courts and the Public Prosecutor's Office. The law generalizes the prior hearing of the Public Prosecutor when a Judge or Court is deciding on any of the referred instruments.

Of special relevance within Title I is the list of criminal categories to which the principle of double criminality will not be applicable, which expresses the basic commitment of the member States of the European Union to waive the requirement of double criminality control for a series of offenses.

All the titles specifically dedicated to each of the mutual recognition instruments follow an identical scheme. They begin with common rules, defining the instrument and identifying the competent issuing and executing authorities. They then contain the rules governing the transmission of the instrument when Spain is the issuing State, and end with the rules governing the recognition and enforcement in Spain of instruments transmitted by other Member States.

For the purposes of this report, the following Titles of the LRM should be highlighted:

- Title II (Arts 34-62 LRM) contains the regulation of the European Arrest Warrant (EAW), incorporating the contents of the Law 3/2003, of March 14, on the EAW (now repealed), but updated in attention to the experience accumulated in this matter.
- Title VII (Arts 143-156 LRM) regulates the transmission, recognition and execution

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of the freezing of assets and securing of evidence resolutions. This Title incorporates the content of the Council Framework Decision 2003/577/JHA, of 22 July 2003, on the execution in the European Union of orders freezing property or evidence subsequently replaced by the Regulation (EU) 1805/2018 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. In relation to the freezing of assets, the regulation of the LECrim of the precautionary measure of seizure of assets (Art 589 LECrim) is also relevant.

- Title VIII (Arts 157-172 LRM) regulates the transmission, recognition and enforcement of confiscation orders. With respect to confiscation, the regulations contained in the Spanish Penal Code on the different types of confiscation (Arts 127-129 bis PC) are also relevant. As is the case with the freezing regulation, the LRM continues to reflect the content of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, subsequently replaced by the Regulation 1805/2018, except for Denmark and Ireland.
- Title X (Arts 186-223 LRM) contains the regulation of the European investigation order (EIO). This title was introduced in the LRM by Law 3/2018, of June 11, amending Law 23/2014, of November 20, on the mutual recognition of criminal decisions in the European Union, to regulate the European Investigation Order.

The final part of the Law contains seven additional provisions, three transitional provisions, one derogatory provision, four final provisions and fifteen annexes. Among these provisions, for the purposes of this report, it is worth highlighting the content of the first additional provision, which refers to the special regime of the EAW between the British colony of Gibraltar and Spain; the fourth additional provision, which contains the rules for the distribution of the assets confiscated by Spain in execution of confiscation orders issued by authorities of third States not members of the European Union and the sixth additional provision, which provides for the regime of the declaration of witnesses or experts by telephone conference within the framework of the EIO, in the event that this procedure should be regulated in the future in the Spanish criminal procedural law.

At the end of the regulation, the different forms or certificates to be used by the Spanish judicial authorities for the transmission of judgments or for the notifications required by

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the LRM are included. In relation to its content, the First final provision contains an authorization to the Council of Ministers so that, at the initiative of the Minister of Justice, it may update the certificate models included in the annexes of the LRM when they have been modified by European Union regulations.

4.2 The implementation of Framework decision 2002/584

4.2.1 Scope

According to Art 34 LRM, the EAW *"is a judicial decision issued in a Member State of the European Union with a view to the arrest and surrender by another Member State of a person who is wanted* for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order *or detention in a juvenile facility*". This definition corresponds to the one provided for in Art 1(1) EAW FD.

Regarding the determination of the facts that may give rise to the surrender of a citizen under an EAW, Art 2(1) EAW FD is substantially in line with the provisions of Art 47(2) LRM. According to both precepts, the instrument applies to cases involving acts punishable in the issuing State by a custodial sentence or security measure or by a measure of detention in a closed regime of a minor whose maximum duration is at least twelve months, a threshold that is reduced to four months of deprivation of liberty when the purpose of the request is the enforcement of a custodial sentence or detention order imposed in the issuing State.

Likewise, Spanish legislation is respectful of the provisions of European legislation as regards the application of the double criminality control. In this sense, Art 47(1) LRM, in line with the provisions of Art 2(2) EAW FD, excludes from the control of double criminality those EAWs issued for an offense falling within the categories of offenses listed in Art 20(1) EAW FD, when such offense is punishable in the issuing State with a custodial sentence or detention order whose maximum duration is at least three years. As clarified by the Spanish legislation, apart from the aforementioned cases excluded from the double criminality control, the surrender may be subject to the requirement that the facts justifying the issuance of the EAW constitute an offense under Spanish law, regardless of the constituent elements or the legal qualification of the offense (Art 47(2) LRM).

The list of offenses contained in Art 2(2) EAW FD substantially coincides with that contained in Art 20(1) LRM. However, in practice there may be difficulties in determining

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whether or not a specific act falls within the aforementioned categories. For example, the category corruption clearly includes those corruption offenses in the public sector, such as active and passive bribery (Arts 419 to 427 bis Criminal Code), influence peddling (Arts 428 to 431 Criminal Code), embezzlement (Arts 432 to 435 bis Criminal Code), fraud and illegal exactions (Arts 436 to 438 bis Criminal Code) and negotiations and activities prohibited to public officials and abuses in the exercise of their functions (Arts 439 to 444 Criminal Code). All these crimes are included, together with some others, in Title XIX on Crimes against the Public Administration. However, the inclusion of corruption offenses in the private sector –known as business corruption offenses (Arts 286 bis, 286 ter, 286 quater and 288 bis Criminal Code)- in this category may be questionable.

4.2.2 Grounds for non-recognition and non-execution

Spanish legislation provides for a series of general grounds for refusal, i.e., applicable to all mutual recognition instruments, some of them mandatory (Arts 32(1) and 33 LRM), and others optional (Arts 32(2) and 32(3) LRM). In addition, specifically for the EAW, there are several mandatory grounds for non-execution (Art 48(1) LRM) and several optional grounds for non-execution (Art 48(2) LRM).

In general terms, the Spanish regulation is in line with the European regulation, having transposed all the grounds for refusal provided for in the EAW FD. However, it should be noted that some of the optional grounds for refusal provided for in the European legislation are included as mandatory in the Spanish legislation. This is the case of the grounds for refusal linked to the *ne bis in idem* principle, those relating to cases of prescription of the offense or penalty, when the Spanish authorities would have been competent to prosecute and some cases of prosecution *in absentia*. This mandatory nature excludes the possibility that the Spanish judge competent to execute an EAW may discretionally assess whether or not to execute the order.

Thus, for example, this discrepancy is observed in the optional ground for refusal provided for in Art 4(3) EAW FD, which is included as mandatory in Arts 48(1)(b) LRM ("*When a definitive dismissal*[145] *has been granted in Spain for the same facts*") and 48(1)(c) LRM ("*When the person who is the subject of the EAW has been the subject of a final decision*

[145] In Spain, legislation provides for two types of dismissal (Arts 634 et seq. LECrim). A free or definitive dismissal, which is equivalent to an acquittal in terms of its effects, and a provisional dismissal, which allows the proceedings to be reopened in the future if new evidence appears, as long as the infraction is not time-barred.

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in another Member State of the European Union for the same facts that definitively prevents the subsequent exercise of criminal proceedings").

The same applies to the optional ground for refusal provided for in Art 4(5) EAW FD, which is included as mandatory in Art 48(1)(d) LRM, according to which the EAW shall be refused when the requested person has been finally judged for the same facts in a non-Member State, provided that, in case of conviction, the sanction has been executed or is currently in the process of execution or can no longer be executed under the law of the convicting State.

Likewise, the optional ground for refusal provided for in Art 4(4) EAW FD is included in Spanish law as mandatory and applicable to all instruments of mutual recognition of criminal decisions. In this sense, Art 32(1) LRM provides the following: "*The Spanish judicial authorities shall not recognize or execute the orders or resolutions transmitted in the cases regulated for each instrument of mutual recognition and, in general, in the following cases: (...) b) When the order or resolution refers to facts for the prosecution of which the Spanish authorities are competent and, if the sentence had been issued by a Spanish court, the crime or the sanction imposed would have prescribed in accordance with Spanish law*".

Regarding the judgments issued *in absentia* of the accused person, the Spanish regulation is quite adjusted in its transposition of the European standard. The only discrepancy lies, once again, in the mandatory nature of the ground for refusal, in those cases in which the conditions of information and notification provided for in Art 4 bis (1) (a), (b) and (c) EAW FD are not observed. In this case, the general ground for refusal is provided for as mandatory in Art 33 LRM.

The provision of the referred grounds for refusal as mandatory in the national legislation is contrary to EAW FD. This is because, in the aforementioned cases, the Spanish legislation excludes, in general, the possibility for the executing authority to recognize an EAW, without leaving it any margin of appreciation to decide in light of the circumstances of the case[146]. In this regard, it is worth mentioning a recent judgment of the CJEU[147] in which, in resolving a preliminary ruling submitted by a German court, it was understood

[146] As indicated by the Attorney General's Office in its annual report of 2022, the conversion of the optional grounds for refusal into mandatory ones clashes with the will of the European legislator to leave a margin of discretion to the competent judicial authorities to assess the relevance of certain circumstances as grounds for refusal (Attorney General's Office. Annual report 2022, 1219-1221. <https://www.fiscal.es/memorias/memoria2023/FISCALIA_SITE/recursos/pdf/MEMFIS23.pdf> accessed 19 July 2024).
[147] CJEU, judgment of 21.12.2023, C-396/22 - *Generalstaatsanwaltschaft Berlin*.

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that the German legislation at issue in the main proceedings generally obliges the executing judicial authority to refuse to execute a EAW in the event of a conviction *in absentia*, without leaving the executing judicial authority any discretion to verify, on the basis of the circumstances of the individual case, whether the rights of the defense of the person concerned may be regarded as having been respected and, therefore, to decide to execute the EAW in question (para. 44). The CJEU concludes that, in those circumstances, it is obliged to declare that such national legislation is contrary to Art 4a(1) EAW FD (para. 45).

This discrepancy is not observed, however, in the case provided for in Art 4 bis (1)(d) EAW FD, in which the issuing State, which has not been able to personally notify the decision to the person convicted *in absentia*, undertakes to notify him/her without delay after the surrender, as well as to inform him/her of the possibilities of a retrial or of appealing the decision rendered *in absentia*. In the latter case, in line with the European standard, the ground for refusal is also provided for on an optional basis in the Spanish legislation (Art 49 LRM).

The Spanish legislation is also in accordance with the European standard regarding the control of double criminality. The lack of dual criminality is provided for as an optional ground for non-execution applicable to all instruments of mutual recognition of criminal decisions (Art 32(2) LRM), although only in relation to offenses not exempt from the aforementioned control in the terms provided for in Art 20 LRM.

With respect to other grounds for refusal provided for in Spanish law, it should be noted that a mandatory ground for refusal, not provided for as such in the EAW FD, is expressly provided for. These are cases in which the form or certificate that must accompany the request for the adoption of the measures is incomplete or manifestly incorrect or does not correspond to the measure requested, or when the certificate is missing, without prejudice to the possibilities of rectification (Art 32(1)(c) LRM). It should be understood that this ground for refusal must be interpreted in line with Art 8 EAW FD, which indicates the content and form of the EAW form.

Finally, it is also relevant to refer to the optional ground for refusal provided for in Art 48(2)(b) LRM. According to this precept, the EAW may be denied when it has been issued for the purpose of executing a custodial sentence or a detention order, when the requested person has Spanish nationality or resides in Spain, unless he/she consents to serve the sentence in the issuing State. Up to this point, the Spanish legislation is in line with the provisions of Art 4(6) EAW FD. However, Spanish legislation adds that if the defendant

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(Spanish citizen or resident in Spain) does not agree to serve his/her sentence in the issuing State, he/she must serve it in Spain. This has been interpreted by Spanish courts as an option given to the person, whereby if he/she does not consent to his/her surrender and proves to have roots in Spain, the surrender is denied, and the requested person must serve the sentence in Spain.

In fact, one of the most common grounds for refusal in Spanish case law has to do with territoriality issues, particularly the nationality or residence of the requested person. This is an optional ground for refusal, which Spanish courts usually appreciate when there is no consent to surrender. So, when the requested person proves to have certain roots in Spain (personal, family, work) and does not consent to his/her surrender, the Spanish Courts refuse systematically to execute the EAW and the sentence is ordered to be served in Spain[148].

The subsequent enforcement in Spain of the sentence imposed by another Member State, in cases where the surrender is refused on the grounds of the nationality or residence, poses some problems in the case of sentences of less than six months. The reason lies in Art 85(b) LRM, in Title III, devoted to the enforcement of decisions imposing custodial sentences, since this precept obliges to refuse the enforcement of sentences of less than six months. The problem is that this refusal has occurred even when the transfer of the custodial sentence for enforcement derives from the previous refusal of surrender of a person requested by an EAW due to his/her Spanish nationality or residence. The situation is contradictory since, although Article 48(2) LRM provides that, in this case, the convicted person not surrendered must serve the sentence in Spain without establishing penological limits, however, in practice, custodial sentences of less than six months could not be executed in accordance with the provisions of Art 85(b) LRM[149]. This issue even led the Criminal Chamber of the NA to propose the possibility of a preliminary ruling before the CJEU. Finally, the Criminal Chamber of the AN resolved, by Order 9/21 of January 15, with

[148] There are many rulings denying the execution of the EAW for this reason. Among others, see the following: National High Court. Orders No. 105/2023, of July 25; 88/2023 of 1 July; 73/2023 of 21 May; 61/2023 of 19 April; 47/2023 of 6 March; 605/2022, October 26; 324/2023, May 8; 584/2022, November 23.

[149] This issue led the National High Court (Criminal Chamber) to propose the possibility of a preliminary ruling before the CJEU. Finally, the National High Court resolved, by Order No. 9/21 of January 15, with an interpretation in accordance with the EAW FD and avoided raising the question for a preliminary ruling. In any case, although the aforementioned Order solves the specific case, it reveals a defect in the LRM that should be corrected to avoid impunity and ensure the execution of the sentence, whatever its duration, when it is the execution in Spain of the custodial sentence derived from the refusal of an EAW due to the nationality or residence of the defendant (Attorney General's Office. Annual report 2022 (n 2) 805-806).

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an interpretation in accordance with the Framework Decision, agreeing to serve a sentence of less than six months.

4.2.2.1 Fundamental rights and proportionality issues

Art 3 LRM contains a provision of general application to all instruments of mutual recognition according to which "*this Law shall be applied with respect for the fundamental rights and freedoms and principles contained in the Spanish Constitution, in Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union, and in the European Convention on Fundamental Rights and Freedoms of the Council of Europe of November 4, 1950*". There is no provision, however, in the specific regulation relating to the EAW, for a particular ground for refusal based on the infringement of fundamental rights.

In any case, as the CJEU stated on a 2023 ruling precisely on a preliminary question raised by the Spanish Courts[150], the executing judicial authority may refuse an EAW when the execution would result in the infringement of a fundamental right enshrined in EU law, provided that the scope of this provision does not exceed that of Art 1(3) EAW FD, as interpreted by the CJEU[151]. In that regard, it follows from the Court's case-law that, where the executing judicial authority has evidence indicating that there is a real risk of infringement of the surrender's fundamental right to a fair trial guaranteed by the second paragraph of Art 47 CFR, based on accounts of systemic or generalized deficiencies in the judicial system of the issuing Member State, that authority must verify, specifically and precisely, whether, in the light of that person's personal situation, the nature of the offence for which he or she is sought and the factual context in which the EAW was issued, there are substantial grounds to believe that that person will run such a risk in the event of being surrendered to that Member State[152].

[150] CJEU, Judgment of 31.01.2023, C-158/21 - *Puig Gordi and Others*.

[151] In the case at hand, the Belgian State had refused the execution ofan EAW issued by the Spanish State in application of a national rule according to which the execution of an EAW must be refused when there are serious reasons to consider that such execution would have the effect of violating the fundamental rights of the person concerned enshrined in Union law. According to the CJEU, such a provision, although not expressly provided for among the grounds for refusal of the EAW FD, could legitimately be applied by the national authorities provided that its scope does not exceed that of Art 1(3) EAW FD, as interpreted by the Court of Justice (paragraph 79).

[152] See the aforementioned Judgment C-158/21 (paragraph 97) citing the following decisions: judgments of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C 354/20 PPU and C 412/20 PPU, EU:C:2020:1033, paragraph 52, and of 22 February 2022, Openbaar Ministerie (Tribunal

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After analyzing the Spanish case law on EAW, it should be noted that it is not common for Spanish courts to refuse the enforcement of EAWs on grounds related to the infringement of fundamental rights. This is because, given the basic principle of mutual trust, Spanish courts are confident that the issuing State respects fundamental rights, unless there are clear and specific allegations that reasonably suggest otherwise. In this vein, there is a consolidated body of case law in relation to the consequences derived from the existence of a European judicial space, as a result of the communion of the same values and guarantees shared among the Member States, regardless their specific positivization and national legal traditions[153].

In line with the case law of the CJEU, the Spanish case law on the matter is unanimous in considering that to deny an EAW it is not enough to make generic statements about the risk of violation of fundamental rights in the issuing State, but rather a concrete and real risk of violation of the rights of the requested person must be reliably proven. Thus, for example, in a case in which the requested person alleged the lack of security in Romanian prisons, despite the recognition that the standards of security and health in Romanian prisons have been called into question in numerous condemns of the European Court of Human Rights (ECtHR), the Spanish judicial authority decided that the application of Art 1(3) EAW FD would require proving a real and patent risk of violation of the fundamental rights of the defendant. In this case, the Court found that the appellant's allegations about the systematic shortcomings of the Romanian prison system, without providing *prima facie* evidence of concrete risks to the appellant himself, were insufficient, especially considering Romania's membership of the EU and its attachment to the ECHR[154].

4.2.3 Execution procedure

The Judge or Court hearing the case in which it is appropriate to issue an EAW will be the competent authority for its issuance (Art 35(1) LRM). Specifically, the competent authority to recognize and execute an EAW in Spain is the Central Examining Judge of the National High Court, in the event that the requested person is an adult, and the Central

established by law in the issuing Member State), C 562/21 PPU and C 563/21 PPU, EU:C:2022:100, paragraph 50

[153] See, in this line, the following judgments of the Spanish Supreme Court: No. 1450/99, of November 18 in relation to the rogatory commission sent by the French authorities; No. 947/2001, of May 18, on the Dutch authorities; No. 733/2013, of October 8, Legal Ground 19ª.

[154] National High Court. Order No. 80/2024, of February 8.

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Juvenile Court Judge of the National High Court, when the requested person is a minor (Art 35(2) LRM). In this way, all the executions of this instrument were centralized in a single specialized body with experience in the matter, since the National High Court is the same entity that has been hearing the extradition proceedings[155].

The competent authority for the execution can receive the EAW in two different ways: by direct communication from the issuing judicial authority, when the latter knows the location of the requested person, or by making it available to the police authorities, in the event that the issuing authority has used the Schengen Information System (SIS) for the management of the EAW, when the location of the requested person is known[156].

Regarding the procedure, once the EAW is received by the competent authority for its execution, the latter will check that it complies with the content requirements provided for in Art 36 LRM, whether it is translated into Spanish, and it is necessary to request any additional information from the issuing authority (Art 19(1) and 30 LRM).

Once the aforementioned conditions have been carried out, unless it is necessary to demand a correction or additional information from the issuing authority or the EAW should be denied, the requested person will be detained in the manner and with the requirements and guarantees provided for in the LECrim (Art 50(1) LRM). This implies that the detained person will be immediately informed in writing, in simple and accessible language that s/he understands, of the facts attributed to him/her and the reasons for his/her deprivation of liberty, as well as the rights he/she has, including the right to remain silent, to appoint a lawyer, to communicate with certain persons, including the consular authorities of his/her country, to be assisted free of charge by an interpreter, to be examined by the forensic doctor, and to request free legal assistance, the procedure for doing so and the conditions for obtaining it (Art 520(2) LECrim).

In accordance with Art 50(2) LRM, within 72 hours of the arrest, the detained person will be brought before a court, and the issuing authority will be notified of this circumstance. At that time, the detained person must be informed of the existence of the EAW, its contents, the possibility of consenting to the hearing before the judicial authority and

[155] Ángela Gómez-Rodulfo de Solís 'La ejecución de la Orden Europea de Detención y Entrega. OEDE pasiva'. Paper presented at the Conference on the European Arrest Warrant and Surrender (2017) <https://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_12/spl_14/pdfs/36.pdf> accessed 19 July 2024.

[156] These two possibilities of communication appear regulated in Art 40 LRM for the case that Spain is the issuing State in line with the provisions of Art 9 EAW FD.

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irrevocably surrender to the issuing State, as well as of the rest of the rights to which s/he is entitled, including the right to appoint a lawyer in the issuing State to assist and advise his/her lawyer in Spain (Art 50(3) LRM)[157].

Within 72 hours of being brought before the court, another hearing must be held with the detainee, with the presence of the Public Prosecutor, the detainee's lawyer – retained or public - and, where appropriate, the interpreter (Art 51(1) LRM). The purpose of this preliminary hearing is multiple. The defendant will be asked whether or not s/he consents to be surrendered and whether or not s/he waives the principle of specialty; the parties will be heard on the possible concurrence of causes for refusal or conditioning of the surrender; it will be decided, likewise, on the precautionary measures for the defendant, decreeing provisional detention or provisional release and adopting the necessary and proportionate precautionary measures to ensure the full availability of the defendant (Art 53(1) LRM).

The provision of consent is a key issue in the way in which the procedure will be developed. Indeed, if the arrested person consents to be surrendered, and the judge does not see, *ex officio* or at the request of the prosecutor, grounds for refusal, the surrender will be agreed by means of an unappealable order (Art 51(4) LRM). However, if the arrested person has not consented to be surrendered, the parties will be summoned to a second hearing within a maximum period of 3 days, during which the means of proof proposed by the parties and accepted by the judge regarding grounds for refusal or conditions to the surrender may be evaluated (Art 51(5) LRM)[158]. If the evidence could not be taken in the course of the hearing, the judge will set a new deadline for its production, taking into account the need to respect the maximum time limits for the processing of the EAW provided for in the Law (Art 51(6) LRM). This hearing may be held in the absence of the requested person, provided that s/he has been duly summoned in the previous appearance before the Central Examining Judge (Art 51(7) LRM). Once the hearing has been held, the judicial authority must decide on the surrender by an order subject to direct and

[157] With respect to the latter right, it is established that «the detained person shall be informed in writing in a clear and sufficient manner, and in simple and understandable language, of his right to waive his/her right to counsel in the issuing State, of the content of said right and its consequences, as well as of the possibility of its subsequent revocation. Such waiver must be voluntary and unequivocal, in writing, and must state the circumstances of the waiver».

[158] Although the LRM foresees the celebration of two successive hearings, in the cases in which the defendant does not consent to be surrendered, in practice, it is usual to concentrate both appearances in a single act (Gómez-Rodulfo de Solís (n 11) 7).

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preferential appeal, which means that the handling of the case before the Criminal Chamber of the National High Court (Art 51(8) LRM) will be prioritized.

In the preliminary hearing with the arrested person, s/he must also be heard on his/her possible waiver of the principle of specialty. If the requested person does not waive the principle of specialty, which is the most common in practice, s/he may not be prosecuted, convicted or deprived of liberty for an offense committed prior to his or her surrender other than the one for which he or she was surrendered, unless the executing State so authorizes (cfr. Art 60(2) LRM). Therefore, in order to prosecute, convict or deprive the surrendered person of liberty for a previous offense different from the one that motivated the surrender, the issuing State must request authorization from Spain, issuing a new EAW. In order to decide on the authorization, after hearing the Public Prosecutor's Office, the Central Examining Judge will decide by reasoned order within ten days, without exceeding in any case the term of thirty days from the receipt of the request. Authorization will be granted if the conditions for executing an EAW are met and none of the grounds for refusing the execution of the EAW apply (Art 60(3) LRM)[159].

The personal situation of the requested person is another critical issue in Spanish case law and legislation. As already indicated, the precautionary situation in which the requested person will remain from the time s/he is arrested until the eventual surrender is carried out, is one of the issues to be decided by the Central Examining Judge. In order to do so, the latter, after hearing the Public Prosecutor's Office opinion (Art 51 LRM), shall adopt the necessary and proportionate measures to ensure the full availability of the requested person (Art 53(1) LRM). The decision will be adopted by order, which will be

[159] This procedure was followed by Germany in a case in which the person surrendered by Spain to the German authorities was subsequently requested by Switzerland. In this case, since the defendant had not waived the principle of specialty and did not consent to his/her surrender to the Swiss authorities, the only possibility for the surrender to the Swiss authorities of the defendant who was serving a sentence in Germany was to request authorization from Spain to carry out the surrender, since Spain was the State that had previously agreed to the surrender, through the mechanism of the EAW (National High Court. Order No. 2/2021, of January 22). The decision states that the principle of speciality does not prevent subsequent extradition, provided that authorization is sought from the Spanish authorities, which are ultimately obliged to grant such authorization in accordance with bilateral or multilateral conventions to which Spain is a party (Art 62(2) LRM). Specifically, the resolution clarifies the following: «What the German authorities cannot do, and have not done, is to agree to the extraditional surrender to Switzerland, without seeking the corresponding authorization from Spain, which has been verified through the present procedure, thus complying with international commitments and safeguarding the guarantees of the requested party. This authorization comes to supplant the consent of the former, in order to avoid the impunity of serious conducts such as the ones we are dealing with».

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subject to direct and preferential appeal before the Criminal Chamber of the National High Court (Art 53(4) LRM).

In order to avoid the escape of the person whose surrender has been agreed, but which has had to be delayed because the requested person is in prison, a legislative amendment was made establishing the obligation Finally, this problem has been solved through a legislative intervention, which established the obligation of the corresponding authorities in the executing State – the penitentiary center or the Court hearing a case involving a pre-trial detainee - to inform the judge competent for executing the EAW of the future release of the requested person, sufficiently in advance to allow such a judge to decide, upon the release, on his/her personal situation with a view to guaranteeing his/her surrender the issuing State[160].

Additionally, a slight discrepancy is observed, at the legislative level, in the transposition of the possibilities of temporary surrender of the requested person to the issuing State, in those cases in which the surrender has been suspended, due to pending criminal proceedings or the enforcement of a sentence in the executing State. In these cases, while the EAW FD provides for the temporary surrender of the requested person to the issuing State as a mere possibility (Art 24(2) EAW FD), the Spanish legislator seems to have converted what was a mere power into an obligation, by using the verbal form "shall order" instead of the verbal periphrasis "may surrender" (Art 56(II) LRM [161]). The

[160] Specifically, Art 58(4) LRM provides the following: «*In the event that the surrender of the requested person has to be suspended or postponed because he or she has criminal proceedings pending in Spain and is deprived of liberty, it must be ensured that the Spanish judicial authority hearing the European arrest warrant proceedings receives information on the future release of the requested person so that it can immediately adopt the corresponding decision on his or her personal situation for the purpose of surrendering him or her to the executing authority. If the requested person is serving a sentence, the penitentiary center must inform the Spanish judicial authority in charge of the European arrest warrant procedure of the effective date of completion of the sentence at least fifteen days in advance, so that it can take the corresponding decision on his personal situation. In the event that the requested person is in provisional detention in a case opened in Spain, the Court hearing that procedure must immediately place the requested person at the disposal of the Spanish judicial authority hearing the European arrest warrant and surrender procedure, communicating sufficiently in advance its decision to agree to release in its procedure, so that the decision on his personal situation may be adopted within seventy-two hours to ensure the execution of the surrender*.»

[161] This precept provides that, in the case of surrender suspended due to criminal proceedings pending before the Spanish jurisdiction, «*the Spanish judicial authority shall order, if so requested by the issuing judicial authority, the temporary surrender of the requested person under the conditions to be formalized in writing with the said judicial authority and which shall be binding on all the authorities of the issuing Member State*».

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impossibility for the Spanish executing authority to refuse temporary surrender can be problematic in cases where the trial in Spain is about to start[162].

According to the provisions of Art 58 LRM, the surrender of the requested person will be carried out by an agent of the Spanish authority, after notification to the authority designated for this purpose by the issuing judicial authority of the place and dates set, always within 10 days following the judicial decision of surrender, unless, for reasons beyond the control of the States involved, the surrender cannot be verified within this period, in which case the judicial authorities will immediately contact each other to set a new date, within a new period of ten days from the date initially set.

It is to be observed that the aforementioned Art 58 LRM establishes the maximum period of 10 days foreseen in the European regulation (Art 23.2 EAW FD). However, it does not expressly provide for the general rule of surrender as soon as possible or on a date agreed between the authorities involved (Art 23.1 EAW FD). The national provision seems to imply that the date will be set unilaterally by the Spanish authority and notified to the issuing authority.

4.2.4 Issues for the rights of the suspect, accused and other parties

As a general rule, the LRM provides that when the person affected by a European order has his/her domicile or residence in Spain, unless the foreign proceeding has been declared secret or its notification would frustrate its intended purpose, the interested party will be notified of the European orders or decisions whose enforcement has been requested. In addition, the regulation clarifies that the practice of this notification will imply the recognition of the right to intervene as a party to the proceedings, through legal representative and lawyer (Art 22(1) LRM).

Once the decision to execute an EAW has been taken, the detention of the requested person must be carried out in in accordance with the requirements and guarantees set out in the Spanish Criminal Procedure Law (LECrim) or the legislation on criminal liability of minors, if applicable (Art 50(1) LRM). This means that the detained person must be informed in writing, in simple and accessible language, in a language s/he understands and immediately, of the facts attributed to him/her and the reasons for his/her

[162] Juan Carlos Hernández Oliveros 'Prisión provisional y orden europea de detención' (2023) 1 *Revista de estudios europeos*, 145, 167.

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deprivation of liberty, as well as the rights s/he is entitled to in accordance with Art 520 LECrim[163].

It is also foreseen that within a maximum period of 72 hours after his/her arrest, the detainee will be placed at the disposal of the judicial authority of execution, which will be the Central Examining Judge. In the case of minors from fourteen years of age, the time limit for bringing him/her to justice is reduced to 24 hours after his/her arrest, in accordance with the legislation on the criminal responsibility of minors. The judicial custody shall be communicated to the issuing judicial authority (Art 50 (2) LRM).

Once the detained person has been brought before the court, s/he will be informed of the existence of the EAW, its contents, his/her right to appoint a lawyer in the issuing State of the EAW whose function will be to assist the lawyer in Spain by providing information and advice, the possibility of consenting (irrevocably) to surrender to the issuing State, and his/her other rights. In the event that s/he requests the appointment of a lawyer in the issuing State, s/he shall immediately inform the competent authority (Art 50(3) LRM).

The detained person shall be informed in writing, clear and sufficient manner, and in simple and understandable language, of his/her right to waive the right to counsel in the issuing State, of the content of this right and its consequences, as well as of the possibility of its subsequent revocation. Such waiver must be voluntary and unequivocal, in writing, and must state the circumstances of the waiver. The waiver of the right to counsel in the issuing State may be subsequently revoked at any time during the criminal proceedings and shall be effective from the time it is made (Art 50(4) LRM).

[163] In this precept the rights that correspond to the detainee are collected in an exhaustive way. Specifically, the following are stated: a) Right to remain silent; b) Right not to testify against oneself and not to confess guilt; c) Right to appoint a lawyer; d) Right to access to the elements of the proceedings that are essential to challenge the legality of the detention or deprivation of liberty; e) Right to inform the family member or person who wishes, without undue delay, of their deprivation of liberty and the place of custody where they are at any given time. Foreigners shall have the right to have the above circumstances communicated to the consular office of their country; f) The right to communicate by telephone, without undue delay, with a third party of their choice; g) The right to be visited by the consular authorities of their country, to communicate and correspond with them; h) The right to be assisted free of charge by an interpreter, in the case of foreigners who do not understand or do not speak Spanish or the official language of the proceedings in question, or of deaf or hearing impaired persons, as well as other persons with language difficulties; i) The right to be examined by a forensic doctor; j) The right to request free legal assistance, the procedure for doing so and the conditions for obtaining it.

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4.2.5 Cooperation issues between executing and issuing authorities

As a general rule, Spanish legislation is based on direct communication between the competent authorities, without the intermediation of any central authority.

In fact, the Ministry of Justice, designated as the Central Authority, has the function of assisting the judicial authorities and collecting statistical data on the use of the instruments of mutual recognition that are sent to it by both prosecutors and judges (Art 6 LRM). The Ministry of Justice is also the competent authority for other types of decisions such as, for example, to authorize the transit through Spanish territory of a person being transferred to the issuing State from the State of execution of an EAW (Art 27(1) LRM).

With the same idea of direct communication between competent authorities, it is provided that the Spanish judicial authority shall inform the competent judicial authority of the issuing State and the Public Prosecutor's Office, without delay, of the decision of recognition or of any incident that may affect its execution, especially in cases of impossibility and in cases where it is impossible to execute alternative measures not provided for by Spanish law (Art 22(2) LRM).

It is also provided that in cases where there is a ground for refusal of recognition or enforcement that justifies it or a rectifiable defect in the certificate, the competent judicial authority may request additional information from the authority of the issuing State, setting a deadline within which such information must be sent (Art 30 LRM).

Beyond the provision for consultation and exchange of information between authorities, minor discrepancies or omissions have been detected in the transposition of the EAW FD. For example, Spanish law does not expressly provide for the successive issuance of EAWs and the application of the principle of specialty in this scenario, as provided for in Art 28(2) EAW FD. In any case, although it does not regulate the case in which a subject who has been surrendered by virtue of an EPO is requested by another Member State, it can be understood that in this case the principle of specialty regulated in Art 60 LRM applies, which limits the detention of the person surrendered for acts prior to the surrender, regardless of whether it is with a view to prosecution in Spain or surrender to another Member State.

Regarding the transit regime, Spain does not foresee the possibility of conditioning the transit through Spanish territory of nationals or residents to their subsequent surrender to serve the sentence in Spain, as foreseen in Art 25 *in fine* EAW DM. However, this does

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not imply a case of non-compliance since such conditioning is foreseen as a mere possibility for the Member States.

4.2.6 Remedies

Regarding the possibilities of appeal against decisions to issue and execute EAWs, Spanish legislation does not contain specific provisions, and the general rules on appeals provided for in Arts 13 and 24 LRM are applicable.

Specifically, Art 13 regulates possible appeals when Spain is the issuing State. For these cases, it is stated that appeals provided for in the Spanish legal system may be lodged against the decisions agreeing to the transfer of an instrument of mutual recognition, which will be processed and resolved exclusively by the competent Spanish judicial authority in accordance with Spanish law (Art 13(1) LRM). In the event that an appeal is upheld, the Spanish judicial authority will immediately communicate it to the authority that is hearing the enforcement proceedings (Art 13(2) LRM).

For cases in which Spain is the executing State, Art 24 LRM applies. According to this precept, against the decisions issued by the Spanish judicial authority ruling on the European instruments of mutual recognition, the appropriate appeals may be lodged in each case in accordance with the general rules provided for in the procedural law in force (Art 24(1) LRM). The competent judicial authority will communicate to the judicial authority of the issuing State both the lodging of an appeal and its grounds as well as the decision on the appeal (Art 24(2) LRM).

In addition, the Spanish regulation, in line with the EAW FD, specifies that the substantive grounds on which the order or decision has been adopted can only be challenged by means of an appeal filed in the Member State of the issuing judicial authority (Art 24(3) LRM). In this regard, it is not uncommon for the Spanish courts to reject the claims of the appellants when they seek to challenge the content of the judgment to be enforced before the courts of the executing State.

In relation to the decision to execute an EAW, the possibilities for appeal depend on the consent of the requested person. In this regard, if the requested person consents to be surrendered to the issuing State and the Central Examining Judge does not find grounds for refusal or conditional surrender, the executing authority will agree to surrender by means of a non-appealable order (Art 51(4) LRM). Although the EAW FD does not establish the need for the surrender decision, with the consent of the requested person, to be adopted

by an irrevocable order, the fact is that the short time limits that apply in this case[164], suggest excluding the possibility of appeal.

However, if there is no consent to the surrender, the Central Examining Judge will summon the parties to a hearing, which must be held within a maximum period of three days and will be attended by the Public Prosecutor, the requested person assisted by a lawyer and, if necessary, an interpreter. At this hearing the admitted means of evidence relating to the concurrence of causes for refusal or conditioning of the surrender may be practiced and the parties will be heard on such matters (Art 51(5) LRM). Once the hearing has been held and the evidence proposed by the parties and admitted by the Examining Judge Central Judge has been taken, the latter will rule by means of an order, which must be issued within a maximum period of ten days after the hearing, and against which a direct appeal may be filed before the Criminal Chamber of the National High Court, which will be processed on a preferential basis (Art 51(8) LRM).

On the other hand, LRM also provides for the possibility of appealing the decision of the executing authority regarding the personal situation of the requested person. In this regard, the decision on the provisional detention or the adoption of other precautionary measures will be made by means of an order subject to direct and preferential appeal before the Criminal Chamber of the National High Court. For the resolution of this appeal, a hearing will be held when requested by any of the parties (Art 53(4) LRM).

4.3 The implementation of Directive 2014/41

4.3.1 Scope

Art 186 LRM, in line with Art 1 EIO D, defines an EIO as a criminal decision issued or validated by the competent authority of a Member State of the European Union with a view to the execution of one or more investigative measure(s) in another Member State, the purpose of which is to obtain evidence for use in criminal proceedings. An EIO may also be issued with a view to the transfer of evidence or investigative measures already in the possession of the competent authorities of the executing Member State.

[164] According to Art 17(2) EAW, in those cases where the requested person consents to his/her surrender, the final decision on the execution of the EAW should be taken within a period of 10 days after consent has been given.

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In the same precept, the Spanish law, in line with the provisions of Art 4 EIO D, provides that the EIO may refer to proceedings started by the competent authorities of other Member States of the European Union, both administrative and judicial, for the commission of acts classified as administrative offenses in their legal system, provided that the decision may give rise to proceedings before a court, particularly in the criminal order (Art 186(2) LRM).

The Spanish regulation does not expressly refer to the possibility of using the EIO in proceedings for crimes or offenses for which a legal person may be held liable or punished in the issuing State (Art 4 (d) EIO D). In any case, given that in Spain legal persons can be liable in both administrative and criminal proceedings, the fact that the EIO refers to the investigation of a legal person should not be an obstacle to execution.

On the other hand, in line with the provisions of Art 3 and Recital (8) EIO D, the Spanish regulation provides that the EIO may comprise all investigative measures, with the exception of the creation of a joint investigation team and the gathering of evidence in such team. However, Spanish law clarifies that, when a joint investigation team needs the investigative measures to be carried out in the territory of a Member State that does not participate in the team, an EIO may be issued to the competent authorities of that third State (Art 186(3)(II) LRM).

The Spanish regulation also expressly excludes from the scope of application of the EIO the regime of transmission of criminal records, which will be governed by its specific regulations (Art 186(4) LRM). In this regard, it is worth noting the application of Organic Law 7/2014, of November 12, on the exchange of criminal record information and consideration of criminal court decisions in the European Union.

4.3.2 Grounds for non-recognition and non-execution

The Spanish regulation includes the specific grounds for non-recognition and non-execution of the EIO in Art 207 LRM. Additionally, Art 32(1) LRM includes several general grounds for refusal, applicable to all instruments of mutual recognition of criminal judgments, including the EIO.

In general, the grounds for non-recognition and non-execution of the EIO provided for in Spanish legislation coincide in their wording with those provided for in Art 11 of the EIO D. However, there is a discrepancy in the mandatory nature that the Spanish legislation attributes to them, as opposed to the optional nature with which they appear in the EIO D.

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In this sense, while the Directive establishes that the enforcement authorities "may refuse" recognition or execution, the Spanish legislation indicates that the Spanish competent authority "shall refuse" recognition and execution (Art 207 LRM).

The referred discrepancy could imply a violation of EU law if national legislation is interpreted as making it impossible for the executing authority to assess at his/her discretion whether or not to refuse an EIO[165]. However, it should be recalled that directives, unlike framework decisions, will have direct effect if their provisions are unconditional and sufficiently clear and precise[166]. In any case, the different nature of the grounds for refusal could give rise to infringement proceedings against Spain, which, to date, have not taken place.

In addition to the grounds for non-execution specifically provided for in Spanish legislation for the EIO (Arts 206(5) and 207 LRM), which substantially coincide with those provided for in the EIO D (Arts 10(5) and 11), Spanish legislation includes some general grounds for refusal which, however, are not reflected in the Directive. These are, specifically, the following:

- When the order or decision refers to facts for the prosecution of which the Spanish authorities have jurisdiction and, if the conviction had been handed down by a Spanish court, the crime or the sanction imposed would have prescribed in accordance with Spanish law (Art 32(1)(b) LRM).
- When the form or the certificate that must accompany the request for the adoption of the measures is incomplete or manifestly incorrect or does not respond to the measure, or when the certificate is missing, without prejudice to the provisions of Art 19 LRM on the possibilities of rectification (Art 32(1)(c) LRM). Although defects in the form are not expressly provided for in the Directive as grounds for refusal, this provision can be understood along the lines of Art 16(2)(a) EIO D, according to which the executing authority shall inform the issuing authority immediately, by any means, if it is impossible for it to take a decision on recognition or execution because the form provided for in Annex A is incomplete or manifestly incorrect.

[165] *Generalstaatsanwaltschaft Berlin* (n 3)
[166] CJEU, judgment of 04.12.1974, C-41/74 - *Van Duyn v. Home Office.*

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4.3.2.1 Fundamental rights and proportionality issues

With respect to the EIO, Spanish legislation, in accordance with Art 11(1)(f) EIO D, provides for the violation of fundamental rights as a specific cause for non-execution. In this sense, the EIO will be denied when there are reasonable grounds to believe that the execution of the investigative measure indicated therein is incompatible with the obligations of the Spanish State in accordance with Art 6 CFR (Art 207(1)(d) LRM). This specific ground for refusal reinforces the general principle according to which the LRM "*shall be applied with respect for the fundamental rights and freedoms and the principles contained in the Spanish Constitution, in Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union, and in the European Convention on Fundamental Rights and Freedoms of the Council of Europe of November 4, 1950*" (Art 3 LRM).

In any case, the above-mentioned ground for refusal must be interpreted restrictively, as the CJEU has established in application of the principle of mutual trust. In this regard, it should be recalled that, according to the CJEU, when Member States implement EU law, they may be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU[167].

Likewise, it is relevant to point out that, despite the application of the principle of *non-inquiry*[168], the LRM establishes a limit to the validity of evidence obtained abroad. In this sense, the regulation indicates that investigative measures carried out by the executing State will be considered valid in Spain, as long as they do not contradict the fundamental principles of the Spanish legal system or are not contrary to the procedural safeguards recognized therein (Art 186(1)(II) LRM).

The fact that the validity of the investigative measures is conditional on the respect of the procedural safeguards provided for in the Spanish legal system cannot be interpreted,

[167] Case *Openbaar Ministerie*. C-562/21 PPU and C-563/21 PPU (n 14) [41] and referred case-law.
[168] The principle of non-inquiry [*principio de no indagación*] is a direct consequence of the principle of mutual trust and implies that, as a general rule, the national authorities of the issuing State will not inquire into the lawfulness of the gathering of evidence by foreign authorities in the executing State.

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however, as the need to respect all the requirements and formalities of the Spanish criminal procedural legality. On the contrary, it should be understood that acts of investigation carried out abroad are generally valid, except when it is established that the right to a fair trial has been violated. In this regard, it should be recalled that, in general, Spanish court decisions are based on the aforementioned principle of non-inquiry[169]. Therefore, when faced with allegations that have to do with the regularity or legality of the investigation carried out in other Member States, the Spanish Courts normally refer to the principle of non-inquiry and to the mutual trust between Member States, according to which the substantive grounds for the order or decision may only be challenged by means of an appeal filed in the Member State of the issuing judicial authority (Art 24(3) LRM).

After analyzing the Spanish case law on the EIO, it should be noted that it is not common for Spanish courts to refuse the execution of EIOs on grounds related to the infringement of fundamental rights. In this vein, Spanish courts generally apply the principles of "mutual recognition" and "non-inquiry" in matters of evidence obtained abroad, which limit the powers of supervision by the Spanish courts of proceedings developed in other Member States, without requiring compliance with national rules and without verifying compliance with foreign rules[170]. This is because, given the basic principle of mutual trust, Spanish courts are confident that the issuing State respects fundamental rights, unless there are clear and specific allegations that reasonably suggest otherwise.

[169] See some relevant judgments of the Spanish Supreme Court on the principle of non-inquiry: 456/2013, of June 9; 312/2012, of April 9; 1281/2006, of December 12; 19/2003, of January 19.

[170] In short, there are many judicial decisions of the Supreme Court that indicate that "*it is not up to the Spanish judicial authority to verify the chain of legality by officials of other Member States, and specifically the compliance by foreign authorities with the legality of that country, much less to subject their actions to contrast with Spanish law*…" (Judgment 947/2001, of May 18). Fernando Gascón Inchausti. 'La eficacia de las pruebas penales obtenidas en el extranjero al amparo del régimen convencional: apogeo y declive del principio de no indagación' in María Isabel González Cano (Ed.), *Orden Europea de Investigación y Prueba Transfronteriza en la Unión Europea* (Tirant Lo Blanch 2019), 49-52, identifies the following basic lines of argument in the case law of the Supreme Court: a. A primordial value must be given to the *lex loci*; b. Spanish courts cannot control or verify how foreign authorities apply the law of their own country; c. Foreign courts and authorities cannot be required to know the Spanish legal system or the development of the jurisprudence in our country. d. In the case of proceedings carried out between Member States, the underlying principle of mutual trust between the participating countries must prevail. However, at the doctrinal level, it is worth asking whether the strict consideration that the Supreme Court had been giving to the *locus regit actum* still makes sense because, according to the most recent EU rules, it is often feasible to request the executing State to apply the procedural rules of the issuing country (José Manuel Pérez Romero 'Obtención eficaz de la prueba transfronteriza en la Unión Europea' (Doctoral thesis, Universidad Nacional de Educación a Distancia 2020, 107. <http://e-spacio.uned.es/fez/eserv/tesisuned:ED-Pg-UniEuro-Jmperez/PEREZ_ROMERO_Jose_Manuel_Tesis.pdf> accessed 19 July 2024.

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Another relevant issue in the issuance and recognition of the EIO has to do with the role played by the principle of proportionality. In line with Recital (11) and Art 6(1) EIO D, Spanish law provides that the issuing authority may issue, ex officio or at the request of a party, an EIO only when its issuance is necessary and proportionate to the purposes of the proceedings for which it is requested, taking into account the rights of the investigated or accused person and provided that the requested measures could have been ordered under the same conditions for a similar domestic case (Art 189(1) LRM).

Also in accordance with the provisions of Art 10(3) EIO D, Art 206(2) LRM [171] establishes the possibility for Spanish competent authorities of substituting the measures requested in the EIO for others less restrictive of fundamental rights [172] that may be appropriate to achieve the same result pursued by the investigative measure proposed in the EIO. In this way, the executing authority is given the possibility to make a judgment on the necessity of the measure requested by the issuing authority, taking into account the investigative measures available in the legal system of the state of execution.

Likewise, in line with the provisions of Art 10(1) EIO D, Art 206(3) LRM [173] allows recourse to different investigative measures, provided that they are suitable for the purpose pursued, when the measure requested in the EIO is not provided for in Spanish law or is not provided for in a similar domestic case. This provision allows the executing authority to carry out a control of legality and suitability of the measure, by being able to limit the most restrictive or onerous measures for the investigation of those more serious crimes, in line with the possibilities considered proportional in a similar domestic case. In short, the executing authority will be able to impose the proportionality test provided for in its domestic legislation on the decisions of the issuing authority.

[171] "*When the result sought by the EIO could be achieved by means of an investigative measure less restrictive of fundamental rights than the one requested in the European Investigation Order, the Spanish competent authority shall order the execution of the latter"* (Art 206(2) LRM) (judgment of necessity).

[172] It should be noted that the Spanish provision refers to the level of restriction with respect to any fundamental right, in line with the provisions of the EIO D in its English version. However, the official Spanish translation of the EIO D refers to less restrictive measures with respect to the right to privacy.

[173] "*When the requested investigative measure does not exist in Spanish law or is not foreseen for a similar domestic case, the Spanish competent authority shall order the execution of an investigative measure other than the one requested, if such measure is suitable for the purposes of the requested order" (Art 206(3) LRM) (legality and suitability judgment).*

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4.3.3 Execution procedure

Although in Spain it is the examining judge who directs the criminal investigation, the legislator has attributed competence to issue OEIs also to the prosecutors, within the framework of the pre-procedural or informative proceedings that the Prosecutor's Office can develop autonomously in the investigation of crimes in accordance with the provisions of Art 773 LECrim. In this sense, Art 187(1)(II) LRM provides that "*Prosecutors are also issuing authorities in the proceedings they direct, provided that the measure contained in the EIO is not restrictive of fundamental rights*".

Likewise, it should be noted that the Prosecutor's Office is the exclusive recipient of all EIOs issued by other Member States, and must register them and acknowledge receipt to the issuing authority (Art 187(2) LRM). However, the Public Prosecutor's Office will only be competent to recognize and execute those EIOs that do not contain any measure limiting fundamental rights or those that contain a measure limiting fundamental rights as long as it can be substituted by another one that does not restrict such rights. Otherwise, the Public Prosecutor's Office must send the EIO, together with a mandatory report on the possible concurrence of causes for refusal of execution, as well as on the legality of the adoption of each of the investigative measures requested, to the competent judicial authority according to the rules established in Art 187(3) LRM[174].

It should be noted that the limits to the material scope of issuance of EIOs by the Public Prosecutor's Office provided for in Art 187(1) LRM are specified in the CJEU of 16 December 2021 (Case C-724/19), regarding the impossibility of the prosecutor to issue EIOs

[174] When the execution of the EIO corresponds to the judicial authority -either because it contains measures limiting fundamental rights, or because the issuing authority has expressly indicated that the investigative measure must be executed by a judicial body- the following Courts shall have jurisdiction. a) The Examining or Juvenile Judges of the place where the investigative measures are to be carried out or, alternatively, where there is some other territorial connection with the crime, the investigated person or the victim. If there is no element of territorial connection to be able to specify the competence, the Central Examining Judges will be competent. b) The Central Examining Judges, if the EIO was issued for the crime of terrorism or another of the crimes whose prosecution falls under the jurisdiction of the National High Court, or if it is the notification provided for in Art 222 - Notification to Spain of the interception of telecommunications with interception of the address of communications of a person under investigation or prosecution who is in Spain and whose technical assistance is not necessary-. c) The Central Criminal or Juvenile Court Judges, in the case of transfer to the issuing State of persons deprived of their liberty in Spain. If the EIO has been issued in relation to several investigative measures that have to be carried out in different places, the judge or court to which the Public Prosecutor's Office refers the order will be competent for the recognition and execution of the order, from among those competent according to the rules provided in this section and, in what is not provided for in them, according to the rules of preference of the LECrim.

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to collect traffic and location data of telematic communications, since in a similar domestic case the competence is exclusive to the examining judge in line with the CJEU of 2 March 2021 (Case C-746/18) issued in interpretation of Directive 2002/58/EC on privacy and electronic communications.

As a consequence of the aforementioned distribution of powers, the enforcement of most of the OEIs received by Spain corresponds to the Public Prosecutor's Office and, since its decisions are not subject to appeal, they do not reach the courts, which results in a low volume of judicial decisions regarding the recognition and/or denial of the OEI[175].

Moreover, the referred distribution of competences between judges and prosecutors has given rise to certain interpretative problems, especially in those cases in which the EIO includes several investigative measures, part of which are restrictive of rights. Some investigating judges interpreted that their competence was limited to the practice of the investigative proceedings in which fundamental rights were affected and that, once these were executed, it was up to the Prosecutor's Office to process the rest of the EIO in relation to the investigative proceedings that did not restrict rights[176]. However, the Courts of Appeal understood that, when a fundamental right is affected, the competence for the recognition and processing of the EIO in its entirety corresponds to the judicial authority[177]. Proof of this is Art 187(2) LRM, which provides that when any of the measures affect fundamental rights, it is the EIO, and not a part of it, that is referred to the judicial body[178]. On these lines, the Plenary of the Criminal Chamber of the National High Court [179] pronounced that the diversification of competences among the different enforcement authorities depending on whether or not the requested measures limit fundamental rights is not appropriate. Therefore, the execution of the EIO must be carried out by a single enforcement authority, which must be the corresponding jurisdictional body in accordance

[175] The reduced volume of judicial decisions on the matter contrasts with the number of EIOs received by the Prosecutor's Office, which in 2021 amounted to 4,606, a figure very similar to that of 2020, when 4,552 were received. Data available in Attorney General's Office. Annual report 2022 (n 2) 1219-1221.
[176] For example, the Order of the Provincial High Court of Segovia, No. 91/2021, of 14 April, refers to the execution of an OEI with respect to which the investigating judge had understood that her competence was limited to the practice of the investigative measure in which fundamental rights were affected (in this case, the entry and search of a home), arguing that, once executed, it would be up to the Public Prosecutor's Office to undertake the rest of the measures requested in the OEI (surveillance, taking witness statements, ...). However, the Court of Appeal maintains that when a fundamental right is affected, the competence to recognise and execute the OEI in its entirety falls to the judicial authority.
[177] Importantly, this term, in Spain does not include the figure of prosecutors.
[178] Provincial High Court of Segovia. Order No. 91/2021, of 14 April.
[179] National High Court. Non-jurisdictional Agreement of December 17, 2021.

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with the provisions of Art 187(2) LRM. The consequence of the referred agreement, which rectifies the criterion maintained by some courts and sections of the National High Court, is that the judicial authority will be competent to execute all the measures included in the EIO when any of those requested is restrictive of fundamental rights.

It is worth noting that, regardless of the model of instruction, the powers of the Spanish prosecutor with regard to international cooperation are very broad, since the execution of international requests for international assistance (e.g. OEIs) is an activity essentially distinct from the national investigation activity, to which the time limits and principles set forth in Art 773 LECrim are not applicable. In this vein, the attribution of competences to the Prosecutor's Office regarding the recognition and enforcement of EIOs is based on the prosecutor's status as a judicial authority for the sole purpose of international cooperation[180].

In any case, the attribution of competences to the Prosecutor's Office regarding the recognition and enforcement of EIOs raises some other problems. For example, in relation to the confidentiality guarantees of Art 19 EIO D, the impossibility for the Prosecutor to decree the secrecy of the investigation in the framework of the pre-trial or informative investigation proceedings may generate some uncertainty. In any case, the general duty of confidentiality that presides over the criminal investigation phase and the subjection of the prosecutor to the duties of confidentiality and secrecy seem sufficient to guarantee the confidentiality required by the European standard[181].

More problematic is the question of remedies, where the European regulation, especially in view of the jurisprudence of the CJEU, seems to contradict the impossibility, decreed in the Spanish regulations, of appealing the decisions of issuance and recognition of EIOs adopted by the prosecutor (Arts 13(4) and 24(4) LRM). We will return to this issue in section 7.3.5 (“Remedies”) below.

On the other hand, the Spanish regulation adequately transposes the deadlines set forth in the Directive, establishing a maximum period of 30 days for recognizing or refusing the execution (Art 208(1)(II) LRM) and a maximum period of 90 days for the execution of the measure from the date the recognition was agreed (Art 208(4) LRM).

[180] Attorney General's Office. Circular 2/2022, of December 20, on the extra procedural activity of the Public Prosecutor's Office in the area of criminal investigation, 348. <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-54> accessed 19 July 2024

[181] Elena Laro González ‘Luces y sombras de la Orden Europea de Investigación’ (2023) 1 *Revista de Estudios Europeos* 129, 134.

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Regarding the execution procedure, Spanish law provides as follows: "*The competent Spanish authority receiving the EIO, if it does not find any cause for refusal or suspension, will issue without delay an order* - in the case of a judicial authority - *or a decree* - in the case of a prosecutor - *recognizing that the legal requirements have been met and ordering its execution. The order or decree will contain the necessary instructions for the practice of the requested investigative measures*" (Art 208(1) LRM).

Moreover, the legal precepts that regulate the causes for suspension of the recognition and execution of an EIO (Art 209 LRM), the participation of the authorities of the issuing State in the practice of proceedings in Spanish territory (Art 210 LRM) and the transfer of the evidence obtained (Art 211 LRM) are also relevant. This regulation is in line with the provisions of the Directive.

A slight discrepancy can be observed, however, in the regulation of the civil liability of civil servants acting in the territory of another Member State. In this respect, as opposed to the provision of Art 18(4) EIO D, according to which Member States shall refrain from claiming from another Member State the reimbursement of the amount of damages suffered by it, with the exception of the amounts which have had to be paid to third parties, the Spanish legislation merely provides that "*The Ministry of Justice shall claim from the issuing State the reimbursement of the amounts which, in accordance with Spanish law, it has had to pay as compensation for damages caused to third parties, provided that these are not the exclusive responsibility of Spain due to the abnormal functioning of the Administration of Justice or due to a miscarriage of justice*", without expressly excluding the claim for other damages.

4.3.4 Issues for the rights of the suspect or accused person

As indicated in relation to the EAW, the LRM establishes among its general provisions provides that when the person affected by a European order has his/her domicile or residence in Spain, unless the foreign proceeding has been declared secret or its notification would frustrate its intended purpose, the interested party will be notified of the European orders or decisions whose enforcement has been requested. In addition, the regulation clarifies that the practice of this notification will imply the recognition of the right to intervene as a party to the proceedings, through legal representative and lawyer (Art 22(1) LRM).

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However, it should be borne in mind that confidentiality, which generally informs the criminal investigation, will usually imply that the execution of the EIO is carried out without prior notice to the person under investigation so as not to frustrate its purpose. In this regard, Art 213 LRM, in line with Art 19 OEI D, provides that, when executing an EIO, the Spanish competent authority is obliged to keep the facts and the substance of the EIO confidential, except to the extent necessary to execute the investigative measure.

Another issue worth mentioning is that Spanish law does not expressly provide for the right of the investigated person to request the issuance of an EIO as part of his/her right of defense. (Art 1(3) EIO D). However, it does indirectly provide for the possibility of the investigated person to request the issuance of an EIO, by indicating that this may be done either *ex officio* by the issuing authority, or at the request of a party, provided that the requirements of legality, necessity and proportionality that must inform the use of this instrument are met (Art 189(1) LRM). Therefore, according to Spanish law, all parties are entitled to request the issuance of the order to the judge, not only the defense, but also the other accusing parties (private accusation or popular actor).

It is also worth noting the recognition of certain rights of the parties in the framework of specific investigative measures. Thus, for example, the right of persons under investigation, or witnesses or experts, to be informed of their rights under the law of the issuing State and under Spanish law when they appear by videoconference or other means of audiovisual transmission is expressly recognized (Arts 216(2)(b) and 216(3)(e) LRM).

Finally, it is worth highlighting the limitation established in the Spanish legislation regarding the use in Spain of personal data obtained in the execution of the EIO in another Member State. In this regard, in a more restricted manner than in European legislation, the LRM provides that personal data obtained from the execution of an EIO may only be used in the proceedings in which that decision has been taken, in other proceedings directly related to that decision or, exceptionally, to prevent an immediate and serious threat to public security (Art 193(1) LRM)[182].

The restriction provided for in the LRM is greater than that provided for in Directive 2016/680, which allows the use of data obtained in judicial assistance proceedings in any criminal proceedings in the issuing country, whether or not related to the country in which the data was obtained through international cooperation. Therefore, according to the

[182] The provision adds that, in order to use the personal data obtained for other purposes, the competent Spanish authority must obtain the consent of the authority of the executing State or of the data subject.

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Attorney General's Office, it would be advisable for the Spanish legislator to amend Art 193 LRM to extend the possible use of data obtained through an EIO, allowing its use in any other criminal proceedings in Spain as permitted by the Directive 2016/680[183].

4.3.5 Cooperation issues between executing and issuing authorities

The mutual recognition system based on the direct relationship between the judicial authorities of the different States is characterized by the need for agile communication between authorities, as well as consultations in many cases, either to allow the competent authorities to assess whether or not to resort to these instruments, or to clarify certain aspects during the procedure.

In the application of the IEO, these consultations are quite frequent. Some provisions in this regard are as follows. For example, Spanish legislation, in line with European legislation, provides that the issuing authority may request to be informed without delay by the executing authority of certain points, such as the advisability of developing other investigative measures not foreseen in the EIO or the impossibility of complying with the formalities, procedures and guarantees expressly indicated in the EIO (Art 190 LRM). It is also provided for the possibility of consulting with the executing authority on the way the telecommunications are to be tapped (Art 202(3) LRM). More generally, it is provided for the possibility of consulting the issuing authority at any time in order to facilitate the execution of the EIO in cases where the issuing authority has requested to participate in the execution of the measure in Spain (Art 210(3) LRM).

In addition, it is mandatory to consult with the issuing authority on the appropriate time or date to carry out the execution of the investigative measure when it cannot be executed within the period provided for that purpose (Art 208(6) LMR) as well as the need to consult with it on the publicity necessary to execute the requested investigative measure (Art 213 LRM).

Likewise, in those cases in which the executing authority decides to replace the investigative measure requested in the EIO with another, it must first inform the issuing authority, which may choose to withdraw the order issued (Art 206(4) LRM). Therefore, the judge who simply refuses the execution of an EIO instead of asking the issuing authority to conduct a less invasive investigative measure, acts incorrectly. This was the understanding

[183] Attorney General's Office. Annual report 2022 (n 2) 807-808

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of the Provincial Court of Barcelona in a case in which the examining magistrate had denied the entry and search of a home requested in an EIO issued by the Netherlands on the grounds that it was inappropriate because the documentation submitted only contained suspicions or conjectures, which did not show evidence of any irregular activity without prior consultation with the issuing authority[184]. The order argues that, although the LRM does not deprive the Spanish judicial authority of the possibility of verifying the adequacy and proportionality of the measure, *it does oblige it to address the issuing authority, prior to the denial of the EIO, stating the reasons for considering that the entry and search is not appropriate, requesting additional information, and also stating the reasons why it considers that a less restrictive measure of fundamental rights is more appropriate*.

4.3.6 Remedies

With regard to appeals, it should be noted that the general regime of appeals provided for in Arts 13 and 24 LRM excludes the prosecutor's decisions from the possibility of appeal. In this regard, the Spanish regulation provides as follows.

For the case in which Spain is the executing State, the law provides that "no appeal shall lie against the decisions of the Public Prosecutor's Office in the execution of the instruments of mutual recognition, without prejudice to possible challenges on the merits before the issuing authority and their subsequent assessment in the criminal proceedings in the issuing State" (24(4) LRM).

On the contrary, where Spain is the issuing State, the law provides that "No appeal shall lie against the decision to transfer a mutual recognition instrument made by the public prosecutor in his/her investigative proceedings, without prejudice to its subsequent assessment in the corresponding criminal proceedings, in accordance with the provisions of the Criminal Procedure Act" (Art 13(4) LRM).

The aforementioned provisions could clash with Art 14 EIO D, especially in view of the interpretation given by the CJEU in the case *Gavanozov II*[185]. According to this decision,

[184] Provincial High Court of Barcelona. Order No. 505/2020, of September 15. In its appeal, the Public Prosecutor's Office emphasizes Art 206 LRM and alleges that, if the Judge had considered that the result sought by the EIO could be achieved by means of an investigative measure less restrictive of fundamental rights, the competent Spanish authority should order the execution of the latter, after consultation with the issuing authority. For its part, the Provincial Court upheld the appeal of the Public Prosecutor's Office, ordering the examining judge to act in accordance with the provisions of Art 206(4) LRM.
[185] CJEU. Judgment of 11.11. 2021 (C-852/19)

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Art 14 of the EIO D, read in conjunction with Art 24(7) EIO D and Art 47 CFR, must be interpreted as precluding legislation of a Member State which has issued a EIO that does not provide for any legal remedy against the issuing of such an order, the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference**.** Consequently, based on this interpretation, the existence of a means of appeal is essential for compliance with EU law. However, the decision to issue a EIO made by the Public Prosecutor's Office is non-appealable (Art 13(4) LRM)[186].

Nevertheless, always according to the State Attorney General's Office, Art 13(4) LRM is not contrary to the referred European case law. This is explained by the prejudicial nature of the investigative proceedings attributed to the prosecutor. Thus, the possibility of bringing the corresponding appeals before the investigating judge in the subsequent criminal proceedings, once the investigation has been brought before the courts, serves to sufficiently meet the requirements of effective judicial protection against the possible infringement of rights recognized by the EU law[187].

The lack of appeals against the prosecutor's decisions taken in the framework of the criminal investigation is consistent with the national appeal system and is a logical consequence of the limited intervention of the Prosecutor's Office in the investigation of crimes[188]. The lack of appeals against the prosecutor's decisions is justified by the fact that the preliminary proceedings attributed to the Public Prosecutor's Office in the Spanish system have a limited scope - both temporally and materially - and play a merely preparatory role, consisting of assessing the suitability of the case for prosecution. In this sense, they do not replace the judicial investigation, nor do they have evidentiary value, which would justify the non-appealability of the decisions adopted in this preliminary phase.

In view of the above, it can be stated that the remedies provided for the decisions of the Prosecutor's Office in relation to the EIO are equivalent to those existing in similar domestic cases. They are given the same treatment as national cases, so the regulation seems to be in line with the wording of Art 14 EIO D. However, as a result of the latest case

[186] Several authors have expressed their opinion on this possible incompatibility: Antonio Martínez Santos '¿Emisión de órdenes europeas de investigación por el Ministerio Fiscal español? Consideraciones sobre la compatibilidad del Art 13(4) de la Ley de Reconocimiento Mutuo con el derecho de la Unión a la luz de las sentencias del TJUE en los asuntos *Gavanozov I y II*' (2022) 57 *Revista General de Derecho Europeo* 272-317; Laro González (n 37) 138-141.
[187] Attorney General's Office. Circular 2/2022, of December 20, on the extraprocedural activity (n 36).
[188] Laro González (n 37) 140.

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law of the CJEU[189], doubts arise as to the compatibility of Spanish legislation with European legislation, opening the possibility to refusals of EIOs issued by Spanish prosecutors, as no appeal against the issuance decision is provided for. A preliminary ruling before the CJEU would be the most appropriate way to determine the compatibility of domestic legislation with the EIO D, as interpreted by the CJEU.

Moreover, it is necessary to underline a discrepancy regarding the concept of "parties concerned" as used in Art 14(4) EIO D. In this regard, according to the conclusions of the Advocate General in the case *Gavanozov I*[190], the expression, within the meaning of EIO D, includes a witness subject to the investigative measures requested in an EIO and the person against whom a criminal charge has been brought but who is not subject to the investigative measures indicated in an EIO. However, according to the Spanish legal system, in order for the person affected by the measure to have standing to appeal judicial decisions, s/he must be constituted as a procedural party[191], a condition that does not apply to the witness - which is by definition not party to the proceedings - or the person who must endure another investigative measure - such as a search - without being a suspect.

4.4 The coordination with Regulation 1805/2018

4.4.1 Legal basis in the national system and scope

As well known, Regulation 1805/2018 becomes directly applicable to freezing and confiscation certificates transmitted as of December 19, 2020. From that moment, Framework Decisions 2003/577/JHA and 2006/783/JHA ceased to be applicable between the Member States bound by Regulation 1805/2018.

However, the provisions of the LRM - specifically Titles VI and VII - continue to include the previous rules on freezing and confiscation, contained in the aforementioned Framework Decisions 2003/577/JHA and 2006/783/JHA. And, the approval of the Regulation 1805/2018 has not entailed, so far, any modification of the Spanish legislation.

In the context described above, the first question to be asked is where the LRM stands, with regard to freezing and confiscation orders, once Regulation 1805/2018 has been approved. Well, it is understood that the regulation of the LRM will continue to apply

[189] *Gavanozov II* (n 41).
[190] Opinion of Advocate General. 11.04.2019 (C-324/17). *Criminal proceedings against Ivan Gavanozov*.
[191] Laro González (n 37) 138.

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insofar as it does not contradict the Regulation 1805/2018 and to everything not regulated by it[192]. Furthermore, it will continue to apply to Denmark and Ireland, as countries not bound by the provisions of the Regulation 1805/2018.

As regards the role to be played by the LRM in the recognition and enforcement of freezing and confiscation orders, it should be borne in mind that, although the Regulation 1805/2018 does not require transposition, certain aspects of the execution procedure must necessarily be supplemented by national rules. In fact, the State Attorney General's Office, in its 2022 annual report[193], recalls the need for modification of the LRM, especially to develop the rules of Regulation 1805/2018, which, although directly applicable, require an appropriate legal adaptation. According to the State Attorney General's Office, the subsistence of the rules provided for in Titles VI and VII LRM, together with the application of the new provisions of the Regulation 1805/2018, significantly complicates in practice the task of judicial authorities in the issuance and enforcement of judicial freezing and confiscation decisions.

In addition, the need to adapt the domestic rules to the Regulation 1805/2018 was noted following the public consultation carried out by the Spanish Government on November 29, 2019[194]. At that time, it was considered that legislative intervention at the internal level was necessary, both to clean up national legal system, as well as to implement the Regulation 1805/2018, determining the "non-existence of a non-regulatory alternative" for the adjustment of the national regulations to the Regulation 1805/2018. This statement, perhaps somewhat convoluted in its wording, proclaimed the need for intervention at the legislative level to adapt our legal system to the Regulation 1805/2018, given the insufficiency of non-legal instruments, such as circulars from the public prosecutor's office or case law. However, to date, this legislative intervention has not yet taken place, which has been criticized by the doctrine for affecting the principle of legal certainty and the effectiveness of the European regulations on freezing and confiscation[195].

[192] Jesús Conde Fuentes 'El Reglamento (UE) 1805/2018 y la ejecución de resoluciones de embargo y decomiso' (2021) 151 *La Ley Penal*.
[193] Attorney General's Office. Annual report 2022 (n 2) 1219-1221.
[194]Ministry of Justice. General Technical Secretariat. "Consulta pública sobre la adaptación al Reglamento (UE)
2018/1805 del Parlamento europeo y del Consejo, de 14 de noviembre de 2018, sobre el reconocimiento mutuo de las resoluciones de embargo y decomiso" <https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/1292430895810-ConsultapublicaEMBARGODECOMISO.PDF> accessed 19 July 2024.
[195] Teresa Aguado Correa 'Reconocimiento mutuo de las resoluciones de embargo y decomiso: de la Ley

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In short, although the Regulation 1805/2018 does not entail a profound alteration of the previous system, there is a number of elements that, without prejudice to its direct application, should be expressly clarified in national legislation in order to facilitate the recognition of freezing and confiscation orders issued in "criminal" proceedings existing in the Member States. In any case, despite the lack of express legislative intervention, many provisions of the Regulation 1805/2018 are reflected in the LRM, with no relevant discrepancies.

On the other hand, in addition to the rules governing the mutual recognition procedure between Member States, national rules governing freezing and confiscation must be taken into account. With respect to confiscation, the regulation contained in the Spanish Criminal Code on the different types of confiscation (Arts 127 to 128 Criminal Code) is extremely relevant. From this regulation, it should be highlighted, first of all, the legal qualification of confiscation as an "accessory consequence" (Art 127 Criminal Code), fleeing from its categorization as a penalty or criminal sanction. Its nature as a sanction is, however, reflected in Art 157 LRM, in line with the definition of the Regulation 1805/2018. The Spanish Criminal Code regulates the different modalities of confiscation (direct confiscation, confiscation by substitution or for equivalent value, extended confiscation, non-conviction-based confiscation and confiscation of third-party assets) in line with the provisions of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds of crime in the European Union. Likewise, the Spanish Criminal Code regulates the possibility of freezing property for subsequent confiscation (Art 127 octies (1) Criminal Code) and the destination to be given to the confiscated property (Art 127 octies (2) and (3) Criminal Code).

At the domestic level it is also worth mentioning the regulation, contained in the criminal procedural legislation, on the intervention of third parties affected by the confiscation and on the autonomous confiscation procedure (Title III ter, Arts 803 ter (a) - 803 ter (u) LECrim). These precepts regulate, on the one hand, the call to the process and the possibilities of intervention of those who, without being a party to the criminal procedure, may be affected by a confiscation resolution. On the other hand, they regulate a special procedure whose purpose is exclusively the confiscation of goods, effects or

23/2014 al Reglamento (UE) 1805/2018: ¿Y la ley de adaptación al Reglamento (UE) 1805/2018, para cuándo?' in José Antonio Posada Pérez; Borja Mapelli Caffarena (edts.). *Análisis empírico y doctrinal de la Ley 23/2014 de reconocimiento mutuo de resoluciones penales* (Aranzadi, 2022) 352, 351.

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proceeds, or a value equivalent to the same, regardless of the exercise of the criminal action. This is an autonomous or non-conviction-based confiscation. However, it is issued in the context of proceedings in criminal matters and therefore the Regulation 1805/2018 applies to it in accordance with its Art 1(1)[196]. This implies that, within the framework of this special procedure, it is perfectly possible that the need to issue a European freezing order may arise. Likewise, in order to execute the decision terminating this autonomous procedure, it may be necessary to issue a European confiscation order.

Also noteworthy is the conceptual discrepancy over the term freezing. In this sense, it is noted that the LECrim uses a broad concept of freezing, which does not only refer to those assets that will later be subject to confiscation, but it is also understood as freezing of assets for the purpose of securing civil liabilities, being, in this case, a real precautionary measure (Art 589 LECrim). For its part, the regulation of the LRM, prior to the Regulation 1805/2018, refers to freezing resolutions as those aimed at provisionally preventing the destruction, transformation, displacement, transfer or alienation, not only of goods that could be subject to confiscation, but also of those that can be used as means of evidence (Art 143(1) LRM). In this case, therefore, the applicability of the Regulation 1805/2018 in relation to the execution of freezing orders will depend on the purpose of the freezing. Thus, if the freezing is ordered for securing civil liabilities or evidence, even if it is issued in the context of criminal proceedings, the Regulation does not apply[197]. However, where a freezing order is made for the purpose of securing a future confiscation decision, the Regulation 1805/2018 does apply.

[196] Regarding the scope of application of the Regulation 1805/2018, it should be noted that it applies to all confiscation orders issued by a court in the context "*proceedings in criminal matters*", the latter being an autonomous concept of European Union law (Recital (13) Regulation 1805/2018). Moreover, it should be borne in mind that the classification of proceedings as criminal in the issuing State implies the acceptance of that nature in a different State (Conde Fuentes (n 48) 3).

[197] It should be noted, in this regard, that freezing orders issued in civil proceedings should be excluded from the scope of application of the Regulation 1805/2018 (Recital (13) and Art 1(4). Therefore, civil action is excluded from the scope of the Regulation 1805/2018. This is because the cumulative exercise of the civil action - aimed at the restitution of the thing, reparation of the damage and compensation for damages caused by the punishable act - and of the criminal action in the framework of criminal proceedings, does not change the nature of the former, which continues to retain its civil nature and is not subject to the same rules as the latter.

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4.4.2 Grounds for non-recognition and non-execution

In the case of freezing, the main discrepancy with the Spanish regulation is due to the fact that, in the Regulation 1805/2018, some of the grounds for non-enforcement are provided for in Spanish law on a mandatory, not optional, basis. This is observed, in relation to the grounds for refusal of freezing related to *non bis in idem* (Art 32(1)(a) LRM) or to the existence of a privilege or immunity (Art 32(1)(d) LRM).

Spanish law refers to the general grounds for non-enforcement provided for in Art 32 LRM (Art 154 LRM), excluding some of them (incomplete or incorrect certificate and commission of a crime in Spanish territory), which do not apply to freezing orders (Art 32(5) LRM). This implies that one of the grounds for refusal of the Regulation 1805/2018 (commission of a crime in Spanish territory) is expressly excluded from its application to freezing orders under Spanish law.

Regarding freezing orders, Spanish legislation does not expressly provide for communication between authorities in the event that the ground for refusal is discovered during the execution of the order (Art 8(4) Regulation 1805/2018). However, the LRM foresees the obligation of the Spanish authority to inform the issuing authority in case the execution of the order must be suspended, as well as the reasons for the suspension and the foreseeable duration of the suspension. (Art 23(2) LRM).

In the case of confiscation, Spanish law provides specific grounds for refusal of confiscation (Art 170 LRM) and also refers to the general ones in Arts 32 and 33 LRM. Again, the main problem observed when comparing the Spanish and European rules is that, in general, the Spanish legislation provides for mandatory grounds for refusal and the Regulation 1805/2018 provides for optional grounds. This discrepancy is appreciated in relation to the following grounds: *ne bis in idem* (Art 32(1)(a) LRM), immunity or privilege preventing enforcement (Art 32(1)(d) LRM), incomplete and incorrect certificate and not corrected after the required consultations (Art 32(1)(c) LRM), decisions issued in *absentia* (Art 33 LRM).

In addition, the Spanish legislation continues to include some grounds for refusal, mainly concerning territoriality issues, that are not provided for in the Regulation 1805/2018 on confiscation orders. Firstly, according to Spanish law, the confiscation order may be denied when the the offense may be considered to have been committed in whole or in a substantial or essential part in Spanish territory (Art 32(3) LRM). Secondly, when the confiscation refers to facts for the prosecution of which the Spanish authorities have

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jurisdiction and, if the conviction had been issued by a Spanish court, the crime or the sanction imposed would have prescribed in accordance with Spanish law (Art 32(1)(c) LRM). Finally, Spanish law also provides for mandatory refusal when the confiscation order refers to acts committed outside the issuing State and Spanish law does not permit the prosecution of such offenses when committed outside its territory (Art 170(1)(c) LRM).

There is also discordance in the ground for refusal provided for in Arts 8(1)(d) and 19(1)(d) of the Regulation 1805/2018 for freezing and confiscation respectively. The ground relates to an offense committed, in whole or in part, outside the territory of the issuing State and, in whole or in part, in the territory of the executing State, and the facts in relation to which the order has been issued do not constitute an offense in the executing State. This ground, which implies an extension of the double criminality control in the case of concurrence of jurisdictions, is not provided for in Spanish law.

Spanish legislation neither foresees as a reason for refusal of freezing and confiscation orders the existence of rules on the determination or limitation of criminal liability in relation to freedom of the press or freedom of expression in other media (Arts 8(1)(b) and 19(1)(b) Regulation 1805/2018).

In short, a comparison of the grounds for refusal provided for in the LRM with those provided for in the Regulation 1805/2018 reveals three types of discrepancies. First, as in the case of the other mutual recognition instruments previously analyzed, the LRM sets as mandatory certain grounds for refusal, which are optional under the Regulation 1805/2018[198]. Secondly, some of the grounds for refusal provided for in the Regulation 1805/2018 are not included in the LRM[199]. Finally, it is noted that some of the grounds for refusal provided for in the LRM are not included in the Regulation 1805/2018[200].

[198] This is observed, in relation to the grounds for refusal of freezing related to *non bis in idem* (Art 32(1)(a) LRM) or to the existence of a privilege or immunity (Art 32(1)(d) LRM). And, regarding confiscation, the same discrepancy is appreciated in relation to the following grounds: *ne bis in idem* (Art 32(1)(a) LRM), immunity or privilege preventing enforcement (Art 32(1)(d) LRM), incomplete and incorrect certificate and not corrected after the required consultations (Art 32(1)(c) LRM), decisions issued in *absentia* (Art 33 LRM).
[199] In this sense, discrepancies are observed in the ground for refusal provided for in Arts 8(1)(d) and 19(1)(d) of the Regulation 1805/2018 for freezing and confiscation respectively. This ground relates to an offense committed, in whole or in part, outside the territory of the issuing State and, in whole or in part, in the territory of the executing State, when the facts in relation to which the order has been issued do not constitute an offense in the executing State. Spanish legislation neither foresees as a reason for refusal of freezing and confiscation orders the existence of rules on the determination or limitation of criminal liability in relation to freedom of the press or freedom of expression in other media (Arts 8(1)(b) and 19(1)(b) Regulation 1805/2018).
[200] For instance, the possibility to deny the confiscation order when the offense may be considered to have been committed in whole or in a substantial or essential part in Spanish territory (Art 32(3) LRM).

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However, the discrepancies described above are not such if it is noted that the entry into force of the Regulation 1805/2018 entails the repeal of those previous and contradictory provisions with its content, regarding the recognition and execution of freezing and confiscation orders between the Member States bound by the Regulation 1805/2018.

In any event, the lack of judicial decisions refusing confiscation orders by Spanish courts makes it difficult to determine whether, in practice, courts actually apply the provisions of the national rule - tacitly repealed - or those of the Regulation.

4.4.2.1 Impossibility to execute the freezing or confiscation orders

In Spanish law there are no specific provisions on the impossibility of enforcing confiscation orders as set forth in Art 22 of the Regulation 1805/2018. Again, as the Regulation is directly applicable, this is not problematic. The executing authority shall act, in these cases, as provided for in the Regulation 1805/2018. On this point, the provisions of the Regulation 1805/2018 are sufficiently clear and precise to be applied without being supplemented by national legislation.

Regarding freezing orders, however, the Spanish legislation does contain a provision for the case of impossibility to execute the order (Art 155 LRM). This provision, although less detailed than in Art 13 Regulation 1805/2018, is in line with the European standard. It establishes the obligation to immediately inform the issuing authority of the impossibility of executing the freezing order when the assets have disappeared, have been destroyed, have not been found in the place indicated in the certificate or the location of the assets has not been indicated with sufficient precision, even after consultation with the issuing authority (Art 155 LRM).

However, the fact that the assets have been confiscated is not foreseen as a cause that makes the freezing impossible (Art 13(3)(a) Regulation 1805/2018). Nor is there any provision on how to act in the event that the enforcement authority subsequently obtains information that allows it to locate the assets (Art 13(4) Regulation 1805/2018). Therefore, with respect to these matters, the Regulation will be directly applicable.

4.4.2.2 Fundamental rights and proportionality issues

Spanish legislation, with respect to freezing, does not foresee as a specific cause for refusal the violation of fundamental rights contained in the CFR, in particular, effective

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judicial protection, the right to a fair trial and the right of defense (Arts 8(1)(f) for freezing and 19(1)(h) for confiscation orders, both of the Regulation 1805/2018), which is foreseen, however, in relation to resolutions for the enforcement of pecuniary sanctions (Art 182(1)(e) LRM) or in relation to EIOs (Art 207(1)(d) LRM).

For confiscation orders, however, it is expressly stated, as a mandatory ground for refusal, the infringement of the rights of the interested parties, including *bona fide* third parties under Spanish law (Art 170(1)(a) LRM), as well as the fact that the Judge considers incompatible with the fundamental rights and freedoms recognized in the Constitution the decision taken in application of the provisions on the extended power of confiscation provided for in the legislation of the issuing State (Art 170(1)(b) LRM).

In any case the direct applicability of the Regulation 1805/2018, together with the general provision of the LRM on the subjection to fundamental rights in the execution of mutual recognition instruments[201], seems sufficient to guarantee that, also in relation to freezing, the existence of well-founded grounds to believe that the execution of the order would entail a violation of fundamental rights, would justify its non-recognition.

As for the assessment of necessity and proportionality that Recital 21 and Art 1(3) of the Regulation 1805/2018 imposes on the issuing authority, nothing is expressly stated in the LRM. However, the principle of proportionality is reflected in the Spanish Criminal Code. This legal Act also incorporates the principle of proportionality that must inform the confiscation, linking the value of the assets to be confiscated with the nature and seriousness of the criminal offense (Art 128 Criminal Code[202]).

4.4.3 Execution procedure

According to Art 23 of the Regulation 1805/2018, the determination of the competent authorities is a matter of national law. Under Spanish law, judges or courts hearing the proceedings in which the measure is to be taken shall have jurisdiction to issue freezing orders (Art 144(1) LRM). At the same time, judges or courts competent for the

[201] As previously mentioned, Art 3 LRM states that "This Law shall be applied with respect for the fundamental rights and freedoms and the principles contained in the Spanish Constitution, in article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union, and in the European Convention on Fundamental Rights and Freedoms of the Council of Europe of November 4, 1950".
[202] This precept provides as follows: "When the referred effects and instruments are of lawful commerce and their value is not proportionate to the nature or seriousness of the criminal offense, or the civil liabilities have been fully satisfied, the Judge or Court may not order the confiscation, or may order it partially".

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execution of the sentence where the confiscation of an asset is imposed as an accessory consequence, will be competent to issue the corresponding confiscation order (Art 158(1) LRM).

For recognition and execution, Spanish legislation has chosen, in the exercise of its discretion, to confer jurisdiction to execute freezing and confiscation orders on different authorities, despite the fact that their execution is often successive in time. On the one hand, the investigating judges of the place where the property subject to freezing is located are competent to execute a freezing order (Art 144(2) LRM). On the other hand, to enforce a confiscation order, the criminal court of the place where any of the property subject to confiscation is located is competent. When such place is unknown to the issuing authority, the criminal court of the place of residence or registered office of the person against whom the order was issued will execute the confiscation order (Art 158(2) LRM).

Additionally, according to the declaration notified by Spain to the European Commission on December 18, 2020 in relation to Art 2(9) of the Regulation 1805/2018, the International Cooperation Unit of the Attorney General's Office (UCIF) is included as the receiving authority for freezing and confiscation certificates "for the sole purpose of determining the location of the property to be seized" when the issuing authority did not know the location of the property to be seized and, in the case of confiscation, when the issuing authority did not know the location of the property to be confiscated or the place of residence or registered office of the person against whom the decision was issued.

At the same time, the Public Prosecutor's Office is also competent in the investigation of assets through the EIO, provided that it does not contain any measure limiting fundamental rights (Art 187(2)(a) LRM).

The described system of competences for the enforcement of freezing and confiscation orders has been criticized for being inefficient, causing not only delays but also, sometimes, the disappearance of the assets affected by the order[203]. In this vein, the Specialized Unit for International Criminal Cooperation of the Attorney General's Office proposes the reform of the LRM in order to designate the Public Prosecutor's Office as the

[203] Conde Fuentes (n 59) 5; Rosa Morán Martínez 'España como país ejecutor de decisiones de embargo y decomiso en el Reglamento (UE) 2018/1805' in Ignacio Berdugo Gómez De La Torre; Nicolás Rodríguez García (edts.) Decomiso y recuperación de activos. Crime doesn't pay (Tirant lo Blanch, 2020) 461; Carmen Rodríguez-Medel Nieto 'España como país emisor de decisiones de embargo y decomiso en el reglamento (UE) 2018/1805' in Ignacio Berdugo Gómez De La Torre; Nicolás Rodríguez García (edts.) Decomiso y recuperación de activos. Crime doesn't pay (Tirant lo Blanch, 2020) 440; Aguado Correa (n 51) 358-359.

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sole authority for receiving freezing and confiscation certificates. A change in the rules of competence such as the one proposed would make it possible to overcome the current dysfunctions resulting from the triple attribution of competence - to the prosecutor for the EIO, to the examining judge for freezing orders and to the criminal judge for confiscation orders - which generates great confusion in the concept of European issuing authority. The receipt of all confiscation certificates by the Public Prosecutor's Office would ensure the necessary coordination in the execution of these instruments at the national level[204].

The proposed system would facilitate asset recovery by strengthening the capabilities of the Public Prosecutor's Office in the early stages of the asset recovery cycle. Thus, once an EIO for financial investigation purposes has been executed by the prosecutor, it would be necessary to legally empower the prosecutor to receive freezing certificates that are forwarded by the same issuing authority, maximizing the cooperation contacts already established and the consultation procedures already open with the issuing authority[205].

Finally, the proposed reform would facilitate the full reporting of statistics, pursuant to Art 35 Regulation 1805/2018, which obliges Member States to collect data on such orders that have been received and executed, with annual statistics to be sent to the Commission. Indeed, in view of the difficulty in complying with the provisions of Art 6 LRM regarding the obligatory notification to the Ministry of Justice of the orders transmitted and executed by

[204] Attorney General's Office. Annual report 2022 (n 2) 1219-1221. In the same vein, see Spanish National Member of Eurojust. Report of Activities (2019) 103. <https://www.fiscal.es/documents/20142/377345/Memoria+de+actividades+del+miembro+nacional+de+Espa%C3%B1a+en+Eurojust+_2019.pdf/a53039fb-01ca-54e2-f916-6ffd6b896125?t=1587375387854> accessed 14 June 2024. This report warns that, in Spain, delays continue to occur in the distribution and execution, as well as quite widespread errors, originating in the Common Services and Deaneries of the courts, which receive and process the EU freezing as national freezing, which are executed by the common services without distribution to Instruction and recognition procedure. Therefore, the national member of Eurojust proposes that the Public Prosecutor's Office be the receiving authority that assigns the certificate to an Examining Court, forwarding it with the corresponding report on its recognition. In this way, the criteria established for the EIO, in Art 187(2) LRM, would be extended to freezing and confiscation, which has proved to be effective for this purpose.

[205] As argued in the Attorney General's Office. Annual report 2022 (n 2) 1219-1221, the proposed change would deepen the approach inspired by the declaration notified by Spain to the European Commission on December 18, 2020 in relation to Art 2 (9) of the Regulation referring to the executing authorities, which includes the UCIF as the authority to receive the freezing and confiscation certificates "for the sole purpose of determining the location of the property to be seized", if the issuing authority did not know the place of its location and/or when the issuing authority did not know the place of location of the property to be seized "nor the place of residence or registered office of the person against whom the decision was issued". In any case, the proposed legal reform should extend the approach, recognizing the Public Prosecutor's Office as the sole receiving authority of the freezing certificates sent to Spain.

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the Judges and Courts, the assumption by the Public Prosecutor's Office of the receipt of freezing and confiscation certificates would make it possible to register such orders within the CRIS/CJI case management system, which is a complex and complete computerized management system at the national level, available to the national prosecutors[206].

The procedure for the enforcement of freezing orders is regulated in Arts 150 to 156 LRM, while the enforcement of confiscation orders is regulated in Arts 166 to 169 LRM. This regime, in general terms, is in accordance with the provisions of the Regulation 1805/2018, despite being prior to the adoption of the new EU instrument.

Regarding the enforcement of freezing orders, it is provided that the enforcement decision must be adopted immediately and communicated without delay to the issuing judicial authority and to the Public Prosecutor's Office, by any means that leaves a written record, setting a deadline of 24 hours from the receipt of the order (Art 151(1) LRM). Likewise, it is provided that the competent authority receiving the freezing order will adopt, within five days of receipt, the necessary measures to ascertain the location of the property subject to freezing (Art 151(2) LRM).

It should be noted that Art 9(3) Regulation 1805/2018 includes an extension of the time limits established in the LRM. Therefore, the deadline for deciding on the freezing order is extended from 24 to 48 hours for cases where the issuing authority has indicated that the freezing should be immediate. Likewise, it should be understood as applicable the possibility - not expressly provided for in the LRM - of the issuing authority indicating a specific date for the execution of the freezing (Art 9(2) Regulation 1805/2018).

The same resolution that grants the recognition and execution of the freezing of assets will determine what specific precautionary measure must be adopted to carry out its execution. The measure may consist of the deposit of the property, its preventive freezing, the blocking of bank accounts, deposits, securities or other financial assets, as well as the prohibition to dispose of the property or any other precautionary measure that may be agreed upon in the criminal proceedings, and must always be carried out in accordance with the provisions of the Spanish legal system (Art 152(1) LRM).

With respect to the execution of the confiscation, the Spanish regulation indicates that the Criminal Court, as the competent authority for the execution, will proceed to ascertain the location of the property subject to confiscation, being able to communicate with the issuing judicial authority so that it may expand on any relevant circumstances for

[206] Idem.

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the execution of the confiscation (Art 167(1) LRM). Likewise, it is foreseen that the Criminal Court, after a report from the Public Prosecutor's Office and other parties involved, issued within five days, will agree by means of an order to execute the duly transmitted confiscation resolution, within a maximum period of ten days from its receipt (Art 167(2) LRM). Once again, the short deadlines provided for in the LRM have been extended by those established in the Regulation 1805/2018 (Art 20).

The enforcement of the confiscation order will depend on whether the measure refers to a specific asset or to a sum of money (Art 168 LRM)[207], establishing specific rules for the enforcement of multiple confiscation orders (Art 169 LRM) and also expressly regulating different possibilities of suspending the enforcement (Art 171 LRM).

There are no relevant discrepancies with respect to the enforcement procedure. However, there is a gap in the national regulations regarding the assignment of confiscated assets for the compensation of victims. In this sense, in relation to the restitution of frozen or confiscated property to the victim (Arts 29 and 30 Regulation 1805/2018), it should be noted that the LRM, in its Explanatory Memorandum (paragraph XII), expressly excludes from its scope of application the restitution of property to the rightful owners[208]. Once again, the loophole can be understood to be filled with the direct application of the Regulation 1805/2018, although it would be advisable to adapt the LRM in this regard.

In addition, the doctrine points out a possible contradiction of Art 374(2) Criminal Code with Regulation 1805/2018. This is because the former excludes victims as possible beneficiaries of confiscation in drug trafficking crimes. In this sense, the Spanish legislation establishes that, in relation to certain crimes against public health, the goods, means, instruments and profits definitively confiscated by final judgment, may not be used to satisfy the civil liabilities derived from the crime or the procedural costs, and must be

[207] As a general rule, confiscation orders shall be recognized and enforced in the same manner as a confiscation order issued by a national judge. Therefore, in the event that it is not possible to confiscate the specific assets set out in the European order, confiscation for equivalent value will be used (Arts 168(1) LRM and 127(3) Criminal Code).

[208] For internal cases, it may be of interest the provision of Art 334(IV) LECrim on property confiscated at crime scenes. This precept provides as follows: "*The effects that belonged to the victim of the crime will be immediately returned to the victim, unless exceptionally they should be kept as evidence or for the practice of other proceedings, and without prejudice to their restitution as soon as possible. The effects shall also be returned immediately when they must be preserved as a means of evidence or for the practice of other proceedings, but their preservation may be guaranteed by imposing on the owner the duty to keep them at the disposal of the Judge or Court. The victim may, in any case, appeal this decision in accordance with the provisions of the preceding paragraph*".

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awarded in full to the State. This prohibition on applying the proceeds of crime to the victims raises doubts as to its consistency with the general principle laid down in the Regulation 1805/2018 according to which confiscation measures must not prejudice the legitimate expectations of crime victims[209].

Finally, it is worth mentioning that according to Art 3(6)(d) Regulation 1805/2018, the confiscated assets may be used for public interest or social purposes in the executing State in accordance with its national legislation, subject to the consent of the issuing State. Regarding such purposes, it should be noted that in Spain, Art 2 of Royal Decree 948/2015, of 23 October, which regulates the Asset Recovery and Management Office establishes that the aforementioned Asset Recovery and Management Office will apply the proceeds of crime with the following priority objectives: a) Support for programmes of care for victims of crime, both of the Public Administrations and of non-governmental organizations or private non-profit entities, with special attention to victims of terrorism, victims of gender violence, trafficking in human beings, violent crimes and crimes against sexual freedom, as well as victims with disabilities in need of special protection and underage victims. b) The promotion and provision of resources for the Victims' Assistance Offices. c) Support for social programmes aimed at crime prevention and the treatment of offenders. d) The intensification and improvement of actions for the prevention, investigation, prosecution and repression of crime; e) International cooperation in the fight against serious forms of crime. f) The operating and management costs of the Office for the Recovery and Management of Assets.

4.4.3.1 Issues for the rights of the suspect, accused and other parties

The LRM does not contain a definition of affected person or specific provisions on the duty to inform such persons regarding decisions to recognize and enforce freezing and confiscation orders. Despite this, it does establish the obligation to give a hearing to the parties to the proceedings before deciding on the recognition of the confiscation order (Art 167(2) LRM). The problem is that the Spanish legislation refers to persons who are parties to the proceedings. However, the concept of affected person in the Regulation 1805/2018

[209] Cristina Martínez Arrieta Márquez De Prado *El decomiso y la recuperación y gestión de activos procedentes de actividades ilícitas* (Tirant Lo Blanch. 2018) 138. For his part, José Antonio Díaz Cabiale 'El decomiso tras las reformas del CP y de la LECrim de 2015' (2016) 18 *Revista electrónica de ciencia penal y criminología*, 34-35, justifies it in compliance with the 1988 UN Convention, where the need to finance the bodies that combat this type of crime is made explicit.

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includes third parties whose rights may be adversely affected by the freezing or confiscation decision, who may not be parties to the proceedings.

In relation to these third parties affected by the confiscation, the LECrim, for domestic cases, does foresee their call to the process and their intervention in it (Art 803 ter a) LECrim)[210], although limited to the aspects that directly affect their assets, rights or legal situation, without being able to extend their participation to issues related to the criminal liability of the defendant (Art 803 ter b) 1 LECrim)[211]. In the same way, third parties, other than the defendant, who may be affected by the confiscation, must be called to the process of execution of the European freezing and confiscation orders.

In relation to the restitution to the victim of frozen property (Art 29 Regulation 1805/2018), it should be noted that the LRM, in its Explanatory Memorandum (paragraph XII), expressly excludes from its scope of application the restitution of property to the rightful owners. For internal cases, it may be of interest the provision of Art 334 IV LECrim on property confiscated at crime scenes (although here there is no freezing or confiscation order). This precept provides as follows: "*The effects that belonged to the victim of the crime will be immediately returned to the victim, unless exceptionally they should be kept as evidence or for the practice of other proceedings, and without prejudice to their restitution as soon as possible. The effects shall also be returned immediately when they must be preserved as a means of evidence or for the practice of other proceedings, but their preservation may be guaranteed by imposing on the owner the duty to keep them at the disposal of the Judge or Court. The victim may, in any case, appeal this decision in accordance with the provisions of the preceding paragraph*".

Regarding the destination of the confiscated goods or of the money obtained after the sale of such goods, the distribution provided for in Art 30(6) of the Regulation 1805/2018 coincides with that provided for in Art 172 LRM. However, in the Spanish

[210] "*Judicial decision to summon them to participate in the proceedings.* 1. The judge or court shall order, ex officio or at the request of a party, the intervention in the criminal proceedings of those persons who may be affected by the confiscation when there are facts from which it may reasonably be inferred that (a) that the property for which confiscation is requested belongs to a third party other than the person under investigation or indicted, or (b) that there are third parties who have rights in the property for which confiscation is requested and who could be affected by the confiscation".

[211] "*Special features of the intervention and summons to trial of the third party concerned.* 1. The person who may be affected by the confiscation may participate in the criminal proceedings as soon as their intervention has been agreed, although this participation shall be limited to those aspects that directly affect their property, rights or legal situation and may not extend to matters relating to the criminal liability of the defendant".

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legislation, the provisions relating to compensation of the victim (Art 30 (1), (2), (3), (4) and (5) Regulation 1805/2018) are not expressly reflected. On this issue, the provisions of Art 127 octies (3) Criminal Code are relevant, according to which "*the goods, instruments and proceeds confiscated by final decision, unless they are to be used for the payment of compensation to victims, shall be awarded to the State, which shall give them the destination provided for by law or regulation*". From this precept derives the priority of the confiscated assets for the payment of compensation to the victims. For its part, Art 367 quinquies (3) LECrim provides as follows: "*The realization of the judicial effects will be carried out in accordance with the procedure determined by regulation. Notwithstanding the foregoing, prior to agreeing to it, a hearing will be granted to the Public Prosecutor's Office and the interested parties. The proceeds from the realization of the effects, goods, instruments and proceeds shall be applied to the expenses incurred in the conservation of the goods and in the procedure for their realization, and the surplus part shall be paid into the consignment account of the court or tribunal, and shall be used to pay the civil liabilities and costs that may be declared, as the case may be, in the proceedings. It may also be totally or partially assigned in a definitive manner, under the terms and by the procedure established by regulation, to the Asset Recovery and Management Office and to the organs of the Public Prosecutor's Office in charge of the repression of the activities of criminal organizations. All of the above without prejudice to the provisions for the Fund of assets confiscated for illicit drug trafficking and other related crimes.*

In the case of realization of a freezing or confiscation property by order of a foreign judicial authority, the provisions of the Law on Mutual Recognition of Criminal Judgments in the European Union shall apply".

As noted above, the doctrine points out a possible contradiction of Art 374(2) Criminal Code with Regulation 1805/2018. This is because the aforementioned precept excludes victims as possible beneficiaries of confiscation in drug trafficking crimes. In this sense, the Spanish legislation establishes that, in relation to certain crimes against public health, the goods, means, instruments and profits definitively confiscated by sentence, may not be used to satisfy the civil liabilities derived from the crime or the procedural costs, and must be awarded in full to the State. This prohibition on applying the proceeds of crime to the victims raises doubts as to its consistency with the general principle laid down in

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European legislation according to which confiscation measures must not prejudice the legitimate expectations of crime victims[212].

4.4.4 Cooperation issues between executing and issuing authorities

Given that the entry into force of the Regulation 1805/2018 has not entailed any modification of the LRM, there are certain discrepancies in the wording of the Regulation 1805/2018 and Spanish law. However, most of these discrepancies can be overcome it is understood that the domestic law should be considered inapplicable in everything that contradicts the text of the Regulation 1805/2018.

For example, there are discrepancies with respect to deadlines. In any case, since the Regulation 1805/2018 is directly applicable, it should be understood that the time limits that apply are those of the Regulation, relegating those provided for in the LRM to Spain's relations with Ireland and Denmark.

With respect to deadlines, firstly, it is noted that the LRM does not include a general provision that makes national and European cases similar in terms of priority and time limits, as does Art 9(1) of Regulation 1805/2018. On the other hand, the LRM sets a general time limit of 24 hours to decide on the recognition of freezing orders (Art 151(1) LRM), as opposed to 48 hours in the Regulation 1805/2018 for urgent/immediate cases. Then, a period of 5 days is foreseen for localization measures (Art 151(2) LRM), as opposed to the 48 hours of the Regulation 1805/2018 to effectively execute the order.

Something similar occurs with the deadlines for recognizing and executing confiscation orders. The LRM does not include the 45-day period for recognition provided for in Art 20(1) of Regulation 1805/2018, although it does establish a period of 10 days to execute the order once the decision to recognize it has been taken (Art 167(2) LRM). Likewise, the Spanish regulation lacks a provision, in line with Art 20(4) of Regulation 1805/2018, setting forth the duty to inform about the eventual impossibility of complying with the legal time limits.

Neither are Art 12(2) Regulation 1805/2018 and Art 153.2 LRM in line. Spanish law provides for the possibility for Spain, as the executing authority, to limit the duration of the freezing, after consultation with the issuing authority, but, contrary to European regulations, without submitting the matter to a request and binding decision by the issuing State, as appears from the Regulation.

[212] Martínez Arrieta Marques De Prado (n 65) 138.

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Regarding the possibilities of transmitting the order to more than one State, Art 162 LRM establishes an additional case that is not in the Regulation 1805/2018. Specifically, it refers to the case in which the competent Spanish judicial authority has reasonable grounds to believe that a specific asset included in the confiscation order is located in one of the two or more given executing States (Art 162(1)(c) LRM). This legal provision seems to refer to cases where the issuing State has doubts about the location of the property, something that the Regulation 1805/2018 does not provide for in Art 15. In this case, since the general rule is that the confiscation order is addressed to a single executing state (Art 15(1) Regulation 1805/2018), except in specific cases expressly provided (Art 15(2) and (3) Regulation 1805/2018), the possibility stated in the LRM will generally become inapplicable.

It is also noted that, to the grounds for postponement provided for in Art 21 Regulation 1805/2018, the Spanish legislation adds the following: "*When it considers it necessary to translate, without passing on its cost to the issuing State, the confiscation order or parts thereof, for the time necessary to obtain its translation*" (Art 171(1)(c) LRM). This addition should not necessarily be problematic given that the Regulation 1805/2018 does not provide for such grounds on an exhaustive basis.

Finally, there are some interesting provisions of Spanish law which, however, are not found in the Regulation, but which could be applied as they do not contradict the letter and spirit of the Regulation. This is the case, for example, with the provision that the Spanish judicial authority, before partially or totally refusing recognition and enforcement of the order, should consult the competent authority of the issuing State to clarify the situation and, where appropriate, to remedy the defect (Art 170(2) LRM).

4.4.5 Remedies

Regarding the possibilities of appeal against decisions to issue and execute freezing and confiscation orders, Spanish legislation does not contain specific provisions, and the general rules on appeals provided for in Arts 13 and 24 of LRM are applicable.

Specifically, Art 13 LRM regulates possible appeals when Spain is the issuing State. For these cases, it is provided that appeals provided for in the Spanish legal system may be lodged against the decisions to issue an instrument of mutual recognition, which will be processed and resolved exclusively by the competent Spanish judicial authority in accordance with Spanish law (Art 13(1) LRM). In the event that an appeal is upheld, the

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Spanish judicial authority will immediately communicate the decision to the executing authority (Art 13(2) LRM).

For cases in which Spain is the executing State, Art 24 LRM applies. According to this precept, against the decisions made by the Spanish judicial authority ruling on the recognition and execution of European orders, the appropriate appeals may be lodged in each case in accordance with the general rules provided for in the procedural law in force (Art 24(1) LRM). This implies that the decisions taken by the investigating judge or the criminal judge competent for the execution of freezing or confiscation orders may be appealed before the corresponding Provincial High Court (Arts 790 and 803 ter (r) LECrim). The executing authority will communicate to the judicial authority of the issuing State both the lodging of an appeal and its grounds as well as the decision on the appeal (Art 24(2) LRM). This regulation is in line with Arts 33(1) and 33(3) of the Regulation 1805/2018.

In addition, the Spanish regulation, in line with Art 33(2) Regulation 1805/2018, specifies that the substantive grounds on which the order or decision has been adopted can only be challenged by means of an appeal lodged before the competent authority of the issuing State (Art 24(3) LRM). In this regard, it is not uncommon for the Spanish courts to reject the claims of the appellants when they seek to challenge the content of the sentencing decision to be enforced before the courts of the executing State.

However, the Spanish regulation (Art 171 LRM) does not provide for the lodging of an appeal as a specific cause for postponement of the execution, as provided for in Art 21(1)(d) Regulation 1805/2018, thus calling into question the suspensive nature of the appeal. However, in the light of Art 33(1) *in fine* Regulation 1805/2018, the suspensive nature of appeals depends on the domestic law of the executing State. Therefore, it must be stated that an appeal against the enforcement of a confiscation order should be suspensive, since criminal convictions are only enforceable when they are final, with no provision for the possibility of provisional enforcement of non-final criminal convictions in the Spanish legal system.

5 Conclusions

The transposition of all mutual recognition instruments through a single legislative instrument - the LRM - avoids regulatory dispersion and guarantees the coherence of the system. However, the existence of general provisions, applicable to all mutual recognition instruments, sometimes leads to discrepancies between Spanish and European legislations.

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With regard to the EAW, the most notable discrepancies relate to the grounds for refusal, some of which are provided for as mandatory rather than optional, as mandated by EAW FD. The incorrect transposition of the grounds for refusal, criticized by the Spanish Attorney General's Office, is problematic because it is contrary to the European legislator's intention to leave a margin of discretion to the competent judicial authorities to assess the consequences of the existence of a ground for refusal on a case-by-case basis.

At the jurisprudential level, as long as the requirements of the EAW are met, the certificate is complete and correct and there are no grounds for refusal, the execution is practically immediate. However, it is usual to refuse the surrender in those cases in which the requested person has legal residence or roots in Spain and does not consent to be surrendered, in which case it is usually agreed that he/she will serve the sentence in Spain.

In any case, the implementation of the EAW FD deserves an overall positive assessment. The extensive experience accumulated over the years in relation to the application of this instrument has made it possible to have a balanced legislation at the domestic level that guarantees the rights of the requested persons and at the same time respects the principle of mutual recognition of criminal decisions.

With respect to the EIO, certain discrepancies are also foreseen with respect to the grounds for refusal and their mandatory nature, as discussed above. But surely the most serious inconsistency has to do with the absence of appeals against the decisions of issuance and execution of the EIO rendered by the prosecutors. Although the non-appealability of such decisions is consistent with the system of appeals provided for at the national level, doubts arise as to their compatibility with Art 14 EIO D, especially in light of the case *Gavanozov II*.

Beyond the inconsistencies detected in the legal transposition, it is worth highlighting the committed jurisprudential application that the Spanish courts make of the principle of mutual trust which, in matters of transnational evidence, translates into the “principle of non-inquiry”. This principle implies that the Spanish courts will not review the way in which the evidence has been obtained abroad, being practically nonexistent the cases in which the violation of fundamental rights in the acquisition of the evidence is appreciated.

Last, as regards Regulation 1805/2018, Spanish law has not been adapted to it, despite the fact that various institutions - Government, Attorney General's Office - have acknowledged the advisability of adapting the domestic legislation to this EU cooperation mechanism. In any case, as far as the competent authorities and the national procedure are

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concerned, the previous legislation, which transposes the Framework Decisions 2003/577/JHA and 2006/783/JHA, will continue to be applicable, insofar as it does not contradict the Regulation 1805/2018.

The lack of express legislative intervention adapting the Spanish legislation to the Regulation 1805/2018 is overcome by the direct applicability of the latter. However, certain doubts remain unresolved which would make it advisable to adapt domestic legislation to the new situation created by the Regulation 1805/2018.

It should be taken into account, for example, that Spanish legislation does not contain a specific regulation on freezing for the purpose of confiscation. Therefore, the regulation of the Criminal Procedural Law on the precautionary measure of confiscation should be applied as far as it is compatible with the provisions of the Regulation 1805/2018, In this sense, despite the fact that the regulation of freezing in Spain is unique for different purposes – e.g. securing means of evidence, securing civil liabilities or securing a subsequent confiscation measure – the rules contained in the Regulation 1805/2018 will only apply in cases of freezing ordered to guarantee a subsequent confiscation measure. This also includes non-conviction-based confiscation, which can be agreed in a criminal proceeding, even if it does not end in a conviction, or in an autonomous proceeding before the criminal judge.

Likewise, Spanish legislation also lacks a consistent regulation on the restitution of assets to victims or compensation to injured parties with the frozen or confiscated assets. In this sense, it would be advisable to review the domestic legislation to correct this legal loophole, in order to avoid interpretative doubts on how the Regulation 1805/2018 interplays with the previous rules existing in the Spanish legal system on the destination to be given to the confiscated assets.

As a general conclusion, it should be noted that the decision of the Spanish legislator to bring together all the rules on mutual recognition of criminal decisions in a single Act is positive. This legislative technique gives coherence to the system and facilitates the application of the rules by the competent judicial authorities. However, there is still some room for improvement to achieve complete alignment of domestic legislation with European legislation. In the meantime, we must rely on the good work of the judicial authorities, who shall apply the national rules in line with the spirit and the letter of the applicable provisions of the EU law.

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