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# RESTREINT UE



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 30 March 2007**

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**REV 1**

**RESTREINT UE**

<b>CRIMORG</b>	<b>5</b>
<b>COPEN</b>	<b>3</b>
<b>EJN</b>	<b>1</b>
<b>EUROJUST</b>	<b>1</b>

**EVALUATION REPORT ON THE**  
**FOURTH ROUND OF MUTUAL EVALUATIONS**  
**"THE PRACTICAL APPLICATION OF THE EUROPEAN ARREST WARRANT AND**  
**CORRESPONDING SURRENDER PROCEDURES BETWEEN MEMBER STATES"**

**REPORT ON SPAIN**

# **RESTREINT UE**

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## 1. INTRODUCTION

1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.

1.2. Following the discussion of a proposal introduced by the Luxembourg Presidency concerning the topic of the fourth round of mutual evaluations<sup>1</sup>, the MDG of 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG of 11 July that the evaluation questionnaire was to be prepared by the UK Presidency.

1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG on 9 September 2005.

1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in document 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.

1.5. Also at its meeting on 28 October 2005 the MDG discussed and approved document 13824/05, the revised sequence for the mutual evaluation visits. Spain is the third Member State to be evaluated during the fourth round of evaluation.

1.6. The experts charged with undertaking this evaluation were: Caroline Tubbs (District Judge, London), Ana Duarte (Head of Interpol, Lisbon) and Evangelos Kasalias (Public Prosecutor, Athens). Two observers were also present; Carmen Manfreda (Eurojust) and Polyvios Panayides (Commission), together with the General Secretariat of the Council.

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<sup>1</sup> Document 9602/05 - Orientation debate on a proposed Mutual Evaluation exercise.

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1.7. This report was prepared by the expert team with the assistance of the Council Secretariat, based upon findings arising from the evaluation visit of 26 - 30 June, and upon Spain's detailed and helpful responses to the evaluation questionnaire and a written request for further information.

1.8. The report makes reference to differing processes in respect of arrest and prosecution cases only insofar as there is a divergence of practice between the two procedures.

1.9. The expert team's overarching purpose was to evaluate the distinct practical processes operated and encountered by Spain both in its role as issuing and executing Member State, to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as they felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

## 2. THE AUTHORITIES AND THE LEGAL BASIS

### 2.1 THE AUTHORITIES

- Judicial Authorities (JAs) – Issuing Member State role.

In terms of its activities relating to the issue of EAWs Spain is entirely decentralised and any of the 1,704 courts of the criminal branch of the judiciary, competent to hear the case and impose a sentence in the area where the requested person is sought, may issue an EAW. Practical experience of issuing EAWs is therefore dispersed as follows:

- The Supreme Court (Criminal Branch): 1 court
- Audiencia Nacional (Criminal Court): 1 court (4 sections)
- Central Investigating Courts (at the Audiencia Nacional): 6 courts
- Central Criminal Court (at the Audiencia Nacional): 1 court
- Central Court for the Supervision of prison sentences: 1 court
- Courts for the supervision of prison sentences: 37 courts
- Regional High Courts: 17 courts
- Provincial Courts: 51 courts
- Criminal Courts: 302 courts
- Investigating Courts: 1,269 courts
- Courts for domestic violence: 18 courts

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The JA may issue an EAW either of its own motion or on the application of a public prosecutor ("fiscal"). As is apparent from the above list, the geographical dispersal of EAW files across the territory of Spain means that, of necessity, magistrates in outlying regions receive less frequent exposure to these matters than those in the larger cities. All issuing JAs are under an express statutory obligation to forward to the Central Authority (the CA) copies of those EAWs which they have issued and transmitted<sup>1</sup>.

- Judicial Authorities – Executing Member State role.

Conversely, in terms of its activities relating to the execution of EAWs, Spain has implemented a centralised competence. The Central Preliminary Investigating Magistrates' Court (CPIMC) and the Criminal Division of the National High Court (CDNHC) which together comprise the Audiencia Nacional (whose unified court building is situated in Madrid) are the designated Judicial Authorities in respect of all surrender decisions throughout Spain. As with issuing MS procedures, the executing JA is under an express statutory obligation<sup>2</sup> to notify the CA of all EAW receipts. In all cases consideration of the file is initially undertaken before 1 (of 6) Investigating Magistrates sitting at the CPIMC who may issue a writ of surrender in consent cases or, where consent is not forthcoming, will pass the case file together with a dossier of their findings to a tribunal of 3 (of 18) judges sitting in the Criminal Division of the CDNHC. In non consent cases the surrender decision will then be determined by the tribunal on the papers, that is to say without further oral representation being made.

- The Prosecutors.

Public prosecutors are not competent to issue EAWs. The chief prosecutor is a governmental appointee who sits at the top of the prosecutorial hierarchy. Although the chief prosecutor may issue general conduct guidelines, the 1,974 individual prosecutors manage their cases independently on the basis of individual evidential and merit based considerations. The Ministry of Justice may not issue either general or specific instructions to prosecutors on a case specific basis, they may however (in conjunction with the General Council of the Judiciary) issue protocols and "best practice" styled guides.

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<sup>1</sup> Article 7, Law 3/2003.

<sup>2</sup> Article 10(3), Law 3/2003.

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Prosecutors are present throughout the litigation phase of the EAW process and, to the extent that they are bound to advise the executing JA on the existence of statutory refusal grounds (independently of similar defence obligations), they represent the rights of the requested person. They also make representations as to remands in custody.

- The Spanish Networks of International Judicial Cooperation .

There are two networks, one comprising of judges and magistrates<sup>1</sup> and the other one of public Prosecutors<sup>2</sup>. They each seek to assist their professional colleagues in respect of specific case related issues and have together compiled a written guide (without legal force) circulated to judicial bodies on the subject of the EAW. The guide contains a practical summary of information required for the completion of the EAW form.

- The Ministry of Justice.

The Ministry is the competent Central Authority ("the CA") in Spain.

Although not designated as a transmission channel<sup>3</sup> the CA provides assistance to its JA pursuant to Article 7(1) of the FD. In this regard it seeks to gather and collate statistical data in respect of Spain's EAW activities (both as issuing and executing MS). The CA is also charged with reviewing those EAWs forwarded to it, so as to distil elements of best practice for dissemination to its Spain's EAW practitioners.

The CA also has a domestic role in EAW coordination and has established an EAW working party chaired by the Deputy Director of International Cooperation from the CA which cascades practical information and best practices by e mail at regional and local levels. It also collaborates with the office of the Attorney General and the General Council of the Judiciary in respect of organising EAW seminars and EAW specific practice guides, the first of which (guide for completion of the EAW form) occurred in April 2004.

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<sup>1</sup> Created by the Superior Council of the Judiciary.

<sup>2</sup> Created by the General Prosecutor's Office.

<sup>3</sup> In those instances in which EAWs are transmitted to the CA in error, they will be forwarded directly to Spain's designated executing JA.

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The CA has further competence in regard to coordinating data in respect of the transiting of requested persons through Spain and deciding on the priority of conflicting EAW and extradition requests, it therefore bears a high degree of accountability in respect of visible elements of the EAW process, although it has no direct control per se over EAW issue or execution processes.

- The General Council of the Judiciary (international relations committee)

The General Council has an advisory role to play (specific to the judiciary) in respect of all aspects of international judicial assistance<sup>1</sup>. The organisation is headed by a senior judge and, although all of the committee members have a role to play, each contributes most actively within his/her area of speciality. The Council has established a judicial cooperation network with 80 contact points throughout Spain (working in both criminal and civil areas) who seek to provide training and support, although not mandatory direction, on a nationwide basis<sup>2</sup>. The Council contributed to the work of the CA in the establishment of the so-called "prontuario" (see below) and assists in the continual electronic updating of that publication.

- The International Police Cooperation Unit

The third round of mutual evaluation reported, inter alia, that Spain's Interpol, Europol and Sirene desks were at a "very advanced stage of being brought under single management". The current expert team noted that these agencies came together as a unified business group on 02 July 2005 and are expected to reach full operational capacity by December 2006. There are groups specialized in Extradition and EAW-matters in BCN INTERPOL and in SIRENE Bureau. The INTERPOL - Group VIII is in charge of active extradition requests and the Groups I and II of the passive ones. Also the SIRENE-Legal Section is in charge of extraditions and EAW. 8 Police Officers are University graduates in Law.

The key objective of the Unit is the simplification and enhancement of police communication.

A flexible workflow/manpower allocation exists within those organisational elements whose work impacts on the EAW and, as such, there are no staff members whose exclusive task is to receive or process warrants or alerts.

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<sup>1</sup> Including the provision of advice on EAWs and letters rogatory.

<sup>2</sup> Although, in addition, they have established links with similar networks in Latin America.



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In addition to standard functions attributed to these agencies they have established a specific tracing unit tasked with localising requested persons on Spanish territory by processing all incoming SIS and Interpol alerts through various electronic databases.

- Officers from any of Spain's 2 National police forces (the Policia Nacional and the Guardia Civil), or from it's 2 autonomous regional forces (the Mosos d'Escuadra in Catalonia and the Ertxantxa in the Basque Country) may conduct the arrest of requested persons on the basis of an EAW, an Article 95 Alert or an Interpol notice/diffusion.

An initial detention of up to 72 hours may be initiated by the police prior to physically producing the requested person before the executing JA (save for in exceptional circumstances where Spain's geography precludes production in that timeframe, in such an instance a magistrate of the national court may request a regional magistrate to undertake his functions in respect the assessment of the detention review). This initial detention period is used to establish the identification of the requested person (via SIRENE) and to prepare a file of case papers for submission to the JA. Once before the court, the requested person is deemed to be under "judicial supervision" and may be further detained<sup>1</sup> by the JA in accordance with domestic legislation.

- The Spanish Constitutional Court - Although there are no avenues of ordinary appeal against a writ of surrender issued by the Audiencia Nacional, there are instances where an appeal may lie to Spain's Constitutional Court on the basis of an alleged breach of the fundamental rights of the requested person. In such cases the Constitutional Court may order a stay of the surrender, pending the hearing of the appeal. Following the evaluation visit the expert team were advised that, by a Constitutional Court ruling of the 6 June 2006 the defendant is entitled to legal representation of his choice (as opposed to duty representation) at the first hearing of the matter.

### 2.2 THE LEGAL BASIS

- Law No. 3/2003 of 14 March 2003 - Spain's implementing legislation, which entered into force on 01.01.2004. The expert team noted that the law reproduces the FD form of the EAW as an Annex and also that the Spanish authorities have published a detailed explanation of the procedures set down in this act on the MoJ website [www.justicia.es](http://www.justicia.es).

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<sup>1</sup> Although in practice the requested person will be so remanded.

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- The Criminal Procedure Act, as amended - Spain's governing domestic code by which all hearings before the criminal courts are governed. In respect of EAW procedures it impacts, inter alia, the following issues:
  - the obligation to afford to a suspect the opportunity to comment on the allegations prior to a final charge decision being made,
  - the rights of the parties to be heard,
  - the rules governing access to evidence,
  - access to legal advice and linguistic provision
  - the possibility that regional investigating courts may substitute for the central investigating court where appropriate<sup>1</sup>.
- The Criminal Juveniles Act No. 5/2000 (as amended) - which sets out the domestic prosecution procedures to be followed in respect of all criminal matters relating to youths, namely suspects aged between 14 and 18.
- The Framework Law on the Constitutional Court no. 2/1979 - which sets down the guiding principles to be applied in respect of matters appealed to Spain's Constitutional Court.
- The Prontuario - A detailed practical guide to matters of international judicial assistance, published in hard copy and on a dedicated website which is updated on a regular basis ([www.prontuario.org](http://www.prontuario.org)). The Prontuario sets out not only the practical steps for JAs and prosecutors to observe, it also signposts non domestic organisations who may provide further assistance in EAW matters, for example Eurojust and EJM contact points.
- Member States may also refer for assistance to Spain's "Fiche Française" (domestically referred to as the "Memorandum on the EAW") which was drawn up in consequence of a collaboration between the Attorney General's Office<sup>2</sup>, the CA, and the Governing Council of the Judiciary and published December 2003. This document sets out those practices which issuing Member States are to adopt when seeking the surrender of a requested person from Spain.

<sup>1</sup> Article 505 paragraph 6 of the Code of Criminal Procedure.

<sup>2</sup> Via its technical secretariat.

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## 3. ORGANISATION AND PRACTICES - ISSUING MEMBER STATE ROLE

The expert team noted that the Spanish CA experienced considerable difficulty in providing statistical data which accurately represented Spain's activities in this regard. The primary cause of this difficulty arose from the fact that the clear majority of issuing JAs had failed to undertake their statutory duty to notify the CA of EAWs issued<sup>1</sup>, thus forcing the CA undertake multiple source enquiries to piece together the country wide position.

The CA used its best endeavours to provide accurate figures to establish EAW activity across all of Spain's 1,704 JAs<sup>2</sup>. In summary, in respect of the calendar year to June 2006 the expert team were advised that: circa 250 EAWs had been issued by Spain, in respect of which 32 arrests had been made by executing MSs and 22 surrenders undertaken. Spain reported that no surrenders had been refused during the period.

### 3.1. THE DECISION TO ISSUE

Spain's implementing legislation does not prescribe a formal method by which decisions to apply for the issue of EAWs are to be taken, as a result of this, Spain's rules pertaining to the merits of applying for domestic warrants<sup>3</sup> are applied by analogy.

In accordance with those practices, EAWs may be issued by the JA either on the application of a prosecutor or, when appropriate<sup>4</sup>, may be granted ex officio by the Examining Magistrates themselves. Spanish EAWs may each cover a number of appropriate surrender offences.

Spain's 1,704 JAs are competent to issue EAWs and, by implication, each may reach a reasoned decision as to the merits of such a course and proceed in accordance with regional variations. In consequence the CA, in conjunction with its EAW partners, had played a role in seeking to standardise EAW issue practices by virtue of the Prontuario and the EAW memorandum mentioned in section 2.2 of this report.

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<sup>1</sup> 2005 - 6 notifications from 516 issued EAWs. Year to June 2006 - 0 notifications from circa 250 EAWs issued.

<sup>2</sup> See annex B and the caveats thereto.

<sup>3</sup> As set out in Articles 489 to 501 of the Code of Criminal Procedure.

<sup>4</sup> In accordance with standard domestic practices.

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### 3.2. VERIFYING THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

Spanish authorities do not conduct enquiries of the International Police Cooperation Unit to establish if domestic warrants or EAWs<sup>1</sup> have already been issued or are pending in respect of requested persons.

Such checks are practically possible but it will be a matter for the appropriate domestic police force to undertake if felt appropriate. The expert team were advised that the existence of current proceedings would, in the normal course of events, be unlikely to have a practical impact on the decision to apply for or issue an EAW.

### 3.3. THE COMPLETION OF THE FORMS/COURT PAPERS

The drafting of the EAW is a matter exclusively for the issuing JA. During the experts discussions with the judges and with the General Council of the Judiciary it became clear that differing levels of exposure to EAW matters led to differing experiences of how long such a drafting exercise would take. Time estimates ranged from a matter of hours in the case of a JA conversant with the subject matter, to one report of several days in respect of a JAs first encounter with the forms.

The expert team were of the view that in respect of those JAs who felt that they would benefit from assistance in respect of their early drafting experiences, their likely first "port of call" would be to telephone the General Council of the Judiciary rather than consult the range of guides available in paper and electronic format. Those that acted in this manner (there was no prescription in this regard) therefore received standardised advice on matters of interpretive assistance and logistical support, such as appropriate time-limits and language regimes.

Given the latitude afforded to Spain's geographically dispersed issuing JA's it was also the case that many sought guidance on the proper completion of the EAW from additional sources including:

- The Judicial International Cooperation Network
- Judicial Contact Points
- The Prontuario or other EAW guides in circulation.

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<sup>1</sup> Including Article 95 alerts and Interpol notices.

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Statutory guidance as to the content of the form is set out in a single Article of Spain's implementing legislation<sup>1</sup>. The expert team noted that the form set out in the Annex to the FD was identical to that appended to Spain's implementing legislation, notwithstanding the fact that certain of the FD list offence categories have no equivalent in Spanish criminal law<sup>2</sup> or carry sentences of less than 3 years<sup>3</sup>. The expert team confirmed that no EAWs had been (or could be) issued by the JA in respect of offences in these latter categories.

International arrest warrants (i.e. those SIS Alerts which predated the implementation of the EAW) may be reissued as EAWs by the completion of the standard EAW form. To assist this process the SIRENE bureau took the proactive approach of faxing a circular to all issuing JAs, together with their corresponding SIS Alerts, informing them of this possibility. In consequence as at 8 May 2006: 1,298 of the 1,425 pre-existing SIS Alerts have been reissued as EAWs. The conversion work continues in respect of the 127 Alerts outstanding.

### 3.4. THE APPLICATION PARTIES/PROCESS

Spain's domestic criminal code provides that, once the identity of the suspect is established, the individual must be brought before an investigating magistrate and given the opportunity to comment on the case against him. This mandatory obligation arises prior to a formal charge decision being recorded<sup>4</sup>.

In consequence therefore, in respect of prosecution requests, the raising of an EAW precedes the formal charging of a requested person/suspect. The experts were advised that Spain has experienced challenge to its EAWs on the basis that they<sup>5</sup> fall outside the scope prescribed in Article 1 paragraph 1 of the FD (namely that the "EAW is a judicial decision issued by a MS.. *for the purposes of conducting a criminal prosecution....*").

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<sup>1</sup> Article 3, Law 3/2003

<sup>2</sup> Corruption - being too generic a term.

<sup>3</sup> Illicit trafficking in endangered plant species - 2 years imprisonment.

<sup>4</sup> However he may thereafter be tried in absentia if, after being heard, he absconds and the case falls within the 2 year in absentia maximum sentencing limit.

<sup>5</sup> That is to say prosecution warrants.

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The expert team explored, in considerable detail, the timing of the charge decision and the evidential and practical reality of the sequence of events which precede it. It became clear to the team during the course of those exchanges that, subject to the mandatory production requirement set out above, the charge decision would in each case<sup>1</sup>, de facto, have been taken by the Spanish authorities prior to the issue of the EAW. Certain MSs whose criminal procedures did not follow this model (most particularly the UK and Ireland, which share a common law jurisdiction) had, on occasion, challenged the purpose of such prosecution based EAWs, and had sought to challenge the validity of such EAWs on the basis that they fell outside of the permissible purpose of the instrument i.e. that they were either fishing expeditions or evidentially premature.

As a matter of practice, each of Spain's JAs could issue an EAW, either of their own motion or on the basis of an oral application of the prosecutor either:

- Where the investigation has formally been concluded and the identity of the requested person discovered. In such instances the prosecutor will forward the criminal file to the issuing JA, who may decide to issue the EAW and retain the file, pending the location of the requested person., or
- Where the preliminary investigation is ongoing, but the identity of the suspect has been established and the decision to charge is a clear one. In such instances the file will have to be reviewed in total by the issuing JA prior to a final determination being made as to the appropriateness of an EAW. The issuing JA, having issued an EAW, will then return the criminal file to the prosecutor so that the investigation may be progressed.

The issuing JA will review the case considering, inter alia, the sufficiency of the evidence, international connections, criminal connections or membership of an organised crime ring. Further, they may direct that additional enquiries be put in place where they feel that the remit of Spain's EAW legislation has not been adequately adhered to<sup>2</sup>.

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<sup>1</sup> In respect of EAW or domestic proceedings.

<sup>2</sup> Article 3, Law 3/2003 (Corresponding to Article 8 FD).

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### 3.5. TRANSLATION OF THE EAW

- In cases of direct transmission by the JA - it will be for the JA itself to outsource the required translation exercise.
- In those cases (the majority) in which transmission is via the SIS system – the International Police Cooperation Unit (the SIRENE bureau) will receive a copy EAW from the JA and, at the same time as validating the insertion of the Alert, will send the A and M forms to the other SIRENE bureaux together with the appropriate translation (usually English unless there is an indication that the requested person is located in France when French<sup>1</sup> will be used). These translations are undertaken by the in house SIRENE translation team.
- Interpol transmissions – the International Police Cooperation Unit will again receive a copy EAW and will undertake circulations by means of Red Notices/diffusions in one of the four Interpol languages<sup>2</sup>.

The expert team were advised that if SIRENE/Interpol were to note material omissions on the EAW, such as a missing date of birth, missing facts (either of the offence or particularisation of the degree of participation etc), they may be unable to consider the matter. In such a case therefore they may return the file to the issuing JA for remedial action to be undertaken prior to progressing the case.

When a requested person is located, the issuing JA must transmit the EAW together with a translation, into the appropriate official language within a specified but variable timetable. In cases of uncertainty translation time-limits and other practical data may be clarified from a number of sources, including the CA, REJUE or the prontuario. In Madrid translation services were attached to issuing judicial bodies in respect of the most frequently encountered languages but in the provinces outsourcing via the Department of Justice was the only option available.

The Spanish authorities based outside Madrid reported that they experienced considerable difficulties in respect of provision of language compliant EAWs in respect of those MSs who had elected not to allow for the use of a vehicular language<sup>3</sup>.

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<sup>1</sup> The "unofficial translation" of the SIRENE forms.

<sup>2</sup> French, English, Spanish and Arabic.

<sup>3</sup> PL, CZ, SK and EL being the MSs cited.

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### 3.6. TRANSMISSION OF THE EAW

Spain's implementing Law sets out a range of discretionary options available to its issuing JA in this regard, although no direct provision for transmission via Eurojust or the EJN has been made. The CA had not been designated to act as a transmission conduit<sup>1</sup> for EAWs, but it does operate so as to provide practical assistance to its JAs, both at its own initiative and upon request.

Save for cases of direct transmission<sup>2</sup> EAWs will, as a matter of course, be circulated as follows:

- In respect of those MSs who participate in the SIS - the JA merely faxes a copy EAW to the International Police Cooperation Unit (of which SIRENE is now a composite part) with a direction that an Article 95 Alert should be issued<sup>3</sup>. The original EAW remains in the court file unless and until the requested person is arrested, at which time the EAW is translated in accordance with the prevailing language regime and transmitted to the executing MS. In keeping with the SIRENE manual<sup>4</sup>, SIS will include only 1 Alert per MS for the same individual and so subsequent Alerts are stored within the SIRENE workflow to be transmitted in the case of a hit being registered by another MS.
- In respect of the 12 MSs not yet connected to SIS - the JA will undertake the same exercise but with the additional request that an Interpol Red Notice/diffusion be issued<sup>5</sup>. The degree of diffusion will be determined by indicators (or the lack thereof) in respect of the locality of the requested person. The Notice/diffusion serving both as an EAW and an international request for provisional arrest with a view to extradition<sup>6</sup>.

In such instances the issuing JA will retain the original EAW pending the arrest of the requested person, the International Police Cooperation Unit will therefore undertake its activities on the basis of copy EAWs.

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<sup>1</sup> A discretionary competence established by Article 7 paragraph 2 of the FD.

<sup>2</sup> In respect of which no statistics were available.

<sup>3</sup> Article 6(2), Law 3/2003.

<sup>4</sup> Article 107 of the SIRENE Convention.

<sup>5</sup> Article 6(5), Law 3/2003.

<sup>6</sup> In total 186 States are currently members of Interpol.



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- Direct transmission – Is permissible in cases where the requested persons location is already established<sup>1</sup>, allowing the issuing JA to transmit the warrant directly to the executing JA or CA as the case may be. The JA is at liberty to issue a SIS Alert or Notice/diffusion in addition to undertaking direct transmission.

Practically speaking, in respect of selection of the mode of transmission, effective reliance was placed upon the judgement and experience of the JA and the merits of the particular case in hand.

As noted, Spain's implementing legislation contains an express statutory provision<sup>2</sup> mandating that each JA transmit copies of all EAWs issued to the CA. This requirement has not been undertaken in respect of the 250 EAWs issued during the calendar year to June 2006. The experts noted that the CA and the Council of the Judiciary had gone to great lengths to seek to impress upon its JA the importance of compliance with this obligation. Examples of these efforts included:

- Making representations at the annual meeting of the Spanish Judicial Network on MLA,
- Reiterating the obligation within the Prontuario,
- The issuing of a detailed letter from the Council of the Judiciary to all judges which, inter alia, reminded them of this issuing requirement.<sup>3</sup>

### 3.7. ISSUES RAISED BY OR IN RELATION TO EXECUTING MEMBER STATES AND THE COMMUNICATION CHANNELS RELIED UPON

Spain's practice was to reciprocate whatever channels of communication were initiated by the executing MS. Faxed communications were generally deemed to be adequate in standard cases with personal interventions becoming necessary only in the more problematic cases.

The Spanish authorities reported that they had encountered considerable difficulties in respect of a number of EAWs files, the issues from which could be exemplified by the following three examples from which it was felt that lessons could be learned:

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<sup>1</sup> Article 6(1), Law 3/2003

<sup>2</sup> Article 7, Law 3/2003.

<sup>3</sup> On 4 May 2006.

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- UK

The UK authorities have required that the Spanish authorities provide them with the following heads of information:

- Investigation chronology so that the reason for passage of time could be assessed,
- Confirmation (undertakings) that the EAW was for the purposes of a criminal prosecution.

- Ireland

In one problematic request to Ireland the Spanish authorities were required by the Irish CA and JA to prepare 5 EAWs in respect of the same individual, requests for further information encompassed:

- confirmation that the street number preceded rather than followed a street address,
- confirmation (undertakings) that the requested person was to be charged with the stated offence,
- confirmation as to why a single word was typed in lower case in the address section of the EAW whereas the translated version was all in lower case,
- copies of requests made by defence counsel enquiring into the facts and evidence of the stated offence (requiring that responses be provided),
- confirmation concerning the objective competence of the issuing JA, and
- confirmation as to the appropriateness of Spanish homicide investigative procedures.

- The Netherlands

Again in a single problematic case the following requests for information were issued:

- Questions as to the facts,
- Questions aimed at establishing double criminality of a list offence,
- Questions as to the Spanish code of criminal procedure,
- Questions as to the passage of time,
- Confirmation that medical facilities were comparable with the NL,
- The issue of an undertaking stating as follows "It expressly agrees that the procedures provided for the law of the executing MS will apply".

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The evaluation team established that it was Spain's practice to comply, if at all possible, with any such requests, rather than to seek to challenge the validity of its basis<sup>1</sup>, although Spain considered most such requests to be illegal, not compatible with the FD and entirely contrary the principle of mutual recognition.

The expert team also noted that the Spanish authorities had experience of refusals to surrender requested persons based upon domestically sanctioned grounds, not provided for by the FD. The view was expressed that the wide degree of variance of refusal grounds made for a very uneven playing field and one which could benefit internationally mobile criminals.

### 3.8. LEGAL REGIME GOVERNING THE RETURN OF OWN NATIONALS FOR THE ENFORCEMENT OF A SENTENCE

The expert team were advised that Spain has requested the surrender of foreign MS nationals on 9 occasions, in only one instance did the surrender prove to be problematic, although the issues were within the executing State rather than within Spain's own processes:

- In 8 such instances Spain was able to provide the Article 5, paragraph 3 guarantees requested without undue issue,
- The 9th case was that of Mamoun Darkanzanli who held dual German and Syrian nationality. This exceptional case ultimately led to the voiding ab initio of Germany's executing transposing legislation by its Constitutional Court<sup>2, 3</sup>.

Spain's authorities regard the FD itself, taken with the Article 5.3 guarantee, as sufficient legal basis for the surrender and return of own nationals. Their authorities do not rely upon the 1983 European Convention on the Transfer of Sentenced Persons.

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<sup>1</sup> Spain's CA was unable to cite any instance where any such requests were not able to be complied with to the satisfaction of the executing MS.

<sup>2</sup> Although an Article 5.3 guarantee was in fact also provided in that case.

<sup>3</sup> The expert team note that the German Parliament has adopted a new act implementing the FD (effective 2 August 2006).

## RESTREINT UE

### 3.9. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

The age of criminal majority in Spain is 18, however in serious cases derogations may be made between the ages of 14 and 18. In such cases the minor would be tried pursuant to The Criminal Juveniles Act No. 5/2000 (as amended) i.e. outside of the normal domestic criminal process.

At this time Spain has not issued any EAWs in respect of individuals below the age of 18 and so has no practical experience in this regard.

### 3.10. EVOLVING BEST PRACTICES

The Spanish authorities recognised that many of the requests for further information/clarification which they had received fell squarely outside of the letter and spirit of the FD. The view expressed to the expert team was that each file was viewed by the Spanish as having concrete consequences and therefore they felt that it was incumbent upon them to take a pragmatic approach as was possible to affect the surrender of requested persons for trial/sentencing.

### 3.11. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

Concerning EAWs which have been transmitted directly by Spain's JAs, normally requests for information are received directly from the executing MSs JA or CA or, in cases where one is in place, a liaison magistrate might be deployed as an intermediary. The Spanish authorities reported that this latter course was perceived as adding great value to the smooth running of the surrender process as a whole.

In other cases notification of arrests is, in general, received by the International Police Cooperation Unit, via its Interpol or SIRENE desks. The police authorities will then route the information to the issuing JA by fax, indicating the need to send a translated version within a designated timeframe. The JA will take over responsibility for the progression of the file from that point.

The experts were advised that requests for information were normally received in the language of the executing MS and that the JA was, via the translation services which it had reserved, responsible for subsequent translation into Spanish and, following resolution, back into the original executing MS language.

# RESTREINT UE

As a general aside, Spanish prosecutors were of the view that systematic updating information on the progress of the file<sup>1</sup> from the executing MS, currently absent, would enable them to more easily manage trials, especially in the case of trials involving multiple defendants.

## 3.12. THE MECHANICS OF THE SURRENDER/TEMPORARY SURENDER

Given that 151 requested persons have been surrendered to Spain pursuant to EAW requests up until June 2006<sup>2</sup>, the units involved had had the opportunity to develop efficient and practical processes and establish lines of communication with their justice counterparts abroad, together with airport and airline staff.

Logistical requirements pertaining to surrenders (and temporary surrenders) are undertaken by the International Police Cooperation Unit.

The expert team were advised however that Spanish JAs were frequently required to ask for clarification of the period of time spent in detention, rather than that detail being provided at the time of surrender, as mandated by the FD<sup>3</sup>.

The experts noted that persons surrendered to Spain would, regardless of the issuing JA, be flown directly to Madrid. There was no legal requirement for this to be the case, rather it seemed that procedures had grown around the former practice with surrendered persons being produced before the duty magistrate at the Plaza de Castilla Courts in Madrid where an initial remand of up to 72 hours may be granted so that logistical arrangements may be put in place to have the surrendered person transferred to the issuing JA.

The Spanish CA was not aware of any instances in which the executing JA was unable to effect the required surrender within the prescribed 10 day time limit.

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<sup>1</sup> Following arrest.

<sup>2</sup> 2004 = 43, 2005 = 56, June 2006 = 52.

<sup>3</sup> FD Article 26 paragraph 2.

## **RESTREINT UE**

### **3.13. THE MECHANICS OF THE SURRENDER IN RESPECT OF REQUESTED PROPERTY/TIMELIMITS/GUARANTEES**

The delivery of evidential items would as a matter of course accompany the surrender of the requested person. Spain did not report any issues of note in this regard.

### **3.14. CONFLICT OF EAWS/EXTRADITION REQUESTS/ONWARD SURRENDER**

Spain has yet to encounter the action taken by executing MSs in cases of conflicting requests related to the same person.

### **3.15. EXPENSES**

Spain reported no conflicts arising from the payment of expenses in EAW surrenders.

## **4. ORGANISATION AND PRACTICES - EXECUTING MEMBER STATE ROLE**

During the course of the evaluation process the expert team were provided with statistics for the calendar year to 12 June 2006 by the CA which may be summarised as follows: A total of 341 EAWs had been received in respect of 311 requested persons. From this total Spain has undertaken 243 arrests, with 162 persons having been surrendered and 3 surrenders having been refused.

### **4.1. RECEIPT PROCEDURES**

Spain's executing JA is the National Court based in Madrid. Any EAW mistakenly forwarded to the CA or to any of the Audiencia Provincial will be passed forthwith to the National Court so that the execution process may be initiated by the central investigating Magistrates. This centralised practice has been adopted to foster a concentration of legal and practical experience.

Spain's domestic practices regarding receipt procedures closely follow the provisions set out in Article 10 paragraph 4 of the FD, in that any secure mode of transmission capable of producing a written record, in conditions in which its authenticity may be established, will be acceptable.

In respect of the initial notification procedures, the International Police Cooperation Unit will have verified the forms before making an entry into the national system. If an arrest were to be undertaken, the police inform the International Police Cooperation Unit whose SIRENE/Interpol units would transmit the notification of the arrest to the issuing MS. Spain's JA would also be advised at that time.

# RESTREINT UE

A and M forms will be concurrently transmitted to the arresting Spanish police force by fax so that they can urgently prepare reports for their JAs consideration at the first hearing of the matter.

Spain's executing JA is under a statutory obligation<sup>1</sup> to notify the CA, as promptly as possible, of all EAWs received for execution.

## 4.2. THE FORM OF THE WARRANT AND REVIEW PROCEDURES

The majority of Spain's EAW receipts are via the SIS. The police operatives do not form part of Spain's JA, however it is they who perform the initial scrutiny of the Alert and they who on occasions arrange for temporary validity flags in respect of what they consider to be clear grounds, examples of which were given as follows:

- Where requisite forms have not been received,
- Where the A form contains material omissions preventing verification, such as failing to detail the time/place of commission of the offence or the degree of participation,
- Where the EAW is for a minor (aged 18 or less).

The expert team were advised that such flags will remain in force until such time as the issuing bureau has provided the necessary data to correct the omission and, as a matter of practice, such communications would normally be conducted in English. The view of the International Police Cooperation Unit was that the categories of data set out above must be based at the issuing office or the Alert could not have been validated in the first instance.

Substantive flagging would not be undertaken in respect of own nationals but, in such a case, and in other cases of doubt, the JA would be telephoned<sup>2</sup> to seek direction as to whether a flag were required whilst further information was provided. The team were advised that the matter would be temporarily flagged whilst the matter were clarified.

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<sup>1</sup> Article 10(3), Law 3/2003.

<sup>2</sup> GSM numbers of all of Spain's JAs are retained and accessible at the International Police Cooperation Unit.

## RESTREINT UE

The expert team noted that the 6 Investigating Magistrates of the CPIMC and the 18 judges sitting in the Criminal Division of the National High Court work together to formulate standard practices and to develop consistency of decision taking at all levels of surrender. They confirmed to the team that they responded regularly to police requests for clarification in this regard.

When matters of special relevance occur, Spain's executing JA meets together in a plenary session (resulting in “non judicial rulings”) to determine what they consider to be the most legally appropriate course. Pursuant to one such plenary it was determined that validity flags should be issued in respect of German requests for the return of Spanish nationals. This decision followed the ruling of the German Constitutional Court on the 18 July 2005 by which Germany's transposing legislation was voided ab initio.

In respect of Interpol receipts from the 12 EU MSs not currently in the SIS, Red Notices/diffusions are transmitted directly to the International Police Cooperation Unit (specifically the judicial cooperation unit of the Interpol Office<sup>1</sup>). Such receipts will be by e mail or by fax. Once again the desk operatives will perform a cursory review of matters, including:

- The attachment of any fingerprints referred to,
- The completion of mandatory fields.

The SIRENE and Interpol desks liaise in respect of all EAW based entries to avoid duplication of work in terms of the electronic database reviews, which are actioned as soon as a domestic file is registered.

### 4.3. REQUESTS AND RESPONSES TO REQUESTS, FOR FURTHER INFORMATION/CLARIFICATION

Notification of the arrest of requested persons will as a matter of course be transmitted via Interpol or SIRENE. Thereafter communications on the file, including the outcome of the surrender decision, will generally be notified via the executing JA (but the use of the International Police Cooperation Unit will be retained as appropriate).

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<sup>1</sup> International Police Cooperation Unit.



# RESTREINT UE

The experts noted that in respect of the majority of the cases before them the JA were united and clear in the purpose and scope of the Article 2 FD list and affirmed that there would be no evidential enquiry into the facts whatsoever. The JA however exhibited signs of division when the debate turned to the treatment of (currently theoretical) cases of EAWs which may allege murder in instances of, say, abortion. In such cases certain judges indicated that such an enquiry might be conducted in accordance with the rule of double criminality.

The nature of the debate was such that the judges indicated that, should such an example in fact arise, a non judicial plenary would likely be convened so that agreement could be reached and a reasoned and unified approach presented to issuing MSs.

In addition to faxed communications, Spain made good use of its various liaison Magistrates and presented a very favourable assessment of their added value in the areas of facilitating understanding of factual communications and issue resolution.

Recourse to communications via Eurojust or the EJM would not normally be undertaken.

The expert team noted that the General Council of the Judiciary also reported that they received approaches from issuing MSs in respect of requests to clarify procedural issues/guarantees arising in respect of Spain's role as an executing MS. Where such information was generic in nature assistance could be provided but referral to the JA was frequently the more appropriate course.

## 4.4. INVESTIGATIONS CONCERNING THE LOCATION OF THE REQUESTED PERSON

The International Police Cooperation Unit was the lead agency tasked with this function. Data notified on each A form received (whether targeted or diffused) was processed against information in Spain's Perpol<sup>1</sup>, Adexttra<sup>2</sup>, penitentiary and other databases, to seek to locate the whereabouts of the requested person. Where such searches yielded hits, a geographically convenient police unit would be dispatched to conduct the arrest pursuant to the EAW/Alert.

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<sup>1</sup> Perpol - Spain's national wanted person database.

<sup>2</sup> Adexttra - Spain's database on foreign nationals who have applied for Spanish documentation (e.g. visa's) and detail of those individuals who have been turned back at the borders.

# RESTREINT UE

In respect of EAWs transmitted via Interpol the warrant detail would be opened as a file in Interpol and tracking and cross checking carried out across the same databases<sup>1</sup>. Should a hit transpire the same course of action would be undertaken as above.

In cases where non targeted EAWs/Alerts are received and no database hits are triggered, the detail would remain live in the various systems to facilitate the potential apprehension of the requested person at a border crossing or during an ordinary ad hoc control.

## 4.5. CIRCULATION PROCEDURES

The International Police Cooperation has access to national data bases and contains one specialist unit for the location of fugitives; this unit co-works with local police units as required.

Interpol EAW files are circulated domestically by means of an automatic entry in the national alerts database (the BDSN), where it can be consulted by the police, the civil guard or the various autonomous police forces, each of whom is empowered to undertake an arrest should the requested person come to light.

## 4.6. ARREST PROCEDURES/FIRST HEARING

Save as in those cases where specialist tactical requirements present themselves, arrests of requested persons may be made by any police officer and on the basis of an EAW, SIS Alert, Interpol Red Notice or diffusion. At a pre-arrest stage the police are at liberty to approach a prosecutor for advice on the file, this advice will be operationally driven and, although prosecutors are not JAs, this course is adopted on the basis that pre-arrest police activity falls outside of the EAW procedures prescribed in Spain's implementing legislation.

Once an arrest has been undertaken, the detained person is afforded all of the guarantees available to a domestic suspect in accordance with the rules of Spain's Criminal Procedure Act<sup>2</sup>.

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<sup>1</sup> EAWs received by direct transmission would also be directed to this route by the JA.

<sup>2</sup> Article 13(1), Law 3/2003.

## RESTREINT UE

Within 72 hours of arrest the person must be placed under judicial supervision, that is to say physically be brought before a Magistrate at the Central Investigating Magistrates' Court in Madrid<sup>12</sup> to be advised (once more) of the existence and content of the EAW and of his right to give irrevocable consent<sup>3</sup> to surrender and specialty.

The expert team noted that, due to the geographical size of Spain it was theoretically possible that, police authorities arresting requested persons in specific locations<sup>4</sup> might not be in a position to comply with this specific temporal requirement. They noted however that every effort was undertaken to avoid breaching this fundamental principle of Spain's domestic procedure. The issuing JAs interviewed confirmed that the residual power to task them to stand in stead of the executing JAs (where such a course was unavoidable) had been deployed at the outset of the implementation of the EAW. However it was now largely redundant due to improved logistical efficiencies.

During the intervening period of (up to) 72 hours the arresting officers will liaise with the International Police Cooperation Unit to create a dossier for presentation to the court at the first hearing; that dossier will comprise:

- A police report of the arrest, including positive assertions as to identity<sup>5</sup>,
- The SIS/Interpol Notice/diffusion which triggered the arrest,
- A declaration that the requested person was provided with his rights on arrest<sup>6</sup>,
- A declaration that the requested person was provided with detail of the existence and content of the EAW,
- A declaration that the requested person was provided with an opportunity to provide a statement in respect of the EAW.

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<sup>1</sup> Article 13(2), Law 3/2003.

<sup>2</sup> The judiciary however retain a rarely used discretionary power to issue a request to a regional judge to undertake the first hearing, thus legitimising the detention, if the distances involved are so great as to defeat the 72 hour limit.

<sup>3</sup> However the JA confirmed to the expert team that in one instance where consent was found not to be real the requested person was permitted to withdraw consent.

<sup>4</sup> Most specifically the Balearic or Canary islands.

<sup>5</sup> The team were advised that in circumstances of doubt an officer from the issuing MS would be required to attend Spain to verify identity.

<sup>6</sup> Article 520 of Criminal Procedure Act.

## RESTREINT UE

Spain's implementing legislation requires<sup>1</sup> that at the first hearing before the CPIC the requested person is advised by the JA of the existence and content of the EAW, in addition to the possibility of providing irrevocable consent to the surrender (the investigating Magistrate will hear from counsel for the requested person<sup>2</sup> and a public prosecutor with the assistance of interpretation if deemed necessary by the court). The expert team noted that as a matter of practice, that is to say without good reason to the contrary, this first hearing would be joined with the substantive surrender hearing<sup>3</sup>. In real terms therefore the hearing could proceed in one of two ways:

- In consent cases - The court will hear from the defence and from the prosecutor to confirm that there are no grounds on which the surrender should properly be refused. Thereafter the fact of the consent is examined by the judge (to ensure that the consequences are understood) prior to the consent being recorded and signed by the requested person, the clerk of the court, the public prosecutor and the judge. If appropriate, renunciation of the rule of specialty is set out in the same document.

Within 10 days of consent having been given in this form, the judge will proceed to issue a writ of surrender which itself is to be effected within 10 days. No appeal lies from such a writ<sup>4</sup>. The expert team were advised that in the circumstances of consent the average time between the signing of consent form and the physical surrender itself was in the region of 14 days. In reality therefore, the expert team noted that many such surrenders are executed prior to receipt of the original/translated EAW<sup>5</sup>.

- In non consent cases - The JA will hear representations as to the grounds for refusal or for conditions to be attached (again these representations may be raised by the defence or by the public prosecutor).

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<sup>1</sup> Article 13, Law 3/2003.

<sup>2</sup> The requested person is entitled to legal representation by counsel of his choice.

<sup>3</sup> Article 14, Law 3/2003.

<sup>4</sup> Save for appeals to Spain's Constitutional Court.

<sup>5</sup> On occasion surrender was effected in less than 24 hours.

## RESTREINT UE

If matters before the court require evidence not yet available, the JA is empowered to adjourn the hearing of the case until such a date as it may specify<sup>1</sup>. In their discussions with the JA and with the defence, the expert team were advised that such applications for further time were in reality highly infrequent.

Once the investigating magistrate has sufficient information to consider the issue of surrender (including the original and translated EAW) he will forward the criminal file to the CDNHC<sup>2</sup>, summarising his findings and setting out a reasoned recommendation as to the proper course.

- In either circumstance, in those instances in which the EAW does not contain the mandatory information required by Spanish law<sup>3</sup>, the JA retains a statutory obligation to adjourn the case (of its own motion or on an application of the parties) and set a timetable for receipt of such information as may be required from the issuing JA to properly consider the case.

The issue of bail/preventative detention is also re-examined at the first hearing. However, whereas it is true that there is constitutional precedent confirming that remands in custody should be the exception rather than the rule (with other non custodial means being deployed in the alternative as appropriate<sup>4</sup>), the expert team noted that, as a matter of practice, such detention seemed to be deemed necessary in all EAW cases. The team noted that the Spanish implementing legislation contained express provision that, in addition to normal bail considerations, the judges must also be mindful of "the goal of ensuring execution of the European (Arrest) Warrant"<sup>5</sup>.

Once determined within the EAW process the bail decision is subject to appeal to the Criminal Division of the National Court<sup>6</sup>.

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<sup>1</sup> The court is under a statutory duty to respect the surrender timetable prescribed in Article 14(2) of Law 3/2003.

<sup>2</sup> Located within the same court building.

<sup>3</sup> Article 3, Law 3/2003.

<sup>4</sup> Such as regular reporting to the judicial authorities, the provision of surety and the like.

<sup>5</sup> Article 17(2), Law 3/2003, referring to Article 12 of the FD.

<sup>6</sup> Article 17(4), Law 3/2003.

## RESTREINT UE

### 4.7. THE SURRENDER DECISION

4.7.1. In cases in which irrevocable consent is given at the first hearing, the writ of surrender will be issued by a single Magistrate of the CPIC, see the procedure at 4.6.

4.7.2. In cases in which irrevocable consent is not given at the first hearing, the criminal file containing the findings of the investigating magistrate<sup>1</sup>, which summarises the proceedings before him and his determination of the issues, will be passed to a 3 judge tribunal sitting at the Criminal Division of the National High Court. It is this tribunal who will, within a period of 60 days (from arrest) reach a final surrender decision<sup>2</sup> on the face of the papers. The court retains a discretion to call for clarification of such issues as may be deemed appropriate.

The expert team were advised that, although there is no statutory right to do so, a practice has evolved whereby defence advocates may submit substantive written representations to the JA prior to the determination of the issue. Where such representations are made they are considered by the court in the interests of justice. Should surrender be ordered the court will issue a writ of surrender (the writ may not be the subject of appeal<sup>3</sup>)<sup>4</sup>.

4.7.3. In either instance the Spanish JA's are obliged to seek guarantees<sup>5</sup> (and to make any surrender conditional on receipt of such guarantees) where:

- The offence on which the EAW was based is punishable by a custodial life sentence/lifetime detention order. In which case surrender will be dependent on the receipt of an undertaking that the requested person will have access to clemency measures.
- Where the requested person is a Spanish national, in which case surrender will be dependent on the receipt of an undertaking in accordance with Article 5.3 of the FD.

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<sup>1</sup> Which must contain the translated EAW, even if that was not available at the oral hearing.

<sup>2</sup> Article 19(3), Law 3/2003.

<sup>3</sup> Save for appeals to Spain's Constitutional Court.

<sup>4</sup> During which time the requested person will as a general rule be the subject of preventive detention.

<sup>5</sup> Article 11(1)(2), Law 3/2003.

## RESTREINT UE

The defence bar confirmed that steps to satisfy these Article 11<sup>1</sup> guarantees were undertaken by the court of its own motion.

They also noted that where a final decision in respect of surrender could not be made in accordance with these time limits, it will be for the JA itself to communicate both the fact and the reasons for the breach to Eurojust.

### 4.8. REFUSALS TO SURRENDER

Surrender may be refused on application of defence or of the prosecutor or on the motion of the JA itself.

The experts were advised that the refusal to surrender the requested person had occurred in 12 instances. The grounds cited for those refusals may be summarised as follows:

Country	Grounds	Number
Germany	The requested person being a Spanish national (reciprocity reintroduced after the German Constitutional Court judgment)	2
Lithuania and Germany	No double criminality (offences not listed in Article 2 of the Framework Decision)	2
France, Italy and Portugal	Sentence time-barred	4
France	Double jeopardy	1
France	Failure to provide guarantees sought	1
Lithuania and Portugal	Non-compliance with the minimum sentence requirements	2

During the course of the evaluation visit Spain's Constitutional Court delivered a judgement confirming that a fresh EAW, issued in respect of a pre-existing extradition request (which had been rejected on the basis of reciprocity) did not offend the rule against double jeopardy.

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<sup>1</sup> Law 3/2003.

## RESTREINT UE

The team were advised by the Spanish authorities that the legal basis for the reintroduction of the rule of reciprocity arose from paragraph 3 of the transitional provisions appended to Spain's implementing legislation<sup>1</sup>.

The expert team note that the German Parliament adopted a new act implementing the FD, effective 2 August 2006, and were subsequently advised by the Spanish authorities that a German EAW was received one day after that Act came into force. That request was processed in accordance with standard EAW practices without the need for a further plenary to be convened.

### 4.9. APPEALS PROCEDURES AND THE IMPACT ON TIME-LIMITS

No right of appeal lies from a writ of surrender. There remains the possibility however that an appeal will lie to Spain's Constitutional Court on the grounds of the infringement of the fundamental rights of the requested person<sup>2</sup>.

In such cases it would be possible for the Constitutional Court to order a stay of surrender, pending the hearing of the case in accordance with Article 54 of the Framework Law on the Constitutional Court (on the basis that the surrender itself would defeat the purposes of the appeal).

The expert team noted that a concrete example was provided by the Audiencia Nacional of one case in which the issue of (irrevocable) consent was re-examined by the court and found to have been provided on an unsafe basis. In that case the allegation that inadequate translation had resulted in the procurement of the consent to surrender could not be rebutted.

The team also noted that there appeared to be a divergence of views as between the police authorities and the executing JA as to the existence of the attempts made by requested persons for a writ of Habeus Corpus.

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<sup>1</sup> "The provisions of this Act shall apply only to MSs that have notified the General Secretariat of the Council and the Commission of the EU of the text and entry into force of the provisions transposing into their national law the obligations imposed on them under (the FD)... Until that time, current provisions on extradition shall continue to apply to the other MSs until the date when those MSs apply their provisions transposing the FD."

<sup>2</sup> A right reinforced in Spain's Constitutional Court ruling 339/2005.



## RESTREINT UE

The police authorities reporting that requested person frequently make (universally unsuccessful) telephone applications for leave to the JA from the airport, whereas the members of the JA itself (being the arbiters of any such applications) reported that such applications were infrequent and, given that the requested persons would be at all times under judicial supervision (of the JA), such applications would be misconceived.

The CA conceded that no statistical data existed in this regard. It was clear that no surrenders have been prevented on this basis.

Spain's implementing legislation<sup>1</sup> stipulates that surrender must be effected (save for the intervention of humanitarian factors) within 10 days of the final surrender decision. Failure to comply with this provision (without prior judicial approval) would result in the release of the requested person<sup>2</sup>, although the team noted that any such release would not prevent a bar to the execution of a subsequent EAW based surrender.

### 4.10. OWN NATIONAL AND YOUTH ARREST AND SURRENDER ISSUES

Spain takes the FD itself as its legal basis for the surrender of Spanish nationals and considers that placing reliance on the 1983 Convention on the Transfer of Sentenced Persons is contrary to the FD<sup>3</sup>.

Spain has some difficulties in accepting that other MSs rely on the 1983 European Convention, which in turn draws the executive into the decision making and logistical processes. The expert team noted that the Spanish authorities consider the involvement of a governmental procedure to be at odds with the judicialisation of the surrender process, the letter and the spirit of the FD and an impediment to compliance with the time-limits set down by the FD.

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<sup>1</sup> Articles 20(1), Law 3/2003.

<sup>2</sup> Article 20(4), Law 3/2003.

<sup>3</sup> In that it re-introduces a governmental procedure to what is otherwise an exercise in judicial cooperation, based on mutual recognition.

## RESTREINT UE

Although there had been no cases in which the surrender of a minor had been sought by an issuing MS, the experts observed that there was a degree of uncertainty as to the precise procedures to be adopted in respect of persons aged between 14 and 18 years old<sup>1</sup> (18 being the stated age of criminal responsibility). The untested view was that in respect of EAW offences alleged against minors between those ages, Spain would refuse surrender but would instead invite the submission of an evidential package from the issuing MS, sufficient to proceed with the prosecution on Spanish territory.

### 4.11. SPECIALTY

Spain's implementing legislation provides<sup>2</sup> that, absent notification made to the General Secretariat pursuant to Article 27 paragraph 1 of the FD, the rule of specialty will apply. Exceptions to this rule include cases where:

- The conditions set out in Article 27 paragraph 3 of the FD are met<sup>3</sup>, or
- Such permission is requested by the issuing MS and granted by Spain's executing JA.

The executing JA must determine any such request no later than 30 days from receipt, and consent must be given if the requested offence were one to which Spain's EAW law applies, save for those instances in which Spain's own statutory guarantees come into play<sup>4</sup>.

As stated, waiver of specialty may of course be made by the requested person himself.

### 4.12. ONWARD SURRENDER/EXTRADITION

Should Spain receive a request for onward surrender it would expect that that request should originate from the issuing MS in the EAW proceedings. However, in the one case experienced to date, Spain was in fact approached by the MS desiring the onward surrender. The issue proved not to be problematic in that Spain referred the matter to the issuing MS for initial consideration.

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<sup>1</sup> The Criminal Juveniles Act No. 5/2000 (as amended).

<sup>2</sup> Article 24(3), Law 3/2003.

<sup>3</sup> As reiterated by Article 24 (4), Law 3/2003.

<sup>4</sup> Article 11(1)(2), Law 3/2003.

## RESTREINT UE

A request for onward extradition to a non EU State would be determined in accordance with such relevant bilateral or multilateral Conventions as were appropriate<sup>1</sup>.

### 4.13. AD HOC ISSUES SURROUNDING UNDERTAKINGS

As a matter of course Spain will receive undertakings via the same receipt channels as were used in the transmission of the EAW and, whereas they have no cause for concern, it was noted that verification that undertakings had been complied with would only be undertaken in those countries where Spain had a liaison magistrate.

### 4.14. ARTICLE 32 EXPERIENCES

The expert team noted that Spain had received several extradition requests from the Czech Republic which, at that time, had provided that it would extend the temporal limits of Article 32 to its activities as an issuing State. In those cases, although arrests were made on the basis of the extradition request, the Czech Republic's inability to provide supporting EAWs within the timeframe permitted by Spain's implementing Law meant that the Spanish authorities had no option but to release requested persons.

The expert team noted however that the issues concerning the transitional provisions of Article 32 FD, as between Spain and Czech authorities, may now be historical by virtue of the enactment by the Czech Republic of a statutory amendment to their implementing legislation effective 1 July 2006, by which the Czech Republic confirmed that:

- it will accept and act on EAWs received on and after that date, irrespective of the date of the alleged offence (save for cases involving CZ nationals, in respect of whom the acts alleged were committed before 1 November 2004) and,
- from that date it will make requests for surrenders in the form of an EAW, irrespective of the date of the alleged offence.

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<sup>1</sup> Article 28(2), Law 3/2003.

## RESTREINT UE

### 4.15. TEMPORARY/CONDITIONAL SURRENDER

The experts noted that Spain has a body of practical experience<sup>1</sup> of temporary surrenders made pursuant to their EAW legislation<sup>2</sup>. In such cases the JA has surrendered the requested person subject to temporal and other pertinent conditions as agreed between the two interested JAs. The expert team were advised that no practical difficulties have been experienced in this regard.

### 4.16. THE MECHANICS OF SURRENDER (INCLUDING TEMPORARY AND CONDITIONAL SURRENDER) OF REQUESTED PERSONS

Although the release of a requested person is mandated by Spain's implementing legislation in cases where the 10 day surrender deadline is breached there is provision<sup>3</sup> for the JA to extend that limit from 10 to 20 days in circumstances beyond the control of issuing or executing MSs, or further still if humanitarian grounds present themselves.

The expert team noted that the Spanish authorities were unable to provide definitive statistics concerning the number of instances in which Spain's 10 day limit for the surrender was breached. However the police authorities advised that for reasons relating to logistics the 10 day limit is regularly exceeded, but that extensions of time had been provided for on the basis of justified applications.

### 4.17. THE MECHANICS OF THE SURRENDER OF REQUESTED PROPERTY/TIMELIMITS/GUARANTEES

As with the surrender of requested persons, these issues are managed by the Interpol section of the International Police Cooperation Unit. No problematic issues were reported to the expert team.

### 4.18. CONFLICT OF EAWS/EXTRADITION REQUESTS

In cases of conflict between multiple EAWS (no such conflicts had arisen at the time of the evaluation visit) Spain's executing JA would be competent<sup>4</sup> to determine the issue of precedence. This decision would be based on a combination of factors such as the relative seriousness of the offences, whether the matters are conviction or prosecution based and the dates of the requests<sup>5</sup>.

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<sup>1</sup> 16 cases, all of which were between France and Spain.

<sup>2</sup> Article 16, Law 3/2003.

<sup>3</sup> Article 16(2), Law 3/2003.

<sup>4</sup> Article 23(1), Law 3/2003.

<sup>5</sup> Eurojust may also be consulted if deemed appropriate.

# RESTREINT UE

In respect of conflicts between EAW and extradition requests, the JA would adjourn proceedings and refer the matter to the CA. Thereafter the CA would consider the facts and submit a proposal as to precedence to Spain's Council of Ministers for a decision to be reached<sup>1</sup>. This decision would be notified to the Spanish JA who would enforce the direction. Spain has experienced such procedures:

- In a case in which overlapping requests had been received in respect of a Dutch national from the USA (prosecution case) and the NL (conviction case) in which the extradition request was prioritised<sup>2</sup>.
- In a case in which overlapping requests had been received from Belgium and Serbia Montenegro, in which a Serbian national was requested by Belgium for murder. Surrender was ordered and then postponed on receipt of an extradition request from Serbia Montenegro by the Council of Ministers. The latter case was also approved, but priority was afforded to the EAW because of potential issues which may have arisen in seeking the surrender of an own national from Serbia Montenegro. The Spanish authorities noted with some concern that the Belgian authorities refused to undertake that the subsequent surrender to Serbia Montenegro form part of the terms of the initial surrender.
- In a case in which overlapping requests had been received from France and Italy, in which, on the facts of the case, precedence was afforded to France.

## 4.19. EXPENSES

Article 4 of Spain's implementing legislation mirrors the provisions set out in Article 30 of the FD. The Spanish authorities were content that matters relating to expenses were being properly discharged by its EAW partners.

## 5. TRAINING PROVISION

A range of training options relevant to EAW practitioners were outlined to the evaluation team by the Spanish authorities:

- The Centre for Legal Studies in conjunction with Spanish police hosted the first International Seminar on the EAW in Madrid in April 2004,

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<sup>1</sup> Article 23(2), Law 3/2003.

<sup>2</sup> The EAW was subsequently withdrawn by the NL.

## RESTREINT UE

- The General Council of the Judiciary hosts an annual European forum within which the EAW forms a distinct module,
- The AG's Office provides ongoing (annual) training for prosecutors in respect of EAW and MLA practices,
- EAW specific training courses for prosecutors and judicial bodies are organised and executed in the provinces by REJUE on an ad hoc basis,
- The International Police Cooperation Unit conducts decentralised training and promotion exercises encompassing EAW practices at local police centres.

The expert team noted that many of Spain's training activities adopt a multidisciplinary approach to EAW issues focussing where possible on practical issues such as: dissemination of best practices, transmission options, language regimes, arrangements for temporary surrender and temporal deadlines pertaining to Articles 23 and 27 of the FD.

The CA also convenes periodical meetings of a working party of Spanish EAW experts chaired by the Head of the Sub Directorate-General for International Legal Cooperation. Attendees include representatives of the AG's Office, the General Council of the Judiciary, prosecutors, senior judges and the Police International Cooperation Unit. The debate covers issues and practices both as issuing and executing MS so that trends may be identified and best practices formulated and disseminated to judicial cooperation networks and distributed across Spain.

The following staff who work in the EAW field at various levels are provided with ongoing training:

- Staff at the CA receive training in English and in French.
- Magistrates' working in this field (most specifically the contact points for the Spanish and European Judicial Networks) may avail themselves of English, French or German training.
- EAW operative staff at the International Police Cooperation Unit (recruited in part for linguistic abilities in any event) are eligible for annual English courses.
- Plans are afoot to commence English language training as part of a dedicated training programme for prosecutors.

## RESTREINT UE

The Spanish Bar Association also provides informal advice based training courses to EAW practitioners in Madrid (being the seat of the executing JA) and promotes attendance at appropriate conferences on the topic. The experts noted that defence advocates were able to undertake this work without being required to attend mandatory training provision.

### 6. DEFENCE PERSPECTIVES

The expert team were able to meet with 3 representatives of the Spanish Bar Association who, between them, had had personal conduct of 18 EAW cases before the Audiencia Nacional. The representatives had engaged in prior discussions with their EAW colleagues and by so doing brought experience of a far greater number of surrenders to the table.

Notwithstanding the scope of this experience the advocates interviewed advised that they were not aware of any cases in which bail had been granted to a requested person by the executing JA in EAW proceedings. They were of the clear view that this would not have been their collective experience had the offences alleged been comparable domestic matters.

The expert team were advised that the requested person's right to legal representation arises in advance of the first judicial hearing<sup>1</sup> however, the speed at which requested persons are processed by the Spanish police and transited to Madrid, is such that in real terms the provision of such advice takes place in the holding cells of the JA shortly before the first hearing. It was the consensus view of the association that this speed coupled with the conditions in the cell areas made the development of a rapport with their clients more difficult and as such meant that the taking of full instructions was hampered<sup>2</sup>.

The team were also advised that these constraints meant that it was of paramount importance that the interpreters were of a high standard and, additionally, were familiar with the terminology and procedures deployed in EAW work. The defence reported that these high standards were not always in evidence.

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<sup>1</sup> As per domestic criminal proceedings.

<sup>2</sup> The parties separated by mesh divides whilst in the holding cells.

## RESTREINT UE

The point was raised that on occasion the prosecution had refused them access to the EAW case file so that the defence were in effect forced to advise on the basis of orally reported facts. This assertion was put to the JA later during the visit and was denied in clear and express terms. The JA stated that proceedings were frequently put back to allow for the provision of copy documents to the defence and further, noted that it was not uncommon for the same advocate to represent the requested person whilst in initial police detention as well as before the JA.

The rates of remuneration awarded were said to be equivalent to those granted during the previous extradition regime and, even though cases were progressed without the necessary legal aid means testing always having been undertaken (by virtue of time pressures), the receipt of appropriate payment under the scheme<sup>1</sup> was not said to be an issue.

The defence confirmed that the court moved of its own motion to secure Article 11 guarantees from the issuing MS.

In many cases<sup>2</sup> the defence bar accepted that consent was forthcoming once the requested persons had received a full explanation of the EAW. None of the representatives present had sought to adjourn the hearing on the basis of seeking to put further evidence before the court<sup>3</sup>.

## 7. CONCLUSIONS

### 7.1 General conclusions

7.1.1. The expert team wish to express their thanks to the Spanish authorities for the willing cooperation provided during the entirety of the evaluation visit. The open and candid manner in which EAW related topics were reviewed and discussed contributed in no small way to the completeness of the evaluation.

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<sup>1</sup> Administered by the Ministry of Justice.

<sup>2</sup> Estimated as being circa 70%.

<sup>3</sup> Article 14(2), Law 3/2003.



## RESTREINT UE

7.1.2. The experts noted the manner in which Spain's implementing legislation had adhered very closely to both the letter and spirit of the FD and in consequence by the priority that was afforded by way of example, to FD time limits and to the precise grounds on which any surrender may be refused. This implementation should in itself be considered an example of best practice for other Member States of the EU.

7.1.3. Evidence of Spain's positive approach to the direct transposition of the FD was reflected in very clear terms by the available statistics. The team noted that during the calendar year to June 2006, 98.8% of EAWs considered by Spain's JA had resulted in the surrender of the requested person being ordered<sup>1</sup>.

7.1.4. Although there was no evidence to suggest failings of the current SIS forms, the expert team felt that there was some merit in reiterating the plea received from the International Police Cooperation Unit concerning the current format of the A and M forms. It was the view of the professionals who worked with these documents on a daily basis that it would be "quicker and more helpful to replace forms A and M (in addition to any M forms required as back up) with a single form for SIRENE bureaux use, such a replacement form being designed to contain all of the information set out in a properly constituted EAW".

### 7.2 Conclusions in respect of Spain's activities as an issuing Member State

#### 7.2.1. Issues

##### 7.2.1.1. Statistics

The expert team noted that during the course of the evaluation visit itself the Spanish authorities were in difficulty in producing a unified body of EAW statistics.

Notwithstanding clear statutory direction<sup>2</sup> and regular oral and written reminders from the CA and the General Council of the Judiciary, Spain's diverse issuing JAs were clearly not forwarding copies of issued EAWs to the CA. During the calendar year to 16 June 2006, none of the 250 EAWs issued had been submitted to the CA (during 2005 the CA received 6 from 516 EAWs).

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<sup>1</sup> 3 surrenders having been refused from a total of 243 recorded EAW based arrests.

<sup>2</sup> Article 7, Law 3/2003.

## RESTREINT UE

The experts were concerned that this left the CA unable to satisfy its duty as custodian of Spain's statistical records and prevented it from performing any effective quality control/standardisation reviews on the drafting styles of over 1,700 individual courts across the territory of Spain. In this regard the team note the necessary caveats made by the CA and appended to the statistics at ANNEX A of this report.

The team were of the view that the statutory requirement was clear and understood but that JAs considered this to be an administrative task rather than a judicial one and so afforded it minimal priority.

### 7.2.1.2. Translation deadlines

Apart from Madrid, where linguistic resources were more abundant, Spain's current arrangements for the provision of language compliant EAWs were such that the contract agencies retained by the provincial administrations found it difficult to deliver EAW translations (even in respect of the frequently encountered languages) in less than 10 days. The expert team were advised that this issue was exacerbated in respect of those MSs which had made no provision for the use of a vehicular language or which had stipulated short delivery deadlines for receipt of language compliant EAWs.

To circumvent the potential release of requested persons on the basis of missed deadlines the Spanish authorities demonstrated that they would go to extraordinary lengths, one example being given of a police officer flying to an executing MS to deliver an original translation required to extend detention.

The Spanish authorities expressed the view that the wide divergence of time-limits<sup>1</sup> between MSs added unnecessarily to the complexity of the surrender process.

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<sup>1</sup> From 48 hours to 40 days.

## RESTREINT UE

### 7.2.1.3. Clarity of domestic criminal processes to foreign MSs

Examples were submitted to the expert team of situations in which executing MSs had been unclear as to the basis for the issue of Spanish EAWs in several prosecution cases. In consequence some proceedings had become unduly protracted.

That confusion stemmed from marked divergences in Criminal Procedures between the MSs. The Spanish Criminal Procedure Act stipulates that every suspect in prospective criminal proceedings must be brought before a court and provided with the opportunity to comment on the allegations they face *prior to the final decision on charge being made*. As a result of this terminology, challenges have been raised on the basis that Spanish prosecution EAWs fall outside the scope of Article 1 paragraph 1 in that they could not, at the time of issue, be "for the purposes of *conducting* a criminal *prosecution*...". The arguments alleged that such Spanish EAW could only have been issued prior to that formal decision having been handed down.

The expert team reviewed one such material case<sup>1</sup> and explored this point in some depth with the Spanish Authorities who were able to state the position in clear and unambiguous terms, namely that the opportunity to comment on the case prior to the charge decision being handed down, arises only after the evidential hurdle has been passed i.e. the charge decision, although not pronounced, will be the self evident outcome of the evidence in the case. The Spanish Authorities reported that the issue of an EAW as a fishing expedition was not permissible<sup>2</sup>.

### 7.2.1.4. Pragmatic approach to requests for further information

On the evidence presented, the experts endorsed Spain's view that it had exhibited "remarkable patience in overcoming formal difficulties raised by executing JAs". Spain considered that the overarching objective of the process was the surrender of the requested person, where that was the appropriate course. In consequence Spanish JAs rarely challenged requests as being contrary to the FD or the spirit of mutual judicial recognition, although they thought this was a fact.

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<sup>1</sup> In which the terminology deployed in the EAW stated it to be in respect of "Writ of [DATE], enquiry number [123]".

<sup>2</sup> Article 5(1), Law 3/2003.

## RESTREINT UE

The diverse practices of executing MSs in respect of raising points for clarification without first seeming to consider the merits or legal basis of the instrument were clearly causing delays and frustrations amongst practitioners. One prosecutor described their experiences in this regard as having to deal with a "barrage of diverse obstacles impeding surrender".

### 7.2.1.5. Early requests for the submission of original EAWs

The Spanish authorities noted that certain MSs<sup>1</sup> require the provision of the original EAW prior to the commencement of substantive tracing work (for example undertaking hit/no hit database searches) on the requested person. The Spanish authorities expressed concern that such requests did not fit with the letter of the FD and, practically, that such demands failed to recognise the burdens which these requirements place on other MSs. Spain was unable, in general terms, to comply with such requests by virtue of the simple logistical fact that, should a requested person be located in a different MS in respect of a general diffusion, the original EAW would likely be unavailable to be submitted to the correct executing MS within an acceptable timeframe.

### 7.2.1.6. Internal coordination - the situation of surrendered persons

The expert team noted that, irrespective of the location of the issuing JA and despite the range of airlines and routes operating to and within Spain, the vast majority of requested persons surrendered to Spain would be transported ( by the Spanish authorities) to Madrid, even where arrests were made in the area of Spain's borders with Portugal and France.

Once in Madrid they would be remanded in custody for a period of up to 72 hours by a duty magistrate sitting at the 24 hour court, before being collected by officers from the geographical area in which the issuing JA was situated.

This practice seemed to the expert team to introduce an unnecessary procedural step in the process which protracted matters and, on one interpretation, prevented the requested person from receiving early legal advice pertinent to the EAW file, which would not be available in its entirety at that remand hearing<sup>2</sup>.

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<sup>1</sup> Notably the UK, who have no access to the SIS at this time.

<sup>2</sup> Although certain core documents could be faxed by the issuing JA if the remanding judge so directed.

## RESTREINT UE

Further, it seemed to be a process which had developed as a matter of custom and practice rather than as a result of any overarching legal or practical imperatives.

### 7.2.1.7. Information concerning the duration of detention of surrendered persons.

The expert team noted that Spanish issuing JAs reported that there were regular examples of surrenders taking place in which the requirements of the FD<sup>1</sup> to advise the issuing MS, at the time of surrender, of the total period of detention had not been adhered to. The issuing JAs reported that, subsequent to discovery, these problems had been resolved with little formality or delay.

The expert team considered that detention periods were of critical importance to any detained person and to the proper administration of justice and as such satisfaction of this obligation deserved to be addressed as a matter of priority.

### 7.2.2 Good practices

#### 7.2.2.1 The Prontuario

The prontuario is a core document which, in electronic form, is constantly updated with relevant law and practice across a range of judicial topics. All EAW practitioners have the ability to access this work and as such the expert team felt that it was a helpful tool, when utilised, in bringing a degree of standardisation to any EAW system, be it centralised or decentralised.

#### 7.2.2.2. Legal basis for the surrender of own nationals

Spain considers that the FD<sup>2</sup> itself created a sufficient legal basis for the surrender of requested persons and as such they held to the view that it was inappropriate to seek to rely on the 1983 Convention on the Transfer of Sentenced Persons in respect of the return of executing MS nationals for the service of sentences imposed.

The expert team noted that the Spanish authorities consider the involvement of a governmental procedure as being at odds with the judicialisation of the surrender process and an impediment to compliance with the stringent time-limits set down by the FD.

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<sup>1</sup> Per FD Article 26 paragraph 2.

<sup>2</sup> In conjunction with the guarantees provided for by the FD.

## RESTREINT UE

Further, reliance on the FD as the legal basis of surrender endows upon Spain the ability to provide FD Article 5.3 guarantees without the need to attach potentially problematic caveats concerning the consent of the requested person or in regard to potential issues arising from the re-application of the test of double criminality.

### 7.3 Conclusions in respect of Spain's activities as an executing Member State

#### 7.3.1. Issues

##### 7.3.1.1 Review of incoming Alerts by non JAs

The expert team noted that operatives at the International Police Cooperation Unit perform an initial scrutiny of all Alerts on the system and on occasion, of their own motion, issue validity flags which remain in force until formal issues, such as material omissions and the like, are resolved. The team noted that in respect of matters considered by the operatives to be legal in nature were at liberty to contact their JA directly for guidance by telephone<sup>1</sup>, although in such cases temporary flags would have been registered in the intervening period.

The team appreciated that the International Police Cooperation Unit viewed such actions as pragmatic and of assistance to the ultimate surrender process; however they were of the view that non judicial interventions were clearly contrary to the FD and, in consequence of the very direct transposition undertaken by Spain, were also outside of the scope of Spain's implementing legislation.

It seemed to the expert team that desk officers responsible for inputting alerts and notices should be at liberty to advise their own issuing JAs (prior to entry of the alert) if key elements of the EAW<sup>2</sup> were absent, so as to improve the quality of alerts in circulation and reduce the potential for later requests for further information.

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<sup>1</sup> The GSM numbers of the executing JAs being readily available to desk officers.

<sup>2</sup> Per FD Article 8.

## RESTREINT UE

### 7.3.1.2. Variable standards of translation and interpretative provision

The expert team noted the uniform view of the defence regarding the inadequacy of specialist linguistic provision available to clients appearing before the JA. The technical nature of EAW proceedings, coupled with strictly enforced time limits demands a higher standard than was stated to be presently available. Some weight was given to this argument by the JA themselves who confirmed that they had given leave on one occasion for the irrevocable consent given by a requested person to be reviewed in answer to a plea that the consent had not been genuine, expressly by virtue of the quality of the interpretation at court.

The defence advanced the credible view that, because of the importance of the first hearing before CPIMC<sup>1</sup> and because of the specific and technical language used in such hearings, requested persons were entitled to a level of interpretation over and above that currently provided.

### 7.3.1.3. Treatment of minors

The team noted that at the time of the evaluation visit Spain had not received any EAWs in respect of minors and, in consequence, procedures in this regard remained untested.

The statutory position<sup>2</sup> in respect of youths aged between 14 and 18 was that no surrender may be ordered. In such cases the Spanish JAs would call for the submission of trial evidence by the issuing MS and proceed to hear and sentence the matter domestically. The experts felt that this reflected Spain's proactive approach to dealing with requested persons but were unclear as to how this would function, for example, in the case of linked prosecutions, that is to say as between minors and adults.

### 7.3.1.4. Reciprocity

The expert team noted that Spain's executing JA had convened a plenary session to agree upon their combined approach to Germany's voiding ab initio of its implementing legislation<sup>3</sup>. This plenary held that the principle of reciprocity should be (re)applied in respect of own national cases between the two MSs.

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<sup>1</sup> Being the only oral hearing afforded the requested person prior to the surrender decision being reached.

<sup>2</sup> Criminal Juveniles Act, Law 5/2000 as amended.

<sup>3</sup> Arising from the facts of the Darkanzanli case.

## RESTREINT UE

The team were advised that Spain's domestic legislation provided an adequate legal basis for the reintroduction of this principle<sup>1</sup> and, whereas they would not wish to debate the proper construction of Spanish law, they were of the view that the principle of the reintroduction of the former reciprocity rules was not foreseen in the FD.

It is also worthy of note that immediately<sup>2</sup> following the implementation of amending German law on this matter, Spain's JA reverted to its former position without formality.

### 7.3.1.5. Examination of the positive list

The expert team engaged in an involved debate with various members of Spain's executing JA in respect of the positive list offences.

It was clear that double criminality has been effectively abolished and that in the main no issue would be raised in respect of the list of 32 offences. The team noted however that in a small number of (currently theoretical) cases, such as the receipt of EAWs alleging murder in the ethically difficult areas of abortion or euthanasia, the JA was itself divided as to how they would in reality proceed.

The JA being centrally located in one court building did however agree that if such an instance presented itself it was likely that a further plenary would be convened so that the views of each member of the JA could be considered before action were taken.

The team wished to underline that these potential enquiries behind specific list offences were based on theoretical examples and recognised the effective manner in which EAWs were and are progressed through the Spanish judicial system.

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<sup>1</sup> Paragraph 3 of the transitional provisions reproduced at footnote 1 at page 31 of this report.

<sup>2</sup> Within a period of 48 hours.



# RESTREINT UE

## 7.3.2 Good Practice

### 7.3.2.1. Adherence to FD time limits

The expert team were impressed by the direct nature of the transpositional legislation put in place by Spain and also by the strict adherence to these rules as applied by the JA. They were of the view that each stage of the surrender process was scrutinised in terms of merit but with an overarching view as to the status of temporal compliance.

### 7.3.2.2. Flexibility in consent cases

The experts noted that issuing MSs were required to provide language compliant EAWs to the Spanish executing JA within 40 days of the requested person being placed under judicial supervision. Failure to comply would result in the release of a requested person without further precautionary measures being applied. However in consent cases surrenders can, and frequently were, undertaken on the basis of the documentation available to the JA at the first hearing within 72 hours of the arrest.

## 8. RECOMMENDATIONS

### 8.1 RECOMMENDATIONS FOR SPAIN

#### 8.1.1 As issuing Member State

Recommendation 1 – That measures are put in place to ensure uniform compliance, by Spain's issuing JAs, of their statutory duty to provide the CA with copies of all EAWs issued and transmitted. (See 7.2.1.1).

Recommendation 2 – That consideration be given by the Spanish authorities to the preparation of a form of words/brief explanatory memorandum to expressly confirm, for the benefit of executing MSs (in particular common law countries) that prosecution decisions have de facto been reached in respect of all EAW prosecution requests, but that before such a decision can formally be taken, the Spanish Procedural Code requires the hearing of the person. (See 7.2.1.3).

Recommendation 3 – That the Spanish authorities reappraise the current practice of causing all requested persons to be transported to Madrid rather than directly to the locality of the issuing JA itself. (See 7.2.1.6).

## RESTREINT UE

### 8.1.2 As executing Member State

Recommendation 4 – To ensure that measures are put in place to ensure that only judicial scrutiny results in flagging or a request for further information being raised in respect of EAWs received via the International Police Cooperation Unit. (See 7.3.1.1).

Recommendation 5 – To examine the quality of linguistic provision available to requested persons and their legal advisors before the executing JA and to take such remedial action as may be required. (See 7.3.1.2).

Recommendation 6 – To update the Fiche Française, ensuring that greater clarity is expressed in respect of the procedures which may be adopted in the case of EAWs concerning minors. (See 7.3.1.3)

## 8.2 RECOMMENDATIONS FOR CERTAIN OTHER MEMBER STATES

Recommendation 7 – To consider measures which would allow for increased flexibility in respect of the temporal provision of language compliant EAWs. (See 7.2.1.2).

Recommendation 8 – That a review be conducted, by the appropriate domestic authorities, to assess the content of requests for supplementary information transmitted to issuing MSs. The authorities should then assess whether those requests fall strictly within the remit of (a) domestic legislation and/or (b) the FD. (See 7.2.1.4).

Recommendation 9 – That those MSs who require receipt of original EAWs prior to commencing substantive tracing work in respect of requested persons reconsider those demands in light of the difficulties caused to issuing MSs who rely upon SIS and Interpol as their primary transmission options. (See 7.2.1.5).

Recommendation 10 – To ensure that all surrenders are accompanied by a package of clear and express information detailing any period of detention served in the executing MS. (See 7.2.1.7).

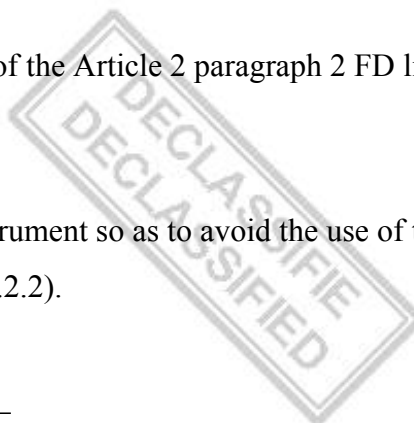
## **RESTREINT UE**

### **8.3 RECOMMENDATIONS TO THE EUROPEAN UNION**

Recommendation 11 - To discuss the merits of adopting a core of vehicular languages in EAW matters, so as to alleviate foreseeable conflicts in the provision of language compliant documentation. (See 7.2.1.2).

Recommendation 12 - To discuss how best the definitions of the Article 2 paragraph 2 FD list offences may be further harmonised. (See 7.3.1.5).

Recommendation 13 - To afford priority to work on an instrument so as to avoid the use of the 1983 Convention on the Transfer of Sentenced Persons. (See 7.2.2.2).



# RESTREINT UE

ANNEX A

**EAWs: INCOMING/ 2006**

Country	Number of cases	Arrest	Reception of EAW by CA	Granted	Refused	Surrender
ALEMANIA	2	2	0	2	0	2
AUSTRIA	7	6	0	4	1	3
BÉLGICA	43	36	0	34	0	26
DINAMARCA	3	2	0	2	0	2
ESLOVENIA	1	1	0	1	0	1
ESTONIA	4	2	0	3	0	2
FINLANDIA	6	4	0	4	0	3
FRANCIA	82	66	0	51	0	46
GRECIA	1	0	0	0	0	0
HOLANDA	12	9	0	6	0	2
HUNGRÍA	9	6	0	7	0	4
IRLANDA	1	1	0	1	0	1
ITALIA	61	39	0	32	0	22
LITUANIA	17	12	0	10	1	10
POLONIA	40	22	2	23	1	17
PORTUGAL	32	21	1	11	0	8
REINO UNIDO	14	11	0	12	0	11
REPÚBLICA CHECA	2	2	0	1	0	1
SUECIA	1	1	0	1	0	1
UNIÓN EUROPEA	3	0	0	0	0	0
<b>TOTALES</b>	<b>341</b>	<b>243</b>	<b>3</b>	<b>205</b>	<b>3</b>	<b>162</b>

**Persons sought: 311**

# RESTREINT UE

The possible inconsistencies between the number of cases (i.e. EAWs) and arrests, and the number of decisions/surrenders may result from the following circumstances:

- Supplementary EAWs related to the same person.
- Supplementary EAWs which refer to a previous extradition request.
- The person sought is serving a sentence in the executing country and surrender is granted but postponed.
- The person sought is a national of the executing country, and surrender is not effected.
- There are multiple EAWs which refer to the same person and facts (so there may be 2 cases, but just 1 decision and surrender).
- The issuing country withdraws its request, before or after a final decision is taken.

# RESTREINT UE

## EAWS: OUTGOING/ 2005

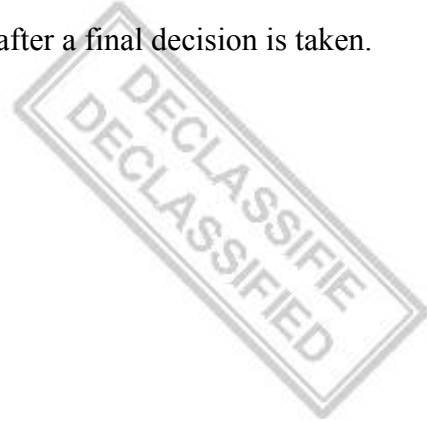
Country	Number of cases	Arrest	Reception		Refused	Surrender
			of EAW by CA	Granted		
ALEMANIA	10	7	1	4	1	4
AUSTRIA	7	4	0	6	0	6
BÉLGICA	5	3	0	4	0	4
ESLOVENIA	1	0	0	1	0	1
ESTONIA	1	0	0	0	0	0
FRANCIA	67	29	1	21	1	20
GRAN BRETAÑA	1	0	0	0	0	0
GRECIA	1	1	0	1	0	1
HOLANDA	10	7	0	1	0	2
HUNGRÍA	5	3	0	4	0	4
ITALIA	5	4	0	2	0	2
PORTUGAL	17	11	1	6	0	6
REINO UNIDO	5	2	0	4	0	4
SUECIA	1	0	0	1	0	1
EUROPEAN UNION (COUNTRY UNKNOWN OR NOT SPECIFIED)	380	0	3	0	0	3
<b>TOTALES</b>	<b>516</b>	<b>71</b>	<b>6</b>	<b>55</b>	<b>2</b>	<b>58</b>

### **Persons sought: 498**

The possible inconsistencies between the number of cases (i.e. EAWs) and arrests, and the number of decisions/surrenders may result from the following circumstances:

## RESTREINT UE

- Supplementary EAWs related to the same person.
- Supplementary EAWs which refer to a previous extradition request.
- The person sought is serving a sentence in the executing country and surrender is granted but postponed.
- The person sought is a national of the executing country, and surrender is not effected.
- There are multiple EAWs which refer to the same person and facts (so there may be 2 cases, but just 1 decision and surrender).
- The issuing country withdraws its request, before or after a final decision is taken.



# RESTREINT UE

## EAWS: OUTGOING/ 2006

Country	Number of cases	Arrest	Reception of EAW by CA	Granted	Refused	Surrender
ALEMANIA	2	1	0	1	0	1
AUSTRIA	9	3	0	2	0	4
BÉLGICA	1	0	0	0	0	0
FINLANDIA	2	1	0	0	0	0
FRANCIA	22	15	0	3	0	8
HOLANDA	4	4	0	0	0	1
HUNGRÍA	1	0	0	0	0	1
ITALIA	4	3	0	0	0	0
POLONIA	2	0	0	2	0	2
PORTUGAL	11	5	0	3	0	5
UNIÓN EUROPEA	192	0	0	0	0	0
<b>TOTALES</b>	<b>250</b>	<b>32</b>	<b>0</b>	<b>11</b>	<b>0</b>	<b>22</b>

**Persons sought: 243**

The possible inconsistencies between the number of cases (i.e. EAWs) and arrests, and the number of decisions/surrenders may result from the following circumstances:

- Supplementary EAWs related to the same person.
- Supplementary EAWs which refer to a previous extradition request.
- The person sought is serving a sentence in the executing country and surrender is granted but postponed.
- The person sought is a national of the executing country, and surrender is not effected.
- There are multiple EAWs which refer to the same person and facts (so there may be 2 cases, but just 1 decision and surrender).
- The issuing country withdraws its request, before or after a final decision is taken.



# RESTREINT UE

**EAWs: INCOMING/ 2005**

Country	Number of cases	Arrest	Reception of EAW by CA	Granted	Refused	Surrender
ALEMANIA	110	88	4	73	3	65
AUSTRIA	14	11	0	12	0	10
BÉLGICA	48	41	1	42	0	36
CHIPRE	1	1	0	1	0	1
DINAMARCA	4	4	0	3	0	2
ESLOVAQUIA	5	4	0	3	0	3
ESTONIA	2	1	0	1	0	1
FINLANDIA	7	7	0	7	0	7
FRANCIA	150	131	0	110	5	103
GRECIA	1	1	0	0	0	0
HOLANDA	27	22	0	21	0	20
HUNGRÍA	8	5	0	6	0	4
ITALIA	66	51	0	45	1	43
LETONIA	2	2	0	2	0	2
LITUANIA	62	52	5	45	2	45
POLONIA	34	13	4	15	0	13
PORTUGAL	64	44	0	36	6	33
REINO UNIDO	35	28	0	28	0	29
REPÚBLICA CHECA	7	5	3	2	0	2
SUECIA	4	4	0	4	0	4
UNIÓN EUROPEA	2	0	0	0	0	0
<b>TOTALES</b>	<b>653</b>	<b>515</b>	<b>17</b>	<b>456</b>	<b>17</b>	<b>423</b>

# RESTREINT UE

## Persons sought: 613

The possible inconsistencies between the number of cases (i.e. EAWs) and arrests, and the number of decisions/surrenders may result from the following circumstances:

- Supplementary EAWs related to the same person.
- Supplementary EAWs which refer to a previous extradition request.
- The person sought is serving a sentence in the executing country and surrender is granted but postponed.
- The person sought is a national of the executing country, and surrender is not effected.
- There are multiple EAWs which refer to the same person and facts (so there may be 2 cases, but just 1 decision and surrender).
- The issuing country withdraws its request, before or after a final decision is taken.

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## PROHIBITIONS ON SURRENDER

<b>Statutory Reference</b>	<b>Précis</b>	<b>Corresponding FD Article</b>
Article 12(1)(a)	Double jeopardy.	Article 3.2
Article 12(1)(b)	Age of criminal responsibility	Article 3.3
Article 12(1)(c)	Pardon granted pursuant to Spanish law where jurisdiction shared.	Article 3.1
Article 12(2)(a)	Lack of double criminality in respect of non list offences.	Article 4.1
Article 12(2)(b)	Domestic prosecution in respect of same acts.	Article 4.2
Article 12(2)(c)	Where a non suit judgement has been issued in Spain for the same acts.	Article 4.3
Article 12(2)(d)	Finally judged by a MS.	Article 4.3
Article 12(2)(e)	Finally judged by a third State.	Article 4.5
Article 12(2)(f)	Article 5.3 guarantee required.	Article 4.6
Article 12(2)(g)	Domestic jurisdiction	Article 4.7.a
Article 12(2)(h)	Offences outside of the territory of the issuing MS	Article 4.7.b
Article 12(2)(i)	Offence is statute barred in Spain if jurisdiction shared.	Article 4.4

# RESTREINT UE

ANNEX C

## PROGRAMME OF VISIT

### Monday, 26 June 2006

- 09H30- Ministry of Justice: Welcome of the Evaluation Team.
- Report on the implementation of the Framework Decision on the EAW.
  - General explanation on the competent authorities and procedure for the issuing and execution of EAW in Spain.
  - Statistics on the practical application of the FD since 1 January 2004.
- 11H30- Coffee break
- 12H00- Visit to the headquarters of the Investigating Courts of Madrid. Interview with different issuing judicial authorities.
- 14H30 Lunch.
- 16H30 Visit to the headquarters of the *Audiencia Nacional*. Interview with the Central Investigating Magistrates, as major issuing judicial authorities<sup>1</sup>.
- 18H30 End of day.

### Tuesday, 27 June 2006.

- 09H30 Visit to the headquarters of the Sirene Office (International Police Cooperation Unit).
- Report on the procedure for the transmission of EAW through the SIS.
  - Execution of EAW introduced in the SIS. The detention of the person and submission to the competent judicial authority.
  - The surrender of the person.
- 14H30 Lunch at the Canteen of UCOPOLIS headquarters.
- 16H30 Visit to the National Bar Association. Interview with defence lawyers on the procedure of execution of EAW.
- 18H30 End of day.

### Wednesday 28 June 2006

- 09H30 Visit to the *Audiencia Nacional*, as executing judicial authority for Spain.
- Interview with the Prosecutor's Office at the *Audiencia Nacional* and with the Antidrug Prosecutor's Office. The role of the Public Prosecutor in the execution procedure.
  - Interview with the Central Investigating Magistrates. The consent of the person.
  - Interview with the Central Criminal Court. The decision on the surrender of the person. Criteria applied to the decision.
- 14H30 End of visit.
- P.M. Flight to Malaga.

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<sup>1</sup> The competences of the Audiencia Nacional fall within the realm of terrorism and organised crime, and thus, are utterly international oriented. A great proportion of the AEW issued in Spain come from this judicial authority.

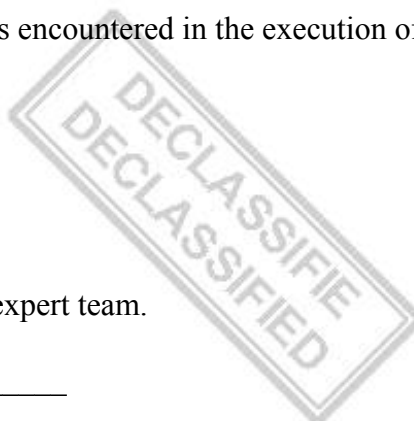
# RESTREINT UE

## Thursday 29 June 2006

- 10H00 Visit to the Provincial Court (*Audiencia Provincial*) of Malaga.
- Report on the experience as issuing judicial authorities.
  - Interview with Public Prosecutors: the role of the Public Prosecutor in the issuing procedure.
  - Interview with judicial authorities: problems encountered in the execution of EAWs by other Member States.
- 14H00 Lunch at Club Mediterraneo.
- P.M. Flight back to Madrid.

## Friday 30 June 2006

- A.M. Meeting at Ministry of Justice. Meeting of the expert team.
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# RESTREINT UE

ANNEX D

## LIST OF PERSONS INTERVIEWED

### **Ministry of Justice:**

Ana Gallego, Deputy Director for International Legal Cooperation.  
Isabel Vevia, Assistant Deputy Director.  
Antonio Romero, Head of Unit for Extraditions and EAW.  
Santiago Hernández, Head of Section.

### **Investigating Courts of Madrid**

Eloy Velasco, Instruction Judge nº 24 in Madrid.  
Hermenegildo Barrera, Instruction Judge nº 13 in Madrid.  
Javier Ballesteros, Instruction Judge nº 46 in Madrid.

### **Superior Council of the Judiciary:**

Francisco de Jorge Mesas, Adviser at the Superior Council of the Judiciary.  
Agustín Azparren de Lucas, Member of the Superior Council of the Judiciary.

### **Sirene Office:**

Francisco Aranda, Head of the International Police Cooperation Unit.  
Julián Sánchez, Interpol.  
José María García, Sirene.

### **Madrid Bar Association:**

Valentín Sebastián Chena, Attorney.  
Enrique Romero Portilla, Attorney  
José Valero Alarcón, Attorney  
Ramón Villota Coullaut, Attorney.

### **Criminal Court:**

Carlos Dívar, President of the *Audiencia Nacional*.  
Javier G. Bermúdez, President of the Criminal Court of the AN.  
4 Magistrates of the Criminal Court of the AN.  
Javier Zaragoza, Chief Prosecutor of the AN.  
Juan A. G. Jabaloy, Prosecutor at the AN.

### **Provincial Court, Malaga:**

Francisco Arroyo, President of the *Audiencia Provincial* of Malaga.  
Fernando Martínez, Instruction Judge nº7 in Sevilla.  
Francisco J. Villarejo, Prosecutor at the AP Malaga.



## LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYM ABBREVIATION TERM	ENGLISH EXPLANATION
BCN	Central National Office
BDSN	National police alerts database
CA	Central Authority
CDNHC	The Criminal Division of the National High Court
CPIMC	The Central Preliminary Investigating Magistrates' Court
EAW	European Arrest Warrant
EJN	European Judicial Network
FD	Framework Decision
JA	Judicial Authority
MLA	Mutual Legal Assistance
REJUE	The Network of Judges and Magistrates for International Judicial Cooperation