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Criminal judicial cooperation in the European Union to obtain cross-border evidence

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Abstract

This paper aims to analyze the problems that may arise from the issuance, by a Spanish criminal judge, of a European Investigation Order to request evidence and/or investigative measures from another Member State of the European Union, to incorporate them later to the Spanish criminal process.

In particular, we will focus on the difficulties set out by the introduction and subsequent admissibility of the evidence and investigative measure derived from a European Investigation Order that has been issued by a Spanish judge to incorporate its result into the Spanish criminal process.

Keywords: European Investigation Order, admissibility, evidence, investigative measures, judicial cooperation in criminal matters

1. Introduction

The increasing frequency of transnational crime, in particular after the terrorist attacks that over the past years have taken place in the territory of the European Union, and the alarming increase of organized crime have made close cooperation between the Member States in this area indispensable. To address this serious issue, the European legislator has activated different mechanisms of judicial cooperation in criminal matters, an important one being the European Investigation Order, the main goal of which is to obtain cross-border evidence. This paper focuses on this instrument of mutual recognition, regulated by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, because of the relevance of evidence in refuting the presumption of innocence, required to substantiate a criminal conviction.

Spain recently transposed this Directive, thus incorporating its provisions into the Spanish legal order. To do so, it decided to use the existing Act 23/2014 of 20 November 2014 on the mutual recognition of decisions in criminal matters in the European Union, regulating the EIO together with other mechanisms established in this area, instead of doing so in the Code of Criminal Procedure.

This new legal framework creates the possibility for Spanish judges to issue and carry out European Investigation Orders. Based on this modified legislation, the Spanish courts act as issuing authority when, in the course of criminal proceedings, they establish the need to request judicial cooperation to carry out an investigative measure or gather evidence in another Member State of the European Union. On the other hand, they will act as executing authority in the case where a court in another Member State requires the collaboration of the Spanish judicial authorities to gather evidence or carry out investigative measures in Spain. In this paper, we will focus on the first scenario because of the manifold different problems associated with the admissibility of evidence derived from a

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European Investigation Order issued by a Spanish judge who wishes to include the results in the criminal proceedings he is dealing with.[1]

2. The general framework: Judicial cooperation in criminal matters

One of the main consequences of the creation of the area of freedom, security and justice (AFSJ) of the European Union, established in art. 3 TEU and developed further in title V of the TFEU (arts 67 to 89),[2] is the implementation of judicial cooperation policies, both in civil and criminal matters,[3] to shape a European procedural law, albeit always, as Art. 67(1) TFEU states, "with respect for fundamental rights and the different legal systems and traditions of the Member States".

More specifically, the judicial cooperation in criminal matters, developed in chapter 4 of the aforementioned title of the TFEU (arts 82 to 86), is based upon two fundamental elements: the principle of mutual recognition of judgments and judicial decisions, which has been a key element of judicial cooperation in criminal matters in the Union since the European Council in Tampere of 15 and 16 October 1999[4]-[5]; and legislative approximation.[6] This has been expressly recognized in the case-law of the CJEU[7] concerning the European arrest warrant, to which it referred as,

> *"the first concrete measure in the field of criminal law implementing the principle of mutual recognition, which the European Council referred to as the 'cornerstone' of judicial cooperation".*

The principle of mutual recognition, which is based on the mutual trust between the Member States of the European Union, and which finds its origin in the desire to create a single European market in spite of legal diversity,[8] implies that the decisions given by the competent authorities of the Member States are directly recognized and executed by any Member State of the Union, except where one of the grounds for postponement or refusal of recognition applies.[9] In this way,

> *"direct effectiveness is given to the decisions of judicial organs in the other Member States of the European Union, without the requirement of previous approval and without any assessment by the executing State of the circumstances on which the decision is based"*[10]

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[1] This paper is part of the R&D project "Towards a new regulation of expert evidence" [Hacia una nueva regulación de la prueba pericial] (DER2016-7549-P), funded by the Spanish Ministry of Economy and Competitiveness, as well as the Consolidated Research Group "Evidence Law" (2017 SGR 2015), funded by AGAUR. The principal investigator of both is Prof. Joan Picó i Junoy.

[2] Consolidated version of the Treaty on European Union and the Treat on the Functioning of the European Union (OJ C 326, 26.11.2012).

[3] M. Jimeno, *Un proceso europeo para el siglo XXI*, (Cizur Menor (Navarra): Thomson Reuters, 2011), pp. 25-32.

[4] Recital 2 of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[5] This principle is introduced in the EU by the European arrest warrant, regulated by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.07.2002), which, in the words of B. Garcia, "Pluralismo constitucional en la Unión Europea y heterogeneidad de las normativas penales de los estados miembros: problemas del principio de reconocimiento mutuo" (2012) 106 *Cuadernos de Política Criminal*, p. 192, "substitutes the traditional extradition procedures used between the EU Member States". The principle of mutual recognition has been studied extensively by legal doctrine, in particular by C. Arangüena, De la Orden Europea de Vigilancia al Reconocimiento Mutuo de Resoluciones Judiciales sobre Medidas Sustitutivas de la prisión provisional: primera aproximación a la Decisión Marco 2009/829/JAI del Consejo, *Espacio Europeo de Libertad, Seguridad y Justicia: últimos avances en cooperación judicial*, C. Arangüena (dir.) (Valladolid: Lex Nova, 2010), p. 224.

[6] Cf. L. Bachmaier, La cooperación judicial penal, *Tratado de Derecho y Políticas de la Unión Europea. Volume VIII. Ciudadanía europea y espacio de libertad, seguridad y justicia*, J.M. Beneyto (dir.), (Aranzadi, 2016 [BIB 2016\21236]), p. 3.

[7] Judgment of the CJEU (Fifth Chamber) (Case C-579/15) 29 June 2017. The CJEU pronounced itself in similar terms, establishing in its Judgment (Third Chamber) (Case C-640/15) 25 January 2017 that "the principle of mutual recognition, which is the 'cornerstone' of judicial cooperation, means, pursuant to art. 1(2) of the Framework Decision, that Member States are in principle obliged to give effect to a European arrest warrant". See also, more recently, the Judgment of the CJEU (Second Chamber) (Case C-390/16) 5 July 2019.

[8] A. L., Martín and L. Bujosa, *La obtención de prueba en materia penal en la Unión Europea*, (Barcelona: Atelier, 2016), p. 23.

[9] In relation to the European arrest warrant, the CJEU (Fifth Chamber) has referred to this principle in the following terms in its judgment (Case C-289/15) 11 January 2017: "The principle of mutual recognition means [...] that, in principle, the competent authority of the executing State is to recognise a judgment which has been forwarded to it and forthwith take all the necessary measures for the enforcement of the sentence".

[10] L. Bachmaier, *La cooperación judicial…,* p. 4. A similar definition is given by A. L., Martín and L. Bujosa, *La obtención de prueba...*, p. 25.

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which has brought about a genuine revolution in the cooperation between the Member States.[11] Even so, the CJEU has allowed for the possible limitation of this principle, including the principle of mutual trust between the Member States, in exceptional circumstances, as explained by the Grand Chamber in its recent judgment of 23 January 2018.[12] To implement this principle, Spain adopted Act 23/2014 of 20 November 2014 on the mutual recognition of decisions in criminal matters in the European Union, thus creating a comprehensive instrument that,

> *"carries out the commitment to improve judicial cooperation in criminal matters in the European Union and to step up the fight against crime, while guaranteeing citizens security and rights as an essential objective of the State".*[13]

In particular, art. 1 establishes that the competent judicial authorities may issue and transmit the orders and decisions foreseen in art. 2 of the same act to another Member State for the purpose of their recognition and execution in that State as well as recognize and execute European orders and decisions in criminal matters that have been correctly issued by the competent authority of another Member State.

3. The European Investigation Order

In order to facilitate this mutual recognition, which as indicated earlier is based on the mutual trust between the Member States, the second paragraph of art. 82 TFEU recognizes the competences of the European Parliament and the Council to adopt directives that establish minimum rules aimed at achieving "police and judicial cooperation in criminal matters having a cross-border dimension",[14] which necessarily, according to the general rule of art. 67(1) TFEU, "must take into account the differences between the legal traditions and systems of the Member States", in order to promote the approximation not the harmonization of the different legislations in the EU.[15] At this point, it should be pointed out that the application of the principle of mutual recognition in criminal matters regarding both the substantive and procedural aspects has been much more difficult than in civil matters. For this reason, with a view to moving the judicial cooperation in criminal matters forward, the observation of M. Jimeno on the "advantage of approximation over harmonization" of legislation makes sense, as approximation, like harmonization, "requires the convergence on a common objective starting from different national legal orders", while it "allows each of them to preserve their singularity".[16] As a matter of fact, this is the criterion the European legislator eventually followed on this issue.

This objective of the current approach of the EU has given rise to the adoption of various instruments of mutual recognition, which have successfully been developed in the form of European orders or decisions. A clear example of this is the European Investigation Order(hereafter, EIO), regulated by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters(hereafter, the Directive), which the Spanish state has recently incorporated into the domestic legal order through Act 3/2018 of 11 June 2018 modifying Act 23/2014 of 20 November 2014 on the mutual recognition of

[11] Paragraph I of the Preamble to Act 23/2014 of 20 November 2014 on the mutual recognition of decisions in criminal matters in the European Union (Spanish Official Journal no. 282, 21 November 2014).
[12] Case C-367/16.
[13] Paragraph XVI of Act 23/2014.
[14] Cf. L. Bachmaier, *La cooperación judicial…,* p. 2.
[15] In this regard, it should be observed that pursuant to art. 82(2) *in fine* TFEU, the adoption of the referred minimum rules does not prevent the Member States who so desire from maintaining or applying "a higher standard of protection to the persons involved".
[16] M. Jimeno, *Un proceso europeo…,* pp. 34-35. See also, more recently, M. Jimeno, Orden europea de investigación en materia penal, *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar* (Barcelona: J.M. Bosch, 2016), p. 195. On the other hand, B. Garcia, "Pluralismo constitucional en…, pp. 194-203, has declared herself more in favour of the harmonization of the criminal and procedural systems of the Member States, in particular because of the experience with the introduction of the European arrest warrant, in spite of being aware that the major changes brought about by the entry into force of the Lisbon Treaty (1 December 2009) have not succeeded in ironing out the "discrepancies between the Member States on the delimitation of criminal offences", nor with regard to the "diverging interpretation of the fundamental rights recognized in the different rules of European and national law".

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decisions in criminal matters in the European Union, in order to regulate the European Investigation Order.[17] The remainder of this paper is dedicated to the analysis of this instrument.

3.1. Background

Following the objective of the Stockholm Programme, adopted by the European Council in December 2009,[18] to set up a comprehensive system for obtaining evidence in cases with a cross- border dimension, based on the principle of mutual recognition, the Directive on the EIO is introduced with the goal of unifying the fragmentary regime existing until then.[19]-[20]

Before the entry into force of the Directive, the European regulations on evidence were dispersed and only partially established in two framework decisions: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence,[21] aiming to prevent the destruction, transformation, moving, transfer or disposal of evidence, albeit limited to the freezing phase; and Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters,[22] only applicable to pre-existing evidence, thus excluding investigative measures.[23]-[24]

The co-existence of multiple instruments based on different principles basically, mutual assistance and mutual recognition resulted in a confusing approach to obtaining evidence, at the expense of a proper system of cross-border judicial cooperation in criminal matters. Aware of this reality, on 11 November 2009 the European Commission presented the "Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility",[25] which sought, on the one hand, to propose a more efficient solution in order to substitute the legal regime used until then for obtaining evidence in criminal matters by a new, single instrument based on the principle of mutual recognition, which would cover not only existing evidence, but also investigative measures, and on the other hand, confirm the validity of this approach by consulting the Member States.

Once the consultation period ended (on 22 January 2010), a proposal for a Directive on the European Investigation Order[26] was submitted to the European Parliament and the Council at the initiative of seven Member

[17] Spanish Official Journal no. 142, 12 June 2018. Besides the EIO, art. 2 of Act 23/2014 regulates the following instruments of mutual recognition: the European arrest warrant, decisions imposing custodial sentences or measures involving deprivation of liberty, probation decisions, decisions on parole supervision measures, the European protection order, freezing orders, confiscation orders, and decisions imposing financial penalties. All of these have been analysed by L. Bachmaier, *La cooperación judicial…*, pp. 20-24.

[18] Official Journal C 115, 4.5.2010. This programme more specifically "sets out the priorities of the European Union (EU) for the area of freedom, security and justice for the period 2010-2014. Building on the achievements of its predecessors, the Tampere and Hague programmes, it aims to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens".

[19] Regarding this fragmentation, not only in relation to the gathering of evidence, but also the judicial cooperation in criminal matters in general, see also M. Jimeno, *Un proceso europeo…,* pp. 92-116.

[20] Cf. Recital (6) of the Directive, Preamble II of Act 3/2018 and Opinion 1/17 of the Public Prosecutor for International Cooperation in Criminal Matters on the applicable legal regime due to the late transposition of the Directive on the European Investigation Order and the meaning of the expression "corresponding provisions" substituted by this directive.
https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/DIC%201-17%20OEI%20Regimen%20transitorio_2.pdf?idFile=6b507dd8-4ec7-427a-b17d-4d29de03539f (accessed on 20 July 2019).

[21] Official Journal L 196, 2.8.2003.

[22] Official Journal L 350, 30.12.2008.

[23] The limited scope of application of the European evidence warrant explains, as indicated in Recital (4) of the Directive, why the competent authorities are "free to use the new regime or to use mutual legal assistance procedures which, in any case, remain applicable to evidence falling outside of the scope of the EEW".

[24] For further details, see L. Bachmaier, "La orden europea de investigación: la propuesta de Directiva europea para la obtención de prueba en el proceso penal" 37 Revista Española de Derecho Europeo, (Pamplona: Civitas, 2011), pp. 2-5.

[25] Green Paper of the European Commission, Brussels, 11 November 2009 [COM(2009)624 final]. https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=COM:2009:0624:FIN (accessed on 19 July 2019).

[26] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of … regarding the European Investigation Order in criminal matters (2010/C 165/2), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010IG0624(01)&from=EN (accessed on 19 July 2019).

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States, including Spain, which led to the adoption of Directive2014/41/EC, just as the Stockholm Programme had suggested, designed to promote the application of the principle of mutual recognition in criminal matters.[27] Although the Directive(art. 36(1)) required it to be transposed by the Member States no later than 22 may 2017, Spain has exceeded this deadline by more than a year in order to meet its obligations.[28]

3.2. Concept and scope of application

Based on a joint analysis of art. 1 of the Directive and art. 186(1) of Act 23/2014, we can define the EIO as an instrument of judicial cooperation in criminal matters which takes the form of a judicial decision issued or validated by the competent judicial authority, which allows a Member State (the State issuing and transmitting the order) to request another Member State(recognizing and executing the order) to transfer evidence and/or carry out investigative measures with a view to their incorporation into domestic criminal proceedings.[29]In particular, its goal was to achieve one or both of the following objectives: a) the execution of one or more investigative measures in order to obtain evidence in one or several other Member States; and/or b) to obtain evidence that was already in possession of the competent authorities of the executing State. The Directive also sought to include the possibility of using an EIO to take any measure with a view to provisionally preventing the destruction, transformation, removal, transfer or disposal of an item that may be used as evidence (art. 32 of the Directive).[30]

This shows that the intention of the European legislator was to go beyond the mere transfer of already existing evidence,[31] by introducing, as a significant novelty, the carrying out of cross-border investigative measures, allowing for this type of collaboration between Member States during any phase of the criminal procedure,[32] which can only be applauded.

With regard to the scope of application, both the European and the national instrument (art. 3 and art. 186(3), respectively) are clear, as they that the EIO comprises "all investigative measures", with the only exception of setting up joint investigation teams and the gathering of evidence within such a team.[33] Even so, a certain authoritative part

[27] "The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The existing instruments in this area constitute a fragmentary regime. A new approach is needed, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a wide scope and should include as far as possible all types of evidence, taking into account the relevant measures".
This consideration is also referred to by A.L. Martín and L. Bujosa, *La obtención de prueba…*, pp. 115-116.

[28] The non-compliance by the Spanish state of this provision and the derogation of Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, prompted the Attorney General's Office (more specifically, the International Cooperation Unit) to publish an opinion on 19 May 2017 establishing basic and transitory guidelines on the interpretation of the EIO by the Public Prosecutors until the Spanish transposition act was published, which eventually entered into force on 1 July 2018 (sixth final provision of Act 3/2018 of 11 June 2018).

[29] Regarding the concept of the EIO, see also, among others, L. Bachmaier, *La cooperación judicial…*, op. cit., p. 22; J. Burgos, La orden de investigación penal en España: aplicación y contenido. Posible relación con la orden europea de protección, *Nuevos horizontes del derecho procesal*, M. Jimeno and J. Pérez (coord.), (Barcelona: J.M. Bosch, 2016), p. 521; and E. Martínez, *La orden europea de investigación: actos de investigación, ilicitud de la prueba y cooperación judicial transfronteriza*, (Valencia: Tirant lo Blanch, 2016), p. 52.

[30] This is also observed by M. Jimeno, Orden europea de…, op. cit., p. 164.

[31] As pointed out by E. Martínez, *La orden europea…*, p. 52, the new EIO is different from the European evidence warrant (EEW) as regulated earlier by the derogated Framework Decision 2008/978/JHA (art. 34(2)) in that the latter was not used to ask for investigative measures, but only for obtaining evidence and information already in the possession of the executing State. According to the author, the difference between the two instruments is "in a qualitative sense very important, as this instrument [in reference to the EEW] is quite inferior to the European Investigation Order, where one court tells another court what they should do in order to collaborate". In this respect, M. Jimeno, Orden europea de…, pp. 152-153, underlines the "provisional character" of the warrant due to its limited scope of application, aimed merely at "the recognition of judicial decisions given for the purpose of gathering (and possibly transmitting) objects, documents or data intended to be used in ongoing proceedings in another Member State, excluding any other means of evidence that go beyond this merely documentary scope". L. Bachmaier, "La orden europea…, pp. 5-7, expresses herself in similar terms, adding that one of the consequences of the incomplete scope of the EEW was that "for any other request regarding evidence public prosecutors and judges had to issue letters rogatory based on the agreements on judicial cooperation used between 1959 and 2000". Finally, regarding the inefficiency of the previous EEW due to its limited scope, see also A. L. Martín and L. Bujosa, *La obtención de prueba…*, pp. 23 and 117-122.

[32] As shown by Recital (25) of the Directive and Preamble II.5 of Act 3/2018.

[33]Thus established under art. 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (established in accordance with art. 34 of the Treaty on European Union – OJ C 197, 12.7.2000) and Council Framework Decision of 13 June 2002 on joint investigation teams – OJ L 162, 20.6.2002), except for the application of art. 13(8) of the Convention and art. 1(8) of the Framework Decision, respectively. In the opinion of E. Martínez, *La orden europea…*, p. 55, it is a pity that it has not been possible to reach sufficient consensus on regulating the joint investigation teams in the Directive, as according to her these constitute "the most adequate, efficient and secure way of obtaining evidence under licit conditions". For further analysis regarding the joint investigation teams, albeit in relation to human trafficking, see García T., "La cooperación jurídica internacional en la persecución del delito de trata de seres humanos. Especial consideración a los equipos conjuntos de investigación" (2018) 3 *Revista Aranzadi Unión Europea*, pp. 15-19.

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of doctrine[34] has pointed out that the Directive does not specify what is meant by an investigative measure, which might lead to uncertainty among Member States which are asked to carry out a measure that is not foreseen under national law. The legislator has however established additional provisions creating a specific regime (arts 22 to 31 of the Directive) for certain investigative measures.[35]

4. The issuing of an EIO by the Spanish state

In Spain, a judicial authority may issue a EIO in the capacity of issuing authority (art. 2(c) of the Directive) when it seeks the performance of investigative measures and/or the cross-border transfer of evidence within the territory of the European Union in order to incorporate the results into Spanish criminal proceedings; at the same time, it may recognize and execute EIOs in the capacity of executing authority (art. 2(d) of the Directive) issued by another Member State seeking the performance of investigative measures and/or the gathering of evidence in Spain in order to incorporate the results into ongoing criminal proceedings in the issuing State. The main subject of this paper is the first of these scenario's, i.e. cases in which the Spanish state issues an EIO.

4.1. Types of procedures in which Spain may issue an EIO

One of the aspects to take into account when issuing an EIO, is to determine in which kind of procedures it may be used. The answer to this question can be found both in the Directive (art. 4) and Act 23/2014 (art. 186(2)). In particular, the Directive establishes that it may be used in criminal proceedings, although it extends its scope of application to proceedings brought by considering that, as E. Martínez indicates, legal systems exist "where administrative proceedings represent a considerable procedural space, as a sanctioning sphere of law bordering on criminal procedure".[36]

The Spanish act in turn refers to both types of proceedings in art. 186(2), i.e. both administrative authorities where the decision may give rise to proceedings in criminal matters, criminal and administrative ones. However, a close reading of this provision shows us that it actually only refers to proceedings that have been brought by the competent authorities of other Member States, which in our view means that this article only applies in cases where Spain acts as executing State. For this reason, it is essential to consider this provision in relation to art. 187 of the same act, which makes clear that the competent Spanish authorities may only issue an EIO in the framework of criminal proceedings.[37]

4.2. Who may request an EIO?

Before the Directive was adopted, there existed no instrument whatsoever that granted suspects or accused persons the possibility of requesting the cross-border transfer of evidence for their defense. In these cases, the only option available depended on their access to sufficient financial means in order to gather the necessary evidence.[38] This lack of options caused an imbalance between the parties in the proceedings in favour of the accusing party, whose needs in obtaining cross-border evidence were met by the efforts of the Public Prosecutor's Office. This imbalance is corrected by the introduction of art. 1(3) of the Directive which, unlike the text of the earlier proposal, expressly grants "a suspected or accused person" the possibility to request the issuing of a

[34] M. Jimeno, Orden europea de…, pp. 170-171.
[35] These measures are: The temporary transfer to the issuing State of persons held in custody, hearing by videoconference or telephone conference, the obtaining of information related to bank accounts or banking transactions, the gathering of evidence in real time, controlled deliveries, covert investigations, and the interception of telecommunications. On these specific investigative measures, see E. Martínez, *La orden europea…*, pp. 87-109; and M. Jimeno, Orden europea de…, pp. 184-191.
[36] E. Martínez, *La orden europea…*, p. 56.
[37] In this respect, it should be taken into account that, as E. Martínez indicates in *La orden europea…,* p. 56, in the case of Spain "it cannot be applied because the Spanish administrative process only allows for appeal before the contentious administrative court, and not for an appeal before the criminal court".
[38] As evidenced by the Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of … regarding the European Investigation Order in criminal matters (2010/C 165/2), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010IG0624(01)&from=EN (accessed on 19 July 2019). At this point it is interesting to point out the observation made by L. Bachmaier, "La orden europea…", p. 11, before the entry into force of the Directive, regarding the need of "a European instrument that uniformly defines the minimum procedural guarantees that must be respected in any criminal procedure", considering that the adoption of this instrument, which promotes the transmission of evidence between judicial authorities, would increase the imbalance between the accusing and the accused party.

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EIO.[39] In this way, it is made clear that EIOs may be requested ex officio by the judicial organ, as well as by any of the parties involved in criminal proceedings.[40]

4.3. Who may issue an EIO?

Pursuant to art. 2(c) of the Directive the following can act as issuing authority, "(i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or (ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law".

In the second case the European legislator requires that the EIO, before it is transmitted to the executing authority, is validated by a judicial authority, which must examine its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in art. 6(1). Therefore, in the last instance, the issuing of an EIO depends in all cases on a judicial authority, either because it issues the order directly or because it validates the order.[41]

Act 23/2014 recognizes in turn, in art. 187(1), both judicial organs in criminal matters and the Public Prosecutor's Office as competent authorities to issue and execute EIOs in Spain,[42] with the following qualifications.

On the one hand, competence is granted to the courts handling the proceedings in which the investigative measure must be adopted, i.e. that handle the pre-trial phase, as well as the courts that have admitted the evidence in case the procedure has already entered the trial phase.

On the other hand, the Public Prosecutors are also considered as competent authorities with regard to the procedures they are handling, provided the measure requested in the EIO does not limit any fundamental rights. In this case, we understand that, pursuant to the provisions of art. 2 of the Directive, validation by the competent judicial authority would be required as in Spain the Public Prosecutor's Office is not considered to be a judicial authority.[43] At this stage, we would suggest that it is not realistic to attribute the competence to issue EIOs to public prosecutors, as under the current Spanish legal system the pre-trial phase is the responsibility of a judicial organ– with the exception of criminal proceedings against minors, considering that art. 6 of Organic Act 5/2000 of 12 January 2000 regulating the criminal responsibility of minors[44] expressly attributes the responsibility for the investigation to the Public Prosecutor's Office. Even though it is true that public prosecutors may bring criminal proceedings and participate as prosecutor in the pre-trial investigation phase, it should also be recalled that the legislator did not take advantage of the reform of the Code of Criminal Procedure of 2015 to put the public prosecutor in charge of the investigation.[45]

4.4. Issuing requirements

If a Spanish judge wants to issue an EIO, he should take into account two requirements, laid down both in the

[39] In this sense, L. Bachmaier, *La cooperación judicial…,* p. 22, notes that this will permit to "redress the existing inequality between the prosecution and the defence regarding the cross-border access to evidence".
[40] This is also recognized by E. Martínez, *La orden europea…*, p. 53, when she indicates that "with regard to the right to request the issuing of an EIO, the national rules shall be applied, but it can undoubtedly also be requested ex officio by the judicial authority at the request of the accusing party or the Public Prosecutor's Office, or at the request of the suspected or accused party or their lawyer, as part of the right of defence".
[41] M. Jimeno, Orden Europea de…, pp. 174-176, criticizes the fact that non-judicial authorities are allowed to authorize an investigative measure if they have "competence to order the gathering of evidence in accordance with national law", e.g. a police or administrative authority. In our view, this is solved by the Directive, as it requires that the request for an EIO is validated by a judicial authority.
[42] Although the Public Prosecutor's Office is considered the competent authority to receive EIOs, according to art. 187(2) of Act 23/2014 it should refer the order to the competent judicial authority in case the requested measures imply a possible limitation of fundamental rights.
[43] From a different perspective, E. Martínez, *La orden europea…*, p. 59, considers that "in the Spanish case, if we are the issuing authority as the procedure is fully judicial, there is no need for validation".
[44] Spanish Official Journal no. 11 of 13 January 2000.
[45] The 2011 draft bill for the Code of Criminal Procedure [*Ley de Enjuiciamiento Criminal*], though, did propose to put the Public Prosecutor's Office in charge of the pre-trial investigation (https://notin.es/wp-content/uploads/2013/01/anteproyecto-de-la-Ley-de-Enjuiciamiento-Criminal-de-27-de-julio-de-2011.pdf, accessed on 25 July 2019); the 2013 draft bill for another Code of Criminal Procedure [*Código Procesal Penal*] as well. Regarding these proposals for the revision of the Code of Criminal Procedure R. Casanova, *Las intervenciones telefónicas en el proceso penal* (Barcelona: J.M. Bosch, 2014), p. 358, observes that "both reforms go in the same direction, proposing a series of significant changes in the structure of the criminal process, one of which is to put the Public Prosecutor's Office in charge of the investigation".

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Directive and in Act 23/2014 (arts 6 and 189, respectively). In the first place the order should comply with the principles of necessity and proportionality, meaning that the investigative measure to be carried out, and which is the reason for issuing the EIO, serves the purposes of the proceedings for which it is requested. Secondly, the same investigative measure would have been ordered under the same conditions in a comparable internal case in Spain.

As for the principles of proportionality and necessity, in our view these must be respected especially in cases where the investigative measure to be performed in the executing State carries with it a limitation of fundamental rights.

Legal doctrine is quite aware that these principles are not easy to define, even more so taking into account, as L. Bachmaier indicates, the difficulty of "elaborating a harmonized concept at the European level", as well as the silence of the Directive on this subject.[46] Considering this situation, as well as the lack of legal provisions including national provisions that help to define these concepts, the only option left for Spanish judges will be to rely on jurisprudence in order to assess whether a requested EIO complies with the criteria of proportionality and necessity. In this respect, with regard to the principle of proportionality, the Spanish Constitutional Court stresses the importance of explaining, when adopting the measure,

> *"all the indispensable elements on which the assessment of proportionality is based, allowing their review ex-post, so as to respect the right to defense of the person against whom the evidence will be used"*

which means that,

> *"the judicial organ must expressly state the data or objective facts that are considered to be indications of an offence and reasonable proof of the relationship between the investigated person(s) and the offence, indications that have to be more than simple suspicions (judgments of the Constitutional Court 167/2002 of 18 September 2002, par. 2; 184/2003 of 23 October 2003, par. 11; and 197/2009, of 28 September 2009, par. 4)".*[47]-[48]

The Constitutional Court considers that the assessment of proportionality should refer to facts or objective data that may be indications of,

> *"1) the existence of an offence; 2) whether the offence is serious; and 3) the relation with the persons who may be affected by the investigative measure".*[49]

With regard to the principle of necessity, the Constitutional Court has stated that "any act or decision that limits fundamental rights must ensure that the restrictive measures are necessary to achieve the intended goal",[50] which was further clarified by the Supreme Court, stating that

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[46] L. Bachmaier, *La cooperación judicial…,* p. 23. In view of this situation, the author points out that the principle of proportionality requires the assessment of, "the seriousness of the offence, the necessity of the evidence for the investigation and the trial, the lack of other, less far-reaching measures that may achieve the same results, the consequences of the measure for the person(s) involved, and finally, whether the measure is proportional to the goals of the procedure".

[47] Judgment of the Constitutional Court 145/2014 of 22 September 2014, rapporteur: Fernando Valdés Dal-Ré, par. 2. See also, in the same sense, the Supreme Court in its recent judgment 86/2018 of 19 February 2018, rapporteur: Juan Ramón Berdugo y Gómez de la Torre, par. 13 [RJ\2018\1029].

[48] On the sufficiency of these indications, citing several judgments of the ECHR (case Ludï v Switzerland of 15 June 1992; case Klass and others v Germany of 6 September 1978), see the transcendent judgment of the Constitutional Court 49/1999 of 5 April 1999, rapporteur: Tomás S. Vives Antón, par. 8, which requires that "there exist factical data or indications that make it reasonable to assume that somebody is trying to commit, is committing or has committed a serious offence or that there are good reasons or strong presumptions that the offence is about to be committed, or in other words, something more than mere suspicions, but also something less than the reasonable indications required for prosecution".

[49] For all of these, see the judgment of the Constitutional Court 695/2013 of 22 July 2013, rapporteur: Julián Sánchez Melgar, par. 2 [RJ\2013\302650].

[50] Judgment of the Constitutional Court 154/2002 of 8 July 2002, rapporteur: Pablo Manuel Cachón Villar, par. 8.

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"the necessity of the measure means that it may only be adopted if, from a reasonable perspective, there are no other measures available to the investigation which, considering their characteristics, infringe less upon the fundamental rights of the investigated person and are just as useful for the purpose of the investigation".[51]

4.5. How is it transmitted?

The general rule is direct transmission between the competent authorities, so that once the EIO has been issued by the Spanish authority, it should be sent to the corresponding authority in the executing State according to Art. 7(1) of the Directive and Art. 8(1) of Act 23/2014. Nonetheless, the Directive alternatively allows for transmission of the order to be done through an expressly designated central authority. This option is also foreseen in art. 6(3) of Act 23/2014, according to which the central authority in Spain is the Ministry of Justice, whose "task is to provide support to the judicial authorities". But what happens when the issuing authority does not know to whom the order should be transmitted? In this case, paragraph 5 of art. 7 of the Directive establishes that the issuing authority shall make all necessary inquiries, including via the EJN contact points,[52] Eurojust[53] or other channels used by the judicial or police authorities,[54] in order to obtain the information from the executing State. The following paragraph adds that where the authority in the executing State which receives the EIO has no competence to recognize the EIO or to take the necessary measures for its execution, it shall, ex officio, transmit the EIO to the executing authority and so inform the issuing authority.[55]

Both the European and the Spanish legislator have sought to guarantee a successful transmission of EIOs by application of another formality: transmission by the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. At his point it should be noted that any conflicts resulting from the transmission or authenticity of the documentation required for the execution of a EIO shall be solved by direct communication between the judicial authorities involved, or where applicable by the intervention of the corresponding central authorities (art. 7(7) of the Directive and art. 8(1)(II) of Act 23/2014).

4.6. Form and content

Before pursuing the further analysis of the subject of this paper, it is necessary to refer briefly to arts 7 and 188 of Act 23/2014, in order to clarify the form of the EIO, basically to establish whether it takes the form of a certificate or rather of a form. In this respect, we can observe that in cases where a Spanish judicial authority adopts a criminal decision that requires the cross-border gathering of evidence by means of an EIO, the Spanish legislator has opted for using a form, i.e. the same format as required for the European arrest warrant and the European protection order. As a result, unlike certificates, it is not necessary to send the original judicial decision together with the form.

The content of the EIO is regulated in art. 5 of the Directive and art. 188 of Act 23/2014. Under both these provisions, the EIO shall be issued using the form set out in Annex A and XIII, respectively, and shall contain the signature of the issuing authority. Moreover, the information included in the form shall be certified as accurate and

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[51] Judgment of the Supreme Court (Criminal Chamber) 644/2012 of 18 July 2012, rapporteur: Cándido Conde-Pumpido Tourón, par. 22 [JUR\2012\255443]. Along the same line, see also the recent judgment of the Supreme Court (Criminal Chamber) 39/2018 of 24 January 2018, rapporteur: Miguel Colmenero Menéndez de Luarca, par. 1 [RJ\2018\247].

[52] For further details, see https://www.ejn-crimjust.europa.eu/ejn/ (accessed on 13 July 2019).

[53] For further details, see http://www.eurojust.europa.eu/Pages/languages/en.aspx (accessed on 13 July 2019). Regarding Eurojust as an instrument of criminal cooperation in the European Union, see A.L. Martín and L. Bujosa, *La obtención de prueba…*, pp. 87-113.

[54] These mechanisms for the coordination and cooperation between judicial authorities are referred to in Recital (13) of the Directive and art. 9 of Act 23/2014. The latter establishes the obligation of transmitting information and requests for assistance to Eurojust in accordance with the provisions of Act 13/2015 of 7 July 2015 regulating the status of Spain as a national member of Eurojust, conflicts of jurisdiction, the international networks for judicial cooperation and the staff of the Ministry of Justice working abroad, as well as the implementing rules. L. Bachmaier, *La cooperación judicial…*, pp. 5-7, goes further into these instruments.

[55] See, in the same sense, M. De La Parte, "Algunas cuestiones sobre la Orden Europea de Investigación" (2015) 1 *Aranzadi digital*, p. 2 [BIB 2015/4851].

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correct by the issuing authority.

In particular, the form used to issue the EIO shall contain the following information[56]:

a) data about the issuing authority and, where applicable, the validating authority;
b) the object of and reasons for the EIO;
c) the necessary information available on the person(s) concerned;
d) a description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal law of the issuing State;
e) a description of the investigative measures(s) requested and the evidence to be obtained.

To these minimum content requirements, the Spanish legislator has added the requirement that the competent judicial authority state the formalities, procedures and safeguards which the executing State should observe while carrying out the EIO (art. 188(1)(f) of Act 23/2014).

Finally, some consideration should be given to the language in which the order is issued. In spite of the recommendation made in Recital (14) of the Directive encouraging Member States to include at least one language which is commonly used in the Union other than their official language(s), this is still only a possibility, and not a requirement, provided for in art. 5(2) of the Directive. Thus, it will suffice that each Member State indicates its official language, which in any case shall be the one to be used by the Member States when transmitting an EIO.

Given the previous requirement, when a judicial authority issues an EIO, it shall translate the order into the official language of the executing State, unless that State has indicated that it will also accept another official language of the institutions of the Union, in which case the issuing authority can also transmit the order in this other language (art. 5(3) of the Directive). In these cases, art.7(3) of Act 23/2014 adds the possibility that the issuing language may also be Spanish in case a treaty provision exists that allows for this possibility.

In our view, the procedure for issuing an EIO would be facilitated considerably if the Member States, apart from their official language (or any other official language of the EU) were to accept translations of EIOs in English, considering this is the most widely used language by the Member States of the European Union.[57]

5. Incorporation of evidence into Spanish criminal proceedings

Art. 13 of the Directive and art. 211 of Act 23/2014 require that the executing State immediately transfers the evidence obtained as a result of the execution of the EIO to the issuing State. Once it receives the result of the evidence gathered or the measures that have been carried out, the Spanish judicial authority should include them in the criminal proceedings.

5.1. Application of the rules of domestic law

Under art. 1(1) of the Directive and art. 186(1) of Act 23/2014 an EIO may be adopted to obtain evidence that is already in the possession of the competent authorities of the executing State, as well as to have investigative measure(s) carried out. This shows that it is possible to activate this mechanism for mutual recognition in any phase of the criminal process in order to obtain evidence. This explains why the Spanish act clarifies in paragraph 1 of art. 187 that the issuing authorities are the judges or courts handling the criminal procedure in which the investigative measure should be adopted the pre-trial investigation phase and those that have admitted the evidence after the trial phase has begun. This considered, there are two possible scenarios for the incorporation into Spanish criminal proceedings of evidence originating from another Member State: one in which existing evidence is received, and another in which the evidence obtained is the result of an investigative measure.

The first scenario applies when the competent authorities of the executing State must transfer evidence that is

[56] For a further analysis of the various elements mentioned, see E. Martínez, *La orden europea…,* pp. 58-65.
[57] http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_243_sum_en.pdf (accessed on 17 May 2019).

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already in their possession to the requesting Spanish judicial organ. Following Preamble II of the Spanish transposition act this is the case, for instance, when the competent Spanish authority seeks the temporary transfer or hearing by videoconference of a person in the executing State (art. 197 of Act 23/2014) in order to obtain their declaration as a witness or expert during the trial,[58] which in the latter case even benefits the person concerned, as in this way he or she avoids having to travel to Spain.

However, neither the Spanish transposition act nor the Directive itself say anything about the way the evidence obtained should be incorporated into the Spanish criminal proceedings. This legal vacuum is covered by the jurisprudence of the ECHR, which not only states that the admissibility of the evidence depends on the rules of domestic law, but also that it is the responsibility of the national courts to assess the probative value of the evidence obtained.[59] In consequence, when the evidence is obtained during the trial phase, in our opinion it shall have the same consideration as the other means of evidence obtained in Spain, and its value shall be assessed by the competent judicial organ in accordance with the rules of the Spanish Code of Criminal Procedure.

The second scenario applies when the competent authority in the executing State has to transfer the results of investigative measures it has carried out. In this case, as indicated, a Spanish judge during the pre-trial investigation (art. 299 CCP) may request any investigative measure foreseen in the Spanish Code of Criminal Procedure to another Member State with a view to incorporating the results into the criminal proceedings. This happens, for instance, when a Spanish examining magistrate adopts the decision to intercept communications in another Member State, for which it needs technical assistance (art. 202(1) of Act 23/2014).

When the results of the investigative measures are transferred, these will be included in the existing body of evidence, together with the results of the other measures that have been carried out. When the pre-trial investigation phase is concluded, the judicial organ will decide whether to go to trial or to dismiss the case (arts 622,632 and 779(1) CCP). The problem arises when the results of investigative measures are going to be used during the trial phase, including those that derive from an EIO.[60]

In this context, it should be recalled that in Spain investigative measures lack probative value, meaning the trial judge cannot use them as such to refute the presumption of innocence.[61] As a general rule, only evidence which has been provided during the court session before the trial judge in compliance with the adversarial principle may be considered. Under Spanish law, it should fulfil the "three requirements of all provision of evidence: publicity, immediacy and the rule of *audi alteram partem*".[62] In this regard, judgment 68/2010 of the Constitutional Court of 18 October 2010 states that,

> *"as a general rule, only evidence that has been provided during the court session may be considered binding for the organs of criminal justice, considering that the production of evidence must necessarily take place during an adversarial oral debate before the judge or court that must rule on the case; this means that the*

[58] It should be noted, though, that if the transfer is requested for the purpose of trying the person concerned, which means bringing him or her before a judicial organ to be judged, instead of an EIO the competent court should issue a European arrest warrant (Preamble II.5).
[59] Judgment of the ECHR 1989/21 of 20 November 1989 (Case: Kostovski v The Netherlands):
"39. It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law (see the Schenk judgment of 12 July 1988 [ECHR 1988\4], Series A no. 140, p. 29, § 46). Again, as a general rule it is for the national courts to assess the evidence before them (see the Barberà, Messegué and Jabardo judgment of 6 December 1988 [1988\1], Series A no. 146, p. 31, § 68)".
[60] This problem has also been pointed out by V. C. Guzmán, *Anticipación y preconstitución de la prueba en el proceso penal* (Valencia: Tirant lo Blanch, 2006), pp. 193-198.
[61] The differences between evidence and investigative measures have been analyzed, among others, by J.A. Fernández-Gallardo, *Cuestiones actuales de proceso penal* (Madrid: Dykinson, 2015), pp. 127-128; and A. González, *Las diligencias policiales y su valor probatorio*, (Barcelona: J.M. Bosch, 2014), pp. 340-341.
[62] Judgment of the Constitutional Court (Plenary Session) 165/2014 of 8 October 2014, rapporteur: Ricardo Enríquez Sancho, par. 2 [ECLI:ES:TC:2014:165]; and judgment of the Supreme Court (Criminal Chamber) 225/2018 of 16 May 2018, rapporteur: Juan Ramón Berdugo y Gómez de la Torre, par. 3 [ECLI:ES:TS:2018:1727].

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opinion of the court on the facts of the case is formed by direct contact with the means of evidence which the parties have submitted for this purpose (cf., among others, the judgments of the Constitutional Court182/1989 of 3 November 1989, par. 2; 195/2002 of 28 October 2002, par. 2; 206/2003 of1 December 2003, par. 2; 1/2006 of 16 January 2006, par. 4; 345/2006 of 11 December2006, par. 3)".[63]

Even so, as is the case with all general rules, there is an exception which grants probative value to investigative measures when certain requirements are met, which in any case must be interpreted restrictively, and which have been set out by both the Supreme Court and the Constitutional Court.[64] In judgment 68/2010 of 18 October 2010, mentioned earlier, the Court explains that,

"this idea may not be interpreted so radically as to deny any probative value to judicial and investigative measures carried out using the formalities established by the Constitution and procedural law, provided they may be assessed during the court session under conditions that allow the defendant to contradict them [judgments of the Constitutional Court 187/2003 of 27 October 2003, par. 3; 1/2006, par. 4; 344/2006 of 11 December 2006, par. 4 b)]. In this sense, the Spanish legal doctrine has already expressly admitted since judgment 80/1986 of the Constitutional Court of 17 June 1986 (par. 1) that this general rule allows for certain exceptions under which it is constitutional, in a limited number of cases, to include the results of measures carried out during the pre-trial investigation phase in the assessment of the evidence, provided they are subject to certain adversarial requirements".[65] *These requirements are classified, as the recent judgment225/2018 of the Supreme Court of 16 May 2018 recalls,*[66] *in "material (impossible to reproduce during the trial), subjective (requiring the necessary intervention of the examining magistrate), objective (guaranteeing possible contestation by the defense of the accused, allowing him to question the witness) and formal (the introduction of the content of declarations made during the pre-trial investigation phase by reading the minutes, in accordance with art. 730 CCP, or by means of interrogation)". It is precisely this last requirement that we will analyse in the next section, as it makes it possible for the results of an investigative measure to "become part of the public trial debate and be subjected to contradiction during the trial before the competent judge or court".*

[63] This is the established case law of the Constitutional Court, as recognized by the court itself, among others, in judgment 165/2014 of 8 October 2014, rapporteur Ricardo Enríquez Sancho, par. 2 [ECLI:ES:TC:2014:165], in which it is applied in identical terms. The Supreme Court refers to this basic rule of constitutional doctrine in judgment 270/2016 of 5 April 2016, rapporteur: Carlos Granados Pérez, par. 1, regarding the appeal brought by the accused Luis Urbano [ECLI:ES:TS:2016:1553], where it insists that "the only incriminating evidence that may be assessed" is evidence that has been provided during the court session in accordance with "the principles of oral hearing, immediacy and *audi alteram partem*", conditions which are not met by investigative measures, which are carried out during the pre-trial investigation with a view to "preparing the decision to initiate the trial phase and to identify and secure evidence".

[64] As recognized and expressed by the Supreme Court in its own jurisprudence, in particular judgments 270/2016 of 5 April 2016, rapporteur: Carlos Granados Pérez, par. 1 regarding the appeal brought by the accused Luis Urbano [ECLI:ES:TS:2016:1553]; and 762/2016 of 13 October 2016, rapporteur: Luciano Varela Castro, par. 6 [ECLI:ES:TS:2016:4418]. In legal doctrine, this is confirmed by A. González, *Las diligencias policiales…,* p. 359, when he indicates that the use during the trial of sources of evidence deriving from investigative measures carried out during the pre-trial investigation must be exceptional.

[65] A similar stance is taken by the ECHR in Judgment 1989/21 of 20 November 1989 (Case: Kostovski v The Netherlands): "41. In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument (see the above-mentioned Barberà, Messegué and Jabardo judgment, Series A no. 146, p. 34, § 78). This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1) provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings (see, mutatis mutandis, the Unterpertinger judgment of 24 November 1986 [ECHR 1986\14], Series A no. 110, pp. 14 and 15, § 31)".

[66] Rapporteur: Juan Ramón Berdugo y Gómez de la Torre, par. 3 [ECLI:ES:TS:2018:1727].

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5.2. Procedural method of incorporating investigative measures into criminal proceedings

5.2.1. The method of Art. 730 CCP

Art. 730 CCP provides that,

> *"it shall be allowed to read or reproduce, at the request of any party, measures carried out during the pre-trial investigation which, for reasons beyond their control, cannot be reproduced during the trial [...]".*

As a preliminary remark, we must point out that Spanish jurisprudence has mainly referred to the application of Art. 730 CCP in relation to the testimony of witnesses.[67] Even so, taking into account that this provision literally refers to "measures carried out during the pre-trial investigation" and not exclusively to the interrogation of witnesses we consider that a flexible interpretation must be made of this rule, meaning that in this way also the results of other investigative measures may be included,[68] which must be introduced at the trial using the relevant means of evidence.[69]

Although this may not be apparent from the literal wording of Art. 730 CCP,[70] the Supreme Court recognizes that this is the way in which the legislator intended to give probative value to investigative measures, as it expressly stated in its recent judgment 225/2018 of 16 May 2018[71] in declaring that,

> *"Article 703 of the Code of Criminal Procedure constitutes one of the exceptional ways of conferring probative value to the results of measures carried out before the trial, outside the general framework of Article 741 and without infringing the presumption of innocence, which in principle can only be refuted by licit evidence provided during an oral and public trial".*

In a broader sense, the Constitutional Court has admitted the constitutional legitimacy of Art. 730 CCP, in particular in judgment 345/2006 of 11 December 2006,[72] par. 3, in which it stated that:

> *"In application of this doctrine we have expressly admitted in earlier judgments the constitutional legitimacy of the legal provisions contained in Arts 714 and 730, provided the content of the measure performed during the pre-trial phase is reproduced during the trial by publicly reading the document in which it was recorded, or by introducing its content during the trial through interrogation (judgment Constitutional Court 2/2002 of14 January 2002), as in this way, through rectification or confirmation by testimony during the trial (art 714 CCP) or in response to the material impossibility of reproducing the results (art 730 CCP), the evidence is included in a public trial debate before the court[...]. This allows for the results of the measure to be challenged by the further declarations of the other parties during the trial".*

In consequence, probative value could be conferred to those investigative measures that are reproduced during the trial either by reading the document in which the results were recorded or by interrogation of the person who carried out the measure, thus complying with the essential "three requirements of all provision of evidence: publicity, immediacy and the rule of *audi alteram partem*".

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[67] See for example the recent judgments of the Supreme Court (Criminal Chamber) 182/2017 of 22 March 2017, rapporteur: Andrés Palomo Del Arco [ECLI:ES:TS:2017:1061]; and 270/2016 of 5 April 2016, rapporteur: Carlos Granados Pérez [ECLI:ES:TS:2016:1553].

[68] Cf. E. Cerrato, La dificultad probatoria del delito de maltrato sobre la mujer, *Peritaje y prueba pericial*, (Barcelona: J.M. Bosch, 2017), pp. 519-529.

[69] On this issue J.A. Fernández-Gallardo, *Cuestiones actuales de…,* pp. 127-128, has specified that "for the evidence deriving from these measures to be assessed, they must be incorporated into the trial in the form of a legally accepted means of evidence, for example the testimony of the agents involved during the court session, with the required safeguards of *audi alteram partem* and immediacy. Therefore, in this case, the evidence will consist of the testimony during the trial of the police agent who carried out the investigative measure. In this respect, according to A. González, *Las diligencias policiales…,* p. 350, "a bad or inadequate selection of the means of evidence used to incorporate the source of evidence may cause it to be declared inadmissible by the trial judge, or its assessment to be denied".

[70] In this regard A. González, *Las diligencias policiales…,* p. 360, criticizes the lack of regulation in the Code of Criminal Procedure, that has lead to a lack of clear standards on how to incorporate the results of an investigative measure as evidence during the trial.

[71] Rapporteur: Juan Ramón Berdugo y Gómez de la Torre, par. 3 [ECLI:ES:TS:2018:1727].

[72] Rapporteur: Pascual Sala Sánchez, par. 3. In the same sense, see Judgment of the Constitutional Court (Plenary Session) 68/2010 of 18 October 2010, rapporteur: Elisa Pérez Vera, par. 5 [ECLI:ES:TC:2010:68].

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Moreover, both the Constitutional Court and the Supreme Court have recognized the preconstituted value of evidence resulting from investigative measures introduced into the trial through art. 730 CCP. Because of the clarity of the explanation, we refer to judgment 225/18 of16 May 2018[73] of the Supreme Court, which "confers on declarations made during the pre-trial phase the value of preconstituted incriminating evidence". As a matter of fact, this judicial decision considers to be "preconstituted evidence" those,

> *"pre-trial measures that are impossible to repeat during the trial because of their intrinsic nature, and the performance of which, as is the case with visual inspections and similar measures, can only be done once".*[74]

Procedural doctrine has also focused on defining "preconstituted evidence", notably V. Gimeno, whose analysis of its documentary character we would like to reproduce here, due to its relevance:

> *"Preconstituted evidence is documentary evidence that the examining magistrate and the supporting staff (police and Public Prosecutor's Office) gather regarding unrepeatable facts which cannot be reproduced, using ordinary means of evidence, during the trial. For this reason, this kind of evidence is intended to secure (sources of) evidence with certain formal safeguards such as the "possibility of refutation" may be presented at the trial by reading the corresponding documents (art.730), as official public documents suitable to substantiate a conviction".*[75]

Nonetheless, in our view the previous definition should be complemented by adding that the results of an investigative measure may also be incorporated into the trial through the interrogation of the person who carried it out, as may be deduced from the legal doctrine and jurisprudence quoted earlier.

5.2.2. Application to investigative measures derived from an EIO

Art. 730 CCP was drafted with a view to investigative measures in Spain. Considering the subject of this paper, the question is whether this provision may also be applied to measures carried out in another Member State, allowing it to be incorporated into the trial. An example of this would be the searching of a house in France carried out by virtue of an EIO issued by a Spanish judge.

In our view, and considering Spanish jurisprudence, the answer ought to be affirmative. The Supreme Court has recently had the opportunity to pronounce itself on this issue in judgment118/2018 of 13 March 2018,[76] in which it recognized the probative value of the declarations of witnesses during the pre-trial phase who could not appear in court because they found themselves outside of Spain, on the condition that certain safeguards were offered: "they must have been impeccably carried out", meaning that necessarily they must have taken place in the presence of the examining magistrate, and that the defence has had "the opportunity, where feasible, to attend the execution of the measure and intervene where applicable", thus respecting the adversarial principle and ultimately the right to defence.[77] The Supreme Court therefore recognizes the probative value of testimonies during the pre-trial

[73] Rapporteur: Juan Ramón Berdugo y Gómez de la Torre, par. 3 [ECLI:ES:TS:2018:1727]. As for constitutional doctrine, see Judgment of the Constitutional Court (Plenary Session) 165/2014 of 8 October 2014, rapporteur: Ricardo Enríquez Sancho, par. 2.

[74] According to V. C. Guzmán, "Anticipación y preconstitución…, p. 203, "it is common in doctrine to refer to the probative value of investigative acts, an expression intended to make clear that there are cases in which it is necessary to transform pre-trial or investigative measures into evidence suited to be used to refute the presumption of innocence. This necessity tends to be prompted by the fact that certain evidence cannot be repeated or reproduced during the trial, so that use must be made of the material obtained during the investigation phase in order to prove the facts". The author makes clear, though, that it is not the investigative measures that have probative value, but their results that may be introduced during the trial, which is different.

[75] V. Gimeno, "La prueba preconstituida de la policía Judicial" (2010) 22 *Revista catalana de Seguretat pública*, p. 38. (https://www.raco.cat/index.php/rcsp/article/viewFile/194212/260386, accessed on 30 July 2019).

[76] Rapporteur: Miguel Colmenero Menéndez de Luarca, par. 4 [ECLI:ES:TS:1782/2017].

[77] Regarding the probative value of testimonies given outside the trial, the referred judgment of the Supreme Court took care to specify that the Constitutional Court does not require the refutation to be effective or to have even taken place, merely that "the judicial organ has done everything possible to facilitate this", considering that "it is not always possible to ensure the presence of the accused or his lawyer during the examination of witnesses in the pre-trial phase, either because the accused himself waives the possibility offered and does not attend, or because of other circumstances", thus avoiding "leaving the rectification of the procedure in the hands of the accused". For this reason, the Supreme Court states that "it is not correct to deny any value to this declaration a priori", considering that the criterion of the ECHR is that "the absence of contradiction is not contrary to the right to a fair trial if in the case at hand measures were available that allowed for a correct assessment of the reliability of the declaration". Regarding the "possibility of refutation", see also the judgment of the Supreme Court (Criminal Chamber) 225/2018 of 16 May 2018, rapporteur: Juan Ramón Berdugo y Gómez de la Torre, par. 3 [ECLI:ES:TS:2018:1727].

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phase. But what about other measures? The judgment of the Supreme Court starts from the premises that art. 730 CCP,

> *"allows to read, at the request of any party, the results of measures carried out during the pre-trial investigation which, for reasons beyond their control, cannot be reproduced during the trial"*

which means, as indicated earlier, that it may be applied to any measure carried out during the pre-trial phase. This considered, we may conclude that the results of an investigative measure carried out in another Member State may also be incorporated into the trial by way of art. 730 CCP.

5.3. Admissibility of evidence derived from an EIO

Finally, after having established how evidence obtained and investigative measures carried out in other Member States may be introduced into Spanish criminal proceedings, it is time to examine their admissibility.

We agree with M. Jimeno that the main obstacle for the application of an EIO is the admissibility as evidence. This issue "constitutes one of the main objections to the application of the principle of mutual recognition in the field of evidence", as the national legal systems have different sensibilities when it comes to the violation of fundamental rights.[78]

Although considering the preceding analysis it is true that the Member States have opted for the EIO as a mechanism of judicial cooperation in criminal matters for the purpose of obtaining evidence, thus achieving an approximation on the minimum aspects to take into account for the cross-border recognition and gathering of evidence, it is also true that each Member State has its own penal system. This makes it inevitable that differences exist with regard to procedural safeguards,[79] which can ultimately lead to problems concerning the lawfulness of the evidence gathered in the executing State when introducing it into criminal proceedings in the issuing State.[80]

This being the case, the following question arises: What should a Spanish judge do when the evidence obtained in another Member State has not been gathered in accordance with due process safeguards in Spain? This question is answered by A. L. Martín and L. Bujosa, who consider that a broad interpretation of the principle of mutual recognition would imply that the receiving State i.e. the State issuing an EIO renounces the possibility of "making the validity of the obtained evidence conditional on its conformity to its own domestic law", which in turn could lead to an atypical situation as regards the safeguards for due process.[81] Thus, following the example used by the authors, when a witness is heard in the executing State without the lawyer of the accused being present, considering that this safeguard is not required under all procedural rules, the Spanish would have no other option than to admit the declaration. To avoid this situation, a more restrictive interpretation of the principle should be applied,

> *"due to its direct relation with the role of national judges as co-responsible and guarantor of the fundamental rights and freedoms of citizens".*[82]

In this way, a Spanish judge could abstain from introducing evidence in criminal proceedings which have been validly obtained in the executing State, but do not comply with the procedural safeguards required by art.24 of the Spanish constitution.[83] At this point, the best option would be to establish certain common minimum procedural standards applicable to all judicial cooperation in criminal matters, non-compliance with which would allow the

[78] M. Jimeno, Orden europea de…, p. 196.
[79] A. L. Martín and L. Bujosa, *La obtención de prueba…*, p. 16.
[80] A similar observation is made by E. Martínez, *La orden europea…,* p. 181, who concludes that "the existence of 26 different interpretations of a term like "caution" may give rise to issues regarding the lawfulness of the evidence obtained in another State and may even constitute a real subterfuge intended to evade the safeguards required in the State requesting assistance".
[81] On due process, see J. Picó, *Las garantías constitucionales del proceso*, 2nd edn (Barcelona: J.M. Bosch, 2012), pp. 159-175.
[82] A. L. Martín and L. Bujosa, *La obtención de prueba…*, p. 25. In addition to this, E. Martínez, *La orden europea…*, pp. 181-182, observes that the principle of mutual recognition is limited by the "principles and rules of the European Union, the inherent limits of cooperation in criminal matters and fundamental rights". This same issue has been extensively dealt with by DE HOYOS SANCHO, M., "El principio de reconocimiento mutuo de resoluciones penales en la Unión Europea: ¿Asimilación automática o corresponsabilidad?", in *Revista de Derecho Comunitario Europeo*, no. 22, September-December (2005), pp. 807-842 (file:///C:/Users/39899072-y/Downloads/Dialnet-ElPrincipioDeReconocimientoMutuoDeResolucionesPena-1389135.pdf, accessed on 1 August 2019).
[83] This idea is confirmed by E. Martínez, *La orden europea…*, pp. 182-184.

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State issuing an EIO to declare the evidence obtained in the However, until today this has not been achieved, which suggests a lack of mutual trust between the EU Member States.[84]

In spite of this, the criterion used in the case law of the Spanish Supreme Court is not to review the content of evidence obtained in another Member State in accordance with the latter's internal legislation, which should be incorporated into Spanish criminal proceedings without necessarily having to comply with Spanish law.

This situation already preceded the Directive. At the time, the Supreme Court declared that it was not for the Spanish judicial authorities to check the legality of evidence obtained in another Member State, so that it had to be admitted directly. Illustrative in this regard is Supreme Court Judgment 1521/2002 of 25 September 2002,[85] which stresses that "in the framework of the European Union, defined as an area of justice, freedom and security, in which common action of the Member States with regard to police and judicial cooperation in criminal matters is an essential element, as established in art. 29 of the consolidated Maastricht version of the Treaty on the Union(RCL 1994, 81, 1659; RCL 1997, 917; RCL 1999, 2661; and LCEur 1992, 2465), it is not necessary to review the value of acts carried out before the judicial authorities of the various countries of the Union, and even less to check their conformity with Spanish law, considering they have been performed in the framework of letters rogatory, and therefore in accordance with art. 3 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959(RCL 1982, 2423; ApNDL 13560) Spanish Official Journal of 17 September 1982. In this respect mention can also be made of judgment 13/1995 of this Chamber of 19 January 1995 regarding the letters rogatory carried out by Germany; judgment 974/1996 of 9 December 1996(RJ 1997, 1121), in which it is expressly stated that,

> *"[...] in the field of European judicial cooperation no distinction ought to be made between the guarantees of impartiality offered by the various courts, nor between the respective value of the acts that have been performed before them according to the procedural rules[...], in relation to letters rogatory carried out by the Swedish authorities; judgment340/2000 of 3 March 2000 (RJ 2000, 1172), which in line with the earlier judgments confirms the doctrine that the incorporation into criminal proceedings in Spain of evidence obtained in other countries in the framework of the referred European Convention on Mutual Assistance does not imply that this evidence should be checked on its conformity with Spanish rules; judgment 1450/1999 of 18 November1999 regarding letters rogatory carried out by the French authorities; and finally, judgment947/2001 of 18 May 2001, which states that "[...] it is not for the Spanish judicial authority to review the legality of the performance of the officials in the countries mentioned, and more specifically the compliance of the Dutch police authorities with their own legislation, let alone the Spanish legislation [...]".*[86]

This jurisprudential criterion has been maintained over time, as is confirmed by Supreme Court Judgment 312/2012 of 24 April 2012,[87] which we will analyse in some detail because of its relevance. As a preliminary remark, it should be noted that the Supreme Court highlights the existence of,

> *"a consolidated body of jurisprudence regarding the consequences deriving from the existence of a European judicial area, within the framework of a Union founded on the basis of values and safeguards shared by all the States of the Union, although their particular positive expression depends on the legal tradition of each State, which nonetheless preserve the essential content of those values and safeguards [...]".*

[84] See A. L. Martín and L. Bujosa, *La obtención de prueba…*, p. 33.
[85] Rapporteur: Joaquín Giménez García, par. 1 [RJ 2002\9846]. Along the same line, see the recent judgment of the Supreme Court (Criminal Chamber) 313/2017 of 3 May 2017, rapporteur: Juan Saavedra Ruíz, par. 3 [ECLI:ES:TS:2017:1688].
[86] Before the entry into force of the Directive, a certain authoritative part of doctrine considered that this matter ought to be determined by the Member States on the basis of their respective criminal justice system, as the European institutions lacked the competence to decide which evidence should be admissible and which not. See for instance L. Bachmaier, "La orden europea…, p. 12; and in the same sense, J.R. Spencer, *European Commission's Green Paper on obtaining evidence from one Member State to another and securing its admissibility* (2010) 9 Zeitschrift für Internationale Strafrechtsdogmatik, pp. 602-606. (http://www.zis-online.com/dat/artikel/2010_9_492 , accessed on 19 July 2019).
[87] Rapporteur: Carlos Granados Pérez, par. 2 [ECLI:ES:TS:2012:3117].

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It subsequently starts to examine the issue at hand quoting judgment 13/1995 of 19 January1995,[88] which refers to the interrogation of a witness in the executing State Germany by the police authorities instead of the judicial authorities, as required in Spain. In spite of this, the Supreme Court in this case considered the evidence obtained to be valid as this,

> *"does not diminish the inherent value of the investigative measures carried out in another country, which justifies why the principles of immediacy, publicity and oral hearing were not complied with, although the adversarial principle was respected, as the parties were given the possibility to ask the corresponding questions, meaning that after being included in the case file and a new trial date was established, it became valid documentary evidence that the court was able to assess, together with the other evidence, in order to refute the presumption of innocence".*[89]

6. Conclusions

After examining the complex issue of the admissibility of evidence obtained by means of the new European Investigation Order in Spanish criminal proceedings, we are able to draw the following three conclusions:

FIRST-The commitment of the European legislator to the approximation of the national legislations in criminal matters while respecting the singularities of each Member State in order to offer a solution to the serious issue of transnational crime, and which materialized with the entry into force of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, has achieved something that until recently seemed impossible: to realize judicial cooperation in criminal matters through an instrument of mutual recognition that allows evidence to be obtained in all phases of criminal proceedings, in any Member State of the European Union.

Nonetheless, in order to assess the practical effectiveness of the EIO, we should await the results of the report which the European Commission in principle, as required under art. 37 of the Directive, must submit to the European Parliament and the Council in May 2019. This report should include an evaluation of the impact on the cooperation in criminal matters and the protection of individuals, and shall, where necessary, be accompanied by proposals for improvement. We are aware, though, that for some Member States, such as Spain, due to the late transposition of the Directive into national law, it will be impossible to obtain a realistic picture of the application of the Directive, considering the scarce results up to date.

SECOND -Even so, lacking this report, the analysis carried out in this paper allows us to be optimistic and anticipate a positive valuation of the EIO as a mechanism of judicial cooperation in criminal matters, for the following reasons:

a) To begin with, the Directive introduces an enormously valuable mechanism of mutual recognition, the European Investigation Order, that has succeeded in leaving behind the existing fragmented regime, substituting all other previous instruments for obtaining cross-border criminal evidence, which offered only a partial solution to this problem.

b) Secondly, the Directive has for the first time created the possibility of not only obtaining already existing evidence in the executing State, but also to have investigative measures carried out in any Member State of the European Union in order to obtain new evidence, thus facilitating the collaboration between the Member States also during the pre-trial phase of criminal proceedings.

c) We can also conclude that the incorporation of the results obtained by means of an EIO will vary depending on whether the transferred material contains already existing evidence in the executing State or the results

[88] Rapporteur: Joaquín Giménez García, par. 2 [RJ 1995\155].
[89] See also the judgment of the Supreme Court (Criminal Chamber) 1281/2006 of 27 December 2006, rapporteur: Juan Ramón Berdugo y Gómez de la Torre, par. 5 [RJ 2007\588].

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of an investigative measure carried out in that State. In the first case, the evidence transferred by the competent authority of the executing State deserve the same consideration as evidence obtained in Spain, although it still needs to be assessed by the judicial organ in accordance with the provisions of the Code of Criminal Procedure, considering that the ECHR has stated that it is for the national courts to determine the probative value of evidence obtained in another country. In the second case, however, in order to introduce the results of an investigative measure carried out in the executing State into the trial as valid evidence, this must be done, as expressly recognized by the Supreme Court and the Constitutional Court, using art. 730 CCP, in the same way as investigative measures carried out in Spain, be it by reading the document recording the results or by interrogating the person who performed the measure. In this way the requirements of publicity, immediacy and *audi alteram partem*, that should govern all probative activity, are met.

d) Finally, one of the more controversial issues raised by the proposed Directive was the imbalance between the parties to the proceedings with regard to the possibility of requesting an EIO, in detriment of the suspected or accused person. This problem is solved by paragraph 3 of art. 1 of the Directive, which expressly grants the accused the right to request an EIO to be issued, thus guaranteeing the respect for his right of defence.

THIRD-In spite of all the advantages brought about by the entry into force of the Directive and the subsequent Spanish transposition act, which has recently incorporated the EIO as an instrument of mutual recognition into the Spanish legal order, in our view there are still aspects to be improved.

a) The first point of criticism concerns the Spanish legislator, who fully aware that the Public Prosecutor's Office currently lacks, according the general legal framework established in the Code of Criminal Procedure, the competence to lead the pre-trial investigation recognizes it as the issuing authority for EIOs in the investigations it performs, provided the EIO does not limit any fundamental rights. In our view, the legislator at the time missed a magnificent opportunity to carry through a comprehensive reform of the procedural system, attributing to the public prosecutor the responsibility for the pre-trial investigation, meaning that, with the current CCP, as a general rule, it cannot issue EIOs. The only exception to this rule is the special proceedings regarding minors, in which the Public Prosecutor's Office has been expressly attributed the competence to lead the pre-trial investigation. We therefore consider that public prosecutors may only issue European Investigation Orders when the accused is a minor and the order does not limit any fundamental rights.

b) The second issue concerns the admissibility of evidence obtained by the execution of an EIO and its consequences for the constitutional safeguards applicable to Spanish criminal proceedings. More specifically, the problem arises when the competent authority in the executing State, which has recognized the EIO issued by a Spanish judge, gathers the requested evidence or carries out investigative measures in accordance with domestic procedural rules that do not provide the same safeguards as established under the Spanish constitutional rules. Even though ideally the Spanish judge, when issuing an EIO, should be able to demand that the minimum guarantees of art. 24 of the Spanish constitution be complied with in order to incorporate the evidence into Spanish criminal proceedings, we are also aware that this would complicate the intended judicial cooperation for obtaining cross-border evidence. For this reason, we consider the solution that the Supreme Court has offered to this complex situation to be sensible, facilitating judicial cooperation in criminal matters by establishing that the results of evidence gathered in another Member State should not be reviewed if this has been done in accordance with the legal guarantees of that State, allowing Spanish judges to incorporate them into Spanish criminal proceedings, even though they do not comply with the Spanish procedural standards.