

Harmonization of Procedural Safeguards of Suspected and Accused Persons

State of the Matter in Spain



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ABSTRACT

After giving a brief overview of the major developments in the harmonization of procedural safeguards for suspected and accused persons in the European Union, this article focuses on the legal reforms that were necessary to implement four of the six adopted EU Directives on procedural safeguards into Spanish national law. This concerns the transposition of the Directives on interpretation/translation, on information, on access to a lawyer and communication with third parties, and finally on legal aid. The main aspects of the transpositions into the Spanish legal order are explained and deviations from the requirements of the Directives pointed out. Pending developmental issues, the article enables the reader to reflect the true status of the suspect and accused person in Spain after the reforms that were triggered by the EU acts.

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I. Brief Introduction into the Harmonisation of Procedural Safeguards in the EU

For more than fifteen years since the Commission presented its Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union in 2003,¹ the European Union has been trying to harmonize this area in Member States. The 2003 Green Paper closely analyzed the standards of procedural safeguards in the European Union. It was confirmed that the cited safeguards already enjoyed recognition at a legal level in most of the Member States; their application in practice was dissimilar, however, a fact that justified joint action.

From then until now, we have witnessed two different stages. The first stage is represented by the 2004 Commission proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, which remained unsuccessful because Member States could not agree on it in the Council.² After the failure of this proposal, a new course on the matter was initiated through the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.³ Unlike the 2004 proposal, the Roadmap preferred to address each of the procedural guarantees separately, based on their importance and complexity, with the pretext of granting each of them an added value.⁴ As a result of this Roadmap, a total of six Directives were adopted. However, the first three Directives were adopted in the period 2010-2013; a second development period culminated in the publication of three other Directives in 2016. One aspect from the Roadmap has not taken up yet, namely that relating to detention and provisional detention (measure f) of the Roadmap).

It should be noted that two of the three Directives adopted in 2016 have yet to be transposed into the Spanish legal system: Directive 2016/343/EU of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings,⁵ and Directive 2016/800/EU of 11 May 2016, on procedural safeguards for children who are suspects or accused persons in criminal proceedings.⁶ The following sections of the article will deal with the most relevant aspects of the new regulation in Spain on safeguards for suspects or accused persons in criminal proceedings, as a consequence of the already transposed four Directives.

II. Right to Translation and Interpretation

The transposition into Spanish law of Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings,⁷ was delayed by a year and a half and took place through amendment of the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*, hereinafter LECrim) by means of the Organic Law 5/2015 of 27 April 2015.⁸ The law introduced a new chapter into the LECrim entitled “On the right to translation and interpretation,” (Arts. 123 to 127 LECrim). The new provisions recognize the rights enshrined in the Directive as part of those enjoyed by the suspected person (Art. 118 lit f) LECrim). Lastly, Art. 416.3 incorporates the professional secrecy of translators and interpreters; the norm stipulates the dispensation from the obligation to testify as a witness in criminal proceedings as regards the facts with respect to which the translators’/interpreters’ intervention referred to.

Prior to this reform, the right to interpretation was practically limited to interrogation by police or judge, both in the pre-trial phase and during the oral trial. The right to translation was restricted to informing the detainee of his or her rights by providing a form in the most common languages.⁹ With the transposition of the Directive, the right to interpretation and translation is enhanced; it is designed as a guarantee for those under investigation or for accused persons who do not understand or speak Spanish or the official language (e.g.

Catalan, Basque, etc.) in which the procedure is being carried out. The right also extends to persons with sensory disabilities. The assistance of an interpreter is now guaranteed from the beginning of the procedure; it is expressly mentioned that the assistance must be guaranteed at the first interrogation by the police, the courts, or the public prosecutor's office¹⁰ as well as in all court hearings. It also covers conversations that the suspected or accused person may have with his or her lawyer. Unlike the Directive – which does not specify the mode of interpretation – the Criminal Procedure Act indicates its preference for simultaneous and consecutive interpretation, both of which require the physical presence of the interpreter next to the suspected or accused person. If this is not possible, the assistance of the interpreter may be provided by videoconference or any other means of communication.

The translation of documents is limited to those that are essential to guaranteeing the right of defense of suspected and accused persons who do not speak or understand the official language (Spanish or Catalan, Basque, etc.), in which the proceedings are to be conducted. These documents include the order of imprisonment, the indictment, and the sentence – ultimately, any other document according to the circumstances of the case if it is so declared by a judicial decision. In accordance with the Directive, Art. 123.4 LECrim requires the translation to be carried out within a reasonable period of time and, to this effect, provides that the applicable procedural periods will be suspended as soon as the translation is agreed by the judge, court, or public prosecutor's office.

Both interpretation and the translation are free of charge, meaning that expenses incurred from the exercise of such rights will be borne by the public administration, regardless of the outcome of the proceedings. Unlike the right to interpretation, however, the right to translation can be waived by the suspect or accused person. The Directive requires the waiver to be duly registered (Art. 7), an aspect that the Spanish legislator has not yet considered.

It should be noted that Spain has failed to meet the quality requirements for interpretation and translation as set out by the Directive. On the one hand, anyone who knows the required language is permitted to be involved as an interpreter, without Spanish regulations requiring a degree, the justification being reasons of urgency that are not specified. On the other hand, Spain has failed to comply with the obligation to create an official register of independent translators and interpreters who are appropriately qualified.¹¹

III. Right to Information

The deadline for transposing Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings¹² into the national law of the Member States was 2 June 2014. The transposition into Spanish law took place late and successively through different legal reforms. With a delay of almost a year, the transposition began by means of the aforementioned Organic Law 5/2015 of 27 April 2015 that modified the Criminal Procedure Act (LECrin).¹³ Organic Law 13/2015 of 5 October 2015 continued the transposition six months later, modifying the Criminal Procedure Act anew.¹⁴ Ultimately, the Act 13/2018 of 11 June 2018,¹⁵ was adopted with the aim of guaranteeing the right to information to the requested person in the case of a European Arrest Warrant.

Prior to the reform, most of the safeguards related to the right to information were already recognized in the Criminal Procedure Act. However, transposition of Directive 2012/13 in Spain led to improvements on the position of the suspected or accused person and, in particular, the subject deprived of liberty.¹⁶ With regard to the person under criminal investigation, there are two outstanding novelties: first, there is now the obligation to update information on the facts the person was charged with and on the subject matter of the investigation in the face of any relevant change emerging during the investigative procedure by the Spanish investigative judge. Second, in order to safeguard the right of defense, the Spanish legislator introduced the

express recognition of the right to examine any actions in due time and, in any case, prior to the taking of a statement (Arts. 118.1 a) and b) LECrim).

The advances made with respect to the detainee are particularly important, since the catalogue of rights about which he/she must be informed has been broadened, and the way in which the information must be provided has been significantly improved. The catalogue was extended with two new rights: the right to access the material of the proceedings that are essential to challenge the legality of the detention or deprivation of liberty and the detainee's right to communicate by telephone, without undue delay, with a third party of his or her own choice (Art. 520.2 d) and f) LECrim). Possibility to access the essential materials of the proceedings for the purpose of challenging the detention, which is of particular relevance,¹⁷ the Spanish law deviates, however, from the Directive. While Art. 7(1) of the Directive requires Member States to surrender any documents related to the specific file that are in the possession of the competent authorities and that are fundamental to effectively challenging the legality of the detention to the detainee or his/her lawyer, the Spanish law only gives the right to access these documents. Another element of the Spanish law is that the information must be provided in written form in clear language, adapted to the addressee in view of his or her personal circumstances, such that the detainee can keep the letter of rights in his/her possession and consult it at any time during the detention.

IV. Right of Access to a Lawyer

Within the set deadline, Spain transposed Directive 2013/48/EU of 22 October 2013 “on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.”¹⁸ The transposition initially took place through the amendment of the Criminal Procedure Act by means of Organic Law 13/2015 of 5 October 2015.¹⁹ However, Act 3/2018 of 11 June 2018 completed an aspect omitted at the time of transposition in 2015, namely the right to double defense of the requested person in case of a European Arrest Warrant and surrender procedure; i.e., the appointment of a lawyer in the issuing country for the person detained in Spain.²⁰

Prior to the reform, the regulation of access to a lawyer in Spanish law was already quite extensive, since representation of the defendant by a lawyer was mandatory except for minor offences.²¹ If the suspect or accused does not appoint a lawyer, legal counsel is appointed *ex officio*. Some aspects of the right of access to a lawyer have been improved, however, following transposition of the EU instrument. This includes particularly the introduction of a confidential interview between the lawyer and the person under investigation, prior to the interrogation of any authority, including the police authority (Art. 520.6 d) LECrim). This possibility had previously only been provided for in criminal proceedings against minors. The transposition also clarified the right by expressly stating that the presence of the lawyer must be taken into account in all statements made by the person under investigation as well as in proceedings involving identity parades, face-to-face confrontations, and reconstruction of the scene of a crime. This aims at informing the suspect of the consequences of giving or refusing consent in the face of such proceedings (Art. 520.6 b) and c) LECrim). Furthermore, the reform has been used as an opportunity to improve conditions for the provision of *ex officio* legal representation by reducing the time available to the lawyer to go to the detention facility from eight to three hours from the moment he receives the order (Art. 520.5 LECrim).

Other novelties include the requirements to be met for a waiver of access to a lawyer in order to effectively handle those cases in which the waiver is permitted, i.e., crimes against road safety. This means that clear and sufficient information must be given to the person concerned in simple and understandable language about the content of his/her right of access to a lawyer and about the consequences of the waiver; the waiver can be revoked at any time (Art. 520.8 LECrim). Finally, the confidential nature of communications

between the person under investigation and his/her lawyer is expressly recognized;²² an exception is made in the two following cases: solitary confinement and when there are signs that the lawyer is involved in criminal acts that are the subject of the investigation.

As the title of Directive 2013/48 indicates, the European instrument does not only cover the right of access to a lawyer but extends to other rights of defendants in connection with the possibility of communicating with the outside world during deprivation of liberty: the right to inform a third party and the right to communicate with third parties and consular authorities. Both elements have been incorporated by means of the aforementioned Organic Law 13/2015 modifying Art. 520 of the Criminal Procedure Act.

As a consequence, the detainee has the right to inform, without undue delay, a relative or person of his/her choice about his/her deprivation of liberty and the place of custody in which he/she is being detained at all times (Art. 520 e) LECrim). The detainee also has the right to communicate by telephone with a third party of his/her choice, in the presence of a police officer or similar authority designated by the judge or prosecutor (Art. 520 f) LECrim). If the detainee is a foreigner, he/she has the right to have the deprivation of liberty and the place of custody communicated to the consular office of his/her country and shall be entitled to receive visits from their representatives, to communicate with them, and to conduct correspondence with them (Art. 520 g) LECrim). If the foreign detainee has two or more nationalities, he/she may choose which consular authorities to contact and with whom to communicate (Art. 520.3 LECrim). There is no exception to informing family members and consular authorities of the deprivation of liberty and the place of custody, even in cases in which solitary confinement has been ordered; this is to ensure that no secret detention is carried out.²³

V. Right to Legal Aid

The transposition into Spanish law of Directive (EU) 2016/1919 of 26 October 2019 “on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings”,²⁴ took place by the deadline. Act 3/2018 of 11 June 2018 reformed the Act 1/1996 of 10 January 1996 on legal aid.²⁵ Prior to the reform, Spanish law already offered broad coverage of free legal aid. For this reason, and also because of its close relationship with the right of access to a lawyer, transposition of the Directive has been simple and rapid. It took also advantage of the legal reform introduced in Spain on occasion of the transposition of the European Investigation Order.²⁶

The main new aspect consists in the extension of free defense counsel and representation when the intervention of a lawyer is not mandatory (this relates to procedures for minor offences). However, it is required that the court agrees on legal aid taking into account the relevance of the offence and the personal circumstances of the applicant (reformed Art. 6.3 of Act 1/1996). Furthermore, the procedure for substitution of the initially designated lawyers at the request of the beneficiary is regulated. The substitution requires a duly justified request, whose purpose is to give effect to the right to free legal aid. The request for substitution is submitted to the competent bar association, which has to reach a decision within fifteen days; the decision denying the appointment of a new lawyer may be challenged (new Art. 21bis of Act 1/1996). Ultimately, another new aspect of the transposition is that the specific needs of persons in a vulnerable situation must be taken into account (new paragraph introduced in Art. 1 of Act 1/1996 making the Spanish Act on Legal Aid compatible with Art. 9 of Directive 2016/1919).

VI. Final Remarks

Art. 48(2) of the Charter of Fundamental Rights of the European Union states that respect for the rights of the defence of anyone charged shall be guaranteed. Since the solemn proclamation of the Charter in December 2000, the European Union has come a long way towards harmonization of the procedural safeguards in its territory, which culminated in the 2009 Roadmap to strengthen the procedural rights of suspects and accused persons in criminal proceedings. This Roadmap prioritized a series of procedural safeguards that are considered essential; consequently, six Directives were adopted from this Roadmap from 2010 to 2016, except the aspect of provisional arrest (Measure f) that is to complete the long-awaited status of the suspected and accused persons in criminal proceedings.

The Spanish legislator has already transposed four of the six Directives. Corresponding procedural rights had already been recognized before the transposition, but the implementation of the EU Directives led to several improvements in defence rights, which can be particularly observed as regards the right to translation/interpretation and the right of access to a lawyer.

The transposition of two of the six Directives is still pending (presumption of innocence/right to be present at trial and procedural safeguards for children who are suspected or accused of crimes), with Spain failing to complete transposition in time. The lack of government in Spain from March 2019 to January 2020 as well as the management of the Covid-19 crisis since March 2020 have not been helpful in furthering the implementation of these two Directives. The lack of transposition of Directive (EU) 2016/343 may be excusable, since the enshrined right to the presumption of innocence and the right to be present at a trial are already guaranteed in the Spanish Criminal Procedure Act. The transposition of Directive (EU) 2016/800, which will require the amendment of Organic Law 5/2000 of 12 January 2000 regulating the criminal liability of minors, entails more challenges. Among other issues, it will be necessary to determine how to give effect to the reinforced right to information available to children. Another issue will concern the right to an individual assessment, taking into account the personality and maturity of the child, his/her economic, social, and family context as well as any specific vulnerability.

1. COM(2003) 75 final.↵

2. COM(2004) 328 final. In connection therewith, see F. Valbuena, "Adaptation of the Proposal for a Council Framework Decision on Procedural Safeguards to the Spanish Legal System", in: M. De Hoyos (ed.), *Criminal proceedings in the European Union: essential safeguards*, 2008, p. 163, 165–168; M. Jimeno-Bulnes, "The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union", in: E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union*, 2008, pp. 171–202.↵

3. O.J. C 295, 4.12.2009, 1.↵

4. For further information on this matter, see M. Jimeno-Bulnes, "The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings", (2009) *eucrim*, 157–161.↵

5. O.J. L 65, 11.3.2016, 1.↵

6. O.J. L 132, 21.5.2016, 1.↵

7. O.J. L 280, 26.10.2010, 1.↵

8. Boletín Oficial del Estado (henceforth BOE) 101, 28.4.2015.↵

9. C. Arangüena, "EU Directives on harmonization of procedural safeguards of suspected and accused persons. Their implementation into the Spanish Law", (2019) 1 *REE*, 5, 7. <<http://www.ree-uva.es/images/numeros/2019-1/2019-em-1-5-40.pdf>> accessed 2 December 2019.↵

10. The need for interpretation may be necessary even before the first interrogation for any proceedings are carried out in the presence of the accused with the assistance of his/her counsel, so that the suspected person may receive their advice and know the scope of the proceedings beforehand. See, in this context, M. López, "La modificación de la Ley de Enjuiciamiento Criminal en materia de derechos y garantías procesales", (2015) 8540 *Diario La Ley*, 1, 8.↵

11. Cf. Art. 5(2) of Directive 2010/64. The first final disposition of Organic Law 5/2015 set a maximum deadline of one year (28 April 2016) for the submission of a respective bill. This bill has not been published to date.↵

12. O.J. L 142, 1.6.2012, 1.↵

13. This Organic Law gave new wording to Arts. 118, 302, 505, 520 and 775 LECrim.↵

14. BOE 239, 6.10.2015. This Organic Law reformed Arts. 118 and 520 again, introduced the new Art. 520 *ter*, and modified Art. 527 LECrim.↵

15. BOE 142, 12.6.2018. This Law reformed Art. 50 of Act 23/2014 of 20 November 2014 on mutual recognition of judicial decisions in criminal matters in the European Union.↵
16. C. Arangüena, (2019) 1 *REE*, *op. cit.* (n. 9), p. 5, 15.↵
17. M. Serrano, "Directiva relativa al derecho a la información en los procesos penales", in: M. Jimeno (ed.) and R. Miguel (coord.), *Espacio judicial europeo y proceso penal*, 2018, p. 219, pp. 241–245.↵
18. O.J. L 294, 6.11.2013, 1.↵
19. This Organic Law modified Arts. 118, 509, 520, 527 LECrim and introduced the new Art. 520 *ter*.↵
20. Art. 50 of Act 23/2014 of 20 November 2014 on mutual recognition of judicial decisions in criminal matters in the European Union.↵
21. C. Arangüena, (2019) 1 *REE*, *op. cit.* (n. 9), p. 5, 20–23.↵
22. F. Valbuena, "Directiva relativa al derecho a la asistencia letrada en los procesos penales", in: M. Jimeno (ed.) and R. Miguel (coord.), *op. cit.* (n. 17), p. 249, 254–257.↵
23. This follows from a joint interpretation of Arts. 520.2 e) and 527.1 LECrim.↵
24. O.J. L 297, 4.11.2016, 1. In this regard, S. Cras, "The Directive on the Right to Legal Aid in Criminal and EAW Proceedings. Genesis and Description of the Sixth Instrument of the 2009 Roadmap", (2017) *eucrim*, 34.↵
25. Specifically, a last paragraph was introduced in Art.1, Art. 6.3 was modified, and a new Art. 21 *bis* was introduced under the heading *Substitution of the assigned professional*.↵
26. C. Arangüena, (2019) 1 *REE*, *op. cit.* (n. 9), p. 5, 32. For the transposition of the legal aid Directive into Spanish law, see also the article by B. Vidal Fernández, in this issue.↵

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