MODULE III JUDICIAL COOPERATION IN CRIMINAL MATTERS WITHIN THE FRAMEWORK OF THE EUROPEAN UNION

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1. BACKGROUND

As tutor for Module III, I would like to welcome all those of you who have shown interest in this area of study, firstly by enrolling on this course, and now by starting work on this new set of contents.

The course has been designed to allow students to make gradual progress, building on the introductory contents of Module I, which offered a historical overview of judicial cooperation in criminal matters within Europe and on a global scale. Module II engaged in an in-depth analysis of certain instruments of cooperation created within the framework of the Council of Europe. Modules III and IV also analyse instruments of cooperation, albeit focusing on those that have been generated within the context of the European Union.

In order to be suitably equipped for the study of these two modules, it is advisable to re-read some of the ideas set forth in units 2 and 3 of Module I, which allow the three units of Module III to be contextualised in the highly specific and singular legal and institutional framework of the European Union. The complex and continually evolving nature of this environment is made patent in the three units you are about to read and in those included in Module IV. The European instruments that form the subject matter of the following seven units are very different in terms of their legal nature, progressing from the more traditional instruments, of a conventional nature, to the genuinely European ones, such as the Framework Decisions that, in turn, include, thanks to the precedent that Prüm represented, main characteristics such as mutual recognition or availability that, together with the principle of harmonisation, regulate cooperation in criminal matters in the European Union, as highlighted by the Treaty of Lisbon, in force since 1.12.09, which subjects judicial cooperation in criminal matters to

regulation by means of the standard legislative procedure.

2. CONTENTS

In its three units, Module III examines three of the instruments the EU has generated as part of its strategy to improve mechanisms for judicial cooperation, one of the four major objectives set by the Tampere Council. Similarly to Module IV, it performs an in-depth analysis of more ambitious instruments which are based on the principle of the mutual recognition of court decisions.

At first glance, it would seem that these instruments form a sequential series, representing the past, present and future of judicial assistance between the Member States. However, although the module units do in fact follow a chronological order, they refer to instruments that exist side by side, complementing and partially overlapping each other in time and in their material scope. The areas where each one is applied are not always the same, and they have an unequal bearing on the police-related and judicial aspects of cooperation in criminal matters. The units are distributed as follows:

- Unit 7, by the lecturer in Procedural Law of the University of Santiago de Compostela Raquel Castillejo Manzanares, starts the module with a study of the so-called "Schengen Area".
- Unit 8, for which I myself am responsible, focuses on The 2000 Convention.
- Lastly, Unit 9, written by Fernando Martínez Pérez, Senior Judge at Trial Court no. 7, Seville, analyses the principle of availability, the Treaty of Prüm and the regulation of access to data from the criminal record.

SCHENGEN

Grounded in the proposal for the elimination of frontiers set forth in the Single European Act, and the free circulation of people, goods, services and capital, already provided in the Treaty of Rome, the **Schengen** Treaty of 1985 and the Schengen Implementation Agreement of 1990 established an area for the free circulation of people which required a series of "compensatory measures". The most relevant of these for the purposes of this course were the speeding up of international judicial assistance and the simplification of extradition procedures. Schengen broadened the

scope of cooperation, enabled documents to be served by post and letters rogatory to be sent directly to the requested authority, narrowed the possibilities for raising reservations to search or seizure requests, made it more difficult to refuse extradition on the grounds of the lapse of the offence, included tax offences among those subject to the extradition procedure, established direct communication between the central authorities on this matter, provided a simplified extradition procedure where the claimed person had expressed consent, and offered a new formulation of the *non bis in idem* principle. Regarding police cooperation, a new information system called SIS was created which allowed the exchange of data on persons and objects, and introduced some innovative concepts such as "hot pursuit".

The Schengen subsystem has slowly expanded from its five original members to almost the entire territory of the Union. Although it - quite remarkably - does not include the UK and Ireland, the group has welcomed third-party states such as Iceland, Norway and Switzerland, and was integrated in the Community acquis through the Protocol to the Treaty of Amsterdam of 1997, although still within what was formerly the Third Pillar.

THE 2000 CONVENTION

With the Treaty of Amsterdam already in force, on 29 May **2000** the Council issued an instrument making use for the first time of the powers it holds by virtue of article 34.2 d) of the Treaty on European Union, according to which the Council may adopt, with the unanimity of its members and at the proposal of any Member State or of the Commission, conventions - among other instruments - which it can in turn recommend to the Member States for their adoption. The first intergovernmental "sponsored" instrument to be produced through this singular procedure was the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. This instrument is undoubtedly a convention, requiring ratification by the different States, but it is also a convention of the European Union, which required the opinion of the European Parliament for its drafting, entered into force after being adopted by half the Member States, and whose provisions, validity and application measures are subject to preliminary ruling by the Court of Justice. Furthermore, it is not an autonomous convention, but a supplementary one, as it explicitly defines itself in relation to the European Mutual Assistance Convention of 1959, the Schengen

Implementation Agreement and the Benelux Treaty. As a result of this, its provisions focus on a particular group of matters, and incorporates simplified versions of elements laid down in previous conventions, such as document service by post and direct communication between judicial authorities, facilitating the application of the principle of *forum regit actum* and paying closer attention to certain forms of assistance, such as controlled deliveries, joint investigation teams and undercover agents, which pertain, albeit non-exclusively, to the area of police cooperation. The genuinely novel elements of the Convention are the first European regulation of statements given through video-conference, and the interception of telecommunications.

PRINCIPLE OF AVAILABILITY: TREATY OF PRÜM AND THE CRIMINAL RECORD

Lastly, on 27 May 2005, in the midst of the process for the ratification - or to be more precise, non-ratification - of the Treaty establishing a Constitution for Europe, representatives of seven countries (Germany, Austria, the three Benelux states, Spain and France) gathered in the German town of **Prüm**, where they signed a treaty "to step up cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration". The initiative, which was later joined by Italy and Finland, has been described as the manifestation of a false "reinforced cooperation", a modality that under the terms of the TEU requires the agreement of at least eight States, once all possible efforts have been spent to reach a solution through the Community institutions. Obviously, these conditions were not present prior to the signing of the Treaty. In terms of its content, however, the Treaty of Prüm is in line with the objectives of reinforced cooperation to the extent that it provides specific elements such as the creation of DNA and epidermal ridge pattern registers, with the undertaking to exchange information on the contents of such files; security in large-scale cross-border developments such as sports events; the fight against terrorism through measures such as the transfer of information, police authority to carry arms in States other than their own, and the presence of security personnel on board flights; the fight against illegal migration and cross-border police cooperation.

The Treaty of Prüm implements the principle of availability referred to in the Programme of The Hague in 2005. Some of the contents of the Treaty were incorporated into the Union's legal framework by means of Decisions JHA/615/2006

and JHA/616/2008 and further implementation of the principle of availability is contained in Framework Decision 2006/960/JHA, of 18 December 2006, on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union and, in relation to the criminal record, Framework Decision 2009/315/JHA.

3. METHODOLOGY

The methodology followed in this module, which is part of a distance-learning course, has the main advantage that it is easy to follow by those of us who have numerous professional commitments and little spare time, as it allows the required reading, studying and thinking to be tackled when it best suits our timetable. Moreover, some of the units may offer different "reading layers", with a fourth layer dealing particularly with the Spanish domestic perspective.

It should be borne in mind, however, that despite the face-to-face activity programmed for the end of the course, distance learning necessarily involves a certain degree of separation between the course participants which can only be offset with active participation through use of the different instruments provided. In addition to the individual or bilateral instruments available - self-evaluation and practical cases - the course platform also offers the possibility to take part in debate forums and to send enquiries via email. Use of these tools favours interaction between all the participants, thus enriching the course contents, which are by nature "closed" or "static". A further element that adds value to the course is the participation of students from a variety of countries, with experiences of different legal systems. Their opinions may prove an antidote for intellectual self-indulgency.

Your participation is essential to ensure that these assets and instruments function as elements of an efficient methodology, resulting in an optimal assimilation of the contents of this module and the course as a whole. Hence, in view of the experience gained in the foregoing modules, I encourage you to commit even more of your time and energy to the course. For my part, I also pledge to answer any queries, comments and suggestions you may have, so that these weeks will prove a satisfactory personal and professional experience for all.

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