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UNIT IX

The principle of availability: the criminal record and the Prüm Convention

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SUMMARY

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AIMS

To inform the participants of the validity of the principle of availability in the context of the European Union's policy on combating terrorism and crime, organised crime in particular, the analysis of the historical development of this principle and the main regulatory texts, both of the EU itself and particular to some Member States, that at present, based directly or indirectly on said principle, serve to provide the broadest collaboration in said fight. In this regard we will study the Prüm Convention and several Decisions.

The last part of the unit will be devoted to the study of these rules in relation to the exchange of information from the criminal record that, while not based on said principle, but rather on the mutual recognition of judicial decisions, is undoubtedly a very useful instrument which serves the above-mentioned purpose of combating terrorism and non-terrorist crime.

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1.- The principle of availability.

It is well known that one of the EU's aims is to develop a space of freedom, security and justice. The achievement of this aim requires, among other things, and more and more in view of the development of terrorism and transnational organised crime, a high degree of cooperation between the police and judicial authorities of the Member States, and as part of that an ever easier exchange of police and judicial information.

Aware of the need to improve the fight on crime, in particular terrorism and organised crime initially, the Commission proposed establishing a European information policy aimed at the authorities responsible for ensuring law enforcement, improving information exchanges.

A result of this was the Communication of the Commission to the European Parliament and the Council "Enhancing Police and Customs Co-operation in the European Union"[1], of 18 May 2004 and the Communication of the Commission to the European Parliament and the Council of 16 June 2004 "Towards enhancing access to information by law enforcement agencies"[2].

The first of the Commission communications evaluates the measures and actions adopted since the Treaty of Amsterdam[3] in the sphere of police and customs cooperation, a key element in maintaining a space of security.

In the communication, the Commission highlights the factors that hinder police and customs work which, it its opinion, are the following:

- the nature of police work
- the lack of strategic approach

[1] COM 2004/376 final. Not published in the OJ.
[2] COM 2004/429 final. Not published in the OJ.
[3] Entry into force on 1 May 1999.

- the proliferation of non-binding instruments
- the decision-making procedures in the Third Pillar
- the insufficient implementation of legal instruments adopted by the Council
- the lack of empirical research on police and customs co-operation
- the nature of co-operation between police and customs
- databases and communication systems.

The communication deals with the actions and the assessment of the activity of the police and other services in relation to cooperation, considering, among other things, that the most relevant articles of the Schengen Convention for police cooperation are Articles 39, 44, 45, 46 and 93 *et seq*, with little use having been made of Articles 40, 41, 42 and 43.

After a further series of considerations, the Commission set itself the objective of improvements in relation to:

- the nature of police work: raise awareness regarding mutual trust among the national authorities, considering it essential that central national contact points be designated to administer the exchange of information and the Member States should have an electronic system to ensure a rapid and secure exchange of information, with the judicial authorities using the technical instruments that facilitate cooperation;
- the lack of strategic approach: after confirming and lamenting the lack of a strategic approach, the communication acknowledged that the fact that unanimity is still the rule in decision making in this area slows progress even more;
- the proliferation of non-binding instruments as a problem for cooperation in the Third Pillar: measures that can be effectively implemented by all need to be established;
- the decision-making procedures in the Third Pillar: the need to decide by unanimity and the right of initiative shared by the Member States and the Commission means that progress is scarce. It envisaged that the European

Constitution (unsuccessful as we know) was to considerably improve the decision-making procedure;

- the implementation of legal instruments: it recalled that the Laeken Council of Europe[4] reaffirmed the need for a rapid transposition of Decisions adopted by the European Union into national laws;
- research on police and customs co-operation: after confirming that empirical research in the field was scarce, the communication proposed providing the necessary means to increase it;
- the nature of co-operation between police and customs: the Commission stated the need for greater coordination and communication;
- third-pillar databases and communication systems: after citing the existence of several databases and communications systems (Europol Information System, SIS ...) the Commission asked about the interoperability of the different tools and proposed a study of three possible options: to merge the existing systems into a single one, to keep the systems independent and to allow creation of new systems as needed and to investigate and implement the harmonisation of the data formats and their respective access rules between the various systems.

The second of the communications proposed that the Member States adopt an information policy designed to:

- make accessible necessary and relevant data and information for EU law enforcement authorities, in order to prevent and combat terrorism and other forms of serious or organised crime;

- stimulate the production and use of high quality EU criminal intelligence, both strategic and operative;

- enhance trust between enforcement services, in particular, by means of the protection of personal data.

[4] December 2001.

Following along these lines, Chapter III.2.1 of the Hague Programme[5] states that the European Council is convinced that the consolidation of freedom, security and justice requires an innovative approach to the cross-border exchange of police information, with said exchange being governed, as of 1 January 2008, on the basis of the principle of availability, which means that, **throughout the Union, a police official in one Member State who needs information to perform his obligations can obtain it from another Member States and that the police body of the other Member State that possesses said information will supply it for the corresponding purposes, taking into account the requirements of the investigations underway in said state.**

In the Programme, the Commission is invited to present a "Proposal on the establishment of a principle of availability" which will strictly comply with the following essential conditions:

- that the exchange only take place for the purpose of complying with legal duties;

- the integrity of the data to be exchanged must be guaranteed;

- the need to protect the sources of information and guarantee the confidentiality of the data in all stages of the exchange and subsequently;

- standard rules must be applied regarding access to data as well as standard technical rules;

- respect for data protection must be supervised and appropriate monitoring of the exchange of information both before and after must be guaranteed;

- protection against improper use of the personal data and the right to the correction of incorrect personal data must be guaranteed.

[5] Communication of the Commission to the European Parliament and the Council, of 10 May 2005, "The Hague Programme: 10 priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice" [COM (2005)184 final – Official Journal C 236 of 24.9.2005].

Chapter 3.1 of the Council and Commission Action Plan implementing the Hague Programme[6] confirmed the presentation of the corresponding legislative proposal[7], together with a proposal on appropriate guarantees and effective avenues of appeal for the transfer of personal data, for the purpose of police and judicial cooperation in criminal matters.

The Preamble to the Proposal of October 2005 refers to the motivation and objectives of the same, and specifically by referring to the general context it sets out that there are seven main obstacles to information being available throughout the EU with a view to furthering, facilitating or accelerating the prevention, detection or investigation of crimes:

- Bilateral and multilateral agreements between Member States are geographically limited or do not allow Member States to supply information, meaning that the exchange of data depends on discretionary factors.

- The current forms of cooperation between police and judicial authorities generally require the intervention of national Europol units or central contact points. Direct exchange of information between authorities continues to be an exception.

- There is no EU-wide standardised procedure for requesting and obtaining information.

- There is no efficient EU-wide mechanism that makes it possible to ascertain whether available information exists and where it is.

- The differences in the conditions of access to and exchange of information, as well as in the differences between police, customs and judicial cooperation prevent an effective exchange of information.

[6] Adopted by the Justice and Home Affairs Council of 2 and 3 June 2005.
[7] Proposal for a Council Decision, of 12 October 2005, on the Exchange of information by virtue of the principle of availability COM/2005/0490 final, which was unsuccessful.

- The differences between the levels of protection hinder the exchange of confidential information.

- There are no standard rules for monitoring the legal use of the information obtained from another Member State and the possibilities of detecting the source and the original purpose of the information are limited.

The aim of this proposed Framework Decision, together with the other Proposed Framework decision on data protection, was to remove these obstacles.

Indeed, with a view to avoiding weakening the principle of availability, it was only possible to refuse to supply information on the following grounds:

- if it compromised the outcome of an investigation in progress;
- in order to protect a source of information or the physical wellbeing of a person;
- in order to protect the confidentiality of the information at all stages of processing;
- in order to protect the fundamental rights and freedoms of the persons whose data is processed by virtue of the Framework Decision

The proposal, also in the Preamble, set out the provisions in force in the field at that time, namely:

- Convention on the implementation of the Schengen Agreement of 1990. Article 39 thereof envisages the exchange of information between the police services that so request, but does not oblige the Member States to reply.

- The Europol Convention of 1995 and its protocols. According to Article 2, the aim of Europol is to improve the efficiency of the corresponding services in the Member States and the cooperation between them with a view to the prevention and fight against terrorism and other serious forms of international and organised crime.

- The initiative of the Kingdom of Sweden in relation to a proposal for a Framework Decision on the simplification of the exchange of information and intelligence, which seeks to improve the mechanism created by the Schengen Convention. This initiative seeks greater harmonisation of the legal framework in which the exchange of data takes place and a reduction of response times.

- The Treaty signed on 27 May 2005 in Prüm on enhancing cross-border cooperation, with a view, in particular, to combating terrorism, cross-border crime and illegal immigration.

With this Treaty[8], signed initially by seven EU Member States, it was agreed that at within a maximum of three years of its entry to force, an initiative would be put in place to transfer its provisions to the legal framework of the European Union.

On 15 January 2007 the initiative designed to transpose the Treaty of Prüm to said legal framework was presented[9].

Previously, and in order to continue progressing in the achievement of the aims of combating terrorism and organised crime, Framework Decision 2006/960/JHA, of 18 December 2006[10] emerged – which is considered by some authors and a first step towards the introduction of the principle of availability - "on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union"[11], which already established rules under which the security services of the Member States could exchange the information and intelligence available rapidly and effectively in order to conduct criminal investigations or criminal intelligence operations[12].

[8] See the corresponding section of this unit.
[9] Published in the OJ of 28 March 2007
[10] Published in the OJ of 29 December 2007.
[11] Spanish participants, see level 4 / [Para participantes españoles, ver nivel 4].
[12] See level 2 which studies the Framework Decision.

The initiative, presented by the German Presidency during the information meeting of ministers held in Dresden on 15 and 16 January 2007, bore fruit in the shape of the resolution adopted by the Justice and Home Affairs Council of the following 15th of February which agreed to integrate some parts of the Treaty of Prüm into the legal system of the European Union by means of a decision based on the third pillar. This led to Decision 2008/615/JHA, of 23 June[13]; its object and scope can be found in Article 1, which states as follows:

"By means of this Decision, the Member States intend to step up cross-border cooperation in matters covered by Title VI of the Treaty, particularly the exchange of information between authorities responsible for the prevention and investigation of criminal offences. To this end, this Decision contains rules in the following areas:

a) provisions on the conditions and procedure for the automated transfer of DNA profiles, dactyloscopic data and certain national vehicle registration data (Chapter 2);

b) provisions on the conditions for the supply of data in connection with major events with a cross-border dimension (Chapter 3);

c) provisions on the conditions for the supply of information in order to prevent terrorist offences (Chapter 4);

d) provisions on the conditions and procedure for stepping up cross-border police cooperation through various measures (Chapter 5)."

For our purposes, some of the statements made in the Preamble are significant, namely:

- In the Hague Programme, the European Council set forth its conviction that for that purpose an innovative approach to the cross-border exchange of law enforcement information was needed and to that end, the European Council accordingly stated that the exchange of such information should comply with the conditions applying to the principle of availability.

[13] Published in the OJ of 6 August 2008.

- For effective international cooperation it is of fundamental importance that precise information can be exchanged swiftly and efficiently. The aim is to introduce procedures for promoting fast, efficient and inexpensive means of data exchange.

- These requirements are satisfied by the Treaty of Prüm. In order to meet the substantive requirements of the Hague Programme for all Member States within the time-scale set by it, the substance of the essential parts of the Treaty of Prüm should become applicable to all Member States. This Decision therefore contains provisions which are based on the main provisions of the Treaty of Prüm and are designed to improve the exchange of information, whereby Member States grant one another access rights to their automated DNA analysis files, automated dactyloscopic identification systems and vehicle registration data [14].

- Closer police and judicial cooperation in criminal matters must go hand in hand with respect for fundamental rights, in particular the right to respect for privacy and to protection of personal data, to be guaranteed by special data protection arrangements, which should be tailored to the specific nature of different forms of data exchange.

Having regard to the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Slovenia, the Slovak Republic, the Italian Republic, the Republic of Finland, the Portuguese Republic, Romania and the Kingdom of Sweden, Decision 2008/616/JHA, of 23 June, was adopted.[15]

[14] In view of the fact that the Decisions contain provisions based on the Prüm Treaty, we will study the latter first and then go on to look at the content of the Decisions.
[15] Also published in the OJ of 6 August 2008.

Article 36 of the first of the Decisions establishes that Member States shall take the necessary measures to comply with the provisions of this Decision within one year of this Decision taking effect, with the exception of the provisions of Chapter 2, with respect to which the necessary measures shall be taken within three years; these terms are repeated in Article 23 of the second one.

2.- The Treaty of Prüm.

2.1.- Introduction

On 27 May 2005 seven EU Member States (the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain[16], the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria) signed a Treaty in the German town of Prüm "on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration", which established several measures for improving police, and consequently judicial, cooperation.

The forerunners of this treaty are the Schengen Agreement of 1985 and the 1990 Convention implementing it, known as "Schengen I" and Schengen II", and as a result it has been commented that with the Prüm Convention we are entering the third stage of development of the European area in the spheres regulated by these agreements.

The treaty, also known as Schengen III or Schengen Plus for the reasons just mentioned, has its origins in an initiative on enhanced cooperation presented by Germany, Belgium and Luxembourg, which was soon adhered to by Austria, the Netherlands, France and Spain[17], and any other Member State is free to join; as

[16] For Spanish participants only: ratified by Instrument of 18 July 2006, published in the Official State Gazette of 25 December 2006 / [Únicamente para participantes españoles: ratificado por Instrumento de 18 de julio de 2.006, publicado en el B.O.E. de 25 de diciembre 2.006].
[17] On 28 May 2004 the Justice and/or Home Affairs Ministers of Belgium, Germany, Luxembourg, the Netherlands and Austria signed a joint declaration stating their intention to establish a Convention to

mentioned earlier, it was born with the idea of being transposed into the legal framework of the EU,[18] thus allowing the 27 to benefit from the significant added value for cooperation that the treaty represents.

This notwithstanding, it should be highlighted that the Treaty of Prüm is a traditional treaty that sets the foundations for governmental cooperation outside of the Community framework established for police and judicial cooperation in the context of the space of freedom, security and justice, but one cannot study it without thinking of it continually within said context.

Jacques Ziller[19] considers that it is a manifestation of false enhanced cooperation[20], in view of the initial number of signatory states, seven and not eight as envisaged in the EU Treaty[21], although notwithstanding the above statement, he also states that it also constitutes actual enhanced cooperation, as one of its aims coincides with Article 29 of the EU Treaty, "preventing and combating crime, organised or otherwise, in particular terrorism".

The initial seven signatory states of the Treaty make the raison d'être and aims of the document clear: step up their cooperation, in order to combat terrorism, cross-border crime and illegal migration more effectively; for the further development of European cooperation, play a pioneering role in establishing the highest possible standard of cooperation, especially by means of improved exchange of information and while fully respecting fundamental rights at all times.

In order to achieve the above, Vuelta Simon[22] highlights that the states have established four main themes in the Treaty:

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develop cross-border cooperation regarding organised crime, terrorism and illegal immigration. After a year of talks, France and Spain were invited to join, and the convention was signed on 27 May 2005.

[18] See the comments on Decision 2008/615/JHA above.

[19] *El Tratado de Prüm*. Jacques Ziller. ReDCE no. 7, January-June 2007. Pages 21 to 30.

[20] See forms of enhanced cooperation in the Nice Treaty.

[21] Article 27.

[22] "The Prüm Treaty, a new tool for police cooperation in Europe". Samuel Vuelta Simon. Online Course on Judicial Cooperation in Criminal Matters in Europe. 2009 Edition.

a) Allow the Contracting Parties to grant other Contracting Parties automated access to certain national files.
b) Provision for the exchange of data to also cover the fight against terrorism, against those suspected of committing future terrorist attacks who are travelling or in order to contribute to fight against illegal immigration.
c) Enhance police cooperation techniques.
d) Thorough regulation of the protection of personal data, in an attempt to comply with the requirements for protection of individual rights and freedoms.

He goes on to say that the Treaty, as of the moment it establishes new channels for the exchange of information, addresses new problems of crime by stepping up the existing operational cooperation techniques between certain states, seeking ultimately to improve judicial proceedings, avoiding at the same time that needs for security impinge on citizens' freedoms, which represents a finished example of the principle of availability.

2.2..- Content of the Treaty.

2.2.1.- Automated searching of national files.

The concern of the signatories of the Convention with the identification of persons and vehicles as a means of obtaining the ends sought is worth highlighting. Chapter II, Articles 2 to 15 of the treaty refers to three types of national files: DNA profiles, fingerprinting data and vehicle registration data, granting the authorities of the other Contracting States immediate access to the information contained therein, by means of reference data, via contact points.

a) DNA profiles. In the treaty, the Contracting Parties undertake to open and keep national DNA analysis files for the investigation of criminal offences, each party guaranteeing that reference data is available in said files, although the reference data must not contain any data from which the data subject can be directly identified; the national contact points will be able to conduct automated searches of such reference data by means of a comparison of profiles, only for specific cases of criminal investigation and both in cases of matches where the profile of the corresponding person appears, and in the case of untraceables, which will appear in the reference data as such.

After the search is performed and, if applicable, there is a match between the profile sent by the consulting party and that stored in the file of the requested party, the former will be notified and the personal data will be transferred in accordance with the national law of the requested party, via the national contact point.

In addition to the above, there are rules (Article 7) aimed at obtaining cellular material and the transfer of DNA profiles when the profile of a particular person is not available and that person is in the territory of a Contracting State other than the one performing the investigation of a criminal offence.

b) Fingerprinting data. the Contracting Parties shall ensure the availability of reference data from the file for the national automated fingerprint identification systems established for the prevention and investigation of criminal offences. As with the DNA profiles, this reference data will not contain any data from which the data subject can be directly identified and the same will apply to untraceables.

With regard to the transmission of data, once a match is found, the rules are similar to those applying to DNA.

c) Vehicle registration data. In line with the internal law of the Contracting Party performing the search, it will be possible to carry out automated searches of the

national vehicle registration data in specific cases in relation to a full identification number or full registration of a vehicle; the search may refer to the owners or operators and the data of vehicle.

d) Supply of other data. The provisions of the Convention of the supply of information and data are not restricted solely to the investigation of criminal offences, and Articles 13 and 14 regulate scenarios regarding the prevention of criminal offences and in maintaining public order and security for major events with a cross-border dimension, particularly for sporting events[23] or the meetings of the European Council, either upon request or at the initiative of the supplying party.

2.2.2.- Measures for the prevention of terrorist attacks.

The new developments in this field are scarce, as the European Union had already shown its concern for the terrorist phenomenon[24]. Chapter III of the Treaty, Articles 16 to 19, regulates the supply of information for the prevention of terrorist attacks and the deployment of air marshals in flights.

The chapter envisages efforts in the exchange of information in order to prevent terrorist attacks. Article 16 allows the supply of personal data on individuals liable to commit terrorist acts, where particular circumstances give reason to believe that they may commit said acts[25].

Meanwhile, Articles 17 and 18 establish rules on the use of air marshals, with the conditioned power[26] to carry arms and ammunition on flights, which each Contracting Party will implement in line with their air safety policies, as well as

[23] On this point, see, for example, Decision 2002/348/JHA and the Council Resolutions of 6 December 2001 and 17 November 2003.
[24] On this point, see, for example, Council Decision 2005/671/JHA, Joint Action 96/610/JHA, Council Decision of 3 December 1998 and Decision 2002/956/JHA.
[25] See Articles 1 to 3 of Council Framework Decision 2002/475/JHA, of 13 June 2002, on combating terrorism.
[26] See Article 18.2.

references to communications that must be made to the destination state of the aircraft, three days in advance.

2.2.3.- Measures for combating illegal immigration.

Chapter IV of the Treaty is devoted to combating illegal immigration. It sets out two police cooperation techniques that facilitate the exchange of information and help redistribute the measures devoted to combating this kind of immigration. Articles 20 and 21 are designed to develop cooperation by means of sending document advisers for the detection of false documents, with advising and training duties[27] and, pursuant to Article 23, to provide support in cases of repatriation.

Special attention is paid to the detection of false or falsified documentation and to the abuse of documents in an effort to further develop the provisions of the 1985 Schengen Agreement, the 1990 Convention on the implementation of the same, on the gradual suppression of border controls and the Chicago Agreement of 7 December 1944 on civil aviation.

2.2.4.- Other forms of cooperation.

Chapter V of the Treaty regulates other forms of cooperation. In reality what it does is enhance border cooperation techniques that had already been implemented by several countries by means of the creation of police and customs cooperation centres situated at the borders. Article 27 of the convention cites eleven cooperation scenarios (which should not be considered a closed list) which correspond in practice to what said centres had already been exchanging up to that point, namely:

- identifying owners and operators of vehicles and providing information on drivers, masters and captains of vehicles, vessels and aircraft, in so far as not already provided for in Article 12;

[27] The document advisers are specialists in the detection of false or forged documentation, as well as in the detection of the abuse of genuine documents as well as in illegal immigration.

- supplying information on driving licences, navigation licences and similar permits;

- ascertaining individuals' whereabouts and place of residence;

- checking on residence permits;

- ascertaining the identity of telephone subscribers and subscribers to other telecommunications services, where publicly accessible;

- establishing the identity of individuals;

- investigating the origin of items such as arms, motor vehicles and vessels (enquiries via trade channels);

- supplying data from police databases and police records and supplying information from official records accessible to the public;

- issuing urgent alerts concerning arms and explosives and alerts concerning currency counterfeiting and securities fraud;

- supplying information on practical implementation of cross-border surveillance, cross-border hot pursuit and controlled deliveries, and

- ascertaining an individual's willingness to make a statement.

But the Convention is not referring just to these centres, it also regulates another four possibilities for police cooperation, namely joint patrols, border crossings, joint operations and what is generically referred to as “cooperation upon request”, aimed at obtaining certain data, regulated in Article 27.

a) Joint patrols. This concept is dealt with in Article 24 of the Convention, which envisages the creation of police patrols comprising agents from the different Member States who can perform joint operations throughout the territory of the Contracting Parties and not just in the border regions, as had previously been the case. It is worth highlighting that the agents taking part in these patrols, the practical aspects of which are to be regulated in implementing agreements,[28] will be subject to the domestic

[28] See Article 44 of the Convention.

legislation of the State in which they are acting and must act pursuant to the instructions received from the authorities of said State.

b) Border crossings. Article 25 of the Convention allows the police officers of a Contracting Party, in urgent situations and acting without the prior authorisation of the neighbouring state, to cross the shared border in order to adopt the necessary provisional measures to avert imminent danger to the life or physical integrity of individuals if there is a risk that the danger will materialise in the event of waiting for the host State's officers; the host State must be notified without delay and will confirm receipt of that notification and without delay take the necessary measures to avert the danger and take charge of the operation.

As you can see, this represented a major step forward in police cooperation, as prior to that it was only possible to pursue criminals in the territory of another state when discovered *in flagrante* and provided it was not possible to immediately notify the authorities of the State being entered (known as hot pursuit).

c) Joint operations. In addition to joint patrols, Article 24 of the Convention mentions other forms of joint operations. They are explicitly referred to in Article 26 which establishes rules for cooperation for major events, disasters and serious accidents.

2.2.5.- Provisions regarding the protection of personal data.

As has been highlighted on several occasions in this unit, the Member States of the EU, and the signatories of the Treaty of Prüm in particular, repeatedly express their concern regarding the guarantees of the fundamental rights of the persons involved. In this regard, they have set out in Chapter VII (Articles 33 to 41) provisions for the protection of data that will apply to those to be transferred or that have been transferred under the Treaty.

It is worth highlighting a series of basic points in relation to the wide-ranging regulation:

- In relation to the level of data protection required, the level of protection of personal data in its national law must at least be equal to that resulting from the Council of Europe Convention of 28 January 1981 and its Additional Protocol of 8 November 2001 and in doing so, shall take account of Recommendation No R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe.

- The recipient of the data will only use it for the purpose for which it was supplied (the principle of a link to the purpose), pursuant to its internal law, unless there is an express authorisation from the supplying party when its internal law so permits.

- The data supplied will only be processed by the competent authorities depending on the purpose for which it was supplied.

- The Contracting Parties must ensure the accuracy and current relevance of personal data, and if the supplying party discovers that data is incorrect or should not have been supplied, it is obliged to correct or delete it, as appropriate. Any data unlawfully supplied or received will also be deleted.

- They are also obliged to keep different documentation and a thorough record of searches and data supplied, to protect against abuse use and the legal control of supply or receipt is regulated, stating that the competent independent body responsible for data protection in each party will assume responsibility.

- The right of the persons involved to information, correction, cancellation and indemnification for damages is also regulated.

- The recipient party is obliged to inform the supplying party, if so requested, on the processing of the data supplied and the results obtained.

We cannot leave this section of the unit without making a brief reference to the provisions on implementation, contained in Chapter VIII, to the existence of Annexes 1 and 2 and to the Joint Declaration of the signatories[29] where some of the most noteworthy provisions include the obligation assumed by the Contracting Parties to appoint national contact points and/or competent authorities and agents for the different areas regulated in the Treaty, to be done upon depositing the act of ratification, acceptance, approval or accession, by means of a declaration addressed to the depositary country, namely the Government of the Federal Republic of Germany, the possibility to conclude execution agreements with a view to its administrative implementation[30], and the rules it contains in relation to its territorial scope (Article 45) and regarding its relationship with other bilateral or multilateral conventions.

On this latter point, regulated in Article 47, the Treaty states that its provisions will only apply where they are compatible with the law in force in the European Union, both at the time of drafting and in the event the Union subsequently issues rules that can affect the scope of the Treaty, in which case the provisions of the convention will cease to apply in favour of Union law. The parties' right to apply any bilateral or multilateral conventions existing between them in their mutual relations is recognised, although in the event of incompatibility, the provisions of this treaty will prevail.

3.- Decisions 2008/615/JHA and 2008/616/JHA.

3.1.- Decision 2008/615/JHA

As stated earlier, Decision 2008/615/JHA, of 23 June, seeks to incorporate the essential aspects of the provisions of The Treaty of Prüm into the legal system of the

[29] See the official text of the Treaty.
[30] An Agreement on administrative and technical enforcement was approved on 5 December 2006. See level 2.

European Union, following-up and perfecting European policy in relation to stepping-up the exchange of information between the competent authorities of the Member States with a view to detecting and investigating criminal offences.

The European legislator considered that the objectives set cannot be sufficiently attained by the Member States individually, meaning that the Decision was adopted in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty establishing the European Community and contemplated in Article 2 of the Treaty on European Union, while considering that it also respected the principle of proportionality set out in Article 5 of the EC Treaty.

We have already referred to the content of the Decision's Preamble. However, even at the risk of being repetitive, said Preamble must be examined as it clearly reflects what the European legislator was seeking to do. Thus, it states that after the entry into force of The Treaty of Prüm, and with the often expressed aim of incorporating the essential aspects of the treaty into the European legal system, the Preamble briefly runs down the main historical landmarks, from the Tampere European Council of October 1999, that this aspect of European policy has seen, stressing in Whereas 4 that the exchange of such information should comply with the conditions applying to the principle of availability, making special reference, on several occasions, to the importance of achieving an agile and reliable exchange of information, which was why Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [31] was issued.

Also in the Preamble, the European legislator states once again his permanent concern regarding the need, in any event, to respect the fundamental rights and declaring that "closer police and judicial cooperation in criminal matters must go hand in hand with respect for fundamental rights, in particular the right to respect for privacy and to protection of personal data, to be guaranteed by special data protection arrangements, which should be tailored to the specific nature of different forms of data exchange."

[31] See level 2 of this unit.

Following the order of the Treaty of Prüm, the Decision, after some general considerations on its object and scope, regulated in Chapter I, devotes Chapter II to online access and requests for the analysis of DNA profiles, dactyloscopic data and vehicle registration data; Chapter III covers the transfer of data in the case of important sporting events or meetings of the Council of Europe; Chapter IV deals with measures for the prevention of terrorist attacks; Chapter V covers other forms of cooperation, specifically regulating joint operations and assistance in connection with mass gatherings, disasters and serious accidents; Chapter VI contains the general provisions on data protection[32]; and Chapter VII contains the provisions on implementation and final provisions.

As you can see, and in relation to the Treaty of Prüm, Decision 2008/615/JHA leaves the areas of "air marshals" and illegal immigration outside of its scope[33]. This can be seen reading Article 1, transcribed above, which defines its object and scope, in addition to its entire contents.

Another point worth highlighting, also in relation to the Treaty of Prüm, is that pursuant to Article 35 of the Decision, the relevant provisions of this Decision shall be applied instead of the corresponding provisions contained in the Treaty of Prüm. Any other provision of the Treaty of Prüm shall remain applicable between the contracting parties of the Treaty of Prüm and in relation to other legal instruments, Member States may continue to apply any multilateral or bilateral agreements or conventions on cross-border cooperation in force on the date of adoption of the Decision, provided that they are not incompatible with its aims and that the Decision does not affect the existing agreements on judicial assistance or mutual recognition of court decisions.

[32] See also Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. OJ of 30 December 2008. We will discuss it briefly in level 2.
[33] Fausto Correia, rapporteur on the working document for the Decision, dated 10 April 2007, stated that the failure to incorporate these areas, because of existing Community competence regarding the same, led to the existence of two different sets of laws, which does not aid legal clarity.

3.2.- Decision 2008/616/JHA

In accordance with the provisions of Article 33 of Decision 2008/615/JHA, the Council adopted the measures necessary for the implementation of said Decision on an EU level pursuant to the procedure established in Article 34, section 2, letter c), second sentence, of the Treaty on European Union, measures that are based on the Administrative and Technical implementing agreement of the Treaty of Prüm of 5 December 2006. The Decision contains the standard regulatory provisions for the administrative and technical implementation of the forms of cooperation established in Decision 2008/615/JHA, with a comprehensive technical annex.

4.- The criminal record

4.1.- Introduction

In the context of the space of freedom, security and justice, we also have to look at the Community provisions regarding the organisation and content of information exchanged from the criminal record between the Member States of the EU, provisions that while not directly based on the principle of availability, but rather on the mutual recognition of judicial decisions[34], allow this exchange of data on convictions and have undoubtedly proven to be a great help in fighting crime.

This is nothing new; in this regard we just have to remind ourselves that Articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959[35] established mechanisms for States Parties to supply each other with information on sentences imposed, mechanisms that, lest we forget, are very slow in view of the current needs for judicial cooperation in the Community.

[34] See Module IV of the course.
[35] See Unit 4 of the course.

It is precisely for this reason, and as part of the Community programme for implementing the principle of mutual recognition of judicial decisions in criminal matters, that Decision 2005/876/JHA, of 21 November 2005,[36] on the exchange of information extracted from the criminal record arose, subsequently repealed by Council Framework Decision 2009/315/JHA, of 26 February 2009[37] on the organisation and content of the exchange of information extracted from the criminal record between Member States"[38], currently in force, and followed by Council Decision 2009/316/JHA, of 6 April 2009[39], on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA [40].

4.2. Analysis of Framework Decision 2009/315/JHA

This Framework Decision 2009/315/JHA, according to Article 12 of the same, complements the provisions of Article 13 of the European Convention on Mutual Assistance in Criminal Matters, its additional protocols of 17 March 1978 and 8 November 2001 and the Convention on judicial assistance in criminal matters between the Member States of the EU and its protocol of 16 October 2001 and replaces in the relations between Member States as of such time as they transpose it, and in any event as of 26 March 2012, the provisions of Article 22 of the European Convention on Mutual Assistance in Criminal Matters completed by Article 4 of the Protocol of 17 March 1978, always respecting any bilateral or multilateral agreements entered into by the Member States with more favourable provisions; it also contains an annex, like other Community instruments, containing forms for sending the request for information and for replying to the request.

[36] Published in the OJ of 9 December 2005.
[37] Published in the OJ of 7 April 2009.
[38] The term for transposition by the Member States ends on 27 April 2012.
[39] Published in the OJ of 7 April 2009.
[40] See level 2.

4.2.1.- Object.

The aims[41] of Framework Decision 2009/315/JHA, pursuant to the principles of subsidiarity[42] and proportionality[43], are established as follows:

- to define the ways in which the convicting Member State transmits the information on such a conviction to the Member State of the person's nationality;
- to define storage obligations for the Member State of the person's nationality;
- to lay down the framework for a computerised system of exchange of information on convictions.

4.2.2.- Obligations of the convicting Member State.

- ensure that all convictions are accompanied, when provided to its criminal record, by information on the nationality or nationalities of the convicted person if he is a national of another Member State;
- inform the other Member States of any convictions handed down within its territory against the nationals of such other Member States;
- notify the Member State of the person's nationality of any subsequent alteration or deletion of information contained in the criminal record;
- supply the Member State of the person's nationality, on the latter's request in individual cases, a copy of the convictions and subsequent measures as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measure at national level.

[41] Article 1 of the Framework Decision.
[42] See Articles 2 of the Treaty on European Union and 5 of the Treaty establishing the European Community.
[43] See Article 5 of the Treaty on European Union.

4.2.3.- Obligations of the Member State of the person's nationality.

- store all information on any of its nationals for the purpose of retransmission;
- alter or delete the information transmitted when notified of an amendment or cancellation of the conditions of the conviction;
- only supply updated information in response to a request.

4.2.4.- Information on convictions.

Request for information

These will be made pursuant to the national law of the requesting state, so that in can be used in judicial proceedings or for any other purpose, even by an individual, although in the latter case he/she will only be entitled to request information on his/her own criminal record, using the form contained in the Annex to the Framework Decision for that purpose.[44]

Reply to a request for information

The Framework Decision establishes different systems depending on the reason for the request for information.

- Request made in the context of criminal proceedings: information will be supplied on the convictions issued in the Member State of the person's nationality contained in the corresponding record, those handed down in other Member States after 26 March 2012,[45] and supplied prior to that date and entered in the criminal record and those handed down in non-Member States that have been entered in the criminal record.
- For purposes other than that of criminal proceedings[46]: the requested state will reply in accordance with its national law in relation to the convictions handed down in the Member State of the person's nationality and those handed down in

[44] Article 6 of the Framework Decision.
[45] See obligations of the convicting Member State and the Member State of the person's nationality.
[46] See optional condition established in paragraph 3 of no. 2 of Article 7 of the Framework Decision.

third countries and entered in the corresponding record, as well as the information conserved due to prior transmission from another Member State prior to 26 March 2012 that has been entered in the criminal record.

- Request made by a third country to the Member State of the person's nationality: the Member State may reply exclusively within the limits established for the supply of information to Member States.

Deadlines for replies

Different deadlines are set depending on the type of request[47]. Thus, if the request is made for the purposes of criminal proceedings or for any other state purpose, the reply must be immediate, or, in any event, take no longer than ten working days as of the date of receipt of the request, with the term being extended up to twenty working days, also as of the date of receipt of the request, when it is made by an individual person.

4.2.5.- Format and other ways of organising and facilitating exchanges of information.

Information, requests for information and replies will be sent via the Central Authority or Authorities of the Member States[48].

4.2.6.- Conditions for the use of personal data.

The data supplied can only be used for the purpose for which it was requested[49]. Exceptionally, data may be used by the requesting Member State for preventing an immediate and serious threat to public security [50].

[47] See Article 8 of the Framework Decision.
[48] See Article 3 of the Framework Decision.
[49] See the form in the Annex to the Framework Decision.
[50] See Article 9 of the Framework Decision.

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Seville, 31 August 2010

LEVEL II: TO LEARN MORE

SUMMARY

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

Introduction.

As we pointed out in the corresponding sections of level 1 of this Unit, in this level 2 we will be elaborating on some of the subject matter dealt with. To be precise, in the section corresponding to the principle of availability, we will be studying Framework Decision 2006/960/JHA; in the one on the Treaty of Prüm, some aspects that we did not look at in the previous level, such as the Administrative and Technical implementing agreement of 5 December 2006; we will make some considerations on illegal immigration and the protection of personal data processed in the context of police and judicial cooperation in criminal matters in the European Union by means of a general overview of the status of the matter; and with regard to the criminal record, we will be referring to the ECRIS.

1.- The principle of availability

Council Framework Decision 2006/960/JHA, of 18 December 2006.

As we mentioned in level 1 of the unit, Council 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 is considered by some authors as a first step towards the implementation of the principle of availability.

Said Framework Decision was published in OJ L 386 of 29 December 2006, page 89, with a correction being published in OJ L 75 of 15 March 2007, page 26, at the initiative of the Kingdom of Sweden – as such, known as the Swedish initiative – in view of Article 30, section 1, letters a) and b) and Article 34, section 2, letter b) of the Treaty of European Union, and consists of 13 Articles, divided into two titles and two annexes that comprise standard forms for information requests to be used by the

competent authority of the requesting state, and for the supply/delay/refusal of the information to be used by the competent authority of the requested state, in line with a practice that has become ever commoner in the European Union.

Everyone knows that police cooperation within the Space of Freedom, Security and Justice has promoted the development of procedures and structures for the exchange of information and intelligence, with significant progress having been made in this field. It can be affirmed that no more than fifteen or twenty years ago, police cooperation and the exchanges of information were limited almost exclusively to bilateral relations. Meanwhile, today we have the introduction of a series of European structures and agencies that have developed information systems along which data of interest to police flows and police cooperation today is, in the words of the Commandant of the Spanish Guardia Civil Anselmo del Moral Torres[51] moving towards a third phase: genuine implementation of the principle of availability.

The European legislator, in the Preamble to the Framework Decision, states that reliable and up-to-date access to information and intelligence is vital if the security services are to successfully discover, prevent and investigate criminal offences and activities, and it is important that the security services have the possibility of obtaining information and intelligence on serious offences and acts of terrorism from other members horizontally. The Preamble acknowledges that there is no common legal framework for the rapid and effective exchange of information and intelligence between the services of the Member States, which is something the Framework Decision aims to remedy.

Moreover, it is aware that the shared interest of the states in combating cross-border crime may, unless it is adapted to the corresponding corrective measures, jeopardise the principles and rules regarding the protection of personal data, fundamental freedoms, human rights and individual freedoms, intending to obtain the right balance, which is why rules are set out in the Framework Decision.

[51] *La cooperación policial en la Unión Europea: propuesta de un modelo europeo de inteligencia criminal*. Anselmo del Moral Torres. Elcano Royal Institute.

Title I (Articles 1 and 2) contains the aim, scope and several definitions of concepts contained in the instrument.

The **aim** of the Framework Decision, according to Article 1.1, is to establish the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations, notwithstanding the legal instruments mentioned in point 2 of said Article 1.

A law enforcement authority is defined as a customs or other authority that is authorised by national law to detect, prevent and investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities, except agencies dealing with national security issues.

The Framework Decision defines a criminal intelligence operation as a procedural stage, not yet having reached the stage of a criminal investigation, within which a competent law enforcement authority is entitled by national law to collect, process and analyse information about crime or criminal activities with a view to establishing whether concrete criminal acts have been committed or may be committed in the future.

Article 2 letter d) defines the concepts of information and/or intelligence. The authors consider that criminal intelligence is the product of the gathering, processing, integration, analysis, assessment and integration of the information available and with the purpose of establishing criminal patterns pertaining to organisations or companies devoted to criminal activities: modus operandi, structures, members, resources and causes, among other relevant aspects.

The above concepts fall outside the realm of procedural law, but the Framework Decision refers not only to possible pre-procedural stages of the investigation, it also defines another important concept in the context of the course, which is that of criminal

investigation, or a procedural stage within which measures are taken by competent law enforcement or judicial authorities, including public prosecutors, with a view to establishing and identifying facts, suspects and circumstances regarding one or several identified concrete criminal acts.

The objective **scope** is all information and intelligence, with the following qualifications:

- Member States are not obliged to gather and store information for the purpose of supplying it to the law enforcement authorities of another Member State;
- Member States are not obliged to supply information and intelligence for use as evidence before a judicial authority, nor is any right to use it in that way granted, although it may be used for that purpose with the consent of the Member State that supplied the information and/or the intelligence;
- the requested Member State is not obliged to obtain the information or intelligence using coercive measures, as defined in its internal legislation.

With regard to the **exchange of information and intelligence** (Title II of the Framework Decision, Articles 3 to 10) it is worth highlighting the following:

- Obligation of the Member States to ensure that the information and/or intelligence can be supplied at the request of the competent law enforcement authority carrying out a criminal investigation or criminal intelligence operation.
- Obligation for the Member States to ensure the supply of information and/or intelligence is not subject to stricter conditions that those applied on a national level.
- Obligation of the requested law enforcement authority to request judicial authorisation to access and exchange information when necessary under national law.

- Impossibility of supplying information and/or intelligence to a Member State when obtained from another Member State or a third country and is subject to the rule of speciality, without the authorisation of the state that supplied it.
- Short time limits for the supply of information and/or intelligence (Article 4), establishing several depending on the urgency of the information and/or intelligence requested, with the obligation to notify the reasons for delay, if they exist and prevent compliance with the obligation to supply by the deadline.
- Prohibition on requesting more information than is necessary for the purpose of detection, prevention or investigation of an offence; the request must state the purpose for which it is requested and the link between it and the person to which the information and/or intelligence refers.
- Possibility of spontaneous exchange of information and/or intelligence for the purpose of detection, prevention or investigation of the offences listed in Article 2, section 2 of Framework Decision 2002/584/JHA (European Arrest Warrant).
- Strict rules on data protection and confidentiality of the confidential information and/or intelligence supplied.
- Reasons are established for withholding information or intelligence: if there are factual reasons to assume that the provision of the information or intelligence would harm essential national security interests of the requested Member State or jeopardise the success of a current investigation or a criminal intelligence operation or the safety of individuals or is clearly disproportionate or irrelevant with regard to the purposes for which it has been requested. Moreover, where the request pertains to an offence punishable by a term of imprisonment of one year or less under the law of the requested Member State, the competent law enforcement authority may refuse to provide the requested information or intelligence.

As with other Community instruments, it regulates its relations with other legal instruments, going on to replace[52] and repeal[53] certain provisions, entitling the Member States to apply or enter into or introduce bilateral or multilateral agreements, in certain conditions.

This section ends with a reference to what is set out in numbers 13 and 14 of the Preamble of the Framework Decision, namely relations with Iceland and Norway and with Switzerland.

In relation to the first two states, the Framework Decision constitutes an implementation of the provisions of the Schengen *acquis* in relation to Article 1 of Council Decision 1999/437/EC, of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*. As for Switzerland, the Framework Decision represents the implementation of the Schengen *acquis* in terms of the agreement signed by the European Union, the European Community and the Swiss Confederation, by means of which the latter joined the enforcement, application and implementation of the Schengen *acquis*.

[52] Provisions of Article 39, sections 1, 2 and 3 and Article 46 on the Convention on the implementation of the Schengen Agreement (OJ 239, of 22 September 2000, with the last amendment by Regulation (EC) 1160/2005 of the European Parliament and the Council, OJ L 191 of 22 July 2005) insofar as they refer to the exchange of information and intelligence for the purposes of performing criminal investigations and criminal intelligence operations

[53] Decision of the Executive Committee of Schengen of 16 December 1998 on cross-border police cooperation in the area of crime prevention and detection (OJ L 239 of 22 September 2000, page 407) and Decision of the Executive Committee of Schengen of 28 April 1999 on the improvement of police cooperation in preventing and detecting criminal offences (OJ L 239 of 22 September 2000, page 421).

2.- The Prüm Convention. The Administrative and Technical implementing agreement of 5 December 2006[54]

The Agreement was signed on the abovementioned date pursuant to the provisions of Article 44 of the Treaty.

The Agreement consists of six sections. The first deals with the object and definitions; the second, the DNA profiles, in relation to which it is worth mentioning that for the purposes of comparison, the parties are to make use of existing standards such as the European Standard Set (ESS) or the Interpol Standard Set of Loci (ISSOL) and that the electronic exchange of DNA related data amongst the Parties is to be deployed by the use of the "TESTA II" communication network.

The third section, devoted to dactyloscopic data, states that the Parties must establish a mutually accessible technical entry to their "automated fingerprint identification systems" (AFIS) and that the electronic exchange of dactyloscopic and other related data between the Parties will be by the use of the TESTA II communication network.[55]

Section four refers to vehicle registration data. As a means for the electronic exchange of vehicle registration data, the Parties are to use the "TESTA II" communication network and for the purposes of the system ex article 12 especially designed EUCARIS[56] software application.

Section five has to do with police cooperation and centres on highly specific rules on joint operations and cross-border intervention in the case of imminent danger;

[54] The agreement and its different annexes can be found as Documents 5473/07 and 5473/07 ADD1, of 22 January 2007, of the Council of the European Union.
[55] Transeuropean electronic communication service between administrations, managed by the European Commission
[56] European car and driving licence information system

Annex D.2 specifies the authorities that must be informed immediately, in the case of this latter form of collaboration, pursuant to Article 25, section 3, of the Treaty.

With regard to the first type of collaboration, it may be organised by means of a mission statement, by two or more Parties, pursuant to Article 24 of the Treaty. Before commencement, they will agree all aspects of the form of intervention, and specifically:

a) the competent authorities of the Parties to the mission statement;
b) the specific purpose of the operation;
c) the host State where the operation takes place;
d) the geographical area of the host State where the operation takes place;
e) the period covered by the operation mission statement;
f) the specific assistance to be provided by the seconding State to the host State, including officers or other officials, material and financial elements;
g) the officers participating in the operation;
h) the officer who will be in charge of the operation;
i) the powers the officers and other officials of the seconding State may exercise in the host Party during the operation;
j) the particular arms, ammunition and equipment the seconding officers may use during
the operation in accordance to the rules laid out in Annex D.3;
k) the logistic modalities concerning transport, accommodation and security;
l) the bearing of costs of the joint operation if it differs from the provision of article 46 of the Treaty;
m) any other possible elements required..

As you can see, no measures are adopted in this Agreement with regard to illegal immigration.

3.- Illegal Immigration

Migration was not initially seen as deserving of a Community policy. The only mention of migration is contained in the Treaty on the European Economic Community

of 25 March 1957, which refers exclusively to emigrant workers from Member States and the object of the provision was to ensure they received appropriate social benefits, so as to allow effective free movement and the right to establishment in any Member State, but the realities of subsequent years meant that immigration, particularly from non-Community countries, has become a top priority for European governments and, as a result, it was mentioned for the first time in a Community Treaty, the Single European Act, signed on 28 February 1986.

The Treaty on European Union[57] is the first Community Treaty that properly regulates immigration as such, which it considers a "matter of common interest" for achieving the aims of the Union, in particular that of the free movement of persons, and this is made clear in Article K.1, paragraph 3.

The Treaty of Amsterdam is the first of the Community treaties to address the concept of immigration as a European policy in depth, and as such the problem that it represented, in some Member States in particular. This Treaty amends the Treaty on European Union, considers the measures regarding immigration as an inseparable part of the aim of developing the Union as a space of freedom, security and justice and allows the European Community to adopt measures in the following fields:

1) the elimination of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;
2) the crossing of the external borders of the Member States;
3) asylum and the status of refugees;
4) immigration policy;
5) combating crime and, as a result, police and judicial cooperation in criminal matters;
6) judicial cooperation in civil matters;
7) cooperation to that end between the departments of the Member States administrations and between said departments and the Commission.

[57] Known as the Treaty of Maastricht.

The Treaty of Nice essentially maintained the previous regulation, without making any important contribution to this field.

After the amendments introduced by the Treaty of Lisbon of 13 December 2007, immigration policy was definitively allocated to the space of freedom, security and justice: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (Article 3.2 of the current Treaty on European Union), regulating border control, asylum and immigration policies in Chapter two of Title IV, and developing a "common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings" (Article 63 bis 1).

There are numerous Community provisions in this field (we must not forget the importance of the instruments contained in the Schengen *acquis*), and as such the following list of some of them which cover several areas of common policy, is purely for information purposes:,

- Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control (OJ C 5, 10.1.1996).

- Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals (OJ C 304, 14.10.1996).

- Council Directive 2001/40/EC, of 28 May 2001, on the mutual recognition of decisions on the expulsion of third country nationals. (OJ L 149, 2.6.200).

- Council Framework Decision 28 November 2002, on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002).

- Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network (OJ L 64, 2.3.2004).

- Council Decision of 29 April 2004, on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ L 261, 6.8.2004).

- Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006).

- Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 111, 4.5.2010).

4.- Some considerations on the protection of personal data processed in the context of police and judicial cooperation in criminal matters in the European Union

Pursuant to Article 8 of the Charter of Fundamental Rights of the European Union, everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the

consent of the person concerned or some other legitimate basis laid down by law. Moreover, everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

As we are all aware, the Treaty on European Union included police collaboration between Member States in the Third Pillar of the European Union, meaning that there were no harmonised Europe-wide rules on protection of the data derived from such collaboration, although there is a common basic level in the data protection legislation of the Member States as they all belong to the Council of Europe and are signatories of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) which applies to all data processing in the public and private sectors, including that performed by the law enforcement agencies.

In 1987 the Committee of Ministers of the Council of Europe approved Recommendation (87) 15 regulating the use of personal data in the police sector. This Recommendation, according to Emilio Aced Félez[58] "has become the *de facto* standard for the protection of data in the processing of personal data performed for the purposes of a police investigation thanks to its inclusion as a minimum requirement in several EU conventions and decisions, such as Schengen, Europol, the Customs Information System or Eurojust."

> According to the same author, the Recommendation can be said to be based on eight principles: control and notification, collection of data, storage of data, use of data by the police, communication of data, publicity, length of storage and updating of data and data security, which establish basic principles that govern the processing of personal data in the police sector

It is EU policy that the exchange of personal data in the space of freedom, security and justice, and especially in the sphere of police and judicial cooperation, where the principle of availability is applied, and maintaining the balance between the

[58] Emilio Aced Félez. *Principio de disponibilidad y protección de datos en el ámbito policial*.

right to privacy and security at all times[59], be based on clear rules, as this helps to increase the trust between competent authorities and guarantee protection of the information, because the existing legal instruments in the context of the European Union are insufficient. Thus, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995[60] does not apply to the processing of data related to public security, defence, national security or a states actions in the criminal justice sphere[61].

In order to address the problem of the protection of personal data processed in the context of police and judicial cooperation in criminal matters in the European Union, pursuant to the principle of subsidiarity, Framework Decision 2008/977/JHA[62] was issued to protect the fundamental rights and freedoms of individuals when their personal data is used for the prevention, investigation, detection or prosecution of criminal offences and the enforcement of criminal penalties[63].

However, it should be kept in mind that several acts adopted by virtue of Title VI of the Treaty on European Union contain specific provisions on the protection of personal data exchanges, constituting in some cases a comprehensive, coherent set of rules[64] governing these matters in greater detail than the Framework Decision meaning that such scenarios fall outside its scope[65]. Moreover, those scenarios in which the existing provisions of specific acts issued pursuant to Title VI of the Treaty on European Union impose stricter conditions on the recipient Member State than the Framework Decision does also fall outside the scope of the latter.

Article 28 of the Framework Decision in question states that "Where in acts, adopted under Title VI of the Treaty on European Union prior to the date of entry into

[59] This was repeatedly requested by the European data protection authorities.
[60] Published in the OJ of 23 November 1995
[61] It only applies to personal data procession included in the activities under the First Pillar
[62] Published in the OJ L 350, of 30 December 2008, with entry into force on 19 January 2009.
[63] The term for transposition ends on 27 November 2010.
[64] It contains rules on the principle of data quality, data security, regulates the rights and protection of the data subjects, the organisation of control and responsibility.
[65] Rules on data protection for Europol, Eurojust, the Schengen Information System (SIS) and the Customs Information System (CIS), and Council Decision 2008/615/JHA, of 23 June 2008, among others.

force of this Framework Decision[66] and regulating the exchange of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaty establishing the European Community, specific conditions have been introduced as to the use of such data by the receiving Member State, these conditions shall take precedence over the provisions of this Framework Decision on the use of data received from or made available by another Member State".

Data can only be collected in line with the principles of lawfulness, proportionality and purpose, according to Article 3 and the Framework Decision addresses, among other things, the topics of rectification, erasure and blocking (*ex officio* or at the request of the data subject), verification of quality of data transmitted or made available, logging and documentation, processing of personal data received, exercise of the right of information and access to the data by the data subjects, as well s the right to compensation and the confidentiality and security of the data processing.[67]

5.- The Criminal Record (SIRENE)

As mentioned earlier, in application of Article 11 of Framework Decision 2009/315/JHA[68] Council Decision 2009/316/JHA of 6 April 2009[69] on the establishment of the European Criminal Records Information System (ECRIS) was passed, which, like Framework Decision 2009/315/JHA, does not establish any obligations regarding the transmission of information on criminal judgments, and the object of which is to implement the latter Framework Decision in order to construct and develop a computerised system for the exchange of information on sentences between the Member States, establishing a standard European format, like other European norms, for the electronic exchange of information taken from the criminal record.

[66] Entry into force twenty days as of its publication.
[67] See the reports of the European Data Protection Supervisor dated 19 December 2005, 29 November 2006 and 27 April 2007 which analysed all the deficiencies that, in his opinion, the successive drafts of the Decision contained.
[68] See level 1
[69] Published in the OJ L 93/33, of 7 April 2009

To that end, Annex A contains a common table of offences categories with parameters such as level of completion, level of participation, exemption from criminal responsibility, recidivism, as well as categories and subcategories of offences and Annex B has a common table of penalties and measures categories and parameters referring to the content of the sentence and subsequent decisions that modify the enforcement of the penalty, all by means of a system of codes that makes it possible to understand the information transmitted.

Seville, 8 September 2010

NIVEL III: REFERENCE DOCUMENTS

ACCESS TO THE DOCUMENTATION REFERRED TO IN LEVELS 1 AND 2

European Union legislation can be consulted, in all official languages, at the following website http://eur-lex.europa.eu/

Official Journal of the European Union: it can be found at the above website.

The official documents of the institutions, agencies and other bodies of the EU can be found on the Portal of the European Union. Publications and documents on the http://europa.eu/ website can be consulted in all the official languages.

European Constitutional Law Review (ReDCE). Google the title to find it online.

The treaties of the Council of Europe can be consulted on the http://conventions.coe.int website. The site is in English, French, German, Italian and Russian.

The Elcano Royal Institute; website:
http://www.realinstitutoelcano.org/wps/portal/rielcano_eng

Europol: website http://www.europol.europa.eu available in all the official languages

Eurojust: website http://www.eurojust.europa.eu available in English.

European Data Protection Supervisor; the page is under revision so it is best to search for it on Google.

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Vademecum: www.prontuario.org

Hyperlinks to the main documents cited:

Council Framework Decision 2006/960/JHA, 18 December 2006.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:386:0089:0100:EN:PDF

Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0001:0011:EN:PDF

Council Decision 2008/616/JHA, of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0012:0072:EN:PDF

Council Framework Decision 2005/876/JHA
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:322:0033:0037:EN:PDF

Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0023:0032:EN:PDF

Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0033:0048:EN:PDF

Prüm Convention

English

http://register.consilium.europa.eu/servlet/driver?lang=EN&ssf=DATE_DOCUMENT+DESC&fc=REGAISEN&srm=25&md=400&typ=Simple&cmsid=638&ff_TITRE=Pr%C3%BCm&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_REUNION=&srs=101&rc=109&nr=111&page=Detail

French

http://register.consilium.europa.eu/servlet/driver?lang=FR&ssf=DATE_DOCUMENT+DESC&fc=REGAISFR&srm=25&md=400&typ=Simple&cmsid=638&ff_TITRE=Pr%C3%BCm&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_REUNION=&rc=10&nr=10&page=Detail

Spanish

http://register.consilium.europa.eu/servlet/driver?lang=ES&ssf=DATE_DOCUMENT+DESC&fc=REGAISES&srm=25&md=400&typ=Simple&cmsid=638&ff_TITRE=Pr%C3%BCm&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_REUNION=&rc=9&nr=9&page=Detail

Spanish Instrument ratifying the Prüm Convention

http://www.boe.es/boe/dias/2006/12/25/index.php