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The Schengen Space

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AUTHOR

Raquel Castillejo Manzanares

Professor at the Department of Special Public Law.

Procedural Law

Universidad de Santiago de Compostela

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LEVEL I: TOPIC

Summary

1. Investigative measures for criminal acts: police cooperation

Article 13 of the Single European Act, which became Article 8 of the Treaty of Rome, establishes that the borders between the Member States of the European Community were to disappear on 1 January 1993, creating the free movement of persons, goods, services and capital.

Faced with this declaration, the Member States of the Community were afraid of the disappearance of the checks that prevented the free movement of persons, convinced as they were that the disappearance of borders would increase criminal acts and the flow of illegal immigrants from third countries. As a result, only some of the Member States of the European Communities signed the first Schengen Agreement of 1985, which would be developed subsequently by the Convention on the application of the Schengen Agreement, dated 19 June 1990.

Schengen is based on the principle of the transfer of internal border checks to the external borders and on the adoption of a series of “compensatory measures”, as a collection of measures that make it possible to dismantle the checks at internal borders and that are destined to ensure that the security of the common territory is no less guaranteed that at present in each of the states concerned.

For these reasons the Convention contemplates the conditions regarding crossing internal and external borders, visas, the movement of aliens, asylum and residence permits, police and judicial cooperation, extradition, narcotics and firearms, transport and movement of goods, etc. Moreover, it contains the basis for the creation of a computer system that facilitates the sealing of external borders as well as the exchange of judicial, police and administrative information aimed at enhancing cooperation in these areas.

1.1. Police assistance

The question regarding the strengthening of the external border checks was indeed problematic, and for that reason we will focus on the framework of the Schengen Instruments, on the study regarding criminal justice, including the pre-trial stage.

As a result, our starting point is the commission of a criminal act with repercussions in several states of Schengen Europe; because it is necessary to investigate the offence in another country; because it is necessary to detain the perpetrator and surrender him/her to the state where the crime was committed; because certain procedural steps

must be taken abroad; because the intention is for the sentence to be served in another state.

In this context, the fact that the application of the Schengen Agreement could represent a lessening of the security of the existing checks at common borders meant that it was necessary to establish certain police cooperation mechanisms, contemplated in Articles 39 to 53 of the Convention.

Indeed, the first measure of police cooperation contained in the Schengen Convention is police assistance, which covers both crime prevention, in which case it can also be provided on the initiative of foreign authorities, according to Article 46.1 of the Convention, and the investigation of criminal offences –Article 39 of the Convention–. The activity of assistance in the latter ambit seems to be open to being understood in a broad sense, including any kind of measures, processes, proceedings or actions that would be expected of the police forces and which must be carried out in the other state. And three types of specific measures are finally set out: assistance between national police forces, performing police work on a cross-border basis and the establishment of material means for the exercise of police action, although Article 39.2 refers essentially to information.

Despite the fact that police assistance is conceived in such broad terms, it has two limitations, namely the judicial reservation and the application of measures of constraint. Thus, first of all, measures or proceedings that have to be requested by a judicial authority, i.e., requests for international cooperation that are reserved for the judicial authority, are excluded from this mechanism, and in such cases the rules set out in Chapter II, “Mutual assistance in criminal matters” will apply.

From another point of view, and assuming that what is requested is of a standard nature, i.e. not reserved for the judicial authority, the same must be the case in the requested state. This means that the authorities responsible for the execution of the request will perform a second check, which tends not to execute the request if such action is reserved for the judicial authority. Nevertheless, the fact that the request cannot be executed by police officers does not mean it is automatically rejected. According to the last point of Article 39 of the Convention, if the requested police authority does not have the authority to deal with the request, it may forward it to the competent authorities, which would logically be the judicial authority.

The second restriction refers to the fact that these mechanisms cannot be used when executing the request for assistance requires the police to apply measures of constraint.

The Convention respects national legislation and the police cannot exceed the limits placed on their actions and on their competence as set out in their own regulations. But at the same time, it restricts the police actions to acting at the request of foreign authorities only in cases where measures of constraint are not necessary, and this provision must be considered applicable even when the national legislation allows the authority to use measures of constraint.

1.2. Cross-border surveillance

Article 40 of the Convention[1] regulates a form of passive cooperation between the Schengen countries in the investigation of criminal offences, consisting in allowing surveillance by foreign officers on its territory, although on request the surveillance may also be entrusted to officers of the state where it is carried out.

In this regard, the right of surveillance or observation consists of the possibility, subject to the authorisation of the state in which it is carried out, of continuing the surveillance of a person who is suspected of having participated in a criminal offence eligible for extradition, in the context of a judicial investigation, without the surveillance officers challenging or arresting the person observed.

According to the wording of the article, the cross-border surveillance measure is envisaged “as part of ongoing criminal proceedings”, in the context of a “judicial investigation” and is solely and exclusively centred on the person that participated in the criminal offence; this means that in reality it represents “mutual assistance”, or cooperation sought by a judicial authority, and it is difficult to understand its inclusion in the chapter on police cooperation.

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[1] Article 40 “Officers of one of the Contracting Parties who, as part of a criminal investigation, are keeping under surveillance in their country a person who is presumed to have participated in an extraditable criminal offence shall be authorised to continue their surveillance in the territory of another Contracting Party where the latter has authorised cross-border surveillance in response to a request for assistance made in advance. Conditions may be attached to the authorisation. On request, the surveillance will be entrusted to officers of the Contracting Party in whose territory this is carried out. The request for assistance referred to in the first subparagraph must be sent to an authority designated by each of the Contracting Parties and empowered to grant or to pass on the requested authorisation”.

If cross-border surveillance, under normal circumstances, is adopted as part of criminal proceedings, it will undoubtedly have to be ordered by the judicial authority that is leading the proceedings, as the body responsible for the investigation of the criminal offences.

This request for mutual assistance must meet a requirement of a temporal nature, i.e. that the request be made before the surveillance, and another of a material nature, namely, that the request must be channelled via the authorities appointed by each state for its transmission and execution. The Convention designates a police authority as the one “empowered to grant or to pass on the requested authorisation” in the case of each of the states. What this means is that, on the basis of a prior court order, both the transmission of the request to another country and the authorisation for the measure to be carried out in Spain are the responsibility of the police authorities and not a judicial authority.

Meanwhile, it will also be necessary that in order for cross-border surveillance to be carried out, the crimes in relation to which it is ordered must exceed the punitive minimum envisaged in the European Convention on Extradition, i.e., deprivation of liberty for at least one year, although France has raised this threshold to a minimum of two years.

Once the cross-border surveillance has been authorised by the visited state, the actions of the visiting officers will be subject to a series of conditions, such as being subject to the law of the state where it is carried out, obeying the orders of local authorities, permanent identification and justification of the authorisation, the prohibition on the use of service weapons except in cases of legitimate self-defence, the prohibition on entry into homes and places not open to the public, the prohibition on challenging or arresting the person under surveillance and the presentation of a report to the authorities where the surveillance was carried out, as well as duly collaborating with them in the investigation resulting from the operation in which they have participated.

In relation to the effect of the cross-border monitoring, there are three possibilities: the first consists, after fulfilling the requirements set out in paragraphs 2 and 3 of Article 40 of the Convention, in the cross-border observation measure not being configured with spatial or temporal restrictions, the surveillance not producing results subsequently or not supplying new elements, such as obtaining data or information on the activities of the person under surveillance abroad, which can be presented as documentary or witness evidence in the criminal proceedings, not leading, in itself, to any other steps being taken. A second possibility consists in, as a result of the cross-border monitoring,

the data acquired by the officers prompting the judge in the country of origin to order the arrest of the person in question, in which case it will first be necessary to obtain a request for provisional arrest –Article 16 of the European Convention on Extradition– or an alert in the SIS –Article 64 of the Convention–. In this case, the immediate issue of the international arrest warrant will lead to the opening of a passive extradition procedure and the person sought will be immediately arrested by the police and brought before the judge. A third possibility consists in the hypothesis of a crime being committed in the country of operation by the person under surveillance, in attempting to elude the surveillance or at the moment he/she is captured as a result of the enforcement of a request for provisional arrest issued by the judge in the country of origin.

1.3. Hot pursuit

Hot pursuit represents another form of passive cooperation, by virtue of which a state allows the pursuit, capture and detention of a person by foreign officers on its territory, aimed at the suppression of crime that must be applied beyond a state's borders –Article 41 of the Convention–[2].

Cross-border pursuit falls almost exclusively under the scope of police cooperation, as because of its nature it does not require the existence of a prior letter rogatory regarding criminal matters, as in the case examined above. This is the case because the measure is designed for crimes *in flagrante*, where pursuit is uninterrupted, or in the case of the escape of detained or sentenced persons.

[2] According to Article 41 of the Convention "Officers of one of the Contracting Parties who are pursuing in their country an individual caught in the act of committing or of participating in one of the offences referred to in paragraph 4 shall be authorised to continue pursuit in the territory of another Contracting Party without the latter's prior authorisation where, given the particular urgency of the situation, it is not possible to notify the competent authorities of the other Contracting Party by one of the means provided for in Article 44 prior to entry into that territory or where these authorities are unable to reach the scene in time to take over the pursuit. The same shall apply where the person being pursued has escaped from provisional custody or while serving a sentence involving deprivation of liberty".

Thus, the first point to make is that this measure is only appropriate in the case of the "continuation" of the pursuit of a person *in flagrante delicto*. The Convention refers to a strictly police act, albeit one that is preordained or aimed at criminal proceedings that will normally have been brought in the country where the crime was committed, where the criminal was surprised and the pursuit began; this process will necessarily have to include the corresponding statement with the incidents that have taken place.

Secondly, it is only an option in the case of serious or very serious crimes. In order to determine to which crimes it can be applied, the Convention gives the states two options: either pursuit is permitted for all offences that are eligible for extradition, or for acts that represent one of the crimes set out on a list: murder, manslaughter, rape, arson, forgery of money, aggravated burglary and robbery and receiving stolen goods, extortion, kidnapping and hostage taking, trafficking in human beings, illicit trafficking in narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, wilful damage through the use of explosives, illicit transportation of toxic and hazardous waste.

Thirdly, the prior authorisation of any places that the criminals and their pursuers enter will be necessary, although no provision is made as to the competent authorities for granting such authorisation.

There are two different interpretations in this case. First of all, it may be considered that in view of the nature of the measure, the authorities responsible for granting the authorisation will be the closest police force to the point where the border is crossed, making for a highly confusing situation, as in Spain the National Police Force, the Civil Guard and the Customs Authorities have structures and officers in border areas. Secondly, it may be argued that, by analogy to the surveillance measure pursuant to Article 40, the authorisation referred to in Article 41.1 of the Convention should be granted by the same authorities set out for the former. A third interpretation is also possible whereby said authorities may be the courts, either directly or through the police forces, provided that the function of said communication is, among other things, to allow this authority to order the immediate cessation of the pursuit or proceed to apprehend the pursued person, which, particularly in the second case, falls within the functions of the public prosecutor and the judges in particular, as well as those of the police.

In any event, conscious in the case at hand that the circumstances would make it impossible to obtain the authorisation in most cases, the Convention provides for pursuit "without prior authorisation" when it has not been possible to inform the authorities in advance or when they have been unable to be present at the border point

where the pursued criminal crossed. In such cases, at the moment the border is crossed at the very latest, the competent authorities in the state where the pursuit is continuing will have to be contacted –Article 41.1–. This will not necessarily involve the central authorities, depending on the situation in question, and above all, because the Convention makes no mention of "authorising", and refers instead to "contacting", meaning that the police units belonging to the forces referred to in the Agreement for the Accession of Spain, situated near the border, will be notified.

Meanwhile, and unlike with cross-border surveillance, whose execution is not subject to spatial or temporal limits, notwithstanding the fact that it must be ceased at the request of the state that authorises it, which also occurs in the case of the measure we are analysing now, hot pursuit may have to observe very strict "limits" in terms of space and time.

The Convention allows the states, by means of unilateral declarations –and equivalent ones have been presented by neighbouring countries–, either to opt not to set limits in terms of space or time or to set an area or a period of time as of the moment the border is crossed for the pursuit to be carried out –Article 41.3–.

Thus, the Unilateral Declaration made by the Government of Spain with the French Republic on the definition of types of cross-border pursuit specifies that the pursuing officers will not apprehend the pursued person or enter the respective territories any further than ten kilometres from the border.

Likewise, the unilateral declaration with the Republic of Portugal also rules out apprehending the pursued person and the maximum distance of entry is extended to fifty kilometres from the border or for a maximum of two hours, and in both cases the pursuit is limited to persons who have committed one of the offences referred to in point (a) of paragraph 4 of Article 41.

On another point, it is necessary to refer to the "conditions" under which the measure may be adopted, because the pursuit of a criminal *in flagrante delicto*, who was in the act of committing or has just committed a crime, is naturally justified in order to detain him/her. As it was impossible to do so in the country where the crime was committed, the criminal has managed to cross into the territory of another state thanks to the disappearance of the border checks that would have prevented his/her flight, cross-border pursuit comes into play. What has to be resolved is how far the powers of the pursuing officers reach and what their duties are once they have entered another country.

Article 41.5 of the Convention obliges the officers intervening to observe the law of the state of operation and obey the orders of the local authorities; they must also be easily

identifiable, either by the officer's uniform or his/her vehicle, they may not use their service weapons save in cases of legitimate self-defence and they are not allowed to enter private homes and places not accessible to the public, which are guarantees that are common to cross-border surveillance. Moreover, the pursuing officers must present themselves to the local authorities to inform them of their mission and remain at their disposal until the circumstances are clarified. Finally, the state where the pursuit began is obliged to help in any investigations that are brought in the other state as a result of the action.

As for the guarantees regarding the actions of the foreign officers, it is still necessary to analyse what activities they can perform in relation to the pursued person. This matter is extraordinarily confusing in the Convention, due to the wording of the same, the interpretation of paragraphs 2 and 5(f) of Article 41, and the Spanish wording. Indeed, according to Article 41.2 "pursuit shall be carried out in accordance with one of the following procedures …:

a) The pursuing officers shall not have the right to apprehend the pursued person;

b) If no request to cease the hot pursuit is made and if the competent local authorities are unable to intervene quickly enough, the pursuing officers may detain the person pursued until the officers of the Contracting Party in whose territory the pursuit is taking place, who must be informed immediately, are able to establish the person's identity or make an arrest".

Spain has opted for the first procedure, i.e., the pursuing officers will be entitled to apprehend, according to the two Unilateral Declarations regarding France and Portugal.

This provision indicates the negative content of the officers' powers; the positive aspects are contained in Article 41.5.(f), according to which the officers, in order to bring the pursued person before the competent local authorities, will subject him/her to a security search, use handcuffs during the transfer and seize any objects in the possession of the pursued person.

This marks the end of the pursuing foreign officers' actions in the "hot pursuit", but once the criminal is captured *in flagrante* it will be necessary to ascertain what the Convention has in store for him/her.

There has of course been no transfer of sovereignty, so the officers cannot take the pursued person with them; he/she must be surrendered to the local authorities, who will confirm his/her identity and logically, arrest him/her. This arrest, which is the result of offences committed abroad, means that the detained person may be interrogated, with

the rights conferred by Articles 17.3 of the Spanish Constitution and 118 and 520 of the Spanish Law of Criminal Procedure.

1.4. Controlled deliveries

The Convention regulates a measure for the investigation of criminal offences in Article 73: controlled deliveries for the suppression of the illicit trafficking in narcotic drugs and psychotropic substances.

This measure should be understood, according to Article 263 bis 2 of the Spanish Law of Criminal Procedure, as "the technique consisting of allowing illicit or suspect shipments of toxic drugs, psychotropic substances and other prohibited substances, the equipment, material and substances referred to in the foregoing section, the substances with which the above-mentioned ones have been replaced as well as the assets and earnings from the criminal activities classified in Articles 301 to 304 and 368 to 373 of the Spanish Criminal Code, to circulate through Spanish territory or exit or enter it without the interference of the authority or its officers and under their surveillance, with a view to discovering or identifying the persons involved in the commission of a crime in relation to such drugs, substances, equipment, materials, assets and earnings, as well as providing assistance to foreign authorities for the same purposes".

For controlled deliveries in the Schengen sphere, in operations that are normally arranged by and from the destination of the drugs, the prior authorisation of the state from which they depart will be required, as well as that of the state they will be entering from abroad and, eventually, the state in which the toxic drugs, narcotics or psychotropic substances are to circulate.

This authorisation means in any event that the judicial or police authorities or the Public Prosecutor's Office of the transit state will refrain from intervening. This makes for a mechanism of international cooperation that works more smoothly in those legal systems governed by the principle of opportunity than in those governed by the principle of legality.

In relation to operations involving controlled deliveries, the infiltration of police officers and other investigative measures, it is necessary to highlight the limitation that the decisions of the Spanish Supreme Court have imposed on the security forces, in the sense that their investigation must be aimed exclusively at discovering the crime that has been committed or that is in the process of being committed, without provoking or inducing persons who are not initially involved in the activity to commit criminal conduct.

This was reflected in a judgment from the Spanish Supreme Court on 21 July 1992, which declared “the lack of responsibility for offences that appear to be eligible for punishment, but in reality were incited by an *agent provocateur*, who may be an individual agent or a member of the police. This is because it is considered that the provocative activity, by incorrectly inducing the subject to commit the alleged offence, restricted his free initiative and thus the intentionality of the action proclaimed dogmatically in Article 1 of the Spanish Criminal Code, or because it is considered, using perhaps more technical criteria, that the incorrect action of the would-be guilty party would constitute a case of factual impossibility (*tentativa inidónea*), putative offence, taken in the broadest sense, or, ultimately, an apparent crime, but one that is in any case not eligible for prosecution, as the impossibility of performing it is initial and pre-constituted, with the danger for the protected legal property having been absent from start to finish. Notwithstanding the validity and applicability of the doctrine presented, for some time now this Court has been extracting and excepting from such considerations those cases in which the aim is not to provoke the commission of a crime, but to discover one that has already been committed; this is an important difference that is particularly applicable to crimes regarding chain of title, which occurs in the trafficking of narcotics. The police force, aware of the existence of an activity and multiple criminal offences, by pretending to contact the alleged agents, is not seeking to provoke the commission of the corresponding crime against public health, but to uncover the channels through which trafficking has been taking place in order to close them off, which is the only effective way of fighting this kind of crime nowadays”.

2. The means of speeding up criminal proceedings

The Schengen Convention, despite the variety of areas regulated therein, only devotes 22 articles to mutual assistance, as in view of the technique it uses, its intention is exclusively to provide certain supplements, aimed at a selective application by the Schengen states of the existing Council of Europe Conventions (plus the Benelux treaties).

Nevertheless, the Schengen Convention has represented an important objective extension in this field. However, this labour of extension rather than innovating, takes established principles, in force under earlier Conventions and others that have been created but are not fully effective due to a failure to ratify them.

The most novel matters introduced by the Schengen Convention in this regard focus on the following areas:

2.1. Scope of assistance

It extends the scope of assistance, as it can be provided in:

- proceedings for claims for damages arising from wrongful prosecution or conviction.
- clemency proceedings.
- civil actions joined to criminal proceedings.
- service of documents in relation to the payment of fines.
- enforcement of a judgment and measures related to sentences and conditional release, or the interruption of such enforcement –Article 49 of the Schengen Convention–.

This sphere is in debt to the general contents of the European Convention on the International Validity of Criminal Judgments, Convention no. 70 signed on 30 May 1984, which was aimed at achieving the enforcement of court sentences abroad, although in this precept it limits its effectiveness to the instrumental aspect of the service of documents.

The introduction of the possibility of assistance regarding infringements of laws on taxes on specific consumption, VAT and Customs is important as it was initially excluded from the European Convention on mutual assistance –Article 50 of the Convention–[3].

2.2. Regulatory offences

A new field refers to a type of proceedings that is not contemplated under Spanish law, infringements of regulations which lead to a decision that can be appealed before the corresponding jurisdictional body, in particular in criminal matters –Article 49(a) of the Convention–; thus bringing about a reconversion that allows mutual assistance.

[3] This extension of the object of cooperation has its origins in the European Convention on the Transfer of Proceedings and in the Additional Protocol to the European Convention on mutual assistance in criminal matters, signed, not ratified, on 12 April 1985, which envisaged that the contracting parties would not refuse mutual assistance merely due to the fact that the request referred to an offence that one of the parties considered a fiscal offence.

This is a standard institution under German (*Ordnungswidrigkeiten*) and Dutch[4] law, but one that is unheard-of in Spain.

This term has been translated as “administrative offences”, introducing a neologism, as it seemed difficult to find another expression that indicated this special category of penalty regulations.

They are administrative penalty decisions that become judicial decisions via an appeal to a judicial body.

These offences include those regarding driving times and rest periods in relation to road traffic and can be punished under Article 21 of the European Convention on Mutual Assistance in Criminal Matters.

Sometimes Spain receives complaints regarding infringements committed by Spanish hauliers abroad that it cannot process as they are not considered a crime in Spain, and cannot be sanctioned via administrative channels due to the lack of extraterritorial competence in relation to administrative penalties[5].

2.3. Service of documents by post

The possibility of serving documents by post –Article 52.1 of the Convention–, even without a translation –Article 52.2 of the Convention– is contemplated.

This is an attempt to speed up cooperation, to the point of bypassing it, as neither the judicial authorities of the requested party nor the Ministry of Justice are aware that the requesting state is using this channel, meaning that it cannot rightly be termed judicial assistance[6].

Nevertheless, due, strict judicial cooperation is envisaged for this process pursuant to Article 52c.5, when the authorities of the requesting party are unaware of the address of the person in question or when they require documents to be served in person.

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[4] This figure also appears in the Convention on the enforcement of foreign judgments in criminal matters, signed by Spain on 13 November 1991, on the occasion of the meeting of community Justice Ministers.

[5] See DE MIGUEL ZARAGOZA, El espacio jurídico-penal del Consejo de Europa, in *Política común de Justicia e Interior en Europa*, Cuadernos de Derecho Judicial, (CGPJ), Madrid, 1995, page 34.

[6] SALCEDO VELASCO, “Mecanismos procesales de cooperación judicia*”,* in *Política Común de Justicia e Interior en Europa*, Cuadernos de Derecho Judicial, Madrid 1995, pages 193 *et seq*.

This kind of service can be extended to the sending of documents generated in administrative proceedings and not just judicial ones, provided that, pursuant to Article 52.4, it refers to an offence that both parties punish as an infringement of regulations prosecuted by an administrative authority whose decision can be appealed to the courts, particularly in criminal matters.

2.4. Direct letters rogatory

The Convention regulates the sending of letters rogatory directly between judicial authorities. This is the result of one of the dimensions of the creation of the community area and within it, of a judicial area, where direct judicial relations are articulated[7].

This, in the context of the Schengen Convention, direct transfer between judicial authorities –Article 53– is the general rule. Moreover, said possibility is not conditioned upon the existence of urgency, it constitutes a standard mechanism. Thus, going via the Ministry of Justice is only obligatory in the Schengen sphere in relation to two scenarios: requests for temporary transfer and transit of persons under provisional arrest or who are the subject of a penalty involving deprivation of liberty and the exchange of information on sentenced persons.

2.5. Letters rogatory for the search or seizure of property

Finally, there is an important modification in relation to the letters rogatory requesting the search or seizure of property. In this regard, Article 51 of the Convention states:

"The Contracting Parties may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than the following:

> *(a) the act giving rise to the letters rogatory is punishable under the law of both Contracting Parties by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Contracting Parties by an equivalent penalty and under the law of the other Contracting Party by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, and*

[7] This idea is not new as, on the one hand, the system of direct communication was already promoted as a priority in certain areas since Recommendation No. R(82)1 adopted by the Committee of Ministers on 15 January 1982, at the 342nd meeting to deal with international cooperation on fighting and suppressing terrorism.

where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(b) execution of the letters rogatory is consistent with the law of the requested Contracting Party".

As a result, according to said article the letters rogatory must be executed if the offence is punishable in Spain with a sentence of more than 6 months, even if it represents an "administrative offence" in another state.

3. Letters rogatory

We will now concentrate on one of the most important measures of mutual assistance in criminal matters, namely, letters rogatory.

In domestic law, a letter rogatory is a request sent by one authority to another asking the latter to take certain steps.

In international law, the objective of the letter rogatory is the same; the only difference is the fact that the corresponding authorities are in different countries. This means that when they are received by the Spanish judicial authorities, they are processed and executed in the same way as requests for judicial cooperation between national bodies. They do not demand additional requirements on top of those set out in the Treaties and Conventions to which Spain is party.

The request may be sent directly from the requesting authority to the requested authority, without the need for transfers or intermediate steps.

A letter rogatory may refer to any act of information or investigation.

Requests via letters rogatory in Spain from countries in the Schengen group may be sent directly to the requested Spanish judicial authority by the requesting judicial authority, who will send a copy to the Spanish Justice Ministry.

It can also be sent via the National Headquarters of the International Criminal Police Organisation (Interpol), which is the most commonly used method. A copy of the letter rogatory is used after preventative authorisation has been received from the judicial authority, although the original is sent via diplomatic channels.

Meanwhile, the parties must inform the party in question of the criminal decisions and other subsequent measures that may affect its nationals and which are entered in the Registry of criminal records.

In this regard, if one contracting state brings a complaint with a view to starting proceedings before the courts of another state, the latter will process it by notifying the respective Justice Ministers and the requested state will inform the requesting state of

the outcome of the complaint, sending it copies of any decisions handed down, as the case may be.

The address, telephone and fax of any Spanish judicial authority may be provided by the Special Public Prosecutor's Office for the Prevention and Suppression of Illicit Drug Trafficking and can also advise the requesting party on which authority is responsible for receiving and processing the request.

In the 1959 Convention, Spain reserved the right to require an authenticated Spanish translation of the request and annexed documentation. Although this does not mean that the request can be rejected if it is not translated, it is advisable to include one in order to avoid delays, particularly when the request is sent directly to judicial authorities in small towns that do not have translators working in some of the languages. All of this is notwithstanding Article 52 of the Schengen Convention.

4. The *ne bis in idem* principle

The *ne bis in idem* principle is based on the general recognition that no one can be convicted of the same crime on more than one occasion.

4.1. The European Convention on Extradition

Even though we already know that this Convention has been replaced by the Framework Decision on the European arrest warrant, notwithstanding its application in relations between Member States and third states, it is worth returning to it in order to clarify the step that Schengen represented.

Thus, on the basis of this principle it is envisaged that extradition will not be granted when the person sought has been definitively sentenced by the authorities of the requested party for the offence or offences on which the extradition request is based and it is for the requested party to decide whether or not to reject it if it has been decided not to prosecute the person or to end the proceedings pending for the same offences or offences.

In a way, the signing of the Additional Protocol to the European Convention (Strasbourg, 15 October 1975) contained the reservations made by the states to the Convention, by determining in Chapter II that Article 9 of the Convention would be supplemented by the provisions it contained, namely the non-extradition of persons regarding whom a final judgment had been issued in a third state (where said state is a contracting party to the Convention) for the same offences:

a. if the aforementioned judgment resulted in his acquittal;

b. if the term of imprisonment has been completely enforced or has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty;

c. if the court convicted the offender without imposing a sanction.

The above notwithstanding, extradition was permitted when the crime to which the judgment referred was committed against a person, an institution or any thing having public status in the requesting State, if the person had himself a public status in the requesting State or if the offence was committed completely or partly in the territory of the requesting State or in a place treated as its territory. Finally, it gives the national laws the possibility of applying the broader provisions regarding this principle that are inherent to judicial decisions handed down abroad.

4.2. The Convention implementing the Schengen Agreement

The Convention implementing the Schengen Agreement dedicates Chapter III of Title III, Articles 54 to 58 to the application of this principle.

The principle is defined in Article 54:

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts[8] provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party".

This article, like the four remaining ones which contemplate the situation of *lis pendens*, or the request for information from the state that brings the second proceedings, is a literal reproduction of the Convention on the international value of the *ne bis in idem* principle.

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[8] The conclusions of Advocate General Ms Eleanor Sharpston presented on 5 December 2006 (Case C-288/05) indicate that the term "the same acts" refers to "identity of material facts, understood as a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. The determination of whether the facts in the main proceedings are so linked is a matter for the competent national court. However, where a defendant intended from the outset to transport smuggled goods from their point of entry to a final destination in the Community in a single operation, any successive crossings of internal borders in the course of that operation may, in principle, be regarded as acts which are inextricably linked for that purpose". See also the following Judgments: Van Esbroeck (CJEC 2006, 70); Van Straaten (CJEC 2006, 279); Van Esbroeck (CJEC 2006, 70); Gasparini *et al.* (CJEC 2006, 277).

It does not contemplate a hypothesis in which the first state has issued a judgment resulting in acquittal, thus reflecting the situation that initially existed in the European Convention on Extradition prior to the adoption of the Additional Protocol in 1975, which does include this hypothesis, as well as the application of the principle even though the judgment was issued in a third state[9].

As Article 58 allows the application of broader national rules, there are no problems for Spain, as the Organic Law of the Judiciary (LOPJ) –Article 23.2 (c)– provides a generous guarantee of the principle by stating that prosecution in Spain can only take place when "the criminal has not been acquitted, pardoned or sentenced abroad or in the latter case, if he/she has not served the sentence. If the sentence has only been partially served, this will be taken into account in order to proportionally reduce the one that corresponds to him/her".

The Passive Extradition Law of 1985 also recognises the principle –Article 4– when Spain is the requested state and the same act has been or is to be judged here[10].

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[9] The Framework Decision on the European arrest warrant states that the surrender of the person sought can be prevented when he/she has been finally judged in the country of enforcement, regardless of whether the decision resulted in acquittal or conviction, provided that the penalty had been enforced in the latter case, was in the process of being enforced, or can no longer be enforced by virtue of the law of the sentencing Member State –Article 3.2–.

[10] But in addition it envisages several different scenarios that entitle the judicial authority of the enforcing state not to surrender the person sought: when the same acts to which the European arrest warrant refers have led the judicial authority of the enforcing state to decide not to bring criminal proceedings –Article 4.3–. When the same acts to which the European arrest warrant refers have led the judicial authority of the enforcing state to decide to consider the criminal proceedings brought at an end, i.e., terminating the proceedings underway for the same acts, by means of a decision other than a conviction –Article 4.3–. When the person sought is the subject of a final decision in a Member State for the same acts that prevents the subsequent exercise of criminal action, i.e., any decision that while not a conviction, has the effects of *res judicata* –Article 4.3–. When the enforcing judicial authority is aware, thanks to the information at its disposal, that the person sought has been finally judged for the same acts in a third state, provided that, in the event of a sentence being

Moreover, the Schengen Convention complements what has already been indicated in relation to the Convention on Extradition and its Protocol, making it possible in the case of new proceedings brought by one party against a person who was the object of a final decision in another party, for the same acts, for the sanction imposed to be reduced by the length of the period of deprivation of liberty the person was subjected to, and the party bringing the proceedings can always ask the state in which the judicial decision was issued for the necessary information on the decision in order to take it into consideration in the new proceedings.

It also allows the parties to make declarations upon ratification, acceptance or approval in order to state whether or not they accept this principle in the three scenarios indicated, i.e., when all or part of the acts were committed in its territory, except in cases where part of the offence was committed in the territory of the party where the judgment was issued; when the foreign judgment is based on acts committed by a public servant who has violated the obligations of his/her post and when they represent an attack on the security of the state or other essential interests[11].

5. The transfer of the enforcement of criminal judgments

Despite such a general title, this chapter does not actually regulate the enforcement of all kinds of criminal judgments, only those involving prison sentences. Therefore, the text on which it is based is not the European Convention on the International Validity of

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handed down, the sanction has already been enforced, is in the process of being enforced, or can no longer be enforced by virtue of the laws of the sentencing state –Article 4.5–. Basically, the *non bis in idem* principle as envisaged in the Framework Decision seems to encompass both the hypothesis of a conviction and those cases resulting in acquittal, the only difference being whether rejection is obligatory or optional; if the conviction has been issued in a Member State, the rejection of execution is obligatory, while if it was handed down in a third state, it is optional. It is remarkable that the formula contained in the Passive Extradition Law takes into account the initial text of the European Convention but not that of its Additional Protocol, ratified at the same time.

[11] See GARCÍA BARROSO, *El procedimiento de extradición II,* Madrid, 1996, pages 360 to 362.

Criminal Judgments[12], but the Convention of 21 March 1983 on the Transfer of Sentenced Persons –Article 67 of the Schengen Convention–.

In this regard, Article 68 of the Schengen Convention states that "The Contracting Party in whose territory a penalty involving deprivation of liberty or a detention order has been imposed by a judgment which has obtained the force of *res judicata* in respect of a national of another Contracting Party who, by escaping to the national's own country, has avoided the enforcement of that penalty or detention order may request the latter Contracting Party, if the escaped person is within its territory, to take over the enforcement of the penalty or detention order".

Indeed, the structure of the Council of Europe Convention on the Transfer of Sentenced Persons is based on the assumption that a sentenced person can be transferred to the state of which he/she is a national, provided the sentencing state, the enforcing state and the sentenced person give their consent, and provided, of course, there is dual criminality.

The enforcing state may apply a system that pursues enforcement or converts it into one of its own judgments, respecting the facts that were proven and without increasing the sentence.

Sentenced persons do not have a right to be transferred, only the right to request it and the decisions of the states are sovereign and discretionary, meaning that they do not have to give a reason for rejecting such requests, unlike in the case of extradition where there are established international obligations.

After transfer, the legislation of the administering state applies. However, the granting of an amnesty, a pardon or the commutation of the sentence must be on a consensual basis by both states. On the other hand, the appeal for review is the responsibility of the sentencing state.

The administering state may opt for one of these methods: it either converts the foreign judgment into one of its own judgments, by means of a judicial or administrative

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[12] The signing by the sixteen members of the Council of Europe of the European Convention on the international validity of Criminal Judgments in The Hague on 28 May 1970, ratified by Austria, Cyprus, Denmark, Iceland, Netherlands, Norway, Spain (ratified on 2 September 1994, entry into force on 3 December 1994), Sweden and Turkey, opened a new avenue for the international fight on crime which, as the preamble to the Convention states "is becoming increasingly an international problem, [and] calls for the use of modern and effective methods on an international scale".

decision, or continues to enforce the sentence imposed abroad, which is the system Spain has opted for.

In Spain the National Criminal Court (*Audiencia Nacional*) –Article 65.3 LOPJ– is responsible for enforcement. Where the situation is reversed, i.e., transfer from Spain, there is a void in the LOPJ, meaning that the practice followed by the Ministry of Justice consists in informing the sentencing court of the existence of the request; if no report (at least no negative report) is issued after a reasonable period of time has passed, the Council of Ministers takes the decision.

The Agreement on the transfer of sentenced persons was adopted in the context of European Political Cooperation, ratified by Spain on 27 April 1992, after having made a declaration of early application on 20 October 1993. This EPC Convention also selectively applies the Council of Europe parent Convention but while altering its subjective element. The agreement allows the sentenced person to opt between serving his/her sentence not only in the state of which he/she is a national, but in any other community state.

The Schengen system introduces three new elements to this structure.

a. When it is a case of enforcing a sentence passed on a national of another contracting state who has taken refuge in his/her country, the sentencing state, instead of requesting extradition, which would be rejected on the grounds of nationality, can directly ask that the sentence be enforced. This is a variation of the *aut dedere, aut iudicare* principle*,* as it is not a question of trying, but of enforcing. This ensures the void in the European Convention on Extradition is filled.

b. The requested party may issue a detention order. Article 68.2 of the Schengen Convention states that “The requested Contracting Party may, at the request of the requesting Contracting Party, prior to the arrival of the documents supporting the request that the enforcement of the penalty or detention order or part thereof remaining to be served be taken over, and prior to the decision on that request, take the sentenced person into police custody or take other measures to ensure that the person remains within the territory of the requested Contracting Party”.

Without this precept it would be difficult to order it as the offences would have been committed outside the territory of the administering state and there has been (and will be) no request for extradition.

c. As a result of the above, in the event that the sentencing state asks that the sentence be enforced in the contracting state where the sentenced person has taken refuge, the consent of the sentenced person will not be necessary, contrary to the

general rule, as the absence of consent would represent impunity because extradition would also be impossible.

6. The Schengen Information System

6.1. Use of the Schengen Information System

In performing the functions of investigation for the persecution and trial of the crimes of terrorism and others in the sphere of organised crime, and given the international projection and global nature of crime, there is a need for legal instruments of international or cross-border contact and cooperation. These instruments are basically International Letters Rogatory and Extraditions, replaced in the context of the European Union by the European arrest warrant. In turn, these legal instruments would be unable to operate properly were it not for the existence of several institutions, essentially INTERPOL, EUROPOL, the Schengen Information System and the SIRENE offices, the Justice Ministries as central bodies, diplomatic and consular representations and, more recently, the European Judicial Network via the points of contact and Liaison Magistrates.

However, all these systems are still insufficient, as they have proven to be slow; indeed, letters rogatory, even when processed as urgent via INTERPOL take months, meaning that they are of very limited use to the police and requests for information sent to EUROPOL are restricted to the countries of the European Union and also tend to be processed with some delay. Nevertheless, faced with this panorama, the Schengen Information System represented a significant advance, shared by the states that signed the Schengen Treaty, that provided immediate access to the data of persons sought or for whom the police have issued an alert, as well as stolen vehicles and documents.

At present, either in the context of a request for extradition or surrender due to the issue of an arrest warrant, the SIS can be used to provide the state executing the warrant with all the information envisaged in Article 95 of the Convention on the application of the Schengen Agreement, or Article 8.1 of the Framework Decision on the European arrest warrant and surrender procedures, which is more complete than the former. However, until the SIS has sufficient capacity to transmit all the information that appears in the Framework Decision, it will be understood that the SIS alert is a provisional equivalent of a European arrest warrant until the enforcing judicial authority receives the original form established for the European arrest warrant in due form.

According to Article 93, the objective of the Schengen Information System is "*in accordance with this Convention to maintain public policy and public security, including*

national security, in the territories of the Contracting Parties and to apply the provisions of this Convention relating to the movement of persons in those territories, using information communicated via this system".

It can be deduced for said article that the Schengen Information System is a computer network for exchanging the details of persons and objects for use by the authorities of each contracting state, responsible for police and customs checks at the external and internal borders of the countries. In fact, its *raison d'être* is to facilitate the exercise of the fourth freedom of movement (the other three are the free movement of goods, services and capital) sought by the founders of the European Community, namely, the free movement of persons, an objective that was reactivated by the Treaty of Rome amended by the Single European Act and the Treaty on European Union.

Thus, the SIS is designed to perform a key function in making up for the security deficits that may be created as a result of the suppression of internal border checks, by allowing the authorities designated by the parties to have access, thanks to an automated system, to recorded data on persons and objectives, be it in relation to a state's external border checks, or regarding those carried out inside its territory, as well as for the purposes of issuing visas, residence permits or the administration of legislation on aliens within the scope of application of the Convention.

In relation to persons, the data to be introduced are of a physical and legal nature –Article 94 of the Convention–[13].

[13] In relation to persons, the elements are as follows: (a) surname and forenames, any aliases possibly entered separately; (b) any specific objective physical characteristics not subject to change; (c) first letter of second forename; (d) date and place of birth; (e) sex; (f) nationality; (g) whether the persons concerned are armed; (h) whether the persons concerned are violent; (i) reason for the alert; (j) action to be taken. –Article 94.3 of the Convention on Application–. As for objects: (a) motor vehicles with a cylinder capacity exceeding 50 cc which have been stolen, misappropriated or lost; (b) trailers and caravans with an unladen weight exceeding 750 kg which have been stolen, misappropriated or lost; (c) firearms which have been stolen, misappropriated or lost; (d) blank official documents which have been stolen, misappropriated or lost; (e) issued identity papers (passports, identity cards, driving licences) which have been stolen, misappropriated or lost; (f) banknotes (suspect notes) –Article 100.3 of the Convention on Application–.

The majority of the information refers to “inadmissible” aliens, when their presence in Schengen territory represents a threat to public policy or national security.

It is precisely the gathering and use of personal data for subsequent inclusion in computer files and use by the police forces that represents one of the main problems personal data protection legislation has faced. This is because two realities are currently at odds:

> On the one hand, the possibilities that the new information technologies offer in relation to the inference of foreseeable behaviour, or for obtaining information by processing other information and, as such, for the effectiveness of police work, are considerable.
>
> Meanwhile, if the guarantees of protection on how personal data is obtained and processed are strengthened, we run the risk of ruining investigations that would be of benefit for the community, in a context of growing criminality, particularly regarding terrorism, drug trafficking …[14]

Aware of this situation, the Council of Europe charged experts from almost all the community member states with preparing a Recommendation on the application of Council of Europe Convention no. 108, dated 28 January 1981, for the Protection of Individuals with regard to Automatic Processing of Personal Data. Recommendation R (87) 15, approved by the Committee of Ministers of the Council of Europe on 17 September 1987, was the result of this initiative; it is an obligatory point of reference in relation in the field of the protection of computerised police data. Article 117 of the Convention mentions the Recommendation as a mandatory rule.

Convention number 108, dating from 1981, has been signed by all the states in the Schengen area and, more generally, by all the EU Member States.

As for the Recommendation that was born of said Convention, it envisages the creation of a controlling authority independent of the Police.

The Schengen Convention offers points of certain doubt in relation to the data included in the Schengen Information System. Articles 96 and 99 are a cause of particular concern.

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[14] On the problems surrounding the computerisation of personal data, see COMMISSION NATIONALE DE L’INFORMATIQUE ET DES LIBERTÉS, *La protection des données informatiques dans le cadre des accords de Schengen,* in NASCIMBENE, *Da Schengen a Maastricht. Apertura delle frontiere, cooperazione giudiziaria e di polizia,* Milan, 1995, pages 161 *et seq*.

(a) According to Article 96, data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law.

Such decisions may be based on “a threat to public policy or public security or to national security which the presence of an alien in national territory may pose”. This can be verified, in particular, according to the provision, in case where “an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year” or “an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences … or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party”.

This provision can be compared with Article 6 of the 1981 Convention, according to which data regarding criminal convictions may not be processed automatically.

Article 96 could, however, be considered justified in light of the exceptions envisaged in Article 9 of the 1981 Convention, which regulate the possibility of derogating Articles 5, 6 and 8 for protecting state security or suppressing crime, although only as a “necessary measure in a democratic society”.

(b) Article 99 causes similar concern, as in the scope of discreet surveillance and specific monitoring, data may be entered that refer either simply to the subject’s identity, his/her travel routes and destinations, the persons who accompany him/her or the occupants of the vehicle, the objects transported and the circumstances in which the subject or vehicle were found.

Such entry of data may only take place:

(a) where there is clear evidence that the person concerned intends to commit or is committing numerous and extremely serious criminal offences; or

(b) where an overall assessment of the person concerned, in particular on the basis of past criminal offences, gives reason to suppose that that person will also commit extremely serious criminal offences in the future.

Moreover, point 3 authorises the entry of data to take place in accordance with national law, when there is clear evidence that the information is necessary in order to prevent a serious threat by the person concerned or other serious threats to internal or external national security. It is clear that the sensitive data mentioned in Article 6 of the Council of Europe Convention can be deduced from similar information.

Finally, it is worth looking at how the Schengen Convention itself contains a series of general principles for the protection of personal data, including the one that establishes the use of the data exclusively for the purposes set out therein, the obligation of the

transmitting parties to ensure the data is accurate, the principle of responsibility for the transmission of incorrect data and the obligation to register the transmission and receipt in the file from which they originate and which contains the transmitted data and in the one the transmitted data is included –Article 126.3 (a), (b), (c), (d) and (e)–. It also requires that the information only be given at the request of a contracting party and will only take place between authorities whose designation has been notified to the Executive Committee by each state –Article 101.4 of the Convention–.

These guarantees are also contained in more detailed form in relation to the SIS, highlighting:

(a) First of all, the principle of responsibility for the data according to which the party supplying the information is responsible ensuring that the data entered into the system are accurate, up-to-date and lawful.

(b) Secondly, use of the data is limited to the purposes announced in each of the alerts, with exceptions to this principle depending on obtaining the prior authorisation of the informing party, and must respond to the need to prevent an imminent serious threat to public policy and public security, on serious grounds of national security or for the purposes of preventing a serious criminal offence.

(c) Limits are also set in relation to the period of time for which the data contained in the SIS can be stored, which will only be for the period of time necessary to accomplish the objective for which they were supplied; the Convention sets maximum terms, notwithstanding the shorter terms envisaged in national laws, as well as the authorities that are authorised to consult the data.

These protective principles are based on an organisational framework which envisages the creation of monitoring authorities on both the common and national levels, responsible for checking the correct verification of the provisions of the Convention, and that the examination and use of the data entered into the SIS does not represent an infringement of the rights of the person in question.

In this regard, it contemplates:

(a) The right of any person to access the data referring to him/her entered into the SIS, although this right may be limited by the execution of the legal task set out in the alert or the need to protect the rights and freedoms of third parties, and must be exercised while respecting the law of the contracting party before whom the allegation was made.

(b) The right to take legal action against a jurisdictional body or competent authority for the purposes of the correction, suppression, information or indemnification in relation to an alert is left to the sphere of the national legislations, which must, in turn, adapt to the

level of protection established in the 1981 Convention and, if applicable, the 1987 Recommendation.

Moreover, the Convention contemplates the condition that the transmission of personal data may not take place until each Member State adopts a national provision containing the guarantees and levels of data protection contained in the 1981 Council of Europe Convention and Recommendation R (87).

6.2. Organisation of the Schengen Information System

The System is managed, in the international sphere, by the Executive Committee (comprising Ministers and Secretaries of State), to which the Central Group (composed of Senior Civil Servants) answers, and below which is a collection of working parties, most of them technical, responsible for carrying out the instruction issued by the first two bodies.

On a Spanish national level, there are two working parties, led by the Secretary of State for Home Affairs: the Inter-ministerial one, comprising the Directorate General of Consular Affairs, the Customs Service, the Secretary of State for Justice, the Civil Guard and the Police; and the Ministerial one, composed of the Police and the Civil Guard.

The physical configuration of the IT system is comprised of:

A national part, the N.SIS[15], in each of the contracting states. Each of the parties is obliged to maintain for its own account and at its own risk, its national section of

[15] This is the national section of the SIS. There is one in each Schengen country, connected to the C.SIS by a data transmission line, and responsible for gathering and sending the information generated in the country to the C.SIS, and receiving the information distributed by the latter. In order to do this it has the Schengen database. In the case of Spain, the Coordination Unit of the Secretariat of State of Home Affairs is the body chosen to manage the national system, consisting of the OE.SIS (an institutional element created in Spain for the IT operations). There is one in each of the Institutions involved in the Project. It is linked via a data transmission line to the institutional computer of the user institutions, guaranteeing the coherence and consistency of the databases of the national bodies. The situation is quite confusing and costly in Spain, as the costs of installation were 6,000 million in 1991, plus our

the SIS (NSIS), according to the “information ownership principle”. This means that each Member State decides to enter data on a person and determine the category of the information gathered, and only the informing party will be authorised to amend, correct or delete the data it has supplied –Articles 92.2 and 106.1 of the Convention–.

A technical support function, the C.SIS[16], situated in Strasbourg, gathers and distributes the information generated by the national sections, which are linked to it by data transmission lines. They serve the institutions of their country that are involved in the system.

SIRENE is another means of interrelation between the Member States[17].

The SIRENE (*Supplementary Information Request at the National Entry)* offices that each contracting party must establish are designed to provide the other parties with a single, permanent point of contact, available twenty-four hours a day. The system used to carry out the exchange of information allows the SIRENE offices to confirm that the

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contribution to the maintenance of the “technical support function” in Strasbourg, which is 11.05% of a total of 24,600,000 ECU.

[16] This is the central body of the SIS. It was in 1992 that the C.SIS had its actual debut and in 1993 the integration test was carried out, together with that of the N.SIS. It is an X-400 communication system consisting of a collection of physical and logical systems. It receives the information generated by each of the Schengen countries and distributes it to the others via the N.SIS after duly validating it. It also guarantees the consistency of the information stored on the national systems. The responsibility for the C.SIS has been assumed by the French Republic. However, its creation and maintenance is paid for by all the contracting states.

[17] SIRENE is an office that exists in each of the Schengen countries. Its main function is to manage the processes corresponding to persons sought for extradition, validate those sent by other countries, and establish the necessary contacts with the rest of the SIRENE offices in the Member States. In Spain, the national system (N.SIS + SIRENE) belongs to the Coordination Unit, and is linked to the computer systems of the Directorate General of the Police, the Directorate General of the Civil Guard, the Directorate General of Consular Affairs at the Ministry of Foreign Affairs and the Customs Service of the Ministry of Economy and Finance.

motive of the alert and the action required fit in with the national laws of each of the affected parties. Moreover, they are responsible for ensuring the information introduced into the SIS by the respective parties is accurate, up-to-date and lawful.

The legal grounds, the case of intervention, the procedures to be followed and the general principles of the organisation of SIRENE are set out for all the contracting parties in the "SIRENE Manual".

Although it may seem that the role of the SIRENE offices may clash with those of other international organisations such as the International Criminal Police Organisation (ICPO - Interpol), neither the SIS computer system nor the SIRENE offices are aimed at replacing or imitating INTERPOL, and even though certain missions may overlap, the principles of action and cooperation between the contracting states differ notably from those that govern INTERPOL, and there are recommendations for organising an exchange of information at a national and international level between the two Organisations[18].

6.3. Areas in which data should be introduced

There are areas in which data (alerts) should be introduced, but which may be reduced if, in the opinion of the informing party, the scant importance of the case so justifies –Article 94 of the Convention–.

The areas are the following:

6.3.1. Data on persons wanted for arrest for extradition purposes –Article 95.1 of the Convention–

According to Article 16 of the European Convention on Extradition, an "alert" entered into the SIS is equivalent to a request for provisional arrest[19]. Although in order for an alert to be accepted by the SIS of the requested parties, it must contain a minimum

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[18] SIRENE is the human face of the SIS, i.e., it is comprised of a collection of civil servants from different areas –customs police, gendarmes, magistrates– and a permanent material structure.

[19] Article 64 of the Schengen Convention states that "An alert entered into the Schengen Information System in accordance with Article 95 shall have the same force as a request for provisional arrest under Article 16 of the European Convention on Extradition of 13 September 1957 or Article 15 of the Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, as amended by the Protocol of 11 May 1974.

amount of data, namely: the authority which issued the request for arrest; whether there is an arrest warrant or other document having the same legal effect, or an enforceable judgment; the nature and legal classification of the offence; a description of the circumstances in which the offence was committed, including the time, place and the degree of participation in the offence by the person for whom the alert has been issued; in so far as is possible, the consequences of the offence –Article 95.2 of the Schengen Convention–.

The new regulation contained in Article 95.2 of the Convention states:

"*Before issuing an alert, the Contracting Party shall check whether the arrest is authorised under the national law of the requested Contracting Parties. If the Contracting Party issuing the alert has any doubts, it must consult the other Contracting Parties concerned".*

The above text has inexplicably complicated the currently existing mechanism, as in order to decree the provisional arrest in an extradition process underway, it is sufficient for the offence to be classified as such in the requesting state. Meanwhile, in the Schengen system, the "alert" is subject to the condition that the offence allow arrest in the requested state or states, according to their internal legislation. Normally, the requesting Spanish judicial body will not have this information, meaning that prior to including the data in the alert, it will first have to obtain the necessary information, usually from the Ministry of Justice.

The requested state can neutralise said "alert", due to reasons of legality or expediency, by adding a "flag" for 24 hours and in exceptionally complex cases, for a week. If the alert is finally cancelled, it becomes a flag, solely for the purposes of notifying the place of residence.

6.3.2. Detention requests for the purpose of a European arrest warrant

In effect, the Member States may decide, under any circumstances, to include an alert regarding the person sought in the SIS.

The SIS must be used to supply the state executing the European arrest warrant with all the information set out in Article 8.1 of the Framework Decision on the European arrest warrant and surrender procedures, i.e., the identity and nationality of the requested person; the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority; evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2; the nature and legal classification of the offence, particularly in respect of Article 2; a description of the circumstances in which the offence was

committed, including the time, place and degree of participation in the offence by the requested person; the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State; if possible, other consequences of the offence. All this information is more complete than as set out under Article 95 of the Convention, as it adds a reference to what the sentence imposed or prescribed scale of penalties is in the legislation.

Nevertheless, until such time as the SIS has sufficient capacity to transmit all the information that appears in the Framework Decision, the SIS alert will be considered equivalent to a provisional European arrest warrant, until the executing judicial authority receives the original form envisaged for the European arrest warrant, in due time and form.

6.3.3. Other data

It is worth highlighting, on the one hand, the data on missing persons or persons who, or in order to prevent threats, need temporarily to be placed under police protection –Article 97 of the Convention–. The purpose of introducing the data is to establish their whereabouts and, if applicable, prevent them from continuing their journey.

Apart from the police action, the decision on suspension corresponds to the courts if the matter is under judicial investigation.

Meanwhile, there is the data on persons who must appear before the courts of the informing party –Article 98 of the Convention–. These are persons summoned to appear as witnesses, accused parties or for the service of criminal judgments and only for the purposes of notifying the place of residence or domicile.

This is a type of international judicial assistance and is governed by European Convention no. 20[20].

Moreover, data regarding inadmissible aliens and persons or vehicles under “discreet surveillance” or “specific checks” can also be included, “where there is clear evidence that the person concerned intends to commit or is committing numerous and extremely serious criminal offences” or “where an overall assessment of the person concerned, in

[20] According to DE MIGUEL ZARAGOZA, *La cooperación judicial en los Pactos de Schengen,* BIMJ, Supplement to number 1676, 1993, page 19, it is not a question of including all the persons summoned to appear in court in the SIS, but only those involved in which there is an element of intent. We do not agree, as the article says nothing regarding this affirmation, only that they be appearing in connection with criminal proceedings.

particular on the basis of past criminal offences, gives reason to suppose that that person will also commit extremely serious criminal offences in the future" or when it "is necessary in order to prevent a serious threat by the person concerned or other serious threats to internal or external national security" –Article 99–.

According to Article 99.4 of the Schengen Convention "discreet surveillance" means that officers from one Schengen state can gather and transmit information to another Schengen state, in relation to border checks and checks carried out within the country regarding the fact that the person for whom or the vehicle for which an alert has been issued has been found; the place, time or reason for the check; the route and destination of the journey; persons accompanying the person concerned or occupants of the vehicle; the vehicle used; objects carried; and the circumstances under which the person or the vehicle was found. Meanwhile, "specific checks" represent, according to the provisions of Article 99.5, that "persons, vehicles and objects carried may be searched in accordance with national law … If the specific check is not authorised under the law of a Contracting Party, it shall automatically be replaced, for that Contracting Party, by discreet surveillance".

But the provisions of the Convention make it possible for decisions to be based on "the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens" –Article 96.3–.

Finally, data regarding objects –Article 100 of the Convention–. This refers to data on objects sought for the purposes of seizure or use as evidence in criminal proceedings.

6.4. Capacity of the Schengen Information System

The service capacity of the SIS, in its current format, is limited to the 18 participant states, and was not conceived to provide service to the number of states that have joined progressively to date. Therefore, and in order to take advantage of the latest advances in information technology and enable the introduction of new utilities, it is necessary to develop a new second generation Schengen Information System (SIS II), as acknowledged in Decision SCH/Com-ex (97) 24 of the Executive Committee on 7 October 1997 (3). That Decision gave rise to Council Regulation no. 2424/2001, of 6 December 2001, on the development of the second generation Schengen Information System (SIS II) (OJ no. L 328 of 13/12/2001). The legislative basis consists of two parts: Regulation 2424/2001, based on Article 66 of the Treaty establishing the

European Community. and the above-mentioned decision based on letters (a) and (b) of section 1 of Article 30, on letters (a) and (b) of Article 31 and on letter (c) of section 2 of Article 34 of the Treaty on European Union.

The reason for this is, as set out in Article 92 of the 1990 Schengen Convention, the Schengen Information System will allow the authorities designated by the Member States, by means of an automated search procedure, to have access to alerts regarding persons and objects in order to carry out border checks and other police and customs checks within the country in accordance with national law, as well as for the purpose of issuing visas, residence permits and the administration of legislation on aliens in the context of the application of the provisions of the Schengen *acquis* regarding the free movement of persons.

All alerts and information will be published via the central national authority responsible in that regard, i.e., the SIRENE offices.

On 18 December 2001, the Commission published a Communication (COM(2001)720) which examined the possibilities for the materialisation and development of SIS II. After the studies and debates in relation to the architecture and the functions of the future system were complete, the Commission presented three proposals for legislative instruments in 2005. On 20 December 2006 two of the instruments were adopted, EC Regulation 1987/2006 regarding first pillar aspects on the establishment, operation and use of SIS II, and EC Regulation 1986/2006, regarding access to the SIS II by the services in the Member States responsible for issuing vehicle registration certificates. The third instrument, Council Decision 2007/533/JHA regarding third pillar aspects on the establishment, operation and use of SIS II, was approved on 12 June 2007.

The Council on Justice and Home Affairs held in December 2006 approved the SISone4all project, which was a temporary solution that allowed the nine states joining the EU in 2004 to connect to the current version of the SIS system with some technical adaptations.

After the Member States asked for more time to test the system and adopt a less risky strategy for migrating from the old system to the new one, the Commission presented proposals in a regulation and a decision that defined the tasks and responsibilities of the different parties involved in the preparation of migration to SIS II, giving rise to Council Regulation 1104/2008 dated 24 October 2008, on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) and Council Decision 2008/839/JHA, dated 24 October 2008, on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II).

7. Conclusions

In the European Union the objective is clear: to usher in a new freedom of persons to come and go freely, without checks, and the opening of borders necessary to achieve this must not take place at the expense of the security of states or persons, or lead to a relaxation of the control of migratory flows, meaning that the appropriate means must be found to reconcile the principle of the free movement of persons with the principle of security, but not only in relation to intergovernmental cooperation, but also in a broader European Community context.

This idea was intensified by the terrifying spectacle we witnessed with indescribable crudity on 11 September 2001, when one of the greatest threats to the rule of law, as well as the citizens that enjoy it, terrorism, manifested itself in an unprecedented attack on the most powerful planet on the globe.

To an increasing degree, crimes are being committed by networks that operate on an international scale, with bases in several countries and taking advantage of legal vacuums derived from the demographic limits to investigations, often with significant logistics and financial backing.

Within the strict framework of the European Union, drugs, organised crime, international fraud, trafficking in human beings and the sexual exploitation of children are problems that affect all the Member States. These plagues know no boundaries. Nevertheless, the Union aspires to become an area of freedom, security and justice and not an area for different types of traffic. The citizens of the European Union want to be able to fully enjoy the freedom of movement allowed by the development of the Union and at the same time, feel protected from threats to their personal security.

Thus, as there are no borders in the European Union and the right of the free movement of persons is guaranteed, new measures must be adopted to fight crime and specifically terrorism. We must react by designing a supranational legal framework that guarantees a uniform and homogenous legal response by all states, enhances the mechanisms of police and judicial cooperation and perfects the investigative means and penalty instruments necessary to combat such serious criminal behaviour. This was the idea behind the 1997 Action Plan of the European Union for Combating Organised Crime, which contains a list of political and legislative recommendations for the EU Member States with a view to advancing in the creation of the “area of freedom, security and justice”, by means of preventative action and the suppression of organised crime and prosecuting participation in criminal organisations. Moreover, it introduces “extraterritorial” jurisdiction, with the possibility to pursue the offences related to the participation in a criminal organisation, which take place in the territory of the Union, in

any Member State, without taking into account the base or place where the organisation acts.

Therefore, now more than ever the European Union has used the Treaty on European Union to set the objective of offering the citizens a high degree of security within an area of freedom, security and justice. The current proposals in this regard are essentially twofold - the organised fight on terrorism and the replacement of extradition with a European arrest warrant; both represent a fundamental element in providing the Member States of the European Union with effective criminal legislation for dealing with terrorism as well as adopting measures aimed at improving international cooperation in the fight on crime.

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LEVEL II: TO LEARN MORE

1. Introduction

The Schengen Agreement of 14 June 1985 was the product of the arrival of a far more favourable climate for the development of the European Economic Community after 1984 than the one that had existed in previous years. This new impetus manifested itself in different areas. On the one hand, the Fontainebleau European Council, meeting on 25 and 26 June 1984, approved a declaration regarding the suppression, at internal borders, of police and customs formalities for the movement of persons and goods. This Council also decided to create an *ad hoc* committee chaired by Mr Andonnino, on a "Citizens' Europe", charged with studying the measures to be adopted in order to enhance the identity and image of the Community, in order to better meet citizens' expectations. The reports of this Committee, concluded a year later, show the main principles on which the Citizens' Europe was to be constructed, and they include the free movement of persons and the removal of internal borders as essential elements of such construction.

Another important event took place that year: the Saarbrücken Agreement between France and the Federal Republic of Germany, dated 13 February 1984, for the removal of border checks between the two countries, which gave rise to the Schengen process. This was an attempt to extend the positive experiences garnered in the Benelux sphere and generalise that model for the continent in order for it to act as a successful counterpoint to the British model of exhaustive border checks. Indeed, the Benelux countries (Belgium, the Netherlands and Luxembourg) signed an agreement in 1960 removing their borders and transferring the control of persons to the external borders, forming a single territory and putting a common visa policy in place, the Benelux tourist visa.

The masterstroke of the Saarbrücken Agreement, signed by President Mitterrand and Chancellor Kohl after the Rambouillet summit of June 1984, was to ease the checks, without removing them. The agreement established: the principle of free passage, i.e., mere visual surveillance by the police and customs authorities of the vehicles that pass, without stopping, at reduced speed; the principle of random checks, to be performed at specific points and without interrupting the progress of other vehicles; the green disc principle, i.e. using a symbol affixed to the windscreen of the vehicle that

indicates that the occupant respects the rules of the customs police and the principle of grouped checks, i.e., concentrating all the checks in one place.

Meanwhile, the Schengen agreement envisaged, among its long-term measures, the abolition of checks at all common borders and transfer of these checks to the external borders. This entailed a prior harmonisation of legislative and regulatory provisions regarding the prohibitions and restrictions on which the checks were based, i.e., the adoption of "complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities".

Thus, the Agreement stresses that it can be signed without reservations regarding ratification or approval and merely lists, in its 33 articles, a series of specific legally binding measures (visual surveillance of vehicles, random checks, etc) that were to be adopted in the short term (Articles 2 to 16), and other long-term ones (Articles 17 to 27), which only establish declarations of intent, with the Parties assuming obligations to "seek", "open discussions", "adopt common initiatives", etc., in certain areas, including judicial cooperation; the latter are, of course *desiderata* without practical effect, which naturally required another text that specified the actual measures. That is to say, the Agreement lacked the necessary instruments to make its provisions effective, which should have been complied with in full by 1 January 1990 (Article 30); for this reason it can be accurately classed as a "framework treaty" or as a kind of rulebook.

Given the state of affairs, the five signatories of the Agreement (Belgium, Germany, France, Luxembourg and the Netherlands) understood the need to approve a new instrument containing the necessary mechanisms to set the gradual abolition of border checks in motion. This gave rise to the Convention on the Application, with 142 articles by no means easy to understand and highly complex both in terms of its structure and the areas it regulates and which was signed by the remaining states.

Simply put, since 26 March 1995 Europe has been the home to an integration mechanism that leaves its citizens with little doubt that they are in a single space. The Schengen agreements are a specific instrument born of the pragmatism and desire of several Member States of the European Union to make the free movement of persons a reality.

The idea behind the cooperation in the field of Schengen is not a million miles away from the one that has inspired the whole process of European integration. It is clear that by means of a "correct implementation", such as the removal of checks on persons at borders, a "*de facto* solidarity" is obtained, a framework for cooperation on several aspects of what can generically be termed internal security.

The artificial barriers that borders represent entail significant costs and a clear loss of competitiveness for the community's economy. Avoiding unnecessary costs was one of the reasons for stepping up cooperation in order to abolish checks affecting persons at Member State borders as well, following the market logic applied in other sectors.

Thus, the fact that a community objective was being pursued and that the Schengen States are also Community States, prevents the provisions of the Convention being applicable where they may be incompatible with community law.

In this regard, on 2 October 1997, the European Council signed the Treaty of Amsterdam, which was to replace the Maastricht Treaty, and which aimed "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". With this aim, the entire Schengen *acquis* can be integrated into the framework of the Union. In fact, as of the entry into force of the Treaty of Amsterdam the entire *acquis* became immediately applicable in the thirteen Schengen states in the legal-institutional framework of the European Union.

All of this represents the creation of an area of free movement of persons, as envisaged in Schengen, but which is adapted to the material and personal infrastructure of the European Union. As a result, Schengen comes under the control of the institutions of the European Union. The Council, the Commission, the European Parliament, the Court of Justice and the Court of Auditors have full competence in the Schengen sphere. The result is the application of fuller safeguards in favour of citizens, which did not exist under Schengen, due to the lack of an equivalent institutional structure.

2. The opening of internal borders

For years, on a European regional level, different groups and bodies had been working in relation to the abolition of checks on persons at inter-community borders. This work was in line with the principles of free movement on which the European Economic Community was founded.

Article 8 A of the Treaty establishing the European Community, introduced by means of the Single European Act, which entered into force on 1 July 1987, defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty". This was to be attained "progressively ... over a period expiring on 31 December 1992".

The Single European Act is a sign that, within the European Community, the push was on to achieve the free movement of persons, without internal borders. This was the legal backing that the European immigration policy needed to attempt to harmonise what had been somewhat confusing up to that point; something that was being discussed in different forums but in an entirely uncoordinated fashion.

There is a basic idea that began circulating in the offices of the community, a strong link between the disappearance of the Community's internal border controls and a tightening of the checks at external borders; two objectives that would have to be pursued simultaneously as the only method for the existing security systems to be preserved.

One of the top priority areas, perhaps the most important one in view of the speed at which events take place, on which the European Community had to agree, was control of asylum seekers. Because once one state allows an asylum seeker to enter its territory, that Member State of the European Community will have to allow, and the others will have to accept, that the person in question can travel without any hindrance throughout the entire Community, crossing its internal borders as a logical consequence of the disappearance of these physical frontiers. Thus, European policy devoted all its efforts to limiting the right of asylum.

At present, all the EU countries, not just the ones that belong to the Schengen System, have a point in common: the stiffening of internal policies on asylum, i.e., the construction of a Europe of and for the citizens, in which the free movement of persons was one of its objectives, has been cut back; the removal of the internal borders is in exchange for the strengthening of the external ones.

Nevertheless, and in response to this new trend, the Single European Act, –signed in Luxembourg on 17 February 1986 and in The Hague on 28 February 1986, entering into force on 1 July 1987–, as the first reform of the founding treaties of the European Community, proposes the creation of a space without internal borders in Article 13, in which the free movement of capital, goods, persons and services is a reality and sets a transition period scheduled to end on 1 January 1993, "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".

Moreover, one of the questions raised at the Luxembourg summit in June 1991 was the inclusion in the Treaty on European Union of the necessary powers to harmonise policies on asylum, immigration and in general the status of citizens of third states.

The Treaty on European Union eventually included this approach and, in effect, raised the possibility of matters regarding access, permanence, etc. of aliens from third states

being dealt with via institutional channels in the future, following the traditional system of initiative from the Commission, consultation with the European Parliament and decision of the Council of Ministers, all of which would be overseen by the Luxembourg Court.

However, this task was performed by direct cooperation between the states in question, via intergovernmental channels, as it was not originally contemplated in the treaties as being the competence of the European Communities, although the Treaty of Maastricht went some way to remedying this legal and institutional void by giving the European Union certain powers; intergovernmental cooperation has traditionally dominated the field of internal security and policing.

In this regard, effective agreements have been reached under the aegis of two bodies, the Schengen and TREVI groups.

As far as Schengen is concerned, it is an agreement that was adopted as a result of the difficulties involved in reaching common positions on sensitive matters affecting the sovereignty of the states in the Union; it was these difficulties that pushed a group of states to accomplish outside the Union what they were unable to achieve within it. This led to a situation in which in order to attain one of the Community's objectives, a completely independent forum was created which enabled the states to create a system of operational cooperation based on mutual trust and in which their national sovereignty was not compromised.

It was for this reason that Schengen emerged in a spirit of controversy; this is because while, on the one hand, it represented an advance compared to the European Union as it gave all persons on the territory of the contracting states to the agreement equal status, regardless of whether they were nationals or aliens, on the other, it established a difference between community citizens and aliens when crossing external borders, and aliens were differentiated according to whether or not they required a visa.

Thus, it is an Agreement that came to light as a result of the efforts made in the context of the community being in vain. It is legally possible for the EC Treaty to oblige the United Kingdom to remove border checks, but the fact is it has not done so, nor has it been called to account by the Court of Justice. For some time now, the members of the Union have been negotiating a Convention on the crossing of external borders but have thus far failed to obtain a consensus of all Member States, despite exhausting negotiations. The only route that has proven successful to date has been to allow the states with decided political will to advance, to do so, acting on a smaller scale than that of the EU.

In 1985 the first Schengen Agreement was signed, after which, in an official communiqué, the signatory states declared that “the abolition of checks on persons at the common borders between states … will be accompanied by the transfer and harmonisation of the checks at the external borders; at the same time the necessary measures are envisaged to maintain the essential level of security and modernise the means of police and judicial cooperation. This mechanism is completed with a series of safeguards in the sphere of the right of asylum and that of the protection of private life in relation to the use of files, which constitute an important process in the Citizens’ Europe”.

This Agreement envisaged, among its long-term measures, the abolition of checks at common borders and their transfer to external borders. This entailed a prior harmonisation of the legislative and regulatory provisions on the prohibitions and restrictions on which the checks were based, i.e., the adoption of “complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities”.

However, in theory at least, the topic of asylum was not included on the agenda for the preparatory work for Schengen. But at the meeting in December 1986 of the Ministers responsible for immigration in the five original signatory countries, the term “asylum” came up. The ministers charged the experts working on the different matters to give priority to the study of the repercussions of the gradual abolition of checks on persons at common borders, on the field of asylum. It was a question of examining the measures that could lead to a common policy that would prevent the abuse of asylum claims. These measures could consist of preventing multiple applications in different European Community states; the recipient state being responsible for the seeker; harmonisation of the admission procedures for obtaining refugee status; exchange of information on asylum seekers.

From this perspective, the object of the intergovernmental cooperation has centred on two vital questions: the elimination of the worrying phenomenon of refugees in orbit, on the one hand, and the equally important one of multiple applications, on the other. For this reason it is hardly surprising that the regulatory results of the above cooperation forums gave rise to two conventional instruments whose object is none other than guaranteeing that any asylum application filed with one European Union Member State will only be examined by one of them, namely, the Dublin Convention on determining the state responsible for examining applications for asylum lodged in the Member States of the European Communities, of 15 June 1990, and the Convention implementing the Schengen Agreement, of 19 June 1990.

Although both instruments form part of a common conception of asylum, the mere existence of two cooperation forums and two Treaties that are potentially applicable to the same reality raises the inevitable problem of their ranking, which cannot be resolved by simply arguing that they should be channelled towards the achievement of a common aim.

This was resolved in a decision on 26 April 1994, adopted in the Schengen Group, by its executive committee, which recognised the primacy of the Dublin Convention on the provisions on asylum contained in the Convention on the Application of the Schengen Agreement. Nevertheless, both instruments undoubtedly constitute a decisive step on the road to the inclusion of asylum within the scope of the EU.

At present, immigration and asylum policies are communitised under the Treaty of Amsterdam and, as a result, included in the Treaty on the European Community, under a new title “Visas, asylum, immigration and other policies related to the free movement of persons”.

In any event, according to Article 64 of the Treaty on the European Community, all of Title IV of the same “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

3. Governing principles of the Schengen Convention

By virtue of what we have been explaining until now, we can infer that the fundamental aim of introducing a new personal freedom, to come and go freely, without checks, is completed with the requirement that the opening of borders not be accomplished at cost of reduced security for states and persons or a relaxation of migratory flows, which makes it necessary to find the appropriate measures allowing the principle of the free movement of persons to be reconciled with a principle of security.

Schengen is articulated on the principle of the transfer of checks from internal borders to external borders and on the adoption of a series of “compensatory measures”, as a series of measures that allow the dismantling of checks at internal borders and which are aimed at ensuring the security of the common territory is safeguarded at least as well as it is in each of the states concerned before implementation.

For these reasons the Convention sets out the conditions regarding the crossing of internal and external borders; visas, movement of aliens, asylum and residence permits; police and judicial cooperation, extradition, narcotics and firearms; transport and movement of goods, etc. Moreover, it contains the bases for the creation of a computer system that facilitates both the sealing of external borders and the exchange

of judicial, police and administrative information in order to enhance cooperation in these areas.

As we can see, despite its apparent complexity, the Convention has a single purpose and that is to be a testing ground, a trial run or antechamber before what will be the free movement of persons through a true space without internal or intra-community border checks.

Nevertheless, the fact that the system resulting from the Schengen Convention was a trial run for what should have been, on 1 January 1993, the legal regime applicable to the space without internal borders –proclaimed by Article 8 A of the EEC Treaty– is not in doubt. Indeed, true to the idea of concurrent responsibilities, the provisions of the Convention on Application establish, among the following essential principles:

First, its subjection to the community legal system; i.e., the Schengen rules are secondary or dependent rules, second-level rules, insofar as they acknowledge and respect the superiority of those emanating from the European Union –Article 134 of the Convention on Application states that its provisions will only be applicable "in so far as they are compatible with Community law"–.

Second, its provisional nature, as Article 142 of the Convention states, "When Conventions are concluded between the Member States of the European Communities with a view to the completion of an area without internal frontiers, the Contracting Parties shall agree on the conditions under which the provisions of this Convention are to be replaced or amended in the light of the corresponding provisions of such Conventions".

The third principle is its supplementary nature, i.e., its vocation as a means of filling the legal void resulting from the failure to attain the community objective. That is, the European Union space and the Schengen space cannot be understood without referring to the common source that is the law of the Council of Europe, as a large part of their content consists in projecting the Council's Conventions to these other areas, introducing certain variations in order to facilitate their application among these smaller groups of states; this being the case, they are complementary rules, as their intention is to include or enhance other international instruments approved in the ambit of the Council of Europe, such as the Convention on Mutual Assistance in criminal matters –Article 48–, the European Convention on Extradition –Article 59–, or the Council of Europe Convention on the transfer of sentenced persons –Article 67–.

Because, far from constituting a closed system, the Convention implementing the Schengen Agreement aspires to encompass all the Member States of the European Communities, as Article 140 states "Any Member State of the European Communities

may become a Party to this Convention. Accession shall be the subject of an agreement between that State and the Contracting Parties. Such an agreement shall be subject to ratification, acceptance or approval by the acceding State and by each of the Contracting Parties. It shall enter into force on the first day of the second month following the deposit of the final instrument of ratification, acceptance or approval".

Meanwhile, in addition to constituting a legal system, the Convention on Application has created what has been termed the "Schengen space", the space resulting from the sum of the territories of the states who are a party to it. In reality, this space is not defined as such in any of its provisions, although it is the result of the logical combination of some concepts that are set out in the first article, namely, the ideas of borders, both internal and external, internal flight and third state.

To that end, allowing the development of closer cooperation between two or more states, provided that said cooperation neither contravenes nor hinders that contemplated in Title VI of the Treaty, as well as arbitrating the mechanisms for replacing its rules with community Conventions, the Maastricht Treaty announces a reform in its final provisions, setting in what is known as the "1996 clause", the moment the corresponding amendment should be prepared.

With something of a delay, the Intergovernmental Conference began work in Turin in March 1996, concluding in October 1997 with the approval of the Amsterdam Treaty. This Treaty meant the start of the communisation of certain intergovernmental matters, including the incorporation of some third pillar matters (external borders, visas, immigration and asylum and judicial cooperation in civil matters) into the Treaty on the European Community. Moreover, it was envisaged that the entire Schengen *acquis* could be integrated into the framework of the Union.

In this way, Article 29 of the TEU established the mandate of a joint action in the area of police and judicial cooperation in criminal matters, by means of preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud and combating racism and xenophobia. All of this was to be accomplished through three instruments: closer cooperation between police forces, closer cooperation between judicial authorities and the approximation of rules on criminal matters.

Meanwhile, the initiative on police and judicial cooperation in criminal matters that corresponded exclusively to the states was now extended to the Commission –Article 34.2 of the TEU–; and the Parliament must be consulted before any measure is adopted –Article 39 of the TEU–. Moreover, the Court of Justice "shall have

jurisdiction,… to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them" –Article 35.1 of the TEU–, although the court is expressly not competent "to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" –Article 35.5 of the TEU–, or in relation to measures or decisions in the field of the free movement of persons that are adopted with a view to maintaining law and order and safeguarding internal security –Article 68.2 of the EC Treaty–.

Following the path cleared by the Treaty of Amsterdam, namely, that the mechanisms of judicial cooperation are no longer the most appropriate in an area without borders such as the European one, characterised by a high level of trust and cooperation between states who share a demanding concept of the rule of law, the Nice Treaty of 26 February 2001, amended Article 31 of the TEU, which now reads:

"Common action on judicial cooperation in criminal matters shall include:

(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;

(b) facilitating extradition between Member States;

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;

(d) preventing conflicts of jurisdiction between Member States;

(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking;

2. The Council shall encourage cooperation through Eurojust by:

(a) enabling Eurojust to facilitate proper coordination between Member States' national prosecuting authorities;

(b) promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol;

(c) facilitating close cooperation between Eurojust and the European Judicial Network, particularly, in order to facilitate the execution of letters rogatory and the implementation of extradition requests".

As can be seen from the provisions of Article 31 of the TEU, one of the matters that was considered relevant for the purposes of promoting enhanced police and judicial cooperation, is the Council's promotion of Eurojust, as well as the European Judicial Network. In this regard, it undoubtedly seems logical that the mechanisms be appropriate for that purpose, as, on the one hand, Eurojust is a unit, envisaged in the conclusions of the Tampere European Council of 15 and 16 October 1999, composed of public prosecutors, judges or police officers with equivalent responsibilities, assigned by each Member State, with the mission of contributing to due coordination between national authorities responsible for fighting crime and collaborating in the investigations regarding organised crime, based on the analysis of the European Police Office. Moreover, it must cooperate with the European Judicial Network in order to simplify the enforcement of letters rogatory.

Meanwhile, the purpose of the European Judicial Network is to improve, from a legal and practical point of view, the mutual judicial assistance between the Member States of the European Union, in particular in order to combat the serious forms of crime. To that end it is envisaged that the Network will comprise the following elements –Article 2 of Joint Action 98/428/JHA of 29 June 1998–:

- The central authorities of each Member State responsible for international judicial cooperation;
- One or more points of contact in each Member State;
- The Commission shall designate a contact point for those areas falling within its sphere of competence.

The Member States may link the liaison magistrates referred to in Joint Action 96/277/JHA of 22 April 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union to the European Judicial Network. In fact, the creation of the European Judicial Network seems to respond to the idea that the exchange of liaison magistrates is insufficient to meet the needs of effective action throughout the territory of the Union. This is because the sending of liaison magistrates is subject to the wishes of the Government of each country, meaning that it was possible for no legal link to exist at all.

4. Participation of new Member States in the Schengen space and relations with third States

The new Member States of the European Union, by virtue of the protocol annexed to the Treaty of Amsterdam, must apply the entire Schengen *acquis*, even though the Schengen space only encompasses nine of them: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. In fact, on 7 December 2007 the Council adopted a Decision that permitted the abolition of checks at the borders of said states, carrying out the effective abolition of land and sea borders on 21 December that year, and air borders on 30 March 2008. Switzerland did the same on 12 December 2008. However, Cyprus stated its desire to maintain the checks on its borders.

As for Romania and Bulgaria, the abolition of checks will take place when the countries comply with the conditions established for the application of the Schengen *acquis*. Thus, it will be the Council that decides on the abolition, once the SIS is operational in those countries and they have undergone an evaluation that confirms their compliance with the necessary conditions to apply compensatory measures which enable the checks on the internal borders to be removed.

Third states also participate in Schengen cooperation insofar as they are included in the space created by the absence of checks on internal borders; they apply the provisions of the Convention on the Application, in particular those regarding the SIS, and all texts adopted that are based on said Convention; they also participate in decision-making on the corresponding texts in the context of Schengen.

This participation is carried out via mixed committees, consisting of representatives of the governments of the Member States of the EU, of the Commission and of the governments of the third states. Nevertheless, although the associated countries can participate in the debates on the development of the Schengen *acquis*, they cannot vote.

LEVEL III: REFERENCE DOCUMENTATION

- Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.
- Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.
- The Schengen Acquis had been legally defined by the Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis (1999/435/EC).
- EC Regulation no. 562/2006 of the European Parliament and the Council, dated 15 March 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). Amended by EC Regulation no. 296/2008 of the European Parliament and the Council dated 11 March 2008.
- Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.
- Council Regulation (EC) No. 693/2003 of 14 April 2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual.
- Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts.
- Council Regulation (EC) No. 1683/95 of 29 May 1995 laying down a uniform format for visas.
- EC Regulation no. 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates [OJ L 381, 28.12.2006].
- EC Regulation no. 1987/2006 of the European Parliament and of the Council, of 20 December 2006, on the establishment, operation and use of the second generation Schengen Information System (SIS II) - OJ L 381, 28.12.2006].
- Council Regulation (EC) No 1104/2008 of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)
- Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
- Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
- Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (in English

<https://sede.cgpj.es/wiki/English_language>).

- Decision from the Council of the European Communities, dated 1 December 2000, on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway (OJ no. 309, 9 December).
- http://www.gdisc.org/index.php?id=346
- Council Decision 2007/533/JHA, of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [OJ L 205, 7.8.2007]
- http://www.intelpage.info/schengen.htm
- Council Regulation (EC) No 1104/2008 of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)
- Council Decision 2008/839/JHA of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)
- Commission Decision 2009/720/EC of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (1st pillar)
- Commission Decision 2009/724/JHA of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)
- Report from the Commission to the European Parliament and the Council of 21 September 2009 on the operation of the provisions on stamping of travel documents of third-country nationals in accordance with Articles 10 and 11 of 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)
- Council Decision 2010/252/EU 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