

Chapter 1

Like Mushrooms After a Rainy Autumn Day

In the past 10 years, the Member States of the EU have experienced an increasing exchange of information for the purposes of preventing and fighting serious cross-border crime. Several elements have contributed to this intensive workflow in the area of Freedom, Security and Justice of the EU.

Firstly, there has been an intensive period of policy and legislative work to create an adequate framework to enable law enforcement and judicial authorities from different Member States to work together in ongoing investigations and criminal proceedings, regardless of the existence of different jurisdictions and legal systems in the EU.

In order to tackle the criminal organisations and networks threatening the security of the EU in the most effective and efficient manner, some innovative principles (mutual recognition, availability) and concepts (Information Management Strategy, European Information Exchange Model) have been adopted.

In accordance with the principle of mutual recognition, which was officially proclaimed by Tampere conclusions, the Issuing and executing judicial authorities are entitled to contact each other directly to exchange information and relevant documents. Obviously this exchange of information and documents must still be undertaken under specific legal instruments and through the appropriate channels, but such cooperation is no longer not longer in the hands of the diplomatic services of Member States: judicial authorities can speak to each other directly and discuss details of common investigations and prosecutions. This constant dialogue will ensure a fruitful collaboration in a particular criminal investigation or prosecution.

The recognition of the principle of availability by The Hague multiannual programme initiated a culture of mutual cooperation and sharing of information across the European Union. According to this principle, a law enforcement officer who needs information in order to perform his duties should be able to obtain that information from another Member State, and the law enforcement office holding

The opinions expressed by the author are personal and do not necessary coincide with those of the institution she is working for.

the information should make it available, for the stated purpose, taking into account the requirements of ongoing investigations in that Member State.

The implementation in practice of this principle has resulted in a proliferation of information systems, channels and tools for the exchange of information, which motivated the need for a comprehensive, integrated and well-structured Information Management (IM) Strategy for the Internal Security of the EU. Following a thoroughly assessment of the implementation of the most relevant existing legal instruments, the Commission has designed a European Information Exchange to guide the Union and the Member States in cross-border exchange of information for operational purposes.

There has also been a proliferation of rules governing the processing and protection of personal data in the area of Freedom, Security and Justice of the EU. In 2005, Mr Charles Elsen pointed out that “the data protection rules were growing like mushrooms after a rainy Autumn day”,¹ and certainly this situation has steadily increased.² As Directive 95/46/EC³ excluded from its scope of application the areas of police and judicial cooperation in criminal matters, the setting up of each information system and databases has been accompanied by its own set of principles, rights and proceedings on data protection.

The Treaty of Lisbon was envisaged by the Commission as a unique legal basis for the adoption of common rules for the processing and protection of personal data in both private and public sectors, including police and justice matters. Although the Commission has issued two different initiatives on this matter (the General Data Protection Regulation and the Data Protection Directive, the later focused on criminal matters), there is a consistent and common approach on this matter.

From a more practical point of view, the Commission has continued working on several initiatives aimed at promoting the exchange of information for the purposes of preventing and fighting cross-border crime. The initiatives of the Commission on the Terrorism Finance Tracking System (TFTS) in the European Union and of the EU Passenger Name Record (PNR) Scheme are some of the most innovative tools in this area.

In this policy and legal framework, we cannot forget the Council of Europe. It was the pioneer European institution regulating the processing and protection of personal data and now, it is sharing this role with the EU.

A second element motivating the increasing exchange of information for the purposes of preventing and fighting serious cross-border crime is the gradual

¹ “Police information systems in the European Union”, *The rights of the individual vis-à-vis police information systems*, published by the *Comissao Nacional de Proteccao de Dados*, Lisbon, 1999, p. 114.

² Mr HUSTINX mentioned more recently that, “since 2005, about 40 percent of Commission proposals analysed in EDPS opinions on new legislation were closely connected to the Area of Freedom, Security and Justice” (eucrim 1/2013, p. 1).

³ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281, 23.11.1995, p. 31.

consolidation of the EU agencies and bodies (Eurojust, Europol, OLAF) with competences in this field.

As neither Europol nor Eurojust have any investigative power (meaning that they cannot generate their own investigations and, in the case of Eurojust, prosecutions), both EU agencies completely rely on the information received from the national competent authorities. For the appropriate development of their tasks, the National Members of Eurojust are in permanent contact with the national prosecution services of their countries of origin, to identify how to best disrupt and dismantle cross-border criminal organisations.

This constant dialogue generates a workflow in the form of a fluent exchange of information between all the actors involved. Europol and Eurojust are governed by strict rules for the processing and protecting of personal data. OLAF, the contact points of the networks with competences in the area of Criminal Justice also exchange relevant information related to ongoing investigations and proceedings.

The third element contributing to an increasing exchange of information is the setting up of important EU information systems and databases (Prüm, SIS-II, ECRIS) enabling law enforcement authorities access, through appropriate channels (SIENA, Swedish Council Decision) and tools (of police cooperation, of judicial cooperation as the confiscation order), the information needed to get a clear picture of criminal phenomena and organisations.

As it has been mentioned, the setting up of these information systems and databases has been accompanied by their own rules for the processing and protection of personal data. These administrative rules should be strictly observed during the collection, transmission, processing and exchange of information at police level. However, when a criminal investigation has started, the application of the rules for the processing and protection of personal data becomes more complicated, mainly because criminal proceedings have their own rules for the management of judicial activities and the protection of the fundamental rights of the individuals concerned (suspects, victims, witnesses).

The confluence of the rules on data protection and those governing criminal proceedings has many practical implications. As an example, in domestic investigations, some lawyers tend to exercise the right of access to the judicial file in accordance with the rules on data protection, whilst the right to information in criminal proceedings has been, and still is, one of the fundamental rights protecting suspects and accused persons in the context of investigations and criminal proceedings. Regardless of which the prosecutor is introducing the information about the case in a manual file or in a case management system, the right to information in criminal proceedings as regulated in the national Codes of criminal proceedings would be applicable. In cross-border cases, the Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings⁴ would be more appropriate than the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial

⁴ OJ L 142, 1.6.2012, p. 1.

cooperation in criminal matters. These examples do not mean that the rules for the processing and protecting of personal data do not have any relevance in the area of criminal proceedings: they prove that the limits between both set of rules are not always clear and that the same interest of the suspects (to be informed on the existence of an investigation against him) may be protected by one or another set of rules, depending mainly on whether there is a formal investigations or not against this individual. If there is such formal investigation, the Codes of criminal proceedings apply.

The new proposal for a Data Protection Directive in cross-border criminal proceedings⁵ is flexible enough to allow different scenarios and possibilities for regulating the interaction between the rules on data protection and those of the criminal proceedings at national level.

Another relevant element to consider is that, in most of cases, the exchange of information between police or judicial authorities precedes, but does not replace, the issuing and execution of request for police and judicial cooperation in criminal matters. As example, automated searches in Prüm system may result in a match between a DNA sample and a DNA profile, however, the name of the individual concerned will be only provided in response to known following a request for mutual legal assistance sent by a police or judicial authority.

We can find another relevant example in the case of PNR information transmitted to United States. The information transmitted through this system is very valuable for the prevention or investigation at police level of serious forms of crime, however, if a formal criminal investigation starts in any Member State of the EU, the EU- US Agreement on Mutual Legal Assistance should apply to the receipt of such information from US authorities through the appropriate channels and its insertion in the judicial file.

As cross-border criminality evolves, the EU bodies must improve their operational capacities to prevent and combat criminal offences in the most effective manner. This has been the main reason for the proposals of new Regulations about Europol⁶, Eurojust⁷ and the European Public Prosecutor's Office⁸. The proposals for exchange of information among them, as well as with the judicial authorities of the Member States is one of the most innovative and interesting matters under

⁵ Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. Document COM(2012) 12 final.

⁶ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA. COM(2013) 173 final. Brussels, 27.3.2013.

⁷ COM(2013) 535 final. Brussels, 17.7.2013.

⁸ COM(2013) 534 final. Brussels, 17.7.2013.

consideration in the area of police and judicial cooperation in criminal matters.⁹ New legal instruments and tools, as the proposal for the European Investigation Order,¹⁰ and the possibility to exchange requests of judicial cooperation through e-Justice portal¹¹ are innovative too.

Despite the existence of a great number of policy strategies, legal instruments, tools and channels for the exchange of information in the EU, all of them should be better aligned to support the common goal of protecting the EU citizens in an area of Freedom, Security and Justice. This has been the approach taken by the Lithuanian and Greek Presidencies of the Council of the EU in view of the next Multiannual Action Plan for the period 2014–2018. No more mushrooms, but the existing crop needs to be better quality, more healthy. The importance of the new initiatives under discussion at EU level in order to facilitate the exchange of cross-border information for law enforcement and judicial authorities is analysed in the last chapter of the book.

A final remark is needed, related to the scope of the book. This is focused on the “operational” information gathered, processed and exchanged for the purposes of preventing and combating serious cross-border crime. “Strategic” information is not analysed in this work, although some references are made to the strategic information processed by Eurojust and Europol, or to the EU policy cycle for serious and international crime. We hope this operational approach will be of interest for the reader, and will provide a clear view on the efforts being made by both the EU institutions and Member States to protect the EU citizens in an Area of Freedom, Security and Justice.

⁹ Regulation of the European Parliament and of the Council concerning investigations conducted by the European Anti-fraud Office (OLAF) repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and of the Council Regulation (Euratom) No 1074/1999. Council document 17427/12 GAF 29 FIN 1022 CODEC 2955 OC 728.

¹⁰ Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. Council document 9288/10 COPEN 117 EUROJUST 49 EJN 13 PARLNAT 13 CODEC 384. Brussels, 21 May 2010.

¹¹ <https://e-justice.europa.eu/home.do>.

Exchange of Information and Data Protection in
Cross-border Criminal Proceedings in Europe

Gutiérrez Zarza, Á. (Ed.)

2015, XXVII, 491 p. 3 illus., Hardcover

ISBN: 978-3-642-40290-6