



The Fight against Terrorism and Cross-Border Crime in the European Union

Minodora-Ioana BĂLAN-RUSU¹

Abstract: Providing an area of freedom, security and justice, an objective assumed by the European Union can only be achieved under conditions that ensure an improvement of judicial cooperation activity in criminal matters. The Council Framework Decision 2008/615/JHA of 23 June 2008 is the framework normative act that rules the Member States' cooperation in the fight against terrorism and cross-border crime. This paper is a review of the European legislative act, with critical remarks and it represents the sequel of these types of examinations, previously published. The research results consist of the presentation of some critical observations regarding the skills of the agents operating in the territory of another Member State rather than in the country from where they come, terms of keeping the data that regards people, the need to take in the records the judicial persons and the need for establishing separate accounts that would regard the natural and legal persons from other countries that are not members of the European Union. The relevant conclusions highlight the usefulness of European legislative act as a whole and the need to complete it with new provisions. The work is useful both for theorists and practitioners in the field, the essential contribution consisting of the formulation of critical remarks and sustained proposals de lege ferenda.

Keywords: European legislative act; offence; cross-border crime; execution, European Union

1. Introduction

Prevention and at the same time fighting against cross-border crime represent a constant preoccupation of states with democratic regimes recognized around the world, the work itself being rather complex and constantly improved. (Balan-Rusu & Rusu, 2011, p. 190)

Time experience in this field by each country in the world has shown, with arguments worthy of being taken into consideration, that preventing and fighting

¹ Legal Counselor S.C. SOTIREX S.R.L. Bacău, PhD in progress at Titu Maiorescu University of Bucharest, Romania, Address: 70 Dionisie Lupu St., Bucharest, Sector 1, Romania, Tel.: 004016507430, Fax: 0040-1-3112297, Corresponding author: oana_rusu86@yahoo.com.

against cross-border crime, with all its forms, can only be achieved under the conditions of adopting a consistent legislation in the domain and the intensification and diversification of international judicial cooperation forms in criminal matters. (Rusu, 2010, p. 10)

One of the priorities set by the European Union is to achieve an area of freedom, security and justice on its territory. This primary objective could be achieved only under the conditions of improving police and judicial cooperation system, cooperation which has as purpose providing all citizens a high level of security. (Rusu, 2011, p. 64)

On May 27, 2005, seven European Union member states, namely, the Kingdom of Belgium, German Federal Republic, The Kingdom of Spain, Republic of France, the Grand Duchy of Luxembourg, the Kingdom of Lower Countries, and Republic of Austria signed the Treaty of Prüm. (Boroi & Rusu, 2008, p. 543)

This international instrument provides that *“in an area of free movement of persons, it is important that the European Union Member States intensify their cooperation in order to combat effectively terrorism, cross-border crime and illegal migration”*.

We find that countries that have acceded to these international instruments have agreed to undertake specific measures of cooperation in order to prevent and combat the three phenomena that have developed at a rapid pace in Europe, in recent years, namely terrorism, cross-border crime in which there are included all forms of manifestation, including organized crime and illegal migration.

This was emphasized in the doctrine as well, where it was argued that the Treaty of Prüm is another normative act of legislation that contributes to improving the activity of European judicial cooperation in criminal and police matters, having as purpose the enhancement of cooperation between the signatory states in the fight against terrorism, cross-border crime, and illegal migration. (Boroi & Rusu, 2008, p. 543)

In this context, given the conclusions of the Tampere European Council in October 1999, which have confirmed the need to improve the exchange of information between competent authorities of the Member States for the detection and investigation of all categories of crimes, it has become a necessity the implementation of EU legal framework of the Treaty of Prüm.

Given the size of cross-border crime and some urgent operative needs, the exchange of information must be achieved, when appropriate, in a fast and efficient way.

The crime magnitude required the adoption of a European legislative act establishing the obligations of each Member State regarding the exchange of information on terrorism and cross-border crime.

On this background, the Council adopted Decision 2008/615/JHA of 23 June 2008 on intensifying the border cooperation, particularly in fighting against terrorism and cross-border crime.¹

2. General Aspects, Online Access and Subsequent Requests

According to the provisions of article 1 of the mentioned European legislative act, its objective is to accelerate the cross-border cooperation in the fields covered by Title VI of the Treaty and, in particular, exchange of information between authorities responsible for preventing and investigating crime.

The covered areas are:

- provisions for conditions and automated transfer procedure of DNA profiles, fingerprint data and certain data on vehicle registration at national level;
- provisions on conditions for providing data on major events that have a cross-border dimension;
- provisions on conditions for providing information to prevent terrorist crimes;
- provisions on the conditions and procedure for intensifying the cross-border police cooperation through various measures.

Under the provisions of the European legislative act, the Member States shall open and keep national DNA data files for crime investigation. Reference data contain only DNA profiles created from the non-coding DNA and an identification number. These reference data will not contain any data that would allow the direct identification of the person concerned.

¹ Published in the Official Journal of the European Union no. L 210 / 1 of 06.08.2008.

2.1. DNA Profiles

In order to investigate crime, Member States shall authorize the National contact points of other Member States, to have access to data reference in their DNA files, authorizing them to automated search by comparing DNA profiles. Searches can be conducted only in individual cases and in accordance with the law of the requesting Member State. If an automated search shows the correlation between a DNA profile provided and a DNA profile registered in the analyzed file of the receiving Member State, the national contact point of the Member State that carries out the search receives an automated notification of the reference data in the report where the match was identified. The Member States compare their unidentified DNA profiles with all DNA profiles that come from all the reference data of other national DNA data files. Providing and comparing profiles is a process achieved automatically. Providing unidentified DNA profiles for comparison is not achieved unless it is prescribed by the national legislation of the requesting Member State.

If after comparing the above, a Member State finds that the supplied DNA profiles match any profile of its own DNA data files, it shall immediately notify the reference data to national contact point of the other member state, the data on which the correlation was found. When there is a match between DNA profiles, providing additional personal data or other information about the reference data it is carried out an investigation under the national legislation and the provisions on judicial assistance, of the requested Member State. Where, conducting investigations or criminal proceedings, there is no DNA profile of a determined person that is in the requested Member State, the requested Member State shall provide legal assistance by collecting and analyzing biological material of the person in question by supplying the obtained DNA profile, if:

- the requesting Member State notifies the purpose for which this procedure is necessary;
- the requesting Member State has a search warrant or a statement issued by a competent authority, as required by national legislation of that Member State, showing that all requirements for the sampling and analysis of biological material would be met if the person concerned would have been in the applicant's Member State territory; and
- the conditions for the sampling and analysis of biological material, and for transmitting the DNA profile obtained are fulfilled in accordance with the legal norms in the field of the requested State.

2.2. Fingerprint Data

In order to prevent and investigate the criminal offenses, the Member States shall ensure the availability of reference data from the file for the created national automated fingerprint identification. Reference data contain only fingerprint data and an identification number. The reference data, as DNA, contain no direct identification data to enable the identification of the concerned person. The reference data is not attributed to any person (unidentified fingerprint data), and it must be recognized as such.

In the purpose of preventing and investigating crime, the Member States authorizes the NCPs of other Member States, to have access to reference data in the automated digital fingerprint identification systems that were created for this purpose, as enabling them to carrying out an automated search by comparing with fingerprint data. Searches can be conducted only in individual cases and in accordance with national legislation of the requesting Member State.

Establishing consistency of the fingerprint data with reference data held by Member State which manages the file is carried out by the national contact point of the requesting Member State via automated transmission of reference data necessary to establish a definite match. If the above procedure indicates a match between the fingerprint data, the additional data transmission of personal and other information about reference data is conducted under the national legislation, according to the provisions on legal assistance of the requested Member State.

2.3. Vehicle Registration Data

In order to prevent and investigate the criminal offenses and during the investigation of other crimes that are under the authority of the law courts or the prosecution of the Member State that carries out the search, maintaining public security, the Member States authorize the NCPs of other Member States to have access to the national vehicle registration data, as it enables them to perform any automated search in individual cases, referring to the data on the owners and / or data of vehicle users. Searches can be performed only by using a full vehicle identification number or complete registration number. Searches can be achieved only in accordance with the national laws of the Member State conducting the search.

3. Major Events

In order to prevent crime and maintain public order and security during major events that have a cross-border dimension, the Member States shall communicate to each other, both upon request and on their own initiative, data that does not concern the persons, which may be necessary for that purpose, in accordance with the laws of the Member State that transmits the data. Major events regard some sporting events, the European football championships, European Cup final of football and other major sporting events or European Council meetings, if necessary. The data do not refer to some people, but to the major event, to some possibilities of serious disturbance of public order in the State in which they occur.

At the same time, the Member States shall communicate to each other, both upon request and on their own initiative, personal data, when any final conviction or other circumstances give reason to believe that the concerned person will commit criminal offenses at the event or that it is a danger to public order and safety, as long as the data transmission is permitted under the national law of the Member State providing the data. All these data and personal information can be processed by the Member State which received them only in connection to major events for which there have been submitted. If the purpose for which they were sent was reached or it was not the case to be achieved (for various reasons), the transmitted data will be deleted immediately and in the other cases there are deleted after a lapse of one year from the event or transmission.

4. Measures to Prevent Terrorist Crimes

In order to prevent terrorist crimes in accordance with the national law and, in individual cases, even without being requested, the Member States may provide to the national contact points in other Member States, the personal data and information necessary to the extent that this is necessary for that specific circumstance there are reasons to believe that the concerned persons will commit criminal offenses as those referred to in article 1 to 3 of Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. These data include: name, surname, date and place of birth, and a description of the circumstances leading to the conviction that these people are suspected of committing these types of crimes.

Each Member State shall designate a national contact point for exchanging information with national contact points in other Member States. The Member State transmitting the data may establish, in accordance with the national legislation, the conditions on the use of such data and information by the recipient Member State.

5. Other Forms of Cooperation

Another form of cooperation, which can be adopted by the Member States in police cooperation activities in order to maintain public order and security and thus preventing the offense, is the establishment of joint patrols. Of course, this measure may be taken against the background of expression patterns of crime in particular on the line of public order and public security and it can be carried out successfully, especially in the case of neighboring states. We appreciate that this form of police cooperation can be used successfully, however by two or more states, even if they are not neighbors, but only to prevent and fight against a certain type of crime, usually the street crime, covering also the individual security of the European citizen. Furthermore, the Member States in relation to the time evolution of the operational situation can organize and execute joint actions in which a state agency can perform, thus preventing specific activities on the territory of another State, along with its agents.

In the two ways of cooperation mentioned above, as host state in accordance with its national law (but with the consent of the State agency to which they belong), each Member State may confer execution competences on the Member State that ordered the detachment of the agents involved in joint operations, or to the extent that host state law allows it; it can allow the Member States agents which ordered the detachment to execute their own executing competences, in accordance with the Member State legislation that ordered the detachment. All these skills aim at executing tasks under the guidance and usually only in the presence of the host state agents. The detached agents will submit to the national legislation of the host Member State which assumes the responsibility for their actions.

In case of mass reunions, disasters or serious accidents, the competent authorities of the Member States shall provide mutual assistance in accordance to the national legislation, the main purpose being to prevent the commission of crimes and maintain public order and safety in the following ways:

- mutual notification as promptly as possible of such situations with cross-border impact and exchange any relevant information;
- the adoption and coordination of policy measures necessary within their territory in cases with cross-border impact;
- as far as possible, detaching agents, experts and advisers and the disposal of equipment, at the request of the Member State in whose territory appeared the situation.

In these forms of police cooperation, the agents of a Member State detached to execute joint activities with the host agents will be able to wear uniform on duty and they can carry the weapons, ammunition and equipment which are allowed in State of origin. In accordance with its national law, the host Member State may prohibit the pore of certain weapons, ammunition or equipment.

All Member States will make statements about the weapons, ammunition and equipment that may be used only in self-defense or in the defense of others. The agent of host Member State that is in command may allow, in certain cases and in accordance with national legislation, the use of weapons, ammunition and equipment and for other purposes than those mentioned above. In all cases, the use of weapons, ammunition and equipment will be made only in compliance with the legislation of the host member state. In situations in which the form of such cooperation form, the Member States concerned shall inform each other about weapons, ammunition, equipment that can be used and under what conditions, using them according to the state law where the action takes place.

The use of vehicles by state agents of another Member State is in compliance with its internal legislation. As regards the protection and assistance, we mention that Member State agents operating in the territory of another State will receive the same protection as their national agents.

To the Member State agents that operate in the territory of another state it is applied the same legal treatment as the agents of host Member State regarding any crime that might be committed by them or that might be committed against them, unless it is otherwise provided in another obligatory agreement for the concerned Member States. In these situations, the Member State from which the agents come from is responsible for any caused damage during their operations in accordance with the laws of the host Member State. The Member State in whose territory the referred to, damages were produced, as a first phase, it repairs the damage under

the conditions applicable to the prejudices caused by its own agents, then the Member State that detached the agent in question would reimburse the amounts paid to the entitled victims or persons. As far as the labor relations go, the European legislative act provides that the agents that operate in the territory of another Member State obey the laws of applicable labor laws in their own Member State, especially in terms of labor standards.

6. Data Privacy

All Member States shall take measures for the protection of data used in the course of judicial cooperation in the field of prevention and combating terrorism and cross-border crime. To avoid unilateral interpretation of terms, the European legislative act defines the following:

- *Processing of personal data* means any operation or set of operations that are performed on personal data, whether they are achieved or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, sorting, recovery, consultation, use, disclosure by supply, dissemination or otherwise making available in another way, alignment, combination, blocking, erasure or destruction of data;
- *Automated search procedure* means direct access to automated databases of another body, if the response from the search procedure is fully automated;
- *Catalogs* means marking stored personal data, without further intention to limit their processing;
- *Blocking* means marking of stored personal data in order to limit their further processing.¹

According to the provisions of the European Legislative Act in respect to personal data that were provided, each Member State shall guarantee a level of protection of their national legislation, at least equal to that provided in the Europe Council Convention for the protection of individuals with regard to Automatic Processing of Personal Data of 28 January 1981 and its Additional Protocol of 8 November 2001, thus taking into account the Recommendation no R (87) 15 of 17 September 1987 of the Europe Council Committee of Ministers by the Member States

¹ Council Framework Decision 2008/615/JHA of 23 June 2008, article 24.

regulating the use of personal data in the police field, even if the data is not processed automatically.

Processing personal data by the receiving Member State is allowed only for the purposes for which there were provided, according to examined European legislative act. Processing for other purposes is permitted only with prior authorization of the Member State administering the file and only according to the national legislation of the receiving Member State.

Processing data relating to DNA profiles, automated comparison of DNA profiles and fingerprint automated data search by Member State that carries out the search or comparison is allowed only for:

- establishing whether DNA profiles or compared fingerprint data match;
- preparing and submitting a request by the police or judicial bodies in order to grant legal aid in accordance with national legislation, if those data match;
- making a recording for the purposes of the legislative act (article 30).

The Member States shall ensure the accuracy and the current relevance of personal data. If ex officio, or in a notification of the concerned person, it results that there has been provided incorrect data or data that should not be provided, it immediately informs the Member State or the Member States of destination, which will delete or correct the data.

The data whose accuracy is disputed by the concerned person or its accuracy or lack of accuracy may not be established, it should be marked with a flag at the request of the concerned person, in accordance with the national laws of the Member States. If there is a flag, it can be removed in accordance with the national laws of Member States and only with permission of the concerned person or by the decision of the competent court or independent data protection authority. However, the Member States providing the data and the destination ones, by the competent institutions there are taken measures to ensure the effective protection of personal data against accidental or unauthorized destruction, accidental loss, unauthorized access, unauthorized or accidental disclosure. Both involved countries will ensure that:

- there are taken the latest technical measures to ensure data protection and security, especially their confidentiality and integrity;

- when there are referred to generally accessible networks there are used procedures for encryption and authorization procedures recognized by competent authorities, and
- there can be checked the admissibility of searches.

7. Keeping a Log of the Recordings. Special Norms Governing the Automated and non-automated Transmission

The need to ensure the data protection requires each Member State to guarantee that every non-automated transmission and each non-automated receipt of personal data, by the body that administrates the file and by the body that carries out the search is introduced in keeping a log, in order to verify the admissibility of transmission. Keeping a log offers the following information:

- The reason for providing data;
- The provided data;
- Date of supply; and
- Name or ID of the searching body and the body that manages the file.

If there are performed automated data searches on DNA profiles, fingerprint data and vehicle registration data and automated data comparisons, the following provisions shall apply:

- only to agents of national contact points, holders of a special permit can carry out searches or automated data comparisons. The list of authorized agents to perform searches or automated data comparisons are made available upon request to supervisors and other Member States;
- each Member State shall ensure that each transmission and receipt of personal data by the body administering the file and the searching body is recorded, communicating, also, whether there was a “hit” or not (that is a positive response). The recording contains the following information:
 - supplied data;
 - date and exact time of the delivery; and
 - name or ID of the searching body and the body that manages the file.

The body that conducts the search records also the reason of the search or transmission, as well as the identifying mark of the agent who conducted the search and of that who require the search or the transmission.

At the request of the competent authorities in data protection domain of concerned Member States legislation in question, the Registrar shall forthwith to the recorded data no later than four weeks from the date of receipt. The recorded data may be used only for the following purposes: monitoring data protection and ensuring data security. All the records are protected by the adoption of the appropriate measures against unauthorized use and other forms of misuse and kept for two years, after they are deleted. The responsibility for legal checks on the transmission or receipt of personal data belongs to independent data protection authorities or, where appropriate, judicial authorities of the Member States in question. Anyone can request these authorities to verify the legitimacy of data processing in relation to them, in accordance with national legislation. In addition to such requests, these authorities and registration bodies carry out random checks on the legality of supplies, using these databases.

Independent data protection authorities keep for inspection the results of such checks for 18 months. After this period, the results in question are deleted immediately. To each data protection authorities may be required by the independent data protection authority in another Member State to exercise its functions in accordance with the national legislation. Independent data protection authorities in Member States carry out inspection tasks necessary for cooperation, notably through the exchange of relevant information.

Regarding the right of the person in question, the European legislative act provides that at the request of the persons concerned, in accordance with national law, it shall provide information, after proving his identity, without excessive costs, using a language understandable and without unacceptable delays, the processed data on the person and the origin of these data, the recipient or recipient group, the purpose and, in case this is according to the national law, the legal basis for processing. Also, the person concerned has the right to request the correction of the data and the deletion of the unlawfully processed data. Moreover, the Member States shall ensure, in case of breaching its data protection rights, the person concerned can effectively address a complaint to independent courts according to article 6 (1) of the European Convention on Human Rights or an independent supervisory authority within the meaning of article 28 of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and data movement, being given the opportunity to claim compensation or seek another form of legal redress. Detailed rules on the procedure to exercise these rights and the reasons for restricting the

right of access shall be subject to relevant national legislation of the Member State in which the concerned person exercises its rights.

According to the provisions of the European Legislative Act, where a body in a Member State has supplied personal data, the recipient body in another Member State may not invoke the inaccuracy of the provided data as a reason to evade the responsibility that accrues to the injured party, in accordance with national legislation. If the recipient body is obliged to pay damages due to the fact that incorrect data was used, the body which provided the data to the recipient body pays back the entire amount as compensation.

8. Critical Remarks

Although the European legislative act brings a series of novelties regarding some forms of police and judicial cooperation in criminal matters in the European Union, there are some provisions that are at least questionable. Thus, according to the provisions of article 19, paragraph (2) agents of another state can use weapons, ammunition and their equipment *only in cases of self-defense and in the defense of others*. We appreciate that these measures are incomplete, because it restricts the right to use weapons, ammunition and equipment in any other situation specific to the police activity in all Member States. We take here into consideration the situation where it is required the immobilization a person after trying to flee from a crime, in order to escape criminal liability. We find that in this case the agent find himself in none of the two instances provided by law and therefore cannot use the weapon. We consider that the European legislator should provide this situation specific to all institutions of public order in Europe.

Another point refers to the term of keeping protected data, i.e. two years, after which they are deleted. We appreciate that the term must be increased to at least five years. We argue that opinion based on our overall progress in the field of crime, on the criminal connections that are established and perfected over time and the fact that any information in this area can become extremely useful in criminal investigations, especially in combating terrorism. Of course, in that event the security of data is required in the same way, obeying the same rules.

Another criticism concerns the fact that European legislative act does not require the imposition of records on legal persons. We argue this proposal on the grounds stated in the practice of judicial logistics, which refers to engaging in such

activities of legal entities, or rather the increased possibility of terrorist organizations often used to hide criminal activity behind real companies with private capital. Finally, the last criticism concerns the lack of rules governing the establishment of separate accounts for legal and physical entities, in other states, which are not members of the European Union. We consider here the need to establish some databases that include natural and legal persons in all countries; the database is not deleted unless the individuals involved are no longer physically capable of carrying out terrorist or other acts of organized crime.

9. Conclusions

Providing an area of freedom, security and justice in the European Union (assumed goal) requires, firstly, the improvement of judicial cooperation in criminal matters between Member States (Rusu & Rusu, 2010, p. 224). The examined European legislative act transposes into EU legislation the Prüm Treaty concluded between seven EU Member States in 2005; the treaty establishes the measures to enhance cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration. In addition to the mentioned provisions in the Treaty, the European legislative act provides for other provisions designed to improve the system of cooperation between the Member States.

The European legislative act in its whole aims at greater exchange of data between Member States regarding the DNA profiles, fingerprint data and vehicle registration data. However, the provisions of European legislative act compel the Member States to ensure security of personal data, in terms of storage and transmission. The critical remarks regard the competence of patrols of a Member State operating in another state, the retention time, setting records on legal entities and establish separate records for physical and legal entities in other states that are not members of the European Union.

According to the provisions of article 36 of the European legislative act, the Member States should take the necessary measures to comply with its provisions within one year after it takes effect and at every three years from that date (available online access on profiles of DNA, fingerprint data and vehicle registration data). Although this European legislative act is not transposed into national law in Romania, taking into account the assumed obligations under EU

accession Treaty and the provisions mentioned above, at the date of publication of this work, it should produce legal effects.

9. References

Balan-Rusu, M. I. & Rusu, I. (2011). Particularitățile executării mandatului european de arestare în cazul infracțiunilor transfrontaliere/Peculiarities of the European arrest warrant execution for cross-border crime. *Dreptul/ Law*, no. 9/2011. Bucharest: Universul Juridic.

Rusu, I. (2010). The Issuance and Transmission of a European Arrest Warrant by the Romanian Judicial Authorities. *Proceedings 5th Edition of The International Conference – European Integration Realities and Perspectives*. Galati: Editura Universitară Danubius.

Rusu, I. (2011) Re-individualizing the Criminal Sanctions of Deprivation of Liberty in the European Union. *Acta Universitatis Danubius Juridica*, Vol 7, no. 2/2011. Galati: Editura Universitară Danubius.

Boroi, A. & Rusu, I., (2008) *Cooperarea judiciară internațională în materie penală/ International judicial cooperation in criminal matters*. Bucharest: C. H. Beck.

Rusu, I. & Rusu, M. I. (2010). Observații critice referitoare la aplicarea principiului recunoașterii reciproce în cazul hotărârilor judecătorești care impun pedepse sau măsuri privative de libertate, în scopul executării lor într-un stat membru al Uniunii Europene/Critical remarks on the principle of mutual recognition to the judgments imposing custodial sentences or measures involving deprivation of liberty, in order to execute them in a European Union member state. *Dreptul/ Law*, no. 2/2010. Bucharest: Universul Juridic.

Framework Decision 2008/615/JHA of 23 June 2008 on border cooperation, particularly in combating terrorism and cross-border crime, published in the Official Journal of the European Union no. L 21/1 of 08.06.2008.