

Ángeles Gutiérrez Zarza *Editor*

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The Hague  
The Netherlands

ISBN 978-3-642-40290-6                      ISBN 978-3-642-40291-3 (eBook)  
DOI 10.1007/978-3-642-40291-3  
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2014947123

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Printed on acid-free paper

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# Foreword

With the entry into force of the Lisbon Treaty and the adoption of the Stockholm Programme, the processing and protection of personal data has become one of the most relevant matters in the area of Freedom, Security and Justice of the European Union.

The Charter of Fundamental Rights of the European Union, which recognised the protection of personal data as a separate fundamental right in its Article 8, has become legally binding not only for EU institutions, bodies, offices and agencies, but also for Member States when acting within the scope of EU law.

Article 16 of the Treaty on the Functioning of the European Union (TFEU) and the abolition of the three-pillar structure provide for the possibility of replacing Directive 95/46/EC and other existing instruments with a comprehensive legal framework on data protection. In accordance with this new legal framework, in January 2012 the Commission issued a legislative package for an overall reform of the data protection rules, including a Communication setting out its main objectives and two legislative proposals: a draft Regulation establishing a general EU framework for data processing and protection (the General Data Protection Regulation), and a draft Directive covering the processing and protection of personal data in the areas of police and judicial cooperation, and national criminal proceedings (the Data Protection Directive).

In the context of the General Data Protection Regulation, a relevant issue currently under discussion is the revision of the traditional principles, rights and procedures on data protection, in order to make them more effective in practice and to deal with new challenges. New phenomena like cloud computing, social networks and geo-location devices are gradually becoming a part of the daily life of the citizens, who have the right to be adequately protected against any breaches of data protection rules.

On the other hand, the Stockholm Programme has also encouraged relevant discussions in the field of data protection. Although the principle of availability would continue to give “important impetus” to the collecting, processing and sharing of information in the area of Freedom, Security and Justice, the European Council has stressed the need to assess the existing information systems and

criminal databases—especially those set up in the past years on the basis of the principle of availability—and integrate them into the framework of a coherent and overall EU Information Management Strategy (IM Strategy). More coherence in the multitude of information systems and databases created for law enforcement purposes, most of which are based on the need to fight against terrorism, is absolutely necessary. New databases should not be created without a prior evaluation of the existing information systems and a real privacy and data protection impact assessment of the new proposal.

The fight against terrorism continues to be a major concern, also for third countries enjoying close relations with the European Union. To tackle this phenomenon, the United States (of America) (US), Canada and Australia have signed individual agreements with the European Union, in order to receive information collected by EU air carriers operating flights from and to their countries, for the prevention, detection, investigation and prosecution of terrorist offences and serious (transnational) crime.

In the framework of such agreements, a considerable amount of personal data is provided to law enforcement authorities of the US, Canada and Australia. These data are provided by passengers to carriers when booking a flight or checking in, and include names, travel dates, travel itinerary, ticket information, contact details, travel agent at which the flight was booked, means of payment used, seat number and baggage information.

Moreover, in application of the EU–US Agreement on the Transfer of Financial Messaging Data for purposes of the Terrorist Finance Tracking Program (TFTP), the US Treasury Department is receiving personal data related to financial payments made by European citizens and companies.

The EU-US Agreement on TFTP is closely monitored by the EU institutions. Following intensive discussions on the US surveillance revelations and data protection, the work has been resumed as to the development of a general transatlantic framework with adequate safeguards for the sharing of personal data for law enforcement purposes.

Judges and prosecutors of the Member States should be aware of the practical consequences of this challenging context. They have a particular obligation to protect privacy and personal data of the citizens in the current information society. Both are fundamental rights of the citizens, expressly recognised in the Charter of Fundamental Rights of the European Union and in most of the legal systems of the Member States, and thus enforceable before the national courts.

Furthermore, the new technologies have created useful tools for police and judicial authorities. The appropriate balance will need to be found between the efficiency of the criminal investigation (when gathering, processing and exchanging criminal data) and the rights of privacy and data protection of persons who may be targeted or otherwise be involved in those investigations, in order to avoid any risk of inadmissibility of evidence at trial stage.

Some databases (criminal records, arrested persons, land registers, taxes and revenues) may be directly accessible by judges and prosecutors, simply by introducing a password in their computers located at court. In the near future, the

exchange of information with Eurojust through the Eurojust National Coordination System, as well as access to databases on criminal records of other Member States of the European Union, will be a reality.

Since 2007, the members of the project entitled “Data Protection in Criminal Proceedings” have worked closely with different institutions and bodies of the European Union and of some Member States (mainly Spain, Germany, the Netherlands and the UK) with the main objective of providing awareness and specialised training on the processing and protection of personal data to judges and prosecutors of the Member States.

The European Data Protection Supervisor has actively supported and participated in the activities organised in the framework of this project, with a view to encouraging an exchange of professional experience and expertise in this new and dynamic environment. I hope that this handbook will provide incentives to its readers to continue in the same spirit and to benefit from the enormous possibilities of the EU databases, information systems, channels and agencies set up for the purposes of preventing and combating crime with full respect of the fundamental rights of the individuals concerned.

Brussels, Belgium  
December 2013

Peter Hustinx





# Rationale

The idea of the DPiCP Project originated in a seminar held at the Faculty of Law of Toledo on 24 and 25 May 2007. In a meeting room of this ancient Convent of the Dominican Order, data protection experts from different European institutions and agencies, as well as Spanish judges, prosecutors and university professors had the opportunity to discuss the implications, in the area of cross-border criminal proceedings, of two main topics closely related to each other: the increasing exchange of information for the purposes of investigating and prosecuting criminal offences, including the setting up of new databases and information systems, on the one hand, and the impact of these phenomenon in privacy and other fundamental rights of suspects and other individuals concerned, including the protection of their personal data, on the other hand.

The discussion ran in parallel to the debate on the most appropriate methodology for providing training on this complex matter. This training was considered necessary because most judges and prosecutors of the Member States were not familiar with the enormous possibilities that come from having access to databases and information systems storing cross-border information that might be crucial in national investigations and proceedings. Moreover, judicial authorities considered mostly the rules on data processing, data protection and data security as a purely set of administrative rules with a minimum impact in ongoing investigations and prosecutions.

Following discussions in the Toledo seminar, from 12th to 14th September 2007 the Council of Europe hosted a workshop for judges and prosecutors on “Data protection in criminal proceedings”, with special focus on Spain, the Netherlands and the United Kingdom. This workshop, with a practice-orientated approach, was based on a case study related to a criminal investigation of drugs, organised crime and money laundering coordinated by the United Kingdom with the support of Europol and Eurojust. In order to progress in the investigation, the UK national competent authorities requested relevant information stored in databases and information systems of other Member States (The Netherlands, and Spain) and a third State (Russia). In the different sessions of this workshop, the role of Eurojust and Europol was promoted, the possibilities of the EU information

systems explored, and the applicable legal instruments analysed. The importance of the administrative rules governing data quality, data protection and data security was highlighted.

The institutions involved in the Toledo seminar then presented a proposal to the Commission, under the “Criminal Justice Programme 2008”, for the organisation of a set of training courses on data protection in criminal proceedings. The proposal was entitled “Data Protection in Criminal Proceedings” (DPiCP) Project.

The Commission awarded a grant to the DPiCP Project and, with its support and co-financing, a another workshop on data protection in criminal proceedings was hosted by the Council of Europe, in Strasbourg, on 7–9 October 2009. This training activity combined a theoretical and practical approach, in order to provide law enforcement and judicial authorities with the necessary basic knowledge, competences and skills to prevent and combat cross-border criminality through the efficient use of the EU agencies and information systems mentioned above. The European Judicial Training Network (EJTN) actively promoted this training activity.

EJTN also supported another two training courses organised in Madrid, at the Spanish General Council of the Judiciary (on 14–16 July 2010), and in Barcelona, at the Spanish Judicial School (on 24–26 October 2011). A considerable number of judges attended both training courses, which focused on the impact of the EU framework for exchange of information in national criminal proceedings.

Discussions during these training courses resulted in the publication in 2012 of a handbook for Spanish judges and prosecutors, covering both the European dimension and the national legal system of Spain.<sup>1</sup>

This book has a more reduced scope and defined purpose. In scope, it mainly covers the European dimension of the information systems and rules for the processing and protection of personal data, although some references are also made to the impact of those rules in domestic investigations and criminal proceedings. As for its purpose, the book intends to be a useful tool for trainers and practitioners in the preparation of training activities related to cross-border cooperation and exchange of information in the fight against organised crime.

During the drafting of this book, I have given special consideration of the Communication “Building trust in EU-wide Justice: a new dimension to European Judicial Training” issued by the Commission in September 2011,<sup>2</sup> as well as discussions taken place at the Conference “Stimulating European Judicial Training” organised by the Commission on 10 April 2013, in Brussels.<sup>3</sup>

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<sup>1</sup> *Nuevas tecnologías, protección de datos y proceso penal*, coordinated by Ángeles Gutiérrez Zarza, edit. Wolters Kluwer, Madrid 2012.

<sup>2</sup> COM(2011) 551 final.

<sup>3</sup> All information, including the Agenda and materials of the conference, are available at [http://ec.europa.eu/justice/events/judicial-training-2013/index\\_en.htm](http://ec.europa.eu/justice/events/judicial-training-2013/index_en.htm). See, in particular, Le Bail, F.: “The European added value: the EU role in Judicial Training”; Berlinguer, L.: “The EP Pilot Project on European Judicial Training”; Goldsmith, J.: “The European training platform: the e-Justice portal as entry point for finding a training session”.

In the above-mentioned Communication, judicial training is considered a crucial element of the creation of a European judicial culture, as it enhances mutual confidence between Member States, practitioners and citizens and ensures the efficient functioning of the European Judicial Area.

This Communication confirmed the importance of providing legal practitioners with appropriate training on EU law, including, among other priority areas, judicial cooperation in criminal matters and data protection.

Another relevant document considered carefully during the preparation of this book has been the Communication “Establishing a European Law Enforcement Training Scheme” (LETS) adopted by the Commission on 27 March 2013.<sup>4</sup> According to this Communication, training for police, customs, border guards and other police authorities is essential to create a common European law enforcement culture and ensure effective cross-border cooperation against serious crime.

This book offers guidance to those dealing with the challenging task of providing training for law enforcement and judicial authorities in the complex topic of cross-border exchange of information and data protection in criminal matters. While the book has been drafted with those objectives in mind, the author is conscious that the matter is extremely complex, the legal instruments are dispersed, and the databases and information systems are constantly evolving.<sup>5</sup> I am confident, however, that the content of the book will be of help to both trainers and legal practitioners seeking to become more familiar with the new possibilities of the EU in fighting cross-border crime effectively and protect EU citizens, whilst respecting privacy and fundamental rights of the suspects and accused persons.

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<sup>4</sup> COM(2013) 172 final. Brussels, 27.3.2013.

<sup>5</sup> The reader will find updated information and documents related to the content of this book at [www.idee.ceu.es/en-us/home.aspx](http://www.idee.ceu.es/en-us/home.aspx).



# Acknowledgements

I would like to express my most sincere gratitude to the European Commission, the Council of Europe, the Spanish Ministry of Science and Education, and both the University of Castilla-La Mancha and the Regional Government of Castilla-La Mancha, for the constant support and co-financing of the Data Protection in Criminal Proceedings (DPiCP) Project. Special thanks should also be given to the Spanish General Council of the Judiciary, the Spanish Judicial School, the Spanish Data Protection Agency, the Spanish General Prosecutor's Office, and the European Judicial Training Network for their collaboration and commitment in the organisation of the training activities for judges and prosecutors organised in the framework of the DPiCP Project and in other activities to follow-up this project.

I am also extremely grateful to the team of experts who provided training and shared their extensive knowledge on data protection and/or criminal proceedings during this project, in particular, to Diana Alonso Blas, Joaquín Bayo Delgado, Giovanni Butarelli, Jose Antonio del Cerro, Elena Domínguez, Daniel Drewer, Antonio Frías, Laraine Laudati, Carlos Lesmes, Miguel Marcos, Peter Michael, Angelika Möhlig and Graham Sutton. We all are extremely grateful to Peter Hustinx for his inspiring support during the DPiCP Project. Many thanks as well to the participants in these training activities, most of them judges and prosecutors from the Member States and experts from EU institutions and bodies, who exchanged practical experiences and provided fresh perspectives on this complex topic.

The book would not have been possible without the determination of Anke Seyfried and the enormous patience and great professionalism of Athiappan Kumar, both from Springer. Thanks are also extended to Professor Tim Wilson of the University of Northumbria Law School, who kindly assisted at the proof stage.

The book was finished on 15 December 2013.<sup>6</sup> All the good ideas it contains are from the above-mentioned experts. Mistakes are mine.

The Hague, The Netherlands  
15 December 2013

Ángeles Gutiérrez Zarza

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<sup>6</sup>The reader will find updated information and documents related to the content of this book at [www.ideo.ceu.es/en-us/home.aspx](http://www.ideo.ceu.es/en-us/home.aspx).

# Abbreviations

AFSJ	Area of Freedom, Security and Justice
ARO(s)	Asset Recovery Office(s)
AWF	Analysis Work File
CAHDATA	Ad hoc Committee on Data Protection (of the Council of Europe)
CARIN	Candem Asset Recovery Inter-Agency Network
CATS	Coordination Committee in the Area of Police and Judicial Cooperation in Criminal Matters ( <i>Comité de l'article trente-six</i> )
CEPOL	European Police College
CFrD	Council Framework Decision
CIS	Customs Information System
CMS	Case Management System
CoE	Council of Europe
COM	Commission Document
Coreper	Committee of Permanent Representatives ( <i>Comité des représentants permanents</i> )
COSI	Standing Committee on Operational Cooperation on Internal Security
DAPIX	Information Exchange and Data Protection (Working Party of the Council of the EU)
DHS	Department of Homeland Security
Dir.	Directive
DL	Deprivation of Liberty
Doc.	Document
DPiCP	Data Protection in Criminal Proceedings (Project)
EAFS	European Academy of Forensic Science
EAW	European Arrest Warrant
EC3	European Cybercrime Centre
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECIM	European Crime Intelligence Model



ECOFIN	European Council of Financial Affairs
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEA	European Economic Area
EEW	European Evidence Warrant
EIO	European Investigation Order
EIS	Europol Information System
EIXM	European Information Exchange Model
EJN	European Judicial Network
EJTN	European Judicial Training Network
ENCS	European National Coordination System
ENFSI	European Network of Forensic Science Institutes
ENISA	European Network and Information Security Agency
ENUs	Europol National Units
EP	European Parliament
EPE	Europol Platform for Experts
EPOC	European Pool against Organised Crime
EPRIS	European Police Records Index System
EU	European Union
EUCPN	European Crime Prevention Network
Eu-LISA	European Agency for the Operational Management of Large-scale IT systems in the area of Freedom, Security and Justice
EUR	Euro
Eurofisc	European Network of national officials to detect and combat new cases of cross-border VAT fraud
Europol	European Police Office
FIDE	Customs Identification Database ( <i>Fichier d'identification des dossiers d'enquête douanière</i> )
FIU(s)	Financial Intelligence Unit(s)
FRA	European Union Agency for Fundamental Rights
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GPS	Global Positioning System
IberRed	Iberoamerican Network of International legal Cooperation
IM Strategy	Information Management Strategy
ISS	Internal Security Strategy
IT	Information Technology
IXP	Information Exchange Platform
JHA	Justice and Home Affairs
JIT(s)	Joint Investigation Team(s)
JSB	Joint Supervisory Body
LETS	European Law Enforcement Training Scheme

LIBE	Standing Committee of the European Parliament on Civil Liberties, Justice and Home Affairs
MLA	Mutual Legal Assistance
MoU	Memorandum of Understanding
OCC	On-Call Coordination
OCTA	Organised Crime Threat Assessment
OECD	Organisation for Economic Cooperation and Development
OfPE	Order freezing property or evidence
OJ	Official Journal of the European Union
OLAF	Anti-Fraud Office of the European Union
p.	Page
parr.	Paragraph
PIES	Prüm Implementation, Evaluation and Strengthening of Forensic DNA data exchange (Project)
PIF	Protection of the Financial Interests of the European Union <i>(Protection des intérêts financiers)</i>
PIU	Passenger Information Unit
PNR	Passenger Name Record
SEC	Commission working documents
SFD	Swedish Framework Decision
SIENA	Secure Information Exchange Network Application
SIS	Schengen Information System
SIS-II	Second Generation System Information System
SOCTA	Serious Organised Crime Threat Assessment
SPOC(s)	Single Point(s) of Contact
SWD	Staff Working Document (of the Commission)
SWIFT	Society for Worldwide Interbank Financial Transfers
TCM	Terrorism Conviction Monitor
TE-SAT	Terrorism Situation and Trend Report of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Financing Tracking Program
TFTS	Terrorist Financing Tracking System
THB	Trafficking in Human Beings
TTIP	Transatlantic Trade and Investment Partnership
TWF	Temporary Work File
UMF2	Universal Messaging Format 2
UN	United Nations
US	United States (of America)
VAT	Value Added Tax
VIS	Visa Information System



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