

# DNA data exchange between EU Member States and fundamental rights protection

by Joaquín Sarrión Esteve

## 1. INTRODUCTION

DNA as biometric data represents a challenge for security systems in the actual global world in order to fight against globalized crime. New technologies help us to identify persons, using fingerprint/palm print identification, iris identification, face recognition and particularly DNA technology which is used specially for investigation purposes in order to identify persons. Criminal investigation makes use of non-coding DNA that provides an anonymous code without information on physical or phenotypic traits of the individual (coding DNA). One of the problems is that the progress of science can convert non-coding DNA in coding DNA (see Gómez Sánchez, 2007).

In the context of globalized crime, DNA technology is very useful. Some EU Member States (Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and Spain) developed a legal framework (out of the EU legal system) in order to regulate the exchange of DNA data between them – the Prüm Convention, signed on 27 May 2005 in the German city of Prüm. Other EU Member States joined it, and finally it was assumed within the EU legal framework thanks to Council Decision 2008/615/JHA of 23 June 2008 (known as the Prüm decision); Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA; and Council Decision 2010/482/EU of 26 July 2010 on the conclusion of the Agreement between the European Union and Iceland and Norway on the application of certain provisions of the Prüm decisions.

Nevertheless, it is important to note that *the goal of using DNA data is to obtain valid evidence for criminal proceedings* (in general, we can speak about national criminal proceedings). To achieve this, DNA evidence must be obtained with maximum respect for fundamental rights and legal guarantees in the three stages of what can be referred to as DNA technology forensic use: sample collection, the extraction of DNA profile, and its treatment in a criminal database (see Cabezudo Bajo, 2011).

The aim of the author's research is to identify the fundamental rights involved in the third stage, the treatment of DNA data, and particularly in the exchange of it between

EU Member States in order to obtain valid DNA evidence for national criminal proceedings.

## 2. METHODOLOGY AND EXPECTED OUTPUTS

The requirements must be identified for the respect of fundamental rights in the use of DNA technology when EU Member States exchange DNA data in the context of the European multilevel system in which we live (European Convention on Human Rights, EU fundamental rights, and EU Member States' (constitutional) fundamental rights).

To achieve identification we must use a multilevel constitutionalism perspective, having regard to different legal systems and the effect of their legislation and interpretation on fundamental rights. Because the different levels or legal systems are becoming progressively more interconnected (see Gómez Sánchez, 2011), we therefore need to explain the relationships and identify the correct criteria to integrate them from the perspective of fundamental rights protection. The three-stage structure of the so-called "forensic use of DNA technology" referred to above also comes into play, with the perspective that DNA evidence should be obtained with the maximum respect of fundamental rights in these three stages (see Cabezudo Bajo, 2011, 2012)

The fundamental rights affected by forensic use of DNA technology in the third stage, and particularly in the DNA exchange between EU Member States, must be identified. But in order to obtain valid DNA evidence using EU exchange data, fundamental rights must be respected in all three stages, as explained below...

## 3. DNA TECHNOLOGY AND FUNDAMENTAL RIGHTS PROTECTION FROM A MULTILEVEL PERSPECTIVE IN THE EUROPEAN UNION

As previously indicated, this research focuses on legal multilevel fundamental rights affected by the use of the DNA technology in the third stage of DNA treatment when

EU Member States exchange DNA data in their fight against globalized crime with the goal of obtaining valid DNA evidence for criminal proceedings.

### ***3.1. The international and EU legal framework on DNA technology***

The exchange of DNA data is based on several legal frameworks, and for EU Member States they basically fall into two types; the international legal framework and the EU legal framework.

The international (non EU) legal framework on DNA technology is based on bilateral agreements (for example the recent agreement between UK and Australia), and the Interpol DNA Gateway ([www.interpol.int/INTERPOL-expertise/Forensics/DNA](http://www.interpol.int/INTERPOL-expertise/Forensics/DNA)). In the Interpol DNA Gateway, Interpol Member States can upload DNA profiles, and other Interpol Member States can use the Interpol central database. It is important to note that the database uses the Interpol Standard Set of Loci (ISSOL). The DNA Prüm system is based on the use of DNA national databases connected with national contact points on the so-called hit/non hit basis. The DNA Prüm system use the European standard set of loci (EES) with 12 loci (they were originally seven, but the 2009 EU Council Decision of 30 November extended them to 12 loci), and the Interpol Standard Set of Loci (ISSOL).

The EU legal framework on DNA technology is based on the three European decisions referred to above that assumed the Prüm Convention of 2005. One of the trends related to the EU legal framework on DNA technology is the eventual consequences of the recent UK opt-out decision regarding the measures in the field of police co-operation and judicial co-operation in criminal matters adopted prior to the Lisbon Treaty, including the Prüm regulation, according to article 10(4) of Protocol 36 to the Lisbon Treaty, after the end of the transitional period on 1 December 2014 (see the report “The UK block opt-out in police and judicial cooperation in criminal matters: recent developments”, [www.parliament.uk/briefing-papers/SN06930.pdf](http://www.parliament.uk/briefing-papers/SN06930.pdf), accessed on 29 December 2014).

The consequences of the UK decision opting out of EU criminal law were pointed out two years ago. With particular reference to the Prüm decision, it was noted that the “UK would be relieved of any duty to provide automated access to its databases (...) At the same time, UK law enforcement authorities would not be able to have direct and automatic access to other Member States’ databases” (see Hinajeros & Spencer & Peers, 2012:18).

One of the problems was that the UK decided on a block opt-out. The UK notified the Council on 24 July 2013 that it would exercise this block opt-out option, and after that

negotiated opting back into 35 measures. However, the Prüm decision was not within them. EU Member States were required to agree unanimously on the decision to opt back, and at the General Affairs Council on 24 June 2014 some EU Member States expressed reservations. Therefore, on 6 November 2014 the UK Government published the Draft Criminal Justice and Data Protection (Protocol 36) Regulations 2014 which aim to transpose into UK law further measures which fully implement 11 of the 35 measures.

In order to solve the eventual problems caused by opting out of the Prüm decision (and to replace it) the UK appears to be seeking a compromise which involves sharing DNA data with EU Member States, but with limited access to the UK’S DNA database (“Police to share DNA database with Europe’s force”, Financial Times, 12 November 2014, [www.ft.com/cms/s/0/5213f5ae-6a82-11e4-8fca-00144feabdc0.html#axzz3NHceO94Z](http://www.ft.com/cms/s/0/5213f5ae-6a82-11e4-8fca-00144feabdc0.html#axzz3NHceO94Z), accessed on 29 December 2014).

However, the actual situation is very unclear and the author is studying the legal implications of the UK opt out decision regarding the Prüm legislation, and the implications of the UK’s present and future cooperation with other EU Member States on DNA data exchange in the post Prüm era.

### ***3.2. Fundamental rights, the EU Charter and the maximum standard of fundamental rights protection from a multilevel perspective***

Problems in relation to the aim of obtaining valid DNA evidence arise at three levels: the technical conditions, the interpretation of the results, and finally the respect of fundamental rights in the realisation of the DNA evidence in the three stages noted previously (the sample collection, the extraction of DNA profile, and its treatment in a criminal database).

However, the author’s research focuses on identifying the requirements for the respect of fundamental rights in the use of DNA technology in the third stage, because that is when the exchange of DNA data between EU Member States takes place. Nevertheless, another problem is that to obtain valid DNA evidence using EU exchange data, fundamental rights need to be respected at all three stages, and so all of them need to be looked at (see Sarrión Esteve & Benlloch Domènech, 2014). Fundamental rights affected in the three stages can be the rights to private life, bodily integrity, home inviolability, the right to defence, and the right to protection of personal data.

Moreover, as pointed out before, we live in the European legal space in the context of legal systems with different levels of rights which are increasingly interlinked (Gómez Sánchez, 2011: 20). Therefore we need to use a European multilevel constitutional approach to identify fundamental rights and, more importantly, the protection standards involved we need

to respect.

There are at least three levels to take into account: European Convention level, EU level (EU Charter/fundamental rights as general principles of EU law), and national level. Therefore, it is important to take into account several legal instruments in the form of national constitutions – the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union.

As we know, the Charter reinforces limits on the power of the EU, as shown by articles 6(1) EUT, and 51(2) of the Charter (Gómez Sánchez, 2008: 507). In addition, article 6(1) (3) EUT provides that rights, freedoms, and principles in the Charter must be interpreted in accordance with Title VII of the Charter.

In relation to the scope and interpretation of rights and principles, article 52 of the Charter stipulates that when the Charter contains rights which correspond to rights guaranteed by the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection” (art 52(3), Charter).

When the Charter recognises rights resulting from common constitutional traditions of Member States, these rights must be interpreted in harmony with them (art 52(4), Charter). In these two paragraphs article 52 establishes the link between the rights enshrined in the Charter with the ECHR and common constitutional traditions in Member States, which are the sources of fundamental rights recognised by the Court of Justice as general principles of Community law. The reason for this provision is to exclude any kind of conflict between fundamental rights protection standards.

In addition, article 53 introduces the requirement that any of the provisions of the Charter shall be interpreted “as restricting or adversely affecting human rights and fundamental freedoms” as recognised in their respective fields of application by EU law, international law, and international agreements (when the EU or all Member States are party to them), including ECHR and Member States’ constitutions. Article 53 therefore provides a limitation on the scope of applicability of the Charter to prevent a lesser level of fundamental rights protection. In this sense, it is equivalent to asking for the highest fundamental rights protection standard as a “principle of non-regression”.

This would mean that the Charter only produces legal effects on Member States if they do not guarantee a higher level of protection, in which case the Charter should be applied or Member States “should make utterly clear that the Community rights should be interpreted, in line with national constitutional traditions, in such a way as to offer a high standard of protection” (Giubboni, 2003: 15).

In the author’s view the Charter should be interpreted as an instrument to apply the highest standard of protection of fundamental rights between ECHR standard, national standard and Charter standard. This position is contrary to what seems to have been the ECJ’s interpretation in the recent case of *Melloni*, C-399/11, where the court emphasised the primacy of EU law over national law, including constitutional law and fundamental (constitutional) rights. Some studies have noted problems with the maximum standard of fundamental rights protection from a multilevel constitutionalism perspective after the *Melloni* judgment (for example, see Tenorio, 2013). However, in the author’s view an adequate multilevel perspective can be adopted, or more accurately must be defended, and recent ECJ case law can change in the context of accession to the ECHR (Sarrión Esteve, 2014). Nevertheless, the ECJ *Melloni* judgment, and the subsequent Spanish Constitutional Court judgment (STC 26/2014, of 13 February 2014) which applied the *Melloni* doctrine, do not resolve all the problems related to the interpretation of article 53 of the EU Charter and the relationship between national and EU legal orders (Gómez Sánchez, 2014: 122-27).

In respect of this, and the issue of DNA data exchange between EU Member States, the author’s view is that EU institutions and EU Member States should respect the highest standard of fundamental rights, and afford maximum respect for any fundamental right affected in the forensic use of DNA technology in any of the three stages outlined earlier.

#### 4. CONCLUSIONS

The use of DNA technology is very useful in the fight against globalised criminalisation, because new technologies help us to identify persons using biometric data as DNA. However, one of the most important challenges is the maximum respect of fundamental rights.

EU Member States exchange DNA data with the aim of obtaining valid DNA evidence (in a national criminal proceeding). To achieve this, there must be respect for fundamental rights and legal guarantees affected in any of the three stages which form the structure of DNA technology forensic use.

Certainly, it is important to note that this technology can affect several diverse and fundamental rights, and that we live in a multilevel system which compels us to identify the standard we need to respect from national, ECHR, and EU levels. It is important that the maximum standard of fundamental rights protection involved is always respected when obtaining valid evidence in national criminal proceedings.

**Joaquín Sarrión Esteve**

*IALS Visiting Fellow; Assistant Professor (University of Valencia), PhD Eu in EU Law (University of Bologna) (email: joaqsarrion@gmail.com)*

**REFERENCES**

- Gómez Sánchez, Y, “Los datos genéticos en el Tratado de Prüm”, *Revista de Derecho Constitucional Europeo*, (2007), 7.
- Gómez Sánchez, Y, *Constitucionalismo multinivel. Derechos fundamentales*, (2011), Sanz y Torres.
- Gómez Sánchez, Y, *Constitucionalismo multinivel. Derechos fundamentales*, 2nd ed, (2014), Sanz y Torres.
- Cabezudo Bajo, María José, “Valoración del sistema de protección del dato de ADN en el ámbito europeo”, *Revista General de Derecho Europeo*, (2011), 25.
- Cabezudo Bajo, María José, “La regulación del “uso forense de la tecnología del ADN” en España y en la UE: “Identificación de cinco nuevas cuestiones controvertidas”, *Revista General de Derecho Procesal*, (2012), 26.
- Cabezudo Bajo, María José, (ed), *Las bases de datos policiales de ADN ¿son una herramienta realmente eficaz en la lucha contra la criminalidad grave nacional y transfronteriza*, (2013), Dykinson.
- Giubboni, S, “Fundamental social rights in the European Union: Problems of protection and enforcement”, *Italian Labor Law eJournal*, 5 (2003), 1.
- Hinajeros, A, Spencer, J R, Peers, S, “Opting out of the EU Criminal law: What is actually involved?”, CELS Working Paper, (2012), New Series, 1.
- Sarrión Esteve, J, “Sobre la necesidad de buscar el estándar o nivel más alto de protección de los derechos fundamentales en el sistema de tutela multinivel en la Unión Europea”, *CEFLegal: revista práctica de derecho*, (2014), 162, pp 155-84.
- Sarrión Esteve, J, Benlloch Domenech, C, “Biometric Technologies Trends in Relation to Fundamental Rights Protection in European Union Security Policy: With a Particular Approach to DNA Technology”, (2014). Available at SSRN: <http://ssrn.com/abstract=2542512> (30 December 2014).
- Tenorio Sánchez, P J, “Diálogo entre tribunales y protección de los derechos fundamentales en el ámbito europeo”, *Revista General de Derecho Europeo*, (2013), 31, 2013.