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MINISTÉRIO DA JUSTIÇA

POLÍCIA JUDICIÁRIA

UNIDADE DE PLANEAMENTO, ASSESSORIA TÉCNICA E DOCUMENTAÇÃO

Act no. 74/2009 of 12 August 2009

Approves the regime applicable to the exchange of information and criminal intelligence between the authorities of the Member States of the European Union, and transposes into the national legal system Council Framework Decision no. 2006/960/JHA of 18 December 2006.

The Assembleia da República¹ hereby decrees the following, pursuant to Article 161(c) of the Constitution:

CHAPTER I

General provisions and definitions

Section 1

Object and scope of application

1. This Act applies to the request for and transmission of information and intelligence by national law enforcement authorities to the competent law enforcement authorities of other Member States of the European Union for the purposes of conducting criminal investigations or criminal intelligence operations.
2. The exchange of information and intelligence between law enforcement authorities of the European Union is based on the principle of availability and accomplished pursuant to the provisions of Council Framework Decision no. 2006/960/JHA of 18 December 2006, on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

¹ T.N.: Portuguese Parliament



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Section 2

Definitions

For the purposes of this Act:

- (a) ‘competent law enforcement authority’: a police, customs or other authority, with the exception of agencies or units dealing especially with national security issues, that is authorised by national law to detect, prevent and investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities, namely one of the following, as far as the Portuguese Republic is concerned:
- Polícia Judiciária²;
 - Guarda Nacional Republicana³;
 - Polícia de Segurança Pública⁴;
 - Direção Geral das Alfândegas e dos Impostos Especiais sobre o Consumo⁵;
 - Other criminal police bodies with specific competence;
- (b) ‘criminal investigation’: a procedural stage within which action as defined in section 1 of Act no. 49/2008 of 27 August 2008, is taken by a competent law enforcement authority;
- (c) ‘criminal intelligence operation’: a procedural stage, not yet having reached the stage of a criminal investigation, within which a competent law enforcement authority is legally entitled to collect, process and analyse information about offences or criminal activities with a view to establishing whether concrete criminal acts have been committed or may be committed in the future;
- (d) ‘information and/or intelligence’:
- (i) any type of information or data which is held by law enforcement authorities;
- and

² T.N.: Criminal Police

³ T.N.: National Republican Guard

⁴ T.N.: Public Security Police

⁵ T.N.: Directorate-General for Customs and Excise Duties on Consumption



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- (ii) any type of information or data which is held by public authorities or by private entities and which is available to law enforcement authorities without the use of means of evidence gathering as referred to in section 3(1)(c).
- (e) ‘offences’: those referred to in section 2(2) of Act no. 65/2003 of 23 August 2003.

Section 3

Limits on the obligation to cooperate

1. This Act does not establish any obligation:
 - (a) to gather and preserve information and intelligence in order to provide it to the competent law enforcement authorities of other Member States;
 - (b) to provide information and intelligence to be used as evidence before a judicial authority;
 - (c) to obtain information and intelligence with the use of means of evidence gathering, as defined by Portuguese national law.
2. When gathered in a context other than that of the inquiry or investigation, or other than that of a preventive investigation procedure as provided for by Act no. 36/94 of 29 September 1994, the information or intelligence referred to in section 2(c), if gathered as a result of the police measures laid down in chapter V of Act no. 53/2008 of 29 August 2008, may only be transmitted, without authorisation of the competent judicial authorities, to authorities as provided for in section 1.



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Section 4

Equal treatment

1. Conditions identical to those legally provided for with regard to the communication of information and intelligence between the national authorities referred to in section 2(a) shall apply to the exchange of information and intelligence as provided for by this Act.
2. In cases where the access to information or intelligence legally depends on an agreement or authorisation of a judicial authority, it shall be requested by the requested authority to the competent judicial authority, so as to be decided upon according to rules identical to those applying to national authorities.
3. Where the information or intelligence sought has been obtained from another Member State or from a third country and has been gathered for a specific, explicit and legitimate purpose, subject to the principle of purpose, its transmission to the competent law enforcement authority of another Member State may only take place with the consent of the Member State or third country that provided it.

Section 5

Investigation secrecy and professional secrecy

1. In each case of exchange of information or intelligence, the national law enforcement authorities shall comply with the requirements under existing legislation on investigation secrecy and shall, in accordance with national law, guarantee the confidentiality of all information and intelligence of such nature.
2. Whoever, in the performance of his duties, obtains knowledge of information, which is not allowed by law to become publicly known, shall be bound by professional secrecy,



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pursuant to the provisions of sections 17(1) and (4) of the Act on the Protection of Personal Data.

CHAPTER II

Exchange of information and intelligence

Section 6

Provision of information and intelligence

1. Information and intelligence shall be provided for the purposes of detection, prevention or investigation of an offence:
 - (a) at the request of a competent law enforcement authority, acting in accordance with the powers conferred upon it by national law, conducting a criminal investigation or a criminal intelligence operation;
 - (b) spontaneously, pursuant to the provisions of section 11 of this Act.
2. Information or intelligence shall also be exchanged with Europol and Eurojust, insofar as the exchange refers to an offence or a criminal activity within their mandate, pursuant to the provisions as defined by the existing instruments on their corresponding duties and powers.

Section 7

Requests for information and intelligence

1. The request shall:



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- (a) set out the factual reasons to believe that the requested authority has relevant information and intelligence;
 - (b) explain the purpose for which the information and intelligence is sought and the connection between the purpose and the person who is the subject of the information and intelligence.
2. The requests for information and intelligence shall contain at least the information set out in Annex B.

Section 8

Time limits for the provision of information and intelligence

1. Urgent requests for information and intelligence concerning the offences referred to in section 2(2) of Act no. 65/2003 of 23 August 2003, shall be responded to within at most eight hours, when the requested information or intelligence is held in a database directly accessible by the requested authority; whenever this is not possible, the following rules shall apply:
 - (a) if it is not possible to respond within eight hours, the requested authority shall state the reasons for such impossibility on the form set out in Annex A;
 - (b) where the provision of the information or intelligence requested within the period of eight hours puts a disproportionate burden on the requested authority, it may postpone the transmission of such information or intelligence, and immediately report this postponement to the requesting authority, providing the requested information or intelligence as soon as possible, but no later than within three days.
2. Non-urgent requests for information or intelligence concerning the offences referred to in section 2(2) of Act no. 65/2003 of 23 August 2003, shall be responded to within at most one week, when the requested information or intelligence is held in a database directly



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accessible by the requested authority; whenever this is not possible, the requested authority shall state the reasons for such impossibility on the form set out in Annex A.

3. In all other cases, the information or intelligence sought shall be communicated to the requesting authority within 14 days; whenever this is not possible, the reasons for such impossibility shall be stated on the form set out in Annex A.

Section 9

Refusal to transmit information or intelligence

1. Without prejudice to the application of the provisions of section 4(1), provision of information or intelligence may be refused if there are factual reasons to assume that the provision of the information or intelligence would:
 - (a) harm essential national security interests of the Portuguese Republic; or
 - (b) jeopardise the success of an ongoing investigation or criminal intelligence operation, or the safety of individuals; or
 - (c) clearly be disproportionate or irrelevant with regard to the purposes for which it has been requested.
2. Where the request pertains to an offence punishable by a term of imprisonment of one year or less under Portuguese law, the requested authority may refuse to provide the information or intelligence sought.
3. Provision of information or intelligence shall always be refused if the competent judicial authority has not authorised the access and exchange requested pursuant to section 4(3).



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Section 10

Communication channels and working language

1. Exchange of information and intelligence under this Act shall take place via the Sirene, Interpol or Europol bureaus.
2. Any of the working languages provided for in the legal instruments offering a framework for the functioning of the bureaus referred to in the previous subsection may be used.
3. The Secretary-General of the Internal Security System is responsible for guaranteeing that the authorities to whom this Act applies have access to the information and intelligence, according to their needs and powers, without prejudice to the provisions of section 15(4) of Act no. 49/2008 of 27 August 2008.

Section 11

Spontaneous exchange of information and intelligence

1. Without prejudice to the provisions of section 8, the national authorities provided for in section 2(a) shall, without prior request, provide the competent law enforcement authorities of other Member States concerned with information and intelligence in cases where there are factual reasons to believe that this information and intelligence could assist in the detection, prevention or investigation of the offences referred to in section 2(2) of Act no. 65/2003 of 23 August 2003.
2. The provision of information and intelligence shall be limited to what is deemed relevant and necessary for the successful detection, prevention or investigation of the offence or criminal activity in question.



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CHAPTER III

Data protection

Section 12

Applicable regime

1. Before their actual transmission, the information and intelligence sought remain subject to existing legislation to ensure their protection.
2. The rules provided for using the communication channels referred to in section 10(1) apply to the procedure on exchange of information and intelligence provided for by this Act.
3. The use of information and intelligence which has been exchanged directly or bilaterally under this Act shall be subject to the national data protection provisions of the receiving Member State, where they shall be subject to the same data protection rules as if they had been gathered in that Member State.
4. In those cases in which Portugal is the requested Member State, the personal data shall be protected in accordance with the provisions of the Act on the Protection of Personal Data.

Section 13

Limits for use

1. The information and intelligence, including personal data, provided under this Act may be used by the requesting authorities solely for the purposes for which they have been supplied or for preventing an immediate and serious threat to public security.



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2. When providing information and intelligence in accordance with this Act, the competent national authority may, pursuant to the existing legal framework, impose conditions on the use of that information and intelligence by the authority they have been supplied to.
3. Conditions may also be imposed on communicating the result of the criminal investigation or criminal intelligence operation within which the exchange of information and intelligence took place, as well as on the further use and processing of the transmitted information and intelligence.
4. Possible transfer to third countries of information and intelligence supplied under this Act shall take place only if adequate protection in the field in question is ensured, with specific national legislation in place and independent authorities to guarantee application thereof.

Section 14

Communication by electronic means

1. Where technical conditions allow for it, data communication to the requesting authorities may be performed by electronic means.
2. In case data communication under the previous subsection is performed, subsequent remittance on a physical medium is no longer required.
3. Authorities receiving a request under this Act shall adopt adequate technical and organisational measures to protect the personal data from accidental or illegal destruction, accidental loss, unauthorised changes, disclosure or access, namely when processing thereof implies their transmission via a network or making them available by granting automated direct access, as well as from any other form of illicit processing, and shall



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prevent data from being consulted, modified, deleted, added, destroyed or communicated in any way not permitted by this Act.

4. As regards automated data processing, measures shall be adopted:
 - (a) to prevent any unauthorised person from having access to the equipment used for processing personal data (control of access to equipment);
 - (b) to prevent data media from being read, copied, modified or removed by an unauthorised person (control of data media);
 - (c) to prevent the unauthorised introduction of data into the archive, as well as any unauthorised knowledge, modification or elimination of personal data inserted into the archive (control of data archive);
 - (d) to prevent the automated data processing systems from being used by unauthorised persons by means of data transmission equipment (control of use);
 - (e) to guarantee that the persons authorised to use the automated data processing system have access only to the data covered by their access authorisation (control of access to data);
 - (f) to guarantee that it is possible to check and establish to which authorities the personal data were or may be transmitted or supplied by means of data communication equipment (control of transmission);
 - (g) to guarantee that it is possible to check and establish *a posteriori* what data have been introduced into the automated data processing systems, when and by whom (control of data introduction);
 - (h) to prevent an unauthorised person from reading, copying, modifying or deleting the personal data during both the transfer of personal data and the transport of data media (control of transport);
 - (i) to ensure that the systems used may be repaired in case of a failure (recovery of equipment);
 - (j) to ensure that the system operates, that operating errors are reported (reliability) and that the data stored are not distorted by any system operating errors (integrity).



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Section 15

National Data Protection Commission

The National Data Protection Commission supervises the data communication and other operations provided for in this Act, and may perform audits on the procedures and platforms for technological support used, as well as exercise any other supervisory powers provided for by existing legislation.

CHAPTER IV

Final provisions

Section 16

Extension of application

The provisions of this Act apply *mutatis mutandis* to the communication of information and intelligence between national criminal police bodies.

Section 17

Access by judicial authorities

The regime provided for by this Act shall not affect the application of the provisions of section 11(3) of Act no. 49/2008 of 29 August 2008, and the competent judicial authorities may, at any time and regarding any case under their responsibility, access the corresponding information and intelligence.



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Approved on 25 June 2009.

The President of the Assembleia da República, *Jaime Gama*.

Promulgated on 29 July 2009.

To be published.

The President of the Republic, ANÍBAL CAVACO SILVA

Countersigned on 30 July 2009.

The Prime Minister, *José Sócrates Carvalho Pinto de Sousa*.