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Information sharing in the Area of Freedom Security and Justice (AFSJ)

Data protection and EU-internal information
exchange

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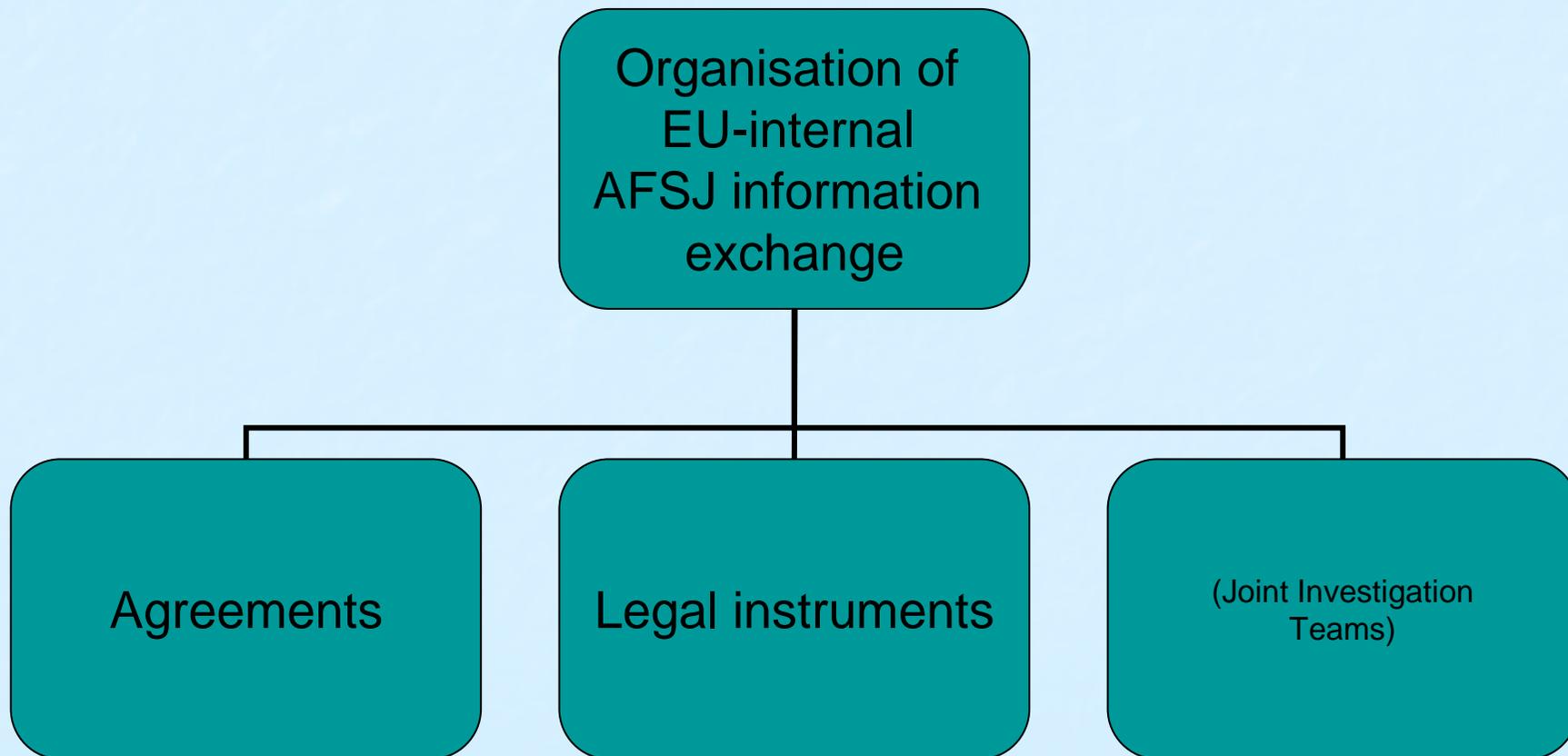


AFSJ = Title V TFEU:

police and border checks,
asylum and immigration,
judicial cooperation in civil matters,
judicial cooperation in criminal matters
and police cooperation.



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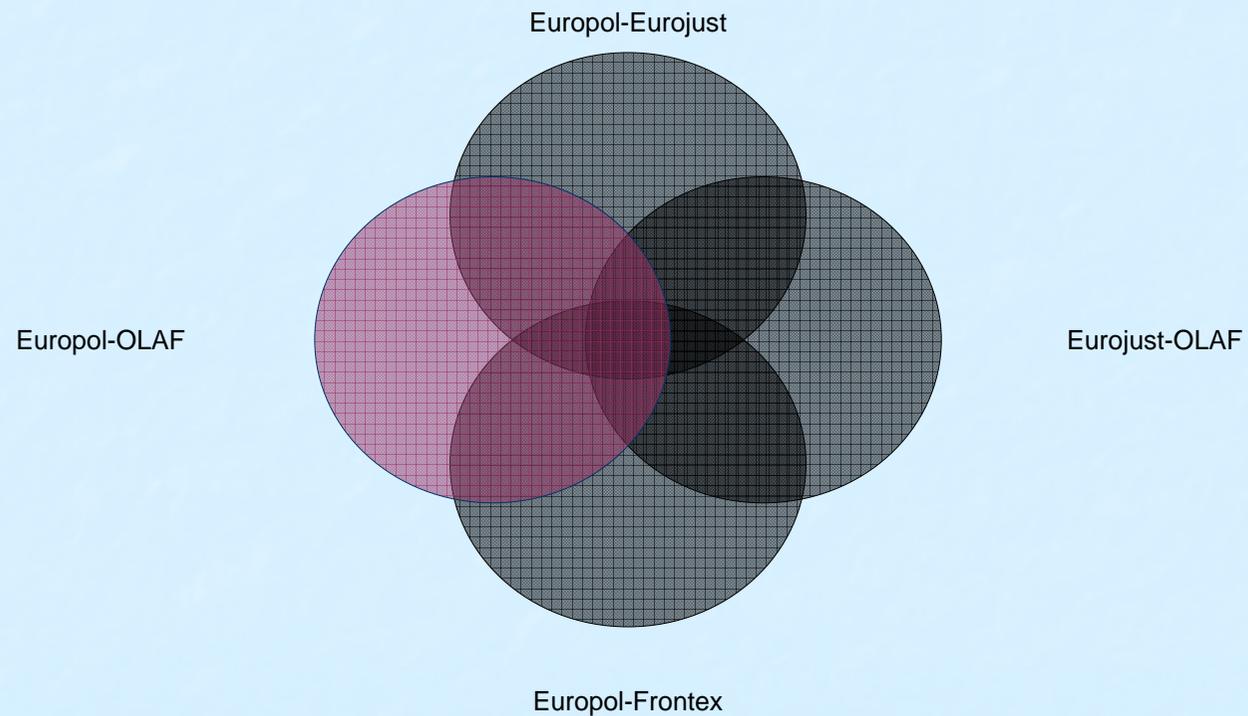




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Information exchange agreements in the AFSJ:





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Law enforcement
access:

Europol and
Eurojust have
(or will soon have)
access to

SIS (II)

VIS

CIS

Eurodac
(proposal)



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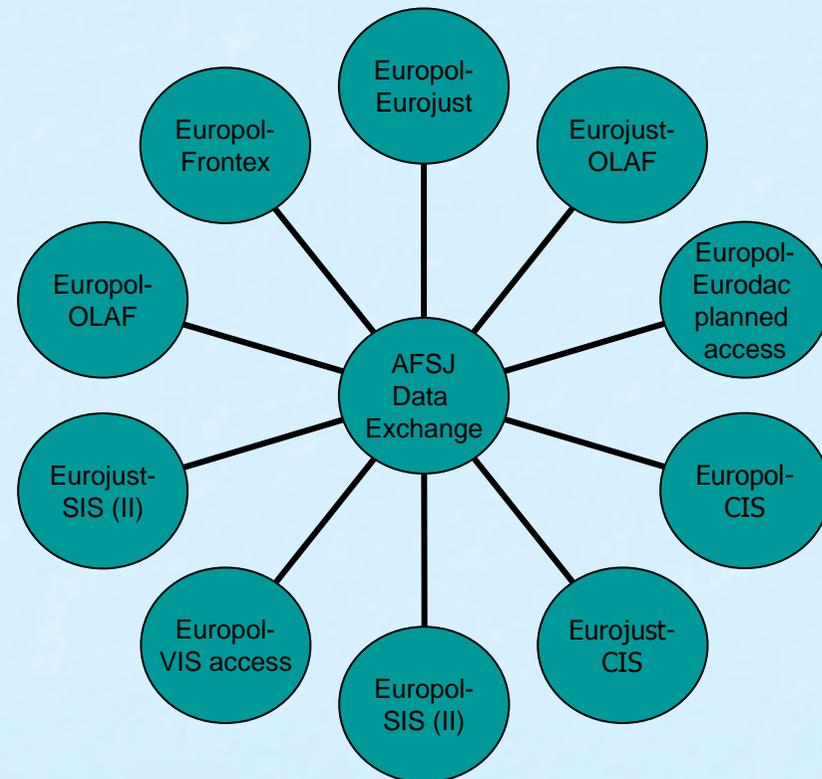


Risks of data transfer, ECtHR:

“Every transmission of data to other authorities enlarges the group of individuals with knowledge of the personal data and can therefore lead to investigations being instituted against the persons concerned”.

This danger constitutes a further separate interference with the applicants’ rights under Article 8 ECHR.

(Weber and Saravia v. Germany, para 79, Application no. 54934/00).





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Conditions of transfer, German Const. Court:

- **Strict purpose limitation**
Data have to be marked and must remain connected to the purposes which had justified their collection.
- **Strict Limitations of the offences on behalf of which data transmission is permitted**
Specific facts and no mere factual indications.
Recording in minutes.
- **Essential supervisory mechanisms against abuse**
Precautions in legal basis + notification of the individual after surveillance measures

Conditions at EU-level:

- **No strict purpose limitation:**
“for the fulfillment of the tasks of Europol/Eurojust”
(prevention, detection and investigation of crime).
- **No specific facts** necessary for the transfer of personal data to Europol or Eurojust
(“prevention” is not defined and is a wide-ranging term at EU-level)
- **No specific precautions** allowing for transfer are laid down in the legal bases of the EU actors, no notification.

(Weber and Saravia, BVerfG, 1 BvR 2226/94 of 07/14/1999, paras 257-285)



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Minimum requirements for the storage and exchange of personal data following from Article 8 ECHR and the case law of the ECtHR:

1. Limitation on the categories of data on individuals stored in a database.
2. Clear definition of the circumstances and limits of the storing and the use of the information.
3. Time limits for storing.
4. Purpose limitation principle.
5. Independent review and adequate and effective safeguards against abuse, including effective remedies.
6. Notification, as soon as it can be carried out.



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Some results of the analysis of the agreements and access decisions:

- Serious shortcomings as regards the respect of time limits
- Very diversified supervisory structure
- Purpose of the transfer is not specified
- Key terms (e.g. prevention of crime) are not defined
- Almost no control of onward transfer
- No notification = no possibility to exercise correction or deletion rights



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- ▶ This lack of knowledge makes the exercise of the right to correction and deletion entirely fictional.
- ▶ Bodies and databases of the former third pillar, but also the former first pillar are concerned.





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10 suggestions for improvement:

1. Reinforced supervision and improved cooperation between the different DPAs → important for DPAs, but also for the trust in law enforcement.
2. Defining unclear key terms (e.g. prevention of crime).
3. Defining the databases in which the data are entered (e.g. in which of Europol's or Eurojust's databases), good example: VIS access decision.
4. Transparency with regard to accessing actors.
5. Harmonising law enforcement access procedure → creates legal security for the persons concerned as well as for the accessing actors.



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10 suggestions for improvement:

6. Harmonising access conditions (two-step access like in VIS access decision).
7. Common criteria on the follow up of the transferred data → increases trust on both sides.
8. Harmonisation of personal access, correction and deletion rights → more clarity for individuals and also for law enforcement actors.
9. Notification of the individuals about the transfer as soon as it can be carried out.
10. Keeping of records of the transfer and of the access requests (ex-post control makes monitoring easier → increases trust in law enforcement actions).



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Summary:

- Growing number of EU-internal AFSJ data transfers makes common principles for this currently unregulated field necessary → leads to legal certainty and trust on both sides.
- Lisbon Treaty = chances to introduce such principles are better than ever (Article 16 TFEU).
- Decision making has improved + participation of the European Parliament in the legislative process = increased respect of fundamental rights.
- Still waiting for the Commission's proposal to review the Directive



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Thank you very much for your
attention!

Comments are welcome:
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