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ABSTRACT: This paper addresses the laws governing the use of tracking and tracing devices by police officers when investigating crimes, analysing the most recent Supreme Court rulings. It focuses on the prerequisites for legality, attaching particular emphasis to the concurrence of the principles of speciality, necessity, suitability and proportionality in court approval; also studying cases of police emergency.

KEYWORDS: Technological crime investigation measures. Geolocation. Beacons. Presuppositions of legality. Court approval. Police emergency.

1. ABOUT TRACKING AND TRACING DEVICES

1.1. CONCEPT AND GEOLOCATION METHODS

The purpose of this work is to analyse technical mechanisms designed to locate and follow the target of an investigation (person, vehicle or thing) to enable the police to determine its position in space (geolocation) and to provide useful data when investigating a crime[140].

This type of devices falls within a broader category called technosurveillance (non trespassory surveillance techniques) that includes the use of technical instruments that allow the police to carry out surveillance of possible perpetrators of a crime that goes beyond what police agents (human beings) can capture with their own senses using traditional surveillance methods[141]. That is why, the evaluation of possible fundamental rights (privacy) revolves around the concept of the reasonable expectation of privacy of the persons affected by the investigation, which can classified into two dimensions: a positive one, that is, the scope of protection of the right to privacy extends to all situations whose circumstances allow the subject to maintain a will to reserve; and a negative one, which does not entail an illegal intrusion of privacy in cases where the subject, intentionally or at least consciously, participates in activities or carries out actions in which they reasonably expose themselves to the knowledge of others[142].

There are two basic modalities: geolocation of electronic communication devices; and the use of beacons or the like.

1.1.1. Geolocation of electronic communication devices

It should be noted that electronic communication devices (smartphones, mobile phones, etc.), when switched on, and even when they are not in the process of communication, are registered in successive BTS antennas (divided into cells) whose geographical location can offer them the service. This makes it possible to locate a given device and its movements in space. It is therefore a tool that makes it possible to detect people who intend to or have committed a crime, together with other complementary investigative actions, or who are at risk of or have been victims of crime. It should be noted that the Global System for Mobile Communications (GSM) is used for positioning with data associated with telephone communication systems. This service is provided by telecommunications companies to

[140] Among other works, see Joaquín DELGADO MARTÍN, "Investigación tecnológica y prueba digital en todas las jurisdicciones", 2nd updated edition, published by La Ley Wolters Kluwer, November 2018; Escarlata GUTIÉRREZ MAYO, "El análisis de la colocación de un dispositivo GPS en el vehículo de un investigado", section #Jurisprudenciatuitatuit, ELDERECHO.COM; Vicente MAGRO SERVET, "Requisitos para la validez de la geolocalización policial por dispositivos electrónicos como mecanismo de investigación", Diario La Ley, No. 9723, 26 October 2020; José Luis RODRÍGUEZ LAINZ, "La nueva jurisprudencia sobre dispositivos de seguimiento y localización (Comment to the STS, Sala 2ª,141/2020, 13 May)", Diario La Ley, No. 9650, Doctrine Section, 10 June 2020

[141] Eloy VELASCO NÚÑEZ, "Delitos tecnológicos", editorial La Ley Wolters Kluwer, 2021, pages 482 et seq.

[142] José Luis RODRÍGUEZ LAINZ considers that in cases in which *"the subject is reasonably aware that he is exposing himself to the knowledge of others"... "could not champion that reasonable expectation of privacy"*, in "El principio de la expectativa razonable de confidencialidad en la STC 241/2012, of 17 December", *Diario La Ley*, No. 8122, Sección Doctrina, 9 July 2013.

pinpoint the approximate position of a mobile phone determined by its constant connection to BTS stations.

These geolocation data are considered communication data, although they are not traffic data, because they can be generated regardless of whether or not communication takes place (Circular of the Attorney General's Office 4/2019). There are two possibilities:

In real time. The location can be known in real time using SITEL data (with complementary techniques). Therefore, court approval of the intervention inherent to SITEL is necessary. It should be remembered that, in accordance with art. 588.3.b 2 LECRIM, interception of communications covers "electronic traffic data or data associated with the communication process, as well as those produced independently of the establishment or not of a specific communication...".

Retrospectively for data held by operators, in accordance with the legal regime of Law 25/2007. This data provides information about changes in the terminal's location in space (expertise location). Judicial authorisation is required to access this data [article 588 section 3.j LECRIM], according to article 588 section 3.j LECRIM.

Retrospectively for data contained in electronic communication devices (smartphones, mobile phones, etc.) found in the possession of the person under investigation: as per the regulations on device registration contained in arts. 588.6.a et seq. LECRIM.

1.1.2. Geolocation by means of tracking and tracing devices (beacons)

The second method consists of geolocation using instruments that are not linked to the electronic communication devices of the person under investigation. This category includes all "technical tracking and tracing devices or means" [art. 588.d.b) 1 LECRIM], i.e. beacons or other types of means which, placed discreetly on a person or thing (boats, motor vehicles, works of art, ransom money,...), enable them to be located in space and tracked at a distance, given that they continuously and regularly emit some type of signal[143]. We will now analyse the problems generated by this second method.

2. ON SURVEILLANCE AND MONITORING WITH BEACONS

2.1. FUNDAMENTAL RIGHTS AFFECTED

These mechanisms have no impact on the right to secrecy of communications, as they do not concern any communication processes between persons[144]. However, knowledge of a

[143] Luis M. URIARTE VALIENTE, "Nuevas técnicas de investigación restrictivas de derechos fundamentales", paper available on the website of the Fiscalía General del Estado, page 22: https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/Ponencia%20Sr%20Uriarte%20Valiente.pdf?idFile=ec583d09-edd5-4a96-b303-a9fca37cf99e.

[144] José Luis RODRÍGUEZ LAINZ says that "the genuine concept of a police beacon is based on the idea of a hidden electronic device which generates information on location; and which, through the signals it emits by radio frequency, whether or not through closed channels, allows remote tracking of a certain object by means of a receiving device. Such devices do not generate the type of communication in which the person driving or transporting the subject of the surveillance would be forced to participate. These signals, in any case, are emitted without the participation of persons, they are sent from machine to machine; and the fact that the person participates in the generation of the information emitted by the beacon in some way, or

person's location in space does affect their right to privacy, albeit to a lesser extent than other technological research measures. STS 141/20, of 13 May, states that "it is true that knowledge by the public authorities, in the framework of a criminal investigation, of the spatio-temporal location of the suspect, involves a lesser degree of interference than other perfectly conceivable acts of investigation".

In this regard, case law considers that "privacy as a constitutional value acquires important axiological nuances depending on the scope and intensity of the intrusion that each of these technological instruments allows. However, this reasoning cannot lead us to trivialise the act of state interference represented by the use of GPS in the circle of any citizen's fundamental rights. There will be plenty of cases where knowing a person's exact location will give investigators a mere operational advantage. However, it is also possible to imagine cases of location where their apparent neutrality will be lost to precipitate an ideological or religious X-ray of the person under investigation. Attending public events of a particular political party, following acts of worship of one religious denomination or another, presence in leisure centres expressive of the person under investigation's sexual preferences and, finally, staying in a health centre for a surgical operation, are personal data that may affect the hard core of privacy and cause exposure if the citizen is not adequately protected from the temptation of the public authorities to unjustifiably use the mechanisms of interference" (STS 493/2022, of 20 May, which cites STS 141/2020, of 13 May).

On the other hand, the longer the measure continues, the more serious the interference with this right to privacy. In this regard, the decision of the European Court of Human Rights of 2 September 2010 (Uzun v Germany) is relevant, which refers to a case of GPS surveillance of a person, in which the investigating authorities systematically collected and stored data for three months about the location of the person and their movements in public (paragraph 51); and considers that this surveillance and the subsequent processing of the data thus obtained interfered with the private life of the person concerned protected by Article 8.1 (paragraph 52).

Therefore, if the location and tracking is short, there will be less interference with the right to privacy, given that the knowledge of the data on the private life of the investigated person that it provides is limited (geolocation).

In cases where the measure has a prolonged duration[145],the impact on the fundamental right is greater[146], which must be considered by the authorising judge deciding on the

possesses the subject of surveillance, does not make him the owner of this particular form of communication", in "GPS y balizas policiales", *Diario La Ley*, No. 8416, Doctrine Section, 7 November 2014.

[145] See the thoughts of Eloy VELASCO NÚÑEZ in section X of "Investigación procesal penal de redes, terminales, dispositivos informáticos, imágenes, GPS, balizas, etc.: la prueba tecnológica", *Diario La Ley*, No. 8183, Doctrine Section, 4 November 2013; and in "Tecnovigilancia, geolocalización y datos: aspectos procesales penales", *Diario La Ley*, no. 8338, Sección Doctrina, 23 June 2014.

[146] Luis M. URIARTE VALIENTE considers that *"the indiscriminate and persistent use of beacons to control persons under investigation can undoubtedly affect their fundamental rights. Thus, if we assume that a beacon provides accurate, real-time information on a person's situation 24 hours a day, it is easy to conclude that its use over a continuous period of time will provide us with precise information about that person's habits, behaviours, relationships and activities. Therefore, if we determine that he is at a certain religious temple at the same time every day, we will obtain information about his religious beliefs; if we verify that he habitually visits a medical centre of a certain speciality, we can obtain information about his*

proportionality, establishing the initial term, as well as its possible extension, under the protection of art. 588.5.c LECRIM.

2.2. USE IN OBJECTS

Let us address the use of technical tracking and tracing devices in objects not linked to people. These might be, for example, tracking parcels or goods containers: the technical device provides advice about the route followed by the parcel or container and its precise location at each specific moment, but does not provide any information that can be linked to any specific person, thus not affecting fundamental rights.

In these cases, it is difficult to justify the need for judicial authorisation when the fundamental rights of the person under investigation are in no way affected (for example, in the case of ransom money), given that the regulation of Title VIII of Book II only applies to "investigative measures limiting the fundamental rights recognised in article 18 of the Constitution". And STS 610/2016, of 7 July, states that "with regard to the decisions of this Chamber that may have an impact on the case in point, the judgement under appeal has referred to them with the scope set out above, in which a significant distinction is made when the interference affects things and not on persons, a distinction is made, then, if the GPS device is applied directly to objects, for their location, or for the location of persons, since only with regard to the latter can the right to privacy be affected".

2.3. USE IN MEANS OF TRANSPORT

In these cases, the placement and use of devices or technical means of tracking and tracing on objects, without the geolocation data of a specific identified person being known, does not affect the fundamental right to personal privacy, and therefore falls outside the scope regulated by articles 588.5.b and c of the Criminal Justice Law (LECrim) and, consequently, by the requirement for prior judicial authorisation[147].

In the specific case of use on a boat, before the 2015 reform of the LECRIM, there were Supreme Court rulings that rejected the need for judicial authorisation. On this line, the STS 798/2013, of 5 November, considers that "no violation of the right to privacy is seen", explaining that "the use of radio transmitters (GPS tracking beacons) for locating vessels on the high seas by the police does not violate the fundamental right to secrecy of communications or involve an excessive inference on the fundamental right to privacy for the purposes of requiring a permission from the court and a weighing said constitutional affectation. For this Second Chamber of the Supreme Court, the absence of constitutional relevance derives from the fact that these are "legitimate investigative measures based on the constitutional function of the Judiciary Police, without interfering with their fundamental right that would require the intervention of the court" (SSTS 22.6.2007, 11.7.2008, 19.12.2008), and even the ECHR judgement cited in the appeal,in the case UZUN v Germany of 2.9.2010, in a case involving the tapping of a telephone booth frequently used by an alleged terrorist, although it considered that such surveillance via the GPS system and the processing of the data obtained constituted an interference with

health; in short, the simple observation of his visits to a certain leisure establishment can provide us with information about his sexual habits",in "Nuevas técnicas de investigación...", paper cited, page 22.

[147] Prosecutor General's Office Circular 4/2019, on the use of technical devices for image capturing, tracking and tracing.

privacy, Art. 8 Convention, it also specified that GPS surveillance, by its very nature, must be distinguished from other methods of acoustic or visual monitoring which, as a general rule, are more likely to interfere with the individual's right to respect for his private life, because they reveal information about his actions or feelings".

However, following the 2015 reform of the LECRIM, the situation has changed, so that it can be interpreted that judicial authorisation is not necessary when the identification of the crew members is not relevant to the investigation. However, such judicial authorisation will be required when their current or future identification is used in any way in the proceedings, since this affects their privacy[148].

3. LEGAL STATUS OF SURVEILLANCE AND MONITORING ARRANGEMENTS

This measure is an important method of investigation, but in a smaller number of cases it may be a source of evidence of the elements of the crime and the involvement of those responsible for it. However, given the impact on the fundamental right to privacy analysed in the previous section, the 2015 reform of the LECRIM has introduced a legal regime that authorises its use subject to prior approval and court monitoring, notwithstanding cases of police urgency (subsequent monitoring by the court).

3.1. TARGET SCOPE

3.1.1. Which devices?

Art. 588.6.b LECRIM refers expressly to "devices or technical means of tracking and tracing". This category includes instruments which, without being linked to an electronic device used by another person (the person being investigated or the victim), allow the location in space of a person or thing (boats, motor vehicles, works of art, ransom money,...)[149]. These different techniques have benefited from technological advances. According to DE LA TORRE Y GARCÍA[150], beacons can be classified as follows:

Radio signal systems. It includes the systems that support the tracking device and are based on the analysis of signal strength and direction, as well as the use of a network of antennae that, through triangulation, provides the approximate location of the target.

[148] Prosecutor General's Office Circular 4/2019, on the use of technical devices for image capturing, tracking and tracing

[149] Eloy VELASCO NÚÑEZ refers to *"technosurveillance"* as "the *use of technical devices to monitor the activities of a person —mainly—, place or specific object in a criminal investigation, both to prove past criminal activity (observing who accesses the stolen painting, the cache of weapons discovered, for example), either existing or future (observing the activities of suspects of a crime to see if they repeat it)",*in "Novedades técnicas de investigación penal vinculadas a las nuevas tecnologías", *Revista de Jurisprudencia El Derecho*, no. 4, 24 February 2011.

[150] Francisco DE LA TORRE OLID and Francisco GARCÍA RUIZ, "Tecnología de geolocalización y seguimiento al servicio de la investigación policial, Incidencias sobre el derecho a la intimidad", 2012, available on web, repositorio.ucam.edu, pages 68 et seq.

GPS (Global Positioning System). This system gathers the signals emitted by several satellites, which makes it possible to locate the GPS instrument in space. The use of the so-called Differential GPS (DGPS) allows more precise localisation.

Special satellite system. The use of independent satellites to monitor a specific, defined area, as opposed to the full coverage of the GPS; and they are able to locate vessels on long crossings on the high seas.

GSM technology. This uses the mobile telephone repeater system, receiving the signal at the repeater in each cell, in conjunction with the trilateration, triangulation and multilateration techniques.

Log file download devices. In this system, the different locations of the GPC location device or mobile terminal are accumulated without real-time location and the information is downloaded later.

3.1.2. Which crimes can be investigated?

The LECRIM does not limit the offences that can be investigated using this measure. This is without prejudice to the fact that judicial authorisation and oversight must respect the principle of proportionality, as per article 588.2.a and article 588.5.b LECRIM (which states that "the measure must be proportionate").

3.2. LEGITIMACY OF THE RESTRICTION

3.2.1. Ordinary regime: authorisation and judicial review

Article 588.5.b LECRIM requires judicial authorisation for the use of tracking and tracing devices or technical means "when there are proven reasons of necessity and the measure is proportionate". Therefore, the entry into force of the LO 13/2015 rules out any doubt about the intention of the law to protect this space of privacy and subordinate the legality of the act of intrusion to prior judicial authorisation (SSTS 493/2022, of 20 May and 141/2020, of 13 May).

3.2.2. Case of police emergency with subsequent judicial control

In less severe cases of the restriction on fundamental rights, Spanish case law has been allowing police interference without prior judicial authorisation, provided there are urgent reasons and the principle of proportionality is respected (STC 115/2013[151]). In this context,

[151] STC 115/2013 refers to the examination of the telephone contacts in a mobile phone without judicial authorisation (affecting the right to privacy) which was found along with other objects by several National Police officers when carrying out surveillance, they entered a greenhouse from which several people fled and in which slightly more than two and a half tonnes of hashish were seized, from which data was obtained that served for his identification and subsequent arrest, prosecution and conviction. The STC affirms that *"although the police officers accessed the data collected in the telephone contact book of the appellant's mobile phone without judicial authorisation (or the consent of the affected party), we have already stated that this requirement does not apply in cases where there is a need for immediate police intervention to investigate the crime, the discovery of the offenders or the obtaining of incriminating evidence, provided that the principle of proportionality is respected (SSTC 70/2010, FJ 10, and 173/2011, FJ 2, among others), as is the case in the present case..."*.

art. 588.5.b.4 LECRIM allows the police to use these mechanisms in cases of urgency, subject to subsequent judicial control within a maximum of 24 hours.

This precept allows the Judiciary Police to install these devices without the need for prior judicial authorisation, "when there are urgent reasons that justify a reasonably belief that if the track and trace device or technical means is not installed immediately, the investigation will fail". The principles of speciality, suitability, necessity and proportionality are required; these must be assessed by police officers when the beacon is installed, and will subsequently be subject to judicial control.

Once the device is in place, the police must inform the judicial authority "as soon as possible, and in any case within twenty-four hours". The court may ratify the measure adopted or order its immediate cessation within the same period; in the latter case, the information obtained from the device placed shall have no effect on the proceedings.

A recent Supreme Court ruling directly addresses this case: STS 856/2021, of 11 November, which will be analysed in section 6.

3.3. DURATION OF THE MEASURE

Article 588.5.c LECRIM establishes that the use of technical tracking and tracing devices shall have a maximum duration of three months from the date of its authorisation.

Exceptionally, the judge may grant successive extensions for the same or a shorter period, up to a maximum of eighteen months, if this is justified in view of the results obtained with the measure.

STS 291/2021, of 7 April, refers to the fact that "the use of the term "maximum duration" and the word "exceptionally" underlines the significant impact on privacy that these geolocation measures can have. An extended duration of a maximum of 18 months can only be justified in view of the seriousness of the act under investigation and the usefulness of the measure. And of course, it is only legitimate on the basis of a reasoned judicial decision explaining the justification for the sacrifice of the right to privacy in the light of the principles of proportionality, exceptionality, and necessity".

3.4. IMPLEMENTATION OF THE MEASURE

3.4.1 Installation and operation of the mechanism

There are also two moments In beaconing, namely the installation andoperation of the mechanism by switching it on. This is because it can be installed without being put into operation to collect location data, and reinstallation is sometimes necessary to change batteries.

All the above can be considered when setting the conditions for authorisation and judicial control of the measure; especially when the system uses records (logs) of the switching on or off of the mechanism.

3.4.2. Duty to cooperate

Section 3 of Article 588.5.b LECRIM stipulates that the providers, agents and persons listed in Article 588.3.e must provide the judge, the Public Prosecutor's Office and the agents of the Judiciary Police appointed to carry out the measure with the necessary assistance and collaboration to facilitate compliance with the surveillance orders, otherwise they may be charged with the offence of disobedience.

For GSM location: the operators

Also other possible persons: e.g. vehicle manufacturers able to cooperate in the use of geolocation systems that may be installed in their vehicles, or to provide the keys of a vehicle in order to gain access to it to install a device (Circular 4/2019).

3.4.3. Custody and recipients of media

Article 588.5.c.2 LECRIM provides that the Judiciary Police shall hand over the original media or authentic electronic copies containing the information collected to the judge when requested to do so by the judge and, in any case, when the investigations are complete.

On the other hand, the information obtained through the technical track and trace devices referred to in the previous articles must be duly guarded to avoid its improper use [article 588.5.c.3 LECRIM].

4. ON JUDICIAL AUTHORISATION

4.1. JUDICIAL AUTHORISATION PROCEDURE

The general procedure foreseen by law for all technological investigation measures and enshrined in Article 588.2.b et seq LECRIM applies; with a specific provision: the description of the technical means to be used.

This procedure has three phases: initiation, report of the Public Prosecutor's Office and judicial decision. Let us look at each of them.

4.1.1. Initiation

Article 588 b) governs the application for judicial authorisation: the judge may order the measures regulated in this chapter ex officio or at the request of the Public Prosecutor's Office[152] or the Judiciary Police.

When the Public Prosecutor's Office or the Judiciary Police apply for a technological measure for use in an investigation from the investigating magistrate, the request must contain [section 2 of article 588.2.b]:

a) The description of the event under investigation and the identity of suspect or of any other person affected by the measure, provided that this information is known.

[152] Carolina SANCHÍS CRESPO is puzzled by the omission of the rest of the parties, both those who seeking to bring the criminal action and the passive party; in "Puesta al día de la instrucción penal: la interceptación de las comunicaciones telefónicas y telemáticas", La Ley Penal, No. 125, March-April 2017.

b) A detailed statement of the reasons justifying the need for the measure, as well as the indications of criminality that have come to light during the investigation prior to the application for authorisation of the act of interference.

c) The identifying details of the person under investigation or the culprit and, where applicable, of the means of communication used to enable the enforcement of the measure.

d) The extent of the measure, specifying its content.

e) The investigative unit of the Judiciary Police responsible for the intervention.

f) The manner in which the measure is executed.

g). The duration of the measure requested.

h). The liable party that will carry out the measure, if known".

4.1.2. Hearing of the Public Prosecutor's Office

Article 588.2.c provides that, before adopting the measure, it must be heard by the Public Prosecutor's Office. Expeditious processing is necessary, especially in cases where there is a more pressing need for its adoption[153].

4.1.3. Judicial decision

Permission for a specific measure must be granted by a state body outside the police organisation, as a way of guaranteeing and controlling the appropriateness of the proportionality test: it can only be allowed with prior authorisation and under the strict control of an independent public authority (the Court)[154].

Art. 588.2.c provides for the following elements the court decision authorising or refusing the requested measure:

Form: reasoned decision; stating the reasons justifying the existence of the conditions for the measure, which are examined elsewhere.

Time:

No later than 24 hours after the application is submitted.

Whenever it is necessary in order to rule on the fulfilment of any of the requirements expressed in the previous articles, the judge may request an extension or clarification of the terms of the application while interrupting the time limit referred to in the previous paragraph.

[153] See STS 272/2017, of 18 April.

[154] This is the judge's role as a guarantor of liberties. Increasingly, the judge's role is not so much the search for a balance between the effectiveness of the investigation and the protection of the individual, as the justification of an exception to individual liberty; *vid.* Mirelle DELMAS-MARTY, directing the Asociation de Recherches pénales européennes (ARPE), *Procesos penales de Europa*, editorial Edijus, Zaragoza, 2000, page 545.

Considering these deadlines, it is essential to coordinate the actions of the Court-Prosecutor's Office-Police to comply with the maximum 24-hour deadline for the judicial resolution established by art. 588.2.c 1 LECRIM. On the other hand, it is important to highlight the importance of the judge being able to request an extension or clarification of the terms of the request, which determines the suspension of the 24-hour time limit [art. 588.2.c 2 LECRIM].

Content: The judicial decision authorising the measure shall specify at least the following points:

The punishable offence under investigation and its legal classification, including prima facie evidence on which the measure is based.

The identity of the persons under investigation and of any others affected by the measure, if known.

The extent of the surveillance measure, specifying its scope.

The investigating unit of the Judiciary Police responsible for the measure.

The duration of the measure.

The manner and frequency with which the applicant shall report on the results of the measure to the judge.

The purpose of the measure.

Effects on third parties: the investigative measures regulated in the following chapters may be granted even when they affect third parties in the cases and under the conditions regulated in the specific provisions of each[155] [Art. 588.2 h)].

4.1.4. Description of technical measures

Paragraph 2 of Art. 588.5.b LECRIM requires that the authorisation "shall specify the technical means to be used", i.e. an allusion to the means used in the specific investigation and the type of data it records and/or transmits, without the requirement to include a description of its technical details being reasonable.

Unlike the case of the recording of oral communications by electronic devices, the Law does not require the specific agents who are going to install the devices or technical means of tracking and tracing to be identified.

[155] Manuel RICHARD GONZÁLEZ states that *"one of the characteristics of technological investigative measures is their extensive nature, based on the fact that they are basically aimed at social relations and communication activities*. That is why*the Law refers specifically to the need to specify which persons, who are not suspects, may be affected by the measure and which others are obliged to collaborate and keep secret with regard to the measures agreed"*,in "Conduct susceptible to be intercepted by electronic investigation measures",in "Conductas susceptibles de ser intervenidas por medidas de investigación electrónica. Presupuestos para su autorización", Diario La Ley, No. 8808, 2016.

4.2. PRESUPPOSITIONS OF LEGITIMACY

The following principles must concur.

4.2.1. Principle of speciality

The Act "requires that the measure be related to the investigation of a specific offence. Technological investigation measures aimed at preventing or uncovering crimes or clearing suspicions without an objective basis may not be authorised" [art. 588.2.a 2 LECRIM]. Thus, prospective technological investigative measures on the conduct of a person or group are prohibited. This principle is directly related to the need for sufficient prima facie evidence, which is discussed in more detail below.

4.2.2. Principle of adequacy

This principle "shall serve to define the objective and subjective scope and duration of the measure by virtue of its usefulness" [art. 588.2.a 3 LECRIM]. Ultimately, there must be an appropriate relationship between the specific investigative measure and the purpose pursued. It must, therefore, objectively serve the constitutionally legitimate purpose, i.e. to obtain information useful for investigating the circumstances of the crime[156]. In this sense, Article 588.2.c 3.g LECRIM requires the authorising decision to contain the "purpose of the measure".

4.2.3. Principles of exceptionality and necessity

In accordance with art. 588.2.a 4 LECRIM, "the measure may only be granted: a) when other less burdensome measures for the fundamental rights of the suspect or the accused and equally useful to clarify the facts are not available for the investigation, or b) when the discovery or verification of the investigated act, the determination of its author or authors, the investigation of their whereabouts, or the location of the effects of the offence would be seriously hindered without the use of this measure".

Ultimately, this investigative measure may only be granted when the same purpose cannot be achieved by other means that are less serious for the person concerned. We are faced with a subsidiarity clause, such that the means selected to achieve the end cannot be substituted by another equally effective measure, but which restricts the fundamental right or does so in a less serious manner[157]. Judicial practice should probably analyse the consequences of the application of this principle in greater depth in each case subject to judicial authorisation, especially in the case of measures that entail greater interference with fundamental rights.

4.2.4. Principle of proportionality

[156] As stated in the 4th legal grounds of the STC 207/1996, the measure must be "*suitable (apt, adequate) to achieve the constitutionally legitimate aim pursued (Art. 8 ECHR), that is, that it objectively serves to determine the facts subject to the criminal proceedings"*.

[157] *Vid.* Ernesto PEDRAZ PENALVA and V. ORTEGA BENITO, "El principio de proporcionalidad y su configuración en la jurisprudencia del Tribunal Constitucional y literatura especializada alemanas", *Poder Judicial*, no. 17, 1990, page 17.

According to article 588.2.a 5 LECRIM, "the investigative measures regulated in this chapter shall only be considered proportionate when, considering all the circumstances of the case, the sacrifice of the rights and interests affected does not outweigh the benefit to the public interest and to third parties resulting from their adoption. In weighing up the conflicting interests, the assessment of the public interest shall be based on the seriousness of the act, its social significance or the technological field of production, the strength of the existing evidence".

In relation to the application of the principle of proportionality to monitoring and surveillance devices, STS 291/2021, of 7 April, states the following: "It is true that unlike other interference measures (arts. 588.3.a or 588.4.b, the new regulation does not specify an explicit proportionality test. The legislator is not concerned with defining quantitative or qualitative parameters for the seriousness of the offence under investigation. This silence cannot, however, be interpreted as a relaxation of the constitutional requirements in Art. 588.2.a. The principles of proportionality, necessity and exceptionality are still prerequisites for legality, the concurrence of which must be expressly reflected in the enabling judicial decision. Hence, far from weakening the judicial duty to justify decisions restricting rights, its necessity is reinforced by that very absence".

For the technological investigative measures to be proportionate in the specific case, several criteria must be taken into account:

Criterion of the expectation of the legal consequences of the offence, i.e. the severity of the penalty for the offence under investigation should be assessed[158]. Article 588.2.c.3.a LECRIM requires the authorising decision to contain "the punishable act under investigation and its legal qualification".

Criterion of the importance of the cause which, among other circumstances, is determined by the nature of the legal right that has been harmed, the specific forms of manifestation of the act (the habitual commission of the crime, the social dangerousness of the effects of the act, etc.) and the relevant aspects of the accused (the tendency to commit acts of the same nature or the particular severity of the criminal behaviour)[159].

It should be remember that different technological investigation measures will affect fundamental rights in different ways, with the intensity of interference varying from one case to another. In this sense, what we have called the proportionality equation[160] makes sense:the greater the limitation of the fundamental right affected, the more the interest must be considered to justify state intervention in the specific case[161]; and a more serious violation of the fundamental right requires the judge to be extremely zealous when analysing and motivating the concurrence of the elements described when setting out the criteria of proportionality in the strict sense of the word. From this perspective, the

[158] Nicolás GONZÁLEZ-CUELLAR SERRANO, "La proporcionalidad y derechos...", ob. cit., pages 309 and 310.

[159] These elements are pointed out by José Francisco ETXEBERRÍA GURIDI, "La inadmisibilidad de los test masivos de ADN en la investigación de hechos punibles", *Actualidad Penal*, No. 28, 12-18 July 1999, page 550, note 39.

[160] Joaquín DELGADO MARTÍN, "Intervenciones corporales. Su colisión con los derechos fundamentales", published in the journal *Iuris*, no. 55, November 2001, page 68; and "La resolución judicial de entrada y registro en lugar cerrado", *Actualidad Penal*, no. 47, 17-23 December 2001, page 1,133.

[161] As Nicolás GONZÁLEZ-CUELLAR SERRANO says, the interest of the criminal prosecution "*must be higher for the more serious measures"*, in "La proporcionalidad y derechos...", op. cit., page 309.

requirement for the authorising decision to specify "the extent of the measure of interference, specifying its scope" (letter c) art. 588.2.c 3 LECRIM) becomes relevant.

4.3. MOTIVATION

The justification of proportionality must be contained in the reasoned judicial decision[162] authorising the investigative measure, making express reference to the concurrence of each and every element described above[163]. To this end, it should be recalled that letter c) art. 588.2.c)3 LECRIM expressly establishes that the decision authorising the measure must contain "the motivation relating to compliance with the guiding principles established in art.588.2.a". Nor should it be forgotten that the Constitutional Court requires a specific and reinforced duty to give grounds for judicial decisions in several cases: when fundamental rights are affected; when the presumption of innocence is undermined, especially in the light of circumstantial evidence; when freedom as a superior value of the legal system is affected in some way; and when the judge departs from his precedents[164]. Insofar as the fundamental rights of the person under investigation are affected, a reinforced statement of reasons for the judicial decision is required.

On the other hand, it should be recalled that case law has been admitting that, although justification by reference is not a model jurisdictional technique, since judicial authorisation should be self-sufficient (STS 204/2016, of 10 March, citing SSTS 636/2012, of 13 July, and 301/2013, of 18 April), both the Constitutional Court and the Supreme Court (SSTC 123/1997, of 1 July, 165/2005, of 20 June, 261/2005, of 24 October, 26/2006, of 30 January, 146/2006, of 8 May and 72/2010, of 18 October, among others, and SSTS of 6 May 1997, 14 April and 27 November 1998, 19 May 2000, 11 May 2001, 3 February and 16 December 2004, 13 and 20 June 2006, 9 April 2007, 248/2012 of 12 April and 492/2012 of 14 June, among others), have deemed it sufficient that the factual grounds for this type of decision are based on the reference to the corresponding background information in the proceedings and specifically to the factual elements contained in the corresponding police request, or in the report or opinion of the Public Prosecutor's Office, when it has been requested and issued (STS 248/2012, of 12 April).

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[162] As Manuel ESTRELLA RUIZ recalls, the purpose of the statement of reasons is none other than the possibility for the person subject to the measure to know the reasons why his rights were sacrificed at the time and, furthermore, by virtue of which interests such intervention was carried out, which has effects with regard to the appeal and other principles that inform the adoption of the measure such as the proportionality of the sacrifices, in clear consonance with the statement of reasons, in "Entrada y registro, interceptación de comunicaciones postales, telefónicas, etc.", *Cuadernos de Derecho Judicial*, Volume on "Medidas restrictivas de derechos fundamentales", published by the Consejo General del Poder Judicial, Madrid, 1996, pages 355 and 356. In this regard, Joan J. QUERALT rightly stresses that "*legality must be derived from the very decision that adopts it and it is not possible to resort to more or less convoluted loopholes such as the alleged seriousness of the facts, the urgency of the decision or the reference to what has been done at the police headquarters, an apparently dominant doctrine so that: the passive subject of the violation, as well as any operator or even any interested party outside the case, has full knowledge, but outside the judicial decision, of the real reasons that motivate the judge to adopt it and the means and forms in which this measure has to be put into practice*", in "Intervención de las telecomunicaciones en sede de investigación judicial y policial" (Interception of telecommunications in the context of judicial and police investigations), *Revista Canaria de Ciencias Penales*, no. 2, December 1998 (homage to Enrique Ruiz Vadillo), pages 111 and 112.

[163] See Vicente GIMENO SENDRA, "Las intervenciones telefónicas en la jurisprudencia del Tribunal Constitucional y del Tribunal Supremo", in *Derechos procesales y tutela judicial efectiva*. *Jurisprudencia del Tribunal Constitucional*, published by the Department of Justice of the Basque Government and the General Council of the Judiciary, Vitoria, 1994, page 106.

[164] STC 116/1998 of 2 June 1998, citing numerous judgements.

This statement of justification by reference further reinforces the need for a proper justification of the police official requesting the authorisation.

5. EXISTENCE OF EVIDENCE

In court practice, one of the elements subject to most procedural debate in oral proceedings is the existence (the principle of speciality applies) or non-existence (a prospective investigation would apply) of sufficient evidence to justify an investigative measure restricting a fundamental right.

Article 588.2.c 3 (a) LECRIM requires the authorising decision to contain the "expression of the rational indications on which the measure is based". The State may only restrict a fundamental right in cases where there is a sufficient evidence that the subject has committed the crime, that is, when there is objective evidence to confirm the likelihood that the subject is committing or has committed a crime; only the concurrence of such indications justifies the State to go beyond the intangible sphere of personal freedom and privacy in the development of the investigation. Otherwise, state bodies would have carte blanche[165] to interfere in the private lives of citizens. It is a question of the existence of evidence[166], and not mere suspicion[167], of the existence of the offence under investigation.

In relation to the concurrence of indications, I would like to highlight STS 811/2015, of 9 December, which states that "on many occasions we have had the opportunity to point out how this need for data justifying the high likelihood of the real existence of the commission of the crime under investigation should not be confused with the presentation of real supporting evidence of the same which, should it exist, would already make the very diligence whose authorisation is sought unnecessary"[168].

[165] The Diccionario de la Real Academia de la Lengua Española defines "letter of marque" as "a writ or dispatch by which the government of a State authorises a subject to engage in privateering against the enemies of the nation", in the 21st edition, Madrid, 1992, page 1,097.

[166] In this regard, the work of José Francisco ETXEBERRÍA GURIDI, "La inadmisibilidad de los *tests masivos* de ADN en la investigación de los hechos punibles", *Actualidad Penal*, No. 28, 12 to 18 July 1999, pages 551 and following, is of interest.

[167] STS 689/2016, of 27 July, states that *"the requirement is specified in the identification of objective data that may be considered as indications of the possible commission of a serious crime and its connection with the persons concerned. Signs that are somewhat more than mere suspicions, but are also less than the rational evidence required for prosecution and which must, of course, be evaluated in the form in which they are presented at the time the judicial decision is taken, without the relevance of the decision being assessed from an "*ex post"*judgement, as the appeal claims when it indicates that no evidence has been provided to corroborate the police assertions upon which the request for the measure was based, which was fully in line with what is now expressly required by art. 588.2.B of the LECRIM...".*

[168] The STS 811/2015 reasons, in reference to the specific case, that *"the fact that the Spanish Police had a communication from its Canadian analogue, in which the name and address of a Spanish citizen who, residing in our country, appeared on a list of persons who had acquired, for payment, the possibility of downloading, for a week, video material in part of which minors appeared naked playing games in which they exhibited their genital organs, was recorded, the name of that purchaser and part of his surname, as well as the address given for that acquisition, coinciding with the actual details ascertained by the officials as a result of their enquiries, must reasonably be regarded as sufficient to carry out a search of the computer equipment which might be found at that address, without it being essential, as the respondent claims, to carry out further enquiries and checks such as those relative tot the possible existence of other inhabitants of the home, the actual download of the digital documents acquired, etc."*

The evidence upon which technological investigation measures of this type must be based must be understood (STS 616/2022, 22 June, citing STS 635/2012, of 17 July on telephone tapping), not as the actual finding or expression of suspicion, but as objective data which, by their nature, must be subjected to subsequent verification, so that they allow for suspicions to be conceived that can be considered reasonably well-founded regarding the very existence of the act to be investigated, as well as their relationship with the person directly affected by the measure. As the aforementioned STS 616/2022 expressly states, they must be objective in a double sense.

Firstly, in that they are accessible to third parties, without which they would not be susceptible to control.

And, secondly, that they must provide a real basis from which it can be inferred that the offence has been committed or is going to be committed, without these relying on subjective assessments about the person" (STC 184/2003, of 23 October).

On the other hand, it should be emphasised that it is not possible to interpret each piece of circumstantial evidence in isolation, as the defendants claim in their respective challenges, but rather to examine it as a whole. In this way, it is a question of analysing the existence of an objective set of data that lead to a reasonable suspicion, a non disintegrated or fragmented weightingrather an overall one, is not acceptable (STS 822/2022, of 18 October).

Finally, the existence of these signs must be assessed in the light of the elements and data available at the time of their adoption, without the insufficiency of the results obtained or any subsequent existence of other evidence that undermines their incriminating content or even their legal relevance affecting the initial legitimacy of the measure restricting the fundamental right (STS 291/2021, of 7 April).

In the case of STS 291/2021, referring to an international organisation dedicated to carrying out Internet fraud, beaconing the vehicle made it possible to prove that it had stopped several times within minutes of the banks from which the cash withdrawals were made. In the case addressed by this STS, the owner (partner of the co-defendant) of the vehicle tracked by beacon was acquitted on the following grounds: "...although Adelaida was the owner of the vehicle, the basis of the judicial decision does not focus on her, but on the tracking and surveillance to which the co-defendant Juan Luis was subjected, as one of the persons who could be part of an international organisation dedicated to Internet fraud. Thus, the judgement under appeal and the surveillance to which he was subjected made it possible to detect that he was picked up at Valencia airport in an Audi A4 with registration number ..... TTZ, this vehicle turned out to be owned by Adelaide, and the man driving it could be her partner. Surveillance was carried out on this vehicle on several occasions in the car park of the Corte Inglés in Valencia, and it was concluded that the driver could be Benedicto, Adelaida's partner. Benedicto's link to Juan Luis is also corroborated by the use of an e-mail with the name "DIRECCION028" in an air ticket booking for Juan Luis'. The appellant says that it is a common name in Romania, but, even if that is the case, the fact that it matches the suspect is suggestive of his identity, as it is clear that one piece of information corroborates another and it is no coincidence that the person who comes to meet Juan Luis is called Benedicto, the partner of the owner of the car with which he was picked up and who is now the accused. Therefore, the surveillance of the co-accused Juan Luis sought to discover the existence of other members of the

organisation and the way they acted, which implies that the placement of the device in the vehicle that facilitated their movements fulfilled the legal requirements".

6. BEACONS IN RECENT SUPREME COURT JURISPRUDENCE

6.1. STS 141/2020, OF 13 MAY

6.1.1. Summary of facts

Under article 588.5.b LECRIM, the judge authorised the installation and use of a global navigation satellite tracking device by police officers in the vehicle habitually used by the defendant.

Information obtained by the officers in this way led to the interception and arrest of the accused when he was carrying 99.98 grams of cocaine with a purity of 76.36.

The Provincial Court of León (3rd Section) convicted the accused as the perpetrator of a drug trafficking offence in the modality of causing serious damage to health. The appeal was dismissed by the TSJ of Castilla y León. A cassation appeal was lodged

The elements offered by the Guardia Civil in the official letter to the judge were the following:

An anonymous tip-off that the accused, who lives in Villagarcía de Arosa, was making trips from that town to Ponferrada (León), carrying cocaine to be supplied to various people;

The existence of a police record for drug trafficking offences in the police database of the Ministry of the Interior;

The finding, through the camera system of the Directorate General of Traffic, that the accused was travelling from Villagarcía de Arosa to Ponferrada.

6.1.2. SC decision

The STS does not consider that these "three indicative elements are sufficient to deprive any citizen of the initial protection provided by his or her right to privacy", and therefore upholds the appeal. It also holds that "a mere anonymous tip, which offers no other corroborating elements than the police record and the existence of some trips, should not have justified a judicial decision authorising the restriction of rights".

For all these reasons, the STS declared (by application of Article 11 LOPJ) the order of the Investigating Court null and void which agreed, without due grounds, to install a tracking and tracing device on the accused, breaching the right to privacy; and acquitted the accused.

6.2. STS 856/2021, OF 11 NOVEMBER

This STS refers to the insertion of a geolocation device ex art. 588.5.b LECRIM in a boat located in a storage unit, being used as a “glider” speedboat for picking up drugs in

Morocco and brought to the Spanish mainland; as well as the vehicles used to collect the drugs. Therefore, the STS audits two different actions:

Application to board a vessel to install a beacon on a semi-rigid vessel (court authorisation).

Once inside the unit, police officers installed beacons on two vehicles that were inside (police emergency).

6.2.1. Installation of beacon on vessel with judicial authorisation

The Supreme Court dismissed the appeal against the conviction, which had confirmed the court's approval to board a vessel to install a beacon on a semi-rigid vessel on the basis of the following evidence:

Unit with boarded-up windows: "the investigating judge's measure in the boat does not refer to a domicile, but to a place which, due to its external characteristics, blatantly prevented the interior from being checked in order to avoid, precisely, the visibility of the operations carried out on the boat".

The police surveillance of the warehouse shows: a) one of the persons is observed as he makes a visual check of everything that is happening around him, to check whether he can been seen leaving and entering the aforementioned unit; b) inside the warehouse there are noises coming from a sander and grinder; c) a vehicle that arrives is registered to someone called Moisés; d) cars arrive from which they take canisters full of fuel and take them into the unit, and shortly afterwards they leave with the empty canisters: "It is detected that the boat was being fuelled for its subsequent use in these operations, and the TSJ reflects that one of those who brought the fuel for the boat was the accused - Cecilio - whose relationship with the drug shipment was established".

The analysis of Hermenegildo's assets, who has an income of 6,000 euros gross per year, who boasts on social networks with photographs with numerous 50 euro notes, accompanied by Moisés with a record for drug trafficking.

The STS states the following: "It is referred to as a semi-rigid vessel known as a "glider" with a length of about fourteen metres and fitted with two outboard engines, and that because of these characteristics, these vessels are used to make the crossing that separates the coasts of this Province from Morocco. The unit was rented and frequented by different people. Self-protection measures are in place to prevent police surveillance, and the unit is arranged to prevent anyone outside from viewing the content. Two individuals filled it with fuel with two bottles that they took to the boat, as the boat was stored out of sight of third parties and possible surveillance, as happened here, and left with them empty, instead of doing so in a visible place, and a few days later the drugs were intercepted in the police operation". It also states that "It was not a motor vehicle to be used in a person's daily life, but a boat suited to the purpose of transporting drugs, duly guarded and enclosed in a unit, with the presence of different people, with protective attitudes and measures, and in a boat expressly hidden to avoid the inside being seen from the outside".

Regarding the need for the measure, it expressly reasons that it is a "...police surveillance operation in an environment where it is a question of evaluating the contents of an

enclosed area, such as a warehouse, despite which the police presence was not detected during the surveillance, since if it had been, the drug unloading operation on the beach which was to be carried out days later would have been aborted, as it was, and the hashish was seized and the participants in the operation were arrested". Adding that "...it is not a motor vehicle parked on the public highway and in which it is more feasible to insert the device...".

6.2.2. Installation of beacons in two vehicles due to police emergency.

In the case heard by the STS, the police, upon entering the industrial unit on 21 July 2017 for the authorised installation of the GPS device on the vessel, found four all-terrain vehicles inside the building, all stolen from their owners according to the information obtained by the police force, with their instrumentation lights disabled - which prevents them from being easily spotted at night - and lacking the rear seats, which considerably increased the space they could be used for loading. Such an arrangement, together with the well-founded suspicions surrounding the boat, reasonably led the police to suspect that the vehicles might be used to transport a stash, prompting them to install tracking devices in two of the cars, one of which, with registration number ....-VCK, would later be driven by the accused, Mr Candido, on the date of his arrest after verifying the existence of the stash, an installation that was authorised by the Investigating Court by decision of 21 July 2017.

The STS argues as follows: "The subsequent placement of the tracking devices in the vehicles was justified on the basis of the confirmation given by the result of the investigation and the extent of interference when it was found that there were also vehicles in the warehouse specifically prepared for transporting drugs, which was validated by the judge before its installation for reasons of urgency, given the characteristics of the operation to avoid the agents being discovered by those involved in the criminal operation related to the transport of drugs".

6.3. STS 493/2022, OF 20 MAY

This judgement refers to a case involving the installation of a tracking beacon in a vehicle, in which the appellants complain that the order issued by the examining magistrate authorising the installation of the beacon, lacks any evidence to justify the appropriateness of the measure.

The Supreme Court declared the authorising order null and void because it "lacked any grounds and was a flat and stereotyped decision, without even referring to the circumstances on which the official police document based the request". However, this nullity does not void any of the other evidence obtained, and therefore the conviction is upheld: "the exclusion of the evidence obtained in this way cannot lead to the claim of complete acquittal that the plea alleges, since not all the evidence against the prosecution derives from the information obtained through this monitoring, nor do the parties question the validity of the judicial decision authorising the monitoring of the location of the Mercedes vehicle registration number D-....-YQ, used in one of the offences for which the appellants are also convicted".