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on a Council Decision on the stepping up of cross-border cooperation,
particularly in combating terrorism and cross-border crime

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Fausto Correia

Introduction

The Treaty of Prüm was signed on 27 May 2005 in Prüm (Germany) by seven Member States (Belgium, Germany, France, Luxembourg, the Netherlands, Austria and Spain) and entered into force in Austria and Spain on 1 November 2006 and in Germany on 23 November 2006. Eight additional Member States (Finland, Italy, Portugal, Slovenia, Sweden, Romania, Bulgaria and Greece) have formally declared their intention to accede to it.

The Treaty establishes a legal framework to further develop cooperation among Member States in combating terrorism, cross-border crime and illegal immigration. More specifically it provides for the exchange between the Contracting Parties of data on DNA, fingerprints, vehicle registration, and personal and non-personal data related to cross-border police cooperation.

The Treaty of Prüm is a Treaty of International law, adopted outside the framework of the European Union but from the content-side closely related to the EU. The adoption and the initiative to bring it into the EU framework bear some similarity to what has happened with the so-called 'Schengen acquis'. The German Presidency initiated the debate on the integration of Prüm into the EU legal framework at the informal Ministers' meeting in Dresden on 15-16 January 2007. At that meeting there appeared to be broad support for the proposal.¹ At the Justice and Home Affairs Council of 15 February 2007 it was agreed to integrate into the EU legal framework parts of the Prüm Treaty by means of a Third Pillar Decision. This concerns all issues related to police and judicial cooperation in criminal matters, with the exception of the provision relating to cross-border police intervention in the event of imminent danger (Art. 25 of the Treaty) and the provision of cooperation upon request (Art. 27 of the Treaty).

The aim of the Prüm Decision is to intensify and accelerate the exchange of information between authorities. This is to be achieved by providing for the possibility to compare an individual DNA profile with profiles to be found in automated databases in the Member States. Links can be made between these personal data by means of national contact points (to be established). In the same way data on fingerprints may be exchanged, just like data on vehicle registration. The national contact points will also be used in the fight against terrorism.

The Hague Programme² sets 1 January 2008 as the date as from which the exchange of data should be based on the principle of availability. This means that a law officer in one Member State who needs information in order to pursue his duties can obtain this information from another Member State (the information will be made 'available').

The Commission presented a draft Council Framework Decision on the availability principle in October 2005. For this file Mr Alvaro was appointed rapporteur. Until now no progress was made on this file.

In parallel the European Parliament is now asked³ to give its Opinion on the Decision on the

¹ Even if there were some concerns about the costs of implementation and reservations about Article 25 ("measures in the event of imminent danger"), see Council doc. 6003/07 of 5 February 2007.

² The Hague Programme for strengthening Freedom, Security and Justice in the EU approved by the European Council on 5 November 2004.

³ by 'lettre de saisine' of 1 March 2007

stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (the Prüm Decision) at the latest on 7 June. The rapporteur deplores that there is so little time to prepare the opinion on such important and complicated dossier.

Some first orientations of the rapporteur

The rapporteur is fully aware of the importance of this instrument as a key tool in cross-border police cooperation and the fight against organised crime and terrorism. He, however, wants to highlight some issues which in his view require more attention:

1) The way in which 'Prüm' was negotiated and adopted

The Treaty of Prüm was negotiated and adopted in a very non-transparent way and without serious democratic control (national parliaments are only involved at the stage of the ratification and the European Parliament is only now involved by means of consultation on the draft Council Decision). Although the Treaty of Prüm states in its Article 1(4) that: *'within three years at most following entry into force of this Treaty, on the basis of an assessment of experience of its implementation, an initiative shall be submitted, in consultation with or on a proposal from the European Commission, in compliance with the provisions of the Treaty of the European Union and the Treaty establishing the European Community, with the aim of incorporating the provisions of this Treaty into the legal framework of the European Union'* a draft Council Decision is already now presented.

The rapporteur considers the incorporation into the EU framework as such as a good step, because it contributes to transparency and legal certainty however, it is regretful that only parts of its content (namely the issues related to the Third Pillar) are currently proposed to be incorporated. The topics for which there exists a Community competence (i.e. the provisions on the "air marshals" in Art. 17-19 of the Treaty and measures to combat illegal immigration in Art. 20-23 of the Treaty) will not be incorporated to the EU framework but will remain in the International Treaty of Prüm. The consequence is that there will be two different sets of laws, which does not contribute to the legal clarity. With regard to the parts of the Prüm Treaty which are clearly Community competences, one could wonder whether keeping those provisions in an International Treaty is not a violation of the EC Treaty. Also, the relationship of the Decision to other multi- and bilateral Treaties (i.e. the Prüm Treaty as such) is an issue which requires more attention (Art. 36 of the draft Decision).

In general, the rapporteur believes that this unclear legal situation is mainly due to the artificial character of the pillar structure and the grey line dividing the competences laid down in the First Pillar from those laid down in the Third Pillar. Adoption of the Constitutional Treaty would have extended the Community method to the whole area of Justice and Home Affairs (JHA), doing away with the requirement of unanimity in Council for a large number of topics. In this respect, the rapporteur welcomes the adoption of the Berlin Declaration and deems it essential that future institutional reforms will consolidate the advances enshrined in the Constitutional Treaty for the whole JHA area. In the meantime, it is to be recalled that Art. 42 EU Treaty (so-called bridging clause) already offers the possibility to shift some topics from the Third Pillar to the Community Pillar (as was also proposed by the Finnish Presidency). This option deserves to be considered, without delay, in order to fill the democratic void still present in such a sensitive area for citizens' fundamental rights.

2) Some specific measures in the draft Decision

The Rapporteur's concerns are primarily aimed at striking a balance between the demands of operational and efficient police cooperation in the fight against the main threats to the European Union's foundations and the protection and promotion of fundamental rights

Therefore, the proposed measures should be necessary and proportionate. Also, mechanisms of evaluation control and redress should be foreseen in order to correct problematic situations.

According to the definition of personal data as set in the proposal for a Framework-Decision on data protection in the Third Pillar (Article 2, a), the DNA profiles established from the non-coding part of DNA related to a reference number are personal data since they allow the identification (although indirectly) of a private person. They are also recognized as such in Article 24, par. 1, a) of the current initiative. For this reason, the same guarantees as proposed in the Framework Decision should be applied in this case, namely an *a priori* and harmonised control of the data access requests. Therefore, the rules laid down in Articles 3, para. 1 and 5 are insufficient since they only make reference to the criteria established in national legislation. The possibility for a Member State to request the collection of DNA samples may give rise to legal problems concerning guarantees due to differences in national judicial systems. A better clarification of conditions and safeguards should therefore be foreseen. Although the hit-no hit system seems to be a balanced mechanism, it is necessary to define not only its technical procedures (Article 6, 2) but also the substantial requirements for accessing personal data. The same guarantees are applicable to dactyloscopic data and vehicle registration data.

Special caution is requested in cases where personal data is transmitted because of major events and for the prevention of terrorist offences, since those transmissions are based on presumptions of risk. Consequently, criteria of strict necessity and clear justification for the transmission of data must be established.

As regards the joint operations referred to in chapter 5 of the proposal, it is essential to define more precise rules on how to coordinate them with Europol activities and on the division of costs between the Member-States participating in these operations.

Regarding the declarations referred to in Article 33, not only should they be submitted to the General Secretariat of the Council and forwarded to the Member-States and the Commission but they should also be regularly published in the Official Journal.

As a general remark, the rapporteur considers it essential that the Council provides the Parliament with an evaluation of the costs resulting from the implementation of this Decision, and more specifically if it is intended to be funded by the Community budget⁴ or by the Member States.

3) The difficult relationship of the draft Council Decision with the Administrative and technical implementing Agreement to the Prüm Convention⁵

Article 34 of the Council Decision states that: *'the Council shall adopt measures necessary to*

⁴ cf Council doc. 6003/07 of 5 February 2007, point 4

⁵ The Implementing Agreement as concluded on 5 December 2006, see Council document 5437/07 of 22 January 2007.

implement this Decision at the level of the Union in accordance with the procedure laid down in the second sentence of Article 34(2)(c) of the EU treaty' . Together with the Treaty of Prüm an Agreement on administrative and technical rules implementing the Prüm Agreement was established. Council stated on these implementation rules that 'the solutions already existing in relation to the implementation of the Prüm Treaty must remain unchanged'⁶. The rapporteur is very worried about this situation as the implementing measures seem to be very detailed (i.e. on joint (police) operations) but the measures risk to be implemented without serious democratic scrutiny.

4) The relationship with other proposals

The German Presidency does not envisage to integrate Article 27 of the Prüm Treaty ("Cooperation upon request") into the EU legal framework since its content is considered as covered by the *Framework Decision 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 EU* (report of Mr Duquesne).

There are, however, links to other legal instruments which should be checked to see if the provisions in the current draft Decision are coherent and not in contradiction. These concern, in the opinion of the rapporteur, at least the following measures:

- the proposal for a Council Framework Decision on the exchange of information based on the principle of availability, (rapporteur: Mr Alvaro),
- the proposal for a Framework Decision on Data Protection in the third pillar (rapporteur: Mrs Roure). A general legal framework on data protection in the third pillar is essential and must be preferred rather than a case by case approach⁷; consequently the Framework Decision on data protection shall apply (after its entry into force) to the present Decision as is the case for the Schengen Information System (SIS II, rapporteur: Mr Coelho) and for the Visa Information System (rapporteur: Mrs Ludford). In either case, the reference to the Council of Europe Convention of 1981 and other instruments in Article 25, 1 must be substituted or complemented by the reference to the Framework Decision on Data Protection.
- the Initiative of the Republic of Austria with a view to adopting a Council Decision on the improvement of cooperation between the special intervention units of the Member States of the European Union ('Atlas' initiative, rapporteur: Mr Correia).
- the question of access by Europol to the data should be clarified (Europol report, rapporteur: Mr Díaz de Mera).
- Joint Action 97/339/JHA, concerning cooperation on law and order and security as well as with the Framework Decision on joint investigation teams of 13 June 2002.

⁶ Council doc. 6003/07 of 5 February 2007.

⁷ See also on this the Opinion of the EDPS on the Prüm Initiative of 4 April 2007.