

# PRÜM AND ITS RELATIONSHIP TO INTERNATIONAL, COMMUNITY AND NATIONAL INSTRUMENTS

Dulce Lopes

Assistant Professor at the Faculty of Law, University of Coimbra, Portugal

## 1. Introduction

The Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed by the contracting parties in Prüm (Germany) on 27 May 2005, is considered to be a decisive step towards boosting police cooperation in criminal matters.

Therefore, although the so called Prüm Treaty was negotiated and concluded in an intergovernmental basis outside the institutional mechanisms of the European Union, it is intimately linked to a number of provisions laid down in Title VI of the Treaty on European Union, in particular article 30, 1, (a), (b) and (c).

This substantive relation to third pillar provisions is expressly recognized in the Prüm Treaty preamble and in its article 1, 4, that states: *“within three years at most following entry into force of this Convention, on the basis of a 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 on European Union and the Treaty establishing the European Community, with the aim of incorporating the provisions of this Convention into the legal framework of the European Union”*.

Nevertheless, the fact that this substantive likeness wasn't accompanied originally by the approval of a third pillar instrument raises several issues regarding its late process of “europeanisation”.

In particular, we will debate the conversion of classic international public law mechanisms (multilateral conventions) into innovative forms of revelation of European Union law, linking them to this multi-level governance system.

## 2. Interlinking policies and rules: Multi-level governance

As stated in the Glossary of the New Modes of Governance Project<sup>1</sup> “*European integration is a polity-creating process in which authority and policy-making influence are shared across multiple levels of government – subnational, national, and supranational*”.

This assertion was traditionally associated to the dilution of the role of states as policy makers and to the growing influence of the European Community due to its particular and original decision making competencies and procedures, mainly to the primacy principle and to the direct effect doctrine.

Nevertheless, this top-down (almost hierarchical and unidirectional) approach to European Governance was soon compensated by a more plural methodology based on a complexity of relations between national law and policies (comprising all levels of government), community rules and several international instruments<sup>2</sup>.

To illustrate this multi-level approach, that is based on interacting and sometimes overlapping systems of law, and that is used proficiently by the European Court of Justice mostly in cases related to fundamental rights protection, all we need is to take a glimpse at some provisions of the Treaties: article 6, 2, of the Treaty on European Union, articles 288 and 302 to 304 of the Treaty establishing the European Community.

From these provisions the influence of national laws and principles to the formation of an European “*corpus iuris*” (also entitled a bottom-up approach) and the intimate relation between the European Union (namely its Charter) and the European Convention for the Protection of Human Rights and Fundamental Freedoms, is crystal clear.

---

<sup>1</sup> Integrated Project funded by the 6th Framework Programme of the European Union (available at [http://www.eu-newgov.org/public/Glossary\\_m.asp#ModesofGovernance](http://www.eu-newgov.org/public/Glossary_m.asp#ModesofGovernance)).

<sup>2</sup> Regarding mutual penetration of governance levels as the functional logic of the Europeanisation process, *vide* Gunnar Folke Schuppert, “*The Europeanisation of national governance structures in the context of the transformation of statehood*”, in *The Europeanisation of Governance*, Gunnar Folke Schuppert (ed.), Schriften zur Governance-Forschung, Nomos, Baden-Baden, 2006:

This complexity is aggravated internally by the plural nature of European Union law based on the pillars distinction and by the wide acceptance of gradual or differentiated “modes” of European integration.

### **3. Integrating the Prüm Treaty into the European Union framework**

The incorporation of the Prüm Treaty into the European Union *acquis* is dependent on the adoption of a legal instrument of the third pillar. On this behalf, fifteen member States have proposed the adoption of a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

This integration, however, only regards aspects of the Prüm Treaty that are included in the area of police cooperation in criminal matters and not those who are relevant to first pillar policies (for instance, articles 17 to 19 of the Treaty include specific regulation on aerial transport security and articles 20 to 23 inscribe measures to fight illegal immigration). These, in the absence of a so far parallel initiative under the first pillar rules, are maintained in the Treaty.

This procedure leads to a few major questions, which we will put forward for further debate:

— Is it possible to adopt atypical means of action, when formal and also flexible (such as enhanced cooperation provisions) exists within the European Union legal order?<sup>3</sup> It is true that before the entry into force of cooperation under the third pillar member states had already established cooperation in criminal matters on an *ad hoc* basis and with proven results, but should this constitute a precedent for nowadays situations? And where do the already limited possibilities of control of European Union Institutions under the third pillar stand (article 35)?

— The area of freedom, security and justice, according to the conclusions of the Tampere Council, is based on *mutual recognition*. But shouldn't there be a highlight on harmonization measures? The answer to this question has not only consequences in the choice of the proper legal instrument (if whether a

---

<sup>3</sup> For the response of the European Court of Justice in a case relating to conflict resolution, *vide* Judgment of the Court (Grand Chamber) of 30 May 2006 — Commission of the European Communities v Ireland, Case C-459/03.

Decision or a Framework Decision), but also an effect on the protection of fundamental rights.

in fact, increasing cooperation between member states within the European Union, namely supplying of personal data, affects the legal position of citizens, “*stressing that legal protection is not merely an issue that needs attention in the vertical relationship between an individual and a state, but also in the horizontal relationship between states*”<sup>4</sup>. For this reason, harmonization measures should be preferred since they boost citizen’s confidence in the European Union police cooperation mechanisms, instead of mutual recognition and assistance that focus primarily on member states trust in the system.

— The “europeanisation” of the Prüm Treaty depends on the fulfillment of subsidiarity and proportionality requirements. Therefore, its rules must be subject to close scrutiny in order to determine whether and how they should be adapted to their new “environment”. Which criteria should be put forward to meet those requirements?

#### **4. The Prüm Treaty: an example of Multi-level governance?**

The Prüm Treaty calls upon a series of instruments, mainly in what concerns the supply of personal data to another contracting party: the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the constitutional traditions common to the States concerned (recital); and more specifically the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981, its Additional Protocol of 8 November 2001 and the Recommendation No R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe (article 34, 1).

---

<sup>4</sup> Aukje van Hoek, Michiel Lutchman, “The European Convention on Human Rights and Transnational Cooperation in Criminal Matters”, in *Multilevel Governance in Enforcement and Adjudication*, Aukje van Hoek, Ton Hol, Oswald Jansen, Peter Rijpkema and Rob Widdershoven (eds.), Intersentia, Antwerpen, 2006

Those references don't hide the fact that negotiation of the Prüm Treaty was conducted outside the European Union framework and that its integration into this framework will always stay half way between its *origin* as an intergovernmental convention and its projected *destiny* as a Decision or a Framework Decision.

Two main ideas to support the shortcomings of this at least “atypical” method of generating European Union law:

1. In general, the integration of an already “functioning” measure into a certain legal order is accompanied by some degree of difficulty in introducing changes to the project. This dilutes the importance of the already limited intervention of the European Parliament in the third pillar and the practical effect of any contribution made.<sup>5</sup>

2. In particular, this proceeding links the Treaty to national and international levels of regulation, but tends to forget the need for “internal” coordination with community measures, namely, in what regards third pillar issues, 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 and the Council Framework Decision 2002/465/JHA of the 13<sup>th</sup> of June 2002 regarding joint investigation teams. Also, regarding its utmost importance in fundamental rights defense, the project of a Council Framework Decision on Data Protection on the third pillar cannot be ignored.

This search for compatibility is now in order and includes also the finding of new institutional arrangements involving not only member states but also European Union institutions and services such as Europol<sup>6</sup>. If not, the risk of loosing sight

---

<sup>5</sup> Which raises doubts on the democratic legitimacy of the measure. *Vide* Donatella M. Viola, “Interparliamentary Co-operation in the European Union: Towards a multi-level Governance”, in *European Governance – Policy Making Between Politicization and Control*, G.P.E. Walzenbach (ed.), Ashgate, Aldershot, 2006.

<sup>6</sup> Joint operations raises, in fact, more problems than classical modes of assistance between member-states for which there are at present few solutions. *Vide* Aukje van Hoek, Michiel Lutchman, “The European Convention on Human Rights and Transnational Cooperation in Criminal Matters”, in *Multilevel Governance in Enforcement and Adjudication*, Aukje van Hoek, Ton Hol, Oswald Jansen, Peter Rijpkema and Rob Widdershoven (eds.), Intersentia, Antwerpen, 2006.

of the rich multi-level system of governance, which is in the basis of the “europeanisation” phenomenon, becomes real.

## **5. Conclusion**

The integration of the Prüm Treaty into the European Union legal order should, vis-à-vis the atypical procedure that has been followed, be covered by the highest degree of procedural and substantive guarantees, in order to prevent further erosion of the existing institutional arrangements in third pillar issues. Also, a renewed framework on the area of freedom, security and justice that contributes decisively to the resolution of the questions posed along this intervention is obviously welcome.

---