

## The Prüm Process: playing or abusing the system?

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*Despite – or perhaps because of – the controversy attached to it, the EU’s move to fold most of the provisions of the Prüm Treaty into its existing accumulated legislation (or *acquis communautaire*) was afforded a single line in the Presidency Conclusions of the Brussels European Council (finalised 22 June 2007). According to this document: “The recent decision to integrate the essential provisions of the Prüm Treaty into the Union’s legal framework will help to intensify cross-border police cooperation”.<sup>1</sup> Underlying this anodyne statement are tensions as to the manner in which the Prüm Treaty entered the EU canon, and the degree to which it helps - or perhaps even hinders - attempts to enhance cross-border law enforcement cooperation.*

### 1. Prüm<sup>2</sup>

The Prüm Treaty was named after the German town where it was signed by Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria on 27 May 2005. It addresses “the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration”.<sup>3</sup> In aiming to improve the exchange of information between subscribing states, Prüm particularly sought to establish reciprocal access to national databases holding DNA, fingerprint, and vehicle registration data. It also included provisions for joint operations between enforcement officers from Contracting States and the establishment of a network of immigration liaison officers to help combat illegal migration. Other areas dealt with included the carrying of firearms by ‘foreign’ officers, ‘hot pursuit’ across borders, the deployment of armed air marshals on aircraft, and more general cooperative arrangements.

While not part of the Schengen *acquis* (which sought to abolish border checkpoints within the EU), elements of continuity between the two processes are discernible. For instance, five of the signatories to Prüm were also the five parties to the 1985 Schengen Agreement and the 1990 Schengen Convention. More contentiously – as is discussed below – there are also similarities between the manner in which Schengen and Prüm were established and the scope of their ambition (both sought to extend themselves into EU-wide agreements), causing some commentators to label the latter ‘Schengen III’.

Germany and Austria were the initial drivers behind Prüm, which, although agreed between a group of EU member states, was conceived and established outside the EU framework. The negotiations took place amid relatively little publicity, and the Treaty entered quietly into force on 1 November 2006. Initially it was between Austria and Spain, with Germany

<sup>1</sup> Presidency Conclusions of the Brussels European Council, June 21-22, 2007, p. 6.

<sup>2</sup> While the Council of the European Council translation calls Prüm a convention, its four authentic (or original) texts (in Dutch, French, German, and Spanish) call it a treaty. Here it is called the Prüm Treaty in keeping with its original title.

<sup>3</sup> The Prüm Treaty, p.1.

joining later that month and Belgium and Luxembourg following suite in May 2007. The ratification process, though not yet complete (as of April this year), is well advanced in both France and the Netherlands. Last year Finland, Italy, Portugal, and Slovenia all applied to accede to Prüm.

## 2. Becoming EU Law

The 2007 German EU Presidency was instrumental in the push to turn the Prüm Treaty into EU law - a goal that was candidly proclaimed by the Treaty signatories from the very start.<sup>4</sup> Prüm set itself a deadline of three years (“at the most”) to launch an initiative to incorporate it within the EU *acquis*, stating that this would follow an assessment of its implementation and occur “in consultation with, or on a proposal from, the European Commission, [and] in compliance with the provisions of the Treaty on European Union and the Treaty establishing the European Community”. In the event, the Prüm signatories would make their deadline for launching such an initiative with time to spare.

Arguably, Germany began preparing the ground in earnest for just such an initiative at least as far back as March 2006 when, the Conclusions of the German-chaired G6 meeting at Heiligendamm emphasised “that the promising model offered by the Prüm Treaty [...] should be considered at EU level as soon as possible”.<sup>5</sup> Within ten days of Germany’s assumption of the EU Presidency at the start of 2007, the country’s interior minister Dr Wolfgang Schäuble was extolling the virtues of the Prüm Treaty as an example of a decision-making process that avoided the bottlenecks of usual EU procedures and was now ready to be transplanted into EU law. Four days after that, the first item on the agenda at the first plenary session of an informal meeting of EU justice and home affairs ministers in Dresden was a paper from the new German Presidency entitled: “Stepping up cross-border police cooperation by transposing the Prüm Treaty into the legal framework of the EU”.<sup>6</sup> Within another four days the Council Secretariat published the first draft of a Council Decision that would do just that.

This was examined by the Article 36 Committee (a coordinating body of senior officials established to advise the Council). At a formal Justice and Home Affairs Council on 15 February this year, EU representatives agreed on the Prüm Treaty’s integration into the EU legal framework. Then on 29 May the Article 36 Committee published its general approval of the latest Draft Council Decision on the Prüm Treaty. This approval effectively cleared the way for Prüm to move from being an extra-EU document into EU law, something which was finally rubber-stamped at the Brussels European Council meeting in June.

By this stage the Prüm Treaty’s original provisions for deploying air marshals and establishing an immigration liaison officer network (neither of which, being first pillar items, can be legally included in a Council Decision) had gone. Similarly absent – largely due to UK qualms – was a ‘hot pursuit’ provision allowing officers to cross from one state into another without prior consent. These changes aside, “the essential provisions” (as the June Presidency Conclusions calls them) of the Prüm Treaty, remained – now to be enshrined in EU law as the Treaty’s founders had planned and hoped since its inception.

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<sup>4</sup> Prüm Treaty, p. 3.

<sup>5</sup> Quoted in, *Prüm: an effective weapon against terrorism and crime?*, House of Lords European Union Committee (Sub-Committee on Home Affairs), 18th Report of 2006/07, HL Paper 90, paragraph 10.

<sup>6</sup> *Prüm: an effective weapon against terrorism and crime?*, paragraphs 33-49.

### 3. Hit or Miss?

Within two months of the Prüm Treaty being in place the Germans presented impressive statistics regarding cooperation between Germany and Austria on sharing DNA samples. German searches of Austria's DNA database apparently turned up 1,510 matches or 'hits' (enabling a request for further information from the searching state), with the Austrian authorities able to connect 710 'open' criminal cases in Germany with known suspects. The hits in the Austrian database were made in connection with 14 homicides, 885 thefts, and 85 robberies or instances of extortion.

However, some are sceptical of claims that the number of DNA search hits will grow as more and more countries take part in the Prüm project. For instance, the UK House of Lords' European Union Committee cited evidence that questioned the sustainability of such high hit rates and how representative they would be of day-to-day searches – as opposed to the initial exercise in clearing a backlog.<sup>7</sup> The figures are also of questionable representative value given the cultural and linguistic similarities and geographical proximity of the two countries. The average British fugitive would probably find it much harder to flee to Estonia (for example) and maintain himself there with the same ease as a German would in Austria.

As the Committee's Report also points out, there is no standard EU policy for the collection and retention of the sorts of data that the Prüm provisions deal in. For example, the UK DNA database is believed to contain some 4.1 million profiles – including those who have been charged with only minor crimes and many others who have never even been charged with a crime (including 100,000 children). This equates to over five per cent of the UK population – five times the EU average and ten times that of the US.<sup>8</sup> Such figures raise serious concerns about data protection, the lack of standardisation of the collection, retention, interpretation, and legal application of DNA evidence at the EU-level.

### 4. Indecent haste or prudent speed?

Potentially more problematic is the manner in which the Treaty of Prüm became EU law. As already mentioned, the German Presidency pursued this objective with remarkable haste. They allowed the European Parliament only a few days more than the minimum mandated three months (under Article 39 of the EU Treaty) to prepare its Opinion on the translation of Prüm into EU law. As the House of Lords Report concludes, Germany's timing suggests that it had no intention of considering the European Parliament's deliberations on the matter.

Similarly, the German Presidency did not consult the European Data Protection Supervisor (EDPS). Although not required to do so, such consultation might have been a prudent and reassuring measure, given the degree to which Prüm revolves around data sharing (and therefore data protection). In the event the EDPS did deliver an Opinion on the matter, in which he welcomed the degree to which the Prüm proposals offered indirect access to databases (via the 'hit'/'no hit' method described above) as a "more cautious, gradual

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<sup>7</sup> Jonathan Faull, EU Director-General for Justice, Freedom and Security in his testimony, cited in Eighteenth Report of House of Lords, EU Committee, *Prüm: an effective weapon against terrorism and crime?*, HL90, 9 May 2007, paragraph 37, Q 57, also QQ 95, 96.

<sup>8</sup> Philip Johnston, 'Innocent – but on a criminal database Home front', *The Daily Telegraph*, 28 May 2007.

approach as a way of implementing the principle of availability”.<sup>9</sup> The purpose of this ‘availability’ principle is to ensure that law enforcement information will be made freely available across EU member states.<sup>10</sup>

However, some compare the Prüm provisions unfavourably against the ‘availability’ principle as the later additionally permits requests for telephone numbers and other communications and ballistics data.<sup>11</sup> Others believe that the Hague Programme’s goal of realising the availability principle by 2008 is not feasible.<sup>12</sup> Under such a reading, the campaign to integrate Prüm into EU law could be viewed as the least bad option – an attempt to salvage the situation by working around processes like ‘enhanced cooperation’ – established by the Treaty of Amsterdam in 1991 to limit treaty-brokering outside the EU framework, but considered cumbersome by some.

## 5. Conclusion

Given time, methods and procedures for collecting, storing, and sharing database evidence can be codified and implemented. Taking legislative shortcuts through the EU’s complex procedures – however inconvenient these may be – could prove more problematic. The EDPS has said that parties to the Prüm Treaty have “evaded the substantive and procedural requirements of enhanced cooperation” and that it is arguable that “the Prüm Convention breaches the law of the European Union”.<sup>13</sup> As this highlights, one of the biggest questions about the Prüm Treaty and its introduction into EU law concerns the manner in which this happened rather than the substance of the Treaty itself.

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<sup>9</sup> Opinion of the European Data Protection Supervisor, with a view to adopting a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, Council of the European Union, Brussels, 20 April 2007, 8656/07, note 48, point 25.

<sup>10</sup> European Commission, Communication on the Hague Programme, COM(2005) 184 final, Brussels, 10.05.2005, paragraph 2.1.

<sup>11</sup> See, Thierry Balzacq, Didier Bigo, Sergio Carrera, and, Elspeth Guild, *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, Brussels: Centre for European Policy Studies, January 2006 (CEPS Working Document, No. 234), p. 13.

<sup>12</sup> See Hugo Brady, *The EU and the fight against organised crime*, London: Centre for European Reform, April 2007 (CER Working Paper), p. 21.

<sup>13</sup> Memorandum by Mr Peter Hustinx, European Data Protection Supervisor, in *Prüm: an effective weapon against terrorism and crime?*, pp. 31-33, p. 31. As the EDPS adds: “[T]his argument is mainly of a theoretical nature, since the European Court of Justice has no competence on this matter, nor does any other Court.”