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The Treaty of Prüm: A Replay of Schengen?

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1. Introduction¹

On 27 May 2005, seven EU member states signed the “Treaty of Prüm” on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration.² It was based on an initiative by the then German Interior Minister Otto Schily from mid-2003.

The paper starts with a few remarks on the notion of “differentiated integration” for which Schengen and Prüm are prime examples. The Schengen process will be summoned up. The core of this paper deals on the one hand with the way to the Prüm Treaty and its final contents. On the other hand, the signing and ratification, also by EU member states other than the original signatories, and its entry into force will be discussed. The debate on the integration of major parts of the Prüm Treaty into the EU legal framework, which started soon after its signing, will be described.

The final sections of the paper present some controversial views of the Treaty among scholars and the analysis by European Data Protection

1 Besides the literature quoted, this paper is based on interviews with officials. I want to thank in particular Brigadier General Kurt Hager, Austrian Federal Ministry of the Interior, for providing me important background information.

2 The title of the treaty is (in the translation by the Council Secretariat) “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”; see the English version in Council of the European Union, Brussels, 6 December 2006, 16382/06. I use the expressions Treaty of Prüm, Prüm Treaty and Prüm Convention interchangeably. Officials from the participating countries are not happy with the use of the word “Convention” by the Council Secretariat and would prefer “Treaty”.

Supervisor of the draft Decision intending to integrate parts of the Prüm Treaty into the Third Pillar of the EU. A few concluding remarks on the whole process wrap up the paper.

2. Differentiated Integration in the EU

The notions of “differentiated integration”, “flexibility” and “closer/enhanced cooperation” have actually a long tradition in the European integration process. Already with the Rome Treaties of 1958, transitional periods for the establishment of the customs union were introduced. This mechanism has been regularly used for the various enlargement rounds. The Schengen Treaty was signed only by 5 member states in 1985. The Social Charta (1989) and the Social Protocol of the Maastricht Treaty (1993) did not bind the United Kingdom. The Economic and Monetary Union, introduced by Maastricht, encompassed several elements of differentiation (stepwise deepening, criteria for participation, opt-outs for the UK and Denmark).

In a recent comprehensive review of differentiated integration, Janis Emmanouilidis lists in all six forms of differentiation:

- (1) creation of a new supranational Union;
- (2) differentiation via established instruments and procedures;
- (3) intergovernmental cooperation outside the EU;
- (4) differentiation through opt-outs;
- (5) differentiation through enlargement;
- (6) differentiation through withdrawal.³

The two relevant instances of differentiated integration for our discussion here are point (2) differentiation via established instruments and procedures and point (3) intergovernmental cooperation outside the EU. Both will be discussed here, starting with point (2).

To avoid the proliferation of cooperation outside the legal framework of the Union, the Treaty of Amsterdam (1999) introduced the possibility of enhanced cooperation inside the EU treaties. Title VII of the Treaty on European Union brought general provisions on closer cooperation (Articles 43–45) which were supplemented by special rules for the EU’s First and Third Pillar. The Nice Treaty (2003) brought a slight relaxation of the rules and made closer cooperation also possible for some parts of the Second Pillar.

3 Janis A. Emmanouilidis, *Institutional Consequences of Differentiated Integration*, Munich: Center for Applied Policy Research, February 2007 (= CAP Discussion Paper), p. 1.

Still, the rules for enhanced cooperation remain cumbersome. At least eight member states have to participate. The cooperation must remain within the limits of the powers of the Union/Community and does not concern the areas which fall within the exclusive competence of the Community.⁴ Enhanced cooperation may be undertaken only as a last resort, when the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties (Article 43a EU Treaty).

The procedure to start enhanced cooperation is different in each of the EU pillars. In the for our discussion relevant Third Pillar (since Amsterdam dealing with police and judicial cooperation in criminal matters) a minimum of eight member states which intend to establish enhanced cooperation have to address a request to the Commission. The Commission may submit a proposal to the Council to that effect. If the Commission refuses to make such a proposal, the member states themselves may submit an initiative to the Council to obtain authorization for their enhanced cooperation. The Council then decides by qualified majority, after consulting the European Parliament. A member state may request that the matter be referred to the European Council. After that matter has been raised before the European Council, the Council can again decide about the request for an enhanced cooperation by qualified majority (Article 40a EU Treaty).

Emmanouilidis lists several positive consequences of enhanced cooperation when established in accordance with the EU treaties: preservation of the EU's single institutional framework; cooperation on the basis of clear-cut rules guaranteeing calculability; preservation of the supranational character of the Commission, the European Parliament and the Courts; involvement of the "outs" and thus reducing the risk of confrontational splits.⁵

Emmanouilidis is much more critical concerning intergovernmental cooperation outside the EU. His prime examples are the Schengen-Model and the Treaty of Prüm, both to be discussed here. He criticizes the exclusion of EU institutions and the establishment of new institutions. The lack of democratic legitimacy concerns in his opinion not only the EU level, but also member state institutions. The cooperation initiated outside the EU framework is limited to intergovernmental relations — thus even the national parliaments

4 Article 43 EU Treaty lists in all ten general conditions that have to be fulfilled.

5 Emmanouilidis, note 3, pp. 5/6.

have only an *ex-post* control, without the ability to influence the content of the treaty/agreement.⁶

The adoption of legal norms outside the EU can, according to Emmanouilidis, decrease trust and obstruct cooperation inside the Union. There is also no “guarantee” that the legal norms adopted outside the EU can be integrated into the Union treaties, even if the intergovernmental “avant-garde” aspires to do so. Long-lasting cooperation outside the EU could also weaken the Union, complicate cooperation between the member states and trigger fragmentation within the EU.⁷

3. Schengen

The Commission White Paper on Completing the Internal Market from June 1985 and the ensuing Single European Act (SEA), in force on 1 July 1987, both aimed at “an area without internal frontiers” which assured “the free movement of goods, persons, services and capital”.⁸ However, in a Declaration attached to the SEA, member states stated that these words did not affect their rights to control immigration and fight terrorism, organized crime etc.⁹ Still, some EC member states wanted to go further and not only abolish controls for goods at the internal EC borders, but also introduce the free movement for persons in the EC area.

Already July 1984, France and Germany had agreed in Saarbrücken to abolish the controls for persons moving across their common borders; the Benelux countries joined them shortly afterwards. To formalize these arrangements, the five countries signed the “Agreement on the gradual abolition of checks at their common borders” at Schengen (a town in southern Luxembourg) on 14 June 1985. It turned out that the realization their goals had to be complemented by “Convention implementing the Schengen Agreement” in 1990, which came into force on 1 September 1993 in seven EU member states (including now Spain and Portugal). The Agreement and the

6 Emmanouilidis, note 3, pp. 9.

7 Emmanouilidis, note 3, pp. 10.

8 This were the words introduced by the SEA into the EEC Treaty (then Article 8a EEC Treaty, after the Maastricht Treaty Article 7a, now Article 14(2) EC Treaty).

9 Thorsten Müller, *Die Innen- und Justizpolitik der Europäischen Union. Eine Analyse der Integrationsentwicklung*, Opladen: Leske + Budrich, 2003, p. 124.

Convention were only fully applied and controls of persons at the borders between the Schengen countries abolished on 26 March 1995.¹⁰

Accession treaties to Schengen were later signed with Italy, Greece, Austria and then with Sweden, Denmark and Finland. The accession of the three Nordic countries was accompanied by an association agreement with Norway and Iceland which enabled to extend the Schengen area to these two non-EU states and thus maintain the Nordic Passport Union. The only EU countries which finally did not participate in Schengen were the UK and Ireland. Britain did not want to lose the control of its borders. On the one hand, it referred to its insular position and on the other hand it pointed to the absence of identity cards and controls in its territory. To maintain the “Common Travel Area” with the UK, Ireland had to decline full participation in Schengen as well.¹¹

The continuing “widening” and also “deepening” of the Schengen rules resulted in an increasing cross-over between Schengen and the new rules of the Third Pillar of the EU on Justice and Home Affairs (JHA), introduced by the Maastricht Treaty (in force on 1 November 1993). In order to reconcile the overlap between the two processes, the Treaty of Amsterdam integrated the Schengen *acquis* into the framework of the EC and EU Treaties (through a Protocol attached to the Amsterdam Treaty). The Schengen *acquis* consisted of the 1985 Schengen Agreement, the 1990 implementing Convention and the measures adopted by the Schengen Executive Committee as well as the other organs implementing Schengen.¹² In specific protocols, the UK and Ireland were allowed to continue checking individuals coming from other EU member states at their borders. They got the possibility of “opting in” to any Title IV EC Treaty measure (in the First Pillar, dealing with visa, asylum immigration and other policies related to free movement of persons). In other protocols, Denmark was exempted from almost all Title IV measures. The Schengen

10 Even then France refused to abolish border checks on any of its internal borders with the other member states. After a year, France dropped the checks on the German and Spanish borders, but still continued to apply them to the Belgian and Luxembourg borders, because of French objections to Dutch drugs policy. See Steve Peers, *EU Justice and Home Affairs Law*, 2nd edition, Oxford–New York: Oxford University Press, 2006, p. 44.

11 Franklin Dehousse/Diane Sifflet, *Les nouvelles perspectives de la coopération de Schengen: le Traité de Prüm*, in: *Studia Diplomatica*, Vol. 49, No. 2 (2006), pp. 199–212, here p. 202.

12 Peers, note 10, p. 45.

acquis allocated to Title IV still continues to have the effect of public international law for Denmark rather than EC (supranational) law.¹³

The Protocol on the Schengen *acquis*, attached to the Amsterdam Treaty, specified that all future member states will be bound by the entire *acquis*. They will not have the possibility to opt out or opt in. Thus, the new member state which joined the EU on 1 May 2004 (and on 1 January 2007) all had to apply the Schengen rules as from the date of accession. Several rules, like the abolition of internal border controls, will only be implemented until a later Council decision (in particular until the standards of controlling the EU external borders satisfy the demands of the “old” Schengen members). This will probably happen at the end of 2007/beginning 2008 for the eight Central and Eastern European EU members.

4. The Treaty of Prüm

4.1. The way to the Prüm Treaty

In late spring 2003, Otto Schily, the Interior Minister from the Social Democrats during the red-green government in Germany, proposed a closer cooperation in Justice and Home Affairs to his colleagues from France (then Nicolas Sarkozy), Belgium and Luxembourg in the context of the opening of a Police Center in Luxembourg by these four countries. The background to this initiative was transnational crime which had increased after the removing of the Iron Curtain at the end of the Cold War and which had been made easier by the ceasing of border controls between the participants of the Schengen area.¹⁴ The rules of the Schengen *acquis* and the Third Pillar of the EU Treaty were not regarded as sufficient. Closer cooperation among the police forces of Germany with its neighbors was deemed necessary.

The Netherlands were also invited to participate in the talks among officials following the initiative of Schily. In these meetings it turned out that France would have problems with its Constitution concerning activities of foreign police officers on its territory. During a visit of the Austrian Interior Minister Ernst Strasser (Conservative, ÖVP/FPÖ government) in Berlin,

13 On the complicated rules for the UK, Ireland and Denmark see Peers, note 10, pp. 55–60.

14 As an example see the data for Austria in Table 3 on page 21 in the Annex.

November 2003, the Germans suggested that Austria should take the place of France. The Austrians accepted this offer.

Officials from Germany, Austria and the Benelux countries prepared a text which was approved at the first Ministerial Meeting in Brussels, 28 May 2004. The eleven points in the Common Declaration anticipated most of the contents of the future Treaty. German officials wanted to include the “Rasterfahndung” (profile searches with computers) into the text but this demand was not accepted by its partners.¹⁵

After four expert meetings in Berlin, a second Ministerial Meeting in Luxembourg, 24 September 2004, led to the official start of the negotiations on what was later called the Treaty of Prüm on 13 October 2004. Nine rounds of negotiations among officials and several expert meetings on DNA data, fingerprints and data protection took place. At the third Ministerial Meeting in Vienna, 26 November 2004, the participants finally decided not to establish centralized databases. Instead, they opted for data exchanges between national databases.

In the Justice and Home Affairs Councils, Germany regularly updated the other EU member states on the progress of the negotiations. It also informed the Commission. At the JHA Council in April 2005, Minister Schily reported about the impending signing of the Treaty. At this moment, France indicated its interest to sign the Treaty as well. The problems with foreign police officers on its soil had been solved in the meantime by the *Conseil Constitutionnel*. Also Spain was now willing to participate in the new Treaty.

On 27 May 2005, the Treaty was signed by representatives of seven EU member states (Germany, Austria, the Benelux countries, France and Spain) in the German town Prüm. With some 6000 inhabitants this small municipality is located near the country triangle Germany/Belgium/Luxembourg. The ministers wanted to make the Treaty a kind of a “Schengen III” treaty. Therefore, they intended first to sign it in Luxembourg, not in the south (where Schengen is located) but in the north of the country. There was no suitable place, so a bit further north Prüm was selected. In addition to its location, ancestors of Minister Schily had lived in this town and had participated in the Revolution of 1848, a nice symbol for a politician from the Social Democrats

15 The “Rasterfahndung” by the German police proved to be rather useful in the fight against the terrorists during the 1970s and 1980s. It involves the canvassing of a large number of databases with the help of computers.

(and a former member of the Green Party). To put into operation the technically complicated matters of the Prüm Treaty, a further “Administrative and technical implementing Agreement to the Prüm Convention” was signed on 5 December 2006 in Brussels.¹⁶

4.2. The contents of the Prüm Treaty

In the short preamble of the Convention, the contracting parties state that in the context of the free movement of persons the EU member states have to step up their cooperation, “in order to combat *terrorism, cross-border crime* and *illegal migration* more effectively”. The contracting parties want to play “a *pioneering role* in establishing the highest possible standard of cooperation, especially by means of improved exchange of information”. They leave participation “*open to all* other Member States of the European Union” and state their intention that the Convention should be “brought within the legal framework of the European Union”.¹⁷

The main part of the Convention includes 8 Chapters:

1. General aspects
2. DNA profiles and fingerprinting and other data
3. Measures to prevent terrorist offences
4. Measures to combat illegal migration
5. Other forms of cooperation
6. General provisions
7. General provisions on data protection
8. Implementing and final provisions

In the introductory Chapter the contracting parties again state that they want to “promote European cooperation” in the fields of the Convention. For this purpose they will submit an initiative within three years to incorporate the provisions of the Convention into the legal framework of the EU.

In Chapter 2, the contracting parties assure the availability of national *DNA files* and *fingerprinting data* for the other parties of the Treaty. But the data must not contain any data from which the subject can be directly identified.

16 Council of the European Union, Brussels, 29 January 2007, 5473/07. The 110 pages of the technical addendum have not been published.

17 Prüm Convention, Preamble, emphasis Paul Luif.

The partner country will only be able to search in the non-coding part of DNA/fingerprinting data. Each of these records will have a reference. This reference data must not contain any data from which the data subject can be directly identified. Reference data not traceable to any individual (untraceables) must be recognizable as such.¹⁸

Each of the contracting parties to the Prüm Treaty has to establish a “national contact point”.¹⁹ These points can conduct directly automated searches and comparisons in the databases of the partner countries by comparing DNA profiles/fingerprinting data with the “matching machine” of the computer in the partner country. This search is done from the requesting country without any intervention by an official from the requested country (thus “automatic”). The requesting official from the national contact point gets a “hit/no hit” information and in case of a “hit” the reference (a number). The requesting official can use the reference to get the information on the person which fits the DNA profiles/fingerprinting data. This is done in the “normal” way, i.e. the official sends a request to his counterpart in the partner country (usually by e-mail) to get the relevant data on the person(s). The requested official decides according to his national law, including legal assistance rules, if he can supply this information to the requesting country.

Chapter 2 also includes rules on the automated searching of *vehicle registration* data. These searches may be conducted only with a full chassis number or a full registration number. The requested contact point of the requested country will provide data relating to owners or operators of vehicles or other data relating to vehicles. Here, no references are used, the data is supplied directly. The reason given for this greater “openness” concerning vehicle data is the fact that this data usually is publicly available.²⁰

Chapter 2 of the Prüm Treaty also includes exchanges of personal and non-personal data for major events with cross-border dimension, in particular sporting events.

18 Article 2(2) Prüm Convention.

19 This could be either separate contact points or one contact point for several matters. In Austria there exists one national contact point for DNA and fingerprints and one for vehicle registration data.

20 In Austria, everybody can contact the traffic office of the police (*Verkehrsamt*) or an insurance company to get the relevant data, e.g. the name of the owner of a car.

Chapter 3 deals with measures to *prevent terrorist offences*. It concerns on the one hand the supply of information on persons when particular circumstances give reason to believe that the data subjects will commit criminal offences which are seen as terrorist acts. On the other hand, the contracting parties accept the employment of air marshals. i.e. police officers or other suitably trained officials responsible for maintaining security on board of aircrafts.²¹

The measures to *combat illegal immigration* (Chapter 4) include the seconding of document advisers to states regarded as source or transit countries for illegal migration. These advisers should help in the detection of false or falsified documents and on document abuse. Another measure is the assistance with repatriation of illegal immigrants. There exist already EU rules for these activities, the Prüm countries accept that repatriation can also take place via the territory of another contracting party. Experts should meet regularly to assess past operations and discuss problems.

Chapter 5 (other forms of cooperation) includes *joint operations* where police officers participate in operations outside their own country. These police officers can either use the sovereign powers of the territory they are operating in or exercise their powers in accordance to the laws of their own country, depending on the consent of the contracting party where the officer is operating. In urgent situations, officers from one contracting party may, without the other contracting party's consent, cross the border and take "any provisional measures necessary to avert imminent danger to the physical integrity of individuals".²²

In connection with mass gatherings and similar *major events, disasters and serious accidents*, the contracting parties promise to provide one another with mutual assistance. Assistance can be provided also upon request. Article 27 gives a list of 11 cases where assistance can be requested, e.g. ascertaining individuals' whereabouts and place of residence, checking on residence permits, establishing the identity of individuals, etc.

The general provisions of Chapter 6 deal with the use of arms, ammunition and equipment and give rules i.a. on liability. Chapter 7 has important provisions on *data protection*. The level of data protection should be at least

21 Austria has used air marshals for some 20 years, Germany introduced them after 9/11.

22 Article 25(1) Prüm Convention; this is the case of "hot pursuit".

equal to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 and its Additional Protocol of 8 November 2001, both established in the framework of the Council of Europe.

In the final Chapter 8, a *Committee of Ministers* is created which will take the necessary decisions on the implementation and application of the Convention; decisions will be taken by *unanimity*.²³ A joint working group will assist the ministers. Each contracting party will have to bear the costs incurred by its authorities in implementing the Treaty.

The Treaty asserts in its final Chapter that the “provisions of this Convention shall apply only in so far as they are *compatible with European Union law*”. EU law “shall take precedence in applying the relevant provisions of this Convention”.²⁴ The Treaty is “*open for accession by any Member State of the European Union*”.²⁵

The Prüm Treaty mirrors to some extent the complicated structure of the Area of Freedom, Security and Justice (the name of JHA after the Amsterdam Treaty) which is divided between the First and Third Pillar as well as the Schengen *acquis*. In fact, the Treaty is a mixture of on the one hand innovations, like the automated searching of databases in partner countries. On the other hand its rules include actions which are already (at least partly) possible with the existing treaties, be it in the First Pillar (e.g. document advisers, repatriation measures) or in the Third Pillar or in the Schengen *acquis* (e.g. various aspects of police cooperation).

Repatriation activities are now also one of the tasks of the EU’s external borders agency, Frontex. In addition, there exist bilateral agreements e.g. between France and Austria on repatriation. Articles 24 to 27 of the Prüm Treaty are almost literally taken over from the bilateral treaty between Austria and Germany on police and judicial cooperation.

23 Article 43(1) Prüm Convention.

24 Article 47(1) Prüm Convention, emphasis Paul Luif.

25 Article 51(1) Prüm Convention, emphasis Paul Luif.

4.3. Ratification, Entry into Force and Integration into the EU Legal Framework

According to Article 50 of the Prüm Treaty, the entry into force of the Treaty will take place ninety days after the deposit of the second instrument of ratification. This happened on 1 November 2006; Austria and Spain were the first countries that had deposited their instruments of ratification with the government of Germany, the depositary. As Table 113 shows, Germany followed soon afterwards. Belgium and Luxembourg ratified the Treaty in February 2007. France and the Netherlands have not yet ratified the Prüm Treaty.

Even before the Prüm Treaty came into force, other EU member states announced their interest to accede to the Treaty. In Table 213 one sees that Finland announced its interest to participate in the Treaty already in June 2006. Until the end of April 2007, in all ten EU countries had expressed their wish to participate in the Prüm Convention.

But not only have 17 countries (of 27 member states) announced their interest in participating in Prüm. In February 2007, 15 EU member states took the initiative to adopt a Council Decision which would introduce important elements of the Prüm Treaty into EU law (Third Pillar); i.e. would make Prüm rules binding for all 27 member states.

This draft Decision (as part of the Third Pillar) would take over most of the rules of the Prüm Treaty. Not included in the draft are a few points: air marshals, document advisers, measures in the event of imminent danger (hot pursuit) and cooperation on request.²⁶ The choice for basing the Prüm rules on a “decision” and not a “framework decision” is based on the possibility to implement “decisions” by qualified majority (Article 34(2)(c) EU Treaty); for “framework decisions” this option does not exist.²⁷ In this way, qualified majority voting could be introduced into matters of the Third Pillar. The German EU Presidency wants to get an agreement on the Decision by June 2007.

26 See the Non-Paper on the Draft Council Decision integrating parts of the Prüm Treaty into the EU legal framework, following from the discussions at the Article 36 Committee meeting of 26-27 April 2007.

27 The Non-Paper on the Draft Council Decision (note 26) mentions explicitly Article 34(2)(c) EU Treaty in its Article 34.

Table 1

Signatories to the Prüm Treaty
(Signed on 27 May 2005)

	Deposit of Ratification Instrument	In Force
Austria	21 June 2006	1 Nov. 2006
Belgium	5 Feb. 2007	6 May 2007
France	not yet	
Germany	25 Aug. 2006	23 Nov. 2006
Luxembourg	8 Feb. 2007	9 May 2007
Netherlands	not yet	
Spain	3 Aug. 2006	1 Nov. 2006

Note: Situation as of 24 April 2007.

Source: Information from the Austrian Interior Ministry.

Table 2

Accession States to the Prüm Treaty

	Declaration of Interest	Ratification	In Force
Finland	21 June 2006	19 March 2007	17 June 2007
Portugal	23 June 2006	not yet	
Italy	4 July 2006	not yet	
Slovenia	28 July 2006	3 April 2007	2 July 2007
Greece	5 Jan. 2007	not yet	
Sweden	18 Jan. 2007	not yet	
Romania	23 Jan. 2007	not yet	
Bulgaria	2 Feb. 2007	not yet	
Slovakia	28 March 2007	not yet	
Hungary	2 April 2007	not yet	

Note: Situation as of 24 April 2007.

Source: Information from the Austrian Interior Ministry.

5. Analysis of the Prüm Treaty

5.1. Comments from Researchers

The Treaty of Prüm has been fiercely criticized by a group of researchers. Thierry Balzacq et al. maintain that the Treaty is not a mere technical attempt to accelerate the flow of information among signatories:

[The Prüm Treaty] is, fundamentally, a significant countervailing political force against the European Union's area of freedom, security and justice. It weakens the EU more than it strengthens it, and under many circumstances, it simply cannot provide the way forward. For the most part much is lost and very little is gained by curtailing the EU framework.²⁸

According to the authors, the Prüm Treaty “creates a creates a *hierarchy* within the EU” if some member states can decide to create a new structure. The Treaty would compete with the proposal by the Commission for the exchange of information among all EU countries under the “*principle of availability*” from October 2005, which was based on the Hague Program of November 2004.²⁹ The Prüm Treaty institutionalizes “a *new electronic border* between the seven and the eighteen”, the Treaty “provokes a relapse of EU integration.”³⁰

Balzacq et al. think that an adherence of the remaining 18 member states to the Prüm Treaty “may turn out to be impracticable”. First, because with more than seven members, enhanced cooperation would need to be instituted, and this would not be easy to implement. Second, there will “still be no guarantee that the provisions defended by Prüm will be integrated in the Union as such.”³¹ If the time required before Schengen became actually

28 Thierry Balzacq/Didier Bigo/Sergio Carrera/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. 1. This Working Document was published within the framework of CHALLENGE (Changing Landscape of European Liberty and Security), a CEPS research program funded by the European Commission.

29 The Commission text is the Proposal for a Council Framework Decision on the exchange of information under the principle of availability (presented by the Commission), Brussels, 12.10.2005, COM(2005) 490 final.

30 Balzacq et al., note 28, pp. 1/2, emphasis Paul Luif.

31 Balzacq et al., note 28, p. 16.

operational can be taken as a norm (some 10 years), the Prüm Treaty “may be *outdated* before it enters into force”.³²

In their concluding remarks, Balzacq et al. find that the provisions of the Treaty of Prüm are *incoherent*, in particular concerning irregular migration because they engage “only seven of the 12 Schengen states”.³³ The Prüm framework lacks *transparency* since it is not subject to oversight by the European Parliament.³⁴ Finally, the Prüm Treaty dismantles *trust* among EU member states. It provides a framework for the “privileged group” of seven signatories. The Treaty includes highly debated and sensitive initiatives, “whose agreement inside the Council would have been difficult”. The provisions are negative factors to the democratic and judicial institutions of the EU “since they exclude them from the development of the EU *acquis*”.³⁵

Since most of these calculations and forecasts have not been confirmed by recent developments, one of the authors of the Balzacq et al. paper has tried to salvage at least some of their claims. For Elspeth Guild, the “alacrity” of the German Presidency to incorporate the Treaty into EU law “indicates that our concerns about the overall effect of the Prüm Treaty on the EU’s area of freedom, security and justice are shared at least in some quarters.”³⁶ A probably more levelheaded explanation is that most of the EU member states rather quickly realized the usefulness of the Prüm Treaty to further their internal security. The German Presidency probably was not “at pains”³⁷ to justify the exchange of DNA records.

Guild finds it “wise” that several provisions of the Prüm Treaty have not been included in the draft Decision proposed by the German Presidency (e.g. air marshals, hot pursuit across borders).³⁸ The measures in sensitive fields

32 Balzacq et al., note 28, p. 17, emphasis Paul Luif.

33 Balzacq et al., note 28, p. 17.

34 As a rather peculiar proof of their thesis, the authors tell that at the opening of an interparliamentary assembly in October 2005, “European Parliament President Josep Borrell acknowledged that he had never heard of the Prüm Treaty.” Balzacq et al., note 28, p. 18.

35 Balzacq et al., note 28, p. 18.

36 Elspeth Guild, *Merging Security from the Two-Level Game: Inserting the Treaty of Prüm into EU law?*, Brussels: Centre for European Policy Studies, March 2007 (= CEPS Policy brief, No. 124), p. 2.

37 Guild, note 36, p. 2.

38 According to Guild, the “inclusion of the provisions [concerning the air marshals] in the Prüm Treaty was something of a *slap in the face* to those member states that were opposed to the very principle”; see Guild, note 36, p. 2, emphasis Paul Luif.

of policing and data exchange will now at least encompass the agreement of all the member states. And thus, according to Guild, the “risk of a small oligarchy appearing to impose their preferred options on the whole of the EU has receded somewhat as a result”.³⁹ Guild overlooks that besides the planned Decision in the EU’s Third Pillar, the Prüm Treaty as such will most probably remain in force among a growing number of EU member states (cf. Table 213).

A completely different explanation of the Prüm Treaty is offered by Hugo Brady. According to him, the goal of the 2004 Hague Program to share all information held by national police by 2008, to realize the “principle of availability”, was not realistic. There exists no automatic access to sensitive police data, some EU countries do not have the data to share (neither Italy nor Poland have working DNA databases yet), or they have incompatible rules on how such information can be gathered.⁴⁰

Some observers feared the Prüm group would undermine efforts to facilitate information-sharing in the EU as a whole, since it involved only a handful of countries and ignored related initiatives by the European Commission. But it turned out that the Prüm treaty was the best way to encourage wider information-sharing.⁴¹

According to Brady, the seven Prüm countries have acted as a “laboratory” by working out the “complicated technical arrangements for querying each others’ police databases quickly and effectively in a small group”.⁴² Their rapid progress has encouraged the rest of the EU to adopt the Prüm system. In February 2007, the EU member states agreed to incorporate at least the information-sharing bits of the Prüm Treaty into the EU’s legal order. This is a “quantum leap in cross-border sharing of information”.⁴³ Critics have seen the Prüm Treaty as attempts to set the EU’s JHA agenda from the outside. But Brady supports the rationale behind such initiatives since it is difficult to get

39 Guild, note 36, p. 3.

40 The British police, for example, have the right to take a DNA sample from anyone they arrest, which is permanently recorded on a national database. In Sweden, DNA records can only be kept on criminals who have spent a minimum of two years in jail and only for a certain period of time. See Hugo Brady, *The EU and the fight against organised crime*, London: Centre for European Reform, April 2007 (= CER Working Paper), p. 21.

41 Brady, note 40, p. 21.

42 Brady, note 40, p. 22.

43 Brady quotes here words from the Justice and Home Affairs Council of 15.2.2007, Brady, note 40, p. 22.

JHA work done in the EU. The EU's decision-making rules in criminal justice and policing "are simply too cumbersome".⁴⁴

Some countries did not want to sign up to other parts of the Prüm Treaty. One example is the United Kingdom, which actually has the biggest DNA database in the EU. It did not want to include provisions for cross-border policing or guidelines for the use of air marshals. But Brady suggests that the Schengen-area countries may well go ahead and adopt these ideas for more sophisticated police co-operation in the near future (as one can already notice in Table 213). According to Brady, "the Prüm experience is an important case study for the future of police co-operation in the EU".⁴⁵

Franklin Dehousse and Diane Sifflet take up another point. The signatories of the Prüm Treaty wanted to accelerate JHA cooperation in several specific areas which they regarded to be essential. In doing so, they "suddenly discovered the advantages ... of classical international treaties as compared to the mechanisms of the European Union".⁴⁶ According to Dehousse and Sifflet, the Prüm experience constitutes an alarm signal about the increasing "heaviness" of the decision-making processes in the EU during the last ten years. For them, the Prüm Treaty has established an important precedent. There seem to exist now solutions for the increasing unwieldiness of the EU institutions which open possibilities for new initiatives concerning the institutional structure of the EU:

*La conclusion de ce traité constitue par ailleurs un précédent très important. Il montre que, à condition d'accepter le prix de la création de mécanismes complexes et superposés, il subsiste des solutions à la pesanteur grandissante des institutions. Un élément essentiel résidera dans l'apparition ou non d'un effet d'entraînement sur les institutions de l'Union. Si cet effet se manifeste, il indiquera qu'il existe des possibilités d'initiative nouvelle dans le système institutionnel.*⁴⁷

5.2. Comments by the European Data Protection Supervisor

In April 2007, Peter Hustinx, European Data Protection Supervisor (EDPS), published an Opinion on the plans to adopt the Council Decision which would

44 Brady, note 40, p. 23.

45 Brady, note 40, p. 22.

46 Dehousse/Sifflet, note 11, p. 212, translation Paul Luif.

47 Dehousse/Sifflet, note 11, p. 212.

make important parts of the Prüm Treaty part of EU law.⁴⁸ He did this *ex officio*, since no request for advice had been sent to the EDPS and only the Commission is obliged to consult the EDPS; consultation of the EDPS by member states is optional.

According to the EDPS, the initiative to make the “essential parts” of the Prüm Treaty “applicable to all Member States” is “unique”.⁴⁹ He contrasts the draft Decision with the Commission proposal for a Framework Decision on the principle of availability.⁵⁰ He notes that the latter proposal was prepared by the Commission at the time of the conclusion of the Prüm Treaty.⁵¹ In his opinion on the Commission proposal, the EDPS had already advocated that the principle of availability should be implemented by way of a more cautious approach, where the principle of availability should be limited and “only indirect access, via index data, should be allowed”.⁵² The EDPS therefore “welcomes” that the initiative for a Council Decision based on the Prüm Treaty “takes this more cautious, gradual approach as a way of implementing the principle of availability”.⁵³

The data protection framework of the draft Council Decision offers “in substance an appropriate protection”.⁵⁴ But the EDPS notes a number of shortcomings. He wants these deficiencies to be dealt by amending the draft Decision and/or “by including these elements in a Council Framework Decision on data protection in the third pillar”.⁵⁵ This latter point seems to be the main criticism of the EDPS, namely that there is still no general rule on data protection in the Third Pillar of the EU. There exists a Directive of the European Parliament and of the Council from October 1995 on the protection

48 Opinion of the European Data Protection Supervisor on the Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Slovenia, the Slovak Republic, the Italian Republic, the Republic of Finland, the Portuguese Republic, Romania and the Kingdom of Sweden, 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.

49 Opinion of the European Data Protection Supervisor, note 48, point 2.

50 See Proposal for a Council Framework Decision, note 29.

51 Opinion of the European Data Protection Supervisor, note 48, point 13.

52 Opinion of the European Data Protection Supervisor, note 48, point 24.

53 Opinion of the European Data Protection Supervisor, note 48, point 25.

54 Opinion of the European Data Protection Supervisor, note 48, point 74.

55 Opinion of the European Data Protection Supervisor, note 48, point 76.

of individuals with regard to the processing of personal data and on the free movement of such data,⁵⁶ but this Directive is only binding in the First Pillar. According to the EDPS, the Council of Europe instruments in this field (to which the Prüm Treaty and the draft Decision refer to) do not provide for the necessary preciseness and are not binding.⁵⁷

6. Concluding Remarks

The Prüm Treaty has most likely dealt with matters which were of relevance not only the signatories. One could not explain otherwise the quick reactions of the other EU member states which have either shown interest in signing the Treaty and/or demanded the insertion of most Prüm rules into EU law. This all happened much more rapidly than in the context of the Schengen agreements. It thus seems that the disapproving view of intergovernmental cooperation outside the EU in general (Emmanouilidis) and the negative remarks concerning the Prüm Treaty in particular (Thierry Balzacq et al.) cannot be supported by a factual analysis of the creation and implementation of the Prüm Treaty.

Enhanced cooperation, as it is regulated in the EU treaties, involves all important EU institutions but is rather cumbersome. Democratic legitimacy comes not only from the participation of relevant actors in the decision-making procedures of a political system. One important element of democracy is also its “output legitimacy”. The momentum of the Prüm process has probably to do with the perceived usefulness of most of the instruments it provides for the fight against various criminal activities.⁵⁸

56 OJ L 281, 23.11.1995, p. 31, last amended by Regulation (EC) No. 1882/2003, OJ L 284, 31.10.2003, p. 1.

57 The EDPS refers to the Council of Europe Convention, mentioned above on page 11. See Opinion of the European Data Protection Supervisor, note 48, point 60.

58 Reports in the media have helped in this respect. See e.g. the Associated Press news item by Constant Brand, EU Pushing Toward Shared Police Database, 15.1.2007 (as reproduced on the Webpage of the Washington Post): “Austrian Interior Minister Günter Platter said the [Prüm] agreement has made cross-border investigations easier by speeding up the transfer of information. Platter and [German Interior Minister] Schäuble said that German and Austrian police have had 3,000 successful DNA matches in national databases of unsolved crimes since December. Schäuble said he hoped to be able to include the data-sharing pact into EU law by the end of Germany’s six-month presidency in June.”

One can also give a more “philosophical” twist to the argument. The EU is a novel political system which does not replace the nation states but adds a supranational element. In such an untested environment, new pieces of legislation could incur negative effects and produce problems for (initially) unknown reasons. Small steps involving only a few countries could simplify a critical analysis of the factors that cause problems. If extensive modifications of rules which also involve a large number of actors turn out to be flawed, then the search for the reasons of failures could be difficult. Karl Popper’s trial and error process of incremental “piecemeal engineering” has perhaps some relevance for EU integration as well.

Annex

Table 3

Non-Nationals Convicted for Offenses/Crimes in Austria (Percentages of All Convictions)

	Youth	Adults
1975	3.3	10.9
1980	3.8	9.3
1985	5.3	8.8
1990	22.8	18.5
1995	21.1	20.7
2000	21.5	23.2
2001	21.9	23.7
2002	26.2	25.5
2003	33.5	27.0

Source: Statistisches Jahrbuch Österreichs 2005, p. 473.