Abstract:

This note addresses the question: Does the Treaty of Prüm, negotiated and signed by 7 Member States, respect the general principles of Community and Union law and in particular the principle of loyal cooperation derived from Article 10 TEC? What action can be requested by Parliament? It presents the content of the Treaty and clarifies why the Treaty may represent a countervailing force against the European Union’s area of freedom, security and justice. It shows that Prüm weakens the EU more than strengthens it, and under many circumstances, much is lost and very little is gained by curtailing the EU framework.
QUESTION:

Does the Treaty of Prüm, negotiated and signed by 7 Member States, respect the general principles of Community and Union law and in particular the principle of loyal cooperation derived from Article 10 TEC? What action can be requested by Parliament?
1. Introduction

On 27 May 2005, seven EU Member States signed an agreement in the German city of Prüm which marks a new step in cooperation in justice and home affairs. The signatory states to the Prüm Treaty are: Belgium, Germany, Spain, France, Luxembourg, Netherlands and Austria. The objective of the Treaty is to ‘further development of European cooperation, to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal migration, while leaving participation in such cooperation open to all other Member States of the European Union’.

This briefing note presents the content of the Treaty and clarifies why the Treaty may represent a countervailing force against the European Union’s area of freedom, security and justice. It shows that Prüm weakens the EU more than strengthens it, and under many circumstances, much is lost and very little is gained by curtailing the EU framework. In short, the Treaty of Prüm potentially undermines the principle of loyalty provided by Art. 10 TEC:

> Member States shall take appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

The note proceeds as follows. First, it outlines the problems raised by an approach to security outside of the EU framework. Second, it develops the argument that the Treaty of Prüm may not fully comply with the principle of loyalty set out by Art. 10 TEC. Third, the note puts forward recommendations as regards actions the Parliament could undertake.

2. The Treaty of Prüm: Aims and Contents

The aim of the Treaty is to help the signatories improve information-sharing for the purpose of preventing and combating crime in three fields, all of which are covered by provisions of EU Treaty: terrorism, cross-border crime and illegal migration.

However, Prüm breaks new grounds in cooperation in the area of internal security as it provides the signatories with certain rights of access to DNA only in repressive context (prosecution of crime), fingerprint data, personal and non-personal data, as well as vehicle registration data in both preventive and repressive context.

Further, the Treaty of Prüm increases law enforcement by allowing for ‘joint patrols and other operations in which designated officers or other officials […] from other contracting Parties participate in operations within a Contracting Party’s territory.’ In addition, ‘In urgent

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2 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, Prüm (Germany), 27 May 2005, Council Secretariat, Brussels, 7 July 2005, 10900/05.
3 Throughout this briefing, the terms Prüm Convention, the Convention, the Treaty of Prüm and the Treaty are used interchangeably.
4 Preamble of the Treaty of Prüm, p. 3.
situation, officers from one Contracting Party may, without another Contracting Party’s prior consent, cross the border between the two so that, within an area of the other Contracting Party’s territory close to the border [...] they can take any provisional measures necessary to avert imminent danger to the integrity of individuals.\textsuperscript{5}

3. The Method of Prüm and Its Implications

At the core of the Prüm Treaty is opposition to the view, held by many, that the European level should be dominant in security-related debates.\textsuperscript{6} The argument is that the Convention of Prüm creates a political rift in the construction of the EU area of freedom, security and justice. Indeed, the fracturing of the legal framework of EU objectives and their pursuit through agreements that escape the EU and engage only some of the parties has a profoundly negative effect on the logic of EU integration.

The first and most paradoxical aspect of the Preamble of the Treaty is how closely it is tied to the European Union. Even in the very first line it states: ‘the High Contracting Parties to this convention, being Member States of the European Union.’ The qualifying characteristic of the parties is not their sovereign right to enter into treaties with other sovereign states but rather the limitation which they have voluntarily accepted to that sovereignty by virtue of their membership of the European Union.

The third Preamble of the treaty reinforces this impression stating ‘endeavouring, without prejudice to the provisions of the [EU and EC treaties], for the further development of European cooperation to play a pioneering role.’ Thus, it is apparent that the participating Member States are fully aware that the action that they are taking by adopting the Prüm Treaty may be considered by some (including potentially the European Court of Justice) as inconsistent with their duties under the treaties.

The Preamble tells the reader that the Treaty is intended ‘to play a pioneering role in establishing the highest possible standard of cooperation, especially by means of improved exchange of information’ particularly in three fields, all of which are covered by provisions of the EU Treaty: combating terrorism, cross-border crime and illegal immigration. It goes on to clarify that the treaty leaves ‘participation in such cooperation open to all other Member States of the European Union’. In effect, the Treaty is proposing that this group of seven states will adopt the rules and practices for cooperation in these three fields and it will be open to other Member States to join in and follow the rules established by the seven if they so wish. In other words, the feeling that seven Member States wish to establish among themselves the rules and practices in the three fields without interference by the democratic and institutional structures of the EU nor by other Member States is reinforced by the next paragraph of preamble which states ‘Seeking to have the provisions of this convention brought within the legal framework of the European Union’, and in Art. 1(4) Basic Principles of the Convention it states ‘within three years at the most following entry into force of this convention, 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 [EU/EC treaties], with the aim of incorporating the provisions of this Convention into the legal framework of the European Union’.

4. Member States’ Obligations under Art. 10 TEC

The principle of loyalty, Art. 10 TEC, sets out two kinds of obligations, the first of which is positive: ‘Member States shall take appropriate measures, whether general or particular, to

\textsuperscript{5} The Treaty of Prüm, Articles 24 and 25. For a comment on all the measures introduced by the Treaty of Prüm, see Balzcaq, T., Bigo, D., Carrera, S., Guild, E., ‘Security and the Two-Level Game: The Treaty of Prüm and the EU Management of Threats,’ CEP Working Document, forthcoming.

ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community’. The second is negative: ‘They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty’. Expressed in other words, as Member States of the European Union, under the doctrine of the EC/EU treaties, in pursuit of the objectives of the treaties, including and most importantly, in this context, the completion of the internal market and the area of freedom, security and justice must take place within the treaties.7

Further, the principle of good faith implies the duty not to interfere with the operation of Community institutions. Title IV of the Treaty on EU acknowledges this duty, in relation to cooperation in the fields of justice and home affairs. ‘This is important’, as Temple Lang puts it, ‘because if such matters were dealt with outside the Community institutions, the safeguards for small Member States provided by the Commission and the Parliament would not function, and the right to judicial review for compatibility with Community law would be nullified.’8

Art. 10 TEC thus requires the Member States to act in good faith to achieve the objectives of the treaty (and by extension all the EC/EU treaties). Thus the room for manoeuvre as regards the conclusion of treaties among a small group of Member States or with third countries is highly circumscribed by the obligations to the EU which the Member States have accepted. To examine the extent to which the Treaty of Prüm infringes upon the principle of loyalty, the next section outlines different axes around which the Convention operates and draws their implications for the relationship between Signatories and the Community.

5. Prüm and the Principle of Good Faith

The Preamble of the Treaty of Prüm is misleading. It provides, inter alia, that the Convention aims to ‘further the development of European cooperation, to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal migration, while leaving participation in such cooperation open to all other Member States of the European Union’.9

At first sight, this provision is in full compliance with the positive obligation of Art. 10 TEC. However, under a closer scrutiny, it appears that in certain respects Prüm negatively impacts on EU, as explained below.

5.1. The exchange of data

Here, Prüm meets the Proposal for a Council Framework Decision on the exchange of information under the principle of availability.10 The following table presents a comparison of the two documents.

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8 Lang, J. T., op. cit., p. 60.
9 Preamble of the Treaty of Prüm, p. 3, op. cit.
Table 1. A brief comparative table on Prüm and the principle of availability

<table>
<thead>
<tr>
<th>Title</th>
<th>Nature of data</th>
<th>Data protection initiative</th>
<th>Who controls the data</th>
<th>Who accesses/processes the data</th>
</tr>
</thead>
</table>
| Prüm Convention | • DNA analysis (art. 2)  
• Fingerprint data (art. 8)  
• Vehicle registration data (art. 12)  
• Non-personal and personal data supplied in connection with major events (art. 13-15) | Contracting Parties (art. 34) | Contracting Parties via their national contact points (art. 4) | Contracting Parties’ national contact points (art. 3). Indirect access regime. |
• DNA profiles  
• Fingerprint  
• Ballistics  
• Vehicle registration information  
• Telephone numbers and other communications data  
• Minimum data for the identification of persons contained in civil registers | Regulatory Committee established pursuant the Framework Decision (point 9, preamble) | Member States’ designated authorities or designated parties (art. 4 and art. 8) | Equivalent competent authorities (i.e. police, customs and other authorities of Member States) as well as Europol (art. 6). Direct access regime is the principle. |

What is important is not whether the Principle offers more room for the exchange of data, but rather how this information is exchanged and on which grounds. Prüm challenges and tones down the Principle of availability promoted by the Commission. In the Hague Programme, the Commission proposed to substitute of the principle that data belongs to the state authorities (subject of the law to protect the data subject) and can only be transmitted to another Member State on the conditions established by the state that holds the information with the principle of availability. Under the latter, the authorities of any Member State would have the same right of access to information held by any other authority in the Union as applies to state authorities within the state where the data are held. Thus, the element of national settlement on the collection, retention and manipulation of data expressed in national constitutions is transformed into an EU-wide right of use of data. The national border is removed from the principle of data collection, retention and use. By contrast, Prüm creates a database whose use is restricted to the seven signatories. Prüm institutionalises a new electronic border between the seven signatories and the eighteen non-signatories. In this context, then, Prüm provokes a relapse of EU integration.

Prüm amplifies the tendency that, in security, more is better. An increase in the number of databases increases security. Yet, insecurity is not acute because law enforcement authorities do not share enough information, but because they share it badly in many different fora. This in turn generates the concern about the lack of any reference to other existing databases, and the lack of indication to the extent to which, if any, synergies will be established between data collected VIS (Visa Information System) and SIS II (Schengen Information System II), particularly when it comes to migration-related issues. Taken individually, these databases do not seem qualitatively different. Taken together, however, they create new patterns of action, and will tend to overlap and duplicate each other’s functions over time.
Finally, as regards the Non-personal and personal data supplied in connection with major events (art. 13-15), the competence of Prüm overlaps with the Council resolution on security at European Council meetings and other comparable events. For instance, Article 14 of Prüm provides that contracting Parties shall ‘provide one another with personal data if any final conviction or other circumstances give reason to believe that the data subject…poses a threat to public order and security.’ The Council resolution has already set out, in 2004, that ‘The information supplied may concern names of individuals in respect of whom there are substantial grounds for believing that they intend to enter to enter the Member State with the aim of disruption public order and security at the event or committing offences relating to events.’

5.2. The deployment of Air Marshals

To fight against terrorism, the Convention opens the possibility, pursuant to Chapter 3, to deploy sky or air marshals. By air marshals the Convention means ‘police officers or other suitable trained officials responsible for maintaining security on board aircraft.’ The phrase ‘or other suitable trained officials responsible for maintaining security’ is certainly too broad and gives a wide room for action to the Contracting parties. This leaves a door open for the States to decide the authority/authorities actually carrying out these functions. The possibility for the military or the private sector to get involved in this task is also critical regarding the accountability and democratic control of these armed security agents in planes. Art. 17 gives the power to the contracting States to decide for themselves to deploy “air marshals” or “security escorts” on aircraft registered in a contracting party. After 9/11 the US demands to arrange for armed air marshals to accompany some flights from the EU are well known. The introduction of this initiative has been subject to long discussions and to serious concerns on grounds of ‘liberty’.

Despite clear opposition to this security policy measure, especially by the Scandinavian EU Member States, the Prüm signatories have clearly seized the opportunity to provide a positive response to transatlantic security demands. The establishment of an air marshal programme among the seven Contracting States may have been considered the best solution in order to prevent the cancellation or disruption of flights to the US. The Convention therefore provides, outside the EU dimension, a general agreement on transport and aviation security. This opens once again serious questions regarding the compatibility of the Convention with the principle of solidarity and good faith as contained in the EC Treaty. It seems that the seven states have completely disregarded the current disagreement about this contested topic at EU level. It shows furthermore how this sort of intergovernmental cooperation tends to be (mis)used to easily pass and agree on a series of policy measures that would be very difficult to settle on under the EU framework.

5.3. Illegal migration

Illegal migration is at the centre of the Convention of Prüm. Here, too, it seeks to build on EU law regarding the operation of border officials outside the territory of the EU. Art. 20(1) provides that ‘on the basis of joint situation assessments and in compliance with the relevant provisions of […] Regulation 377/2004 […] on the creation of immigration liaison officers network, the Contracting Parties shall agree on the seconding of document advisers to States regarded as source or transit countries for illegal migration.’ In light of Art. 10 TEC, the good faith obligation of the Member States, is it not questionable whether a small group of Member States can seek to act under the auspices of an EC Regulation but outside its scope? (a) offensive to the guardian of the treaties, the European Commission, (b) setting aside the European Court of Justice which is responsible for interpreting EU law, (c) disrespectful of

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11 Council resolution on security at European Council meetings and other comparable events, 29 April 2004, 2004/C 116/06.

12 The Passenger Name Record (PNR) and the introduction of biometric technologies in passports of EU citizens represents similar critical responses to the American pressure. The ECJ has ruled that the EU handover of passenger data to US authorities should be annulled (Opinion of Advocate general Leger Affaire 317/04 Parlement européen contre Conseil de l’Union européenne).
the European Parliament which is entitled to co-decision in the adoption of legislation is this field and has battled long and hard to ensure that delegated powers even to the Council do not interfere with its prerogatives and (d) impractical in that the liaison officers of non-Prüm states are participating in the network and it would be rather difficult to determine when a liaison officer is acting under Prüm and when under the Regulation and thus engaging all the other liaison officers of the Member States or only those of the Prüm parties.

Art. 20(3) provides that in seconding document advisers, the parties may entrust one of their number with specific coordination tasks. Again, not only is this legally problematic but it is fraught with practical problems regarding the liaison officers of the 25 and their entitlement to information under the Regulation against the exclusivity which is at the heart of Prüm, reserving extra information for only the participating few.

Art. 23 provides for assistance with repatriation measures. Again, this area is the subject of a Council Decision (2004/573) and a Directive (2003/110). Thus all of the concerns expressed above about overlapping competences and lack of respect for Art. 10 TEC are also valid as regards this article. The provision calls for the Prüm parties to assist one another with repatriation measures including assistance in cases of transit. Participants shall inform one another of planned repatriation measures, in good time and give the others a chance to participate. Arrangements for escort and security are to be agreed separately. Also repatriation via another party’s territory is to be resolved by negotiation in compliance with the law of the state through whose territory the repatriation is to take place. A working group is established to assess the results of the operations and resolve problems.

A new element arises in this section which is important – the reference to the national law of the state namely, through whose territory action is taken. The principle that is being asserted is that of retention of sovereignty by the Prüm states over activities of repatriation occurring on their territory. In contradiction to some of the moves that are under consideration at the EU level that the decision of repatriation should have consequences across the common territory, this provision breaks up the common EU territory into its national constituent blocs once again for the purposes of determining the legality of repatriation. While this may be beneficial for a third country national who is being repatriated via a number of states as he or she may appeal repatriation under the national law of each of them separately, it does not advance EU integration much further. It will probably discourage any Member State planning repatriation via the territory of another party from pursing such a route as this is likely to be time consuming and fraught with difficulty.

Finally, members of Prüm have decided to set up a ‘technical group focusing on return issues [which] would be coordinated by France.’ How this group would work is not clear. For instance, would it operate in accordance to the rules set out by the Council Decision 2004/573/EC and by COM(2005) 391? More fundamentally, would it work under the supervision of or in parallel with the foreseen Special Representative for a common readmission policy?

6. Recommendations to the European Parliament

Let us preface our policy recommendation with a remark. It may be argued that that Prüm leaves open the possibility for the remaining 18 Member States to adhere to its rules and practices. This last point may turn out to be impracticable, however, for essentially two reasons. First, Prüm is just one Member State short of the number specified in the EU treaty

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14 Council Decision 2004/573/EC of 29 April 2004 on the organization of joint flights for the removal from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ L 261/28, 6.8.2004. On the appointment of a Special Representative for a common readmission policy, see the Presidency Conclusion of Brussels European Council, 4-5 November 2004. See also the Hague Programme 1.6.4. on Return and Readmission Policy.
as necessary to trigger the provisions on enhanced cooperation. Second, enhanced cooperation would have required an approval by a qualified majority in the Council of Ministers, and the EU Commission would have had to assess whether Prüm is compatible with other institutions governing the EU. Even if these conditions were met, however, there will still be no guarantee that the provisions defended by Prüm will be integrated in the Union as such. In fact, under the terms of the Treaty of Nice ratified in 2003, acts and decisions resulting from enhanced cooperation ‘shall not form part of the Union acquis.’

Further, as regard efficiency, without the participation of the Commission there is no mechanism to ensure even and consistent application of the provisions and thus the same problems which led to the need to move the Schengen acquis into the EU competence will reoccur. The Treaty of Prüm is not made under either the treaty on European Union or the treaty establishing the European Community. It is therefore very complex to draw a policy recommendation that will, itself, stems from either EC or EU law. Yet, we may start from a general principle: all Member States have the obligation to facilitate and contribute positively to the life of the Union. In this context, as we have shown, Prüm may well have adverse effects on the Community’s objectives. In short, the signatories may be in breach of the obligation of cooperation under Art. 10 TEC. The European Parliament's possibilities to act are not clear in such cases as the primary guardian of the treaties is the European Commission. However, the EP has taken steps in other cases (such as the failure to ensure the abolition of border controls on intra Member State movement after 1 January 1993) to force the Commission to protect the Union's interests.

Three possibilities are immediately available to the EP. First, the European Parliament may raise the issue in its annual general debate on the progress made in the fields of police and judicial cooperation in criminal matters. Second, the European Parliament may ask questions or make recommendations to the Council in this regards. For instance, the EP may request the Council to seek explanation from the Prüm signatory states as to how they see the interaction of the provisions of the Prüm Convention with EC law in the fields of illegal migration, data exchange and data control. These two actions are based on Art. 39 TEU. But the third possibility, based on Art. 226 TEC, is potentially stronger. Through questions and petitions, the European Parliament may ask the Commission to initiate Art. 226 TEC which provides that

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its reservations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

The nature of this enforcement procedure provides the European Parliament with powers to trigger judicial mechanism against Member States. This is both a credible and feasible way for the European Parliament to intervene in the very process that has sought to exclude it.

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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, Prüm (Germany), 27 May 2005, Council Secretariat, Brussels, 7 July 2005, 10900/05.

Council resolution 2004/C 116/06 of 29 April 2004 on security at European Council meetings and other comparable events.


