

# Prüm: A Model 'Prêt-à-Exporter'?

## The 2008 German–US Agreement on Data Exchange

**Rocco Bellanova**

### Abstract

A growing number of security policies are based on access to and exchange of personal data, frequently with an international scope. While transatlantic measures generally include the EU as a single actor, the last two years have seen a proliferation of bilateral agreements between the US and individual EU member states. These agreements usually seek to extend abroad a range of specific, internal security measures.

This paper aims at studying the position of relevant actors and their capacity to increase their power or to quell resistance during the process of extra-territorialisation. The paper assumes as a hypothesis that the set-up of security policies is readable as a 'plateau', a transversal field in which actors' ability to shape new configurations of actors and fields is a key asset for enhancing their relevance. The research investigates this hypothesis further by taking as a case study the conclusion, in March 2008, of a transatlantic agreement on data exchange between Germany and the US. The text of the agreement mirrors the wording of existing European instruments and thus seems to offer an appropriate occasion to analyse the process of extra-territorialisation of security policies.

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# PRÜM: A MODEL ‘PRÊT-À-EXPORTER’?

## THE 2008 GERMAN–US AGREEMENT ON DATA EXCHANGE

ROCCO BELLANOVA\*

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### Introduction

The practice of collecting personal data is becoming ever more widespread nowadays. The ability to manage personal data is perceived as one of the cornerstones of further developments in a widening range of domains (Stocker & Schöpf, 2007, pp. 10–12). Its growing importance is becoming very visible in the commercial sphere: sectors ranging from transport management to the entertainment business are increasingly asking for and relying on personal data. Yet, practices based on personal data access are also spreading in the public sector. Notwithstanding that the collection, storage and exchange of data is not new in public administration (Bennett & Lyon, 2008), it could still be argued that the last few years have seen an outstanding diffusion of such policies. These policies frequently have an international dimension and they are legally based on international agreements or supranational legislation. Gaining access to data seems to offer a solution to a wide spectrum of modern needs, fears and perceived threats. In particular, in a world that can be understood as increasingly “liquid”<sup>1</sup> and interdependent, accessing data could appear as the best way to secure mobility (Stirling-Belin, 2005; Ceyhan, 2005) and thus addressing, if not preventing, its related perceived threats: terrorism and transnational organised crime.<sup>2</sup>

The US is generally perceived as the main promoter of these security measures, and explicitly or implicitly, of their proliferation in different foreign systems. This has notably been the case for the passenger name record (PNR), a US initiative aimed at accessing the travel data of all passengers of US-related flights.<sup>3</sup> At the same time, EU countries are actively proposing

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<sup>1</sup> “Opening the way to the nomadic traffic and removing the few remaining blocks is, nowadays, the main goal of politics, as well as of wars” (Z. Bauman, *Modernità liquida*, Roma-Bari: Laterza, 2002, p. 10).

<sup>2</sup> “The post Cold War environment is one of increasingly open borders in which the internal and external aspects of security are indissolubly linked” (European Council, *A Secure Europe in a Better World, European Security Strategy*, presented by J. Solana, Brussels, 12 December 2003, p. 2). The European security strategy is based on the perception of an increasingly interconnected world, and it identifies among the key threats both terrorism and organised crime (pp. 3–5).

<sup>3</sup> Access to PNR data by security agencies was first the object of a series of agreements between the EU and the US (the latest being the 2007 EU–US Agreement, OJ L 204, 4.8.2007). Then it was partially introduced in agreements between the EU and Canada (2005 EU–Canada Agreement, OJ L 82/15, 21.3.2006) and between the EU and Australia (Council of the European Union, Draft Council Decision on the signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of EU-sourced passenger name record (PNR) data by air carriers

security measures based on data access. Since the drafting of the compensatory measures to the Schengen Treaty (OJ L 176, 10.07.1999) or the establishment of EURODAC (OJ L 316, 15.12.2000), political discussions and legislative proposals have focused on creating databases,<sup>4</sup> on exchanging information among law enforcement agencies<sup>5</sup> and on collecting data by electronic communication.<sup>6</sup> More specifically, since the launch of the Hague Programme in 2004 (OJ C 53, 3.3.2005, pp. 1–14), data access has become a major issue and a driving force in the European Area of Freedom, Security and Justice. Furthermore, as this paper argues, European ministries of justice and interior affairs, with the support of foreign affairs ministries, are becoming very proactive in spreading such security measures at the international level. Finally, it is important to recall that at the transatlantic level, the conclusion of international agreements on access to data such as PNR or financial data (Council of the European Union, 2007d), seems to have not only an intrinsic value as a tool in the so-called ‘fight against terrorism’, but also a highly political value as a form of external cooperation (Council of the European Union, 2008a).

## 1. Hypothesis and case study

This study aims at analysing the position of relevant actors and their capacity to increase their powers or to quell resistance during the process of extra-territorialisation of security measures based on data access.<sup>7</sup> It deals with the process of extra-territorialisation of the Prüm Treaty, a European set of security measures enhancing, inter alia, the exchange of personal data. Given the series of legal instruments developed on the basis of the Prüm Treaty provisions, the paper questions the creation of a ‘Prüm model’ and analyses its features in order to outline and discuss a possible model of extra-territorialisation.

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to the Australian Customs Service, Doc. 9508/1/08 REV 1, Brussels, 2008(c)). It has also been echoed by a European Commission proposal (European Commission, *Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes*, 2007/0237 (CNS), Brussels, 2007).

<sup>4</sup> See the Regulation on the development of the second generation Schengen Information System (SIS II) of 6 December 2001, (EC) No. 2424/2001, OJ L 328, 13.12.2001. See also European Commission, *Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas*, COM(2004) 835, Brussels, 2004; and European Commission, *Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences*, COM(2005) 0600 final, Brussels, 2005(a).

<sup>5</sup> See for example the so-called ‘Swedish proposal’: Council of the European Union, 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 European Union, OJ L 386, 29.12.2006 (2006a, pp. 89–100).

<sup>6</sup> See Council of the European Union, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105 13.04.2006 (2006b).

<sup>7</sup> The process of extra-territorialisation is defined in this study as the extension or the diffusion of the same or a similar measure in other legal settings.

The conclusion of an international agreement between Germany and the US on the exchange of personal data offers an interesting and challenging case study.<sup>8</sup> It is the first case in which a security measure initially developed within the European context has been ‘exported’ to the US. Furthermore, in the months following the conclusion of the US–Germany Agreement, other EU member states signed similar agreements, creating a sort of ‘ping-pong’ effect of extra-territorialisation and confirming the idea that some actors have the ability to propose security measures as a response to other actors’ non-security needs, such as admission to the US Visa Waiver Program (VWP). Lastly, given its geographical scope and wording based on intra-European and EU legal instruments, it provides scholars with the possibility to analyse how measures are set up and promoted in different fields, how measures change and the resulting potential impact in terms of power shifts and protection of fundamental rights.

The research assumes as a hypothesis that the set up of security measures is readable as a plateau, a transversal field in which actors’ ability to shape new configurations of actors and fields is a key asset to enhancing their relevance.<sup>9</sup> The most successful actors are those who can easily create new fields, move across the existing ones as well as generate multiple initiatives and different alliances in order to retain a reference position in several fields. Therefore, addressing such a hypothesis implies the analysis of how security measures are established: the context, the main actors and fields involved, their relations, the content of the measures and where the increase of power or resistance occurs.

Such a study should also provide initial insight into the main risks and distortions generated in the course of power struggles among actors. This seems especially important, because security measures based on data access tend to give rise to criticism and issues. Among these are questions of the relations of European institutions and the process of Europeanization as well as the safeguard of fundamental rights and data protection.

## 2. Towards a Prüm model?

On 11 March 2008, the Federal Republic of Germany and the US signed an international agreement on enhancing cooperation in preventing and combating serious crime.

This agreement provides for the exchange of a wide range of personal data, notably including fingerprints, DNA and other sensitive data. As stated in the preamble,<sup>10</sup> the agreement follows

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<sup>8</sup> See the Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America (Washington, D.C., 11 March 2008) on enhancing cooperation in preventing and combating serious crime (hereafter ‘US–Germany Agreement’ or ‘transatlantic agreement’).

<sup>9</sup> This hypothesis is partially inspired by the reflection of U. Beck on the reinforcement of interior ministries’ powers through international cooperation among them (“The Terrorist Threat, World Risk Society Revisited”, *Theory, Culture & Society*, Vol. 19, No. 4, 2002). It is also based on the notion of “champ” of P. Bourdieu (*Risposte: per una antropologia riflessiva*, Torino: Bollati Boringhieri, 1992, pp. 66–83) and the “two-level game” theory of R.D. Putnam (“Diplomacy and Domestic Politics: The Logic of Two-Level Games”, *International Organization*, Vol. 42, No. 3, 1988). Although the notion of ‘plateau’ as expressed in this paper presents several differences from the concept of G. Deleuze and F. Guattari, there is a common point in the conception of a plateau as a sort of transversal field, including, overlapping and linking several different fields: “We define ‘plateau’ as any multiplicity which can be bonded to others through superficial subterranean roots, in a way to form and expand a rhizome” (*Mille plateaux, Capitalisme et schizophrénie 2*, Paris: Les Éditions de Minuit, 1980, p. 33).

<sup>10</sup> See para. 4.

the example of the Treaty of Prüm<sup>11</sup> and thus seems to reinforce the idea of the success and diffusion of what could be called a ‘Prüm model’.

In fact, since the conclusion of the Prüm Treaty in May 2005 (Council of the European Union, 2005), some governments have been promoting the Prüm Convention as an EU-wide tool to be formally proposed and adopted within the EU framework. Simultaneous with the adoption of some aspects of the Convention under EU law, has been the further promotion of the Prüm Treaty as a model, this time within the transatlantic framework. Meanwhile, and despite some provisions being on course for adoption at the EU level, several member states have joined the ‘Prüm club’ and others have declared their interest.<sup>12</sup> The reasons for this rather astonishing success seem to lie especially in the proactive role of the German government – and a strong continuity between two governments and two interior ministers of different political orientations – as well as in the appeal of its provisions. Moreover, since its very beginning the Prüm Treaty and its EU transposition has been a major issue not only of the debate on police cooperation and data exchange (EDPS, 2006 and 2007), but also of Europeanization and its values and rules (Apap & Vasiliu, 2006; Balzacq, 2006a and 2006b).

Given such an interesting history and EU-wide implications, as well as its strong echoes in the US–Germany Agreement, it is worth advancing a rough analysis of what could be the Prüm model. A tentative draft can offer insight into the issues of international police cooperation and the extra-territorialisation of security measures. Additionally, it can provide a first overview of the new configuration between power and resistance. Finally, it aims at assessing the possible consistency of the initial assumption of the working paper and stimulating further analysis and discussion.

In order to sketch the features of the Prüm model, the rest of the paper compares the contexts and the contents of three instruments, identifies the main actors and analyses some key provisions. It offers an initial overview of the resistance already encountered by the agreement and some concluding remarks.

### 3. Contexts: Transition periods?

All the Prüm-based instruments have been discussed and concluded in a mixed context, made up of institutional pushes and discussions towards integration and political statements as well as speeches on the so-called ‘variable geometry approach’ (Dehousse et al., 2004 and Dehousse & Sifflet, 2006). The Treaty was signed merely two days before the French referendum on the European Constitution, and the German initiative (General Secretariat of the Council, 2007b) was presented at the same time as the negotiations on the Lisbon Treaty. Both initiatives have been presented as an opportunity for achieving greater European cooperation, and even if this concept has been challenged by numerous critics, it has frequently been used and accepted by policy-makers at the European and national levels.

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<sup>11</sup> See the “Treaty 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” (‘Treaty of Prüm’), (Prüm, 27 May 2005), hereafter also ‘Convention’ and ‘Treaty’.

<sup>12</sup> Italy was the first non-Prüm country to sign a declaration of intent to join the group (Repubblica Italiana, Dichiarazione di intenzione di adesione al Trattato di Prüm, Berlino, Berlin, 2006). It was followed by three other countries by the end of 2006: Slovenia, Portugal and Finland. During the first months of 2007, at least other three further member states asked to join – Hungary, Bulgaria and Romania. Among them, Hungary and Finland had already signed the agreement by the end of 2007.

The conclusion of the negotiations on the US–Germany Agreement occurred in the background of a transition period in Europe, related to the adoption of the Lisbon Treaty and its process of ratification. Besides the purely ‘internal’ European aspects of transition, the context of transatlantic relations between the US and EU member states and institutions is relevant. In the recent years, measures concerning data access have climbed up the transatlantic agenda. Security and visa issues are among the main topics of discussion at both the international level, with US pursuing an active policy of further data access and bilateral diplomacy, as well as the internal level, with a potential clash on the defence of member state and Commission prerogatives and powers. All the transatlantic agreements have provoked fierce struggles in the field of European institutions, as demonstrated by the PNR<sup>13</sup> and SWIFT dossiers, on both the content and the form. In 2008, the legitimacy of the European Commission as a leading actor in transatlantic relations was stressed between the activities of the High Level Contact Group (Council of the European Union, 2008d), paving the way to a possible, transatlantic data-protection agreement (De Hert & Bellanova, 2008), and Eastern European member states negotiating bilateral agreements in order to enter into the US VWP.<sup>14</sup> Such a picture seems to confirm the idea that the US–Germany Agreement entered the transatlantic and European arenas at a very delicate moment. Therefore, in line with what had already happened at the time of the conclusion of the Prüm Treaty, the US–Germany Agreement and its promoters were immediately successful in its diffusion. Seven months later, the text of the US–Germany Agreement had been codified as a ‘standard transatlantic agreement’ between the US and non-VWP EU member states.<sup>15</sup>

The first extra-territorialisation of (parts of) the Prüm Treaty into the EU framework and the subsequent ping-pong, transatlantic extra-territorialisation appear to confirm the idea that a prominent feature of the Prüm model is its ability to present itself as a quick and effective solution for international cooperation as well as a ‘prêt-à-exporter’ model. The idea of transposing the Prüm Treaty within the EU framework is already declared in the preamble and in the first article of the Convention.<sup>16</sup> It is now echoed by the preamble of the transatlantic

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<sup>13</sup> See the Agreement between the European Community and the United States of America (Washington, D.C., 28 May 2004) on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ L 183/84, 20.5.2004. See also the Agreement between the European Union and the United States of America (Luxembourg and Washington, D.C., 16–19 October 2006) on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, OJ L 298/29, 27.10.2006.

<sup>14</sup> See the Memorandum of Understanding between the Ministry of the Interior of the Czech Republic and the Department of Homeland Security of the United States of America (Prague, 26 February 2008) regarding the United States visa waiver program and related enhanced security measures. See also the Agreement between the Government of the Republic of Hungary and the Government of the United States of America (Budapest, 20 May 2008) for the Exchange of Screening Information concerning Known or Suspected Terrorists.

<sup>15</sup> At the time of writing, at least six other Eastern European member states have signed a similar agreement: Hungary, Estonia, Lithuania, Latvia, Czech Republic and Slovakia.

<sup>16</sup> The 4<sup>th</sup> para. of the Prüm Treaty Preamble states, “[s]eeking to have the provisions of this Convention brought within the legal framework of the European Union”, and then Art. 1(4) further defines the guidelines for transposition:

Within three years at 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 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.

agreement (4<sup>th</sup> para.). Both governments state their expectation that the agreement will be considered a model for similar future agreements (5<sup>th</sup> para.). Apart from such a declaration, the European and transatlantic contexts themselves offer this transatlantic agreement the occasion to set the basic model. The active US diplomatic policy favouring bilateral agreements (such as the 2008 US–Czech Republic Memorandum of Understanding and the 2008 US–Hungary Agreement) on data access measures as well as the strong interest of Eastern European member states in taking part in the VWP provides fertile ground for reproducing the model. Furthermore, the previous adoption of a Prüm system at the EU level could push several member states towards adopting similar agreements at the transatlantic level. Obviously, such a political, juridical and diplomatic choice would have consequences for the conception and shape of transatlantic security and data protection relations as well as the concept of Europeanization itself. Given a certain proliferation of agreements and the lack of a common framework, it could give rise to a sort of piecemeal legislation that is built around pivotal governments and agencies, rather than centrally coordinated (De Hert & De Shutter, 2008).

#### 4. Contents and core provisions: Which core? Which provisions?

The Prüm Treaty covers a wide range of matters. It promotes the exchange of DNA, fingerprint and vehicle registration data (Arts. 2–12). It organises the supply of data for security management during major events (Arts. 14–15), as well as the sending of data for anti-terrorism purposes (Art. 16). It reinforces police cooperation in the field, allowing for intervention by foreign agents within national borders (Arts. 24–32) and the use of ‘air marshals’ (Arts. 17–19). It also deals with immigration issues such as repatriations and the control of fake documents (Arts. 20–23). The Treaty also provides for an ad hoc data-protection framework, based on existing legal instruments (Arts. 33–41). This broad scope of provisions had already been subject to reduction in the wording of the first two draft Council Decisions aimed at transposing the Treaty within the EU framework (General Secretariat of the Council, 2007a & 2007b). In particular, sensitive issues like cooperation on illegal immigration and air marshals were withdrawn from the proposed text. The scope of the Treaty was even further reduced between February and July 2007 by Council discussions, resulting in the exclusion of Art. 25, “Measures in the event of imminent danger”. Since December 2006, some documents<sup>17</sup> as well as officials have begun to refer to the transposition of the ‘core parts’ of Prüm. *Ex post*, the core parts could be defined as the provisions coinciding with the text of the Council Decision (Council 2007a; Guild, 2007). This covers the articles related to all forms of data exchange, data protection and police cooperation. Data exchange provisions were generally considered the most important and the most controversial aspects. Yet, it could be difficult to argue that other provisions were not originally felt to be part of the ‘core’ or at least important for specific member states and agencies. The harsh debates over the inclusion of “Measures in the event of imminent danger”

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<sup>17</sup> See the Joint Declaration of the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Republic of Finland, on the occasion of the Meeting of Ministers on 5<sup>th</sup> December 2006 in Brussels, within the framework of the Treaty 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 (Treaty of Prüm), Brussels, 5 December 2006. See also Council of the European Union, Note from the Presidency to the Coreper/Council, Integration of (parts of) the Prüm Treaty into the Union Legal Order, Doc. 6003/07 CRIMORG 26 ENFOPOL 17, Brussels, 5 February 2007(c).



seem to demonstrate this idea, as well as the tendency of member states to sign the Prüm Treaty even if some parts were in the process of being adopted at the EU level (Bellanova, 2008).

Compared with the Council Decision, the transatlantic agreement seems to go a step further in the process of lightening the text: the agreement focuses entirely on setting up a system of data exchange. Therefore, the agreement has drawn from the very core of Prüm and its specific added value – the ‘hit/no hit’ system for sharing DNA and fingerprint data (chapter 2 of the Council Decision). One could say that, with two significant exceptions discussed below, all the data sharing provisions have been deeply inspired or directly cut and pasted from the 2005 Prüm text.

The focus on data sharing could show the significant relevance acquired by such practices and forms of cooperation. It also suggests the tendency for the core of the Prüm model to be reshaped in order to restrain possible debates with strong actors, such as member states with veto powers over adoption at the EU level, or to attract new actors and enter new spheres as in the case of transatlantic relations. Moreover, the potential negative aspects of losing some core provisions of the 2005 Prüm agreement seem contained by the diffusion of the model across a variety of fields. Certain differences could even strengthen the appeal of the model by attracting new actors to previous and more complete agreements. Indeed, the contemporary and crosscutting presence of the three different legal instruments, with their diverse memberships, permit some actors to retain a certain power over multiple and parallel domains.

## 5. Actors and membership

The last point in the discussion above offers the occasion to identify the main actors involved in the Prüm model. The negotiations of the Prüm Treaty developed during the period 2003–05, and involved a limited number of member states. Seven countries finally signed the Convention: Germany, Austria, Belgium, the Netherlands, Luxembourg, France and Spain. The last two countries had a limited say, however, because they joined the core group only some weeks before the signature. This initial membership prompted some critics, and later on many supporters, to refer to Prüm as ‘Schengen III’ (Balzacq et al., 2006). According to interviews conducted by the author during the preparation of a previous study (Bellanova, 2008), within member states the main actors have been the ministries of interior and justice, often supported by those of foreign affairs. Apart from them, very few actors have had the possibility to intervene officially in the discussions. Data protection authorities were quite marginalised, with the partial exception of the German and French authorities (HoL, 2006b). The European Commission was even working on a parallel initiative covering the principle of availability (European Commission, 2005c). The European Parliament was formally involved only two years later, at the time of the presentation of the German initiative in February 2007. Still, since its signature in May 2005, Prüm has started to acquire growing attention, as well as critics, from a considerable share of the potential stakeholders: EU institutions, European and national data protection authorities (AEPD, 2005; CNIL, 2006; EDPS, 2006 & 2007), national parliaments (Deutscher Bundestag, 2006) and civil society (Balzacq et al., 2006). Notwithstanding this strong interest, only a few actors have had the possibility to retain some power over the entry into force of the Treaty or its transposition. For example, the legal structure of decision-making under the third pillar weakened the power position of the European Parliament (European Parliament, 2007), leaving all the powers of control to national parliaments (Guild & Geyer, 2008).<sup>18</sup> This concentration of the policy-making in the hands of executive branches and the

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<sup>18</sup> The legislative initiatives under Title VI of the Treaty of the European Union (TEU), “Provisions on Police and Judicial Cooperation in Criminal Matters”, undergo a process of decision-making that leaves to the European Parliament a mere power of consultation. In fact, the adoption of instruments such as

little room left to parliamentary debates provoked criticism amidst the negotiations, which were additionally accused of being held behind “closed doors” (HoL, 2006a).

All throughout this process, the German government, and notably the ministries of interior and justice, seems to have maintained a pivotal position. It was able to capitalise on the interest of other governments and institutions, and it showed a strong capacity to present both initiatives as the best and only way to further integration. The conclusion of the transatlantic agreement seems to reinforce the idea of the great role and ability of the German government in promoting the Prüm model. One could also assume that German ministries were the actors that possessed the best capacity, and maybe the stronger motivation, to move on and across different issues and through different channels. This ability reinforced a powerful position on all the fields. For example, one should consider the fact that other member states are concluding similar agreements on the exchange of DNA and fingerprint data, implementing the same German system of data exchange. Building a parallel system would be both expensive and redundant, especially if all potential partners have already accepted and developed a common one. The analysis on actors and membership helps to define another feature of the Prüm model: it is not just an instrument of governance, but a semi-open configuration of relations among actors and fields, originally designed to leave to some actors a major capacity to decide how and when to open the structure or to resist external pressures.

## 6. Divergences among the provisions of Prüm instruments

Before presenting and discussing the resistance to the conclusion of the transatlantic agreement, and thus to this segment of the process of extra-territorialisation, it is important to complete the tentative sketch of the Prüm model by comparing some key provisions of the three Prüm instruments. Such a comparison aims at offering an assessment of new increases in powers according to the text of the transatlantic agreement.

As previously stated, the preamble of the agreement underlines the direct influence of the Prüm Treaty.<sup>19</sup> Even so, a close comparison reveals some meaningful differences. In particular, at least four other divergences deserve to be mentioned.<sup>20</sup>

The first two divergences highlight the fact that in the last redefinition of the core provisions, the powers concerning data exchange increased considerably.

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framework decisions (Art. 34(2)(b) TEU), Council decisions (Art. 34(2)(c)) and conventions (Art. 34(2)(d)) imply only consultation with the European Parliament (Art. 39(1)). For an insightful analysis of the modifications to such a scenario under the Lisbon Treaty, see S. Carrera and F. Geyer, “The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice”, in E. Guild and F. Geyer (eds), *Security vs. Justice? Police and Judicial Cooperation in the European Union*, Aldershot: Ashgate, 2008, pp. 289–307.

<sup>19</sup> The 4<sup>th</sup> para. of the Preamble states, “[f]ollowing the example of the Treaty of Prüm”.

<sup>20</sup> Surely a deeper analysis is needed to detect and assess other divergences. For example, apart from the lack of provisions on vehicle registration data, which is obviously linked to geographical evidence, other issues that deserve more thorough analysis are the differences entailed in and future implementation of DNA-related provisions (Art. 7–9). At present, Art. 24 on “Entry into force” explicitly excludes the exchange of DNA data unless implementing agreement(s) have entered into force. Given the extreme sensitivity of such data, a real assessment of such provisions can only be done on the basis of implementing measures. Here it can just be noted that no automated comparison of DNA and no collection of cellular material or supply of DNA profiles (Arts. 4 and 7) are provided for in the text of the transatlantic agreement.

- Art. 10 of the agreement concerns the “Supply of personal and other data in order to prevent terrorist offences”. It echoes Art. 16 of both the Prüm Treaty and the Council Decision, and profoundly extends its scope. The supply of personal data remains allowed even on a spontaneous basis, but the extent and quality of personal data that can be sent is greater. To the list of categories of data provided in Art. 16(2) – surnames, first names, date and place of birth, description of the circumstances giving rise to the belief of terrorism involvement – the following data are added: former names, other names, aliases, alternative spelling of names, gender, current and former nationalities, passport number, numbers from other identity documents and fingerprint data. Finally, para. 6 also partially integrates and extends the scope of the wording of Art. 13 of the Prüm Convention, “Supply of non-personal data”. The supply of “[n]on-personal, terrorism-related data” is no longer limited to the security management of major events.<sup>21</sup>
- Art. 12 of the agreement covers the “Transmission of Special Categories of Personal Data”. This article is completely new and it explicitly admits the possibility, under suitable safeguards that seem still to be defined, of providing sensitive data. Even if para. 1 limits the supply of such data to the stipulation that “only if they are particularly relevant to the purposes of (this) Agreement”, it also establishes a very comprehensive list of categories of data: “personal data revealing racial or ethnic origin, political opinions or religious or other beliefs, trade union membership or (concerning) health and sexual life”.

Two further divergences focus on the other aspect of the core provisions of the Prüm model: data protection.

Arts. 11 to 18 of the agreement provide the framework for data protection. Here the Prüm Treaty and the Council Decision texts have been a minor source of inspiration. While the data protection framework of the Prüm Treaty greatly relies on security and on the architecture of the system itself,<sup>22</sup> it also provides a juridical set of references and safeguards, within both national and international law (Arts. 34 and 40). In comparison, the new transatlantic agreement focuses even more on a (future) technical approach to security with the risk of marginalising juridical guarantees. This could be linked to the different juridical and institutional approaches to data protection on the two sides of Atlantic (Council of the European Union, 2008d) and merits further and deeper analysis. Nevertheless, it is possible to point out at least two differences, more specifically two elements that are lacking in the new text.

- Art. 40 of the Prüm Treaty, literally translated into Art. 31 of the Council Decision, defines the data subjects’ rights to information and damages. Among these rights, only that concerning the data subjects’ right of access has been maintained in the transatlantic text. The second part of Art. 40(1), providing for the possibility to lodge a complaint to “an independent court or a tribunal” is not present. Furthermore, the rights of access of the para. 1 of Art. 17 are severely limited by a series of exceptions listed in para. 2.<sup>23</sup>
- The second difference is the lack of reference to the role of data protection authorities. Indeed, in reading Art. 15(1) one could wonder whether this lack of reference is not part

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<sup>21</sup> See Art. 10(6) of the US–Germany Agreement.

<sup>22</sup> See the Prüm Treaty, chapter 7, in particular Arts. 37–39 as well as the provisions on the automated search system for DNA and fingerprints in chapter 2.

<sup>23</sup> Art. 17(2) states, “[s]uch information may be denied in accordance with the respective laws of the Parties, including if providing this information may jeopardise: (a.) the purposes of the processing; (b.) investigations or prosecutions conducted by the competent authorities in the US or by the competent authorities in Germany; or (c.) the rights and freedoms of third parties”.

of a shift of power in favour of government agencies. For example, the provisions of Art. 15 set up “a record of the transmission and receipt of data communicated to the other party”. More precisely, this record shall serve not only to ensure the effective monitoring of data protection and data security, as is the case in the texts of the Prüm Treaty and the Council Decision, but also to “enable the Parties to effectively make use of the rights granted to them according to Articles 14 and 18”. The rights of Arts. 14 and 18, “Correction, blockage and deletion of data” and “Information”, are state agency rights and not explicitly those of independent authorities.

It is worth remembering that these divergences could stem from the specific nature of US legislation (De Hert & Bellanova, 2008, pp. 13–20). Still, the apparent shift in the powers of control and supervision as well as the reduced set of data subjects’ rights highlight once again the difficulties of reaching agreements on data access and exchange with the US in the absence of a European and transatlantic framework for data protection covering data used for security purposes. Therefore, the decision to continue the process of extra-territorialisation seems strongly motivated by the will to reinforce the capabilities of state and law enforcement agencies.

## 7. Resistance to the ‘Prüm model’?

On the basis of an initial round of interviews, published documents and press releases, it is possible to identify a primary layer of resistance to the ratification and entry into force of the transatlantic agreement. At the time of writing, German actors are animating the main points of resistance: several political parties, some trade unions, the federal data protection authority and an association of German civil rights and privacy activists. Such a picture is clearly not exhaustive for three reasons: the documentation is still poor and generally not translated, and direct interviews require a longer period of research; the research is focused on Germany, because a preliminary overview of US sources has brought few if any results; finally, other layers of resistance, especially legal constraints, could arise later.

As was the case when the Prüm Treaty was concluded and later when the Council Decision was first adopted, the main line of possible resistance is national parliaments. Notably, it is the German parliament (Deutscher Bundestag) that is called upon to discuss and ratify the transatlantic agreement. The assent of the US Congress does not seem to be called for by the legal form of the agreement, nor is modification to the present legislation required.

According to an interview with the legislative assistant to the Free Democratic Party (FDP) speaker for policy and the interior,<sup>24</sup> all the parties making up the opposition in the German parliament have voiced criticism of the government initiative. The FDP and the Green Party have separately lodged a motion with the government. The motion of the FDP concentrates on seven shortcomings of the transatlantic agreement and asks the government to intervene on six points (Deutscher Bundestag, 2008). The shortcomings refer to the lowering of data protection guarantees if compared with the Prüm Treaty, as related to the US legal framework of data protection as well as the negotiating atmosphere of closed doors and government denials to the national parliament. Indeed, according to the same interview, even if the German Bundestag has no explicit right to be associated with international negotiations, it nonetheless has a right to be correctly informed. The government infringed this right earlier when it had been asked about negotiations with the US on data sharing and it denied any activity. Among the points raised,

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<sup>24</sup> Derived from an interview with Maja Pfister, Legislative Assistant to Gisela Piltz (MP), Speaker for Policy of the Interior in the Parliamentary Group of the FDP in the Deutscher Bundestag, 29 October 2008.

the most important ones are proposals of amendment to the text, with a view to improving data protection, limiting the exchange of sensitive data, specifying the purpose of the agreement and keeping the parliament informed.

Despite the resistance of opposition parties, the present government's parliamentary support can overcome any opposition by a number of votes. According to the above-quoted interview, the potential of the opposition to inspire greater numerical resistance to the agreement could advance if the trade unions continue their critical posture towards the agreement and lobby members of parliament with the Social Democratic Party (SDP). At present, the SDP is part of the coalition government, but it is highly sensitive to the pressures coming from trade unions. As previously stated, Art. 12 of the transatlantic agreement leaves open the possibility of transmitting sensitive data, including trade union membership. Discussion in the media and among trade unions about this article could become a driver of pressure on SDP members.

Even if no official report has been released by the German federal data protection authority, in a press release (BFDI, 2008) on the day that the agreement was signed, its president stressed the insufficient level of data protection in the agreement: “[D]ata protection remains far below the level which is [a] common standard when transferring data within Europe...an independent data protection control is missing, and rules on purpose limitation are insufficient.” The way in which the exchange of sensitive data is conceived is also lamented. An interview with the Data Protection and Freedom of Information Commissioner of Berlin, Alexander Dix, has highlighted the same concerns, adding to them criticism of the “illusion” of the exchange of legal data protection with technological data security, the tendency towards a maximisation of data exchange and the principal problem of decision-making behind closed doors.<sup>25</sup>

The last actor opposing resistance to the transatlantic agreement is the Arbeitskreis Vorratsdatenspeicherung [Working Group on Data Retention], an association of German civil rights and privacy activists. They were the first to publish the German version of the transatlantic agreement (in September 2008), and they have started a civil society campaign on this issue.<sup>26</sup> Their criticism centres on the lowering of data protection standards and the shortcomings of the US system of data and human rights protection.<sup>27</sup> They also identify several defaults on “basically all of the preconditions set out by the German Constitutional Court for interferences with...basic rights”.<sup>28</sup> They are asking the national parliament not to ratify the agreement, and in the event that ratification occurs, they plan to challenge it before the Federal Constitutional Court.<sup>29</sup> This last strand of opposition is particularly relevant in the study of resistance to security measures based on data access and their extra-territorialisation. Notwithstanding an apparent silence on the other side of the Atlantic in this specific case, generally non-governmental organisations (NGOs) in the US are very active in promoting resistance to such security measures, using communication and legal instruments (Bennett, 2008). In contrast, Arbeitskreis Vorratsdatenspeicherung's activities are one of the few European examples.

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<sup>25</sup> Derived from an interview with Alexander Dix, Berliner Beauftragter für Datenschutz und Informationsfreiheit, 29 October 2008.

<sup>26</sup> See “Alarming secret German deal on disclosure of personal data to the US published 2008-09-25”, Arbeitskreis Vorratsdatenspeicherung [German Working Group on Data Retention] (retrieved from <http://www.vorratsdatenspeicherung.de/content/view/253/1/lang,de/>).

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Derived from an interview with Patrick Breyer, a jurist and member of the Arbeitskreis Vorratsdatenspeicherung, 3 November 2009.

According to this first overview of resistance, it is important to note that several issues raised by ‘resistant actors’ are not dissimilar to those raised at the time of transposing parts of the Prüm Treaty within the EU legal framework. They both focus on the content (data protection, scope and aim of the instrument) and on the decision-making process (the behind-closed-doors style). Moreover, different actors voice the same criticisms, even if they propose different solutions, ranging from the renegotiation of the agreement to its non-ratification. The main novelty of these strands of resistance is the diffusion of the opposition, owing to the entry of new actors (such as NGOs) and to a critical posture of other actors (such as trade unions). Every actor has specific powers and limitations, as highlighted above in the case of parliamentary opposition. Even so, as interviews seem to confirm, flows of communication and expertise among them could play a role in linking their stances across various fields.

## 8. Final considerations and recommendations

The success of the Prüm model could confirm the initial hypothesis that security measures based on data access are also an occasion for some actors to increase their power in several fields. Moreover, the case study highlights parallelism and overlap with variable geometry governance. Both can act as a catalyst with respect to pending European and transatlantic issues. In spite of strong political and juridical appeal, such reconfigurations of power relations can ultimately risk creating distortions that are detrimental to the values and the forms of European integration: a lowering of citizens’ privacy and data protection rights, limited and scattered supervision of executive powers by independent authorities and parliaments, and ping-pong multilateralism as a shortcut for the diffusion of norms and policies.

This overview has also underlined that the Prüm model is not a fixed structure or package of provisions. While some provisions remain the same, the core is partially reshaped every time it generates a new legal instrument, by the subtraction of contested parts or enlargement of others. Yet, nothing is completely lost for those actors that are able to move along the different fields and levels – international, European and transatlantic. On the contrary, this could reinforce their position in every field because they can move across them. It is also worth stressing that the Prüm model remains a highly symbolic, political form of cooperation rather than an already working measure. Regardless of its proliferation in several frameworks, its implementation is still not complete even among the ‘founding members’.

Drawing from these final considerations, three sets of recommendations can be addressed to the actors involved:

- 1) At the launch of a new instrument, it is of overall importance to perceive and understand the main changes in terms of content, contexts and relations among the stakeholders. Every change, even if apparently minor, deserves close attention, because it is not without consequences and it risks triggering a different status quo in the related fields of fundamental rights, Europeanization and transatlantic relations.
- 2) The tendency towards a proliferation of security measures aimed at widening the extent of accessible data clashes with the ideas of both data minimisation (focusing on the quality, pertinence and necessity of data access) and simplification (clear rules on procedures and easily recognisable rights). These criteria should be of primary relevance for all the stakeholders, their interests and their activities. A more open structure of decision-making coupled with sound assessments of what is needed and what is at disposal could prove a step forward. Finally, further European coordination in transatlantic relations would limit the ping-pong multilateralism and its negative consequences.

- 3) Given the linkage between security measures and other key issues such as visas, other political priorities can play in favour of a rapid adoption of similar agreements within different national settings. These factors contribute to diffusing a model that, de facto, undermines resistance and possible amendments in other countries. Thus, to avoid this sort of self-fulfilling process and the relative marginalisation of layers of resistance, concerned actors should foster their ability to create new configurations of relations to retain their powers of decision and supervision. This point seems particularly important in the light of the future decision-making structure under the Lisbon Treaty, where closer collaboration between the European Parliament and national parliaments could become a major asset in reaffirming their roles.

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