

*From an early stage, the JHA research unit of CEPS has closely monitored and critically commented on the development of the Treaty of Prüm. On 23 November 2006, the treaty entered into force between Austria, Spain and Germany, providing a good occasion to take yet another look at its content, the most pressing questions and the current state-of-play.*

## **Getting local: Schengen, Prüm and the dancing procession of Echternach**

### **Three paces forward and two back for EU police and judicial cooperation in criminal matters**

**Elsbeth Guild and Florian Geyer**

The little towns of Schengen and Prüm lie only around a hundred kilometres away from each other. From an enlarged European angle, this distance is close to nothing. The geographical proximity might be the reason why some are inclined to see the Prüm Treaty of 2005 – following the Schengen agreement of 1985 and its implementing convention of 1990 – as just another positive step in the right direction, towards closer European cooperation of police and judicial authorities in insecure times. ‘Schengen III’, in fact, is often used as an informal label for the Treaty of Prüm. This treaty however bears a fundamental flaw: that of restricted intergovernmentalism, which (potentially if not in reality) smacks of disloyalty within an integrated EU policy by a small group of influential member states.

#### **What is it all about?**

On 27 May 2005, the Treaty of Prüm was signed by seven EU member states: Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain. The facilitated exchange of data concerning DNA files, fingerprints and vehicle registration is at the heart of the convention. In addition the signatory states have agreed upon further measures to prevent terrorist offences, such as information exchange without request as well as the deployment of Air Marshals in civil aviation; measures “to combat” illegal migration including the seconding of document advisers to source or transit countries for illegal migration and assistance with repatriation measures; closer police cooperation involving joint patrols, mutual assistance in connection with major events, disasters and serious accidents as well as the possibility of hot pursuit of suspects across borders without prior consent in order to avert imminent danger to individuals.

As stated in the Preamble, the objective of the treaty is “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”. Many provisions of the Prüm Treaty pay tribute to the European legal framework. Signatory states explicitly state that they intend for the content of the treaty to be “brought within the legal framework of the European Union” (Preamble). Yet they negotiated, formulated and signed the convention entirely outside the EU context – notwithstanding the fact that most of the provisions relate to policy fields included in the Third Pillar of the Treaty on European Union (TEU). Arts. 40 seq. TEU allow for enhanced cooperation, but set nevertheless certain prerequisites and conditions,

securing – among others – the involvement of the European Commission, the Council, the European Parliament and the European Court of Justice. This procedure has not been invoked by the Prüm group.

On 23 November 2006, the treaty entered into force between Austria, Germany and Spain, and ratification procedures are currently underway in the remaining signatory states. Ministers from the participating countries characterise the treaty as a pilot project for cooperation and as an open laboratory. As a consequence, several EU member states, e.g. Finland, Hungary, Italy, Portugal and Slovenia, have already signalled their interest in joining the group. According to official German sources, the number of potential candidates has risen to eleven. In addition, neither the Finnish Council Presidency nor the European Commission has voiced serious doubts about the legality or value of Prüm.

The indications are that 'Schengen III' is a valued undertaking, welcomed by many political actors and even by some independent analysts. Yet a closer look reveals that the Prüm approach cannot provide the way forward to the establishment of a manageable area of freedom, security and justice.

### **The setbacks of Prüm**

The concerns that have been expressed so far are less connected to the treaty's substantive arrangements, although the extensive exchange of information among law enforcement agencies without common legally binding data protection standards has been identified as an issue worth examining further. Nor does the discussion concentrate on the question of whether the data exchange mechanism foreseen by Prüm contravenes the "principle of availability" formulated in the Hague Programme of November 2004. Indeed the Prüm mechanism is understood as already realising the principle of availability. Yet, in our view, the differences are substantial.

The focus, instead, so far has been on institutional aspects and the intriguing question: are seven Member States free to turn their backs on 18 others, to decide among themselves on a model of police cooperation and data exchange only to return to the originally excluded rest to sell their product as the latest innovation in managing threats, a product that no responsible European government could nowadays afford to miss.

It is not a huge surprise therefore that the British House of Lords EU Select Committee is among the most visible critics of Prüm. As Lord Avebury stated during the Joint Parliamentary Meeting between the European Parliament and the National Parliaments on 2-3 October 2006:

What is peculiar about the G6 Group and the Prüm Group, which gave birth to the Prüm Convention, is that they seek to pre-empt EU decision-making processes, by making arrangements of their own, and offering them to other Member States on a take-it-or-leave-it basis.

However, while so far left-out member states still have the possibility to join the Prüm group, European institutions and in particular the European Parliament find themselves in the worst position. By reverting to an intergovernmental arena, the initiative ignores

European Parliament precisely at a time when it is achieving an increasingly central role in law-making in the field of justice and home affairs.

Not only is the European Parliament's role endangered. Prüm also produces negative externalities for the EU's area of freedom, security and justice as such by challenging trust, coherency and transparency:

The Treaty of Prüm undermines the EU's ability to become an efficient policy-making body in the field of security. To start with, by setting up exclusive and competitive measures that seek to address threats that affect the EU as a whole, it blurs the coherence of EU action in these fields. Second, by developing new mechanisms of security that operate above and below the EU level, it dismantles trust among Member States. Finally, by establishing a framework whose rules are not subject to Parliamentary oversight, the Convention impacts on the EU principle of transparency. These three principles – trust, coherency and transparency – are yardsticks against which Prüm should be assessed (T. Balzacq, D. Bigo, S. Carrera and E. Guild, *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, CEPS Working Document, No. 234, January 2006, p. 17).

Furthermore political reality has shown that national parliaments are not able to guarantee democratic control over purely intergovernmental agreements. Germany provides a telling example: after signing the Prüm Treaty in May 2005, it was not until April 2006, only a short time ahead of the FIFA World Cup, which was seen as a potential major security threat, that the government tabled a ratifying draft. With less than two months left, the draft was declared "urgent" leaving the *Bundestag* only some weeks for parliamentary scrutiny – including committee work – and merely thirty minutes for discussion and vote in the plenary. In the debate of 19 May 2006, coalition MPs did not even bother to speak but instead submitted their statements in writing. Consequently only three MPs from the opposition gave a short speech, concentrating less on the content of the Prüm Treaty but criticising – with justification – the entire procedure.

### **Schengen as a model for extra-Community enhanced cooperation?**

Justifying the benefits for all member states of an intergovernmental avant-garde of some member states, supporters of Prüm like to refer to the Schengen experience. What they do not mention, however, is that between Schengen and Prüm lie 20 years of further European integration. The institutional and political preconditions of 1985 can hardly be compared to those of 2005. In addition, it should not be forgotten that Schengen has been anything but a smooth and easy success story. Instead the entire Schengen process has been considered anomalous and a far cry from optimal deviation from the European legal framework. The fact that one of its core elements, the internal market without internal frontiers for goods, persons, services and capital, was in need of extra-Community, intergovernmental means in order to be fully realised, always threw an ambiguous light on the powers of European integration. Barely was the Schengen experiment off the ground when many commentators, both external and within national and EU institutions, stressed the need to tame and integrate it into the common European framework. When this task has been finally approached, the *Schengen acquis* had

already grown to a “Byzantine complexity” (E. Philippart, *A new mechanism of enhanced co-operation for the enlarged European Union*, Notre Europe Research and European Issues No. 22, March 2003, p. 4), posing considerable difficulties to adjust and join it to the *European acquis*. The most important lesson learned from this experience has been to prevent another Schengen. This is precisely why the Amsterdam Treaty further facilitated enhanced cooperation within the third pillar.

Bearing this legislative motivation in mind, it seems highly objectionable that member states should be free to cooperate independently outside the EU framework while aiming to establish enhanced cooperation in a policy field covered by EU Treaty provisions. One might well conceive Arts. 40 seq. TEU as *leges speciales* that prevent enhanced cooperation in police and judicial cooperation in criminal matters unless the numerous conditions, limitations and procedures foreseen by the EU Treaty are met. This is further strengthened by fact that the TEU provisions on enhanced cooperation are considered as a specific expression of the obligation to cooperate in good faith imposed on the member states by Art. 10 TEC. Avoiding the binding procedures of enhanced cooperation in the Third Pillar consequently may amount to a breach of the principle of loyalty.

### **Conclusion: Prüm - a substantive step forward?**

The Treaty of Prüm is an anachronistic attempt to revive the Schengen experience. When the first Schengen agreement was signed in 1985 – before the Single European Act, before Maastricht, Amsterdam and Nice – the European Communities were still far from being able to agree upon the concept of an area of freedom, security and justice. Undisputedly, the Schengen agreements turned eventually to pave the way to the current level of integration, however painfully. Justice and home affairs have in the meantime undergone a remarkable shift towards Europeanisation and integration. With the extension of EU competence both in the First and Third Pillars to all the activities covered by the Prüm Treaty, there is no excuse, as was in the Schengen period, for a lack of EU competence to move forward in this field. European institutions – and the European Parliament in particular – have gained a central role in this field. Prüm’s return to the inter-governmental arena bluntly ignores the EU’s post-Amsterdam Treaty constitution and appears as an unfriendly and disloyal act not only towards fellow member states, but even more towards Europe.

Right in the middle between Schengen and Prüm lies another little town, the town of Echternach. You have to pass it on your way from Schengen to Prüm. For centuries now, a famous procession has been held there every year. Accompanied by a simple melody, this procession is danced as follows: three paces forward and two paces back. All indications suggest that Prüm signatory governments missed the opportunity to pay Echternach a visit on their imaginary road from Schengen to Prüm. Had they stopped, perhaps they would have realised that not every step taken is a substantive step forward.

This contribution is a revised version of a commentary that will be published in the 3<sup>rd</sup> issue of the *Journal of European Criminal Law*.