SWP Comments

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From Schengen to Prüm

Deeper Integration through Enhanced Cooperation or Signs of Fragmentation in the EU?

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The convention on stepping up cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, initiated by the Germans and signed in Prüm (Germany) on May 27, 2005, represents a new element in the fragmented landscape of European Justice and Home Affairs. The signatories of the so called Prüm Treaty are Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria. Presently, the treaty is going through the ratification process in each of these countries. The treaty bears the marks of the Schengen integration process and thus creates questions regarding its role in the future development of European Justice and Home Affairs policy. In particular, how will the democratic oversight of such deepened integration among a small circle of EU member states be ensured? And above all, is this treaty compatible with the European Union's goal of establishing an EU-wide area of freedom, security and justice as set out prominently in the European Treaties?

In the last decade, the cooperation in Justice and Home Affairs within the framework of the European Union has been the subject of extensive legislation. Despite some important exceptions, the progress in the sub-area of police and judicial cooperation in criminal matters, however, remains limited due to the unanimity rule in Council decision making, i.e. the veto power of each member state. Therefore, cooperation below the EU-25 threshold continues to play an important role in combating cross-border crime and terrorism. Germany, for example, has signed far-reaching bilateral agreements on cross-border policing with all of its neighboring states in recent years.

The legal nature of the policy field and the network of bi- and multilateral forms of cooperation make it more and more difficult to follow the developments in this policy area, which influence and are influenced by the measures and instruments adopted at the EU level. Accordingly, it is extremely difficult for national parliaments, and the judicial and data protection authorities of the EU member states to monitor these interconnected developments.

In the case of the Prüm Treaty, parliaments are now confronted with the task of intensely scrutinizing the agreement from a democratic political perspective as well as from a human and civil rights and data protection point of view. In Germany, the

recent criticism by the Constitutional Court of the relatively low level of active parliamentary involvement in the incorporation of the European Arrest Warrant into German national law should be understood as an indicator of the expected amount of parliamentary debate over the ratification of the Prüm Treaty.

Improving Data Exchange

All three policy areas covered by the Prüm Treaty—terrorism, cross-border crime and illegal migration—are also regulated by EU law. How do the Prüm provisions, laid down only for the small circle of EU member states which have signed the treaty, relate to the existing and envisaged EU norms in these areas?

The main focus of the treaty is the improvement of data exchange between the law enforcement authorities of the Prüm states. Among other things, the treaty provides for the comparison of DNA-profiles, fingerprints and vehicle registration data as well as the exchange of personal data. Furthermore, it envisages a series of measures for the prevention of terrorist attacks (exchange of personal data, deployment of sky marshals) and for combating illegal migration (deployment of document advisers and joint repatriation measures).

Regarding data exchange, the treaty provides for the direct online access, by the authorities of a contracting state, to the DNA and fingerprint databases of the other Prüm states in accordance with the so-called "hit/no-hit" system. In the first of a two-step process, a state searching for a match can go online and compare the trace DNA it has recovered to anonymous reference data contained in other Prüm states DNA databases. Reference data contains a DNA-profile together with a corresponding reference number, but does not contain any personal information. Only in case of a "hit" can the searching state go to step two and ask the authorities of the other state to provide it with the corresponding personal information. The legal assistance rules of the state holding the data govern the conditions under which the personal data is provided. The Prüm Treaty thus enables a very rapid and efficient way to find out whether another state possesses relevant information. Because the exchange of personal data is regulated by the law of the state holding the data, the Prüm Treaty limits the "principle of availability" which was established in the EU's five-year working program in Justice and Home Affairs, the so-called Hague Program. For the principle's full implementation the Commission already submitted a proposal for a framework decision of the Council. This decision, if adopted, would replace the reliance on national legal provisions for the exchange of personal data with common criteria that would apply to all EU member states. In contrast to the Prüm provisions, this would overcome the diversity of national legal assistance provisions which so far have hampered the efficient exchange of information.

The Prüm Treaty raises two important concerns. First, the treaty contains multiple provisions which, like the above example of data exchange, directly conflict with existing or planned EU law. It also contains provisions covering vehemently disputed issues in the Council of Ministers and thus thwarts efforts to find a European-wide solution. Second, its imprecise formulations concerning cooperation in combating terrorism and the regulations on data exchange, which go far beyond the status quo of cross-border cooperation, raise the question whether the interference of the Prüm provisions with civil rights is justified by the aim of providing a higher level of security and whether they respect the principle of proportionality.

Conflicting Goals: the Promotion of Integration versus the Principle of Loyalty

The Prüm Treaty is closely tied to the integration of European Justice and Home Affairs policy. It is open to all EU member

states and should be incorporated into EU Law within three years after it comes into force. The treaty's phrasing leads one to assume that the incorporation into European law should occur in accordance with the regulations concerning enhanced cooperation contained in the EU Treaty. This application of these regulations, however, requires a minimum of eight member states, the Commission's verification of the compatibility of the Prüm Treaty's rules with those of the EU Treaties and institutions as well as the consent of the Council of Ministers by a qualified majority after consulting the European Parliament. Obtaining a qualified majority in the Council of Ministers appears unlikely in the medium term because Prüm deals with hotly contested issues.

Prüm presents a case of enhanced cooperation outside of the European Treaties based on the Schengen model. For supporters of the Schengen model the advantage of such cooperation is that progress in the field of integration can continue even when the EU-level processes become stalled. However, they critically remark that the new edition of the Schengen model requires that the new measures be compatible with existing EU law. In addition, one should learn from the mistakes of Schengen: the cooperation processes' legal and democratic control must also be assured for an intergovernmental project outside of the EU legal framework. Is it desirable for a limited group of member states to establish its own security agenda with the prospect of regulating very sensitive and—in the context of the EU—extremely contentious issues and to write all of the rules for its implementation and then present the later-joining treaty parties, as well as the EU institutions, with a *fait accompli*?

Moreover, since the signing of the Schengen Implementation Agreement 15 years ago, two general conditions for the repetition of such deepening steps have radically changed: First, a substantial body of law in the field of European Justice and Home Affairs policy has been developed (as of May 2006 there were 1152 regulations, directives and further decisions.) Accordingly, there is a very high probability that every form of deepened cooperation will clash with existing law. In this context, critics note that the principle of loyalty, established in article 10 of the EC Treaty, could be violated. According to this principle, the European Union's member states are obliged to take all measures to fulfill the EC treaty's obligations and to refrain from all actions which could threaten the EC treaty's objectives. Against this backdrop one should critically examine the Prüm Treaty to see if it could interfere with the EU's objective of the creation of an EU-wide area of freedom, security and justice. Above all, with respect to data exchange and the repatriation of third country nationals, Prüm anticipates ongoing decision-making processes on the European level but falls short of those measures planned on the EU level. Moreover, regarding the use of sky marshals, which is highly disputed in many EU countries and incapable of a consensus on the European level, the Prüm Treaty diminishes the trust among the member states which is necessary for cooperation in the field of Justice and Home Affairs.

It is not easy to refute the accusation that the seven Prüm states have evaded 18 other EU partners, and the European decision-making mechanisms and institutions in order to implement their own limited interests instead of an EU-wide compromise. If the Prüm Treaty's regulations are not incorporated into the EU legal framework with a larger number of supporting states in the near future, it could inhibit, at least in the medium term, the creation of an EU-wide area of freedom, security and justice. Prüm would then not promote the integration process by pulling it along, but rather trigger further fragmentation within the EU.

The second significant change since the conclusion of the Schengen Treaty concerns the decision-making structures on the EU level. The European Parliament now possesses extensive co-decision rights in almost

all justice and home affairs policy matters; for criminal law and police cooperation matters it has at least consultation and budget rights. Should the Prüm Treaty in one way or another be incorporated into EU law, the Members of the European Parliament would be in effect confronted with a set of legal norms that were enacted outside of the EU's legal framework and without the EP's participation. If adopted within the EU's framework, which would be possible given that all policy fields covered by Prüm have a legal basis in the European Treaties, the EP would have had a say in the adoption of these measures. Also the Commission's right of initiative and the European Court of Justice's (ECJ) supervisory authorities would be sidestepped with this kind of retroactive integration. From a democratic political perspective, one should also bear in mind that neither national parliaments nor the representatives of civil society played a role during the drafting of the treaty. In the context of ratification (for the current status see the table on p. 5), national parliaments now only have the possibility to adopt or reject the treaty. For equivalent regulations developed in the context of the EU Treaty, the national parliaments are at least able to influence the legislation through their governments.

Lessons from Schengen

The main objective of the Prüm Treaty, the more efficient exchange of information with a view to combating crime in an area without internal borders, is an important and meaningful plan that is not challenged in the treaty states' parliaments. However, given that the enlargement of the competency of the police—both domestic and transnational—is one of the most sensitive political issues from the perspective of preserving basic and civil rights, national parliaments should deal with the Prüm Treaty very carefully.

Several aspects of the Prüm regulations deserve special attention during the ratification processes within national parliaments:

First, parliaments should be considered whether, taking Austria as an example and looking at the clause in article 3.2 of the treaty, to set up obstacles for the access to DNA databases at the time of ratification or in the implementation agreement. The imprecise formulations in articles 14 and 16 of the treaty, for the exchange of personal data related to the prevention of terrorist crimes and criminal offenses in connection with cross-border big events as well as the cooperation in the field of DNA data, should likewise be worth a debate from a civil rights perspective.

The mandate of the planned Minister's committee also seems to be in need of clarification. If the parliaments want to prevent the analogue to the Schengen Executive Committee from making substantial legal decisions—which are not subject to parliamentary supervision because they are valid as administrative acts on the national level—then the ratification stage should clarify which functions the Minister's Committee has and the decisions it can make and how the national parliamentary supervision and reservations would be made effective.

After all, the ratification debates should be an occasion to discuss the Prüm Treaty from the perspective of the future development of European Justice and Home Affairs policy. Does the treaty really present a desirable course of action to promote integration in this field or does it conflict with the higher objective of creating an area of freedom, security and justice? In this context a debate and, should the occasion arise, a coordination of the national parliaments with the European Parliament could be useful. The latter has the interest to ensure that non-EU treaties à la Prüm do not cancel out its hard-fought rights with respect to EU Justice and Home Affairs policy.

The status of the ratification of the Prüm Treaty as of May 24, 2006

Germany	
Bundestag	Ratified on 19.5.2006
Bundesrat	Opinion of 7.4.2006: no objections
France	
National Assembly / Senate	Law on Treaty not yet submitted to Parliament for approval
Netherlands	
House of Representatives / Senate	Treaty not yet submitted to Parliament for ratification, start of ratification process envisaged for autumn 2006
Belgium	
House of Representatives / Senate	Treaty not yet submitted to Parliament for ratification
Austria	
National Council	Ratification of Treaty on 29.3.2006
Federal Council	Approval of ratification on 21.4.2006
Luxemburg	Law on Treaty submitted to Parliament for approval; not yet discussed in committees or plenary, start of proceeding likely before summer break 2006
Spain	
Congress	Ratification of Treaty on 27.4.2006
Senate	Submitted to committees on 5.5.2006, awaiting plenary decision

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