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Europeanization and Democracy: Negotiating the Prüm Treaty and the Schengen III Agreement*

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Summary

Europeanization and the so-called “democracy-deficit” are two of the major issues dividing European publics and national executives. The following analysis intends to elaborate on these two subjects as they relate to the Prüm Treaty of 2005, an agreement between Schengen member states to enhance cross-border security cooperation, which later formed the basis of a 2007 amendment to the EU’s *acquis communautaire*. Participating states agreed to implement data exchange capabilities and bolster cooperation of police forces. Criticism of the Prüm Treaty tends to focus on two topics: the protection of personal data and the role of national executives and parliaments in the course of the negotiation process. For this particular treaty, national executives negotiated in almost total secrecy and at a runner’s pace uncommon to the European legislation process. Thus, negotiators bypassed national parliaments and the European Parliament, the legitimate, democratically-elected actors that should have been involved in the treaty’s negotiations from the onset. This paper will detail the interactions between the different national executives and parliaments during the treaty’s negotiation process and reveal how European legislative standards were manipulated in order to secure support and democratic legitimacy. In most cases, national parliaments could only maintain the role of an ex-post control instrument; they could exert little, if any, influence on the contents of the treaty. Another popular criticism of the Prüm Treaty concerns questions regarding Europe’s differentiated integration. Because the Schengen and Prüm frameworks were developed by a minority of member states outside the EU’s institutional framework, some contend that the EU is beginning the process of fragmentation. Still others argue that this legislative flexibility is an asset for the future composition of

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a widened and deepened European Union. This argument will be analyzed within the context of the provisions of the Nice and Lisbon Treaties.

Key words: Europeanization, communitarisation, flexible integration, Home and Justice affairs, basic rights, civil liberties, democratic legitimacy, democratic control



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Introduction: the game of the name

The Prüm Treaty, signed in 2005 by Schengen member states and later incorporated into the EU's *acquis communautaire* in 2007 during the German Presidency of the EU Council, sought to enhance cross-border security cooperation between participating member states. The agreement, though intended to be a complement to Europe's burgeoning security alliances and enlargement into Central and Eastern Europe, sparked a public outcry against the Europeanization of member state's Home and Justice Affairs, or in the EU's official parlance, the European Space of Freedom, Security, and Justice.

Much of the public's criticism focused on the fact that the Prüm Treaty's official documents did not adequately reflect the effects these amendments would have on the rights of citizens. Only a single sentence in the European Council Presidency Conclusions of June 2007¹ noted the Prüm Treaty's transformation from a Schengen-area agreement to a codified-European law. The new agreement was not even considered important enough to receive a distinct name. Most analysts considered this behaviour far too laconic, for the changes made to European security were indeed profound. Some analysts consider the new chapter to be Schengen III, following the Schengen Agreement of 1985 and the Schengen Convention of 1990. This name also refers to the Schengen Information Systems I and II, the systems of data exchange developed under the Schengen Convention over the last fifteen years.

¹ The conclusions of the presidency are available at europa.eu/european-council/index_en.htm. The one sentence in the conclusions of the German Presidency of I / 2007 is: "The recent decision to integrate the essential provisions of the Prüm Treaty into the Union's legal framework will help to intensify cross-border police cooperation." (see consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf, p. 7, accessed 18 October 2008)

The new agreement will perhaps soon see the development of a substantially enlarged European data exchange system – a Schengen Information System III, so to speak.

Schengen III and the Prüm Treaty, on which the former is based, create new cooperation dimensions for European police and justice systems. Yet because the treaties' negotiation processes and enactment into European law were largely guarded from the peering eyes of public watchdogs, many European citizens suspect an encroachment into their basic human rights and civil liberties, as well as a deterioration of the EU's democratic legitimacy. These treaties also touch on the issue of flexibility *versus* fragmentation within the EU. After a brief description of the history and contents of these two treaties, this paper will analyze the arguments of each of the three above-mentioned criticisms.

The Schengen Agreement and the Schengen Convention

The Schengen Agreement of 1985 intended to finalize the completion of the European Community's Single Market, assuring the free movement of goods, capital, services, and persons. The Schengen Agreement primarily stipulated that checks at common borders were to be abolished in the near future. The signing of this treaty on a ship on the Mosel River (the border between Germany and Luxembourg) symbolised the free and open space between European borders. Yet diplomatic formality – every agreement needs a concrete place to be signed – forced signatories to move across the river to Schengen, a small town in southern Luxembourg. In 1990, Schengen members agreed to properly implement the 1985 Agreement at the Schengen Convention. The Convention included the establishment of an Executive Committee consisting of Interior and Justice Ministers from participating countries; it was perhaps the most important decision in the organization's brief history. Decisions of this body are made by unanimous vote and form the legal basis of the aforementioned Schengen Information System. Though the Convention came into force in 1993, the complete abolition of border controls did not occur until 1995.

Perhaps the Schengen Convention's most important legacy is that a group of countries made the deliberate decision to form a forerunner group willing to integrate deeper. Sovereign powers of national governments were now transferred to European bodies to seek European solutions. The 1985 group, originally consisting of Germany, France, and the Benelux countries, added Spain and Portugal prior to the Convention's execution. Following the creation of the European Union in the early 1990s, Justice and Home Affairs, formerly a domain of national governments, were given a European dimension. By 1997, Schengen rules and procedures were integrated into the

European Union's *acquis communautaire* as a protocol to the Treaty of Amsterdam. These rules were binding for future members. In the meantime, Italy and Austria joined the original seven countries in the Schengen Convention.

Another significant aspect of Schengen, later acknowledged in the Treaty of Amsterdam and the Nice Treaty of 2001, was that it introduced a more flexible approach to integration. One of the major provisions of the Treaty of Nice explicitly allowed a group of at least seven member states to integrate deeper if the states so choose. The 1997 Treaty of Amsterdam allowed Britain and Ireland to exclude themselves from certain European Union provisions, but maintain the right to opt-in. The Amsterdam Treaty also allowed non-EU members to join the Schengen-area. As a result, non-EU members Norway and Iceland joined the agreement in 1991 alongside Denmark, Sweden, and Finland (all EU member states). Similarly, neutral Switzerland joined in late 2008, along with new EU member states Malta and Cyprus. Meanwhile, the rest of the 2004 EU entrants, including Latvia, Lithuania, Estonia, Poland, the Czech Republic, Slovakia, and Hungary, having successfully completed accession negotiations, joined Schengen in 2007. The agenda of the Schengen *acquis* eventually began to enforce and standardize control of the Schengen-area borders, create a common visa policy, and cooperate in the fields of police and justice systems.

*The Prüm Treaty*²

The origins of the Prüm Treaty can be traced back to the security concerns Germany brought to the attention of its Schengen partners. Together with Austria, the two countries argued that the new enlarged zone of liberty creates security risks, particularly for those states that have common borders with East and Central European countries. Prior to 1990, cross-border traffic was relatively low along the Eastern front, but soon exploded with the opening of the Iron Curtain and has continued to rise over the last two decades. Though EU membership and the abolition of border controls by the end of 2007 brought these countries together, it also facilitated the increased operation of illegal cross-border activities.

As a result, Germany initiated bilateral negotiations with its neighbouring states to increase police cooperation. Bilateral treaties were quickly completed with the Netherlands and Austria in 2003. Simultaneously, Germany launched a multilateral security initiative with the Benelux countries and France. France soon balked at the so-called "hot pursuit" condition,

² The original text of the Treaty is available at register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf (18 October 2008).

which would allow for the operation of foreign police forces (e.g. German) on French soil; the matter was not in accordance with the French constitution. Austria was later invited to take France's place. In 2005, the partners, together with Spain, signed a treaty in the German town of Prüm, close to the borders of Belgium, Luxembourg, and the town of Schengen. This agreement became operational by the end of 2006. France, having received approval from its constitutional court, joined in 2007 alongside Slovenia and Finland.

The Prüm Treaty intensifies cross-border security cooperation, specifically as it relates to terrorism, crime, and illegal migration. Some of the novelties of the Prüm Treaty include (a) the simplified exchange of data, e.g. DNA, fingerprints, and vehicle registers, (b) the introduction of document specialists to detect false papers, and (c) the joint operations of national police forces. Debates during the negotiation process largely focused on two key issues. The first point of contention was the proposed creation of a centralized database versus the maintenance of several decentralized national databases. Germany suggested the former, hoping to headquarter the new database in Luxembourg, but was unsuccessful in persuading others to agree. The outcome of the negotiations established national databases with Prüm partners and allowed members to make use of so-called national contact points. The institutional set-up, however, is left to national authorities. Austria, for example, operates one contact point for DNA data and fingerprints and a second one for vehicle registration data. The second point of debate during negotiations focused on the issue of data protection. Prüm partners agreed that every request automatically has direct access to data of partner institutions. Answers are given in an anonymous "hit" / "no hit" mode. In case of a "hit", the requesting partner receives a reference number (no names, nor a list of crimes committed, etc.). Using the reference number, a request is then sent to the partner where the "hit" originated, and he/she will respond with data and details that he/she is allowed to supply according to the national law of the partner country. The delivery and protection of data has been an enduring issue of debate (detailed in the Critique I section below). It should be noted, however, that the data exchange program dramatically increased crime-solving rates. The then-Austrian minister of Justice Günther Platter labelled Prüm a "milestone in the fight against crime at the European level."³

³ Platter in a parliamentary committee meeting where he had to report (see http://parlament.gov.at/PG/DE/XXIII/V/V_00003/fnameorig_087632.html, accessed 19 October 2008), and at several other occasions.

Critique I: Human and Basic Rights

The major criticism of Prüm centres on the potential violation of human and basic rights. This concerns, in particular, the protection of personal data. Prüm partners were aware of this risk and subsequently left the issue with the national delegations to verify whether the new treaty violates citizens' rights. For instance, the German delegation requested the German Commissioner of Data Protection to testify to the Bundestag that the Treaty upheld a high standard of data protection (Kietz and Maurer 2007: 9). The Austrian Nationalrat's respective committee took similar actions, which resulted in a similar conclusion (see footnote 3). Still, critics who are particularly sensitive to the violation of basic rights have yet to be convinced. Austria's Green party, whose platform was created during the civil rights movements in the 1980s, voted against adopting the Prüm Treaty specifically because of this issue. The party argues that with access to national crime databases, data can spread with little or no controls and "international black lists" of ordinary civil rights proponents will be created (see footnote 3). These arguments were specifically applicable to protests held at the 2007 G8 Summit in Heiligendamm, Germany. Many protesters feared that their personal information would be unknowingly spread throughout police stations in Europe.

The focal point of the critique is that each member state's national legislation deals differently with the use, storage, and deletion of data (Kietz and Maurer 2006: 5-7; Kietz and Maurer 2007: 12-13). The police forces of Poland and Italy, for example, do not currently use DNA data. Sweden uses DNA data but only in cases where the culprit was imprisoned for a minimum of two years. In Germany and Austria, the collection of DNA data is a standard practice of police investigators in criminal cases. The country with the largest DNA database in Europe, Britain, shows no interest in joining Prüm, but agreed to share data according to the new Schengen *acquis*. On the European level, this issue came to the floor again in the spring of 2007 when the Council of Ministers ignored the topic entirely. The European Data Protection Supervisor, Peter Hustinx, was not even consulted. He proceeded *ex officio* and published an Op-Ed in April 2007 that criticized the aforementioned country-by-country approach to data protection. Hustinx stated that no general rule exists on data protection in the Third Pillar of the EU.

Critique II: Democratic legitimacy of new legislation

Negotiations for the Prüm Treaty's bilateral agreements were conducted primarily by Interior and Justice Ministers. Much of the content was simply rubber-stamped from the bilateral agreements between Germany and Austria and the Netherlands. Hence, negotiations and agreements were almost exclusively in the domain of national bureaucracy experts. In this process, the role

of national parliaments was frequently neglected, given that they are the supposed legitimate democratically-elected actors and they house the floor where national debates should take place. As Belgian Senator Hugo Vandenberghe criticised, the role of the parliament as an instrument of democratic control is at risk:

Le parlement n'est pas associé à l'élaboration des projets de loi portant assentiment à des traités et conventions et qu'il ne peut exercer aucun contrôle à cet égard. Il est inadmissible que les parlementaires soient purement et simplement liés par les dispositions d'un traité qui est en soi la traduction de décisions prises par des fonctionnaires.⁴

The resulting treaty, which indeed encroaches on the fundamental rights of citizens, was the result of expedited, closed-door negotiations. Parliaments were often reduced to the role of an ex-post control instrument. Parliamentarians could exercise little or no influence on the contents of the treaty. Political practice, however differed from country to country, as research from Daniela Kietz and Andreas Maurer demonstrates (2007: 8-10). Spain's Cortez waved the Prüm Treaty through by group voting. In Belgium, the government did not involve parliament at all apart from voting for or against the negotiated treaty. Germany's Bundestag was likewise not involved apart from the data protection issue when the expert's statement was requested. A more attentive role was practiced in the Netherlands; its parliament was assigned a potential veto on all steps of the negotiation process. Yet a silent consent mechanism was in place and required the vigilance of parliamentarians to exercise influence. Austria's delegation reported all of the steps of the negotiation process back to the respective parliament committee. The delegation was keen to listen to critics and incorporate amendments on this basis. The Finnish delegation depended on a parliamentary mandate, and thus the parliament could control and reject the outcome of the negotiations.

Critique III: Europeanization of Home and Justice Affairs?

Two key criticisms exist regarding the Europeanization of Home and Justice Affairs: (1) a variation of the "democratic deficit" argument and (2) a debate on Europe's flexible integration. The first criticism concerns the way Prüm was incorporated into European legislation. Many argue that the German Presidency quickly pushed the issue through the EU's institutional framework in order to finalize it as soon as possible. German Interior Minister Schäuble brought the Prüm Treaty to the attention of his colleagues at a

⁴ Text available at <http://senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=50335244>, page 8 (14 September 2008).

February 2007 plenary session of an informal meeting of Justice and Home Affairs Ministers in Dresden. Four days later, the Council Secretariat published a first draft of a European-wide Prüm Treaty, a document that was later approved by the Art 36 Committee, a coordinating body of senior officials that advises the Council. At a formal meeting on 15 February 2007, the Prüm Treaty's integration into EU legislation was agreed upon. The latest Art 36 Committee approved the version that was finally executed at the European Council meeting in Brussels in June 2007 (Burgess 2007: 2).

Critics argue that the adoption of the new Schengen *acquis* was too hasty and lacked consideration of a number of existing EU procedures. The European Parliament was given no more than three months to gather an informed opinion. Moreover, the expertise of the European Data Protection Supervisor was not requested. Critics contend that this act was deliberate. EU Home and Justice Ministers only actually agreed on a lighter version of the Prüm Treaty, one that excluded the obligatory and automatic use of air marshals, document advisers, and emergency measures in the event of imminent danger (the so called "hot pursuit," or the crossing of borders by a national police force). Given the hastiness (and some might say sloppiness) of the procedure, one can argue that Europe's proud tradition of democratic discourse is threatened. EU expert and Professor at the University of Oslo, Mark Burgess, concluded that, "one of the biggest questions about the Prüm Treaty and its introduction into EU law concerns the manner in which this happened rather than the substance of the Treaty itself" (Burgess 2007: 4). This is particularly regrettable given the lack of democratic legitimacy under which Prüm was negotiated. Prüm/Schengen III leave little to no doubt that the EU must address criticism of its "democratic deficit."

Criticism on flexible integration, i.e. whether a group of member states can address and implement laws outside the jurisdiction of the EU, questioned whether this is actually in the interest of European integration. Some argue that a group of member states could function as a role model. In a Europe of different speeds, some countries should advance first and integrate deeper, leaving other member states to follow. Hugo Brady argues that fore-runner countries could serve as laboratories (Brady 2005). Prüm was a case study of police cooperation on a European scale. It turned out to be successful and was thus incorporated into the European legislative body. Franklin Dehousse and Diane Sifflet argue that Prüm partners had a very pragmatic approach. National executive bodies simply used the form of a multilateral international treaty. This was considered both simple and advantageous in that Prüm partners were able to bypass the complicated procedures of European institutions (Dehousse and Sifflet 2006; various sections refer to procedural aspects).

Others argue that this flexible approach will lead to increased fragmentation within the EU. When considering the example of Germany and her relations to neighbouring countries, it is clear that flexibility opened the door to widely disparate modes of cooperation with different EU members. Regarding Justice and Home Affairs, three layers can be identified. The widest and least intensive is based on the Schengen III agreement, e.g. cooperation with the Czech Republic and Poland. A more intensive type of cooperation that includes all Schengen III provisions is the one based on the Prüm Treaty, e.g. co-operation with Belgium and France. The most intensive type, one that includes all Schengen III and all Prüm provisions, goes even further and is based on bilateral agreements, e.g. cooperation with the Netherlands and Austria. One can see that these different modes of cooperation may lead to fragmentation. Thierry Balzacq argues that such differentiation lacks transparency and dismantles trust among EU partners (Balzacq *et al.* 2006: 17-18). Balzacq's colleague, Elsbeth Guild, adds that a small oligarchy of countries imposes their preferred options on the EU as a whole (Guild 2007). Guild's critique is on point given that disparate integration models are initiated in intergovernmental negotiations outside the EU institutional framework, as it was the case with Prüm. The risk of fragmentation is smaller when differentiated integration takes place through established instruments and procedures within the EU, as was seen in the Nice Treaty.

Flexible Integration, Home and Justice Affairs, and the Lisbon Treaty

The policy area of Justice and Home Affairs in the context of the Prüm Treaty demonstrates that member states have been "tempted to opt for models of intergovernmental cooperation outside the EU" (Tekin and Wessels 2008: 26). The yet-to-be ratified Lisbon Treaty attempts to find more balance on the issue of flexibility and its unintended outcome, fragmentation. With the exception of the Common Foreign and Security Policy (CFSP), the new treaty makes no specification about flexibility and policy areas. Thus, Justice and Home Affairs are to be treated equally with all other policy areas.

Under the provisions of the Lisbon Treaty, flexibility arrangements are itemized more precisely than they were in previous EU-wide treaties. The provisions identified in the Treaty of Lisbon "provide an alternative within the EU's legal framework" (Tekin and Wessels 2008: 27). The minimum number of member states required is raised from eight to nine. This figure – one third of the current EU 27 – should adequately raise the legitimacy of those willing to cooperate. In terms of procedures, the authorisation of enhanced cooperation has been facilitated. The European Parliament will enjoy increased rights of participation, and in the Council, qualified majority voting can be applied in this same respect to all policy areas except CFSP

(Tekin and Wessels: 2008, 29). Hence, the hurdle to bring more member states on board for enhanced cooperation has been moderately raised, whereas the hurdle of national vetoes has been considerably reduced. Only time will tell if such provisions will effectively lead to a multi-speed Europe or create one of multiple geometries, where a once a proud union may find itself at the edge of fragmentation due to the implementation of imperfect communitarisation rules, regulations, and practices.

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