

The Treaty of Prüm: Improvement of national security vs. data protection?

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Abstract: On 27 May 2005 seven EU Member States signed in the German city of Prüm the so-called Treaty of Prüm. Its task is the further development of European cooperation in combating terrorism, cross-border crime and illegal migration especially by means of information. This contribution aims to examine whether the Prüm Treaty assists the process of Europeanization, the enhancement of national security policy and on the same time the guarantee of principles of data protection.

1. Introduction

On 27 May 2005, seven EU Member States – Belgium, Germany, Spain, France, Luxembourg, Netherlands and Austria – signed in the German city Prüm the “Treaty of Prüm”, that aims the enhancement of cross-border cooperation. The aim of the Treaty is the further development of European cooperation and playing a pioneering role in establishing the highest possible standard of cooperation, especially by means of improved exchange of information.¹

According to the preamble of the convention its aim is to assist the contracting parties to improve information-sharing for the purpose of preventing and combating crime in three fields, namely terrorism, cross-border crime and illegal migration. The cooperation is open to all other Member States of the European Union.

According to Art. 50 of the Treaty, the Convention shall enter into force 90 days after the deposit of the second instrument of ratification what hap-

¹ Preamble of the Prüm Convention.

pened on 1 November 2006. So far, Austria, Belgium, Germany, Luxembourg and Spain have ratified the Treaty. Additionally Finland and Slovenia participate in the work of the Convention since 2007. Already the Preamble of the Convention states that the Treaty should be “brought within the legal framework of the European Union”.²

2. Main issues

The Treaty foresees two instruments for the cooperation between the contracting parties:

- The simplified exchange of data (principle of availability) and
- The operative cooperation between the law enforcement authorities, the police and the immigration authorities.

The most important issues of the Convention are:

- Direct automatic searches and comparisons in the databases of the contracting parties for the comparison of DNA profiles/fingerprinting data. The search is done by the requesting country without intervention of an official from the requested country. The requesting official will receive automated notification of a “hit/no hit” answer and in case of a “hit” the reference, namely a number. The requesting official will then use the reference to get further personal data. This is done by applying legal assistance rules, namely the official sends a request to the partner country that decides according to its national law.³
- Automated searching of vehicle registration data. These searches may be conducted only with a full chassis number or a full registration number. The requested country will provide personal data relating to owners or operators of vehicles or other data relating to vehicles.⁴
- Exchange of personal and non-personal data for major events with a cross-border dimension, in particular for sporting events or European Council meetings for the prevention of criminal offences especially terrorist offences.⁵

2 Preamble of the Prüm Convention.

3 Art. 3–11 Prüm Convention.

4 Art. 12 Prüm Convention.

5 Art. 13–15 Prüm Convention.

- For the purpose of exchange of personal information the contracting parties designate a national contact point (NCP). Their powers shall be governed by the applicable national law.
- Sending of document advisers to states regarded as source or transit countries for illegal migration. These should especially help in the detection of false or falsified documents and on document abuse.⁶
- Joint operations of the police of the contracting countries, where police officers participate in operations outside their own country.⁷
- Deploy of “air marshals” for maintaining security on board aircraft.⁸

In the following I will mention the main critical points that concern the issues of data protection within the Treaty.

3. Critical points of the Treaty referring to data protection

3.1 “Principle of availability”

The Treaty adopts elements of the Proposal for a Council Framework Decision of 12. 10. 2005 “on the exchange of information under the principle of availability”.⁹ This principle inverts the traditional form of the exchange of data: Instead to define which kind of personal data under which presupposition such data can be exchanged assumes the principle of availability that all data can be exchanged.¹⁰

In a similar way one has to face the supply of personal data in connection with major events. The competence of the Prüm Treaty overlaps with that of the Council resolution on security at European Council meetings and other comparable events.¹¹ The problem is that while – according the Proposal for a Council Decision and Resolution – the collection, retention and supply of personal data is applicable EU-wide, Prüm Treaty creates a data base whose use is restricted to the seven signatories. Therefore, the Treaty creates an electronic border between the seven signatories and the other Member

6 Art. 20–23 Prüm Convention.

7 Art. 24–27 Prüm Convention.

8 Art. 17 Prüm Convention.

9 COM (2005) 490 final; SEC (2005) 1270.

10 See *Weichert*, Wo liegt Prüm? Der polizeiliche Datenaustausch in der EU bekommt eine neue Dimension, in: *DatenschutzNachrichten* 2006, 12.

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

States of the EU and as a result provokes a relapse of the integration within the EU.

3.2 Synergy with other data bases

The Convention assumes that for the purposes of security more is better. Huge data bases containing personal information increase security. It is however known that the problem is often not the fact that law enforcement authorities do not share enough information but that they share such information in a wrong way and with many different authorities.

In this regard the fact is alarming that there is no reference to other existing data bases and no indication concerning possible synergies with data collected according to the Prüm Treaty and data gathered by EURODAC (system for the comparison of fingerprints of asylum applicants), the VISA Information System and the Schengen Information System. Actually all these data bases contain similar personal data. However, the sharing of the data can create new patterns of action, which will overlap and duplicate each other.¹²

3.3 Level of data protection

As far as the level of data protection is concerned, Art. 34 of the Convention is questionable. According this provision, the level of protection of personal data in the national law of the contracting parties has to be at least equal to that resulting from the Convention of the Council of Europe 108 protecting personal data of 28. January 1981.¹³ This approach causes three remarks:

- No legislation of the European Union is mentioned within the Treaty. This is not amazing since the contracting parties are Member States of the EU.
- The Convention of the Council of Europe is considered as too general for specific use and needs several instruments for the application in explicit areas.
- This remark is connected with the fact that the Convention does not foresee any mechanisms that they could control the data protection level of the contracting parties.

¹² See *Balzaq/Bigo/Carrera/Guild*, Security and the Two-Level Game, The treaty of Prüm, the EU and the Management of Threats, CEPS Working Documents, January 2006, 14.

¹³ Art. 34 Prüm Convention.

In this context, the provisions of the Convention are positive that foresee strict rules concerning the accuracy and relevance of the exchanged data, technical and organisational measures to protect personal data and the special rules governing automated and non-automated supply of data. Important is on the other hand that there is no storage time in case of the exchange of data except for those cases when data is transferred in relation to terrorist activities.¹⁴

3.4 Supply of information for prevention of terrorist offences

Art. 16 of the Convention provides a detailed explanation of the kind of information that will be supplied in order to prevent terrorist offences. According this provision the Contracting Parties may, in compliance with national law, supply other contracting parties with personal data and information in so far as necessary because particular circumstances provide reason to *believe* that the data subjects will commit terrorist offences.

Therefore, the Convention does not specify the existence of conditions or reasons for the supply of personal data, namely the inclusion of a person in a transnational system of data exchange. That has as consequence that whatever circumstances are mentioned to justify the transfer of personal data, they will be taken as “real”, namely unquestionable. The contracting party will provide reasons why they fear that a particular individual is threatening, but this will not take place for the sake of accountability but as complementary information deemed necessary for “preventive purposes”. This wide formulation of the Convention could lead in cases where the meaning of “internal security” dominates issues of protection of human rights.¹⁵

4. Consequences

The uncertainties of the Prüm Treaty regarding the data protection issues indicate a number of problems that this Convention can cause during the development of an EU-wide policy in the area of internal security.

14 See *Kietz/Maurer*, Von Schengen nach Prüm, Sogwirkung verstärkter Kooperation und Anzeichen der Fragmentierung in der EU, Diskussionspapier Forschungsgruppe EU-Integration Stiftung Wissenschaft und Politik, Berlin 2006, 7.

15 See *Balzaq/Bigo/Carrera/Guild*, Security and the Two-Level Game, The treaty of Prüm, the EU and the Management of Threats, CEPS Working Documents, January 2006, 8.

Fact is that the contracting parties have circumvented the legislative mechanism of the EU to avoid compromises concerning internal security. From this point of view the Treaty provokes a relapse of EU integration.¹⁶

However, the contracting parties may amend or replace the provisions of the Treaty in view of those new arrangements resulting from EU law.¹⁷ The applicability of the Prüm Convention besides overlapping EU law remains unclear.

It is not very likely that the contracting parties will approve EU legislation not following the standards of the Prüm Treaty¹⁸. Thus, the step-by-step “infiltration” of the rules of the Prüm Treaty within EU law will take place. The Convention might be the basis for further discussion within the EU-legislative process as this approach seems to be the only possibility to develop an EU-wide internal security policy. This development will add to the already existing lack of democratic legitimacy as basic documents were prepared outside the European Institutions.¹⁹

The point is however if the European Institutions will follow this first step. The EU area of freedom, security and justice should be developed without prior acceptance of the legal principles of Prüm Treaty. Legislative processes should not be determined by intergovernmental treaties as they do not support Europeanization in a sufficient way.

5. Literature

- Balzaq/Bigo/Carrera/Guild:* Security and the Two-Level Game, The treaty of Prüm, the EU and the Management of Threats, CEPS Working Documents, January 2006.
- Kietz/Maurer:* Von Schengen nach Prüm, Sogwirkung verstärkter Kooperation und Anzeichen der Fragmentierung in der EU, Diskussionspapier Forschungsgruppe EU-Intergration Stiftung Wissenschaft und Politik, Berlin 2006.

16 See *Balzaq/Bigo/Carrera/Guild*, Security and the Two-Level Game, The treaty of Prüm, the EU and the Management of Threats, CEPS Working Documents, January 2006, 2.

17 See Art. 47 Prüm Treaty.

18 So *Kietz/Maurer*, Folgen der Prümer Vertragsavantgarde, Fragmentierung und Entdemokratisierung der europäischen Justiz- und Innenpolitik?, Diskussionspapier Forschungsgruppe EU-Intergration Stiftung Wissenschaft und Politik, Berlin 2007, 13.

19 See *Balzaq/Bigo/Carrera/Guild*, Security and the Two-Level Game, The treaty of Prüm, the EU and the Management of Threats, CEPS Working Documents, January 2006, 18.

Weichert:

Wo liegt Prüm? Der polizeiliche Datenaustausch in der EU bekommt eine neue Dimension, in: DatenschutzNachrichten 2006, 1 et seq.