



HOUSE OF LORDS

European Union Committee

18th Report of Session 2006–07

**Prüm: an effective
weapon against
terrorism and
crime?**

Report with Evidence

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FOREWORD—What this Report is about

The Prüm Treaty is an initiative by seven Member States which, having decided on their own common action for improving cooperation in combating terrorism and serious cross-border crime, are now attempting to incorporate it into EU law.

A Decision based on the Prüm Treaty can only be adopted unanimously. The Government are therefore in a strong negotiating position. Although initially slow in reacting to the proposal, they have obtained agreement on the deletion of a provision on “hot pursuit”. We have recommended that they should also seek agreement on the estimated cost of incorporating the provisions, on monitoring the operation of the Decision, and on the fate of a related Commission proposal.

The Prüm Treaty is mainly concerned with the exchange of data. Inevitably this raises data protection issues. As so often, these tend to be overlooked. We believe that Member States now have an opportunity to link negotiations on the fight against crime with agreement on a Data Protection Framework Decision guaranteeing an appropriate level of protection for the personal data which are exchanged. We have made suggestions as to how this might be done.

In this report we have looked at the Prüm initiative; at how it relates to other proposals in the same field which are genuine EU initiatives; and at the desirability of a small number of States attempting to bypass the established procedures.

Prüm: an effective weapon against terrorism and crime?

CHAPTER 1: INTRODUCTION

1. In principle, any EU initiative to improve cooperation between the Member States in the fight against terrorism and other serious cross-border crime is to be welcomed. The subject of this report, the Prüm Treaty, is an initiative of only a few Member States to enhance cooperation between themselves.¹ It may be ideal for them and, although the EU Commission were not consulted at all in its drafting, it is perfectly in order for those Member States to wish to have their agreement adopted by the EU as a whole. However the other Member States, the Commission, and appropriate bodies such as the European Data Protection Supervisor should be entitled to have a say in the classes of information which are to be exchanged, the procedures for exchanging them and the safeguards which will apply. Furthermore, an Explanatory Memorandum and assessment of costs should have been submitted beforehand for all to consider, just as the Commission do when they propose legislation. In its haste to agree a Decision based on the Prüm Treaty during its Presidency, Germany has markedly failed to produce these or to consult fully.
2. What is remarkable is how little any of the other Member States appear to have questioned what they are being asked to agree. The purpose of our inquiry has been to see whether the Government are right to accept these radical proposals almost without question.
3. We requested a number of persons and bodies whose views we knew would be especially significant to supply us with written evidence, and we asked some of these for oral evidence. Their evidence is printed with this report. We are most grateful to all those who have helped us in this way.
4. The German Presidency has been the main moving force, and we would have welcomed an opportunity to hear their views on aspects of the inquiry. Unfortunately, apart from a written answer to a question put by the Select Committee to the German Ambassador in a separate evidence session,² the Presidency declined to give evidence to the Committee. **We put on record our regret that the German Presidency should have been unwilling to discuss with the Committee of a national Parliament an initiative to which we, like them, attach great importance.**
5. **We recommend this report to the House for debate.**

¹ See paragraph 21 below for “enhanced cooperation” in the sense in which this expression is used in the Treaty on European Union.

² *Evidence from the Ambassador of the Federal Republic of Germany on the German Presidency*, 10th Report, Session 2006–07, HL Paper 56, page 6.

CHAPTER 2: BACKGROUND

6. The Prüm Treaty³ is an agreement between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria

“on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration.”

It was signed at Prüm on 27 May 2005. It is perhaps not a coincidence that the Contracting States chose to conclude the Treaty at a small town not far from Schengen, though on the German side of the border. Indeed, the Treaty is sometimes, inaccurately, known as Schengen III. Five of the parties to Prüm were the five parties to the 1985 Schengen Agreement and the 1990 Schengen Convention. As in the case of Schengen, those States had ambitions to extend their agreements to the other Member States in due course. However Prüm is not part of the Schengen acquis, and the differences between Prüm and Schengen are greater than the similarities.

7. The initiative for the negotiations which led to the signing of the Treaty came initially from Germany and Austria, joined by the Benelux States. France and Spain joined only at the last moment. The negotiations were given very little publicity.⁴ The Treaty entered into force between Austria and Spain on 1 November 2006, and between those States and Germany on 23 November. Luxembourg has ratified it, and the ratification processes in the other three States party are well advanced. Four other States applied last year to accede: Finland, Italy, Portugal and Slovenia.

The main provisions of the Prüm Treaty

8. The principal purpose of the Treaty is to improve the exchange of information between the Contracting States, particularly by giving reciprocal access to national databases containing:
- DNA profiles;
 - fingerprints; and
 - vehicle registration data.
9. These provisions are in Chapter 2 of the Treaty. Each Contracting State must ensure availability of these data and allow other Contracting States access to the data with the power to conduct automated searches. As in the case of the Schengen Information System (SIS), the first contact is on a “hit/no hit” basis: “Does another State have comparable data to match the data I have?” In the case of a hit, the next step is to seek further information

³ In all four authentic texts (German, Spanish, French and Dutch) it is called a Treaty. The official English translation prepared by the Council (Document 10900/05) refers to it as the “Prüm Convention”, but the Implementing Agreement between the seven Contracting States (Document 5743/07), for which English is an authentic language, refers to it as a Treaty. The draft Decision of 27 February 2007 (Document 6566/07), which is agreed by the jurist-linguists, refers to it as the “Prüm Treaty”. Since this will be its title in any future instrument for which English is an authentic or official language, this is what we have called it in this report, except where we are quoting documents which refer to it as a Convention. We have also sometimes referred to it simply as “the Treaty”, or just “Prüm”.

⁴ On 17 October 2005, five months after the signature of the Treaty, the President of the European Parliament admitted in his opening speech at a meeting of the European Parliament and national Parliaments that he had not heard of the Treaty.

from the contact point designated by the other State for the supply of further data, rather on the lines of SIRENE.⁵

10. Chapters 5 and 6 include provisions on joint operations between the officers of Contracting States, including the carrying of arms, with the permission of the other State; and operations across the border of a neighbouring State without that State's prior permission "in the event of imminent danger".⁶ There are provisions on the use of arms and the wearing of uniforms on such occasions. There is a general provision for cooperation on request.
11. All these are matters which, in an EU instrument, would be the subject of third pillar measures. There are also, in Chapters 3 and 4, provisions which would, in an EU instrument, be first pillar measures. These are the deploying of air marshals on aircraft (and the carrying by them of arms); and the creation of a network of immigration liaison officers to help combat illegal migration.⁷
12. The exchange of information, particularly by reciprocal access to national databases, must be subject to accountability. It needs appropriate guarantees as to the accuracy and security of the data, as well as procedures for recording data exchanges, and restrictions on the use of information exchanged. These provisions are in Chapter 7. We consider them in more detail in Chapter 4 of this report.

The principle of availability

13. The provisions of Chapter 2 of the Treaty on reciprocal access to information held by another State are, in effect, based on the principle of availability. This principle means that "throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State, and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose."⁸ If the information is available, it must be provided; the grounds for declining to do so are extremely limited.
14. The Hague Programme, which was approved by the European Council on 5 November 2004 and set out the EU's priorities in the field of justice and home affairs for the following five years, invited the Commission to present by the end of 2005 legislation to implement the principle of availability which would be operational by 1 January 2008. The Commission put forward its proposal for a Framework Decision on the exchange of information under the principle of availability on 14 October 2005.⁹ This went wider than the Prüm Treaty, covering not just DNA profiles, fingerprints and vehicle registration data, but also:

⁵ The working of the SIS is fully explained in Chapters 2 and 3 of our recent report *Schengen Information System II (SIS II)* 9th Report, Session 2006–07, HL paper 49. SIRENE (Supplementary Information Request at the National Entry) is explained in paragraph 55 of that report.

⁶ These provisions are not unlike the "hot pursuit" provisions in Article 41 of the Schengen Convention, which apply to the Schengen States but not to the United Kingdom or Ireland.

⁷ First pillar measures are those which have the EC Treaty as their legal base. Third pillar measures are those which have as their legal base Title VI of the Treaty on European Union: Provisions on Police and Judicial Cooperation in Criminal Matters.

⁸ The Hague Programme, paragraph 2.1, agreed by the European Council on 4–5 November 2004.

⁹ Document 13413/05, enclosing COM(2005)490 final.

- ballistics;
 - telephone numbers and other communications data; and
 - minimum data for the identification of persons contained in civil registers.¹⁰
15. Under the Hague Programme the intention was to create an EU-wide right to access data collected and retained in national police databases. Hence in the Commission proposal “availability of information” means that all available national information should be directly accessible on line to the authorities of other Member States. Jonathan Faull, the Director-General for Justice, Freedom and Security at the Commission, told us that “Prüm will go some way, not the whole way, to doing that.” (Q 83) The European Data Protection Supervisor (EDPS) went further, explaining that “Prüm is of a fundamentally different nature”: it does not give direct access, but indirect access through reference data. (p 31) In oral evidence Mr Hijmans, the legal adviser to the EDPS, added that “Prüm is not really [about] availability” because it does not eliminate borders for police information. (Q 127) We set out in Appendix 6 the similarities and differences between the current texts.
16. In its Explanatory Memorandum for the Framework Decision to implement the principle of availability, the Commission explained that there were similarities between its proposal and the Prüm Treaty, but pointed out that that the Treaty was more limited in scope, applied to only seven Member States, and was still subject to ratification.
17. When the interior ministers of the G6—Germany, France, the United Kingdom, Italy, Spain and Poland—met at Heiligendamm in March 2006 under German chairmanship, the Conclusions of the meeting included the following passage:
- “4. Principle of availability*
- The ministers again highlighted the importance of significantly improving cross-border information exchange between law enforcement authorities, as already set out in the Hague Programme. To rapidly achieve this objective, they advocate focusing on DNA, fingerprints and motor vehicle registration data. At the same time they stressed that the promising model offered by the Prüm Treaty, including online requests and hit/no hit access, should be considered at EU level as soon as possible.
- The ministers underscored that rapid implementation of the availability principle must not depend on the adoption of a framework decision on data protection in the third pillar.”
18. In Chapter 3 of our report on the Heiligendamm meeting¹¹ we drew attention to this passage, and were particularly critical of the attempt to

¹⁰ The expression “civil registers” is not defined in the Commission text. In a letter of 15 December 2005 to the House of Commons European Scrutiny Committee Paul Goggins MP, then the Parliamentary Under-Secretary of State at the Home Office responsible for these matters, said that this category of information was included because of the value to law enforcement of access to data which could identify or confirm who people were. He understood that electoral registers and registers of births, marriages and deaths were examples of registers held in the United Kingdom which might be of this type (House of Commons European Scrutiny Committee, Fourteenth Report of Session 2005–06, HC Paper 34-xiv).

¹¹ *Behind Closed Doors: the meeting of the G6 interior ministers at Heiligendamm*, 40th Report, Session 2005–06, HL Paper 221.

divorce progress on the principle of availability from adoption of a third pillar Data Protection Framework Decision. Now, with the benefit of a year's hindsight, this statement can be seen as the first sign of the German chairmanship attempting to sideline the EU initiative on the principle of availability in favour of "the promising model offered by the Prüm Treaty"—an attempt which has been conspicuously successful. It is the Commission proposal which risks becoming redundant; there have been no further negotiations on it, and Ms Joan Ryan MP, the Parliamentary Under-Secretary of State at the Home Office, told us in her written evidence that the Commission proposal was being held in abeyance. (p 1) However in oral evidence she said that the Government "want that Framework Decision to go ahead" (Q 32); but she did not say whether the Government would be pressing for the negotiations to be resumed or, if so, how the differences with the Prüm Treaty would be reconciled.

Lawfulness of the Treaty

19. Questions have been raised about the legality of the Prüm Treaty, on the ground that it may be contrary to the implementation of Community objectives. Article 10 of the EC Treaty provides:

"[Member States] shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty".

In a Briefing Note prepared at the request of the LIBE Committee of the European Parliament in January 2006¹² Dr Thierry Balzacq¹³ argued that Prüm breaches the principle of loyal cooperation of Article 10. In the States in which it is in force, Prüm sets up a regime which in his view is inconsistent with the Commission proposal on the principle of availability, and which prevents the latter from ever being brought into effect.
20. In written evidence to us on behalf of the Centre for European Policy Studies (CEPS) Professor Elspeth Guild, Professor of European Migration Law at Radboud University, Nijmegen, had told us that "[T]ransferring privately negotiated treaties into the EU acquis does not fulfil the requirements of legitimacy. It appears underhanded and dishonest." In oral evidence she confirmed this view, and said that in relation to its first pillar provisions on immigration the Prüm Treaty was in breach of Article 10. (Q 50) Mr Tony Bunyan, the Director of Statewatch, pointed to the practical difficulties of such an approach: "if you have 15 Member States who are signing up to, for example, sky marshals, how can that work within the European Union? You can have sky marshals on some flights between some countries but not sky marshals on other flights." (Q 49)
21. Mr Peter Hustinx, the European Data Protection Supervisor, argued in his written evidence (p 31) that the Contracting States "evaded the substantive and procedural requirements of enhanced cooperation" which have been included in the EU Treaty since its amendment by the Treaty of Nice.¹⁴ For

¹² IP/C/LIBE/FWC/2005-08

¹³ Research Fellow at the Centre for European Policy Studies (CEPS).

¹⁴ The Treaty of Nice amended Article 40 of the Treaty on European Union (TEU), and added Articles 40a and 40b. Together these Articles provide a way for Member States to establish enhanced cooperation between themselves with "the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice". The procedure is governed by Title VII of the TEU. It requires an initiative of at least

these and other reasons he believes that it is arguable that “the Prüm Convention breaches the law of the European Union”. But in his view this can never be more than a theoretical argument, since neither the European Court of Justice nor any other court has jurisdiction to rule on this question. Jonathan Faull regretted that the initiative had not been taken within an EU framework from the beginning, and confirmed that it could have been taken under enhanced cooperation.¹⁵ (Q 83)

22. **We believe that for seven Member States to enter into an agreement including first pillar matters falling squarely within EC competence may have breached the letter, and certainly breached the spirit, of Article 10 of the EC Treaty.**

The approach of the United Kingdom

23. The Government’s approach to Prüm might be described as cautious. When Ms Ryan came to give oral evidence we asked her whether the United Kingdom had been invited to take part in the negotiations leading to the signature of the Prüm Treaty when these first began, and if not, what steps the Government took to be included in the negotiations. Ms Ryan told us that the United Kingdom had indeed been invited to take part, but had not done so. She did not suggest that the Government had thought that such an agreement would be unlawful or even undesirable; the reason she gave was that the draft Treaty contained provisions which the Government found unacceptable.
24. We were perplexed by this reply, and pressed the Minister to explain why, if there were provisions in the draft which were unacceptable, the Government had not taken part in the negotiations and attempted to have those provisions amended or deleted when there was an opportunity to do so, rather than waiting until the Treaty was signed. Ms Ryan was unable to give us a satisfactory answer to this question, merely repeating her original reply. (QQ 2, 6)
25. A Government taking part in treaty negotiations is not bound to sign a draft treaty which emerges from these negotiations; and if it does sign, is not obliged to ratify the treaty.¹⁶ It may have been likely that the negotiations on Prüm would result in a draft acceptable to the majority of the Member States taking part in those negotiations, but unacceptable to the United Kingdom; but this was not, in our view, a reason not to take part in those negotiations.
26. Once the Treaty was concluded without the United Kingdom as a signatory, the question arose whether the Government should attempt to accede to it. On 9 January 2006, ten months before the Treaty entered into force, Paul Goggins MP, then the Home Office Minister responsible, told us in a letter to our Chairman that “the Government is currently considering

eight Member States. It is clear from subsequent events that the seven signatories of the Prüm Treaty would have had no difficulty in finding an eighth State to join them if they had wished to use this procedure. In fact it has never been used.

¹⁵ However in a second briefing note prepared for the LIBE Committee in July 2006 (IP/C/LIBE/FWC/2005–22–SC2) Dr Balzacq argues that, given that Articles 20–23 of the Prüm Treaty deals with issues which *ratione materiae* fall within the Schengen *acquis*, enhanced cooperation would not have been open to the signatory States.

¹⁶ Perhaps the best example of this is the failure by the United States to ratify the Kyoto Protocol. Signature of a treaty does, in international law, involve an undertaking not to act in a manner contrary to the aims of the treaty, but no more.

whether the UK should accede to the Prüm Treaty”. Two months later, on 14 March 2006, Baroness Scotland of Asthal, the Minister of State at the Home Office, when asked by Lord Wallace of Saltaire whether the Government proposed that the United Kingdom should become a party to the Treaty, replied:

“My Lords, the Government are looking closely at the Prüm Convention. No decision has yet been taken. We expect to come to a preliminary view in the next few months.”¹⁷

27. On 29 November 2006, when the Treaty was already in force between three of the signatories, Ms Ryan told the Sub-Committee inquiring into SIS II: “We believe there are potential benefits for signatories to the Prüm Convention, so we are looking at that very actively at the moment”.¹⁸ And in evidence to this Committee on 19 December 2006 the Rt Hon Geoff Hoon MP, the Minister for Europe, said: “The Government is seriously considering signing up to the Prüm Convention and intends to enter into formal discussions with the existing signatories in the near future”.¹⁹
28. **In the space of a year four ministers told us that the question of accession to Prüm was under “close”, “active” and “serious” consideration. We do not understand why it should have taken so long for the Government to conclude that there was at least one provision of the Treaty to which the United Kingdom could not agree.**

Prüm: the way forward

29. The time for accession is in practice past. It is now clear that Prüm was never more than a stepping stone to an EU-wide instrument. The first clue can perhaps be found in the Treaty’s opening words:

“The High Contracting Parties to this Convention, being Member States of the European Union,”

which make clear the capacity in which the Contracting States are signing: not just as independent sovereign States, but also as Member States of the EU.²⁰

30. Article 1 explains the reason for this. Not only is it open to any Member State of the EU to join the Convention, but:
- “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.”
31. Schengen also started as an agreement between a small number of Member States, impatient at the slow progress of the EU (then EC), going forward at

¹⁷ Official Report, 14 March 2006, col. 1098.

¹⁸ *Schengen Information System II (SIS II)*, 9th Report, Session 2006–07, HL paper 49, Q602.

¹⁹ *Evidence of the Minister for Europe on the Outcome of the December European Council*, 4th Report, Session 2006–07, HL Paper 31, Q 25.

²⁰ Dr Thierry Balzacq, briefing note prepared at the request of the LIBE Committee of the European Parliament in January 2006.

their own speed, secure in the knowledge that if they could persuade enough others to join, the rest would have to follow, so that eventually the provisions they had agreed became part of EU law. The 1985 Schengen Agreement said nothing at all about other Member States. The 1990 Schengen Convention, implementing that Agreement, provided that “Any Member State of the European Communities may become a Party to this Convention”, but said nothing about attempting to incorporate it into EU law; it took another Treaty to achieve this.²¹ The Contracting States to the Prüm Treaty have been more brazen about it, making their ambitions clear from the outset. In the next chapter we explain how those ambitions are being pursued.²²

²¹ Protocol No 2 to the Treaty of Amsterdam, integrating the Schengen acquis into the framework of the European Union.

²² With the further enlargement of the European Union and the creation of an increasing number of regional groupings, and groups like the G6 not based on a geographical region, it is probable that more initiatives of this type will be proposed. It remains to be seen whether they would use the formal Treaty enhanced cooperation procedure.

CHAPTER 3: THE GERMAN PRESIDENCY'S INITIATIVE

32. At the meeting of the G6 interior ministers in Stratford-upon-Avon on 25 and 26 October 2006²³ Germany was represented by its interior minister, Dr Wolfgang Schäuble. Within ten days of Germany taking over the EU Presidency, in a speech to journalists in Berlin on 11 January 2007 Dr Schäuble said that he accepted that the G6 caused a degree of mistrust with those 21 partners which do not take part in the meetings, but thought that if too many issues were tackled in formal Council meetings, not all Member States would be satisfied with the degree of efficiency of the decision-making process. As an example of the benefits of informal structures he highlighted the Prüm Treaty. The seven signatory States had simply thought that EU procedures would take too long, and clinched their own deal; but now that the Treaty was there, the German Presidency would see if it could be put into an EU legal framework.

The Dresden meeting

33. Any questions about the extent to which an EU-wide instrument would differ from one extending to only seven Member States were rapidly answered. Four days later an informal meeting of justice and home affairs ministers of all the Member States was held in Dresden. The first agenda item at the first plenary session on 15 January 2007 was a Presidency paper whose topic was: “Stepping up cross-border police cooperation by transposing the Prüm Treaty into the legal framework of the EU”. After three pages extolling the virtues of the Treaty—it “amounts to a *quantum leap*²⁴ in the cross-border sharing of information”—a single question was put to ministers: “Do you support the planned initiative of the Prüm contracting states to incorporate the contents of the Prüm Treaty into the EU law 1-to-1?”
34. By the end of the day Dr Schäuble was able to say:
- “I am pleased that the proposal to transpose the Prüm Treaty into EU law, which was submitted informally by the German Presidency together with the other Prüm signatories and the European Commission today, has been so very well received. With this in mind, we want to take up formal discussions at the next meeting of justice and home affairs ministers in Brussels on 15/16 February.”
35. We explained in paragraph 30 that any initiative to incorporate Prüm has to be “in consultation with or on a proposal from the European Commission”. The Presidency paper stated that “[T]he German Presidency, together with its Prüm partners and the European Commission, wishes to initiate the conversion of the Prüm Treaty into EU law.” Jonathan Faull told us that there the Commission had regularly attended meetings of working groups. (Q 89)
36. We do not question the sincerity of the views of the German Presidency, nor that Dr Schäuble was genuinely of the view that the provisions of the Treaty would transform the effectiveness of police cooperation on counter-terrorism and serious crime in those States where it is in force. The Presidency clearly

²³ This meeting was the subject of our report *After Heiligendamm: doors ajar at Stratford-upon-Avon*, 5th Report, Session 2006–07, HL Paper 32.

²⁴ Bold in the original.

has no problem extrapolating this to the whole of the EU. At the time of the Dresden meeting the Treaty had been in force between Germany and Austria for less than two months, but the paper presented to ministers at that meeting stated:

“Already at this early stage, the automatic information exchange has brought about noticeable operational success: for instance, the German authorities matched DNA profiles of open cases against data held by the Austrian authorities and found hits in 1510 cases. In this context 710 open traces from Germany could be attributed to persons known to the Austrian criminal prosecution authorities. Broken down by types of crime, 41 hits in homicide or murder cases, 885 hits in theft cases, 85 hits in robbery or extortion cases were found. Prosecution authorities are confident that the number of hits will increase constantly as further Prüm countries take part in this process, and that they will thus be able to solve numerous other open cases.”

37. Some of these figures were quoted to us in evidence by Ms Ryan, who (with Baroness Ashton of Upholland) represented the United Kingdom at Dresden. (Q 20) We agree that if a significant proportion of these cases resulted in the identification, extradition, prosecution and conviction of criminals who would not otherwise have been identified, this was a highly satisfactory result. However the implication is that this result, obtained after only two months, would be repeated in future months. Tony Bunyan, the Director of Statewatch, described this as “a headline-making figure”, and pointed out that this apparently impressive result followed from the fact that there was a large amount of information about earlier serious crimes which was available for the first time to the prosecuting authorities. Once the backlog of crimes was cleared up, results would not continue on anything like this scale. (Q 57) Jonathan Faull admitted that this could be the case. (QQ 95, 96)
38. In our view the statement in the Presidency paper that “Prosecution authorities are confident that the number of hits will increase constantly as further Prüm countries take part in this process” is highly misleading. It seems to us that each time a further country takes part there will be another backlog to clear up, and this will produce apparently impressive results; but thereafter the figures are bound to be significantly lower. It is hardly to be expected that every month twenty or so homicides in Germany will be cleared up from data made available by the Austrian authorities.
39. Moreover, there is no reason why this result could not have been achieved by a Framework Decision on the principle of availability. Given that the scope of this Framework Decision, and the data it covers, would go considerably wider, the result might well have been surpassed.
40. The German Presidency’s enthusiasm for the results achieved by matching DNA profiles held in its database with those held by the Austrians ignores other problems which are likely to arise when the same exercise is carried out among 27 Member States. The absence of a harmonised approach to the collection and retention of data means, for instance, that there will continue to be differences between the grounds on which Member States collect DNA and fingerprints, and the length of time they are allowed to retain these data under their national law. Thus we were told by Tony Bunyan that “in most European Union States [fingerprints and DNA] are kept and held for serious crimes, whereas in the UK we are keeping fingerprints and DNA for all

crimes, however minor”. Since January 2006 it has been possible for persons arrested to have their DNA and fingerprints taken compulsorily even if they are not charged. (Q 76) The Home Office has now proposed in a consultation paper that this should be possible if people are only suspected of a crime, even though they are not arrested.²⁵

41. It therefore comes as no surprise that the United Kingdom has the largest DNA database in the world, half as large again as all the other Member States put together.²⁶ Jonathan Faull confirmed that this was likely to lead to the United Kingdom exchanging DNA data more widely than other Member States. (Q 102) Officials of a country which holds DNA data only for serious crimes will inevitably start with the presumption that DNA data are held in the United Kingdom for the same purpose, and perhaps put at risk those whose DNA is held because they have committed only a minor crime, or perhaps no crime at all. The Assistant EDPS, Mr Bayo Delgado, believes that in such cases “the interpretation of the result [of a match] may be in need of some clarification.” (Q 126) Nothing in the Minister’s evidence to us suggests that the Government are concerned about this.
42. **The threshold for holding DNA profiles on the United Kingdom DNA database is far lower than in any other Member State, and the proportion of the population on the database correspondingly far higher. The Government should as a matter of urgency examine the implications of DNA exchanges for those on the United Kingdom database.**

The draft Prüm Decision

43. Within four days of the Dresden meeting the Council Secretariat had published a Working Paper containing a first draft of a Council Decision incorporating the Convention into EU law.²⁷ The eighth and ninth recitals of that draft read:

“(8) For effective international cooperation it is of fundamental importance that precise information can be exchanged swiftly and efficiently. The aim is to introduce procedures for promoting fast, efficient and inexpensive means of data exchange. For the joint use of data these procedures must be subject to accountability and incorporate appropriate guarantees as to the accuracy and security of the data during transmission and storage as well as procedures for recording data exchange and restrictions on the use of information exchanged.

(9) These requirements are satisfied by the [Prüm Convention] ... In order that both the substantive requirements of the Hague Programme can be fulfilled for all Member States and its targets in terms of time-scale can be achieved, the essential parts of the Prüm Convention need to be made applicable for all Member States. This Council Decision is therefore based on the main provisions of the Prüm Convention.”

²⁵ Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984, Home Office, March 2007, paragraphs 3.31–3.38.

²⁶ DNA Expansion Programme 2000–2005: Reporting Achievement (Home Office, October 2005). At that date 5.24% of the UK population was on the database, compared to 0.5% in the United States. The figure for the EU as a whole was 1.13%. Austria is the Member State with the next highest proportion, 0.98%.

²⁷ General Secretariat of the Council, Working Document of 19 January 2007. We refer hereafter to a draft of a Decision to incorporate the Prüm Treaty into EU law as a “Prüm Decision”.

44. The references to the “essential parts” and the “main provisions of the Prüm Convention” follow from the fact that, as explained in paragraph 11 above, while most of the Treaty consists of provisions which might be described as third pillar provisions, Chapters 3 and 4, which deal with the deploying of air marshals on planes and the creation of a network of immigration liaison officers to help combat illegal migration, are first pillar provisions, and cannot therefore be included in a Decision whose legal basis is Title VI of the Treaty on European Union. These chapters, because they do not feature in any draft of the Prüm Decision, are set out in Appendix 4 to this report. Apart from those chapters, the substantive provisions of the draft are not merely “based on the main provisions of the Prüm Convention”, but replicate them word for word.
45. This draft of the Prüm Decision was considered by the Article 36 Committee at a meeting on 25–26 January. This is a Coordinating Committee of senior officials set up under Article 36 of the Treaty on European Union “to give opinions for the attention of the Council, either at the Council’s request or on its own initiative”, and to contribute to the preparation of Council discussions in Title VI matters. The Committee’s opinions are not made public, but they clearly did nothing to impede the process of incorporation of Prüm.

The February Council

46. On 6 February a revised draft of the Prüm Decision,²⁸ put forward by the Presidency and twelve other Member States, was published for consideration at the formal Justice and Home Affairs Council on 15 February. If this had been a Commission initiative, the proposal would have been accompanied by an explanatory memorandum and, crucially, by an impact assessment. The Member States putting it forward, though under no obligation to provide an explanatory memorandum or impact assessment, might have realised this would be useful not just to the other Member States but to all of those who might be interested, including national Parliaments.
47. At the February meeting the Council (at which the United Kingdom was represented by Baroness Scotland of Asthal and Ms Ryan) formally agreed on:
- “the integration into the EU legal framework of the parts of the Prüm Treaty relating to police and judicial cooperation in criminal matters [Title VI of the EU Treaty, the so-called ‘third pillar’] with the exception of the provision relating to cross-border police intervention in the event of imminent danger [Article 18]. This last particular issue will be further examined by the Council at one of its forthcoming sessions.”²⁹
48. A third draft of the Prüm Decision was prepared on 27 February.³⁰ The significant difference from the draft considered by the Council is the omission of the former Article 18, removed from that draft in the circumstances we describe in paragraphs 60 to 66 below. We consider the consequences of that omission in the following chapter.

²⁸ Document 6002/07.

²⁹ Press release of 2781st Council Meeting, document 5922/07.

³⁰ Document 6566/07.

49. Another draft was prepared by the Presidency on 14 March 2007 in anticipation of a further meeting of the Article 36 Committee, and this is the draft which we have printed in Appendix 3.³¹ There are no significant changes of substance, but enough changes of detailed wording for the recitals to refer, not to the “essential parts”, but to “the substance of the essential parts” of the Prüm Treaty. The “main provisions” have become “provisions based on the main provisions”.³²

Relationship with other EU instruments

50. The Prüm Treaty already overlaps, and the Decision when adopted will overlap, with three EU instruments. Two of these, the draft Framework Decisions on data protection and on the exchange of information under the principle of availability, have already been discussed.³³ Perhaps because they are still in draft, they do not merit a mention in the recitals to the Decision, which therefore gives no clue as to whether or to what extent it will be related to these instruments, or how any conflict between them will be settled.
51. However a third instrument has already been adopted. This is the 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,³⁴ under which they must ensure that information and intelligence will be provided to authorities of other Member States on request. The existence of this Framework Decision is acknowledged in recitals (7) and (11) of the Prüm Decision. We understand from Jonathan Faull that there is a sense that the two instruments are complementary, but that it is too early to tell precisely how they will co-exist, given that the new administrative procedures for the exchange of information under Framework Decision 2006/960/JHA have not yet been tested. (Q 113)³⁵
52. If and when the Prüm Decision is adopted, there will be three third pillar instruments dealing in different ways with the exchange of information between law enforcement authorities of different Member States. As we have said in paragraph 15 above, we set out in Appendix 6 the similarities and differences between the current texts. We believe that this is an unsatisfactory situation. Those who are attempting to make use of this legislation in the fight against crime should have at their disposal provisions which are clear, simple and straightforward, not complex, cumbersome and inconsistent as they are now.
53. We asked Jonathan Faull whether consolidation of these laws would not in due course be desirable. While agreeing in principle, he doubted whether Member States would ever be able to agree to a strict consolidation; they would be unable to resist the temptation of seeking to negotiate

³¹ Document 7273/07.

³² Some of the detailed changes are less than felicitous. Articles 8 et seq of the Treaty, dealing with “fingerprinting data”, in the Decision refer to “dactyloscopic data”. In the latest draft of the Decision there is a recital which refers to “the architectonics of comparing anonymous profiles”.

³³ Paragraphs 13 to 18 above.

³⁴ OJ L386 of 29 December 2006, page 89.

³⁵ In paragraph 32 of his Opinion of 4 April 2007, to which we refer in paragraphs 82 et seq below, the European Data Protection Supervisor (EDPS) “regrets the fact that the present initiative is issued without a proper evaluation of the existing measures on the exchange of law enforcement information”. Among the “existing measures” to which he refers are the Schengen Information System (SIS).

improvements, and in doing so would increase the confusion. (Q 114) We agree that, in the absence of a special procedure for strict consolidation without amendments,³⁶ this is a very likely outcome. We hope however that the point will not be lost sight of. Meanwhile, **law enforcement authorities in all the Member States must be provided with the same clear guidance and training which will enable them to operate the new laws responsibly in the fight against crime.**

Timetable

54. The German Presidency at one time had ambitions that this Decision should be agreed at the JHA Council on 19–20 April, but this would have been to ignore the role of the European Parliament. Although the Parliament does not—yet—have co-decision powers in third pillar matters, Article 39 of the Treaty on European Union does require the Council to consult the Parliament, and to give it at least three months to deliver its Opinion.
55. On 28 February the Secretary-General of the Council wrote to the President of the European Parliament to initiate the formal consultation of the Parliament on the draft of 27 February. The letter informed the Parliament that the Council was still debating the approach to be adopted in relation to Article 25 of the Treaty—“measures in the event of immediate danger”, and would inform the Parliament of the outcome of its discussions without delay.
56. The letter asks the Parliament to deliver its Opinion no later than 7 June 2007. This gives the Parliament barely more than the three month minimum required by Article 39 TEU. It gives the Council two working days to consider the Opinion before the last JHA Council of the German Presidency on 12–13 June. Since the Presidency intends, or at least hopes, to have the Decision adopted at that Council, and since the instruments to be adopted have to be circulated a little time in advance, it is plain that the Presidency is complying with the formalities of the Treaty, but has little intention of being influenced by the views of the Parliament.³⁷
57. **It is understandable that a State which holds the Presidency should wish to make use of that opportunity to further legislative proposals which it is particularly anxious to see implemented. This should not however be seen as a reason for cutting short full consideration by all the Member States. The timetable for initiatives by Member States should be the same as for Commission proposals.**

³⁶ The Parliamentary procedure under the Consolidation of Enactments (Procedure) Act 1949 is a good example.

³⁷ In paragraph 18 of his Opinion the EDPS states that the procedure chosen by the Presidency “denies all need for a demographic and transparent legislative process since it does not even respect the already very limited prerogatives under the third pillar”.

CHAPTER 4: WHAT SHOULD THE UNITED KINGDOM BE DOING?

58. In their response to the Heiligendamm report³⁸ the Government suggested that “if the Prüm treaty reaches the EU it will be opened up to the same negotiations and processes as all other proposals and a single Member State can prevent it from being enacted.” It is true that the Prüm Decision, being a third pillar measure, must be adopted unanimously or not at all;³⁹ but this is only half the truth. The real picture is that the Decision replicates a deal agreed between a group of Member States, and already ratified by some of them and in force between them. It was the firm and stated intention of those States that it should become binding on the other Member States without amendment; and this, with a single exception, is what they have so far achieved.
59. The Government, being broadly supportive of the measure, may not wish the United Kingdom to be one of the States—perhaps the only State—preventing its adoption altogether. But this does not mean that it should play a passive role in the negotiations. The Government have already shown that there is one provision they are not prepared to accept. We believe that there are four other matters which the Government should be actively pursuing.

Measures in the event of immediate danger

60. Article 18 of the draft of the Decision considered by the Council on 15 February,⁴⁰ the equivalent of Article 25 of the Treaty, would have allowed officers⁴¹ of one Member State to cross the border into another Member State without that State’s prior consent “in urgent situations” to take “any provisional measures necessary to avert immediate danger to life or limb”.⁴²
61. In her letter to the Chairman, written on 2 February in advance of the February Council, Ms Ryan wrote:

“Article 18 ... is one of the reasons that the UK was cautious about signing the original Prüm Convention ... The Article is designed for States with extensive land borders who may have a situation, such as a train crash, which would need to be dealt with by the nearest police. We therefore doubt that it is operationally feasible or desirable for the UK.

In addition, whilst the focus is on urgent situations, the Article does not preclude ‘hot pursuit’ in a situation such as kidnapping where there may be ‘immediate danger to life or limb.’ The UK does not participate in Article 41 of the Schengen Acquis on ‘hot pursuit’. Furthermore, Article 18(4)⁴³ requires signatories to accept liability for foreign officers operating in our territory. This would require primary legislation.

³⁸ The response to our report *Behind Closed Doors: the meeting of the G6 interior ministers at Heiligendamm* (40th Report, Session 2005–06, HL Paper 221) is reprinted as Appendix 2 to our report *After Heiligendamm: doors ajar at Stratford-upon-Avon* (5th Report, Session 2006–07, HL Paper 32).

³⁹ Article 34(2) of the Treaty on European Union.

⁴⁰ This Article is reproduced in Appendix 5 to this report.

⁴¹ “Officers” is the word used in the official English text of the Prüm Treaty and in the text of the Prüm Decision of 6 February. The Article does not feature in the text of 27 February. “Officers” is used as shorthand for “designated officers and other officials”: see Article 17(1) of the Decision.

⁴² In Article 25 of the Treaty this reads “...to avert imminent danger to the physical integrity of individuals”. There is no difference between the German texts (“Gefahr für Leib oder Leben”).

⁴³ Sic: in fact Article 18(5).

Therefore we will seek to ensure our concerns are addressed in negotiations, possibly exploring the possibilities of an opt out or the removal of the Article altogether.”

Ms Ryan repeated some of these concerns in her oral evidence. (QQ 6, 16–17)

62. At the February Council the Government, to their credit, voiced their concerns about this provision, and insisted on its removal from the draft Decision. This has been done: the article was omitted from the draft of 27 February which was forwarded to the European Parliament for its Opinion.
63. We agree that those drafting Article 18 certainly did not contemplate its applying to maritime borders; the constant references to “crossing the border” are proof of this. But if left in the Decision unamended, this provision would arguably allow foreign police officers and other foreign officers and officials to enter and act in this country uninvited.⁴⁴ Given our maritime borders it would be unnecessary and undesirable. Any arrangements affecting the border between the United Kingdom and Ireland have been made and should remain on a bilateral basis.
64. Portugal has suggested that the mandatory provisions of Article 18 might be replaced by a provision allowing Member States to agree on a bilateral basis to allow officers of another State with a common border to enter their territory without prior permission “in urgent situations”. There is a precedent for such a provision in Article 39(5) of the Schengen Convention.⁴⁵ Ms Ryan referred to this in evidence (Q 17) but did not state whether the United Kingdom would support this initiative. Mr Faull mentioned an alternative solution under examination which would require Member States with a common border to conclude separate bilateral agreements about measures they would take in the event of an immediate danger in their border regions. (Q 106)
65. **We congratulate the Government on having successfully insisted on the removal from the Prüm Decision of a general provision which would allow designated officers and officials of one Member State to enter the territory of another Member State without prior permission.**
66. **Since unanimity is needed for the adoption of the Prüm Decision this shows that, given the will, the Government should be able to secure agreement on other matters which need to be settled before the Decision can be adopted.**

Principle of Availability

67. We explained in paragraph 14 that the draft Framework Decision covered some data not covered by Prüm: ballistics, communications data and identification data in civil registers.⁴⁶ We do not know whether those

⁴⁴ French and Belgian customs officers are already present at the Eurostar terminal of Waterloo station in London, but that of course is by invitation.

⁴⁵ “The provisions of this Article [on police cooperation] shall not preclude present or future bilateral agreements between Contracting Parties with a common border.”

⁴⁶ The six types of information had been identified by the Council in Decision 7641/2/05 of 14 April 2005. At the meetings of the Article 36 Committee on 8 December 2005 and 3 February 2006 a majority of Member States opted for a progressive implementation of the principle of availability starting with the

negotiating the Prüm Treaty took a conscious decision to exclude these data, and if they did, what the reason may have been. An explanatory memorandum could have given the reason for this.

68. Whatever the reason, we need to know what is to be the fate of information, for example data on ballistics, which may well be important for the prevention and detection of crime, and which would have been available under the Framework Decision, but will not be available under Prüm. Despite the importance apparently attached by the Government to progressing the Framework Decision (Q 32)⁴⁷ we see no prospect of negotiations on this resuming once the Prüm Decision has been adopted. The obvious solution would be to amend the Prüm Decision to include ballistics and the other categories of information not so far included. There is no suggestion that the States promoting that Decision have given any thought to this.
69. We asked Jonathan Faull whether the Commission believed that ballistics, communications data and identification data in civil registers should have been included in the Prüm Treaty. He was unable to explain why these categories of data had been left out, but he believed that their exchange under the principle of availability remained a priority for the EU. (Q 110)
70. There is another way in which the Framework Decision is (or would have been) an improvement on Prüm, and that is the involvement of Europol. Europol is an agency created by a Convention between all the Member States, and as such could not be given access to data by a multilateral treaty between seven of those States; yet under the Framework Decision it would have had access to data available to all Member States. According to Jonathan Faull, this point is likely to be taken up in the wider discussions on the future role of Europol. (Q 112)
71. **If and when the Prüm Decision is agreed, any matters in the Framework Decision on the principle of availability which have not been adequately dealt with must continue to be the subject of negotiation.**

The cost of implementation

72. If this had been a Commission initiative, there would have been an explanatory memorandum from the Commission which would have given an estimate, however rough, of the cost of implementing the Prüm Decision. But the States whose initiative this is have not done so. While they were under no legal obligation to supply an explanatory memorandum, we believe that they should have done so.
73. **There should be a convention that any legislative proposals by Member States should, like Commission proposals, be accompanied by full explanatory memoranda and regulatory impact assessments.**⁴⁸

exchange of DNA data, and followed by the exchange of fingerprint and vehicle registration data, as well as the other types of information identified by the Council: Document 6259/3/06 of 20 April 2006 from the Presidency to Coreper. For the meaning of “civil registers” see paragraph 14 above.

⁴⁷ See also paragraph 18 above.

⁴⁸ We made a similar recommendation in our report on *Human Rights Proofing EU Legislation*, where we said: “It is our experience that Third Pillar measures commonly raise issues relating to fundamental rights. We have no doubt that impact assessments are particularly important in respect of such proposals. Indeed the failure of Member States to provide background information and explanations for the measure being

74. **Member States which are asked to consider an initiative by some of their number should normally decline to do so unless and until they have been supplied with a full explanatory memorandum covering in particular the estimated cost of the initiative.**
75. Ms Ryan's letter of 2 February states, and the Government's Explanatory Memorandum on the Prüm Decision repeats:
- “Germany has stated that the costs to them of implementing the Prüm Convention, including the provisions that are included in the draft Council Decision, have been in the region of €900,000. We are considering in detail what the financial implications for the UK might be but the initial view of UK experts is that the costs associated with implementing Prüm among all 27 EU Member States may be considerably higher, depending in part on the precise technical arrangements for allowing Member States to link into one another's systems. We are currently exploring with Germany and other existing Prüm participants the basis on which their costings were developed, with a view to further developing our own cost analysis.”
76. In a further letter to the Chairman of 19 April 2007 (p 11) Ms Ryan explains that the question of cost was discussed at a technical workshop at Wiesbaden on 9 March to which the Government sent experts from the DNA National Database, the Police Information Technology Organisation and the Driver and Vehicle Licensing Agency (DVLA). She tells us that the figures used at the meeting “in some cases appear considerably higher than the German or Austrian costs ... the figures from other signatories do not include project or business costs, which can often be some of the most expensive elements.” On the basis of these discussions “the Government estimates that the total start-up cost for the United Kingdom will be in the region of £31 million pounds for the exchange of fingerprint, DNA and vehicle registration data”; but the Minister stresses that “these are informed but necessarily limited estimates of cost based on the information currently available”. She tells us that the Government do not consider the £31 million estimated start-up cost unreasonable “considering the benefits that the draft Council Decision will bring.”
77. What Ms Ryan does not give us is any estimate of the annual cost of running the Prüm system. It seems to us possible that the German assessment of the cost of exchanging information with Austria, whose population is just over 8 million, may be only a fraction of the cost of exchanges with 26 other States whose total population is over 400 million. The cost to the United Kingdom of supplying information to other States may be one of the highest, given the size of its DNA database to which we have referred in paragraphs 40 to 42 above.
78. **The Government should not allow the Prüm Decision to be incorporated into EU law unless and until there is available a reliable estimate of the start-up cost and the running costs of doing so, and then only if they believe that the benefits to the United Kingdom of implementing the Decision justify these costs.**

proposed makes our own scrutiny work that much more difficult and places a further burden on the Government faced with our requests for clarification. We therefore recommend that Member States should carry out impact assessments before bringing forward any proposal under the Third Pillar. Any such proposal should also be supported by a full explanatory memorandum including a section dealing with fundamental rights.” (16th Report, Session 2005–06, HL Paper 67, paragraph 41)

Supervision of operation

79. The draft Decision does not include any provision for the collection of statistics, or for monitoring and evaluating its operation. This is unacceptable in an instrument of this type. The Regulation on the establishment, operation and use of the Second Generation Schengen Information System (SIS II) sets up a Management Authority whose duties include the collection and publication of statistics.⁴⁹ Every two years the Authority has to submit to the European Parliament and the Council a report on the technical functioning of Central SIS II, including its security, and every four years the Commission has to produce an overall evaluation of Central SIS II and of the bilateral and multilateral exchange of information between Member States. We believe that this provides a good model for the sort of supervision which is essential for the Prüm Decision.
80. **The Government should insist on the inclusion in the Prüm Decision of provisions to ensure that its operation is properly monitored. What is required is at the very least:**
- **an obligation on national agencies to produce annual reports, including statistics, on the use of their powers under the Decision; and**
 - **an obligation on the Commission to produce an overall evaluation of the operation of the Decision, for submission to the Council, the European Parliament and national parliaments, to see whether it needs amendment.**

Data protection

81. We have referred in paragraphs 72 to 74 to the desirability of initiatives of Member States, like Commission initiatives, including full explanatory memoranda. **There should be a similar requirement that Member States putting forward initiatives with data protection implications should consult the European Data Protection Supervisor.**
82. Even without such a requirement, the EDPS could have been consulted; but he was not. Nevertheless on 4 April 2007 he sent to the German Presidency a very full Opinion, which was published on 11 April.⁵⁰ We congratulate him on having taken this step; his Opinion makes a number of useful points, many of them repeating views he had already given us in evidence and supporting conclusions we had already reached.
83. Data protection issues in first pillar instruments are governed by the 1995 Data Protection Directive.⁵¹ The Hague Programme instructed the Commission to bring forward proposals for a third pillar Data Protection Framework Decision (DPFD) at the same time as it put forward proposals for a Framework Decision on the Principle of Availability, since the two were intimately connected. This it did in October 2005. Data transferred under the second of these Framework Decisions would be governed by the DPFD.

⁴⁹ Regulation (EC) 1987/2006 of 20 December 2006, Article 50 (OJ L 381 of 28 December 2006).

⁵⁰ www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2007/07-04-04_crossborder_cooperation_EN.pdf

⁵¹ Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281, 23 November 1995, p 31.

Importantly, the Commission's impact assessment accompanying the Framework Decision on the principle of availability highlighted that the risk for personal data involved in that proposal would be significantly diminished by the existence of the third pillar data protection regime which was then envisaged.⁵² As we have explained, negotiations on the Framework Decision on the principle of availability have already foundered; we are anxious that the same fate should not await the DPF.

84. In three of our recent reports we have commented on the number of EU initiatives for the exchange of information which have data protection provisions, the extent to which they differ, and the difficulty of determining how they interact.⁵³ In Chapter 6 of our recent report on the second generation Schengen Information System⁵⁴ we considered in some detail the problems caused by the differences between the provisions in the Schengen Decision and those in what was then the latest draft of the DPF.
85. Inevitably, the data protection provisions in Chapter 7 of the Prüm Treaty, and hence in Chapter 6 of the Prüm Decision, are yet again different from those in the latest formal draft of the DPF.⁵⁵ The protection is to be no less than that of the Council of Europe Convention 108; the purpose of the supply of information is to be respected; and the data subject has a right to know what information is held about him, and a right to damages for injury from inaccurate information. There are also provisions for the deletion of information which is inaccurate, or has become irrelevant, or which has reached the date of deletion under the law of the State which supplied the information.
86. There is nothing to say whether these provisions or those of a future DPF are to prevail in case of conflict. The Information Commissioner hopes and expects that "the DPF will provide the *lex generalis* and the Prüm Convention will provide the *lex specialis*. Thus the general provisions of the DPF will apply except where there are more specific provisions [e.g. in relation to logging and recording] in the Prüm Convention." (p 37) This is also the view of Baroness Ashton, the Parliamentary Under-Secretary of State at the Department for Constitutional Affairs who is responsible for data protection. (Q 39)
87. The EDPS believes that these provisions "offer in substance an appropriate protection", but points out that they are "intended to build on a general framework for data protection that ... has not been adopted". He believes (and has stated more than once in his earlier formal Opinions) that the Prüm Decision should build on a general framework of data protection in the third pillar, and should not be adopted before the adoption of a framework on data protection guaranteeing an appropriate level of data protection. But he points out that "in practice legislation facilitating exchange of data is adopted before an adequate level of data protection is guaranteed. This order should be reversed." (p 32) He repeats these views in his latest formal Opinion.⁵⁶

⁵² Document 13413/05 Add 1.

⁵³ *Behind Closed Doors: the meeting of the G6 interior ministers at Heiligendamm*: 40th Report, Session 2005–06, HL Paper 221, Chapter 3, to which we refer in paragraph 32 above; *After Heiligendamm: doors ajar at Stratford-upon-Avon*: 5th Report, Session 2006–07, HL Paper 32, paragraphs 22–28.

⁵⁴ Schengen Information System II (SIS II): 9th Report, Session 2006–07, HL Paper 49.

⁵⁵ Document 13246/2/06.

⁵⁶ Paragraphs 57–59 of the Opinion.

88. The German Presidency does not share these views. In the press notice reacting to the EDPS' Opinion, it stresses that "incorporating the Prüm Treaty into the EU's legal framework does not depend on first achieving agreement on the proposed data protection framework decision. On the contrary, both the Prüm Treaty and the draft Council Decision to replace the treaty already contain very carefully drafted data protection provisions". The EDPS had indeed said that he felt these provisions had been carefully drafted, but he saw them only as "specific provisions on top of a general framework for data protection".
89. Mr Faull helpfully reminded the Committee that "[T]he Justice and Home Affairs Council on 14 April 2005 considered how the principle of availability should be implemented and in doing that confirmed that an appropriate system of data protection needed to be put in place". The Commission too thought that "the right way to do that is to adopt the Framework Decision on data protection", and he hoped that "we will have, alongside the Prüm Treaty having become part of law of the European Union, a dedicated data protection system for the third pillar as well." (Q 108)
90. **We share the view that negotiations on the Data Protection Framework Decision, instead of being sidelined, should proceed in parallel with those on the Prüm Decision.**
91. **The Government should seize the opportunity to stipulate that they will agree to the Prüm Decision only if other Member States, led by the German Presidency, simultaneously agree to a Framework Decision setting high standards for the protection of data across the third pillar.**
92. **If the Presidency wishes other Member States to accept its own views on the exchange of information, it must be prepared to listen to views on how that information is to be safeguarded, and to act on those views.**
93. After months of stalemate in the negotiations on the Framework Decision, the German Presidency came forward in March with a new draft. We are by no means sure that it will prove satisfactory. The Assistant EDPS said that he had "spotted some positive things" about it, but was also worried that it was a text with more general principles than the Commission proposal. As in the case of the Prüm Decision itself, the EDPS has not been consulted on this draft because it is not a formal proposal. (QQ 138–140)
94. Mr Faull told us he was "confident" that adoption of the Framework Decision was possible under the German Presidency. (Q 108) This would certainly be a momentous achievement—provided of course that the Framework Decision offered adequate safeguards. However we believe it may be optimistic to expect negotiations on a draft DPF to be concluded in time for agreement by the JHA Council in June. Article 39(1) of the Treaty on European Union requires a minimum of three months for consultation of the European Parliament, and even if the Parliament agreed on a shorter time, the opportunity for scrutiny by national delegations and Parliaments and by the European and national data protection authorities would scarcely be adequate.
95. Negotiations leading to a satisfactory DPF which offers adequate safeguards may well therefore last beyond the end of the German Presidency. If, as we hope, they proceed in parallel with those on the Prüm Decision, it

follows that the adoption of both instruments may be delayed. Perhaps the Presidency is hoping that agreement on a statement of principles on third pillar data protection will suffice. **The Government should strongly resist any such suggestion.**

96. Baroness Ashton has told this Committee more than once that the United Kingdom has high data protection standards which apply to information processed in the law enforcement field. We accept that this country's legislation is stricter than most. But once the principle of availability is fully implemented, Member States will lose the power to control the flow of information to other States, and so lose the power to impose their own standards. The relevant standard becomes that of the Member State with the weakest legislation, offering the least protection.
97. **The Government should try to ensure that United Kingdom data protection standards are replicated across the EU. The only way to achieve this is to adopt for all third pillar measures a Framework Decision which will guarantee those standards for the protection of personal data in all Member States.**
98. **We believe that, given the need for unanimity, the negotiations on the Prüm Decision provide an unrivalled opportunity for adopting a data protection regime at the same time as the legislation facilitating data exchange is adopted.**

CHAPTER 5: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

99. We put on record our regret that the German Presidency should have been unwilling to discuss with the Committee of a national Parliament an initiative to which we, like them, attach great importance. (paragraph 4)
100. We believe that for seven Member States to enter into an agreement including first pillar matters falling squarely within EC competence may have breached the letter, and certainly breached the spirit, of Article 10 of the EC Treaty. (paragraph 22)
101. In the space of a year four ministers told us that the question of accession to Prüm was under “close”, “active” and “serious” consideration. We do not understand why it should have taken so long for the Government to conclude that there was at least one provision of the Treaty to which the United Kingdom could not agree. (paragraph 28)
102. The threshold for holding DNA profiles on the United Kingdom DNA database is far lower than in any other Member State, and the proportion of the population on the database correspondingly far higher. The Government should as a matter of urgency examine the implications of DNA exchanges for those on the United Kingdom database. (paragraph 42)
103. Law enforcement authorities in all the Member States must be provided with the same clear guidance and training which will enable them to operate the new laws responsibly in the fight against crime. (paragraph 53)
104. It is understandable that a State which holds the Presidency should wish to make use of that opportunity to further legislative proposals which it is particularly anxious to see implemented. This should not however be seen as a reason for cutting short full consideration by all the Member States. The timetable for initiatives by Member States should be the same as for Commission proposals. (paragraph 57)
105. We congratulate the Government on having successfully insisted on the removal from the Prüm Decision of a general provision which would allow designated officers and officials of one Member State to enter the territory of another Member State without prior permission. (paragraph 65)
106. Since unanimity is needed for the adoption of the Prüm Decision this shows that, given the will, the Government should be able to secure agreement on other matters which need to be settled before the Decision can be adopted. (paragraph 66)
107. If and when the Prüm Decision is agreed, any matters in the Framework Decision on the principle of availability which have not been adequately dealt with must continue to be the subject of negotiation. (paragraph 71)
108. There should be a convention that any legislative proposals by Member States should, like Commission proposals, be accompanied by full explanatory memoranda and regulatory impact assessments. (paragraph 73)
109. Member States which are asked to consider an initiative by some of their number should normally decline to do so unless and until they have been supplied with a full explanatory memorandum covering in particular the estimated cost of the initiative. (paragraph 74)

110. The Government should not allow the Prüm Decision to be incorporated into EU law unless and until there is available a reliable estimate of the start-up cost and the running costs of doing so, and then only if they believe that the benefits to the United Kingdom of implementing the Decision justify these costs. (paragraph 78)
111. The Government should insist on the inclusion in the Prüm Decision of provisions to ensure that its operation is properly monitored. What is required is at the very least:
 - an obligation on national agencies to produce annual reports, including statistics, on the use of their powers under the Decision; and
 - an obligation on the Commission to produce an overall evaluation of the operation of the Decision, for submission to the Council, the European Parliament and national parliaments, to see whether it needs amendment. (paragraph 80)
112. There should be a requirement that Member States putting forward initiatives with data protection implications should consult the European Data Protection Supervisor. (paragraph 81)
113. We share the view of the Commission that negotiations on the Data Protection Framework Decision, instead of being sidelined, should proceed in parallel with those on the Prüm Decision. (paragraph 90)
114. The Government should seize the opportunity to stipulate that they will agree to the Prüm Decision only if other Member States, led by the German Presidency, simultaneously agree to a Framework Decision setting high standards for the protection of data across the third pillar. (paragraph 91)
115. If the Presidency wishes other Member States to accept its own views on the exchange of information, it must be prepared to listen to views on how that information is to be safeguarded, and to act on those views. (paragraph 92)
116. The Government should strongly resist any suggestion that agreement on a statement of general principles on data protection would be an adequate *quid pro quo* for the adoption of the Prüm Decision. (paragraph 95)
117. The Government should try to ensure that United Kingdom data protection standards are replicated across the EU. The only way to achieve this is to adopt for all third pillar measures a Framework Decision which will guarantee those standards for the protection of personal data in all Member States. (paragraph 97)
118. We believe that, given the need for unanimity, the negotiations on the Prüm Decision provide an unrivalled opportunity for adopting a data protection regime at the same time as the legislation facilitating data exchange is adopted. (paragraph 98)
119. We recommend this report to the House for debate. (paragraph 5)

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which conducted this inquiry were:

Baroness Bonham-Carter of Yarnbury
Earl of Caithness
Baroness D'Souza
Lord Foulkes of Cumnock
Lord Harrison
Baroness Henig
Lord Jopling
Earl of Listowel
Lord Marlesford
Lord Teverson
Lord Wright of Richmond (Chairman)

Declarations of Interests:

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

Interests declared by Members relevant to this inquiry

Baroness Henig
Chair of the Security Industry Authority
President of the Association of Police Authorities

Lord Wright of Richmond
Former Chairman, Joint Intelligence Committee

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- * Centre for European Policy Studies (CEPS)
- * Department for Constitutional Affairs (DCA)
- * European Commission, Directorate-General Justice, Freedom & Security (D-G JLS)
- * European Data Protection Supervisor
- * Home Office
Office of the Information Commissioner
- * Statewatch

APPENDIX 3: THE PRÜM DECISION: DOC. 7273/07

DRAFT COUNCIL DECISION

**on the stepping up of cross-border cooperation,
particularly in combating terrorism and cross-border crime**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 30(1)(a) and (b), Article 31(1)(a), Article 32 and Article 34(2)(c) thereof,

On the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Slovenia, the Slovak Republic, the Italian Republic, the Republic of Finland, the Portuguese Republic, Romania and the Kingdom of Sweden,

Having regard to the Opinion of the European Parliament,

Whereas:

- (x) Following the entry into force 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 (Prüm Treaty), this initiative is submitted, in consultation with the European Commission, in compliance with the provisions of the Treaty on European Union, with the aim of incorporating the substance of the provisions of the Prüm Treaty into the legal framework of the European Union.
- (1) (deleted)
- (2) (deleted)
- (3) The conclusions of the European Council meeting in Tampere in October 1999 confirmed the need for improved exchange of information between the competent authorities of the Member States for the purpose of detecting and investigating offences.
- (4) In the Hague Programme for strengthening freedom, security and justice in the European Union of November 2004, the European Council set forth its conviction that for that purpose an innovative approach to the cross-border exchange of law enforcement information was needed.
- (5) The European Council accordingly stated that the exchange of such information should comply with the conditions applying to the principle of availability. This means that a law enforcement officer in one Member State of the Union who needs information in order to carry out his duties can obtain it from another Member State and that the law enforcement authorities in the Member State that holds this information will make it available for the declared purpose, taking account of the needs of investigations pending in that Member State.
- (6) The European Council set 1 January 2008 as the deadline for achieving this objective in the Hague Programme.

- (7) The 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 Union⁵⁷ already lays down rules whereby the Member States' law enforcement authorities may exchange existing information and intelligence expeditiously and effectively for the purpose of carrying out criminal investigations or criminal intelligence operations.
- (8) The Hague Programme for strengthening freedom, security and justice states also that full use should be made of new technology and that there should also be reciprocal access to national databases, while stipulating that new centralised European databases should be created only on the basis of studies that have shown their added value.
- (9) For effective international cooperation it is of fundamental importance that precise information can be exchanged swiftly and efficiently. The aim is to introduce procedures for promoting fast, efficient and inexpensive means of data exchange. For the joint use of data these procedures should be subject to accountability and incorporate appropriate guarantees as to the accuracy and security of the data during transmission and storage as well as procedures for recording data exchange and restrictions on the use of information exchanged.
- (10) These requirements are satisfied by the Prüm Treaty of 27 May 2005 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. In order to meet the substantive requirements of the Hague Programme for all Member States within the time-scale set by it, the substance of the essential parts of the Prüm Treaty should become applicable to all Member States. (...)
- (11) This Decision therefore contains provisions based on the main provisions of the Prüm Treaty and designed to improve the exchange of information, whereby Member States grant one another access rights to their automated DNA analysis files, automated dactyloscopic identification systems and vehicle registration data. In the case of data from national DNA analysis files and automated dactyloscopic identification systems, a hit/no hit system should enable the searching Member State, in a second step, to request specific related personal data from the Member State administering the file and, where necessary, to request further information through mutual assistance procedures, including those adopted pursuant to the Framework-Decision 2006/960/JHA, referred to in recital (7).
- (12) This would considerably speed up existing procedures enabling Member States to find out whether any other Member State, and if so, which, has the information it needs.
- (13) Cross-border data comparison should open up a new dimension in crime fighting. The information obtained by comparing data should open up new investigative approaches for Member States and thus play a crucial role in assisting Member States' law enforcement and judicial authorities.

⁵⁷ OJ L 386, 29.12.2006, p. 89.

- (14) The rules should be based on networking Member States' national databases and not the creation of new, common, data bases.
- (15) Subject to certain conditions, Member States should be able to supply personal and non-personal data in order to improve the exchange of information with a view to preventing criminal offences and maintaining public order and security in connection with major events with a cross-border dimension.
- (16) In addition to improving the exchange of information, there is a need to regulate other forms of closer cooperation between police authorities, in particular by means of joint security operations (e.g. joint patrols).
- (17) Closer police and judicial cooperation in criminal matters must go hand in hand with respect for fundamental rights, in particular the right to respect for privacy and to protection of personal data, to be guaranteed by special data protection arrangements, which should be tailored to the specific nature of different forms of data exchange. Such data protection provisions should take particular account of the specific nature of cross-border on-line access to databases. Since, with on-line access, it is not possible for the Member State administering the file to make any prior checks, a system ensuring post hoc monitoring should be in place.
- (18) The architectonics of comparing anonymous profiles, where personal data is exchanged only after a hit, the hit/no hit system guarantees an adequate system of data protection, it being understood that the supply of personal data to another Member State requires an adequate level of data protection on the part of the receiving Member States.
- (19) Since the objectives of this Decision, in particular the improvement of information exchange in the European Union, cannot be sufficiently achieved by the Member States in isolation owing to the cross-border nature of crime fighting and security issues, and the Member States are forced to rely on one another in these matters, and can therefore be better achieved at European Union level, the Council may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty, to which Article 2 of the EU Treaty refers. In accordance with the principle of proportionality pursuant to Article 5 of the EC Treaty, this Decision does not go beyond what is necessary to achieve those objectives.
- (20) This Decision respects the fundamental rights and observes the principles set out in particular in the Charter of Fundamental Rights of the European Union,

HAS DECIDED AS FOLLOWS:

CHAPTER 1

General aspects

Article 1

Aim and scope

By means of this Decision, the Member States intend to step up cross-border cooperation in matters covered by Title VI of the EU Treaty, particularly the exchange of information between authorities responsible for the prevention and

investigation of criminal offences. To this end, this Decision contains rules in the following areas:

- (a) Provisions on the conditions and procedure for the automated transfer of DNA profiles, dactyloscopic data and certain national vehicle registration data (Chapter 2);
- (b) Provisions on the conditions for the supply of data in connection with major events with a cross-border dimension (Chapter 3);
- (c) Provisions on the conditions for the supply of information in order to prevent terrorist offences (Chapter 4);
- (d) Provisions on the conditions and procedure for stepping up cross-border police cooperation through various measures (Chapter 5).

CHAPTER 2

On-line access and follow-up requests

Section 1

DNA profiles

Article 2

Establishment of national DNA analysis files

1. Member States shall open and keep national DNA analysis files for the investigation of criminal offences. Processing of data kept in those files, under this Decision, shall be carried out in accordance with this Decision, in compliance with the national law applicable to the processing.
2. For the purpose of implementing this Decision, the Member States shall ensure the availability of reference data from their national DNA analysis files as referred to in the first sentence of paragraph 1. Reference data shall only include DNA profiles established from the non-coding part of DNA and a reference number. Reference data shall not contain any data from which the data subject can be directly identified. Reference data which is not attributed to any individual (“unidentified DNA-profiles”) shall be recognisable as such.
3. Each Member State shall inform the General Secretariat of the Council of the national DNA analysis files to which Articles 2 to 6 apply and the conditions for automated searching as referred to in Article 3(1) in accordance with Article 37.

Article 3

Automated searching of DNA profiles

1. For the investigation of criminal offences, Member States shall allow other Member States’ national contact points as referred to in Article 6, access to the reference data in their DNA analysis files, with the power to conduct automated searches by comparing DNA profiles. Searches may be conducted only in individual cases and in compliance with the requesting Member State’s national law.

2. Should an automated search show that a DNA profile supplied matches DNA profiles entered in the receiving Member State's searched file, the national contact point of the receiving Member State shall receive in an automated way the reference data with which a match has been found. If no match can be found, automated notification of this shall be given.

Article 4

Automated comparison of DNA profiles

1. For the investigation of criminal offences, the Member States shall, by mutual consent, via their national contact points, compare the DNA profiles of their unidentified DNA-profiles with all DNA profiles from other national DNA analysis files' reference data. Profiles shall be supplied and compared in automated form. Unidentified DNA profiles shall be supplied for comparison only where provided for under the requesting Member State's national law.
2. Should a Member State, as a result of the comparison referred to in paragraph 1, find that any DNA profiles supplied match any of those in its DNA analysis files, it shall, without delay, supply the other Member State's national contact point with the reference data with which a match has been found.

Article 5

Supply of further personal data and other information

Should the procedures referred to in Articles 3 and 4 show a match between DNA profiles, the supply of further available personal data and other information relating to the reference data shall be governed by the national law, including the legal assistance rules, of the requested Member State.

Article 6

National contact point and implementing measures

1. For the purposes of the supply of data as referred to in Articles 3 and 4, each Member State shall designate a national contact point. The powers of the national contact points shall be governed by the applicable national law.
2. Details of technical arrangements for the procedures set out in Articles 3 and 4 shall be laid down in the implementing measures as referred to in Article 34.

Article 7

Collection of cellular material and supply of DNA profiles

Where, in ongoing investigations or criminal proceedings, there is no DNA profile available for a particular individual present within a requested Member State's territory, the requested Member State shall provide legal assistance by collecting and examining cellular material from that individual and by supplying the DNA profile obtained, if:

- (a) the requesting Member State specifies the purpose for which this is required;
- (b) the requesting Member State produces an investigation warrant or statement issued by the competent authority, as required under that

Member State's law, showing that the requirements for collecting and examining cellular material would be fulfilled if the individual concerned were present within the requesting Member State's territory; and

- (c) under the requested Member State's law, the requirements for collecting and examining cellular material and for supplying the DNA profile obtained are fulfilled.

Section 2

Dactyloscopic Data

Article 8

Dactyloscopic data

For the purpose of implementing this Decision, Member States shall ensure the availability of reference data from the file for the national automated fingerprint identification systems established for the prevention and investigation of criminal offences. Reference data shall only include dactyloscopic data and a reference number. Reference data shall not contain any data from which the data subject can be directly identified. Reference data which is not attributed to any individual ("unidentified dactyloscopic data") must be recognisable as such.

Article 9

Automated searching of dactyloscopic data

1. For the prevention and investigation of criminal offences, Member States shall allow other Member States' national contact points, as referred to in Article 11, access to the reference data in the automated fingerprint identification systems which they have established for that purpose, with the power to conduct automated searches by comparing dactyloscopic data. Searches may be conducted only in individual cases and in compliance with the requesting Member State's national law.
2. The confirmation of a match of dactyloscopic data with reference data held by the Member State administering the file shall be carried out by the national contact point of the requesting Member State by means of the automated supply of the reference data required for a clear match.

Article 10

Supply of further personal data and other information

Should the procedure referred to in Article 9 show a match between dactyloscopic data, the supply of further available personal data and other information relating to the reference data shall be governed by the national law, including the legal assistance rules, of the requested Member State.

Article 11

National contact point and implementing measures

1. For the purposes of the supply of data as referred to in Article 9, each Member State shall designate a national contact point. The powers of the national contact points shall be governed by the applicable national law.

2. Details of technical arrangements for the procedure set out in Article 9 shall be laid down in the implementing measures as referred to in Article 34.

Section 3

Vehicle registration data

Article 12

Automated searching of vehicle registration data

1. For the prevention and investigation of criminal offences and in dealing with other offences coming within the jurisdiction of the courts or the public prosecution service in the searching Member State, as well as in maintaining public security, Member States shall allow other Member States' national contact points, as referred to in paragraph 2, access to the following national vehicle registration data, with the power to conduct automated searches in individual cases:
 - (a) data relating to owners or operators; and
 - (b) data relating to vehicles.

Searches may be conducted only with a full chassis number or a full registration number. Searches may be conducted only in compliance with the searching Member State's national law.

2. For the purposes of the supply of data as referred to in paragraph 1, each Member State shall designate a national contact point for incoming requests. The powers of the national contact points shall be governed by the applicable national law. Details of technical arrangements for the procedure shall be laid down in the implementing measures as referred to in Article 34.

CHAPTER 3

Major Events

Article 13

Supply of non-personal data

For the prevention of criminal offences and in maintaining public order and security for major events with a cross-border dimension, in particular for sporting events or European Council meetings, Member States shall, both upon request and of their own accord, in compliance with the supplying Member State's national law, supply one another with any non-personal data required for those purposes.

Article 14

Supply of personal data

1. For the prevention of criminal offences and in maintaining public order and security for major events with a cross-border dimension, in particular for sporting events or European Council meetings, Member States shall, both upon request and of their own accord, supply one another with personal data if any final convictions or other circumstances give reason to believe

that the data subjects will commit criminal offences at the event or pose a threat to public order and security, in so far as the supply of such data is permitted under the supplying Member State's national law.

2. Personal data may be processed only for the purposes laid down in paragraph 1 and for the specified event for which they were supplied. The data supplied must be deleted without delay once the purposes referred to in paragraph 1 have been achieved or can no longer be achieved. The data supplied must in any event be deleted after not more than a year.

Article 15

National contact point

For the purposes of the supply of data as referred to in Articles 13 and 14, each Member State shall designate a national contact point. The powers of the national contact points shall be governed by the applicable national law.

CHAPTER 4

Measures to Prevent Terrorist Offences

Article 16

Supply of information in order to prevent terrorist offences

1. For the prevention of terrorist offences, Member States may, in compliance with national law, in individual cases, even without being requested to do so, supply other Member States' national contact points, as referred to in paragraph 3, with the personal data and information specified in paragraph 2, in so far as is necessary because particular circumstances give reason to believe that the data subjects will commit criminal offences as referred to in Articles 1 to 3 of EU Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism⁵⁸.
2. The data to be supplied shall comprise surname, first names, date and place of birth and a description of the circumstances giving rise to the belief referred to in paragraph 1.
3. Each Member State shall designate a national contact point for exchange of information with other Member States' national contact points. The powers of the national contact points shall be governed by the applicable national law.
4. The supplying Member State may, in compliance with national law, impose conditions on the use made of such data and information by the receiving Member State. The receiving Member State shall be bound by any such conditions.

⁵⁸ OJ L 164, 22.6.2002, p. 3.

CHAPTER 5

Other forms of Cooperation

Article 17

Joint operations

1. In order to step up police cooperation, the competent authorities designated by the Member States may, in maintaining public order and security and preventing criminal offences, introduce joint patrols and other joint operations in which designated officers or other officials (“officers”) from other Member States participate in operations within a Member State’s territory.
2. Each Member State may, as a host Member State, in compliance with its own national law, and with the seconding Member State’s consent, confer executive powers on the seconding Member States’ officers involved in joint operations or, in so far as the host Member State’s law permits, allow the seconding Member States’ officers to exercise their executive powers in accordance with the seconding Member State’s law. Such executive powers may be exercised only under the guidance and, as a rule, in the presence of officers from the host Member State. The seconding Member States’ officers shall be subject to the host Member State’s national law. The host Member State shall assume responsibility for their actions.
3. Seconding Member States’ officers involved in joint operations shall be subject to the instructions given by the host Member State’s competent authority.
4. Member States shall submit declarations as referred to in Article 37 in which they lay down the practical aspects of cooperation.

Article 18

Assistance in connection with mass gatherings disasters and serious accidents

Member States’ competent authorities shall provide one another with mutual assistance, in compliance with national law, in connection with mass gatherings, disasters and similar major events, and serious accidents, by seeking to prevent criminal offences and maintain public order and security by:

- (a) notifying one another as promptly as possible of such situations with a cross-border impact and exchanging any relevant information;
- (b) taking and coordinating the necessary policing measures within their territory in situations with a cross-border impact;
- (c) as far as possible, dispatching officers, specialists and advisers and supplying equipment, at the request of the Member State within whose territory the situation has arisen.

Article 19

Use of arms, ammunition and equipment

1. Officers from a seconding Member State who are involved in a joint operation within another Member State’s territory pursuant to Article 17 or

18 may wear their own national uniforms there. They may carry such arms, ammunition and equipment as they are allowed to under the seconding Member State's national law. The host Member State may prohibit the carrying of particular arms, ammunition or equipment by a seconding Member State's officers.

2. Member States shall submit declarations as referred to in Article 37 in which they list the arms, ammunition and equipment that may be used only in legitimate self-defence or in the defence of others. The host Member State's officer in actual charge of the operation may in individual cases, in compliance with national law, give permission for arms, ammunition and equipment to be used for purposes going beyond those specified in the first sentence. The use of arms, ammunition and equipment shall be governed by the host Member State's law. The competent authorities shall inform one another of the arms, ammunition and equipment permitted and of the conditions for their use.
3. If officers from a Member State make use of vehicles in action under this Decision within another Member State's territory, they shall be subject to the same road traffic regulations as the host Member State's officers, including as regards right of way and any special privileges.
4. Member States shall submit declarations as referred to in Article 37 in which they lay down the practical aspects of the use of arms, ammunition and equipment.

Article 20

Protection and assistance

Member States shall be required to provide other Member States' officers crossing borders with the same protection and assistance in the course of those officers' duties as for their own officers.

Article 21

General rules on civil liability

1. Where officials of a Member State are operating in another Member State, their Member State shall be liable for any damage caused by them during their operations, in accordance with the law of the Member State in whose territory they are operating.
2. The Member State in whose territory the damage referred to in paragraph 1 was caused shall make good such damage under the conditions applicable to damage caused by its own officials.
3. The Member State whose officials have caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.
4. Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3, each Member State shall refrain, in the case provided for in paragraph 1, from requesting reimbursement of damages it has sustained from another Member State.

Article 22

Criminal liability

Officers operating within another Member State's territory under this Decision, shall be treated in the same way as officers of the host Member State with regard to any criminal offences that might be committed by, or against them, save as otherwise provided in another agreement which is binding on the Member States concerned.

Article 23

Employment relationship

Officers operating within another Member State's territory, under this Decision, shall remain subject to the employment law provisions applicable in their own Member State, particularly as regards disciplinary rules.

CHAPTER 6

General provisions on data protection

Article 24

Definitions and scope

1. For the purposes of this Decision:
 - (a) "processing of personal data" shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, sorting, retrieval, consultation, use, disclosure by supply, dissemination or otherwise making available, alignment, combination, blocking, erasure or destruction of data. Processing within the meaning of this Decision shall also include notification of whether or not a hit exists;
 - (b) "automated search procedure" shall mean direct access to the automated files of another body where the response to the search procedure is fully automated;
 - (c) "referencing" shall mean the marking of stored personal data without the aim of limiting their processing in future;
 - (d) "blocking" shall mean the marking of stored personal data with the aim of limiting their processing in future.
3. The following provisions shall apply to data which are or have been supplied pursuant to this Decision, save as otherwise provided in the preceding Chapters.

Article 25

Level of data protection

1. As regards the processing of personal data which are or have been supplied pursuant to this Decision, each Member State shall guarantee a level of protection of personal data in its national law at least equal to that resulting from the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981

and its Additional Protocol of 8 November 2001 and in doing so, shall take account of Recommendation No R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe to the Member States regulating the use of personal data in the police sector, also where data are not processed automatically.

2. The supply of personal data provided for under this Decision may not take place until the provisions of this Chapter have been implemented in the national law of the territories of the Member States involved in such supply. The Council shall unanimously decide whether this condition has been met.
3. Paragraph 2 shall not apply to those Member States where the supply of personal data as provided for in this Decision has already started pursuant to the Treaty of 27 May 2005 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, in particular in combating terrorism, cross-border crime and illegal migration (“Prüm Treaty”).

Article 26

Purpose

1. Processing of personal data by the receiving Member State shall be permitted solely for the purposes for which the data have been supplied in accordance with this Decision. Processing for other purposes shall be permitted solely with the prior authorisation of the Member State administering the file and subject only to the national law of the receiving Member State. Such authorisation may be granted provided that processing for such other purposes is permitted under the national law of the Member State administering the file.
2. Processing of data supplied pursuant to Articles 3, 4 and 9 by the searching or comparing Member State shall be permitted solely in order to:
 - (a) establish whether the compared DNA profiles or dactyloscopic data match;
 - (b) prepare and submit a police or judicial request for legal assistance in compliance with national law if those data match;
 - (c) record within the meaning of Article 30.

The Member State administering the file may process the data supplied to it in accordance with Articles 3, 4 and 9 solely where this is necessary for the purposes of comparison, providing automated replies to searches or recording pursuant to Article 30. The supplied data shall be deleted immediately following data comparison or automated replies to searches unless further processing is necessary for the purposes mentioned under points (b) and (c) of the first subparagraph.

3. Data supplied in accordance with Article 12 may be used by the Member State administering the file solely where this is necessary for the purpose of providing automated replies to search procedures or recording as specified in Article 30. The data supplied shall be deleted immediately following automated replies to searches unless further processing is necessary for recording pursuant to Article 30. The searching Member State may use

data received in a reply solely for the procedure for which the search was made.

Article 27

Competent authorities

Personal data supplied may be processed only by the authorities, bodies and courts with responsibility for a task in furtherance of the aims mentioned in Article 26. In particular, data may be supplied to other entities only with the prior authorisation of the supplying Member State and in compliance with the law of the receiving Member State.

Article 28

Accuracy, current relevance and storage time of data

1. The Member States shall ensure the accuracy and current relevance of personal data. Should it transpire *ex officio* or from a notification by the data subject, that incorrect data or data which should not have been supplied have been supplied, this shall be notified without delay to the receiving Member State or Member States. The Member State or Member States concerned shall be obliged to correct or delete the data. Moreover, personal data supplied shall be corrected if they are found to be incorrect. If the receiving body has reason to believe that the supplied data are incorrect or should be deleted the supplying body shall be informed forthwith.
2. Data, the accuracy of which the data subject contests and the accuracy or inaccuracy of which cannot be established shall, in accordance with the national law of the Member States, be marked with a flag at the request of the data subject. If a flag exists, this may be removed subject to the national law of the Member States and only with the permission of the data subject or based on a decision of the competent court or independent data protection authority.
3. Personal data supplied which should not have been supplied or received shall be deleted. Data which are lawfully supplied and received shall be deleted:
 - (a) if they are not or no longer necessary for the purpose for which they were supplied; if personal data have been supplied without request, the receiving body shall immediately check if they are necessary for the purposes for which they were supplied;
 - (b) following the expiry of the maximum period for keeping data laid down in the national law of the supplying Member State where the supplying body informed the receiving body of that maximum period at the time of supplying the data.

Where there is reason to believe that deletion would prejudice the interests of the data subject, the data shall be blocked instead of being deleted in compliance with national law. Blocked data may be supplied or used solely for the purpose which prevented their deletion.

Article 29

Technical and organisational measures to ensure data protection and data security

1. The supplying and receiving bodies shall take steps to ensure that personal data is effectively protected against accidental or unauthorised destruction, accidental loss, unauthorised access, unauthorised or accidental alteration and unauthorised disclosure.
2. The (...) features of the technical specification of the automated search procedure are regulated in the implementing measures as referred to in Article 34 which guarantee that:
 - (a) state-of-the-art technical measures are taken to ensure data protection and data security, in particular data confidentiality and integrity;
 - (b) encryption and authorisation procedures recognised by the competent authorities are used when having recourse to generally accessible networks; and
 - (c) the admissibility of searches in accordance with Article 30(2), (4) and (5) can be checked.

Article 30

Logging and recording; special rules governing automated and non-automated supply

1. Each Member State shall guarantee that every non-automated supply and every non-automated receipt of personal data by the body administering the file and by the searching body is logged in order to verify the admissibility of the supply. Logging shall contain the following information:
 - (a) the reason for the supply;
 - (b) the data supplied;
 - (c) the date of the supply; and
 - (d) the name or reference code of the searching body and of the body administering the file.
2. The following shall apply to automated searches for data based on Articles 3, 9 and 12 and to automated comparison pursuant to Article 4:
 - (a) Only specially authorised officers of the national contact points may carry out automated searches or comparisons. The list of officers authorised to carry out automated searches or comparisons, shall be made available upon request to the supervisory authorities referred to in paragraph 5 and to the other Member States.
 - (b) Each Member State shall ensure that each supply and receipt of personal data by the body administering the file and the searching body is recorded, including notification of whether or not a hit exists. Recording shall include the following information:
 - (i) the data supplied;
 - (ii) the date and exact time of the supply; and

- (iii) the name or reference code of the searching body and of the body administering the file.

The searching body shall also record the reason for the search or supply as well as an identifier for the official who carried out the search and the official who ordered the search or supply.

3. The recording body shall immediately communicate the recorded data upon request to the competent data protection authorities of the relevant Member State at the latest within four weeks following receipt of the request. Recorded data may be used solely for the following purposes:
 - (a) monitoring data protection;
 - (b) ensuring data security.
4. The recorded data shall be protected with suitable measures against inappropriate use and other forms of improper use and shall be kept for two years. After the conservation period the recorded data shall be deleted immediately.
5. Responsibility for legal checks on the supply or receipt of personal data lies with the independent data protection authorities of the respective Member States. Anyone can request these authorities to check the lawfulness of the processing of data in respect of their person in compliance with national law. Independently of such requests, these authorities and the bodies responsible for recording shall carry out random checks on the lawfulness of supply, based on the files involved.

The results of such checks shall be kept for inspection for 18 months by the independent data protection authorities. After this period, they shall be immediately deleted. Each data protection authority may be requested by the independent data protection authority of another Member State to exercise its powers in accordance with national law. The independent data protection authorities of the Member States shall perform the inspection tasks necessary for mutual cooperation, in particular by exchanging relevant information.

Article 31

Data subjects' rights to information and damages

1. At the request of the data subject under national law, information shall be supplied in compliance with national law to the data subject upon production of proof of his identity, without unreasonable expense, in general comprehensible terms and without unacceptable delays, on the data processed in respect of his person, the origin of the data, the recipient or groups of recipients, the intended purpose of the processing and the legal basis for the processing. Moreover, the data subject shall be entitled to have inaccurate data corrected and unlawfully processed data deleted. The Member States shall also ensure that, in the event of violation of his rights in relation to data protection, the data subject shall be able to lodge an effective complaint to an independent court or a tribunal within the meaning of Article 6(1) of the European Convention on Human Rights or an independent supervisory authority within the meaning of Article 28 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing

of personal data and on the free movement of such data⁵⁹ and that he is given the possibility to claim for damages or to seek another form of legal compensation. The detailed rules for the procedure to assert these rights and the reasons for limiting the right of access shall be governed by the relevant national legal provisions of the Member State where the data subject asserts his rights.

2. Where a body of one Member State has supplied personal data under this Decision, the receiving body of the other Member State cannot use the inaccuracy of the data supplied as grounds to evade its liability vis-à-vis the injured party under national law. If damages are awarded against the receiving body because of its use of inaccurate transfer data, the body which supplied the data shall refund the amount paid in damages to the receiving body in full.

Article 32

Information requested by the Member States

The receiving Member State shall inform the supplying Member State on request of the processing of supplied data and the result obtained.

CHAPTER 7

Implementing and Final Provisions

Article 33

Declarations

(included in Article 37)

Article 34

Implementing measures

The Council shall adopt measures necessary to implement this Decision at the level of the Union in accordance with the procedure laid down in the second sentence of Article 34(2)(c) of the EU Treaty.

Article 35

Costs

Each Member State shall bear the operational costs incurred by its own authorities in connection with the application of this Decision. In special cases, the Member States concerned may agree on different arrangements.

Article 36

Relationship with other instruments

1. For the Member States concerned, the relevant provisions of this Decision shall be applied instead of the corresponding provisions contained in the

⁵⁹ OJ L 281, 23.11.1995, p. 31. Directive as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

Prüm Treaty. Any other provision of the Prüm Treaty shall remain applicable between the contracting parties of the Prüm Treaty.

2. Without prejudice to their commitments under other acts adopted pursuant to Title VI of the Treaty:
 - (a) Member States may continue to apply bilateral or multilateral agreements or arrangements on cross-border co-operation which (...) are in force on the date this Decision is adopted in so far as such agreements or arrangements are not incompatible with the objectives of this Decision. (...)
 - (b) Member States may conclude or bring into force bilateral or multilateral agreements or arrangements on cross-border co-operation after this Decision has entered into force in so far as such agreements or arrangements provide for the objectives of this Decision to be extended or enlarged.
3. The agreements and arrangements referred to in paragraphs 1 and 2 may not affect relations with Member States which are not parties thereto.
4. Within [... days/weeks] of this Decision taking effect Member States shall inform the Council and the Commission of existing agreements or arrangements within the meaning of paragraph 2(a) which they wish to continue to apply.
5. Member States shall also inform the Council and the Commission of all new agreements or arrangements within the meaning of paragraph 2(b) within 3 months of their signing or, in the case of instruments which were signed before adoption of this Decision, within three months of their entry into force.
6. Nothing in this Decision shall affect bilateral or multilateral agreements or arrangements between Member States and third States.
7. This Decision shall be without prejudice to existing agreements on legal assistance or mutual recognition of court decisions.

Article 37

Implementation and declarations

1. Member States shall take the necessary measures to comply with the provisions of this Decision within [... years] of this Decision taking effect.
2. Member States shall inform the General Secretariat of the Council and the Commission that they have implemented the obligations imposed on them under this Decision and submit the declarations foreseen by this Decision. When doing so, each Member State may indicate that it will apply immediately this Decision in its relations with those Member States which have given the same notification.
3. Declarations submitted in accordance with paragraph 2 may be amended at any time by means of a declaration submitted to the General Secretariat of the Council. The General Secretariat of the Council shall forward any declarations received to the Member States and the Commission.
4. On the basis of this and other information made available by Member States on request, the Commission shall submit a report to the Council by [at the latest after three years after taking effect] on the implementation of

this Decision accompanied by such proposals as it deems appropriate for any further development.

Article 38

Application

This Decision shall take effect [... days] following its publication in the Official Journal of the European Union.

APPENDIX 4: CHAPTERS 3 & 4 OF PRÜM TREATY

CHAPTER 3

Measures to prevent terrorist offences

Article 16

Supply of information in order to prevent terrorist offences

1. For the prevention of terrorist offences, the Contracting Parties may, in compliance with national law, in individual cases, even without being requested to do so, supply other Contracting Parties' national contact points, as referred to in paragraph 3, with the personal data and information specified in paragraph 2, in so far as is necessary because particular circumstances give reason to believe that the data subjects will commit criminal offences as referred to in Articles 1 to 3 of EU Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.
2. The data to be supplied shall comprise surname, first names, date and place of birth and a description of the circumstances giving reason for the belief referred to in paragraph 1.
3. Each Contracting Party shall designate a national contact point for exchange of information with other Contracting Parties' contact points. The powers of the national contact point shall be governed by the national law applicable.
4. The supplying authority may, in compliance with national law, impose conditions on the use made of such data and information by the receiving authority. The receiving authority shall be bound by any such conditions.

Article 17

Air marshals

1. Each Contracting Party shall decide for itself, under its national aviation security policy, whether to deploy air marshals on aircraft registered in that Contracting Party. Any such air marshals shall be deployed in accordance with the Chicago Convention of 7 December 1944 on International Civil Aviation and its annexes, in particular Annex 17, and with documents implementing it, with due regard for the aircraft commander's powers under the Tokyo Convention of 14 September 1963 on Offences and Certain Other Acts Committed on Board Aircraft, and in accordance with any other applicable international legal provisions in so far as they are binding upon the Contracting Parties concerned.
2. Air marshals as referred to in this Convention shall be police officers or other suitably trained officials responsible for maintaining security on board aircraft.
3. The Contracting Parties shall assist one another in the training and further training of air marshals and shall cooperate closely on matters concerning air marshals' equipment.
4. Before a Contracting Party deploys air marshals, its relevant national contact point must give notice in writing of their deployment. Notice shall

be given to the relevant national contact point in another Contracting Party at least three days before the flight in question to or from one of its airports. In the event of imminent danger, notice must be given without any further delay, as a rule before the aircraft lands.

5. The notice in writing shall contain the information specified in Annex 1 to this Convention and shall be treated as confidential by Contracting Parties. The Contracting Parties may amend Annex 1 by means of a separate agreement.

Article 18

Carrying of arms, ammunition and equipment

1. The Contracting Parties shall, upon request, grant air marshals deployed by other Contracting Parties general permission to carry arms, ammunition and equipment on flights to or from airports in Contracting Parties. Such permission shall cover the carrying of arms and ammunition on board aircraft and, subject to paragraph 2, in restricted-access security areas at an airport in the Contracting Party in question.
2. The carrying of arms and ammunition shall be subject to the following conditions:
 - (1) those carrying arms and ammunition may not disembark with them from aircraft at airports or enter restricted-access security areas at an airport in another Contracting Party, unless escorted by a representative of its competent national authority;
 - (2) the arms and ammunition carried must, immediately upon disembarking from the aircraft, under escort, be deposited for supervised safekeeping in a place designated by the competent national authority.

Article 19

National contact and coordination points

For the purposes of duties under Articles 17 and 18, each Contracting Party shall designate a national contact and coordination point.

CHAPTER 4

Measures to combat illegal migration

Article 20

Document advisers

1. On the basis of joint situation assessments and in compliance with the relevant provisions of EU Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, the Contracting Parties shall agree on the seconding of document advisers to States regarded as source or transit countries for illegal migration.
2. Under their own national law, the Contracting Parties shall regularly exchange any information on illegal migration that is gleaned from their document advisers' work.

3. In seconding document advisers, the Contracting Parties may entrust one Contracting Party with coordination of specific measures. Such coordination may be temporary in nature.

Article 21

Document advisers' duties

Document advisers seconded by Contracting Parties shall have the following duties in particular:

- (1) advising and training Contracting Parties' representations abroad on passport and visa matters, particularly detection of false or falsified documents, and on document abuse and illegal migration;
- (2) advising and training carriers on their obligations under the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders and under Annex 9 to the Chicago Convention of 7 December 1944 on International Civil Aviation and on the detection of false or falsified documents and the relevant immigration rules, and
- (3) advising and training the host country's border control authorities and institutions.

This shall not affect the powers of the Contracting Parties' representations abroad and border control authorities.

Article 22

National contact and coordination points

The Contracting Parties shall designate contact and coordination points to be approached on concerted arrangements for document adviser secondment and on preparation, implementation, guidance and assessment of advice and training schemes.

Article 23

Assistance with repatriation measures

1. The Contracting Parties shall assist one another with repatriation measures, in compliance with EU Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders and EU Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air. They shall inform one another of planned repatriation measures in good time and, as far as possible, shall give other Contracting Parties an opportunity to participate. For joint repatriation measures, Contracting Parties shall together agree on arrangements for escorting those to be repatriated and for security.
2. A Contracting Party may, where necessary, repatriate those to be repatriated via another Contracting Party's territory. A decision on the repatriation measure shall be taken by the Contracting Party via whose territory repatriation is to be carried out. In its decision on repatriation, it shall specify the conditions for implementation and, if necessary, also

impose on those to be repatriated such measures of constraint as are allowed under its own national law.

3. For the purposes of preparing and implementing repatriation measures, the Contracting Parties shall designate national contact points. Experts shall meet regularly in a working party in order to:
 - (1) assess the results of past operations and take them into account in future preparations and implementation;
 - (2) consider and resolve any problems arising from transit as referred to in paragraph 2.

APPENDIX 5: ARTICLE 18 OF PREVIOUS DRAFT OF DECISION

Article 18⁶⁰

Measures in the event of immediate danger

- (1) In urgent situations, officers from one Member State may, without the other Member State's prior consent, cross the border between the two so that, within an area of the other Member State's territory close to the border, in compliance with the host State's national law, they can take any provisional measures necessary to avert immediate danger to life or limb.
- (2) An urgent situation as referred to in paragraph 1 shall be deemed to arise if there is a risk that the danger would materialise while waiting for the host State's officers to act or to take charge as stipulated in Article 17(2).
- (3) The officers crossing the border must notify the host State without delay. The host State shall confirm receipt of that notification and without delay take the necessary measures to avert the danger and take charge of the operation. The officers crossing the border may operate in the host State only until the host State has taken the necessary protective measures. The officers crossing the border shall be required to follow the host State's instructions.
- (4) When adopting this Decision, Member States shall issue a declaration designating the authorities to be notified without delay, as stipulated in paragraph 3. The officers crossing the border shall be required to comply with the provisions of this Article and with the law of the Member State within whose territory they are operating.
- (5) The host State shall assume responsibility for the measures taken by the officers crossing the border.

⁶⁰ From Document 6002/07.

APPENDIX 6: COMPARATIVE TABLE OF INSTRUMENTS ON THE EXCHANGE OF INFORMATION

Title of instrument	Subject Matter	Type of data/information
<p>Principle of availability: Draft Framework Decision on the exchange of information under the principle of availability (COM(2005) 490 of 12 Oct 2005)</p>	<p>Determines the conditions and modalities under which Member States' competent law enforcement authorities, and Europol, would be given online access to databases in another Member State under the same conditions as the equivalent law enforcement authorities in that State have access to their own databases.</p>	<ul style="list-style-type: none"> • DNA profiles • Fingerprint data • Ballistics • Vehicle registration data • Telephone numbers and other communications data • Minimum data for the identification of persons contained in civil registers
<p>Swedish initiative: Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between Member States' law enforcement authorities</p>	<p>Sets up an enhanced mutual assistance procedure for the exchange of law enforcement information.</p>	<p>All information and intelligence which is held by, or available to, law enforcement authorities (except where the request for information would involve the application of coercive measures, but including information which requires judicial authorisation subject to that authorisation being given)</p>
<p>Prüm Decision: Draft Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Doc 7273/07 of 14 March 2007)</p>	<p>Determines the conditions and modalities for cross-border searches and comparison of law enforcement data.</p>	<ul style="list-style-type: none"> • DNA analysis files • Fingerprint data • Vehicle registration data • Personal and non-personal data in connection with major international events

Procedure for exchange	Access and processing bodies	Data protection regime
<p>Competent law enforcement authorities in one Member State would be given direct online access to other Member States' databases. Alternatively, if the information is not available online, then it would be possible to consult index data online, and in the event of a hit to obtain supplementary information in the knowledge that the information exists. There are limited grounds for refusal.</p>	<p>Equivalent police, customs and other competent authorities in all Member States (under specific criteria for ascertaining equivalence), and Europol.</p>	<p>Once adopted, the Data Protection Framework Decision (DPFD)</p> <p>(Draft Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters)</p>
<p>On request, by completing the specific forms provided (Annexes A and B to the Decision). On these forms the requesting and requested authorities are to indicate, among other matters, urgency of the request, type of criminal activity being investigated, what information or intelligence is being requested, reliability of sources, accuracy of information, reasons for any delays etc.</p> <p>There is an obligation to provide information, subject to limited grounds for refusal, within specific time limits.</p>	<p>Any competent law enforcement authority as designated, i.e. national police, customs or other authority authorised by national law to detect, prevent and investigate offences and take coercive measures in the context of such activities (excluding those dealing with national security issues).</p>	<p>Information and intelligence exchange is subject to the national data protection provisions of the receiving state; personal data must be protected in accordance with the Council of Europe 1981 Convention for the protection of individuals with regard to automatic processing of personal data and, for Member States which have ratified it, the 2001 Additional Protocol regarding supervisory authorities and cross-border flows of data; account should be taken of Recommendation R(87) 15 of the Council of Europe on the use of personal data in the police sector.</p>
<p>Member States' authorities are granted online access to one another's databases to search or compare data on a hit/no hit basis. In the case of a hit the next step is to seek related personal data from the Member State administering the file and, where necessary, request further information through mutual assistance procedures, including the procedure set out in the Swedish initiative. When a match is found, there is an obligation to supply further information to the requesting State's contact point.</p>	<p>Designated national contact points.</p>	<p>Level of protection at least equal to the Council of Europe 1981 Convention and 2001 Additional Protocol regarding supervisory authorities and cross-border flow of data; account should be taken of Recommendation R(87) 15. Specific provisions on data processing apply, i.e. purpose limitation, accuracy, storage etc.</p>

APPENDIX 7: LIST OF ABBREVIATIONS

Central SIS II	Central section of the second generation Schengen Information System
CEPS	Centre for European Policy Studies
DCA	Department for Constitutional Affairs
DG JLS	Directorate-General Justice Freedom and Security of the Commission
DPFD	Data Protection Framework Decision
DVLA	Driver and Vehicle Licensing Agency
EC	European Community
EDPS	European Data Protection Supervisor
EU	European Union
Europol	European Police Office, set up under a Convention between Member States
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States
G6 ministers	the ministers of the interior of the six largest Member States: Germany, France, United Kingdom, Italy, Spain and Poland
G6 meetings	the regular six-monthly meetings of G6 ministers
ICO	Information Commissioner's Office
JHA	Justice and Home Affairs
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
PACE	Police and Criminal Evidence Act 1984
Prüm Convention	The name by which the Prüm Treaty was known in the earlier official documents
Prüm Treaty	Treaty between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration
SIRENE	Supplementary Information Request at the National Entry
SIS	Schengen Information System
SIS II	Second generation Schengen Information System
TEC	Treaty establishing the European Community
TEU	Treaty establishing the European Union

APPENDIX 8: OTHER RELEVANT REPORTS FROM THE SELECT COMMITTEE

Recent Reports from the Select Committee

Annual Report 2006 (46th Report, Session 2005–06, HL Paper 261)

Relevant Reports prepared by Sub-Committee F

Session 2004–05

After Madrid: the EU's response to terrorism (5th Report, HL Paper 53)

The Hague Programme: a five year agenda for EU justice and home affairs (10th Report, HL Paper 84)

Session 2005–06

Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm (40th Report, HL Paper 221)

Session 2006–07

After Heiligendamm: doors ajar at Stratford-upon-Avon (5th Report, HL Paper 32)

Schengen Information System II (SIS II) (9th Report, HL Paper 49)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE F)

WEDNESDAY 7 MARCH 2007

Present	Caithness, E	Jopling, L
	D'Souza, B	Listowel, E
	Foulkes of Cumnock, L	Marlesford, L
	Harrison, L	Teverson, L
	Henig, B	Wright of Richmond, L (in the chair)

Memorandum by the Home Office

THE INCORPORATION OF ELEMENTS OF THE PRÜM CONVENTION INTO EU LAW—DRAFT COUNCIL DECISION ON THE STEPPING-UP OF CROSS-BORDER COOPERATION, PARTICULARLY IN COMBATING TERRORISM AND CROSS BORDER CRIME

1. *The implications of a small number of Member States fixing the policy on matters of importance for all the Member States (as in the case of Schengen)*

The Government wants an EU that adds value to the efforts of Member States and which provides the opportunities and tools for better practical co-operation. If a sensible proposal is put forward by a Member State or a group of Member States that appears to meet these criteria then the Government will react positively as long as it is consistent with national interest and democratic accountability.

Under the third Pillar of the EU individual or groups of Member States regularly exercise their right of initiative. Indeed, the UK has co-sponsored a number of third pillar proposals and is also a member of the informal G6 group of Member States, which may from time to time put proposals to the rest of the Council.

Adoption of a proposal requires unanimity, which means that policy cannot be fixed by a small group of Member States. To this extent the incorporation of elements of the Prüm Convention into EU does not differ substantively from normal process. That process also provides democratic accountability through the normal third pillar avenues ie the domestic scrutiny process and consultation with the European Parliament.

In this particular case the significant potential benefits of the Council Decision incorporating parts of Prüm, improving public safety by sharing information for police purposes which can have an important role for the investigation of cross border crime including terrorism, have convinced the Government that subject to certain conditions being met we can support the proposal.

2. *The relationship of the Convention with EU initiatives in the same field which would be binding on all Member States, in particular the negotiations on the draft Framework Decision on the exchange of information under the principle of availability*

The draft Council Decision provides a mechanism for the exchange of information between police and law enforcement bodies, consistent with the principle of availability. The Government supports the application of the principle of availability and therefore welcomes a measure that provides a concrete method for its implementation in relation to three specific types of data. The Presidency has indicated that whilst this Council Decision is under negotiation the separate Commission proposal for a Framework Decision on the exchange of information under the principle of availability will be held in abeyance.

3. *Whether the provisions of the Convention are justified by the need to combat terrorism and cross-border crime*

Terrorists and other criminals do not respect borders; it is therefore important that police can track individuals including foreign nationals who have committed crimes in the UK, across borders, through sharing

information with law enforcement agencies of other EU member states. Police cooperation through measures such as cross border information sharing can play a vital role in prevention, investigation and prosecution of serious crimes.

DNA, Fingerprints and Vehicle registration data is already shared between the police forces of EU member states, including the UK. The arrangements in the draft Council Decision will speed up and improve the quality and quantity of information exchanged, which has the potential to improve the ability of UK law enforcement officials to identify and bring to justice, terrorists and criminals.

4. The legal basis of the two draft third pillar Decisions seeking to incorporate the provisions of the Convention into EU law, which were considered by the Article 36 Committee on 25–26 January 2007

The Article 36 Committee on the 25–26 January discussed legal drafts for a first pillar and a third pillar instrument on Prüm. Subsequently it was agreed that the elements of the Prüm Convention to be brought into EU law would be primarily the third pillar information sharing elements. Consequently, the first pillar draft Council Decision was not resubmitted to the February meeting of the Article 36 Committee and will not be sent to the European Parliament. The legal basis for the third pillar draft Council Decision is Article 30(1)(a) and (b), Article 31(1)(a), Article 32 and Article 34(2)(c) of the Treaty on European Union (TEU).

5. The relationship between the data protection provisions of the Convention (and hence the implementing Decision) and those of the draft Data Protection Framework Decision (DPFD)

The DPFD will set overarching minimum standards of data protection across the whole of the third pillar and so will have an impact upon other third pillar measures, including the draft Council Decision on elements of Prüm, it is not possible to comment definitively on the relationship between the data protection provisions in that draft Council Decision and those in the DPFD at present because both texts are still under negotiation. However, the DPFD is designed for general application so its application will be superseded by any specific data protection provisions in other third pillar instruments: as a consequence, the specific data protection provisions in the draft Council Decision on elements of Prüm will apply to data that is processed under that Council Decision.

The data protection provisions in the draft Council Decision differ from those in the DPFD because the two instruments, and their data protection provisions, aim to achieve different things. The Council Decision is designed to intensify cross border police cooperation, especially in the fight against terrorism and cross border crime. The DPFD, on the other hand, aims to set a minimum standard of data protection to apply to all data processing in the third pillar. The data protection provisions in the DPFD are much more general than those in the Council Decision on elements of Prüm because they are intended to provide for all types of processing relating to all types of third pillar data; by contrast, Prüm would only be relevant to specific forms of processing under certain circumstances. There would be no conflict between the provisions in the DPFD and those in the Council Decision: the Council Decision would simply supplement the data protection safeguards set out in the DPFD, so where stricter, we would expect the Council Decision to apply over and above the DPFD.

6. Whether the provisions allowing automated searching of DNA and fingerprint records are matched by adequate safeguards

The Government believes that the data protection safeguards in the draft Council Decision are robust and largely consistent with UK legislation. For example, the bodies processing data obtained through the Council Decision must ensure that the data is effectively protected against unauthorised access, unauthorised disclosure, accidental loss or alteration etc. There are also provisions relating to how the data may be used and for how long the data may be kept.

7. The part, if any, to be played by the European Parliament and national Parliaments

The draft Council Decision will be subject to consultation with the European Parliament and scrutiny by national Parliaments, like all other legislative proposals submitted under Title VI of the TEU.

8. *Why the United Kingdom is only now considering acceding to the Convention (or negotiating on the draft Decision)*

The Government seriously considered signing up to the full Prüm Convention as the information sharing aspects of the Convention bring real value to the fight against terrorism and cross border crime. There were however aspects of the Prüm Convention such as the provisions on air marshals, a measure on action to be taken in urgent situations and those on immigration that prevented UK accession to the Convention. The subsequent discussion of the draft Council Decision, in particular at the February meeting of the JHA Council, has led to these provisions being removed, although the Council is currently investigating a solution that would mean that only those Member States who chose to apply it need be bound by the provision on measure in the event of immediate danger (Article 18 of the Council Decision). Current suggestions include the Article being dependent on the negotiation of bi—lateral arrangements. The draft Council Decision subsequently differs from the original Prüm Convention, and therefore the Government has reassessed its position.

28 February 2007

Examination of Witnesses

Witnesses: Ms JOAN RYAN, a Member of the House of Commons, Parliamentary Under-Secretary of State, MR TOM DODD, Director of Border and Visa Policy, MR NICK FUSSELL, Assistant Legal Adviser and MR PETER STORR, International Director, examined.

Q1 Chairman: Welcome back, Minister, and indeed welcome back those who are at the table and behind. Could I start by saying that this meeting is on the record, it is being broadcast and you are again very welcome.

Joan Ryan: Thank you very much.

Q2 Chairman: Can I ask you whether the United Kingdom was actually invited to take part in the discussions that led to the Prüm Convention and did we try to be included?

Joan Ryan: We were offered the opportunity to take part in negotiations on Prüm and we decided not to on the basis that there were measures within the proposed Convention that we would have some difficulty with. What we decided originally was to wait and see, to keep a watching brief on how this was developing. We have always been interested in Prüm and seen the possibilities within it and have always thought there would be advantages in some of the measures within Prüm. We were invited but we did not decide to take part.

Q3 Chairman: Having decided not to be included or to accept an invitation to take part, was the Government a bit taken aback by the finality with which the Germans announced that the Prüm Convention would be incorporated into EU law?

Joan Ryan: No, I could not say we were. I think we need to bear in mind that whatever is said incorporating the Third Pillar elements of the Prüm Convention into EU law will be the subject of voting and unanimity.

Q4 Chairman: There was an element of take it or leave it, was there not?

Joan Ryan: Over the last two years we have made clear that we have considerable interest in the Prüm Convention and there have been regular discussions

taking place at official level and we have been included in the attendance there as observers. We have followed the progress of Prüm and we have seen its development and we are also very conscious of some of the very good outcomes in terms of the data sharing measures, police cooperation and tackling cross-border crime and counter-terrorism. We have followed its progress and we have been involved so we were not surprised that it moved forward in the way it did because prior to the German Presidency it was clear—the Germans made it clear—that they were going to seek to take Prüm forward in this way. It was flagged up before their Presidency and we have been quite involved in following its progress prior to that.

Q5 Chairman: I am sure you know, as a Home Office Minister, that this Committee has issued two reports in the last six months; first of all on the Heiligendamm meeting and secondly on the Stratford-Upon-Avon meeting, in which we made it absolutely clear that we had no quarrel at all with the idea of a certain group of EU members getting together. But we did think it was very important that any conclusions they reached should be presented to the 27 members of the EU for those 27 members to discuss. There was an element of criticism in our reports of the take it or leave it attitude when a small number of countries get together to discuss things that are of interest to all 27.

Joan Ryan: Let me say that our view is that this is moving with considerable speed. That is a fact and that is part of why I wanted to communicate with your Lordships earlier in the process than we usually would and because I think clearly this will be discussed at the Justice and Home Affairs Council in April. It would be very helpful to have your Lordships' view before that point. However, we have discussed the G6 before and the way in which small

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groups are able to operate within the European Union. The last time we discussed that we probably had a difference of view there in that those small groups—whether the G6 or any other group—are perfectly able to bring forward initiatives but ultimately those initiatives are subject to decision at the Council, they will be subject to various levels of scrutiny, not least what is happening here. It is about bringing forward an idea; it is not about being able to impose it on everybody else and however many members brought forward a notion, if it is within the Third Pillar then we have the right to vote on that and make our view known and, as you know, in the Third Pillar there will be a requirement for unanimity. Voting against something in the Third Pillar has quite a significant impact.

Chairman: Incidentally I should earlier have thanked you for the very helpful letter you wrote us on this subject. Lord Marlesford?

Q6 Lord Marlesford: Minister, I am afraid I do not wholly follow the logic of your earlier answer. When you were asked why we had not taken part in the negotiations on Prüm you indicated that there were certain elements or measures which caused us difficulty. Surely negotiations are about discussing what is proposed in order to eliminate or deal with the difficulties. What were those items that caused difficulty and what is the logic in not taking part in the negotiations because there are things in the initial draft that you do not like?

Joan Ryan: There were issues around the scope and some of the measures (this is obviously before I was in this ministerial post so I am going to ask Peter Storr if he wants to elaborate on some of this in a moment because I think that might be helpful) around things such as air marshals and immigration measures that we would have had great difficulty with. There are measures in the Third Pillar element that we would have difficulty with now but we have indeed had bilateral meetings and made our views clear and the German Presidency has already indicated that for things such as Article 18—which I think we will probably come to—their proposal is that it be deleted. Article 18 is around things like urgent action and would involve the possibility of hot pursuit. You know that we do not sign up, for instance, to Article 41 of Schengen because of that notion of hot pursuit, police officers being able to cross borders and use their powers on our soil. In terms of Article 18 in the Third Pillar it is not currently proposed that that be transposed into EU law although there are discussions around it because other Member States want to be able to use that, especially where they have long land borders; in certain instances they might find it useful. There are proposals that they might be able to go ahead and do that on bilateral or multi-lateral agreement basis

which I do not think we would have any problem with as long as it is not transposed into EU law. We do not want to be in the position where we could not stop police officers from another country coming onto our soil and exercising their powers. That would be a problem for us. We seem to have got that one well on the way to being sorted out but there were other measures as well that we would have had some difficulty with at the time. In any negotiation it depends upon the willingness of others to compromise and meet your concerns. That is not always possible and as a number of other states were happy to go ahead themselves on the basis upon which they subsequently went ahead, we cannot stand in the way of that if we are not signing up to it. It is not as if it was part of EU law, it was an agreement amongst those Member States so it is entirely a matter for them as it was entirely a matter for us not to sign up to it because there were measures in it that were difficult for us.

Mr Storr: Just to add to what the Minister has said, the original Prüm Treaty contained articles on air marshals, document advisors which related to immigration, assistance with repatriation measures, measures in the event of imminent danger which now finds itself in Article 18 of the draft Council decision, and one or two others. The Home Office took the view that that amounted to a tranche of measures with which we would have difficulty, that had sufficient weight to cause us to wonder whether we should just sit out the negotiations in the realisation as we saw it that the really important stuff of Prüm were the data measures. I think that was the reason we did so. It is always very difficult as a negotiator to judge whether you are best taking part in the negotiations ab initio or whether it is better to leave it to see how things transpire. As matters have turned out, most of these issues have been excluded from the text that finds itself before the Council and I think from our point of view we would see as not entirely fitting the take it or leave it expression which we used it because the German Presidency has now shown some flexibility in changing the original Prüm model. Whether it would have shown sufficient flexibility for us without, in their view, having the prize of an EU framework decision which I think caused them to vary their position a little bit is a moot point.

Q7 Chairman: Do you think the German Presidency have changed the text because of the reservations that we expressed?

Mr Storr: Yes. As a negotiator that is my view. Informally I think our process of lobbying them patiently, exposing to them the doubts that our ministers had about things like air marshals and document advisors has been quite influential in getting them to shift their position.

Q8 Lord Teverson: My question really follows on from Lord Marlesford's so I will keep it short. I find it difficult to understand the logic of that argument because the whole of history of the UK and the European Union seems to be one of waiting, finding you are left with a de facto decision and then trying to negotiate from the position of weakness and that is exactly what I would see that sort of strategy as being. I did not understand the logic of that but I understand now that most of that has been argued back. However, does this not again give the image of the United Kingdom, as a leading Member State, as being in the second division in terms of participation? Would it not have been better in terms of our position in the EU to go in and actually negotiate those areas at the beginning rather than later? It seems to me a strange way to do it but I think those questions have mainly been answered.

Joan Ryan: I do not think we are in any way seen as second division. I think some of the response to the problems and the issues we have expressed in terms of Prüm (if it is to be to be incorporated into EU law and in our being able to support that) are met because we have a strong voice and because we took the approach of making it clear that if certain things happened we would be able to sign up to Prüm, that we very much saw the benefits of that. I think we were in a very good position to get an outcome that enables us to sign up to Prüm and to get all the benefits of that in terms of fighting cross-border crime and counter-terrorism where so much depends on good data exchange and intelligence led policing which is obviously enhanced by good data exchange. I think we positioned ourselves well in that instance and there are examples where we absolutely lead on initiatives. The counter-terrorism strategy during our own Presidency was a hugely important strategy for the European Union as I am sure everybody would agree and we have also, in the way in which Prüm has come about, had other framework decisions come about from a small group in which we have been included. The example I was given when I asked about this was the mutual recognition of financial penalties framework decision which was indeed just ourselves, Sweden and France. We brought that forward in a very similar to they way in which this has happened. If a group of Member States decide they will make a treaty with each other, to sign up to it simply to be in at the beginning would not be a good way forward because there will be some treaties—and this was indeed one—where there were measures that we would have great difficulty with and I think your Lordships and others would wonder why on earth we had signed up to something that was completely at variance with our policy on a number of very major issues, not least our approach to Schengen and our borders and issues like that. I agree there is an element of a juggling act and having to make very

careful decisions, but one would expect that when making policy amongst 27 Member States. I think we have done rather well out of this, to be honest. We seem to be managing to iron out the measures we could not accept, whilst getting something incorporated into EU law that very much is along the lines of the approach that we have been taking about good practical cooperation that leads to much more effective law enforcement.

Q9 Earl of Caithness: It does sound from what you say that the Government's mind is already fixed and clear on Prüm but do you approve of sliding treaties sideways into the EU when those subjects are already being discussed under the legal treaty procedures of the EU when that treaty is signed? Do you approve of that? Do you think that is proper, legitimate and democratic?

Joan Ryan: I think if sensible proposals come forward I think we should be considering them.

Q10 Earl of Caithness: If those proposals are already under discussion under the legal basis of the treaty of the EU and you are sliding in something, do you think that is right?

Joan Ryan: I will come to the officials in a moment and perhaps we could comment on the general process, but in my own view if we have a treaty that a number of Member States are signed up to that other Member States have not been able to sign up to for the reasons that we have discussed and there are measures within that treaty that are clearly delivering real benefits on the issues that we spoke about, issues that are a priority for us, if it is possible to take those measures and enable all 27 members to have the benefit of those measures then I think that is a good thing to do. The reason I think it is a good way forward is two-fold. Not only can we see that it is delivering the benefits, we get the opportunity to negotiate and deal with the rest of the European Union and take the bits we are able to put into practice while not having to have the bits that we cannot. I cannot really see a major problem with that because if we think it is a problem it cannot be imposed upon us.

Q11 Earl of Caithness: You have a wonderful way of excluding any contribution from European Parliament or national Parliament.

Joan Ryan: No, the European Parliament is not excluded. This measure now goes to the European Parliament and I think that is very important, it is a big part of the scrutiny within Third Pillar measures. It has to go to the European Parliament as it has to come to our own national Parliament and I think it is some time around early June that the European Parliament will be expected to give their views.

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Mr Storr: I have a brief but important point of clarification arising from the last question. Prüm is not a treaty put together under the European Union treaty system. This was initially a bilateral treaty between Germany and Austria which then expanded to include a number of other countries. I do not think it was originally a process which would have been involved with the instruments of the European Union, including the European Parliament. It was only something that turned into a proposal for a Council decision, which of course would involve the European Parliament, after the initial Prüm Treaty had been signed by a number of countries in much the same way as the UK Government signs memoranda of understanding with other countries.

Q12 *Baroness Henig:* I would like to start of by saying that as a keen student of the diplomatic art I welcome the flexibility shown by the Germans and also I would like to commend the patient diplomacy that quite clearly our officials have deployed that has already brought significant changes. That is what, as I understand it, diplomacy is all about and that is how we should be operating within whatever structures we are working in. Following that theme of patient change to achieve our objectives, can we perhaps say what opportunities you think there will be to further event a further change in the Prüm provisions before they are actually incorporated into EU law? My colleague has talked about the European Parliament and the national Parliament, I just wondered how you see the possible progression to what the end point is for us in terms of securing our national objectives?

Joan Ryan: The European Parliament's opinion was requested on 1 March so they have from March to their deadline of 7 June and obviously our MEPs, I hope, will be playing a very active part in their deliberations. As I have said, we have the Justice and Home Affairs Council in April and I think there can be little doubt that this will be a discussion there as this is a priority for the German Presidency. This opportunity today and receiving your Lordships' views will be very helpful prior to that discussion. I would expect at that discussion in April that there will be an effort to reach a situation where everybody has their minds set at rest about whatever difficulty they might have. In terms of Article 18, for example, and it being deleted or not—there is a Portuguese proposal on the table that I think your Lordships are aware of that would not necessarily be unsatisfactory to us that I referred to earlier that would involve Member States being able to go ahead with urgent action across borders but on a multilateral or bilateral basis—we would look to have some kind of reassurance around those kinds of issues and how that will work. I think April is a very important Council in terms of both what will be discussed in the

Council and what discussions we will have in bilaterals to get to the point where we are happy to see things move further on. I think at the Council of 12 and 13 June the Presidency will then seek political agreement. We do have a little bit of time, but that is quite quick in European Union terms. From June to the autumn the text would then go to the language lawyers.

Q13 *Baroness D'Souza:* Could I ask whether there is any estimate of the costs involved in implementing these provisions, for example what kind of resources will be needed to exchange DNA and fingerprint data?

Joan Ryan: There has been some estimate of the cost mainly because Germany and Austria are making this work. The Germans have estimated their costs as around 900,000 euros which I understand is about £600,000. This might be a reasonable figure under German costings but it might not be an accurate guide for the UK for a variety of reasons, one of which I understand is that for Germany the cost of the DNA exchange—search for DNA match and exchange of information—would accrue to the police whereas for us it would not accrue to the police, the Forensic Science Service maintain and operate the DNA database under the national DNA custodian. There would be a separate cost there, for instance, just to add a little bit of detail to our understanding of how our costs might work. Because we are concerned that the figure might be higher than that, especially if all 27 Member States are involved in this—which clearly they will be—there is an experts working group on Friday of this week at Wiesbaden to look at this issue because we want to be sure as far as it is possible what we are getting into in terms of cost.

Q14 *Baroness D'Souza:* The Wiesbaden meeting would be to determine what the costs what be for implementation as a whole amongst all members. What I am trying to get at is if there is any UK estimate at the moment of UK costs?

Joan Ryan: At Wiesbaden we will be trying to bottom out exactly what is involved so we can work more clearly on our own costs. I do not have an estimate to put before the Committee today but there is clearly a lot of work happening on just that aspect. I think we will be able to make some further steps on that after Friday's meeting.

Q15 *Chairman:* If and when it becomes clearer what the costs are going to be, please feel free to write to us and let us know. That would be very helpful.

Joan Ryan: I will indeed.

Q16 *Earl of Caithness:* Minister, you have mentioned Article 18 which allows officers of other Member States in urgent situations to cross the

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border into the UK without prior consent. How many other countries support your view that this is unacceptable and what do you think the chances are of Article 18 of the draft decision and Article 25 of the Convention being dropped?

Joan Ryan: From the discussions at the last Justice and Home Affairs Council in February it is clear that there is a significant number of Member States who would have been happy for Article 18 to be brought into European Union law. There is a smaller number of states who take our view and would be concerned that it would perhaps present a barrier and possibly to some an insuperable barrier. However, there are a significant number who support it and I think that is why the German Presidency and the flexibility that has already been referred to is very helpful because they are taking account of the fact that there are a large number who would be very happy to go ahead on that basis and want to be able to have the advantages of that provision for them. This multilateral/bilateral suggestion is around and what the German Presidency said during the Justice and Home Affairs Council itself is that they were aware from the discussion that there were a large number of Member States who would be happy with that provision and they would have discussions to enable them to have the benefits of that as they saw it but also to ensure that that was not done in such a way that prevented the UK and a number of others being able to sign up.

Q17 Earl of Caithness: Would you ever accept Article 18?

Joan Ryan: I cannot see it at present but I do not think it is helpful really to look ahead into hypothetical situations and make predictions. At the moment we are operating on the basis that it very much is not our policy to accept Article 18 or the measure I referred to in the Schengen article. I do not have a crystal ball so I will not attempt to predict the future, suffice to say that the policy is that we do not accept Article 18 and I go off to the European Union on behalf of the Government and ensure that I deliver just that policy.

Q18 Lord Teverson: I absolutely agree you should not declare your position any further on that, but just to be the devil's advocate for a minute, would hot pursuit not be particularly important to us in terms of maritime issues, drug running, arms running, even fisheries protection? Is it not in the national interest to have that facility?

Joan Ryan: I think you would need to elaborate a little further on how you think that would actually, in practical terms, be of use to us and I think we would need to discuss the practicalities of that.

Q19 Lord Teverson: Immigration running is obviously an area of concern.

Joan Ryan: We already have measures of practical cooperation by which we are approaching these issues and cooperation in being able to work together on the issue of illegal immigration. We already participate in that kind of cooperation through Frontex, the border agency that is just a year old and doing some very good work.

Mr Dodd: We have very good relations with our fellow immigration authorities in Europe and in fact with France through our juxtaposed controls. Our most important borders are actually in France (in Calais and the ports) and those cooperation arrangements are very good already.

Q20 Lord Foulkes of Cumnock: I was very worried about the way the questioning was going because the implication was that we were wishing you to agree to watering down the Prüm provisions in the Convention. I was going to say why can we not accept Article 18? If we are serious about fighting cross-border crime and terrorism surely we will not want to water down the provisions of Prüm, we want to accept as many as we can. We should not be working towards the lowest common denominator as part of that, should we?

Joan Ryan: What we want from Prüm is the data sharing measures that have such an impact on being able more effectively to fight cross-border crime and counter terrorism. We do have some evidence, for instance, from the way that the Convention is working between Germany and Austria. In terms of exchanging data they have had 14 hits in homicide or murder cases, 885 hits in theft cases and 85 hits in robbery or extortion cases. That is as of 4 January and just between Germany and Austria in a short space of time. I think we can see how useful those data sharing measures would be. In relation to the notions of hot pursuit we have had that debate under Schengen and we have some difficulties there in the sense that you would have police officers from other countries who perhaps have different powers than our police officers coming onto our soil and being able to use their powers. That is a problem for us.

Q21 Lord Foulkes of Cumnock: That happens with France already, does it not, between us and France?

Joan Ryan: No, I do not think it does. Article 18 which is about measures in the event of immediate danger are not exactly the same as hot pursuit but there is a possibility of a read-across so it is a problem for us. Also I suppose if you think of examples like a train crash on a cross-border train you could see then why measures in terms of immediate or urgent danger would be very important. We do not have those kinds of extensive land borders with another country other than Northern Ireland and the Republic of Ireland so

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the measures are not applicable to us in the same way that they are to other countries who have these land borders in the European Union. They would not as useful for us to be able to implement and as there is a possibility of a read-across to a measure that we have a lot of issues with, ie hot pursuit, then it seems to us that a better protection for our position is that Article 18 is not transposed into European Union law. That is not to water down by any means the data exchange measures which we see as a huge benefit which will bring real gain in cross-border law enforcement.

Q22 Baroness D'Souza: There are a number of provisions on immigration and other matters which are not included in the draft decision and I wonder is the Government happy that the Contracting States will be bound by these provisions while other Member States will not be?

Joan Ryan: We would expect that an existing treaty and the provisions in it will continue to be binding on the original signatories. I do not see that it has any particular effect on us that we are not part of that. Those provisions are binding now on those states and they will continue to be binding.

Q23 Baroness D'Souza: Do you not think the discrepancies will actually cause confusion and difficulties?

Joan Ryan: I am not sure what those discrepancies will be. I am not entirely clear what the issue will be.

Q24 Baroness D'Souza: If there is one set of immigration measures and rules for the Contracting States and these do not apply to other Member States.

Joan Ryan: We already have the right to opt in to measures if we choose to or not on a whole variety of areas which touch on this. I do not think it changes any of those possibilities. Of course there are the measures around illegal immigration in Pillar One which would apply to everybody and if we did not want to participate on certain measures we would have the right therefore not to do so. It does not affect legal migration policy where we retain the right to make that policy.

Mr Dodd: As you know there are a number of bilateral arrangements between Member States which do not operate at the EU level. In our case we have special immigration relationships with Ireland in the Common Travel Area. These are not seen as a particular problem by the Commission or by other Member States so I do not think we would have a problem with these elements which are in the original Prüm Treaty.

Q25 Lord Harrison: Minister, you have very helpfully given us the figures for the Austria/Germany data exchange and have told us how

beneficial that has been. It would seem to me a fortiori that is all the more reason why we should be interested in making progress there. Do I take it therefore that you believe the decision will help promote the discovery of cross-border crime and solving it? Do you have anything more to say about the UK being persuaded to go down that path because of that very good evidence?

Joan Ryan: It is because of the support that this will give us in tackling law enforcement and cross-border crime that we are so keen on these measures. The world changes very quickly; globalisation is much talked about and unfortunately that is the future of crime as well as trade and being able to tackle cross-border crime is increasingly important in all kinds of ways. For those who, for instance, are involved in facilitating illegal entry and trafficking a very significant majority of those whom we find working illegally or entering the country illegally are facilitated and that is cross-border crime. Being able to share data is crucial now and will become even more important as time goes on to tackle this type of crime, drugs trafficking, all kinds of cross-border crime from the most serious to petty crime, all of which we need to be able to tackle. If policing is not intelligence led then it is not going to be effective across 27 Member States and dealing with crime that is coming to our borders from third countries. I think we would be turning our faces against the most effective means to lead law enforcement across the European Union if we do not make sure we have effective means to share data of this nature.

Q26 Lord Harrison: I could not agree with you more but that seems to me to be a plea for doing more ourselves. Can I just ask you what consultations on these issues have taken place with the police, with the CPS and also with the Serious Organised Crime Agency (SOCA)?

Joan Ryan: There have been discussions at all levels and of course SOCA are very involved in our European Union activities and in leading on intelligence led policing and ensuring that approach is taken across the European Union.

Q27 Lord Harrison: What, if anything, arose from those consultations that the Committee might benefit from hearing?

Joan Ryan: We have had a number of examples of how effective cross-border cooperation and sharing of data is. When I was in Romania recently I visited Project Reflex which is an operation that is a joint operation originally led by SOCA with Romanian police. A version of it also operates in Bulgaria. It has been hugely effective in identifying routes both of drug smuggling and human trafficking which crosses many borders from outside the European Union into it and then working its way through Member States

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and up to the northern Member States, ourselves included. It is this ability to share data and work together across those borders that has proved very effective in tackling some of this crime. The people doing the smuggling do not particular care what their cargo is, whether it is humans, drugs, electrical items or whatever because for them it is about profit. They are I suppose what we might call high performers quite often in terms of crime in that they are very keen to stay one step ahead of the police and the law enforcement agencies and the challenge for our law enforcement agencies is to try and be at least level with them if not one step ahead.

Q28 Lord Harrison: That is SOCA, what about the others?

Joan Ryan: We are working with the law enforcement agencies within the other Member States. That kind of cooperation, working together, clearly benefits us if these routes are being used to move whatever the cargo is up through the European Union or from outside the European Union up to and into the northern Member States. That clearly has an impact on us so working together, our law enforcement agencies with other Member States, is crucial. Being able to exchange data is also crucial. We already exchange this data through other means—including mutual legal assistance requests—it is just very slow; this is about making it a speedy process and making it an electronic process. Clearly if the police law enforcement agencies are going to be able to operate effectively, getting information weeks and weeks and weeks after the point of need or use is not going to facilitate the police and law enforcement agencies being able to really be one step ahead of those who are perpetrating cross-border crime.

Q29 Lord Teverson: Minister, I have to confess that I have some difficulty in some areas in Europe, understanding things like exchange of information and all the complexities under different agreements, but could you clarify the relationship between the Prüm Convention and the proposed framework decision on the exchange of information under the principle of availability?

Joan Ryan: The principle of availability which, as a government, we support and are in favour of is at the moment, as I understand it, in abeyance whilst we move forward with this. Obviously the principle of availability is that if the information is available and would assist law enforcement agencies then that information should be able to be exchanged. Clearly what we are trying to do here would very much be a practical demonstration of the principle of availability actually happening.

Q30 Lord Teverson: Generally in terms of these framework conventions and regulations in terms of information sharing or availability, is it not important for all of us as citizens to have these sorted before we have the delivery of the practical policies so that there is the framework within which they operate which give us all as citizens some faith in our rights or limitations of what can be done or how these things operate?

Joan Ryan: It sounds in theory like a sensible thing to do.

Q31 Lord Teverson: Is that a yes?

Joan Ryan: It is not really a yes, no. The reason being that many of the things that come forward that can turn out to be the most effective policies can start as a small bilateral agreement between two countries. One of the things we are often asked is where is the evidence that this is needed or that it will work or what the outcomes are. I think the advantage here with Prüm is that we have some evidence, we can see that it is effective and that it works and that there is good reason for doing it. It seems to me that if we wait for the framework decision which inevitably takes longer because it will not just apply to these particular measures it will apply to a much bigger range of measures right across the European Union, then knowing that this works and knowing that it is possible, knowing that it fits the principle of the framework decision that we are trying to take forward across the European Union, I think we would be in the wrong place; it would almost be irresponsible of us, knowing that we can tackle law enforcement so much more effectively than we are doing if we have this data exchange, not to go ahead with this when it becomes possible to do so, and we know now is the time that we are able to move forward with this. Although it sounds in theory to be a sensible thing—let us get the framework decisions in place and the other bits will come—actually getting framework decisions in place (such as the principle of availability) is quite a tortuous process it seems to me across the whole 27 Member States of the European Union, whereas these practical measures that we see can work and are working, and we are on the verge of 27 Member States being able to sign up, I think we have to go ahead with that.

Q32 Lord Teverson: I have some sympathy with that view but what worries me is that it takes the pressure off the Government and other governments in actually making sure those are ever nailed down. I supposed it is some reassurance that the Government is pursuing those frameworks urgently as well while not, as you say, getting in the way of key practical policies.

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Joan Ryan: We want that framework decision to go ahead and there are other framework decisions which I know your Lordships are interested in that would relate to that and we are also very committed to those going ahead, around data protection et cetera.

Q33 Lord Marlesford: I would like to ask whether the framework decision of 18 December 2006—simplifying the exchange of information—is as wide as Prüm or is Prüm wider than it?

Joan Ryan: Both of the measures are compatible for instance with the principle of availability. The framework decision itself to simplify the exchange of information is not a matter of whether it goes further than Prüm, it is about the way in which we exchange the data. It obviously is related to Prüm; it is being able to exchange data around DNA, around DVLA information and around fingerprints, but it is about simplifying it so we are able to exchange it with each other. It is about how we exchange information as opposed to exactly which information.

Q34 Lord Marlesford: So you are saying the framework decision is a means of implementing Prüm, are you?

Joan Ryan: The decision of 18 December actually sets out that information and intelligence that is already available to law enforcement authorities in one Member State should be made available spontaneously or on request to law enforcement agencies in another Member State with a minimum of formality. That is what the simplification indicates. It is based on the understanding that it will not be used as evidence or as evidence without consent, so that if the information is available it should be made available to another Member State. To that degree it could go further than Prüm.

Q35 Earl of Listowel: Taking forward the theme of the last two questions on protection for the information about the public, can you provide any information about the level of qualifications across Europe in the people who would be the law enforcement officers managing this? Is there some sort of qualifications framework for these people or is there work towards such a framework?

Joan Ryan: Within each Member State—as there is here, although I cannot comment on legislation in other Member States—there is legislation about who has access to what data and what they can do with that data as well as things like the European Convention on Human Rights—that obviously comes into play as well in terms of individuals—and the Data Protection Act. We have a lot of legislation that indicates what data can be made available and what you can do with it. Within different organisations there will be

individuals identified who can access that data. For dealing across police forces, for instances, or across the European Union, for each country there will be a national contact point and only specially authorised officers will be able to access data. The guidelines for legislation, the identification of the national point of contact, does give a great deal of security about exchanging information and about what happens to it when it is received.

Q36 Lord Foulkes of Cumnock: I can understand confusion between framework decisions, conventions, draft agreements, draft Council decisions and so on, so could you help me? This draft Council decision covers murder, rape and other serious crime. Will this also cover serious crimes associated with football or is that dealt with separately?

Joan Ryan: There are separate means of communication around that, but in actual fact these databases will have all serious crimes on them so it would indeed cover that. For instance at the World Cup in Germany police forces worked very closely together and had a special operation around the issue of football. If they commit a crime, even if it is related to a football match—an assault or something or other related to a football match—data in relation to that crime would then be held in precisely these databases. Yes, it would relate to any serious crime.

Q37 Lord Foulkes of Cumnock: I think you are saying it is implicit in this. I wonder if you would consider at the meeting in April or on some other occasion making it explicit. I think that would send a good message to people who might be considering using the opportunity of these gatherings around football matches to commit serious crime.

Joan Ryan: What I will undertake to do is to ensure that I raise the issue with my European Union colleagues in the margins of the Council. There might not be a benefit in making any particular issue explicit because each of the 27 Member States might well have an issue they would like to see made explicit depending on what is an issue at any point in time for them, but I think it is an issue that would be useful to raise in the margins. In answering Lord Marlesford's question, the issues around DVLA, DNA and fingerprints I think I might have transposed them myself in conversation into the framework decision that you had asked about in December. They are, of course, part of Prüm and not part of the December framework as I said about information and intelligence.

Chairman: I have had my attention drawn to Article 13 which does specifically refer to sporting events. Minister, thank you very much indeed for your extremely helpful and comprehensive replies to our questions.

**Letter to the Chairman dated 19 April 2007 from Ms Joan Ryan, MP,
Parliamentary Under-Secretary of State, Home Office**

You requested further information on the cost of the implementation of the data sharing covered by the draft Council Decision on stepping up of cross-border cooperation particularly in combating terrorism and cross-border crime, which proposes incorporating elements of the Prüm Convention into EU law.

I thought you may also be interested to know about the progress of negotiations. Following a Director level meeting of senior officials in Brussels on 22–23 March, we believe that the final Council Decision will reflect the UK position and not include a provision along the lines of Article 25 of the Prüm Convention on measures in the event of imminent danger. The detail of the text will be discussed at a Director level meeting in April. We will use this as an opportunity to pursue our remaining concerns, including ensuring that the data protection provisions are consistent with national and EU law. We still expect the Presidency to try and reach agreement on this proposal at the June JHA Council, and would therefore welcome any views you have on the proposed Council Decision as soon as possible.

Cost

As you know, one of our principal concerns in taking forward this proposal has been to establish the likely cost of implementation. For this reason the UK asked the German Presidency to hold a technical workshop, which took place on 9 March in Wiesbaden. The Government sent experts from the DNA National Database, Police Information Technology Organisation, the Driver and Vehicle Licensing Agency, and the Department of Constitutional affairs as well as the Home Office.

UK experts used both the information provided in Wiesbaden by existing Prüm signatories and previous experience to work up some estimated base costs. These figures in some cases appear considerably higher than German or Austrian costs because of different methods of costing in the UK. As far as I understand, the figures from other signatories do not include project or business costs, which can often be some of the most expensive elements. These costs are likely to have been included in the German implementation but will have been accounted for through other financial streams.

The Government estimates the total start up cost for the UK to be in the region of £31 million pounds for exchange of fingerprint, DNA and vehicle registration data. This figure is subject to change depending on a more detailed feasibility study and final decisions on system specifications that represent best value. We do not consider this an unreasonable figure considering the benefits that the draft Council Decision will bring. It has the potential to improve the safety of UK citizens by aiding UK authorities in criminal investigations including those against foreign nationals who may have committed crimes in the UK and crossed borders to avoid detection.

I must stress that these are informed but necessarily limited estimates of cost based on the information currently available. It is likely that a project such as this one will require a more detailed feasibility study and impact assessment before we agree on the specific implementation models. The Presidency has indicated that it intends to table a proposal for an EU implementation agreement in due course, drawing heavily on the implementation agreement that accompanies the current Prüm Convention. Negotiations on that would commence following agreement on the terms of the Council Decision.

I hope that you find the above information useful and will keep you informed as to the progress of negotiations on the draft Council Decision. I would also like to use this opportunity to remind you that the Presidency are hoping that the matter will be agreed in early June and I look forward to having your opinion well in advance of this.

WEDNESDAY 7 MARCH 2007

Present	Caithness, E D'Souza, B Foulkes of Cumnock, L Harrison, L	Jopling, L Listowel, E Marlesford, L Wright of Richmond, L (in the chair)
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Examination of Witness

Witness: RT HON BARONESS ASHTON OF UPHOLLAND, a Member of the House, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, examined.

Chairman: Minister, thank you for agreeing to come to answer one or two questions on the Prüm Convention. This is on the record and you will be sent a transcript in due course. Lord Caithness, would you please ask our first questions.

Q38 Earl of Caithness: Minister, in the Prüm Convention there are different data protection provisions from any other instrument within the EU and yet the Presidency is seeking to incorporate the Prüm Convention within the EU unamended. Are you content that this should happen? How are we going to change it if you are not?

Baroness Ashton of Upholland: It has already been amended it from the original. One example is that they have taken out the hot pursuit aspect of it because a number of Member States were concerned that hot pursuit across their borders was not necessarily what they wanted under the control of another police force. Discussions are still on-going as to exactly how it will turn out. We have an officials meeting on 9 March in Germany which will continue those discussions.

Q39 Earl of Caithness: Will the Government press ahead with negotiations on the Data Protection Framework Decision? If and when it is agreed, will its provisions supersede the data protection provisions of the Prüm Decision and in fact other ones?

Baroness Ashton of Upholland: Yes, we are pursuing the Data Protection Framework Decision discussions. It is important that we conclude those if and when we can. I would describe the Prüm protection within the treaty as what I call DPF Plus. In other words, the way that we have approached the Data Protection Framework Decision is to say it is the minimum you can do but you can do more. As Data Protection Minister frankly that is I think where we should be. The difference you will see in the Prüm Treaty is that they have provided for tighter data protection within that Treaty than would be required in the Framework Decision. That feels right to me because the Framework Decision has to set out the principles; it has to be a general decision about what is going to

happen. However, I think when you come to negotiate individual things for particular reasons you might want to make protection stronger and tighter and that is all to the good if that is relevant. That is what we have, DPF and DPF Plus.

Q40 Earl of Caithness: Can I ask you two supplementaries on that then, what do you expect the timings to be on the Framework Decision? When you have two conventions or agreements relating to data protection and one is a basic level—the Framework—and one is Prüm or whatever it is, does one supersede the other or do you as a lawyer look at them complementary and say they are both together and that is the whole law.

Baroness Ashton of Upholland: I should say that I am not a lawyer, as I am sure you can tell. As to the timing of the DPF I would like to see it concluded as quickly as we can. The German Presidency wants to look again at some of the aspects of it so it would be nice to finish it in the German Presidency, if not then the Portuguese, but certainly before we get to Slovenia. I am hoping it will be reasonably soon although I do not have a timescale. I will know more as my officials conclude some of the early discussions in the German Presidency; we will have greater clarity on that and of course I will write to you as soon as I know when it is likely to be. In terms of what supersedes what, I think the way that it would work is that you cannot operate without the Data Protection Framework Decision; that guides you and binds you on all aspects of what you are doing. If, on a particular matter, you have agreed something that is tighter and stronger that would be for those issues the agreement that you have to follow. You cannot fall back if you have already said, as they have in the Prüm Treaty, there will be stronger and tighter data protection requirements than anything you do in that particular treaty you have to do under that regime.

Q41 Chairman: Forgive me if I am asking a question you have already answered about data protection provisions in Prüm. Are you wanting to get amendment to those and what opportunities will

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there be for the Government to seek amendment if that is what you want?

Baroness Ashton of Upholland: I am not necessarily seeking an amendment to them because, as I say, they are stronger than what is already in the Data Protection Framework Decision, but our officials are still meeting to discuss aspects of that so we will see what comes out. If other things are changed then it may have a knock on effect on what we have to think about in terms of data protection. That is really what I am looking for.

Q42 *Baroness D'Souza:* I have picked up a kind of feeling of anxiety about the Data Protection Framework in some of the papers I have read and I just wondered whether you could say something about where you think there might be objections or difficulties given that you are trying to tighten the principles all the time.

Baroness Ashton of Upholland: I would not say anxiety although obviously any negotiations across 27 Member States bring with it challenges, particularly on the Council of Ministers. We believe that our data protection in this country is of a very high standard and we are very keen that the Data Protection Framework Decision is as close to our system as possible, not just to please us but because we think it is of a good and high standard. The additional advantage for us is that the closer we are to the system we have then the easier it is for those who have to operate both domestically and across Europe to be able to do so. That has always been our ambition, to make it good and strong. Other Member States would agree with that but their systems are different, or their systems are quite new in some cases in terms of what they are doing and we always have to negotiate around what is possible. I think for the German Presidency they are trying to look at whether what has already been put into the pot is as good as it could be and also to bring their own particular presidential overview to that. What the detail of that would be I am not sure; we will keep you in touch with that. That is my ambition, to try to get it to be as good as it can be and inevitably if I can get it closer to our system that would be very good.

Q43 *Earl of Caithness:* I have a general question on the Prüm Convention. The EU has a very set way of introducing new measures; it is all laid down in the treaties. Do you approve of a group of countries getting together, making an agreement and sliding that agreement sideways into the existing structure of EU law making when the same subject is already being discussed at EU level? Do you think that is appropriate and constitutionally fair?

Baroness Ashton of Upholland: I am not sure that they slid because I was there at the time. We have had interesting discussions about this before and I think

the argument I would put to the Committee to think about is what I have used before, which is that if you have 27 countries operating as one and trying to develop policy on a whole range of issues from justice and home affairs, from orders for payment and civil law procedures to family to maintenance to matrimonial property with alimony and divorce, through to issues of security, anti-terrorism and so on, it is possible that one way of trying to develop policy more effectively is for countries in smaller groups to start to think about these issues as they affect them. There are countries who have either traditionally worked together or who share similar issues, problems and questions and I think I gave the example of the Common Law Club which we have created with those countries who have common law tradition particularly in civil justice matters dealing with family law and so on, the fact that you have a common law tradition marks you out from the vast majority of European countries and has different implications for how law is applied than it does for others. So working together is an effective way of trying to address those concerns. That is what we do with Ireland, Malta and Cyprus, so that is one example. The Prüm work was done by those countries who have come together in that particular way and what they did, having developed what they thought was a good and sensible proposal, they brought it to the informal Council in Dresden and it was brought in a very open way, saying that they thought this was a good proposition. All Member States had the chance to consider it; there was a good debate. Again it is about perception, it may feel that countries go off and do things but in this particular case it is a good example of a number of states getting together and then being able to come forward with the proposal. The Council could have rejected it; it does not have to accept it but indeed they welcomed it very much because it was a good basis on which to have a debate.

Q44 *Earl of Listowel:* Minister, previously you had responsibility for childcare and you took through the Childcare Act 2004 legislation regarding the sharing of information databases on children.

Baroness Ashton of Upholland: I remember it well; clause 8 as I recall.

Q45 *Earl of Listowel:* It is striking looking around Europe at the different levels of qualifications of those working in childcare, particularly early years and in children's homes. Should there be a concern in this area that qualifications within those agencies handling this information across Europe and the people working in those capacities may have varying degrees of qualification. Are there plans to ensure that there is some sort of minimum qualification for managing this sort of information or for registering

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information of this kind? We have been assured that in police forces there is an individual person who is dedicated to ensuring that this information is handled properly. Do you have information or perhaps you could send any information you may have on what thought there is going on into ensuring that there is a consistent level of quality of attention to managing this information across the European Union?

Baroness Ashton of Upholland: I agree with you completely that the quality of how it is handled is very, very important. That is actually the reason why we need an EU-wide agreement on data protection and why the Framework Decision is quite important in that. Security of how your information is dealt with is really important. In the 27 Member States you have to be confident that in sharing information—certainly we understood it within the child protection field, it is equally if not more so true in the field of serious organised crime and terrorism—we have to make sure it is done properly and only used for the purposes for which it should be used. The combination of the information commissioners' work across Europe and the work they do together is very, very important. I was in Slovenia last week talking to the Information Commissioner of Slovenia who had been over here and heard me address a conference that the information commissioner here had had and we talked about the measures that she has in place in Slovenia and how she deals with complaints and the rulings that she makes and so on, hugely similar in many cases to the things that we do here. A combination of the right framework which

says to people that this is the standard we have to reach, linked to the role of the information commissioners and then each Member State making sure that in applying the Framework Decision it follows naturally that they must have the right qualifications in people, the right standards at play because otherwise they have not followed the Framework Decision and it is a way of ensuring that. Also the information commissioners are able to look at and examine individual cases in particular and the system as a whole to make sure it is working well.

Q46 Chairman: Minister, as always you have been extremely helpful to us. I think we owe you an apology, not only have we asked you questions relating to another department's responsibilities, we have also asked you questions relating to your previous ministerial responsibilities. On all of them you have been very helpful. Is there anything else you want to say?

Baroness Ashton of Upholland: No, just to reiterate that on all these things I will keep in touch and I am always delighted to come back. As you can see, I can talk about anything.

Q47 Chairman: We are always ready to welcome you back and if, when you see the transcript, you or your officials think there is anything supplementary that we would need to help our inquiry then obviously we would very much welcome it.

Baroness Ashton of Upholland: I will certainly make sure we do that.

Chairman: Thank you very much indeed.

WEDNESDAY 21 MARCH 2007

Present	Bonham-Carter of Yarnbury, B D'Souza, B Foulkes of Cumnock, L Harrison, L Henig, B	Jopling, L Listowel, E of Marlesford, L Teverson, L Wright of Richmond, L (Chairman)
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**Memorandum by Professor Elspeth Guild, Radboud University, Nijmegen, Senior Research Fellow,
Centre for European Policy Studies (CEPS)**

1. This inquiry into the Prüm Convention is particularly timely in light of the German Presidency's moves to incorporate the Convention, or parts of it into EU law. CEPS has already produced two analyses of the Prüm Convention and submitted evidence to the House of Common Home Affairs Committee's inquiry into the Convention. We will not repeat here the comments which we have made there.
2. Four main issues arise as regards the implications of a small number of Member States fixing the policy on matters of importance for the Member States (1) democracy; (2) transparency; (3) legality and (4) legitimacy. The EU is founded on the value of democracy.¹
3. *Democracy*: In a democratic system, decisions on matters of importance are the subject of debate among all those who participate in the project and are adopted in accordance with the rules which govern the entity. The fields covered in the Prüm Convention are indeed of great importance, touching sensitive questions of access to data across frontiers, irregular migration and police cooperation, to name just some. All Member States and the European institutions, most importantly the European Parliament need to be involved in decision making in these key areas. The Prüm Convention, however, was drafted and concluded by a small group of Member States outside any of the established EU venues. No doubt, had there been agreement among the (now) EU 27 Member States on the contents of the Convention it would have been adopted as an EU measure. Clearly there was not such agreement. Thus to insert the Prüm Convention now as a *fait accompli* into the EU legal order raises very serious concerns about democracy. The methodology employed seems much closer to oligarchy than democracy.
4. *Transparency*: The EU draft constitutional treaty states that equality is a core value (article I-2). Equality among the Member States depends on transparency in the way in which rules which touch key fields are developed and adopted. The Prüm Convention was drafted and adopted by five Member States without any consultation with the others. Civil society, even in the participating states, were largely unaware of the existence of the negotiations. The mechanism of intergovernmentalism in fields of EU concern among a small group has been consistently criticised by parliamentarians, academics, ngos and others not least since the first Schengen Convention in 1985 was published. To revert to this somewhat discredited mechanism in 2006 is not conducive to respect for the principle of transparency and equality in the EU.
5. *Legality*: we have elsewhere commented in some depth on the questionable legality of the Prüm Convention vis-à-vis EU law.² The lack of clear rules on the interpretation and application of the Prüm Convention which apply to all the parties and are accessible to the individuals who are directly affected by its operation is highly unsatisfactory and contrary to the value of the EU for rule of law as expressed in its draft Constitutional Treaty (article I-2).
6. *Legitimacy*: All EU measures need to be accepted by the people of Europe as legitimate if the EU is to enjoy the coherence and effectiveness which it claims. Transferring privately negotiated treaties into the EU aquis does not fulfil the requirements of legitimacy. It appears underhanded and dishonest. If the EU seeks new measures, the EU treaties set out exactly how they should be proposed and adopted. Sliding in sideways treaties which deal with subjects which were already under discussion and proposal at the EU level when they were signed does not conform to any acceptable standard of legitimacy in a democratic society.
7. The Sub Committee has asked whether the provisions of the Convention are justified by the need to combat terrorism and cross-border crime. In light of the relatively opaque definitions which the EU has adopted regarding terrorism and cross border crime it is very difficult to answer this question. A starting place could

¹ EU draft Constitutional Treaty Article I-2.

² Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats
Thierry Balszag, Didier Bigo, Sergio Carrera and Elspeth Guild, CEPS, Brussels, 2006.

well be to obtain from the Member States statistics on the number of criminal charges, trials and convictions which they have undertaken regarding terrorism and cross-border crime (as defined in the Framework Decisions) over the past five years. Only then could even some attempt be made to assess whether measures as severe as those in the Prüm Convention are proportionate.

8. The legal base of the draft Council Decision to incorporate parts of the Prüm Convention into the Third Pillar³ is articles 30(1)(a) and (b), 31(1)(a) and 34(2)(c) which are reproduced in the Annex hereto.⁴ From the face of the provisions relied upon and the fact that the Decision prays in aid article 34 in addition to the more specific powers, clearly there are questions about the adequacy of the legal base. It is not self evident that articles 30 and 31 permit the adoption of a Decision with such important provisions on data collection, retention, exchange and manipulation. The opinions of both the Council and Commission's legal services on the question of the legal base would be most helpful.

9. In light of the wide powers on data collection and use in the Prüm Convention, it is important to remember the key concerns regarding personal data which have arisen in the EU over the past years. Two data collection and use practices have fallen into disrepute as a result either of decisions of Member States' constitutional courts or the European Court of Human Rights. These are data mining—the process of automatically searching large volumes of data for patterns using tools such as classification, clustering etc, and profiling—commonly understood as recording a person's behaviour and characteristics in order to predict or assess their future actions or to identify a particular group of people. The provisions of the Prüm Convention are not sufficiently clear or adequate to ensure that this two practices are excluded. The provisions permitting automated searching of DNA and fingerprint records are a case in point. These are insufficient precise and without enough detail and safeguards to ensure that limitations which have been required by the ECtHR are complied with. Our concerns regarding the protection of data are reinforced by the determination of the German Presidency to open the EURODAC data base to police and law enforcement authorities. This data base containing the fingerprints of every asylum seeker in the EU (and some others) was carefully, and after substantial deliberation, placed beyond the reach of police and law enforcement agencies on the basis of the protection of the fundamental rights of asylum seekers. Article 1(1) of the EURODAC regulation clearly states its purpose as strictly limited to the allocation of responsibility for determination of a claim. The risks to asylum seekers of the opening of the database are self evident.

10. In conclusion, then, our concerns about the Prüm Convention which we expressed almost two years ago continue to be valid. Not only is the process seriously flawed but the flaws which we highlighted in 2005 are now at risk of being replicated in the transposition of the Prüm Convention to the EU acquis. The content of the Prüm Convention also raises concerns in particular regarding the respect for individual's privacy and the protection of people's data. Finally, the legal basis on which this process has been launched does not seem to us sufficiently robust to support the action.

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Annex

TREATY ON EUROPEAN UNION

ARTICLE 30

1. Common action in the field of police cooperation shall include:

- (a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;
- (b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data.

ARTICLE 31(14)

1. Common action on judicial cooperation in criminal matters shall include:

- (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions.

³ Council Document 6002/07.

⁴ We understand that a second proposal was withdrawn as its content was replaced by Framework Decision 960/2006/JHA adopted on 18 December 2006.

ARTICLE 34

2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

- (c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union.

Examination of Witnesses

Witnesses: PROFESSOR ELSPETH GUILD, Centre for European Policy Studies (CEPS), and MR TONY BUNYAN, Director, Statewatch, examined.

Chairman: We move on seamlessly, if we may, to our inquiry into the incorporation of the Prüm Treaty into EU law. This is still on the record and a record is being taken of it. You will be sent a transcript in due course. I would like to start by asking Lord Marlesford to ask a rather general question of which you have not been given notice, but I am sure you will both be very well able to cope with it.

Q48 Lord Marlesford: You made a strong case against Prüm. What alternative and effective cross-border measures do you think could be adopted to prevent terrorism and crime?

Professor Guild: There are two angles from which one has to look at the question of Prüm. The first issue, which I think is terribly important, is that if seven Member States start acting and negotiating agreements in a field which is under discussion in the EU Council in which proposals are being put forward, you have a negative externality created; you break the solidarity of the Member States in seeking to achieve a common solution with a small group making decisions on their own. The consensus necessary to make any agreement work for 27 Member States is lost. So I think the process by which Prüm was adopted is one which has negative consequences for the fight against terrorism in the European Union. The second question is then what about the measures in the Prüm Treaty; what about the exchange of information—the various provisions? There, as one can see from the proposal for a Council decision, which the German Presidency has put forward (and the latest version I saw was from the middle of February this year), a number of issues which had been highly controversial with some Member States have now been dropped—for instance, the air marshals—on hot pursuit (at the UK's insistence I understand). So we see that the negotiating process results in a different mechanism, a different content to the agreement, a content which is acceptable to all Member States, not just to seven Member States, and, of course, we will have further negotiations on the various issues regarding the criminal justice provisions.

Q49 Lord Marlesford: Does Mr Bunyan have any measures to offer?

Mr Bunyan: No. I agree with Elspeth on this. The only point I would add is that I happened to be in Berlin on Monday in a meeting debating with a German interior ministry official, who is the German Presidency's person working on this area, and he did tell me that on the First Pillar measure, covering immigration (because Prüm has to be translated into the EU and the one on police co-operation is Third Pillar, which we have copies of), it was expected we were going to have a First Pillar measure but he did say that had now been dropped. So it is good to know it has been dropped. On the other hand, that leaves one, to back up Elspeth's point, with a contradiction that it means we have not got seven Prüm states but 15 Prüm states—I think Finland has just indicated it is going to join. That, of course, does create a difficulty because if you have 15 Member States who are signing up to, for example, sky marshals, how can that work within the European Union? You can have sky marshals on some flights between some countries but not sky marshals on other flights. I would disagree with sky marshals anywhere as a good idea, but if you are going to have it you are getting a two-tier Europe again; it is not just two-tier decision-making, it now becomes two-tier practice. The whole idea of incorporating the Schengen acquis under the Amsterdam Treaty was to get rid of (there are still other tiers anyway, we know) those two tiers, but you now have a new two-tier being created, which does cover not just sky marshals but important issues like the joint return of rejected refugees—there are important issues in that area where we can see a two-tier development.

Q50 Lord Jopling: Professor, you are on the record as having said that to create privately negotiated treaties (and I quote) “appears underhand and dishonest”. Do you think that what those nations did is illegal and do you think it is in breach of Article 10 of the Treaty? Do you think there is anything anybody can do about it, if you dislike it so much?

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Professor Elspeth Guild and Mr Tony Bunyan

Professor Guild: In my opinion, the insertion, in particular, of provisions on immigration into the Prüm Treaty was and is contrary to Article 10 of the EC Treaty. We transferred competency for immigration and asylum to the First Pillar of the European Union in 1999 because we intended that to be the venue where measures would be adopted. The UK chose to opt out; quite properly, it negotiated a protocol to remain opted out. We are not now talking about the position of the UK in respect of that particular decision, but once a state enters into an agreement with the 27 other Member States to make law in one venue regarding an area of law it is a very poor idea as far as solidarity, efficiency and effectiveness of law is concerned if a small number of them start adopting laws on exactly the same field among themselves without consulting the others. It would seem to me this definitely falls into the category of questionable good faith as required by Article 10. What can be done about this? The guardian of the EC Treaty is the European Commission. The European Commission is responsible for ensuring the proper application of EC law; it has a monopoly over the introduction of legislation in the First Pillar, including immigration, which perhaps explains why the proposal for a First Pillar measure on immigration out of Prüm has been dropped because the Commission has not considered that, presumably, to be necessary, or is working on its own proposals. However, the Commission cannot be forced (the European Court of Justice has said this in more than one judgment) to bring enforcement proceedings against any particular Member State or set of Member States on the basis of Article 10. It is within the Commission's assessment of what ought to be done, what is most effective and what is in the interests of the European Union, taking into account not merely the legal arguments I put forward but also the political ones.

Q51 Lord Jopling: Thank you. You have addressed yourself, principally, to the legality of all this, but I remind you that you called it "underhand and dishonest". As you will know, the French and the Germans for years have made agreements between themselves which they then have imposed upon the whole Community, from one time to another. I will give you another example, and I am going to ask you whether you think these things are wrong and should not happen and should be stopped. That is one French and German one. I can remember once, as a member of the Council of Ministers, in a very difficult negotiation in the middle of the night, where there was something that I wanted to get into the agreement and there was not very much support for it, but the Italians had much the same attitude, and because we were two of the big states with 10 votes we had enough votes to block the whole thing. So we

went to the Commission, the two of us, and said: "Unless those two things we want are in the agreement we shall block the whole thing." Do you think that was underhand and dishonest? If you do, frankly, that is politics.

Professor Guild: Certainly not. There you are talking about politics; the negotiations; if you have good negotiators sometimes you can call a bluff, sometimes you cannot; sometimes you can move things along. Of course that is completely reasonable. The European Union is a venue in which there are negotiations which, result in decisions which are then transformed into law. There is certainly nothing wrong with, bilateral or multilateral agreements among Member States. The place where this runs into difficulty is when the Member States decide to transfer competence to the EU in a field and then behave as if they have retained competence to run little bilateral or multilateral agreements among themselves. That is where the problem lies. It is not in the correct operation of politics. How do you run international negotiations? How do you seek the best interests of your state in the context of the interests of the other states? This is what we pay our negotiators to do. But once you have made a decision and you have entered into a binding agreement in the European Union that you will only reach laws and make binding provisions in that context, then you do not then form bilateral agreements on exactly the same subject which pre-empt what you have already done in handing over your competence. First you would need to denounce the larger agreement and then enter into the bilateral agreement.

Q52 Lord Teverson: I just have a point of clarification. Clearly, as you say, the Commission on the First Pillar has the exclusive right for initiation of legislation, but in terms of bringing a case to the ECJ does it also in this area have a monopoly? Cannot a Member State or a legal entity, a citizen or a company, also bring a case to the ECJ on this now or is that not the case?

Professor Guild: This is a minefield. Access by individuals to the European Court of Justice is extremely limited. You have to have a very individual decision against you to have standing.

Q53 Lord Teverson: I asked the question too broadly so we could move into a seminar. What I really meant was, in relation to an issue such as Article 10 is there the ability, say, for an NGO or for an individual Member State to take a case to the ECJ or is it a Commission monopoly in this particular area?

Professor Guild: In the EC Treaty itself there is a power for Member States to bring actions. There is also at least a potential power for individuals, but effectively the judgments of the Court of Justice have said that it is in the discretion of the Commission

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whether it wishes to bring proceedings against Member States under Article 10. A Member State could seek to bring an action against the European Commission that it has failed to bring an action against a Member State on the basis of Article 10, the Court of Justice has said that it is the Commission's decision.

Lord Teverson: So it is a Commission decision exclusively in this area. Thank you.

Q54 Lord Foulkes of Cumnock: Can I ask a question following Lord Marlesford's question? In your response, both of you, to Lord Marlesford's question do you believe that you came up with an alternative to Prüm for fighting terrorism and other serious cross-border crimes? Did your answers provide that alternative?

Professor Guild: We need to look at the proposals which have been put forward by the Commission in the Third Pillar regarding fighting crime. There is in the Hague Programme agreed by the Commission and endorsed by the Council, the proposal on availability of information, that information held by law enforcement agencies in one Member State will automatically be available to their equivalents in other Member States, and this objective was adopted by the Council. The Commission has put forward a proposal to give it effect. It is, of course, a measure on the fight against terrorism. The principle runs contrary to the principle of Prüm where information is retained in the ownership of the law enforcement agency which has collected it. It must respond to the request of another law enforcement agency. So you can see Prüm as a different mechanism. The answer to your question then is that there are many proposals on the table and there is certainly a proposal within the EU which is much wider than that in Prüm in respect of exchange of information in this field.

Q55 Lord Foulkes of Cumnock: The European Data Protection Supervisor thinks that the Prüm states ought to have used the EU Treaty enhanced co-operation procedure. Is that what you think?

Mr Bunyan: The point being made there is that there is precisely a mechanism, if a group of Member States feel that things are going too slowly at the EU level, to take action if eight or more of them come together, and under the co-operation procedure they reach what is effectively a bilateral agreement between them, as I understand it. What is interesting is why could not the German government, having got seven members, and it has now got 15, get the eight and do it with that procedure? What is interesting is that if you compare it with the Schengen Convention Treaty this was agreed between those founding Member States, again a small group of Member States, but at a time when other Member States like the UK and

Ireland did not want to take part in it and when there was no EU competence in that area. Now we have a situation where there is EU competence across the whole of justice and home affairs and there is a mechanism for co-operation by which they could govern things, which would have meant that we would not then be in a position in the United Kingdom of saying, "Do we sign up to this treaty and not with a change of a dot or a comma?". In other words, there was a procedure for anybody to come together to an agreement for their co-operation without necessarily, as it were, affecting the Member State which did not wish to be part of it.

Q56 Lord Foulkes of Cumnock: So it is not the actuality of Prüm that you are concerned about; it is the way it was achieved?

Mr Bunyan: As you will discover later, I have some criticisms of what is in it as well, but that is not the question at this time.

Q57 Lord Teverson: Presidencies have made a number of statements. We have had a number of times the example that has been brought forward around the Austrian situation with the Prüm Treaty with regard to these 41 murder cases, et cetera. Is that one statistic that seems to have come out so far something that acts as a good foundation for what is being tried to be done here and do you think that sort of result could be rolled out once this agreement was made as a European Union agreement? Is that a good example and does that justify what the EU is trying to do?

Mr Bunyan: It was fortuitous that I was in Berlin on Monday because I had this question and I was able to ask people what the answer was. Whether the answer satisfies you or not, I do not know. The first point that was made by the people I spoke to in CILIP, which is a group similar to us which monitors the EU, was that even prior to Prüm there were under Schengen and other agreements many exchanges of data, so it is not a question of Prüm enabling something which was not happening in Schengen. However, the key point here is that I was told that the figures given out here are in effect what happens when you check the whole of your suspects database, what you are looking for in Germany, against the whole of the Austrian database. This throws up these very high figures. I was told that the figure of 41 murders would never occur if you did it on a monthly basis. In other words, because you are doing a one-off and considering all the cases you are looking to solve and you check them against the whole of the Austrian database, that throws up some very high figures but that is a one-off experience and I was told it was highly doubtful, because not that many murders take place in Germany on a monthly basis, that you would ever see figures as high as this again. In other words,

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it was a headline-making figure, and I am not denying its accuracy but it should not be taken as an indication of what it is going to be like in the months and years ahead.

Q58 Lord Teverson: Can I seek some clarification on all that? You are saying that that came about through a complete reconciliation of the two databases?

Mr Bunyan: Yes.

Q59 Lord Teverson: Is that allowed under the Prüm Treaty? I thought it was not.

Mr Bunyan: Apparently this is what the figure is based on. That was confirmed by the Interior Ministry official who gave a global figure, which I cannot quite remember now. I think overall there were something like 15,000 matches for minor crimes, out of which they took these headline figures.

Q60 Lord Teverson: They would probably have been for speeding somewhere.

Mr Bunyan: In other words, he would also say, “This was a one-off. Let us catch up together. Let us match the two data sets and see what we can solve”, so we should accept the fact that it is true but we should not necessarily take it as indicative of what we are going to get out in the future.

Q61 Lord Teverson: Do you think that is a good result?

Mr Bunyan: Obviously, it is good if you can solve murders, but that is not to say that with proper full co-operation they could not have got there anyway.

Q62 Lord Harrison: You may have answered this question but I will ask it anyway. Is it satisfactory that, as happened with Schengen, the United Kingdom and other Member States should be presented with a fixed text which the Presidency is seeking to incorporate into EU law unamended? I think, Professor Guild, you partly tackled this and, unless I am confused, I think your point was that once an agreement has been made in a certain area where Member States might come together that should be respected. However, is it still not the case that, even if it is a fixed text that is provided and suggested should be incorporated into EU law, at any point any one of those other than the 15 states already signed up to Prüm, the other 12, can stop it and seek to amend it? It is all very well that it is a fixed text but it is not fixed into European Union law, is it, until it is agreed by all 27?

Professor Guild: It is very encouraging to see that the proposal of the Presidency for a Council decision transposing Prüm into an EU measure has already been very substantially changed from the Prüm Treaty itself. The immigration provisions have been taken out. We have got rid of the sky marshal

provisions and hot pursuit across borders. There have been a number of amendments already in response to concerns by non-Prüm states that do not want, for instance, hot pursuit by French police officers in the UK. Therefore, we see that in the process of making EU law the proper mechanism of negotiation and compromise is taking place, meeting the requirements of different Member States, and I think that is a very good sign. It is infinitely better than what happened with Schengen where by a protocol to the EU Treaty, all of Schengen was lumped in and then we had to try and deal with it and turn it into proper EU law. I think it is part of the very early recognition by a number of the supporters of the Prüm Treaty that perhaps this was not going to be a positive experience for the European Union. The problem that we now have is that we are going to have the Prüm Treaty with however many partners—we are not entirely sure; at the moment there are only three that have ratified—and we are going to have a Council decision that takes parts of the Prüm Treaty and turns them into EU law. How are these two going to work together? There we still have a very substantial problem and one that is raising a lot of questions in the LIBE Committee in the European Parliament at the moment.

Q63 Lord Harrison: Yes, and again perhaps it is my failure to understand, but will not the Prüm Treaty in essence be superseded once the appropriate directive is agreed amongst all the 27?

Mr Bunyan: Only part of it.

Professor Guild: It can only be superseded in the sense that the states that are parties to it need to denounce it. For instance, the Schengen implementing agreement has not been denounced by the Member States, even though it was all lumped into the EU, because it still applies with, for instance, Norway and Iceland, and it applies for Switzerland, so we still have the Schengen implementing agreement swirling along in its own world as well as EU law which applies. So it is not self-evident, unless the states that are parties to the agreement denounce it, that it will not continue to have some kind of half-life.

Q64 Lord Teverson: Are you saying that the participation of Norway is not within an EU context?

Professor Guild: No. Norway is not an EU Member State.

Q65 Lord Teverson: No, I know that.

Professor Guild: But it participates in the Schengen information system, in the whole of Schengen. It participates in Schengen because it has acceded to the Schengen implementing agreement. Therefore, the Schengen implementing agreement continues to have a life for the EU and it is the mechanism by which Norway can participate in Schengen.

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Mr Bunyan: If I might add by way of explanation, when you get many meetings in the EU, including the ministry meetings, part one is the EU and part two is called the mixed committee, so any measure related to Schengen is discussed in another committee where Norway, Iceland and Switzerland walk in the door and join in, and substantial decisions are made in that area.

Lord Teverson: I understand that, but it is something I will pursue another time.

Q66 Lord Harrison: I do not see that the template is the same because your example of Schengen includes Norway, which indeed is not a member of the EU, but am I right that in the case of Prüm we are talking about a contiguous group; they are all within the European Union? The only way I can interpret your answer is that there may be elements of Prüm which stand outside what was proposed by the Commission. There may be an agreement by those 15 Member States within the European Union so to collude and work together, but the viability of what is agreed by the 27 Member States under EU law cannot be contaminated, can it?

Professor Guild: Then we are in the realm of EU law, as you rightly point out. The question is what happens to a multilateral agreement among a number of Member States. Unless they denounce it it continues to have existence. There is no provision in the Prüm Treaty itself to provide for its automatic extinguishment. It does not have a set lifetime by a provision within the treaty itself.

Q67 Lord Harrison: But if this were to be a clash is that not something that the ECJ would have to resolve?

Professor Guild: Indeed.

Q68 Baroness Bonham-Carter of Yarnbury: I think my question is slightly parallel to where Lord Harrison was going. Baroness Ashton, in evidence to us, said that under the Prüm Treaty there would be stronger and tighter data protection requirements than in the proposed framework decision. What is your view about how close the two are?

Mr Bunyan: We are all in some difficulty on this one, and I will tell you what the difficulty is in terms of Prüm and the framework decision. We know what Prüm says now and we know indeed what Prüm in the EU on policing was going to say. The draft framework decision was proposed by the Commission in October 2005 and the opinion of Mr Hustinx was given in December 2005. The Parliament drafted its opinion and agreed it in May 2006, but through the whole of 2006 the Multidisciplinary Group on Organised Crime, which

I think your Committee has discussed at some level of this before, was meeting effectively in secret although that information came out, but there were major differences, primarily, I think, because you had a committee I think comprised people who were law enforcement officials and were talking about data protection issues. The problem was how do you get law enforcement people agreeing on what the rights of the data subject should be? The minute it went up to the Article 36 Committee it started to bump into problems, and in fact by mid November it was sitting there; there were no more meetings, no more discussions on it. In January the German Presidency came in and said that the Commission should be asked to redraft the proposal and set out a limited number of principles. Then last week on Friday we got hold of a new draft from the German Presidency, which was a complete new draft. I do not know what is going on, first they asked the Commission to come up with a new draft because there were so many differences in the Council, so I can only talk in a sense of their new draft as it is and compare it to what Prüm says. The difference between Prüm and the new draft as of 13 March—and that new version is on our website—is that the core of it is what are the rights of the data subject? In the new draft framework decision on data protection first of all it loses the distinction, which was an important distinction in the Commission proposal, between data gathered that then was going to be passed on, where the individual knew the data had been gathered, ie, he had been arrested and the information obtained, and where the individual did not know the data was being gathered, but in both cases the individual, under the original Commission proposal, would have had the right to be informed if that data had been passed on to another Member State. That distinction is not in this new draft of 13 March. What it now says in the 13 March draft under the rights of the data subject to be informed is that they can be informed unless—and I must admit it needs a lawyer to interpret this—it is incompatible with the permissible purpose of the processing. The reason I was concerned about this was that the reason why the Multidisciplinary Group knocked out the right of the individual to be informed, and I am quoting here from their minutes, was that there were so many exceptions that it would be meaningless, so I do not know what the new right to be informed means because I do not know what the *caveats* are and I do not know how it would be interpreted.

Q69 Chairman: Can I just cut you short here and ask you to explain what is the relevance of this to the Prüm Treaty? I am not suggesting there is not a relevance but I think it would be useful to have an explanation.

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Mr Bunyan: If we look at Prüm on the other hand, what are the rights of the data subject under Prüm, both in the Prüm Treaty and what is coming forward there is no right to be informed.

Q70 Baroness Bonham-Carter of Yarnbury: So they are moving towards Prüm?

Mr Bunyan: There is no right to be informed. You have a right to information if you request it and prove your identity but there is no right to be informed, so Prüm is deficient in that sense. I am also suspicious of the new draft of the German Presidency; we do not know what that actually means and its effect. There is another feature which is not agreed effectively by Prüm, which is that the data protection one does not set any limits on the exchange of data with third countries. It leaves all the bilateral agreements in place, although Prüm, of course, does not deal with exchanges externally. The other point with Prüm, which is true of both of these, and I made this point earlier, is that there is no distinction between hard data and intelligence and supposition. In law enforcement terms there is a grading of the historical reliability and known reliability of the source. In other words, has this person proved to be, on a scale of one to five, reliable or unreliable, and they have to do this in order to know internally whether they have reliance in place or not. There is no distinction here which says that this intelligence can be literally passed over to another Member State for further processing, so one has a lot of concerns. We are in great confusion because we have only just got this latest draft. I do not think the Prüm data protection provisions are sufficient, the key thing being the right of an individual to know what is happening to their data. Remember that Prüm concerns the exchange of data between Member States, and not just within Member States. It concerns national exchange and exchange between.

Q71 Baroness Bonham-Carter of Yarnbury: Do you think the framework decision is going to be concluded before the end of the German Presidency?

Mr Bunyan: I am not sure we are going to get a decision on this one. One of the reasons why it is going to be a problem is that the new data protection draft is sticking to what was the problem before and saying that because we are deciding on the exchange of data between the Member States this must also define the data protection in national laws on national processing, and that is a bone of contention with a number of countries, so they have not pulled back from what is a potential conflict: is the purpose just to cover exchanges or is it also to define police and judicial co-operation at the national level which would require changes to our law and everybody's law? I do not think this is going to go away for a little while.

Q72 Earl of Listowel: Professor Guild, you have suggested that the Prüm data protection provisions are not adequate to ensure the exclusion of data mining or data profiling. Is this a real danger?

Professor Guild: I think the question of whether it is a real danger depends on the national law of the Member States because if the provisions within the agreement itself do not clearly exclude certain practices then you are left with national law and national practices. We had in 2006 the decision of the German Constitutional Court finding that practices of the German police in the use of data in the fight against terrorism was in fact contrary to the constitution because they considered it to be effectively data profiling; the rest are filed in judgment, so we see that the German law enforcement authorities believed that certain practices that they were carrying out were lawful and have only recently been advised that under the German constitution they are in fact not lawful and therefore they are having to change their practices. Is the judgment of the German Constitutional Court one which will be followed in all of its detail in the other 26 Member States? That is very unclear. It seems to me that we need a measure in the framework decision itself to ensure the constitutionality of the use of data.

Q73 Lord Jopling: If you both had the ear of ministers what would you be advising them to do with regard to the forthcoming negotiations over Prüm?

Professor Guild: I would say that at the heart of the question of co-operation among law enforcement agencies in the European Union is the question of how we make our criminal justice systems work effectively with the guarantees we want for defendants across 27 Member States. If you are going to start with the exchange of information among law enforcement agencies you are going to have a huge series of problems when you get to court because the information has been exchanged with a view to turning it into evidence which is then admissible in the courts of the Member States and can be used in trials to find defendants guilty or not guilty. If you do not have mechanisms of confidence and equivalence in your criminal justice systems you can exchange all the information you like; you are never going to get to the end result, which is that you are putting in jail the right people and you are acquitting the people who ought to be acquitted.

Q74 Chairman: I think I am right in saying that in terms of negotiation, and I am not sure to what extent this relates to the British/German negotiation, one item in the Prüm Treaty has already been dropped, namely, the item on hot pursuit. Is that right?

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Professor Guild: Yes, hot pursuit and sky marshals have both been dropped, as have the immigration charges.

Mr Bunyan: Maybe I am an old-fashioned democrat, but I would like to see in this report the obligation placed on national agencies to produce annual reports as to the use of the powers they are going to be given under the framework decision or the Prüm Treaty. I would like to see annual reports, in other words, on how many times have you got a hit and have you been sent evidence as well? How many times has that been used in cases to bring charges and how many times has that resulted in conviction? How many times have the data protection authorities had concerns about the use of the data? I think if we offer it in the European Union, and we get some of the same things with PNR, we are not being given what should be public information. We are talking about aggregate information. Never mind about individual cases; we are being given the overall figures of what is being collected, how it is being used, the numbers where there are problems with it and this should be a question for the data protection authorities. That does not endanger any kind of policing operation.

Q75 *Baroness D'Souza:* It is called evaluation, is it not?

Mr Bunyan: But there is nothing in this to say annual reports should be produced, and I think that is fundamental. Only on the basis of that can parliaments and people say, "We gave you these extra powers. Are you using them properly? Do you indeed need them?"

Q76 *Baroness D'Souza:* Are they yielding useful data?

Mr Bunyan: With great disparity. When we did work on the SIS about people under Article 96 it turned out that Italy had put in 179,000 people, Germany about 80,000 people and some other countries put about 10 or 15 on each. We need to know is this being used by all Member States properly? Is this power necessary? I think that is fundamental. The other thing one has to say about it is that the UK sends out DNA data and, of course, the UK has got the biggest DNA database in the world. This is largely because we changed our law on this. The police were meant to destroy the DNA of people who were not charged and were not convicted, and they did not to delete them. Then from January last year people arrested could have their DNA and fingerprints compulsorily taken even if they were never charged, and I see in a Home Office consultation paper which came out this month that they have even proposed that people who are suspected, not even arrested, can have their fingerprints and DNA taken which can be kept for ever more, but when you look at other Member States, and there was a study by the EU last year,

which is not a public study, of the criteria on which DNA and fingerprints are kept, in most European Union states they are kept and held for serious crimes, whereas in the UK we are keeping fingerprints and DNA for all crimes, however minor. There is a very big difference between the legal basis on which the UK is building up its DNA data and nearly all the other Member States. I merely signal that to you as the kind of issue which we should be concerned about because that might mean all kinds of problems in harmonising that law to have comparable data.

Q77 *Chairman:* Professor Guild, can I go back to my remark about hot pursuit being omitted? The Clerk has just suggested that the Germans and the initial signatories of Prüm never asked for sky marshals to be included in it. Is that your understanding?

Professor Guild: I am afraid I cannot illuminate you on that question.

Q78 *Lord Harrison:* I have a very quick follow-up for Mr Bunyan. Your suggestion about having annual reports, national reports to national parliaments, is a useful one but surely you would want to complement that with a report at the European Union Commission level presumably presented to the European Parliament?

Mr Bunyan: Of course. I am sorry if I did not say that. I meant that. I mean national reports to the parliaments and another by the European Commission and it should be a public report so that we can see what is happening.

Q79 *Chairman:* You are talking about individual reports?

Mr Bunyan: Yes, but the Commission would gather them. It would be an obligation on the national level to produce them and they would have the ability to do one report and we would see the effect across the European.

Q80 *Lord Jopling:* I would just like to end with an extra question to try to understand better in my mind what your philosophical approach is to both the Prüm and the PNR situations. Let me try and find that out by asking you what your attitude is to, for instance, a new technique which is being used in the UK by the police where they have a van sitting on a motorway bridge which monitors the number plates of all vehicles travelling on that road, and a mile down the road are cars and motorcyclists who will stop anyone whom the computer has shown to be in a car which is stolen, maybe which is associated with people in whom the police are interested. It has, I may say, been hugely successful in finding people on roads and catching stolen cars and apprehending people whom the police are interested in. It does not always

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lead to arrests or even prosecutions, but it can perhaps lead to cars being stopped which have been reported missing and then have been restored to the owner and so on, so mistakes are made, and that information can be used again by the police if they can then show that somebody was on that motorway and they said they were not. There are parallels between that and PNR and Prüm. Do you have similar reservations about this new police technique, this magic way that they have of being able to tell after a vehicle has gone half a mile whether it is something they are interested in?

Mr Bunyan: I think you raise a specific issue. If we are talking about road safety that is one issue.

Q81 Lord Jopling: No, we are not talking about road safety.

Mr Bunyan: I am saying if it was just road safety it would be one issue, but if then you link it into the PNR and the gathering of data on people and what they are doing, then I think it is a major political, ethical and moral question for this Parliament and the European Parliament. If we look at the gathering of data for passports, ID cards, health cards, driving licences, the sharing of that data, the interoperability of it, the access to it, the control over it, whether we have got annual reports on it, is a very big discussion on which there is a sense that there is too little concrete information about what kind of world we are heading for if we are going to do that. I probably cannot give you an answer which will satisfy you in

the course of this Committee because it is partly technical but it is also a moral and political question. We run across it in our work and we see that the EU in secret committees is discussing at what age to fingerprint children. Then we get concerned, you get discussions saying it should be 12 for children and then it should be six and you realise that this discussion is purely based not on a moral or political issue but on what is technologically possible. I am sorry; I am one of those old-fashioned people who believes yes, we should use technology, but we use technology by having open political debate which ensures accountability and scrutiny and there are limits on the use of that technology. Just because we can/it is technologically/technically possible does not mean to say we should use it.

Professor Guild: I just wish to signal that I am not entirely in agreement with Tony on this particular question but perhaps this is not the time or place to go into that discussion.

Chairman: We are extremely grateful to you both for the very helpful answers you have given. We are hoping to produce our report in a pretty short time. If anything occurs to either of you in the next few days, even in advance of seeing the transcript, and I think we have already touched on one point by Mr Bunyan, that you feel you ought to let us have in writing, we would be extremely grateful if you could let us have it. Meanwhile, we are very grateful to you both and it is very nice to see you again. No doubt we shall see you again in the future.

THURSDAY 22 MARCH 2007

Present	Caithness, E D'Souza, B Foulkes of Cumnock, L Listowel, E	Marlesford, L Teverson, L Wright of Richmond, L (Chairman)
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Examination of Witnesses

Witnesses: MR JONATHAN FAULL, Director-General for Justice, Freedom and Security (JLS) and Ms CECILIA VERKLEIJ, DG JLS policy lead on PNR and data protection policy, European Commission, examined.

Q82 Chairman: Director General, if we can now move to Prüm, please. This is part of our inquiry which I think and hope we are likely to conclude before our inquiry into PNR. In a sense, this is rather top of our agenda at the moment. Again, thank you and your colleagues very much for agreeing to come and give evidence to us. Perhaps if I could open this by saying it has been suggested that for seven Member States to conclude a Treaty in an area of EU competence was a breach of the requirement to abstain from action which could jeopardise the attainment of the EC Treaty objectives, Article 10. Would you agree?

Mr Faull: As early as July 2004 we said very clearly that the co-operation, which is now enshrined in the Prüm Treaty, should be brought into the institutional framework of the European Union. We talked to the Prüm negotiators about ways in which the ideas that they were working on could be developed to improve law enforcement co-operation with the then 25, now 27, Member States. Therefore, we welcome the initiative now underway under the German Presidency of the Council to bring the Prüm Treaty into the institution and legal system of the European Union. It is an important step forward to improve the exchange of information to which the Union as a whole is committed under The Hague Programme, and we have said that we are willing to help the process of integration of the Prüm system into the EU in any way we can.

Q83 Lord Teverson: One of the things we have come up with, particularly with the European Data Protection Supervisor but also in other areas, is around this area of the EU Treaty enhanced co-operation procedure and should that not have been used? In fact, in certain areas it has been suggested that it is unlawful that that route was not used? Perhaps you could comment on that for us?

Mr Faull: As I said, we regret that this was not done in an EU framework from the very beginning and it could have been done in an EU framework, in the way you suggest by using the enhanced co-operation provisions of the Treaty. In parallel, of course, we have been working as the whole of the EU under The

Hague Programme on intensification of cross-border co-operation of police and customs authorities, and we have a commitment to implement the principle of availability by 1 January 2008. Prüm will go some way, not the whole way, to doing that. It was developed outside the EU framework, we are pleased that it is coming back in and we regret that it was not done in that way from the very beginning.

Q84 Earl of Caithness: Director General, I think you have answered what my question was going to be but I will ask it nevertheless. Given that the Commission has the sole right of initiating legislation in the EU, what involvement did you have in the Prüm Treaty?

Mr Faull: Unfortunately we do not have the sole right of initiating legislation yet in the European Union framework, the third pillar; we do in the First European Community pillar, but in the third Justice and Home Affairs pillar the Member States have a parallel right of initiative. Indeed, even under the provisions of the draft Constitutional Treaty some right of initiative for the Member States would be presented. Our right of initiative is not an exclusive one, it exists, but it is not an exclusive one in respect of the third pillar. We were not involved in the negotiations of the Prüm Treaty, which was negotiated as an international treaty by the states concerned, although some of those states made sure that we were kept informed.

Q85 Chairman: Had you seen a draft of any sort from the Austrians before this started?

Mr Faull: I cannot remember from whom, although that can be checked, but we did see drafts from time to time.

Q86 Lord Teverson: In terms of how it all started, was it sort of six Member States skulking off into a corner and deciding to do it and keeping away from you or was it done completely openly? How did that arise, in very broad terms?

Mr Faull: In very broad terms, it started as Germany plus neighbours.

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Q87 Chairman: I thought it started with Austria, did it not?

Mr Faull: It was Germany with Austria. Who first had the idea? We think it was Germany.

Ms Verkleij: I think it was Germany.

Mr Faull: Which is why it ended up getting signed in Prüm, no doubt, which is a small German town not very far from here. It was Germany plus neighbours, no doubt born from an occupational need, get our police forces working together, exchange information between our databases because of a very manifest common interest in enforcing the law together even across borders. You will have to ask them this question but I may imagine that they thought it would be easier to make rapid progress with like-minded neighbours than through the EU mechanisms involving 25 countries, some of which were quite a long way away. They may be surprised with the enthusiasm that this has generated in countries much further away than they thought. Of course there is a domino effect because everybody is somebody else's neighbour, even our islands in a way, we have neighbours too. I would imagine that people, having got used to the idea first of all because of the general discussions in the EU context, seeing something was beginning to work and had engendered quite some enthusiasm between Germany and its neighbours, Member State after Member State after Member State started signing on. I think that is the way it worked in practice, and enhanced co-operation, much heralded, much talked about, has never been used.

Q88 Lord Teverson: That is an interesting fact.

Mr Faull: And people are very reluctant to use it, for reasons which frankly I do not always understand.

Q89 Baroness D'Souza: What kinds of consultations have there been about proposals for incorporating the future provisions into EU law?

Mr Faull: After the Treaty was signed a joint working group at senior level and six technical working groups were created, and from December 2005 the Commission regularly attended meetings of the joint working group, the senior level group. Therefore, we established close contacts with the people responsible for the Treaty in the Member States and, in particular, with the German Presidency now, and in the latter months of last year when preparing for the German Presidency, we have been talking to them in great detail about how to bring it into the EU framework?

Q90 Lord Foulkes of Cumnock: This is a very significant initiative by a number of European Union states in your area of responsibility. Would you not have expected it to be accompanied by an

explanatory memorandum and an impact assessment?

Mr Faull: One of the strange features of the EU's affairs is when the Commission makes a proposal it is always accompanied by a very detailed and rigorous impact assessment. There is no requirement on Member States when making proposals to carry out such impact assessments and in practice they do not. They may for their own domestic purposes, no doubt, consider in accordance with their own procedures the impact of a particular European initiative in which they are interested, but it does not happen at European level. The Commission would very much welcome it if it did.

Q91 Lord Foulkes of Cumnock: That certainly is an anomaly. Has that happened on a number of other joint initiatives?

Mr Faull: As far as I know, every occasion on which a Member State or a group of Member States has made a legislative initiative we have not had an impact assessment.

Q92 Chairman: Or any explanatory memorandum?

Mr Faull: There may be some papers explaining the purpose. They do not have to follow exactly the same procedural arrangements or format of documents that we do, so there may be some explanatory material but there is no impact assessment as such.

Q93 Earl of Listowel: The Presidency has explained that data exchanges with Austria have already resulted in a number of serious crimes being solved. How significant would you say the results are so far?

Mr Faull: Considerable. I do not have numbers here and I am not sure they are in the public domain, but as between Germany and Austria, the exchanges of DNA data have been numerous and very successful. There have been 300 cases solved by exchanges of DNA. Of course, Germany and Austria are neighbours, sharing a language and it is easy to get from one country to another, so of course it is a good test case. It will not be replicated in exactly the same way but the Germans and Austrians are very enthusiastic about it.

Q94 Lord Teverson: Is that likely to be a once-off? I think it was described when we took evidence somewhere else, that at the very front end of this process you get a—

Mr Faull: You solve a lot of old cases.

Q95 Lord Teverson: Yes.

Mr Faull: There could be that effect. You may not remain in the 300 forever—I am not sure what period that is over—because you can sort out a backlog, but everybody has a backlog.

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Q96 Chairman: But it is not an average figure?

Mr Faull: No, it is not necessarily an average figure, there may be a front-loading effect.

Q97 Lord Marlesford: Is the connection and categorisation of data sufficiently harmonised across all 27 EU Members for the principle of availability to be implemented in a Prüm system?

Mr Faull: The Hague Programme, under which we are operating, highlights six categories of data which we are to bring into the principle of availability, that is to say, for which we should arrange access from one country to another by 1 January 2008. Three of those six are covered in Prüm. Is that enough? No, we want to do more but, I have to say, Prüm is so far by far the most successful implementation of this principle of availability. It will not be easy to meet the deadline of 1 January 2008, which is only seven or eight months away, for these other categories. Meanwhile, we are discussing a related Framework Decision in the Council on data protection, which is an important part of this balancing which we were talking about earlier, and all of that is part of a wider political discussion among ministers and in the European Parliament about what sort of information exchange should be carried out. Harmonisation of categories and definitions is important in this area because you need to identify precisely, and perhaps harmonisation is not even the right word, you need to have a definition of DNA. That is probably a scientific matter but you need to have precise definitions of the information which is exchanged under a particular legal instrument and the Prüm Convention does that, and any other legislation produced by the European Union would have to contain some agreed definitions so that the various authorities in our Member States would understand what they are sharing with each other.

Chairman: I think we shall want to revert to the relationship with the Data Protection Framework Decision later on and, as you possibly know, we are expecting to hear evidence after this meeting from Mr Delgado, the Data Protection Supervisor.

Q98 Lord Teverson: This question is around exchanging DNA, fingerprint data and equipment and is everybody equipped sufficiently. To be honest, the question I would like to ask beyond that more is in terms of DNA held by future signatories of the EU version of Prüm. It is well known that the UK has a larger DNA database than the rest of the world put together and includes a lot of people who have committed no offence or have just been arrested or even questioned. I also want to ask can the availability of DNA be restricted by Member States to certain categories because presumably different Member States have different reasons for collecting DNA or different thresholds at which they keep

people's DNA? Is this an issue in the negotiations in that maybe in Austria it is only murderers and paedophiles, whereas in the UK it could be anybody who has walked into a police station or been breathalysed, I am not saying that is the case? Is there not an asymmetrical problem or issue?

Mr Faull: Yes, of course we expect Member States to comply with their obligations. They will have a certain period of time in which to gear up to do so, but once they have undertaken to exchange DNA data they have to have the equipment in place enabling them to do it properly. On the question of the disparity between volumes of DNA available and reasons for collecting it, that may well give rise to disparities in the way exchanges take place because you cannot provide something which you do not have, of course. The initiative for the sharing, for the exchange, will come from a country which has an interest in checking someone's DNA—to stay with DNA—and that country will address a request to others. If those others just do not have it, for whatever reason, that person has not crossed their particular radar screen, which can be different, then I think that is the end of the story. We are not obliging Member States to build up DNA databases of innocent people just in case one day somebody else in another Member State might be interested in knowing about them.

Q99 Lord Teverson: What I was trying to understand there is, is a Member State allowed to restrict the amount which is available or, through signing up to the Directive, does it therefore have to share all its DNA? There could be some question in another Member State if someone has a DNA record then prima facie that might seem there is something suspicious about them whereas there might be nothing suspicious about them.

Mr Faull: No, I think that would have to be made clear. The fact that DNA is available in another place does not mean that other place has convicted the person of a crime.

Q100 Chairman: I think I remember a minister telling the House of Lords last week that DNA information is never destroyed.

Mr Faull: In the United Kingdom?

Q101 Chairman: Yes, it is kept forever.

Mr Faull: Article 7: collection of cellular material and supply of DNA profiles.

Q102 Baroness D'Souza: It is restricted to criminal convictions?

Mr Faull: No. The minimum requirement is that the contracting party undertake to open and keep national DNA analysis files for an investigation of criminal offences. They can do more if they want. If

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a request is on a specific basis from another Member State, of course, the requesting country will say, "I am investigating Ms X and I want information on the following basis". If you happen to have it in the UK, just because you cast your net more widely than others, you have it. That is my understanding of the system, which may mean you give more than you get, unless others join you in casting the DNA net very widely. Is that right?

Ms Verkleij: I think so.

Mr Faull: Subject to verification, I believe that to be the position.

Q103 Earl of Caithness: Given the fact that there is no explanatory memorandum, have you received any estimates of the cost of implementing these provisions, and what resources will be needed to exchange DNA and fingerprints?

Mr Faull: No.

Q104 Earl of Caithness: Is that not a huge lacuna?

Mr Faull: I do not know. If the data does not exist it might be, but I do not know whether the data exists or does not exist. We have not been informed of cost estimates by the Member States. I would imagine that Member States, in their thinking about Prüm, their negotiating of the Prüm Treaty, will have thought about that and for all sorts of internal purposes may have made such estimates but we have not seen them.

Chairman: I think it was Mark Twain who commented on the absence of statistics on undiscovered burglaries in New York!

Q105 Baroness D'Souza: Could you tell us something about the Portuguese initiative for dealing with hot pursuit?

Mr Faull: There is a new provision suggested by Portugal, it would be a new Article 18, obliging Member States with a common border to declare that they would apply the provisions of Article 18, usually called hot pursuit. I am not quite sure that it is exactly the same as hot pursuit in the way that is defined in international law. It would be up to pairs of Member States to agree with each other that they would do this and then make a declaration that they would implement it.

Q106 Baroness D'Souza: That would be an open agreement, a standing agreement, between neighbouring states?

Mr Faull: That is the Portuguese idea. There is controversy around this hot pursuit idea of Article 18 and people are looking for solutions which would enable the Prüm Treaty to be brought into the Treaty. This is one of the last issues needing resolution and the Portuguese idea, which is a very interesting one, is one way to deal with it. Another solution under examination would require Member

States with a common border to conclude separate bilateral agreements about measures they would take in the event of an immediate danger in their border regions. In any event, there would have to be agreement on responsibility, powers and liability for the hot pursuers on the other side of the border. One way or another, I know this is controversial in some countries, we need to find a solution to this pressing issue because it is preventing the incorporation of the Prüm Treaty into the EU system. We are prepared to look at any sensible solution for doing that.

Q107 Chairman: Going back to the question of Commission involvement, were you represented at the Wiesbaden meeting on 9 March?

Mr Faull: No, we were not.

Q108 Lord Foulkes of Cumnock: We were discussing earlier the position of Prüm in relation to the Framework Decision on the exchange of information under the principle of availability and we are getting different views about whether Prüm supersedes it or it overlaps and so on. I must confess, I am a little confused. Could you help to try and dispel that confusion? Does Prüm supersede it or do they run in parallel or how do they relate?

Mr Faull: The Prüm Treaty and the initiative to bring it, or at least the non-Schengen third pillar part of it, into the EU framework is an important, albeit incomplete, implementation of the principle of availability and therefore more needs to be done. The Justice and Home Affairs Council on 14 April 2005 considered how the principle of availability should be implemented and in doing that confirmed that an appropriate system of data protection needed to be put in place. We believe that the right way to do that is to adopt the Framework Decision on data protection, and we are confident that is possible under the German Presidency, which attaches great importance to that matter and is making considerable efforts with our support to do that. I hope we will have, alongside the Prüm Treaty having become part of the law of the European Union, a dedicated data protection system for the third pillar as well.

Q109 Chairman: That is a very interesting reply because I had got the impression that from the Presidency's point of view Prüm had made the Framework Decision unnecessary. That is quite wrong, is it?

Ms Verkleij: No, not at all.

Chairman: Thank you for that clarification.

Q110 Earl of Listowel: Director General, the proposed Framework Decision on the exchange of information under the principle of availability covers matters such as ballistics and telecommunications

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data. Can you explain, please, why these are not included in the Prüm Treaty? Would it not be better if they were included in the Treaty?

Mr Faull: Yes, it would be better but they were not. We did not negotiate the Prüm Treaty and I do not know why it was thought that these items, the ones you mentioned, for example, were not to be included. Are they more difficult to deal with? Are they considered to be less necessary? Frankly, we do not know. We believe that the implementation of the availability principle for more categories than the three covered by Prüm remains a priority of the European Union, and we hope that progress will be made to extend the availability principle to other categories at a later stage.

Q111 Chairman: When Prüm was being negotiated, do you know to what extent there was any discussion of its relationship with the Framework Decision?

Mr Faull: I do not know offhand. From the record, which is certainly not the full record that we have seen, my impression is probably not, but I do not know.

Lord Marlesford: Can we move on to Interpol.

Chairman: Do you mean Europol?

Lord Marlesford: Sorry, that is right. Neither the Prüm Treaty nor the Prüm Decision involves a role for Europol and yet the objective of Member States is supposed to extend the availability of information to Europol. How do you see that developing?

Q112 Chairman: I should say, having interrupted Lord Marlesford, please, by all means answer the question about Interpol if you want.

Mr Faull: Interpol has an important role to play as well. We very much believe that the role of Europol in this respect needs to be considered carefully. That has not been done in Prüm but I do not think the issue of the role of Europol has been settled or has gone away in any way. As soon as possible the Member States and the Council must agree precisely what role they want Europol to play in this respect. In the Commission's proposal for a Framework Decision on the principle of availability we made specific provision for Europol to play a part in a network of implementation of the principle of availability, but the Prüm contracting parties did not do so.

Q113 Lord Teverson: What is the relationship between Prüm and the Framework Decision of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States? Does the Prüm Decision not make this Framework Decision redundant?

Mr Faull: The December 2006 Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of

the Member States, based on a Swedish initiative lodged in 2004, lays down rules whereby Member States' law enforcement authorities may exchange information and intelligence swiftly and effectively for the purpose of conducting criminal investigations or police intelligence gathering procedures. It is much broader than the exchange of data provided for in the Prüm Treaty and does not provide for the infrastructure for the technical exchange of information which Prüm sets up. The Framework Decision replaces the information exchange system under Article 39 of the Schengen Implementing Convention, which has been in place since 1995. It is unclear at this stage, just because it is too early to carry out an assessment, how it will improve exchanges of information and whether the new and untested administrative procedure which Member States will introduce to implement the 2006 Framework Decision will lead to better exchanges of information. The Prüm contracting parties have said that their assumption is that the Framework Decision will have a positive impact on the time period needed to process requests for mutual legal assistance in order to get further personal data following a hit for DNA and fingerprints under Prüm. There is a sense that they are complementary, that the 2006 Framework Decision will help what happens after the Prüm system has revealed a first level of information, but it is still too early to tell precisely how it will work because each Member State has to set up a system at home.

Q114 Lord Foulkes of Cumnock: I confessed earlier I was confused and my Lord Chairman, you are much more experienced than I am and so is Robin and we have all been looking at it, yet there does seem to be some need to try and produce something which explains how the various Framework Decisions in Prüm interrelate. Are there any proposals to produce a guide for those people, particularly for the people who are going to have to work it on the ground?

Mr Faull: Yes, very much so. Yes, there is and we will, if it is agreed that it should be we who do it, by the way, but I do agree that some practical guidance for the people at the sharp end of this, with all these bewildering bits of paper with different names, is very necessary. No doubt, each country will be producing this in its interior ministry, its home offices, and so on for its police forces and other law enforcement bodies. We are very willing to help and we can bring people together and exchange good practices and perhaps root out bad practices and, of course, produce information in all languages for everybody. I hope that is done. We will play our part in that and we should do it quickly. You did not quite ask the question but a further related important issue is whether we should codify some of these texts because this is still a relatively new area of European law. It is

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growing and there are lots of different bits of paper out there now, and it would make sense to look at codifying the legislation and perhaps even simplifying the legislation. The problem being, frankly, that codification in the European Union is a difficult exercise because you have to go back through the entire legislative procedure which you went through in the first place to get all the various instruments in place, and the Commission tends to start out by saying, “Will everybody agree . . .”—meaning the Council plus the Parliament if we are in the First Pillar—“. . . that we do no more than codify”, we do not take the opportunity to reopen any discussions which were closed painfully after months of discussion?. It is sometimes hard to get that commitment, so there is certain wariness about codification because you can find yourself embarking on a whole new complex legislative exercise. Nevertheless, we believe very strongly in better regulation, clear regulation, and part of that drive is to keep things under review, get rid of what is not needed anymore and codify by joining up things adopted at different times, so we will not give up.

Lord Foulkes of Cumnock: It might be helpful if we were to recommend to our Government that the Commission be asked to produce handbooks in all of the languages of the Union on this area and also that you might be asked to codify it. Is that going too far?

Q115 Lord Teverson: I think codification would be extremely useful as a recommendation in this report.

Mr Faull: We are certainly willing to provide guidance and we are willing to propose, because ultimately it would not be we who decide, consolidation or codification of text.

Q116 Chairman: I should say—although clearly it is no business of this Committee to codify anything—our specialist adviser has done some very helpful educational work for the Committee on the inter-relationship of all these various systems of exchanging information, but it does occur to me that we might consider—and I am not in any way preempting our report—if I could call it this without sounding condescending, “A child’s guide to the exchange of information in the European Union”. If you had anything that we could use for that purpose, and this is with great respect to our specialist adviser, I would be very grateful if you could think about that, could you?

Mr Faull: With pleasure.

Q117 Chairman: Because, as Lord Foulkes says, it is not just for children, it is a very confusing area.

Mr Faull: That is true. The policeman or woman on the beat needs to know that.

Chairman: Absolutely.

Q118 Earl of Caithness: Is all this action not utterly chaotic? There is a sensible discussion going on about the Data Protection Framework Decision and out of nowhere come the Germans with the Prüm Convention, which the Commission were not involved with, with its own data protection provisions which are going to be agreed before the Data Protection Framework Decision and it is going to be steamrollered through. That is not a satisfactory way to do business.

Mr Faull: Life is messy. I think the European Union is well served by its institutional framework and each of its institutions playing its role properly, which means that in an ideal world, but we do not live in one, the Commission would make proposals and the Council and Parliament would legislate, the Council by qualified majority and the Parliament in accordance with its procedures. However, in the real world Justice and Home Affairs are not wholly in that European Community system, they are still largely inter-governmental with shared right of initiative between the Commission and the Member States, with this disparity about impact assessment requirements we talked about earlier, with a very limited role for the European Parliament and largely on the sidelines, and with the requirement of unanimity. That reflects the fact, and it is a fact, that nearly all of the Member States in one way or another still believe at the moment that Justice and Home Affairs are special, different. I say that because even the Constitutional Treaty, which all Member States have signed, retains some special characteristics of the inter-governmental origin of Justice and Home Affairs policy in the European Union. That is what we have to live with. It is also the case in this area, but not only in this area—and you yourselves more than anybody have cast light on this process—that Member States are taking initiatives in sub-union groups on a number of important areas in Justice and Home Affairs. You know yourselves about the G6 and you know also that there are other geographical groups of Member States working together on some of these issues. You know how Schengen was born and how it has developed. It was born outside the EC framework, it has come into the EC framework, but in a rather odd way with some Member States of the European Union not in it and some non-Member States in the European Union in it, plus the Euro, plus all sorts of other examples outside our area. We have this variable geometry, as we call it in our jargon, it makes life complicated, interestingly perhaps, but you of all countries, I think, should know that constitutional neatness is not always the way in which affairs can be run effectively. That is where we stand in the European Union in 2007. Is it better than doing nothing at all? Of course it is. Can

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we make it work? We do, as best we can. Could it be more efficient and effective? Yes. Does the Constitutional Treaty provide all the answers? No. Most of them? Yes. Then I stop because I am wading into controversial areas. It could be better, it could be different and I think given where we are, a Union of 27 Member States, some large, some small, some new, some old, some with very real practical recent experience of terrorism, some blessedly inexperienced in terrorism and so on, we have the system we have and Europe is well served by having

it. It could be better but my job is to make my bit of it work, your job, if I may say so, by casting light on this in the way you do is extremely effective as well, and most of the time agreements are found and things are done properly and the law enforcement authorities charged with our security are able to get on with doing their job.

Chairman: Director General, can I thank you very much indeed for the extremely helpful evidence and the very helpful way in which you have answered our questions. I wish you good luck on both subjects.

Memorandum by Mr Peter Hustinx, European Data Protection Supervisor

The EDPS would like to focus on the following elements, taken from the list of issues in the request for evidence:

1. On the implications of a small number of Member States fixing the policy on matters of importance for all the Member States (as in the case of Schengen).⁵

- There is a fundamental difference with Schengen: There is now a European legal framework which enables the European Union to regulate the matters concerned and there were actual plans to make use of it for the (main) matters covered by the Prüm Convention. The Member States concerned nevertheless opted for a multilateral treaty enabling them to sidestep the thorny path of third pillar legislation by unanimous agreement.
- They also evaded the substantive and procedural requirements of enhanced cooperation, included in Articles 40, 40A, 43 and 43A of the EU-Treaty. This is all the more important since the procedure on enhanced cooperation was compulsory, if at least eight Member States were participating. However, only seven Member States signed the Prüm-Convention, but they subsequently encouraged other Member States to join.
- In the present situation, 16 Member States proposed a Council Decision replacing the Prüm Convention. *Ipsa facto*, the other Member States are denied any chance of a say in the choice of rules. They can only choose between participating and not participating. Since the third pillar requires unanimity, if one Member State says no, the way of enhanced cooperation would be the appropriate one to choose as from now.
- One could argue that the Prüm Convention breaches the law of the European Union, for the reasons mentioned above. However, this argument is mainly of a theoretical nature, since the European Court of Justice has no competence on this matter, nor does any other Court.

2. On the relationship of the Convention with the negotiations on the draft Framework Decision on the exchange of information under the principle of availability.

- On the substantial differences: In essence the draft Framework Decision requires all national information available also to be directly accessible on line to other Member States' authorities. Prüm is of a fundamentally different nature: no direct access, but indirect access through reference data. Furthermore, Prüm is not directed at information that is available in the Member States, but to the contrary it requires Member States to collect and store certain information. Finally, Prüm is more limited, as far as types of information are concerned.
- The negotiations on the draft Framework Decision were not conducted in a serious way within Council. It seems that there was no willingness at all amongst the Member States to really develop the principle of availability into a legal instrument, in spite of the Hague Programme, approved by the European Council in 2004.
- It is at this stage not very useful to link the Convention with the negotiations on the draft Framework Decision, in the light of what has been said before. It is better to link the Convention in particular with Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange

⁵ See also H Hijmans, "The third pillar in practice: coping with inadequacies. Information sharing between Member States", published on the EDPS-website.

of information and intelligence between law enforcement authorities of the Member States of the European Union (based on the Swedish proposal) that must ensure that information and intelligence will be provided to authorities of other Member States, on request.

3. Whether the provisions of the Convention are justified by the need to combat terrorism and cross-border crime?

- An effective exchange of law enforcement information is a key issue in police and judicial cooperation. It is an essential part of the development of an area of freedom, security and justice without internal borders that information is available cross-border. An appropriate legal framework is needed to facilitate the exchange.
- It is a different issue to determine whether the provisions of the Prüm Convention are necessary and proportionate. The EDPS recalls that the Prüm Convention has been set up as a “laboratory” for cross border exchange of information, in particular DNA and fingerprints. It enabled the Member States concerned to experiment with this exchange. However, the proposal for a Council Decision is presented before the experiments have been effectively put in practice, apart from a very limited exchange between Germany and Austria.
- It makes a difference of scale whether one establishes a system of information exchange between a few Member States, that already have experience with DNA-databases, or if one establishes an EU-wide system, including Member States that have no experience at all. Moreover, the small scale allows close contacts between the Member States involved; those contacts could also be used to monitor the risks for the protection of the personal data of the persons concerned. Moreover the small scale is much easier to supervise. So, even if the Prüm Convention itself would be necessary and proportionate, this does by itself not mean that the draft Council Decision should be evaluated in the same sense.
- In general, new legal instruments on police and judicial cooperation should only be adopted after an evaluation of the already existing legislative measures, leading to the conclusion that those existing measures are not sufficient. In the present case, in particular Council Framework Decision 2006/960/JHA should be examined.

4. On the relationship between the data protection provisions of the Convention (and hence the implementing Decision) and those of the draft Data Protection Framework Decision:

- The Council Decision should build on a general framework for data protection in the third pillar. As stated on several other occasions,⁶ it is essential to the EDPS that specific legal instruments facilitating the exchange of law enforcement information—like the present Council Decision—are not adopted before the adoption by Council of a framework on data protection, guaranteeing an appropriate level of data protection in conformity with the conclusions of the EDPS in his two opinions on the Commission proposal for a Council Framework Decision on data protection in the third pillar.
- A legal framework for data protection is a *conditio sine qua non* for the exchange of personal data by law enforcement authorities, as is required by Article 30(1)(b) of the EU Treaty, and recognised in several EU policy documents. However, in practice legislation facilitating exchange of data is adopted before an adequate level of data protection is guaranteed. This order should be reversed.
- The provisions on data protection in Chapter 7 of the draft Council Decision apply to data which are or have been supplied pursuant to the decision. They deal with a number of important issues and have been carefully drafted, as specific provisions on top of a general framework for data protection. Leaving apart details resulting from a more profound examination, one could conclude that the provisions offer in substance an appropriate protection. However, the field of application of the provisions is limited to data that are or have been exchanged between the Member States (this is at least how the EDPS understands the text) and the provisions are intended to build on a general framework for data protection that, as said, has not yet been adopted.

5. Whether the provisions allowing automated searching of DNA and fingerprint records are matched by adequate safeguards.

- The processing of DNA and fingerprint data, both being biometric data, has a sensitive nature and requires supplementary safeguards.
- As to DNA data, reference can be made to earlier EDPS-opinions.⁷ It is essential that the concept of DNA data is clearly defined and that a difference is between DNA profiles and DNA data that

⁶ See most recently, the EDPS-Opinion of 16 February 2007 on the proposal for a Council Decision establishing the European Police Office (EUROPOL).

⁷ See, in particular, Opinion of 28 February 2006 on the Proposal for a Council Framework Decision on the exchange of information under the principle of availability, point 55–64.

can provide information on genetic characteristics and/or the health status of a person. Also progress in science has to be taken into account: what is considered as an innocent DNA profile at a certain moment in time, may at a later stage reveal much more information than expected and needed.

- The draft Council Decision limits the availability to DNA profiles established from the non-coding part of DNA. However, precise definitions of DNA-profiles, as well as a procedure to establish such common definitions, pursuant to the state of the art in science, are missing.
- The draft Council Decision relies on the presupposition that matching DNA profiles is the key instrument in police cooperation. For this reason, all Member States have to establish DNA data bases for the purposes of criminal justice. Taking into account the costs of these data bases and the risks from the perspective of data protection, a thorough ex ante assessment is needed of the effectiveness of this instrument. The limited experience in the exchange of DNA data between Germany and Austria does not suffice.

28 February 2007

Examination of Witnesses

Witnesses: MR JOAQUIN BAYO DELGADO, Deputy European Data Protection Supervisor, and MR HIELKE HIJMANS, Legal Adviser, EDPS, examined.

Q119 Chairman: Good afternoon, Mr Delgado and Mr Hijmans. This is part of our inquiry into the Prüm Treaty. It has been suggested to us that for seven Member States to conclude a Treaty in an area of EU competence was a breach of the requirement to abstain from action which could jeopardise the attainment of the EC Treaty objectives, ie Article 10. Do you agree?

Mr Delgado: It is difficult to be black and white in this respect. The idea is basically that when you create a sub-area in which this takes place in a different way, within an area which is supposed to be a common space of justice and security, it is some barrier for the other Member States to share those data; this itself poses problems in this respect. Of course, how you can legally analyse and conclude from a legal perspective if this is really a breach of European law or not, that is something which is very, very difficult to specify.

Mr Hijmans: It is difficult to say as an authority. Once I wrote an article—maybe you have seen it—which is with more of an academic background trying to argue why this would be a breach of European law. My conclusion was I think there is good reason to assume that if you do what has been done by these seven Member States it is in fact evading the rules of European law, but it is mainly an academic conclusion because who would punish the Member States? In the third pillar there is no court competent, the Commission cannot take Member States to the court, so there is not much which can be done, it is mainly an academic conclusion. I think there is good reason to say that if you have an obligatory procedure for eight or more Member States to follow in order to involve other institutions in your decision-making and you do it with seven and then you ask others to come in and you do not follow all these procedures, that is not really loyal co-operation. That is my academic point of view but as EDPS, I do not think we can say.

Q120 Chairman: We are very lucky to have that.

Mr Delgado: Let me add something which is also clear. We are not talking about the Prüm-Convention as such any more, but about a Convention which is intended to be transposed into the legal framework of the European Union, then this debate, this academic aspect, is not so important, so meaningful, because the facts which I was referring to, being a group of countries that could jeopardise this exchange with others, is supposed to disappear, so it is more of an academic perspective.

Q121 Earl of Caithness: You said that any decision about data protection should build on the Data Protection Framework in the third pillar; the Prüm Treaty goes in quite a different direction and has its own set of data provisions which got a bit lumped in. What are the implications for the principle of availability being taken forward in the absence of a third pillar Data Protection Framework?

Mr Delgado: We really think—and when I say “we” I am not only referring to EDPS, in this context “we” means all the European data protection authorities involved in this field—that this is a prerequisite, a *lex generalis*, which gives the basics of data protection in the so-called third pillar and that is fundamental. It is not only a theoretical question, it is a practical question. There are many, many legal instruments in our day which are referring to these *lex generalis* but if you do not have these *lex generalis*, then it is like building something with no base. From a logical perspective that is quite clear. Going into the specifics in the case of the Prüm Treaty, there are some practical implications which may be of interest in this respect. One in the Prüm Treaty refers to the national law which applies because it is the way technically it can be done. But what happens is that this national law is the national law of every single Member State which has not been harmonised. So by this reference to national law we are referring to different national

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laws which are not consistent with each other because being as we are in the third pillar area. Since the directive 95/46 does not apply in this area, we have quite a lot of differences. Let me give you an example, the right of access for police data is quite different from one country to another, it may be very different, so the end result could be very different if it is in one country or another. We need this harmonised platform to build on, that is one thing. Another thing which, for example in the case of the Prüm Treaty, is missing is the onward transfers, what happens when data are received from another Member State? Are those data going to be sent onwards, in which conditions, et cetera? There are other reasons why we need this Framework Decision to be adopted. After adoption, we will know exactly the meaning of the specific rules of the Prüm Convention. As you know, the provisions in the Prüm Convention are specific to the exchange of data which is basically DNA and fingerprints. You have to have some general framework to put all of this together.

Q122 Earl of Caithness: Have you made your concerns clear to the Presidency and the Commission?

Mr Delgado: We are going to issue an opinion on the Prüm Council decision implementation. We are going to because I think it is very important and we have our institutional role. We think the European Union should give advice to the Community institutions when legislating in this respect. There are specific provisions when the proposal comes from the Commission, but in this case we are going to issue an opinion *motu proprio* because we feel these things are very important and we should give this opinion.

Q123 Chairman: That would be directed to the Presidency, would it?

Mr Hijmans: Or to the Council. The problem in this specific case is the normal procedure in which the Commission proposes does not apply, so the Member States could have asked us and involved us as well. There is nothing which prohibits the Member States from asking our advice, they did not but, nevertheless, we will give them our advice.

Q124 Baroness D'Souza: It has been suggested to us that the Prüm data protection provisions are not adequate to ensure the exclusion of data mining or data profiling. Do you think this is a real danger?

Mr Delgado: In the scope of this Prüm Treaty it is difficult to imagine the problem of data mining because, as you know, it is a hit/no hit system, so it is difficult to think this has a meaning when you talk about data mining. It is difficult to understand what is meant by this problem. As you know, the Prüm Treaty, and then the implementation will make it

necessary for the Member States to set up these databases.—

Q125 Baroness D'Souza: Like watch lists you mean?

Mr Delgado: No, databases, for example DNA database. If they do not have these databases they have to set them up. Of course, the more databases you have on, for example, DNA or in the case of fingerprints, statistically then you have the possibility of data mining, but not in the context of the exchange of data. It is difficult to understand why the exchange of data.

Mr Hijmans: Let us make it quite simple, Prüm is mainly about a hit/no hit system, so we cannot do anything, but for everything which is behind it, the exchange of data takes place on a case-by-case basis. You must explicitly ask for more information from another Member State. If you have to ask on a case-by-case basis, then it is not fit for data mining.

Q126 Lord Teverson: Is it not possible that just by the fact that you get a hit on someone you might think of them as being suspicious?

Mr Delgado: That is another problem also with this which is quite technical and important and there is a lot of concern about this because, first of all, it has not been defined what hit means. The match is not defined, how you define which elements you have to have, that is the first thing. The second thing, which is linked to your observation, is it is also difficult to see the people concerned if there is not a specific definition of people who are going, for example, to have their fingerprints or their DNA in the database. In the case of the UK, it is well known that the DNA database is quite a big one and not all DNA which is gathered there is from people who are suspicious or convicted, you have different possibilities. If some other country is getting a match on these databases, the interpretation of the result may be in need of some clarification. This leads me to another thing which is interesting in connection with this, the Commission proposal for a Data Protection Framework Decision included something which was crucial in this respect, the need to specify in this exchange of data the status of the person concerned, so be it a witness, a convicted person, a suspicious person, et cetera. Unfortunately, this has disappeared in the last version Framework Decision, how it has evolved, and that makes it worrying. This is something we will also mention for sure in our opinion because there is a lot of concern in this respect.

Q127 Lord Marlesford: Different commentators disagree about how close the Prüm data exchange provisions are to the proposed Framework Decision on the exchange of information under the principle of availability. How consistent is the approach under

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the two instruments? What are the main similarities and differences?

Mr Delgado: Basically, let me summarise the differences. In the case of Prüm, as we said, it is a hit/no hit system and then if the hit takes place then the exchange of data on these can be done. In the case of the availability principle which, by the way, has arrived at a position which is apparently not progressing and it has not been taking any further steps, the idea is direct access to the data, in fact it is online access to that data, but that is the fundamental difference in the two. Then Prüm, as we have also said, is very specific, it is DNA fingerprints, while also bifocal recognition but the main thing is fingerprints DNA, while the availability principle is relating to all data in the police sector, so it is also a question of scope. I referred to something previously which is the fact that the Prüm Treaty, means that countries have to establish and set those databases which are the object of the Treaty. In the case of the framework proposal, the principle of availability, there is not such obligation. There is the obligation to share the data which you already have but as a Member State you are not obliged to build a database because of this principle. I think these are the three main areas in which we can compare both instruments.

Mr Hijmans: We would even say that Prüm is not really availability, in effect, because availability means that data which is available for another police force in your own country, is also available cross-border. It is the idea that we cut down the borders also for police information; that is the basic idea behind it. It is a very European idea, no internal borders anymore and also for police information. That is the idea of the availability and that is the idea of the Framework Decision as well. Prüm is a far more limited step which we take now, it is just that you exchange information under certain conditions. You are even obliged to store certain information under certain conditions. This is not really availability but it is more of a specific mechanism for exchange of information.

Mr Delgado: As we mentioned in our written evidence, there is another instrument which is also in this field, the so-called Swedish initiative, which is in this line of making possible the exchange of data in the principle of availability.

Q128 Lord Foulkes of Cumnock: Can I say quite gratuitously that your written evidence is excellent, a model of clarity and conciseness, I wish every one we received was as good as that. You mentioned earlier on that your role is to advise the Council and you issue an opinion.

Mr Delgado: All institutions: the Council, the Commission and Parliament.

Lord Foulkes of Cumnock: Are you in any way directly involved in the negotiations, personally in attending any of the meetings or in a more direct way?

Q129 Chairman: In the Prüm negotiations?

Mr Delgado: We are not involved in the negotiations, we are always available to give advice on the different aspects of data protection, of course. This is our institutional role and we play this institutional role both in the informal phase whenever possible and also by issuing formal opinions.

Q130 Chairman: I think we are wrong to ask you about negotiations, the question really is the first decision, were you involved at all?

Mr Delgado: No.

Mr Hijmans: With the Prüm Treaty itself, no.

Q131 Chairman: And the decision?

Mr Delgado: Yes, the Prüm Treaty, the Convention?

Q132 Chairman: Yes, that is right.

Mr Hijmans: The decision, the text which is now on the table, which transposes the Convention—

Mr Delgado: Part of it.

Q133 Chairman: You have not been involved in that?

Mr Hijmans: We were not involved at all. We have the same source as many people in Statewatch, so that was the first time.

Mr Delgado: This is why we want to quickly issue our opinion because we want to give this advice, we think we should.

Q134 Baroness D'Souza: How confident are you that some of your suggestions will in fact be taken on board?

Mr Delgado: If we measure our success in other instruments, we are quite confident that some of them will be taken on board. Of course, we cannot expect 100 per cent of our advice to be taken on board, this is always real life but so far, there are exceptions, it should be more specific depending on the legal instruments, but our opinions are normally taken into account, especially Parliament is very keen to follow our advice. Of course we are pleased when this is the case.

Q135 Chairman: Does every Member of the European Union now have a data protection supervisor?

Mr Delgado: Yes.

Q136 Chairman: Every single one?

Mr Delgado: In fact, it is mandatory and in many cases in some countries you even have sub-national data protection authorities.

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Q137 Chairman: Is there anything you can tell us about your relationship with the British data protection authority?

Mr Delgado: Yes, the relationship is excellent. The Directive 95/46 established a Working Party, which is the so-called Article 29 Working Party, and with this Working Party all national authorities are members and the EDPS is also a member and we actively take part with the UK Commissioner. We have an excellent understanding and we share common ground.

Q138 Chairman: I am very glad to hear it. You referred to your regret that the question of the status of individuals had disappeared from the draft Data Protection Framework. What can you tell us about the German proposal for a new text?

Mr Delgado: As you know, the text has very recently become publicly known and we are analysing this text. The idea is that at this point we can share with you our very general ideas because it is a question of the same analysis. There are some positive things which we have spotted. In general terms, it is a text of a more general nature than the Commission proposal. So, in this respect we are worried that the data protection level has not increased. There is another thing which is also obvious, and this is mentioned in the same text, that a new issue has been introduced which is the unification of the supervisory bodies of the third pillar in one body. This is a very interesting idea, but this issue is a new issue which

may also represent some problems in the context of an already problematic proposal.

Q139 Chairman: Are you being consulted about this?

Mr Delgado: The German proposal?

Q140 Chairman: Yes.

Mr Delgado: No, we have not been consulted as yet.

Mr Hijmans: It is also not a formal proposal. We have been consulted on the Commission proposal, we have even issued two opinions because we find it so important which is quite irregular. But, now this new text is a discussion text which will be discussed in the Council. It is not a formal proposal even but it is the basis for further discussion. The German Presidency hopes in this way to get these negotiations which were completely blocked back to life again.

Q141 Chairman: I take it it will not come to a decision without full consultation with you? Do I take it correctly?

Mr Delgado: As I said, in any case we are always keen to give advice in this respect.

Chairman: Mr Delgado and Mr Hijmans, thank you very much indeed. I am sorry, I have skipped a few questions, I am afraid, but time is pressing on and we must not keep you longer than we promised. I am very grateful to you both for coming to give evidence to us. It is very nice to see you. Please give our greetings to Mr Hustinx. I wish you good luck, and thank you again for your reports.

Written Evidence

Memorandum by the Information Commissioner

1. The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 and the Freedom of Information Act 2000. He is independent from government and promotes access to official information and the protection of personal information. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken. The comments in this evidence are primarily from the data protection perspective.
2. The Information Commissioner's understanding is that the German Presidency of the European Union is giving priority to achieving the incorporation of the Prüm Convention into EU law. He also understands that whilst the principle of availability is still a guiding force, work on the adoption of a Framework Decision on the exchange of information under the principle of availability is not proceeding, at least for the time being. Work on the Data Protection Framework Decision (DPFD) is still underway, albeit that it is not now the Presidency's highest priority. Proposals from the Presidency on how the DPFD might be taken forward are awaited.
3. The Commissioner does not have any fundamental concerns about the Prüm Convention itself or its incorporation into EU law. His principle area of concern is over the direction that developments in the EU's third pillar are now taking. In previous evidence to the Committee he has stressed the importance he attaches to the DPFD. He sees clear advantages in a single comprehensive data protection instrument for the third pillar. If framed appropriately it has the potential to provide a simple, easily understood data protection regime that provides real benefits to the individuals it is seeking to protect and is easily put into effect by the law enforcement agencies to which it is directed. He has been encouraged by the extent to which the Committee have shared this view.
4. The problem with the Prüm Convention is that it is another example of the piecemeal approach to the exchange of information and associated data protection controls in the third pillar. So far as data protection is concerned it will further complicate an already complex picture. Complexity is neither in the interests of the individuals whose rights and freedoms are being protected nor of the law enforcement agencies who have to implement the necessary controls. The Commissioner's view is that to be consistent with good regulatory practice the correct strategic approach would be to give priority to the adoption of the DPFD as a precursor to any further developments involving the exchange or availability of personal data. To the extent that incorporation of the Prüm Convention diverts attention from progressing the DPFD, it is unwelcome.
5. If the DPFD is eventually adopted the relationship between its provisions and the data protection provisions of the Prüm Convention is unclear. As currently drafted the DPFD excludes a number of other data protection regimes established under third pillar instruments such as the Europol Convention. It is possible that the Prüm Convention could be added to the list of exclusions. However it is the Commissioner's understanding that as part of its proposals for progressing the DPFD the Presidency intends to propose removal of these exceptions. This would be welcome from the point of view of clarity and consistency provided it does not involve any reduction in the level of protection afforded to individuals.
6. Perhaps the most likely and desirable outcome, if both the Prüm Convention and the DPFD are incorporated into EU law, is that, as discussed in the Commissioner's evidence on SISII, the DPFD will provide the "lex generalis" and the Prüm Convention will provide the "lex specialis". Thus the general provisions of the DPFD will apply except where there are more specific provisions (eg in relation to logging and recording) in the Prüm Convention. We would not expect the provisions of the DPFD to be undermined by the Prüm Convention. Rather it would "particularise and complement" the provisions of the DPFD in the specific context of Prüm Convention activities.
7. So far as data protection controls are concerned there is much to be welcomed in the Prüm Convention itself. There is no new central database with the attendant risk and need for supervision that this would bring. The exchange of DNA profiles and fingerprints is based on a hit/no hit system. This means that full details are only exchanged once it is clear that the records in question relate to the same person. Such an approach is consistent with the aim of "data minimisation". The data protection provisions apply equally to automated and to non-automated processing of personal data and includes detailed rules on logging and recording the exchange of data.

8. The Committee has indicated that it has a particular interest in the automated searching of DNA and fingerprint data. The Commissioner is encouraged that the exchange of data in both cases is initially limited to “reference data” from which the data subject can not be directly identified. Whilst it is clear to the Commissioner that this is still an exchange of personal data the limited extent of this initial exchange is welcome. However the Commissioner has some concerns over the basis on which matching will take place. There is no definition of what is meant by a “match”. It is the Commissioner’s understanding that in the UK matching of DNA profiles used to take place on the basis of six regions of the DNA. Following a case in which a sample from a crime scene was matched with an individual who could not in fact have been at the scene of the crime ten regions are now used for matching.¹ It is also the Commissioner’s understanding that some other EU member states still use six point matching and this may be the basis for matching under the Prüm Convention. This gives rise to obvious concerns about the reliability of matching. If matching on less than six points is allowed, for example because a scene of crime sample is not good enough to yield as many as six points, the Commissioner’s concerns are heightened.

9. Furthermore the Commissioner is aware of the importance of quality control in DNA profiling. He has no evidence about the quality of DNA sampling in other EU members states but is aware that if the Prüm Convention is adopted across the EU DNA profiles from the UK will be available to law enforcement agencies that have very much less experience of DNA profiling than those in the UK. In this connection it is worth noting that extending the Prüm Convention to all 27 EU member states will mean that its benefits and data become available to a range of countries with traditions, legal systems and law enforcement expertise that are very different from those in the seven original signatory countries. The Commissioner’s concern is not to prevent DNA and fingerprint matching across borders but to ensure that no-one places any more reliance on an apparent match of DNA or fingerprints that is scientifically justified. He has in mind in particular, a case from 2003 when a UK citizen who had never been to Italy was wrongly arrested for a murder in Italy on the basis of apparent DNA evidence.²

10. Another area of concern arises from the size of the UK’s DNA database. As the Committee will know the UK has the world’s most extensive collection of DNA profiles. This is an issue on which the Commissioner has frequently passed critical comment. The database extends not just to those who have been convicted of offences but also in many cases to those who have been arrested and to those who have volunteered samples for elimination purposes. Once held profiles are retained for the lifetime of the subject. Other EU members states have very much smaller collections of DNA profiles. For example the Commissioner’s understanding is that in Germany profiles are only held for those who have been convicted of serious offences. The effect of this is that, so far as the UK is concerned, the traffic of DNA profiles is likely to be largely one way.

11. Furthermore the uses to which profiles may be put may differ from member state to member state. For example in the UK the technique of familial searching is used whereby a suspect can be identified though the DNA of family members in the same genetic line. It is not known how widely the same technique is used in other member states. Whilst it appears that the provisions of the Prüm Convention may not permit familial searching across borders this is not beyond doubt, particularly as there is no definition of what constitutes a DNA profile match. This is though illustrative of how DNA profiles, fingerprints and supplementary information could be used after transfer in a way that would not be permissible in the member state of origin. In practice this may be more of a problem for some other EU member states that it is for the UK, although the extension of the Prüm provisions to all 27 EU member states rather than the original seven signatories must be borne in mind. In any case there will be a need to check that making the UK’s collection of DNA profiles available under the provisions of the Prüm Convention is consistent with the basis of which the profiles were originally obtained. This is particularly true of voluntary samples where samples will have been given on the basis of assurances about their future use.

12. The Information Commissioner would also like to draw attention to the provisions in Article 39 for data protection supervision. To the extent that they underline the importance of such supervision and give powers to supervisory authorities to make checks on the exchange of data under the Prüm Convention that would not otherwise be available to the UK Information Commissioner’s office, they are welcome. The Commissioner’s expectation is that these additional powers would have to be specifically translated into UK law by amendment to the Data Protection Act. This is the approach that has been taken in other cases where deficiencies in the Commissioner’s inspection powers have had to be corrected in order to honour the UK’s commitments under international instruments. An example is the Europol Convention.

13. Another concern is that the Convention makes it mandatory for supervisory authorities to carry out random checks on the lawfulness of the supply of data. This clearly has resource implications for the Commissioner’s office. How significant these are will depend on the extent to which personal data are

¹ The case of Raymond Easton 1995.

² The case of Peter Hamkin 2003.

exchanged under the Prüm Convention once all 27 EU member states are party to it. The main concern though is the principle involved in placing an obligation on the Commissioner to carry out specific checks on the processing of personal data. He is very clear that he should concentrate his limited resources on addressing processing of personal data that carries a significant risk of serious harm. This is consistent with good regulatory practice. Although in reality processing under the Prüm Convention might well satisfy this test there is a wider principle at stake in that placing legal obligations on the Commissioner to carry out checks in specific areas could deflect him from carrying out checks in areas that in fact pose greater data protection risk, unless he has additional resources made available to him.

14. There is also a question about arrangements for cooperation between data protection supervisory authorities beyond the requirement of one authority to carry out checks when requested to do so by another. Although the Commissioner is not in favour of any disproportionately burdensome cooperation arrangements there will be a need, particularly once all 27 member states are involved, to ensure consistency in the application of the data protection provisions of the Convention, to carry out coordinated checks and to identify and make recommendations to address any defects in the legal framework. This is the nature of the role envisaged for the Working Party that is proposed in Article 31 of DPF. Implementing the Prüm Convention in the absence of the DPF and without any compensating provisions will leave an unfortunate gap.

15. Finally the Commissioner draws attention to Article 44 of the Prüm Convention. This provides for the Contracting Parties' competent authorities to conclude agreements for the administrative implementation of the Convention. The Commissioner's understanding is that such agreements have been concluded between the existing Prüm members. He is therefore unclear as to whether the UK will simply have to accept these or whether application of the Convention to the UK will lead to a new set of agreements. It is through these agreements that a number of areas of uncertainty and potential data protection concern can be addressed. The Information Commissioner would expect to be consulted by the Government to the extent that they are in a position to influence these agreements.

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