

INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

TITLE OF THE INITIATIVE	EU Police Cooperation Code (PCC)
LEAD DG (RESPONSIBLE UNIT)	DG HOME
LIKELY TYPE OF INITIATIVE	Interinstitutional legislative file
INDICATIVE PLANNING	Q4 2021
ADDITIONAL INFORMATION	https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/operational-cooperation

A. Context, Problem definition and Subsidiarity Check

Context

Serious and organised crime acts across borders. Within the EU, criminal activities are facilitated by an uneven degree of cooperation between Member States while the so-called 'digital revolution' has caused communication, business and financial flows to become more digital and global. Criminal and terrorist groups are adapting their modus operandi to this new reality. If the EU wants to continue combatting organised crime and terrorism effectively, law enforcement authorities must adapt accordingly.

Contrary to other areas of the Schengen acquis, **the legal framework for law enforcement cooperation, where it exists, has not been consolidated so far**. The existing EU legal framework is currently scattered in parts of different (at times outdated) texts, notably the 1990 Convention Implementing the Schengen Agreement (CISA)¹, parts of the Prüm Decisions² relating to operational cooperation (joint operations) and the Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the EU (Swedish Framework Decision – SFD). There is also no clear framework for the investigative tools specifically used for combatting organised crime. EU legal instruments usually refer to the laws of the Member States when referring to such tools without providing a definition or comprehensive list³. The 1998 Naples II Convention on mutual assistance and cooperation between customs administrations also contains provisions on law enforcement cooperation. Both the provisions in the CISA and Naples II give flexibility to state parties in the way they choose to implement it. Since the 1990 CISA and the 1998 Naples II Conventions, new developments also occurred in customs cooperation.

In practice, Member States have systematically complemented the existing EU legal framework for police cooperation with various **bi/tri/multilateral cooperation agreements** between themselves. The Schengen

¹ With the signing on 14 June 1985 of the Schengen Agreement, Belgium, France, Germany, Luxembourg and the Netherlands agreed that they would gradually remove controls at their common borders and introduce freedom of movement for all nationals of the signatory EU States, other EU States or non-EU countries. The Schengen Convention, signed on 19 June 1990, supplements the Agreement and lays down the arrangements and safeguards for implementing freedom of movement and police cooperation.

² The Prüm Decisions refer to Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA.

The Prüm Decisions contains rules for operational police cooperation such as joint patrols and introduced procedures for fast and efficient data exchange in specific areas. The core of the Prüm framework lays down provisions under which EU Member States grant each other access to their automated DNA analysis files, automated fingerprint identification systems and vehicle registration data.

³ For example, Article 11 of Directive 2018/1673 on combating money laundering by criminal law states that “*Member States shall take the necessary measures to ensure that effective investigative tools such as those used in combating organised crime or other serious crimes are available to the person, units or services responsible for investigating or prosecuting the offences* [emphasis added].”

evaluations in the field of police cooperation conducted in the past five years confirmed that while some of the bilateral agreements negotiated between neighbouring Member States are going much further than the EU legal framework in allowing cross-border cooperation, others are outdated or underused. Additionally, on top of being very time-consuming for Member States to negotiate, sign and ratify, the proliferation of these bilateral agreements has created across the EU a complex web of very different arrangements between Member States. As a result, for instance, in smaller or landlocked countries, police officers have to carry out operational actions in accordance with up to seven different sets of rules for each neighbouring country. This creates undue obstacles to certain important operations, such as hot pursuits or surveillance of suspects over internal borders.

In addition, a large part of the existing intra-EU cooperation is based on Council non-binding documents (e.g. guidelines on the role of the Single Point of Contact (SPOC), on the Police and Customs Cooperation Centres or on operational cooperation).

Also, intra-EU operational cooperation that involves new technologies such as e.g. drones is not covered by the current EU framework, thereby creating a legal vacuum. There is also no comprehensive list of the investigative tools that need to be available to law enforcement authorities in order to effectively tackle the specific threat of organised crime. Police and customs cooperation can also frame differently the use of similar tools thereby hampering police-customs cooperation in criminal matters.

Problem the initiative aims to tackle

The current legal framework has hampered law enforcement cooperation between the Member States.

As also stated in the Security Union Strategy⁴, a number of EU instruments and sector specific strategies have been set up to further develop operational law enforcement cooperation between Member States. However, the level of cooperation could still be improved through streamlining and upgrading the available instruments. Most of the EU legal framework underpinning operational law enforcement cooperation was designed 30 years ago. A complex web of bilateral agreements between Member States, many outdated or underused, risks fragmentation. Operational cooperation on new technologies such as drones are also not covered by the current EU framework.

Consequently, the level of law enforcement cooperation that exists between Member States varies greatly in different parts of the EU. This significantly impedes both the nature and quality of intra-EU law enforcement cooperation. This inequality also has a negative impact on the capacity to investigate and prosecute serious and organised crime groups capable of inflicting considerable harm on EU citizens as well as the internal market.

Basis for EU intervention (legal basis and subsidiarity check)

The legal basis of the initiative is Article 87 (1)(2)⁵ and Article 89⁶ of the Treaty on the Functioning of the European Union (TFEU).

Inherent limits of national jurisdictions and limited capacity to tackle cross-border crime from a national perspective reduce the ability of Member States to address serious and organised crime and terrorist offences that affect their country.

The initiative is based on the acknowledgement that an efficient counter action to cross-border terrorism and serious and organised crime can only be achieved jointly by way of cooperation at EU level.

B. Objectives and Policy options

The objective of the initiative is to streamline, enhance, develop, modernise and facilitate law enforcement cooperation between relevant national agencies, thus supporting Member States in their fight against serious and organised crime and terrorism.

⁴ COM(2020) 605 final

⁵ The Article 87 TFEU states:

"1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning:

(a) the collection, storage, processing, analysis and exchange of relevant information;

(b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;

(c) common investigative techniques in relation to the detection of serious forms of organised crime."

⁶ The Article 89 TFEU states "The Council, acting in accordance with a special legislative procedure, shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 82 and 87 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament".

An Impact Assessment will be carried out to help shaping a possible new legislative proposal. The Impact Assessment will be informed by an external study, that will look into the feasibility and the costs and benefits of respective options, as well as their impact on fundamental rights, including necessity and proportionality (subsidiarity test).

Four options (or combination of options) can be considered at this stage.

Option 1: Baseline scenario: no legislative change

In the absence of EU action, the EU legal framework for law enforcement cooperation will remain partially outdated, scarred in many different binding and non-binding acts and in practice largely superseded by bi/tri/multilateral agreements presenting wide differences in scope and actions. These agreements may be updated by Member States across a long period of time in a piecemeal approach further adding to existing law enforcement cooperation differences.

Option 2: Streamline and develop the different EU legal texts and non-binding guidelines on police cooperation into one coherent consolidated legal text.

- Align and develop the different EU legal texts and guidelines into a single consolidated Regulation would improve the clarity of the legal base for national law enforcement officers when they engage in cooperation with peers in other Member States. For instance:
 - The Prüm Decision contains provisions that mirror the Convention implementing the Schengen Agreement (CISA) on the use of firearms or on liability of police officers operating on foreign territory. The scope of these provisions however differs. As a result, the EU legal framework on liability of police officers acting on foreign soil differs, e.g. between cross-border surveillance and hot pursuits, or between joint operations and joint patrols, while being essentially of the same nature. This creates unnecessary complexity. The same goes for the use of firearms on foreign soil, which is defined by bilateral agreements and thus differs from one Member State to the next. These issues would be addressed as part of this option.
 - The Swedish Framework Decision ('SFD') replaces Art. 46. CISA and the major part of Art.39 CISA, both dealing with information exchange. However, the SFD is limited to the "*exchange of information and intelligence for the purpose of conducting criminal investigations or criminal intelligence operations*", while Art. 39. CISA refers to "*preventing and detecting criminal offences*" and Art. 46. CISA, which concerns the spontaneous exchange of information, refers to "*combat[ing] future crime and prevent[ing] offences against or threats to public policy and public security*". The differences in formulation make it very complicated to determine the extent to which Articles 39 and 46 are still applicable. These issues would be addressed as part of this option.
- Existing Council non-binding guidelines are very broadly defined, which limits their operational value. A new legal text would formalise and clarify some important features of police cooperation, for instance on clarifying the role of the Single Point of Contact (SPOC). These issues would be addressed as part of this option.
- Negotiating and updating bilateral agreements requires a lot of time and resources from Member States, and makes the training of law enforcement officers and the actual law enforcement cooperation with other Member States complicated. A Consolidated legal framework at EU level would address such issue as part of this option.

Option 3: In addition to the measures envisaged under option 2 turn some of the most advanced types of police cooperation included in recent bilateral cooperation agreements between Member States into EU law, including the creation of a comprehensive list of investigative tools for effectively fighting serious and organised crime.

- The most advanced bilateral agreements contain provisions going beyond the CISA that could be integrated in a new consolidated legal text. For instance, it should be considered whether the following features (**all taken from existing bilateral agreements**) should be included in a Police Cooperation Code, and with which safeguards:
 - Allow cross-border hot pursuits without time or geographic limitations, and regardless of the type of border (land, sea, air or river) ;
 - Allow cross-border surveillances without prior authorisation in case of urgency;
 - Covert gathering of information onto the neighbouring country's territory;
 - Prepare cross-border situational reports/risk analyses;
 - Joint purchase or lending of equipment;
 - Right to wear its country's uniform, and weapons, in other Member States;
 - Right to stop and detain a suspect in the neighbouring country's territory, including through means of coercion, physical force or the necessary use of firearms;
 - Joint crime prevention programs;
 - Joint trainings and joint exercises;
 - Cross-border investigative actions;
 - Assistance in witness protection and protection of persons close to them;

- Own initiative action in the territory of a neighbouring country in case of urgency in matters of public security or cross-border danger avoidance;
- Undercover investigation in neighbouring country's to investigate crime⁷ or prevent criminal offences;
- Police interview on the neighbouring country' territory, including by phone or video;
- Establishment of Joint Crime Detection teams;
- Use of a common network of liaison officers with access to a common information system (e.g. Nordic liaison officers network).

Expanding the scope of the EU legal framework for police cooperation (while guaranteeing data protection and fundamental rights) to some or all of the above actions (or more) would significantly improve the effectiveness of Member States in fighting serious and organised crime and terrorism in their border regions, and would effectively boost law enforcement cooperation between EU Member States.

Option 4: In addition to the measures envisaged under option 3, examine relation with customs cooperation (Naples II Convention and other relevant acts if any)

- The 1998 Convention on mutual assistance and cooperation between customs administrations (Naples II) contain provisions mirroring the CISA. It contains similar provisions as CISA on cross-border surveillance; cross-border hot pursuit; covert investigations; joint special investigation teams; or controlled deliveries. Customs cross-border cooperation focuses on illicit drugs, weapons, munitions, explosives, cultural goods, dangerous and toxic waste, nuclear materials and equipment for biological and chemical weapons or illicit cash movement. It is thus comparable to police cooperation. However, the differentiation in scope between both instruments when performing the same actions is complex and hampers further police-customs cooperation.

Under this option it would be examined whether creating a single set of rules for the same actions, whether carried out by the police or by customs authorities, would significantly clarify the rules of engagement and help strengthen police-customs cooperation. Due consideration should be given to administrative vs criminal investigations in customs matters.

These possible options are preliminary and non exhaustive. They may be adjusted in the course of the impact assessment and consultation process; sub-options could be added. They will be assessed accordingly as part of the Impact Assessment process.

C. Preliminary Assessment of Expected Impacts

Some preliminary impacts can be identified.

Likely economic impacts

By enhancing Member States competent authorities' ability to cooperate, this initiative will contribute to improving the fight against cross-border and cross-cutting criminal threats. This includes the penetration of the licit economy by serious and organised crime activities, such as financial and economic crimes, money laundering and frauds, thus better safeguarding the principle of fair competition and protection of consumers and companies. In doing so, it will reduce the cost of crime.

Likely social impacts

By enhancing Member States competent authorities' ability to cooperate, this initiative will contribute to improving security in the society at large.

Likely environmental impacts

By enhancing Member States competent authorities' ability to cooperate, this initiative will contribute to improving the fight against environmental crime.

Likely impacts on fundamental rights

By enhancing Member States competent authorities' ability to cooperate, this initiative will contribute to better protecting citizen's lives and their rights, including to security, while guaranteeing data protection and fundamental rights with due regards to the necessity and proportionality principles and in line with EU data protection rules (Law Enforcement Directive 2016/680) and the General Data Protection Regulation 2016/679, as regards the cooperation of customs authorities.

Likely impacts on simplification and/or administrative burden

The driving idea throughout the assessment of administrative impacts is to facilitate the work of the end-users. While impacts will depend on the choices of policy options, enhancing Member States competent authorities' ability to cooperate will contribute to reduce the administrative burden of Member States, for instance when having to negotiate and implement bilateral agreements which are all different in scope and in terms of the measures

⁷ Covert investigations are already covered by Art 29 of European Investigation Order Directive in the area of judicial cooperation.

they include. The development of the National Single Point of Contacts will also help speed up information exchange. A uniform set of rules on various cross-border actions will alleviate implementation issues stemming from diverging interpretation, ultimately further facilitating the use of these tools.

D. Evidence Base, Data collection and Better Regulation Instruments

Impact assessment

An Impact Assessment (scheduled for Q3 2021) will support the preparation of this initiative with the aim to clarify the measures to be proposed and estimate their possible impact.

Evidence base and data collection

In the past years, several processes have contributed to establishing the benefits and shortcomings of the EU police and law enforcement cooperation framework.

- Schengen evaluations in the field of police cooperation since 2015⁸;
- Workshops with Member States and competent JHA agencies and networks in 2019 and 2020;
- Discussions in various Council configurations (LEWP, Schengen evaluations, CCWP, COSI);
- A SFD compliance study in 2018;
- European Parliament Pilot Project 'Fundamental Rights Review of EU data collection instruments and programmes'⁹

This foundation will be further developed and refined through additional workshops and a preparatory study for the Impact Assessment, containing desk research, cost-benefit analyses, an open public consultation and interviews with relevant stakeholders.

Consultation of citizens and stakeholders

Several consultation activities are planned to seek citizens' and stakeholders' views on the policy options described above and their likely impacts.

As indicated above, an open public consultation will be organised for the Impact Assessment. In addition relevant stakeholders will be contacted through targeted instruments e.g. questionnaires, interviews, debates at Council, or workshops to receive their opinions and also presenting preliminary findings. Other appropriate methods will be identified as necessary in the consultation strategy of the initiative.

A synopsis report compiling the outcome of all consultation activities will be published on a specific consultation page on the Commission's Portal.

Will an Implementation plan be established?

At this stage, no such plan is foreseen. Depending on the delivery instruments of the final proposal an implementation plan may be established.

⁸ See [Summary of the cycle to be published as part of the revision of the monitoring mechanism – publication is pending].

⁹ <http://www.fondazionebrodolini.it/en/projects/pilot-project-fundamental-rights-review-eu-data-collection-instruments-and-programmes>