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Subject:	Enhancing cross border law enforcement cooperation: Best practices, current challenges and way forward

Introduction

Effective cooperation between EU Member State law enforcement officers, in particular along the shared internal borders of the Schengen Member States, plays a key role in fighting serious and organised crime and keeping the EU safe.

The Schengen acquis lays the groundwork for cooperation within the Schengen area, together with the so-called Prüm Decisions which provide for additional forms of cooperation between Member States. Moreover, bi-, tri- and multilateral arrangements for cross-border police cooperation between Member States exist alongside these instruments. They provide for forms of cooperation beyond the Schengen Convention and Prüm Decisions, or further specify those of their provisions which require more detailed bilateral arrangements for implementation in practice. The problems identified in this context, as well as best practices, were the subject of discussions on the future of EU law enforcement initiated in 2019 under the Romanian EU Council Presidency. Those discussions were continued under Finland's EU Council Presidency, and in the workshops held by the European Commission.

The Commission has announced further steps envisaged in this context in its Communication on the EU Security Union Strategy covering 2020-2025, published on 24 July 2020:

„... 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 A complex web of bilateral agreements between Member States, many outdated or underused, risks fragmentation. In smaller or landlocked countries, law

enforcement officers working across borders have to carry out operational actions following, in some cases, up to seven different sets of rules: the result is that some operations, such as hot pursuits of suspects over internal borders, simply do not happen. Operational cooperation on new technologies such as drones are also not covered by the current EU framework. Operational effectiveness can be supported by specific law enforcement cooperation, which may also help to provide key support to other policy goals – such as providing security input for the new assessment of foreign direct investment. The Commission will look at how a Police Cooperation Code might support this“.¹

In order to further develop the discussion on the subject and reach a common understanding of the status quo and the way forward, the German EU Council Presidency has asked for Member States’ support and distributed a questionnaire².

In the questionnaire, the Member States were asked to provide insight on the functioning, challenges, best practices, and potential of cross-border law enforcement in general. 19 Member States, Switzerland and FRONTEX replied to the questionnaire.

The analysis below lists existing challenges and constraints reported by Member States. It outlines, too, the expectations expressed by Member States as regards changes that could be made to the legal framework with a view to improving the most common instruments of EU cross-border cooperation. This analysis is based, in particular, on the Member States’ replies to the second question of the questionnaire which relates to the issue of possible improvements in the area of cross border police cooperation³. The analysis of Member States’ replies to the remaining questions is set out in the Addendum to this note, together with a thorough overview of the existing legal framework and its limits.

¹ COM(2020) 605 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the EU Security Union Strategy, p.22.

² CM 2716/20 - Questionnaire on Cross Border Law Enforcement cooperation: Outcomes of Part I of the questionnaire were discussed at the LEWP VC on 23 July 2020.

³ Question 2: *What changes (practical, technical, legal) do you consider necessary to further improve cross-border police cooperation?*

In particular with regard to the following instruments:

- a) Joint police patrols/units/offices, joint operation points, etc.*
- b) Support in the event of large-scale incidents and crises*
- c) Cross-border hot pursuit*
- d) Cross-border surveillance*
- e) Special intervention units*
- f) Police and Customs Cooperation Centres (PCCCs)*
- g) Other*

Key findings on existing instruments

The functioning of cross-border operational law enforcement cooperation between Member States is satisfactory in many regards. Even so, law enforcement authorities within the EU recognise there is a need to be able to respond to the *challenges of a quickly evolving and interconnected environment*, in which most (serious) criminal phenomena do not stop at national borders and go way beyond neighbouring countries. With regard to current instruments, the principal issues raised by the respondents were the following:

- **Joint police patrols / units / offices, joint operation points, etc.:**

In general, joint police patrols/units/offices, joint operation points etc. are considered to be a valuable tool, increasing the sense of security of citizens in border regions. In particular, the increase in migratory phenomena means that joint cooperation between services in border regions is crucial⁴.

However, the Member States identify room for improvement in two areas in particular. Firstly, joint patrols would benefit significantly if there were clarification – and perhaps, as appropriate, extension – of the executive powers exercised by the police officers of the respective seconding States operating in the respective host States⁵. Secondly, in order to make full use of these executive powers and the potential of a joint cross-border service in general, there is a need to find solutions in terms of the communication devices⁶ used and to further develop joint training activities (including bi-/trilateral training). Training should comprise language and legal training, and focus, too, on the further development of practical skills⁷. To this end, additional funding is needed. Some Member States suggest involving European agencies such as FRONTEX, and CEPOL⁸ in such training programmes, or focusing on joint action days in order to save resources⁹. In this regard, FRONTEX has stated that it is willing to provide additional support to further develop joint law enforcement efforts. Such support could be delivered, for instance through JPCO/JCOs, FRONTEX multipurpose operations, pilot projects and operational actions under EMPACT (especially Joint Action Days)¹⁰. In general, cost efficiency is a major issue in the context of joint patrols¹¹. In addition, the manual on cross-border operations needs to be updated in terms of applicable procedures and the competent contact points¹². Other suggested improvements include the

⁴ SK.

⁵ BE, CZ, DE.

⁶ CZ.

⁷ BE, CH, CZ, DE, ES, LT.

⁸ LT.

⁹ CH.

¹⁰ FRONTEX.

¹¹ DE.

¹² PL.

introduction of a web app informing individual officers about the options, rules and regulations for cross-border police action¹³, or the use of standardised forms facilitating the processing of requests¹⁴.

- **Support in the event of large-scale incidents and crises:**

The issues identified by Member States as regards mutual support in the event of large-scale incidents and crises are closely related to the general complexities of cross-border service performance¹⁵. Necessary improvements identified include: the clarification and extension of executive powers¹⁶; the need to develop police officers' legal and practical knowledge (in terms of the scope, definitions and conditions for such support) through joint training sessions¹⁷. There is a need to focus in particular on the deployment of support mechanisms¹⁸, as the latter can often be time-consuming. Member States considered that awareness of existing instruments and the readiness to call on cross-border assistance were at times insufficient. They identified a need to further develop joint training and increase planning effort. As in the case of joint patrols, the use of secure communication channels should be increased¹⁹.

- **Cross-border hot pursuits:**

Member States consider the current provisions regulating the conditions for cross-border hot pursuits, as set out in Article 41 CISA, no longer reflect the current practical needs. For this reason, bi-/multilateral police agreements frequently contain provisions widening the scope of cross-border hot pursuits²⁰. For instance, suspects are often not caught in the act of committing offences. They often do not stop their vehicles for a police check, seemingly aware of the legal obstacles hindering cross-border hot pursuits. In addition, the list of offences enabling hot pursuits is often restrictive. Even at borders where, under the relevant bi/trilateral police cooperation agreements, all extraditable offences may justify cross-border hot pursuits, police officers face a number of complex issues: first, they have to clearly identify the offence in question; they need to determine whether the offence in question allows for extradition and hence whether the continuation of the hot pursuit would be permissible. In regions where three or more Member States share borders, the situation is even more complex²¹. One complex issue, in particular, undermines trust and cooperation between police authorities and causes legal uncertainty, namely asymmetry in

¹³ Suggestion formulated by NL, based on the BENELUX web app (in Dutch and French).

¹⁴ SE

¹⁵ BE.

¹⁶ BE.

¹⁷ BE, CH, ES, LT, SE.

¹⁸ LT.

¹⁹ IE.

²⁰ DE.

²¹ Describing these complexities in detail: BE.

executive powers: police officers of one Member State may have more extensive powers in the neighbouring Member State than the latter's police officers have in the first Member State.

With a view to increasing the effectiveness of cross-border hot pursuits, Member States suggest broadening the scope²² of hot pursuits in several ways by: clarifying the legal conditions enabling hot pursuits (e.g. the definition of such terms as “apprehend” and “detain”)²³; broadening the executive powers of police officers pursuing suspects across the border, including the right to carry and use service weapons²⁴; revising the lists of offences enabling a hot pursuit²⁵; extending the period within which extradition may be requested by the seconding State²⁶; improving the technical conditions for radio communication (where necessary, by involving the EU Radio Communication Expert Group – RCEG) and sharing localisation data²⁷; developing specific joint training activities²⁸; in general, allowing hot pursuits to be carried out via land, air, sea and waterways²⁹; developing a clear provision enabling hot pursuits whenever a person attempts to evade law enforcement procedures³⁰.

- **Cross-border surveillance:**

As a rule, Member States emphasise the growing importance of cross-border surveillance, in particular in the fight against organised crime³¹. The effectiveness of the current tool is appreciated. Even so, Member States have submitted a large number of proposals to improve the overall framework for cross-border surveillance. The most crucial point of criticism relates to the differences between national regulations: the different legal regimes complicate or undermine the effective surveillance of criminal activities within the territory of a number of Member States. The COVID-19 pandemic has further complicated such work³². Whereas in some Member States the police is responsible for granting authorisations for surveillance, in other Member States the judiciary is the responsible body. In addition, there is a need to clarify the relationship between the provisions regulating cross-border surveillance and the European Investigation Order. There are very significant differences between the various national regimes covering, for instance, the use of technical means used for surveillance, and the degree to which it is possible to use the data gathered through surveillance as evidence in criminal proceedings³³.

²² Comments to this effect: BE, CH, CZ, DE, ES, LT, NL, PL, SE.

²³ CH.

²⁴ BE, CH, CZ DE.

²⁵ CH, ES.

²⁶ DE.

²⁷ CZ, PL.

²⁸ CH.

²⁹ BE, DE, FI, PL, SE.

³⁰ BE, CH, DE, NL.

³¹ For instance, DE.

³² ES.

³³ Describing these obstacles in detail: CZ, DE, PL, and SK.

Member States suggest several ways in which to improve conditions for surveillance operations. They suggest: dropping the distinction between urgent and non-urgent surveillance contained in Article 40 CISA³⁴, or at least extending the time frame needed to obtain authorisation for urgent surveillance³⁵; allowing - beyond the current wording of Art. 40 (1) under which the surveillance has to start in the home country before it continues in the territory of another one - also the converse scenario of a surveillance launched in the territory of another country, before it continues in the home country of the officers involved;³⁶ consolidating technological solutions such as the use of localisation devices or drones used in the context of cross-border surveillance³⁷; holding international exercises involving all types of units/agencies dealing with surveillance³⁸; developing more effective tools and common approaches with a view to facilitating the granting of surveillance authorisation³⁹. Furthermore, there is a need to draw up a unified and updated working catalogue listing the respective competent authorities and relevant national legal requirements. Such a catalogue will help overcome uncertainties⁴⁰.

- **Special intervention units:**

Cross-border assistance involving special intervention units is rare. However, other types of cooperation are common and have been used over a long period. These include joint exercises within the ATLAS network⁴¹. On the issue of the cross-border deployment of special intervention units, Member States highlighted the ambiguous legal status of the EU Council Decision 2008/617/JHA, which sets out a general clarification of the competences of special intervention units in cross-border operations.⁴² Furthermore, not all Member States have implemented the necessary legal procedures enabling joint operations⁴³. Therefore, Member States suggest additional emphasis on: the drafting of national provisions regulating the intervention of cross-border special intervention units⁴⁴; establishing budgets to acquire shared materials⁴⁵; further developing joint planning effort in terms of emergency scenarios⁴⁶. In addition, emphasis is placed on the establishment of centres of excellence in selected Member States and the strengthening of secure communication channels. Such measures would enhance this form of cooperation.⁴⁷

³⁴ BE.

³⁵ CZ, DE, LV, SK.

³⁶ BE, DE.

³⁷ CH, CZ.

³⁸ CZ.

³⁹ LV.

⁴⁰ HU, SK.

⁴¹ DE, SE.

⁴² BE, NL.

⁴³ LT, SE.

⁴⁴ ES, SE.

⁴⁵ ES.

⁴⁶ DE.

⁴⁷ SK.

- **Police and Customs Cooperation Centres – PCCCs:**

Most Member States recognise PCCCs as being highly effective structures facilitating cross-border law enforcement cooperation. However, Member States consider that, in some regards, the working methods of PCCCs could be further improved. Most crucially, Member States believe that PCCCs should be further anchored within a network of smoothly cooperating structures. Therefore, the competence of PCCCs should not be limited to border regions. This would enable the exchange of information – facilitated through SIENA⁴⁸ and bilateral “interfaces”⁴⁹ – with all Member States⁵⁰. Furthermore, it would be possible to assess whether a joint case management or case registration system for all European PCCCs should be developed⁵¹. This could comprise an integrated translation tool⁵². Lastly, Member States highlighted the possible scope for the further integration of PCCCs and national SPOCs⁵³. Member States expressed the view that PCCCs should be involved in a broader range of tasks, including analysis work⁵⁴. To help PCCCs to perform such work, there is a need to: further develop digital infrastructure; improve language and thematic training given to PCCC staff (in line with PCCC guidelines); ensure that the Commission allocates the necessary funding⁵⁵. The fundamental role of PCCCs and the potential benefits of their integration within larger operational activities is highlighted by FRONTEX. FRONTEX describes how 18 PCCCs from 11 Member States participated in the enhanced information exchange effort involving 22 Frontex Focal Points and designed to increase the efficacy of border controls⁵⁶. As a general remark, a widespread and systematic use of SIENA by the PCCCs should be promoted, together with their involvement in Europol and EMPACT activities, such as Joint Action Days (JADs).

Main trends and the way forward

From the comments of the Member States set out above, a number of *key issues* emerged. These relate to the challenges of cross-border law enforcement cooperation in an increasingly transnational environment characterised by threats relating to organised crime, migratory phenomena and the COVID-19 pandemic:

- I. **Balancing regional and EU-wide cooperation:** at local, regional and national level, Member States considered that there is a need to focus on further developing structures (organisational and technical) designed to promote interaction, information exchange and

⁴⁸ ES.

⁴⁹ CZ.

⁵⁰ CZ, DE, ES, PL.

⁵¹ CH.

⁵² BE

⁵³ CH, CZ, PL.

⁵⁴ ES.

⁵⁵ PL. Note by DE: specific training of language and skills is already part of the ISF PCCC project.

It is open for further contributions and improvement by partners

⁵⁶ FRONTEX.

personal contacts between their law enforcement authorities. Member States' positions and priorities varied and included: an emphasis on smoother and enhanced information exchange; the further development of relevant structures and platforms; joint training, exercises, seminars and workshops; the reduction of technical and language barriers. Since every border is different, a “one-size-fits-all” approach is not realistic. A well-balanced, functional combination of updated EU-wide norms reflecting the needs of actual practice on the one hand, and a range of improvement in terms of pragmatic, small-scale forms of cooperation on the other, appears to be the most promising way forward. For instance, some procedures such as authorisation for cross-border surveillance and other joint investigative operations could benefit from a *consolidation of legal requirements* and the *development of common approaches* at EU level. That said, Member States regard law enforcement as a genuine component of their national sovereignty. They therefore wish to retain control over the terms of its exercise. This is where closer regional cooperation built on the basis of decades of trust-based and reciprocal contacts demonstrates its importance.

- II. Legal diversity and lack of awareness:** the multi-layered nature of the legal basis for cross-border police cooperation allows for the adaptation of general guidelines to local needs. However, this also increases the risk of creating an unclear, contradictory legal framework. Practitioners frequently point out uncertainty as regards the content and applicability of existing rules. This includes uncertain legal conditions for cross-border action, including: unclear definitions of key terms; insufficiently known competences of police officials operating abroad and the competent counterparts in the host State; uncertainty regarding the scope of cooperation instruments; insufficient knowledge of the applicable procedures to lawfully obtain authorisation and enforce measures. However, Schengen-wide consolidation is not the only possible answer to increasing legal certainty. As suggested by Member States, updated manuals and working catalogues specifying applicable national requirements, competences and procedures, as well as intensified legal training, could significantly improve cross-border cooperation mechanisms.
- III. Increasing availability and the use of secure communication channels:** upholding internal security within the EU requires strong cooperation based on reliable and secure communication. This general finding has been highlighted by the measures taken to prevent the spread of the COVID-19 pandemic, as discussed by COSI and LEWP. The process needed to address this issue has already been set up⁵⁷.
- IV. Conferring sufficient and symmetrical executive powers:** one key aspect of the reported deficits in the legal bases of cross-border law enforcement cooperation touches upon the respective executive powers of police officials operating in neighbouring Member States.

⁵⁷ See 10315/20.

Executive powers (for instance the right to carry out cross-border operations, or to apprehend, arrest and search suspects, or to carry and use service weapons) are often *insufficient to efficiently carry out tasks* in practice. In regions where three or more countries share borders, keeping track of applicable regulations can be challenging. Particularly challenging are situations in which the police officers of one Member State carrying out a cross-border operation exercise more extensive executive powers than their colleagues from the host Member State. More alignment could broaden the basis for more trust-based cross-border cooperation.

- V. **Existing tools should be improved, rather than developing new instruments**: finally, despite underlining the *possibilities for improvement* in a number of areas, Member States express their wish not to replace current law enforcement cooperation mechanisms. Instead, the preferred approach was first to prioritise *thorough analysis* and discussion on how some of the existing tools could be improved so as to function more effectively. This could, as appropriate, result in a *targeted update (of relevant provisions)* as a second step.

In the light of the above, delegations are kindly invited to indicate whether:

- **They agree with the main findings of the analysis, and thus whether**
- **The LEWP should draw up draft Conclusions on the matter, for referral to the Council, especially as regards the issues of legal certainty, awareness, symmetry of conferred powers and balance between regional and EU-wide law enforcement cooperation.**