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NOTE

From:	Presidency
To:	Delegations
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Subject:	Council Recommendation on operational police cooperation Initial comments by the Member States prior to or during the Law Enforcement Working party – Police of 11 January 2022 and the Commission's replies to the Member States' questions

Courtesy translation

I- Summary of Member States' comments

This document follows the meeting of the Law Enforcement Working Party on 11.01.22 during which it was agreed that the French Presidency would send to the Member States, in liaison with the General Secretariat of the Council, a summary of their initial comments as well as the Commission's clarifications on the mechanisms envisaged in the proposal for a Council recommendation on operational police cooperation (Brussels, 9.12.2021 COM (2021) 780 final. Proposal for a council recommendation on operational police cooperation). It is recalled here that about ten Member States had sent comments in view of the LEWP of 11.01.

Most of the delegations that submitted their comments and/or spoke in the 11.01 Law Enforcement Working Party and then submitted comments following that meeting welcomed the Commission's proposal and all stressed that they were in favour of strengthening police cooperation in the European Union, in conjunction with the associated Schengen countries. Most of the States specified that these were initial analyses subject to additional and internal analyses (examination reservations). Some States also wished to emphasise that the recommendation should be analysed in relation to existing European provisions and/or those under negotiation, such as the Directive on the exchange of information, the Convention implementing the Schengen Agreement (CAAS), the Schengen Borders Code (SBC) and the Prüm decisions.

General comments on the main provisions of the text are given below (recitals, definitions, provisions to remove obstacles to operational police cooperation, operational police cooperation to combat the smuggling of migrants and cross-border crime linked to illegal immigration, operational police cooperation to combat trafficking in human beings and to identify and protect victims, joint police and customs centres, coordination platform for joint operations, ensuring effective access to information and communication, joint training and professional development, final provisions).

The recitals did not give rise to many comments.

With regard to the recitals, it was proposed that a new recital "11a" be added, specifying that the fundamental rights, norms and other standards used in Article 6a are maintained (legal protection, data protection). It was also added that recitals 17, 18 and 19 lacked clarity and it was requested that their indispensability be verified.

The Members States generally considered the section of definitions useful but that it could be amended and added to.

The comments of the Member States were not generally against a definition part, but they most often asked for amendments or clarifications. He also pointed out that the definitions were already contained in other texts and that it would simply be a matter of repeating them.

With regard to the questions, what is meant by "defence of others", for example?

The definition of SPOC (single point of contact) appears difficult to define in view of the developments brought about by the recommendation on the role of the SPOC at the level of the coordination platform for joint operations. In any case, this definition must be brought into line with the definition mentioned in the proposal for an information exchange directive currently under discussion in the IXIM Working Party.

Furthermore, the notion of hot pursuit appears incomplete insofar as hot pursuit "in case of leakage" is not mentioned.

A request for a definition was also made concerning weapons. It should be noted here that in one Member State the police are not always armed.

With regard to joint operations, it was mentioned that these operations differ according to whether they are conducted in accordance with the rules relating to the PCCCs or according to Article 17 of the Prüm Decision.

It should also be pointed out that the definition of crimes with reference to the Annex raised questions as to whether it was most appropriate to refer to the offences covered by the European arrest warrant. This issue of the definition of crimes is linked in particular to the EMPACT framework, which was mentioned on several occasions. In particular, the Commission was asked to ensure that the scope of the recommendation did not overlap with the scope covered by the EMPACT framework.

Cross-border observations, cross-border prosecutions and joint operations.

All the States that submitted comments agree on the fact that operational police cooperation must be facilitated; this includes cross-border surveillance and hot pursuits. In any case, a link between the recommendation and the bilateral agreements appears to be required.

Moreover, one can be in favour of cross-border hot pursuits beyond the sole land framework, i.e. also maritime, air and river. Furthermore, it should be noted that the procedure for cross-border surveillance has been described by some Member States as a judicial procedure.

The role of the POCS in the area of cross-border sightings is also questionable as this is not yet within the competence of the POCS.

With regard to cross-border hot pursuit, it should first be noted that no State has questioned the provision that Member States should authorise cross-border hot pursuit without geographical or temporal limitation until the arrival of the competent internal security forces. On the other hand, the autonomous power of interception may constitute a constitutional block for some Member States. The word "intercept" is a point of attention, as is the notion of "suspect", which should be clarified. In addition, identity checks should include a statement that these police acts can only be carried out by the internal security forces of the competent Member State. Furthermore, it was pointed out that hot pursuit implies an information procedure as soon as possible, before crossing the border. Furthermore, is it envisaged that the pursuit will involve non-neighboring States?

The extension of prosecution beyond land borders was repeatedly considered to be positive, although the compatibility of this proposal with the Convention implementing the Schengen Agreement was questioned. Furthermore, reference was made to the Law of the Sea Convention which would apply in the case of prosecutions at sea.

Specific points raised in relation to cross-border sightings and prosecutions included the use of weapons and the question of self-defence. For example, how should self-defence be defined? What about the use of weapons on the territory of another Member State, in particular for the "defence of others"?

Furthermore, reference was made to the European arrest warrant in relation to cross-border prosecutions. In addition, the question was raised as to whether it is worthwhile to prosecute when there are serious doubts and reliable information about an ongoing or future crime, and it was suggested that a Member State could better facilitate prosecutions on the basis of cross-border risk analysis.

Questions were also raised about the legal regime relating to the use of technologies such as drones or GPS: for example, what is the legal regime of the country in which the prosecution is carried out (e.g. framework relating to GPS tracking and the implications for data protection). In view of the importance of this subject, particularly with regard to data protection, the question was raised as to whether this part of the recommendation should not be the subject of legally binding provisions.

As regards cross-border observations, the Commission is asked to determine the difference in regime between urgent and non-urgent observations.

With regard to joint operations, the question was raised as to which legal framework applies. Is it the definition contained in Prüm?

With regard to the evolution of police and customs cooperation centres (PCCCs) into joint police and customs stations.

All Member States underline the extremely positive role of PCCCs in the fight against cross-border crime. These structures, which have proven their effectiveness, must be supported. However, many Member States wondered about the future tasks of the platform. What would be the role of these future centres and who would lead them? Many Member States consider that the PCCCs play an effective role in the exchange of information and wonder whether these centres should be given more operational tasks. This is why it was requested that the expression "carrying out" in paragraph 5 (a) i. "carrying out, supporting and coordinating joint operations in intra-EU border areas" be deleted. Also, several Member States indicated that they were not in favour of changing the name of the PCCCs. One Member State at least wonders about the value of describing all the tasks of the PCCCs in one text.

The coordination platform for joint operations has raised many questions about its organisation and tasks.

Many Member States have questioned the place of the platform in the landscape of operational police cooperation. Clarifications appear necessary. Would the platform have a specific infrastructure? How would it be organised? According to which legal basis? How would the contact points of the networks articulate their work with the platform (example of the NFIP network, National Football Information Point)? Is the platform intended to carry out its missions at a national level? The question of the "ex-ante" evaluation of the costs of such a platform was also raised. It would also be necessary to clarify the role of Europol and the Commission in the system. Europol's vision of the platform could also be interesting. Furthermore, which authority would be empowered to launch the procedure for launching joint operations? Furthermore, would there be a link or at least coordination between the platform and the Union Civil Protection Mechanism (UCPM)? What would be the role of the SPOCs in the procedure, as joint operations are not currently triggered by these entities? The SPOCs are mentioned in section 5 on "joint police and custom stations" and it is asked whether this cross-border risk analysis will be carried out by the SPOCs in the framework of the coordination platform for joint operations. It was also indicated that the risk analysis conducted at the level of the PCCCs should not be "decentralised" but conducted more in a broader framework.

Furthermore, it was stated that this coordination platform should not have the effect of creating duplication with existing structures; the EMPACT "platform" was mentioned.

The subject of statistical feedback raised questions about the nature of and reasons for the information to be transmitted.

The subject of statistics gave rise to questions about the purpose of such data: for what purpose are the statistics? What is the added value of such data, bearing in mind that information on joint operations or joint patrols alone will not be able to reflect the full extent of operational police cooperation within the European Union and the Schengen associated States. What data would be transmitted and which authority would be responsible for its transmission? For what purpose would statistics be transmitted to the European Parliament and the Commission? For what purposes?

The existence of sections devoted to combating the smuggling of migrants in connection with irregular immigration and combating trafficking in human beings (THB) raised questions about other forms of crime.

Several States, without questioning the merits of this proposal and its importance, nevertheless questioned the specific point of irregular immigration and trafficking in human beings, given that the recommendation is intended to cover many other areas of crime.

Effective access to information and communication was welcomed but raised questions about the technical and legal feasibility.

States agreed on the importance and need to promote communication. However, provisions to allow real-time communications on the territory of another Member State could initially run into technical and legal difficulties. Furthermore, it would be necessary to identify the contributions of both the EU and the Member States to develop new communication tools. In addition, the place of the Europol Innovation Lab was welcomed, but Member States can use other tools.

The training aspect was welcomed but should be developed in line with the different training provisions and cycles of the Member States.

The Member States generally welcomed the fact that joint training is planned, but it should be checked that this training is consistent with the Member States' training courses. Moreover, it is requested to clarify what the Commission understands by the expression "accredited European cross-border operational police cooperation courses". Furthermore, the role of CEPOL in the system should be clearly defined. In any case, it could appear difficult to effectively implement a "police Erasmus", as the training cycles and methods are so different between Member States. Moreover, the training courses of the Member States should not duplicate the training courses supported under the aegis of CEPOL. The importance of CEPOL was stressed.

It was also mentioned that training involves substantial funding and that the European Union should be able to provide funding for training.

Several Member States were in favour of this aspect of operational police cooperation as a vehicle for a European culture of internal security forces.

The final provisions gave rise to remarks concerning the timeframe for implementation.

All Member States commented on the deadlines indicated by the Commission. The six-month deadline for translation into national standards and/or agreement conclusions was described as extremely difficult to meet, given the deadlines for drafting and approving the texts and the revised agreement conclusions. The time limit of 18 months was mentioned. The evaluation after one year may also have prompted another approach (e.g. a request for a year and a half).

Furthermore, the interest of bringing to this part the existence of European financing to favour operational police cooperation (mention in particular of the police internal security fund, FSI-Police) was mentioned.

II- Explanations from the European Commission on the proposal for a Council recommendation on operational police cooperation

The Commission has identified a certain number of questions raised from the Member States during the Law enforcement party which took place on the 11th of January 2022 regarding the Council recommendation on operational police cooperation.

The Commission addressed those questions based on seven main topic.

1/ On the first topic relating to the impact or possible incompatibility of some recommendations with existing national legislation or national sovereignty (e.g. cross border surveillance, use of weapons) that will require careful legal analysis.

It is important to note that the Commission considers these recommendations as developments of the Schengen *acquis*. They aim to clarify and align rules of engagement in cross-border law enforcement operations and are based on best practices existing in some Member States that the Commission considers it should be extended across the EU to remove barriers to cooperation. For hot pursuits and surveillances, the recommendations are building on the CISA, and national legislation should be in principle compatible with CISA. What the Commission does in this recommendation is either to extend the scope of what is already possible under CISA, or when CISA offers two possibilities, the Commission recommends to harmonise the CISA rules for all Member States, using only one of these two possibilities. This proposal is described as follows :

First, on cross-border hot pursuits and surveillances, the Commission includes in the Annex of the recommendation a list of eligible crimes.

Concerning hot pursuits, CISA provides in its article 41 paragraph 4 two possibilities : either a list of specific crimes, or extraditable offences, without listing them. In order to align the list of eligible crimes to start a cross-border hot pursuit and avoid different list of crimes between Member States, which create implementation barriers, the Commission has chosen to list the most recent and up to date wording of extraditable offences in the latest EU relevant legal act – this list is the list from the EU-UK Trade and Cooperation Agreement. A list of extraditable offenses is available in the European Arrest Warrant (EAW) and on the European Investigative order (EIO). In fact it is the exact same list of crimes in the EAW and the EIO. That list was however considered outdated and was slightly updated in the EU-UK TCA. For more clarity, the Commission decided to list the eligible crimes directly in the recommendation.

Concerning surveillances, CISA only included in Article 40 paragraph 7 a list of crimes -the same as for hot pursuits- without a reference to the possibility of extraditable offences. In order to remove unnecessary complexity, the Commission has recommended again a uniform way to address it, that is to say to use the list of crimes in the EU-UK Trade and Cooperation Agreement. So, the Commission recommends to use the same list of eligible crimes for hot pursuits and cross border surveillances. Both cross-border activities - although different - have common characteristics : they both require the physical presence of police officers on the other side of the border, they both are deployed in a cross-border context for serious crimes and this means that uniformity is needed. The Commission stresses that we cannot have different crimes in the list for hot pursuits and different crimes for surveillances. Besides, a surveillance can always turn out into a hot pursuit.

In doing this, The Commission underlines the fact that it is not going against CISA, because of course an EU recommendation cannot go against EU legislation, but it aims at clarifying and expanding the scope of eligible crimes for cross-border surveillances, which the legal service of the Commission confirmed.

Third, for both hot pursuits and cross-border surveillances, The Commission recommends that police officers having to intervene in a neighbouring Member State can carry their service weapon and ammunition and be able to use them in legitimate self-defence and, where necessary, in the defence of others. CISA already provides in article 40 paragraph 2 (for surveillances) and in article 41 paragraph 5 (for hot pursuits) for the possibility to carry and use its service weapon but only for legitimate self-defence and not for the defence of others, meaning that it does not cover the possibility of criminals shooting against citizens in the context of a hot pursuit or surveillance, but only against police officers. The Commission believes this is important to be covered, notably for the protection of citizens. The Commission recalls that the Prüm Council Decision, in its article 19 paragraph 2, already provides for the use of firearms in the defence of others for joint patrols and other joint operations. The Commission indicates that this creates an imbalance. Police officers can use their firearms to defend citizens during a patrol but not during a hot pursuits or when a surveillance turns out in exchange of fire.

Fourth, on joint operations (so with police officers from 2 Member States), The Commission has introduced the possibility of officers from the competent law enforcement authority of another Member State to perform identity checks, and intercept any person who tries to avoid an identity check. This means that police officers from the seconding Member State together with their colleagues of the hosting Member State should be able to check the identity of an individual, his identification documents, for instance to identify if this person is wanted. This goes together with police officers checking their national databases. This identity check is important for instance in mass gatherings such as sport events where nationals from the Member State of the seconding officer visit a hosting Member State. The identity checks are also important to identify prevent and detect illegally staying migrants and cross-border crime linked to irregular migration (e.g. migrant smuggling, document fraud), and to counter trafficking in human beings and to identify and protect victims in the context of targeted joint patrols and other joint operations in intra-EU border areas. Concerning secondary movements, an effective Union return policy requires the apprehension and identification of illegally staying third-country nationals, which can be achieved through identity checks in joint patrols.

The recommendations that the Commission has put forward builds upon existing EU legislation in CISA and Prüm, and focuses on what is needed to remove the implementation obstacles that have been noted during Schengen evaluations on police cooperation and the consultation phase. This is the main focus : make recommendations to facilitate cooperation and remove identified obstacles.

However, The Commission did not conduct a conformity check with the national legislations of all the Member States. Therefore, a legal analysis -conducted at national level by each MS- is indeed necessary and welcomed, in order to identify potential implementation difficulties. The Commission would welcome receiving such a list of legal implementations issues against the recommendation, as it would provide a clear indication of the chances of success of implementing this recommendation. The Commission stresses that it is proposed that the Commission takes stock of progress made after one year of implementation of this recommendation.

2/ On the second block of comments on the work of Police and Customs Cooperation Centers (PCCCs).

The Commission indicates that the recommendation for the PCCCs is not to change anything as regards what the PCCCs do in terms of information exchange, i.e. their current tasks. Instead, in the view of the Commission, the recommendation aims to broaden the role of the existing PCCCs to become “joint police stations” capable of not only exchanging information as currently, which they generally do very well and should continue doing, but to also plan, support, coordinate and carry out joint patrols and other joint operations, based on shared risk analysis.

In addition to their current tasks of regional cross-border information exchange, the Commission proposes that the Joint Police and Customs Stations develop the capacity to establish, support, coordinate and conduct permanent forms of operational cooperation in cross-border areas, such as joint patrols and other joint operations.

The Commission also propose that those stations produce a joint analysis of cross-border crimes that are specific to their border area and share them through the national Single Point of Contact (SPOC) with all Member States and competent EU agencies, such as Europol.

Such targeted joint operations would be governed by the rules on the exercise of police powers in the intra-EU border areas, notably those set out in Article 23 of the Schengen Borders Code. This is to ensure that they do not have an effect equivalent to border controls.

These stations would also allow to further develop the capacity to jointly support investigations into cross-border crimes occurring in border regions, in conformity of course with applicable legislation and based on relevant legal authorisations as required and issued under such legislation.

Thus, the proposal of the Commission recommends to take the successful PCCCs to “the next level of cooperation” not only being responsible for facilitating the exchange of information but to have a more direct operational role. This does not cover hot pursuits and surveillances. Thus, it does not imply that those structures will take over the role of operational units conducting surveillances and hot pursuits, operating on a cross-border context.

Furthermore, the proposal does not lead to these structures becoming autonomous, falling outside the realm of the existing law enforcement arrangements, structures and workflows. It does not contradict their local/regional nature and jurisdiction nor affects their command and decision making arrangements.

On the contrary, it means that they will focus more on supporting operational activities and thus having an ever more important role. The internal structure of those stations, their position in the chain of command, workflow and cooperation with other formations and structures at national level is left to the discretion of the Member States. However, the Commission believes that they should be able to perform at minima the tasks recommended, in order to assume more tangible and operational law enforcement actions.

Moreover, according to the Commission, the proposals included in the Recommendation do not affect the way PCCC's cooperate with the SPOCs. The "Joint Police Stations" will cooperate with the SPOCs when it comes to the need to exchange information and cooperate with third countries and international organisations, but also when a wider cooperation is needed with other EU Member States and EU agencies. The Commission "can imagine" these structures as local/regional structures dedicated to cross-border cooperation.

Furthermore, it should be noted that the scope of the proposal does not cover any PCCC's established or to be established between Member States and third countries based on bi- or multi-lateral agreements with a view to enhance cross-border cooperation, such as for instance between Greece and Albania.

3/ On the Third topic regarding questions relating to the coordination platform to support and target joint operations and patrols across the EU, notably whether this platform would be permanent or not, and what would be the role of the Commission and legal basis for its role.

According to the Commission, the coordination platform that the Commission recommends to set up, aims to fill an important operational gap in the area of police cooperation in the EU, that is to say the absence of a mechanism where Member States are able to coordinate and exchange on their needs, priorities, and risk areas for joint patrols and other joint operations with a pan-European dimension. This platform won't be dealing with the exchange of personal data here, but strategic information on key crimes, crime hubs, specific situations and needs where the deployment of police officers from other Member States would be helpful and needed.

As discussed during the Bulgarian Presidency to prepare the Council Conclusions on preventive policing, police assets to be deployed abroad are not infinite, and therefore, according to the Commission, a coordination mechanism enabling to better coordinate and target these deployments is needed.

The Commission believes this will support the Member States by maintaining and enhancing public order and safety, to prevent criminal offences, including by serious and organised crime groups, and to help addressing specific crime waves in key locations, at specific times and in specific situations.

The Commission envisages the platform as a permanent dedicated forum that will support decision-making and leveraging EU support in case of need. The Commission will be part of this Member States driven platform and will support its creation and function, along with Europol. Indeed, the COM will take advantage of this forum to identify the needs of the Member States and identify EU policies and measures to support Member States.

Europol would support with analysis on identifying locations that are of particular importance to prevent and counter crime, such as key criminal hubs or touristic areas or during mass gatherings and major events likely to attract visitors from other Member States, such as large sport events or international summits.

The Commission stresses : “It goes without saying” that the platform will coordinate with the EU Civil Protection Mechanism and the Emergency Response Coordination Centre (ERCC), in case of disasters and serious accidents. Such situations require to focus not only on the safety element but as well on the security element, meaning for instance the deployment of joint patrols in areas hit by disasters to prevent crime.

The Commission indicated that it had identified the need for such a coordination platform and initially wished to recommend that either the Commission or Europol, using the EPE, develop this forum where Member States could exchange their needs and problems. However, the Commission clarified that this recommendation was only addressed to the Member States and that it was therefore not possible for the Commission to make a recommendation to the Commission or the agencies. However, the Commission clarified that it envisages something very pragmatic and simple, possibly in the form of a platform within the framework of the Europol EPE, where Member States can exchange their needs.

4/ On the fourth block concerning the 6-month implementation period.

The Commission says that it understands that some of the measures proposed might need time to be implemented, however the Commission believes that the 6 month period is enough to proceed and give effect to the Recommendation, even where there is a need to change your national rules.

The Commission would like also to remind the need for a strong police cooperation to counter crime in the EU, as expressed in the Council Conclusions of the German Presidency on police partnership and internal security. The recommendations are the result of intense consultation with experts, taking into account the best practices, the best working, tangible and effective solutions that are applicable in Member States today. The Commission took them and tried to diffuse them in all the Member States, for the benefit of all the Member States.

5/ On the fifth block concerning questions on the use of ‘secure communication’, such as the relation with Europol core group on secure communication and COM ongoing EU-funded project “Broadway” to develop a EU-wide secure communication infrastructure, as well as the role of the EU innovation hub.

According to the Commission all stakeholders agree on the need for our police officers on the ground to have reliable and secure, real-time interconnectable mobile communication means, such as instant messenger tools. This means that these communication equipment will not cease to function when police officers cross the borders on hot pursuits or surveillances and that they allow them to communicate with their colleagues on the other side of the borders in the same way as with their base in their country.

The Commission wanted to be more specific in the recommendation on how this secure communication will be implemented. The Commission was also considering mentioning Europol and the innovation hub in the Recommendation.

In this context, indeed Europol innovation hub can play a significant role on this, but this is for the MS to decide and task the hub. Concerning project “Broadway” and the development of an EU-wide secure communication infrastructure, the Commission can confirm that it did not consider it specifically when drafting this recommendation. However, this of course does not mean that the Recommendation should not refer to it, as it could be the basis for the solution needed, perhaps also in conjunction with the European Messenger Service supported by ENLETS. In this point, the Commission highlight that it is talking about communication tools and not for exchanging information, as this would fall under the remit of the directive of information exchange.

6/ On the sixth block concerning the objective of statistics and its compatibility with GDPR.

The proposal recommends the collection of statistics on hot pursuits, surveillances and joint operations and annual reporting of them to the European Parliament, the Council and the Commission.

According to the Commission the objective of this recommendation is to have a quantitative picture of the state of play of the implementation of these police cooperation activities in the EU, next to the qualitative one that will be acquired through the deliberations in the permanent coordination platform that the Commission recommends.

This is beneficial for the co-legislators and especially the Member States to have a thorough knowledge and understanding of the needs and any potential issues that need to be addressed.

The Commission stresses that it understands that the collection of statistics adds administrative work and requires resources, however the data are data that are normally collected or can be collected in the course of police actions and, in any case, would be worth the extra work.

These statistics will not include any personal data thus the Commission does not see any incompatibility with GDPR. We are dealing with data such as number and areas of activities (e.g. joint operations), number of Member States involved, assets (i.e. personnel and equipment deployed).

7/ On the seventh block concerning the need to link between the different texts of the police cooperation package and the recommendation and align the definitions.

The three texts together, the Regulation on automated information exchange for police cooperation – Prum II, the Directive on information exchange between law enforcement authorities of Member States - ‘SF Directive’ and the Council Recommendations on operation police cooperation, form the Police Cooperation Package

This package aims to ensure a higher level of security within the territory of the Member States, and hence to support a Schengen area without controls at internal borders. This proposal therefore complements the proposal to amend the Schengen Borders Code that was adopted on 14 December.

According to the police cooperation package is a coherent and self-standing set of proposals to be seen in the broader political context of reinforcing Schengen.

While drafting the Recommendation, the Commission explained that it worked in parallel with colleagues working on the other two texts of the police cooperation package and the proposal to amend the Schengen Borders Code, in order exactly to ensure a uniform approach alignment and links, where appropriate.

On the reasoning for the reference to “illegally staying migrants”.

The Commission explained that the reasoning behind this is that the recommendation also aims to address secondary movements and migrant smuggling. Criminal networks facilitate the unauthorised movements of irregular migrants (secondary movements). Such crimes have a high cross-border nature and their detection and investigation requires targeted police action on the ground in intra-EU border areas.

The Commission believes that coordinated joint patrols and other joint operations, based on risk analysis should focus -where appropriate- on detecting migrant smuggling. This will also help preventing and detecting illegally staying third country nationals. Following the apprehension of illegally staying third country nationals, coordination should be ensured at national level between the competent authorities involved in the joint operations and those competent to further handle third country nationals apprehended for an illegal stay.

In addition, the Commission specifies that the mechanisms referred to in Article 6(3) of Return Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals can be used, namely returns of third country nationals based on bilateral agreements or arrangements.

The Commission considers that this proposal is in line with its proposal to amend the Schengen Borders Code to address the issue of unauthorised movements of irregular migrants, which introduces a possibility of transferring irregular migrants if there is a clear indication that the person apprehended at the internal borders as part of cross-border police operational cooperation has just arrived from that other Member State (for instance, registration in Eurodac by another Member State or recent bills issued in the other Member State).

This new procedure should encourage the use of joint patrols as a tool allowing this simplified transfer of persons apprehended at the internal borders to be applied.

The Commission considers that the Schengen Borders Code proposal also provides for lifting of the ‘stand-still’ clause currently applicable to the existing bilateral agreements and arrangements between Member States, as referred to in Article 6(3) of the Return Directive and determining the conditions under which irregular migrants can currently be sent back once apprehended in a situation of illegal stay in a Member State.

Concerning the question why the possibility of cross-border pursuit when suspect evading a police or customs checks is not foreseen in the list of crimes.

First of all, the Commission specifies that CISA does not provide today for the possibility of cross-border hot pursuits when suspects evade police or customs checks. There is only one reference in Article 41 (4)(a) that the contracting parties shall define the offences in accordance with one of the following procedures, either form a list of crimes, which include failure to stop and give particulars after an accident which has resulted in death or serious injury or extraditable offences.

The list of offences mentioned in the Annex takes into account the seriousness/gravity of the offense. The Commission considered that conducting hot pursuits or surveillances in another country should be granted for serious offences such as the extraditable offences. The Commission says that it understands the operational reasoning of this question. However, the Commission indicates that the gravity of evading a police check, which most likely would be a minor offence, cannot be compared with drug trafficking, THB or other serious crimes.

On Naples II.

The Commission stresses that Naples II convention is excluded from the scope of our proposals in the Recommendation.
