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NOTE

From: Presidency
To: Delegations

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Subject: Council Recommendation on operational police cooperation
Explanatory note on the amendments made

Courtesy translation

Without claiming to be exhaustive, this explanatory note aims at introducing to the delegates of the Law Enforcement Working Party (LEWP-P) who will meet on 8 March the general amendments (revised version No 1 or 'REV 1') made compared to the first version of the French Presidency which was presented in the Working Party on 7 February. These amendments take into account the comments made in the Working Party on 7 February but also received in writing following that meeting.

First of all, it should be pointed out that the term 'police' has been systematically replaced by the term '*law enforcement*'. Therefore, the English title of the Recommendation now reads: *Proposal for a Council Recommendation on operational law enforcement cooperation*.

In addition, a significant number of recitals have been “transferred” to the operational part of the text, in a new section of the Recommendation entitled “Legal framework”. This section refers expressly to the various existing European Union texts relating to operational police cooperation (Convention implementing the Schengen Agreement, Prüm Decision 2008/615 of 23 June 2008, Directive EU 2016/680 of 27 April 2016 on the protection of individuals with regard to the processing of personal data, etc.). This section also refers to compliance with the various national provisions. A reminder of the binding nature of these texts at the beginning of the Recommendation will make it possible to avoid repeating it in the rest of the text when certain measures based on such texts are specified.

Recitals

The Presidency proposes only minor amendments to the recitals.

The recital on cross-border surveillance states that this mechanism must be established in accordance with judicial mechanisms. This addition appeared necessary since several Member States stressed that authorisation in their country was a decision of the judicial authority.

Furthermore, the recital on police and customs cooperation centres clarified that some members did not have a PCCC.

As regards the recital on communication systems, references to ENLETS messages and the Broadway project have been added as requested by several Member States. In any event, it would be useful to mention or refer to all relevant tools in order to highlight the systems which can remove technical constraints hindering mechanisms of cross-border cooperation and operational police cooperation.

As regards the deadlines for implementing the recommendation, the Presidency would point out that the two-year period is generally approved by the vast majority of the Member States which have intervened on this point: It is therefore proposed that this time limit be kept unchanged. On the other hand, the verb “change” when it comes to the process of examining national law to be amended is replaced by “review”. This is based on a request made by a Member State and seems more appropriate, considering that during the initial six-month period, the examination process rather calls for a “review/examination” of existing texts than a “change” of the texts.

Finally, as regards the recitals relating to the Schengen acquis, the Council Legal Service should forward its analysis at a later stage, when the text will be stable as to the substance.

Legal framework

As mentioned above, the “Legal Framework” section refers to EU rules and the necessary compliance with national provisions.

It is recalled that a Council Recommendation has no binding legal force and therefore cannot be in contradiction with EU primary and secondary law and national provisions (legislation, regulations).

Therefore, this Presidency revision recalls the existing law on operational police cooperation and refers to full compliance with national provisions. This is in particular the meaning of the following recital: “this recommendation should not be understood as seeking to affect the national rules providing for limitations, safeguards and conditions not specifically addressed in this Recommendation, that apply to the relevant cross border operational police cooperation activities pursuant to acts of Union law with binding force, including the CISA, the Schengen Borders Code and the Prüm Council Decisions and national law in accordance with Union law (...)”.

Subject matter and scope

Following the discussions in the Law Enforcement Working Party on 11 January and then on 7 February, it appeared useful to determine the objective of the proposal for the Recommendation, even if the Council's recitals provided good guidance on its scope. Furthermore, the definition of operational police cooperation seemed better placed either in the 'definitions' section or in a section regarding the subject matter of the Recommendation. The Presidency therefore proposes to create a section on the subject matter and scope, highlighting the scope of operational police cooperation at EU level. The reference to "bordering States" has been removed, as it seems superfluous.

Operational police cooperation can take place between two neighbouring or non-neighbouring States: this is particularly the case in the context of joint operations (joint patrols, for example), but also in the case of cross-border hot pursuits which may begin in the neighbouring State and continue in another State.

Definitions

This part, as requested by several Member States, contains a reference to statistics. The Commission has sent a proposal for a definition which refers to statistics according to the various strands of operational police cooperation: cross-border hot pursuits and surveillance, joint operations. The Presidency proposes to raise the issue of the authorities responsible for collecting statistics in the Working Party on 8 March: this is why the terms "Commission" and "Member States" appear in square brackets.

Furthermore, it was decided to delete the definition of "EU internal border areas". Such a vague definition could give rise to confusion and differences in interpretation.

Obstacles to operational cooperation during police interventions in another Member State

In line with the definition of statistics, this section contains a list of statistics to be provided according to the type of police cooperation.

With regard to cross-border hot pursuits, the Presidency noted a Member State's remark concerning the law of the sea. For this reason, a reference to the International Convention on the Law of the Sea is expressly proposed (such a reference would not be useful in the part on "cross-border surveillance", since Article 40 (6) provides for a possible extension of the scope of the Article in its entirety).

Furthermore, as regards actions to be carried out on the territory of another Member State, it was proposed to mention the carrying of weapons and the use of service equipment in the context of such pursuits.

In order to take account of the structural and functional concerns of certain Member States, the wording relating to the single contact point has been amended.

As regards joint operations, the verb 'intercept' was replaced by the verb 'detain' in order to remain consistent with the Convention implementing the Schengen Agreement.

Sections 3 and 4 on provisions against migrant smuggling and trafficking in human beings (also related to the fight against irregular migration).

In response to the many comments from Member States which have questioned the relevance and legal appropriateness of these two sections relating to "joint operations", the Presidency proposes that they be deleted in principle, with one part being merged with Section 2.3 (joint operations).

The Presidency would also like to draw the delegations' attention to the reference made by the Commission to the prevention and detection of "illegally staying migrants". The Council's Legal Service will be invited to comment on this point during the meeting. The views of the delegations will also be welcome.

Police and Customs Cooperation Centres

This section has been the subject of only minor amendments, the Presidency's intention being to take account of the comments of the Member States which have reiterated the role of PCCCs in exchanging information, and the possibility, where appropriate, of contributing to actions of an operational nature.

Support platform for joint operations

A large number of questions and requests for clarification have been raised by the Member States regarding this platform. They also stressed that it should not lead to an excessive administrative burden for the Member States as regards the production of statistics or reports.

In view of these concerns, the Presidency wished to propose a wording that relieves this burden, while clarifying the tasks of this support platform, namely the identification and centralisation of Member States' needs for joint operations. The platform should also be able to automatically generate statistics and an annual report on the needs identified and the operations carried out during the previous year. At the same time, it would be up to the Member States, as provided for in the initial text proposed by the Commission, to provide the platform with information, in particular on threats to public order and security.

Ensuring effective access to information and communication

As in the recital section, an addition was made concerning the ENLETS system and the Broadway project.

Furthermore, it is now specified in the revised version that the transmission of information must be limited to and relevant for the tasks carried out by the internal security forces.

Joint training and further training in cross-border operational cooperation

This part has been amended only slightly, as the main amendments had already been made before the meeting of the Law Enforcement Working Party of 7 February.

The Presidency noted a strong consensus among Member States to develop training between the law enforcement authorities of the Member States. However, a number of Member States have at the same time stated that the heterogeneity of training systems could not lead to standardisation: more joint training and approximation mechanisms need to be sought. The Presidency therefore proposes to adopt formulations that encourage the approximation of training mechanisms and exchanges (“Member States should (...) seek to adjust the curricula of their national training academies (...) seek to align with due consideration of the needs of the Member States (...) law enforcement cooperation set in the EU strategic training needs assessment”).

Furthermore, in the spirit of consistency, the paragraph on training in part 2.3 (b) i, which is devoted to joint operations, has been transferred to this section.

