Fight against crime: general availability of information for Member States' law enforcement authorities and for Europol officers

2005/0207(CNS) - 12/10/2005 - Document attached to the procedure

COMMISSION'S IMPACT ASSESSMENT

For further information regarding the context of this issue, please refer to the summary of the Commission's initial proposal for a Council Framework Decision on the exchange of information under the principle of availability (COM(2005)0490).

1- POLICY OPTIONS AND IMPACTS The Commission's impact assessment examined the following four policy options.

1.1- Option 1 - No legislative initiative:the first option departs from the situation where the principle of availability would not be established or no additional legislation would be considered. However, the following developments in the current situation which have potential to contribute towards the political objectives should be noted:

- Establishment of the second generation of the Schengen Information System (SIS) with its gateway the SIRENE-bureaux. The information that is exchanged in that context is limited to what is explicitly foreseen in the relevant Acts of the Parliament and Council, or – in the case of SIRENE - data supporting action on the basis of SIS information. The SIS is presently conceived as a hit/no-hit control system, not to prevent or investigate criminal offences.

- Some Member States are in the process of setting up direct online access to certain national databases (Schengen II, Schengen III). These multilateral processes are taking place outside the mechanisms and cooperation structures foreseen in the Union treaties, and disregard the European dimension of law enforcement and security issues, and the interdependence of law enforcement authorities. This approach risks jeopardising the solidarity of EU Member States.

- The legislative revision of the fundamental rules on law enforcement information exchange laid down in Arts 39 and 46 of the Schengen Convention working rules will lead to significantly improved conditions and infrastructures for law enforcement cooperation and information exchange. The situation will be improved *inter alia* by speeding up response times. However, it contains a number of new limitations that curb its applicability, and does neither eliminate the unpredictability inherent to such conditions nor the differentiated treatment between national and non-national requests for information.

- Bilateral agreements will continue to determine the information exchange landscape in order to respond to the specific needs that are not catered for by common agreement or covered in the context of a general legal framework.

1.2- Option 2 - Access to information based on the principle of equivalence: at present, law enforcement authorities can search databases that are nationally accessible. However, accessing information held by law enforcement services from other Member States poses challenges that make it inaccessible in practice. A "right of equivalent access" would make this information practically accessible to competent law enforcement authorities in the Member States under the condition of respecting the rules that apply in the requested country. This right would imply a correspondent obligation for the requested

Member State to provide information to the law enforcement authorities of another Member State that are entitled to obtain it under the law of the former.

1.3- Option 3 - Mutual recognition mitigated by a condition of equivalent access in conjunction with a mechanism to appraise the equivalence of the authorities that are competent to obtain information: the problem arising from the application of a right of equivalent access is that the conditions to meet can be different in the Member States, which hinders the full deployment of the law enforcement potential of the Union. Harmonisation would be a means to address this discrepancy.

However, the Commission does not have the intention and has not been invited to bring about such harmonisation. For that reason, mutual recognition of the competencies of the authorities in one Member State to obtain information under their national law is the best means of facilitating the information flow. Mutual recognition implies a corresponding obligation for the requested Member State to provide information to the law enforcement authorities of another Member State that are entitled to obtain it under the law of the latter. Mutual recognition constitutes a higher level of cooperation, because of the trust and confidence that is necessary to operate the law enforcement mechanism. However, because of the diversity in legal traditions and organisational idiosyncrasies in the Member States, the straightforward application of mutual recognition will inevitably run into questions of asymmetry of competencies.

1.4- Option 4 - Mutual recognition mitigated by a condition of equivalent access in conjunction with a mechanism to appraise the equivalence of the authorities that are competent to obtain information, and an index system to identify the information that is not available online: Option 4 actually consists of option 3 plus an additional obligation: the obligation to provide information is complemented with the obligation to know and to show which information exists within a Member State to qualify for exchange under the principle of availability. To supply each other with knowledge about available information, it is proposed that infrastructures are set up by Member States to 1) grant each other direct access to pre-determined, selected databases, allowing for direct consultation of available information and 2) if information cannot or may not be made available online, to establish an obligation to provide an index system of information that is not available online. Online consultation of these indexes will tell other Member States whether solicited information is available. To be able to comply with this obligation, technical implementation is necessary in order agree on and elaborate technical architecture support. This technical support should be adapted to the nature of the data, the type of access (online or via indexation), and to the level of political ambition vis-à-vis its exchange.

CONCLUSION: As no fundamental rights would benefit from inaction, option 1 must therefore be rejected. Between the three other options, option 4 which allows access to information based on mutual recognition mitigated by a condition of equivalent access in conjunction with a mechanism to appraise the equivalence of the authorities that are competent to obtain information, and an index system to identify the information that is not available online, is the most effective from the point of view of securing the right to life and physical integrity (please refer to CNS/2005/0202).

IMPACT

With regard to the impact on fundamental rights affected by public security, and data protection in particular, the three options (2, 3 and 4) are equivalent. The implementation of equivalent access or mutual recognition would be accompanied by the establishment of common standards on data protection specially adapted to the exchange of information for the purpose of preventing and combating crime. They would constitute a robust and comprehensive system ensuring that the data subject is generally well protected against unlawful processing of personal data.

In spite of the fact that it is an expensive one, option 4 is expected to achieve a far higher level of security. And, as public security and financial costs are not on an equal footing and the rights to life and personal integrity have such weight, important costs should not serve to discourage the implementation of a system

if it can be proven to be efficient. An estimation of the cost will be done when the Council decision on how data should be interchanged – either via direct access or via an indexation system – is taken.

2- FOLLOW-UP

With regard to the implementation of the proposed option, i.e. a Framework Decision on exchange of information under the principle of availability by Member States, it shall be evaluated in accordance with the usual procedures under Title VI of the Treaty on European Union. Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of this information and a written report from the Commission, the Council shall before December 2008 assess the extent to which Member States have taken the measures necessary to comply with this Framework Decision, and take all measures necessary to ensure its full application.