



# SOME

Serious offending by Mobile European Criminals  
Improving information exchange and cross-border supervision

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## Report 2, Part One

# European Union Information Exchange Mechanisms A Mapping Report of existing frameworks

Sarah Hilder and Hazel Kemshall

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Associate Partners:



With the financial support of the Prevention of and Fight against Crime Programme  
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### European Union Information Exchange Mechanisms

#### A Mapping Report of existing frameworks

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# Report 2, Part One

## EU Information Exchange Mechanisms

### A Mapping Report of Existing Frameworks

#### Contents

<b>EXECUTIVE SUMMARY: EU INFORMATION EXCHANGE MECHANISMS - A MAPPING REPORT OF EXISTING FRAMEWORKS.....</b>	<b>3</b>
<b>INTRODUCTION.....</b>	<b>9</b>
<b>SECTION 1 - LITERATURE REVIEW METHODOLOGY .....</b>	<b>15</b>
<b>SECTION 2 - THE CONTEXT OF EU DEVELOPMENTS IN INFORMATION EXCHANGE.....</b>	<b>19</b>
2.1 THE LEGAL CONSTRUCTION OF THE EUROPEAN UNION.....	19
2.2 GLOBALISATION AND THE INCREASE IN TRANSNATIONAL CRIME .....	20
2.3 FREEDOM OF MOVEMENT AND TENSIONS WITH SECURITY.....	24
2.4 INFORMATION EXCHANGE AND THE CHALLENGES OF DATA PROTECTION, PROTECTING HUMAN RIGHTS AND PRIVACY.....	26
2.4.1 <i>The second generation Schengen Information System (SISII) Data handling – an example of developing a data handling system .....</i>	<i>28</i>
<b>SECTION 3 - AN OVERVIEW OF EXISTING INFORMATION EXCHANGE ARRANGEMENTS .....</b>	<b>33</b>
3.1 THE SWEDISH FRAMEWORK DECISION.....	33
3.2 INTERPOL NOTICES AND DISSEMINATION CHANNELS .....	34
3.3 EUROPOL .....	36
3.4 SCHENGEN SISII.....	37
3.5 EUROPEAN CRIMINAL RECORD INFORMATION SYSTEM (ECRIS) .....	39
3.6 THE PRÜM COUNCIL DECISIONS .....	41
3.7 BILATERAL AGREEMENTS, LIAISON OFFICERS, REGIONAL DEVELOPMENTS AND INFORMAL ARRANGEMENTS.....	43
3.8 SINGLE POINT OF CONTACT, CENTRAL BUREAUX .....	45
3.9 THE CONVENTION ON THE TRANSFER OF PRISONERS 1983 EUROPEAN TREATY SERIES ETS NO 112 AND ADDITIONAL PROTOCOL TO THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS ETS NO 167. FRAMEWORK DECISION 2008/909/JHA .....	45
3.10 THE COUNCIL FRAMEWORK DECISION 2008/947/JHA, “THE PRINCIPLE OF MUTUAL RECOGNITION TO JUDGEMENTS AND PROBATION DECISIONS WITH A VIEW TO THE SUPERVISION OF PROBATION MEASURES AND ALTERNATIVE SANCTIONS”.....	46
3.11 CARRIER COMMUNICATION OF PASSENGER DATA, COUNCIL DIRECTIVE 2004 82/EC .....	47
3.12 DEPORTATION.....	48
3.13 MECHANISMS FOR THE EXCHANGE OF CRIMINAL INFORMATION AND THEIR POTENTIAL IN RELATION TO A PROACTIVE/PREVENTATIVE APPROACH .....	49

**SECTION 4 - IMPLEMENTATION ISSUES..... 59**

**SECTION 5 - IMPLICATIONS FOR THE SOMEK PROJECT ..... 63**

**APPENDICES ..... 67**

**REFERENCES ..... 83**

# Executive Summary: EU Information Exchange Mechanisms - A Mapping Report of Existing Frameworks

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## Background

The SOMEK project (Serious Offending by Mobile European Criminals) seeks to assess the scale of the harm posed to the European Union (EU) community by serious sexual or violent offenders who travel across EU borders. The project has three main aims:

- To assess the threat posed to European citizens when serious violent or sexual offenders travel between EU Member States.
- To identify the methods and effectiveness of mechanisms used by EU Member States in the management of serious violent or sexual offenders travelling across borders.
- To explore critical success factors and provide recommendations to facilitate the improved exchange of information for the prevention of crime.

This report principally addresses aim 2 and is complemented by a field work report.

There have been a number of tragic examples in recent years that have exposed these weaknesses within the EU where a serious violent or sexual offender has travelled to one Member State from another without any public safety organisation within the receiving Member State being made aware of the harm they may pose. It is often not until the individual carries out a criminal act and a check is made, that antecedents and an indication of the previously known concerns are revealed. Such offenders are able to integrate into communities across the EU free from any management, supervision or surveillance, which may lead to an increase in the risk to public safety. Whilst information exchange mechanisms have developed and are well used in respect of organised crime and terrorism, coverage of mobile serious sexual or violent offenders is less well developed. This report draws on a systematic literature review of current research to explore existing EU information exchange mechanisms and their relevance to the management of serious mobile sexual or violent offenders.

For the purposes of this review the following definitions of 'criminality information' are used:

- **Conviction data** - formal records of current and previous convictions and associated information such as modus operandi.

- **Information and Intelligence** - Referring to Article 2(d)(i) of Council Framework Decision 2006/960/JHA (the Swedish Initiative), the International Centre for Migration Policy Development (EC 2010 p16)<sup>1</sup> concluded that “information” is defined as any type of information or data which is held by law enforcement authorities, whereas “intelligence” is defined as information which has been evaluated and analysed and which has been identified as being of material value or potential material value, in an investigation for example.
- **Proactive/preventative information exchange** - This pertains to information on offenders where there may be no current conviction or pending investigation, but rather a comprehensive understanding of a pattern of offending which poses a risk of serious harm to others, a high likelihood of further offending occurring, together with significant concerns regarding their mobility across the EU. The exchange therefore is seeking to prevent another serious crime occurring, rather than responding to one that already has.

SOMEK is primarily concerned with proactive/preventative information exchange.

## Information Exchange Mechanisms

The review presents the purpose and utility of each mechanism, the challenges and benefits of each, and the potential relevance for proactive and prevention information exchanges. The illustrative table presented on pages 53-59 highlights that no one mechanism is likely to solve the issue of information exchange on SOMEK defined offenders. In brief the review of mechanisms suggests that:

- Interpol dissemination channels may be used to send targeted information to one or more Member States, but details of intended destinations of the mobile offenders are likely to be required for this to be effective.
- Interpol Green Notices are helpful to SOMEK type offenders, although their underuse remains problematic within the context of overall overuse of all Interpol notices. There are some concerns that access to the I 24/7 system stretches beyond the EU community to all 190 Interpol member States
- The secure and systematic information exchange by Europol has been recognised as a benefit by the European Commission ((EIXM) /\*COM/2012/0735 final \*/); and

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<sup>1</sup> See the European Commission (2010) Study on the Status of Information Exchange amongst law enforcement authorities in the context of existing EU instruments. International Centre for Migration Policy Development. JLS/2009/ISEC/PR/001-F3, available at: [http://ec.europa.eu/dgs/home-affairs/doc\\_centre/police/docs/icmpd\\_study\\_lea\\_infoex.pdf](http://ec.europa.eu/dgs/home-affairs/doc_centre/police/docs/icmpd_study_lea_infoex.pdf); accessed March 26th 2014.

by those Member States who have moved to a more systematic use of the Europol channel. However, this function is largely targeted at terrorism and serious organised crime. At present it is difficult to see the individual mobile serious sexual or violent offender falling within the annex list of crimes within the Europol remit (The Europol Council decision 2009 2009/936/JHA). It is too early to comment on the implications for SOMEK type offenders of recent Europol changes.

- SISII Article 36 alerts are again more likely to be used for terrorism or serious organised crime. Criterion (b) 'where an overall assessment of a person gives reason to suppose that a person will also commit serious offences in the future', may apply to SOMEK type offenders, but it is likely that Member States may interpret this criterion differently and that application to serious sexual or violent offenders will require significant negotiation.
- The European Criminal Records Information System (ECRIS) is a mandatory system for the exchange of conviction data. Despite residual implementation issues, the system is operational. However, there are limits in applicability to SOMEK type offenders, not least the restriction to conviction data only; the lack of further assessment of risk/threat; and limited (if any) exchange of information on modus operandi. This restricts the use of ECRIS as a preventative information exchange mechanism.
- Prüm operates a hit/no hit database for DNA, fingerprints, and vehicle registrations. It is reactionary only, but can assist with investigations and may have a limited role in identifying the movement patterns of individual offenders.
- The exact role of Embassy Liaison Officers can vary across Member States. There is evidence to suggest that they do develop important links and networks, and can facilitate investigations. Their role in managing or expediting proactive information exchange on travelling sexual or violent offenders is not previously researched and remains unclear.
- Single Points of Contact (SPOC) do streamline formal arrangements and appear to be valued by some Member States for the efficiency and effectiveness they bring to information exchange. Arguably duplication of effort can be reduced, and if SOMEK type offenders are included in mechanisms utilised by SPOCs then it could save time.
- Bilateral and multilateral arrangements rooted in common borders and shared policing concerns can be useful operationally, particularly where there may be gaps in Pan European arrangements. However, whilst pragmatically attractive and potentially serving as an important starting point, such an approach risks a

piecemeal response to a Pan European problem. However, such arrangements may serve as a useful starting point for those countries and geographical regions where 'sex tourism' or travel by violent offenders is more common.

- Informal arrangements are often formed and driven by operational expediency and are often preferred by law enforcement personnel. Whilst often a pragmatic response to 'on the ground' issues such arrangements can lack accountability and audit trails of decision making, adequate governance and may ultimately prove challengeable on human rights grounds. However the importance of building professional relationships with key personnel, joint training initiatives and shared understandings in addressing specific issues of criminality across borders is of significant note for SOMECS.

## Implementation Issues

Previous research indicates a range of implementation issues in utilising and extending current information exchange mechanisms. In brief these are:

- The development of various EU mechanisms over time has made them complex with areas of overlap.
- Multiple channels can create confusion if the rationale and purpose of each channel is not clear and understood. This can partly be mitigated by SPOCs.
- Practical implementation problems can remain unresolved and in some instances can result in practitioners resorting to informal mechanisms, particularly to avoid delays.
- There are documented barriers to sharing information, based on legislative constraints in Member States; ethical concerns; and differing perceptions and responses to this type of criminality across the EU.
- There are documented barriers to sharing 'non-factual' information and going beyond conviction data, and assessments of the threat or harm posed by a sexual or violent offender is not seen as a primary function of police authorities.
- Information is exchanged but is not necessarily used at receiving national or local level. Global does not necessarily become local.

Whilst crime prevention and information exchange for terrorism and serious organised crime has developed relatively rapidly, increased co-operation and information exchange continues to remain challenging when it relates to the activities of the individual transient offender. It appears to be the individual assessment of the level of harm posed by a particular offender

and differing perceptions of the rights of the Member State of Nationality to convey their concerns to others, where police cooperation across borders continues to meet its greatest challenges.



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## Introduction

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In recent years there have been a number of improvements in the exchange of conviction data, criminality information and intelligence across Europe. Progress is evident in Justice and Home Affairs across the EU community through the establishment of mechanisms to improve police co-operation (e.g. Cross Border operations and joint investigation teams as highlighted in the OJ C 197 of 12.7.2000 and OJ L 162 of 20.6.2002 and Framework Decisions on criminal records exchange (EU Council Framework Decision 2006/960/JHA; EU Council Framework Decision 2009/315/JHA; and EU Council Framework Decision 2009/316/JHA, which set the objective to establish the European Criminal Records Information System (ECRIS)). It is also demonstrated in the Justice arena in the availability of European Union (EU) information in domestic court proceedings and in the transfer of custodial and community sentences (EU Council Framework decision 2008/909/JHA and 2008/947/JHA, Treaty Series ETS no112 and ETS no 167). However, there is also evidence to suggest that the provision of opportunities for these various types of exchange is very different from the effective implementation of such measures. Therefore it must also be recognised that more can be done across Europe to safeguard its citizens, especially in respect of those with the most serious patterns of offending, posing the highest level of harm to others, who can often become mobile without scrutiny across the European community.

As the European Union (EU) has developed, the increased mobility of citizens through free movement has increased the threat from a minority of individuals whose offending behaviour is severe in nature, long lasting and extreme in terms of impact. This includes mobile serious, violent or sexual offenders.<sup>2</sup> Lammers and Bernasco (2013) highlighted that offenders with increased mobility across jurisdictional or geographical boundaries are less likely to be detected, as links in patterns of behaviour and crime analysis become more problematic to ascertain and as information and intelligence sharing between police services becomes more limited. Their study examined the activities of “serial offenders” covering a range of offences including theft and burglary, in addition to violent and sexual crimes. They focussed on rates of offending in relation to the frequency and distance of travel by an offender to different countries and regions, rather than assessments of the harm they posed. However they raise some points of note for the Serious Offending by Mobile European Criminals (SOMECE) project.<sup>3</sup> Of greatest significance are the gaps in the ability of Member States to exchange criminality information and intelligence with each other or respond to it appropriately when it

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<sup>2</sup> The SOMECE project is using a sub-set of European Criminal Records Information System (ECRIS) offence codes as a proxy for serious sexual and violent offending. These are reproduced in Appendix 1.

<sup>3</sup> Serious Offending by Mobile European Criminals SOMECE, EU funded project no: HOME/2011/ISEC/AG/4000002521.

is received. Such deficits have the potential to enable serious violent or sexual offenders to re-offend and avoid apprehension for prolonged periods of time.

It is noted that other studies have engaged in similar activities, examining the effectiveness of information exchanges between EU law enforcement authorities but with a primary focus on criminal acts of trafficking in human beings, smuggling and trafficking of stolen vehicles and computer-related crime.<sup>4</sup> The development and implementation of procedures to share information on serious violent and sexual offenders has received far less attention.

There have been a number of tragic examples in recent years that have exposed these weaknesses within the EU where a serious violent or sexual offender has travelled to one Member State from another without any public safety organisation within the receiving Member State being made aware of the harm they may pose.<sup>5</sup> It is often not until the individual carries out a criminal act and a check is made, that antecedents and an indication of the previously known concerns are revealed. Such offenders are able to integrate into communities across the EU free from any management, supervision or surveillance, which may lead to an increase in the risk to public safety.

The SOMEK project seeks to assess the scale of the harm posed to the EU community by such offenders. Whilst it is anticipated that this will be restricted to a relatively small number of perpetrators of serious violence or sexual harm, the “critical few”, an exploration of how this issue is perceived and addressed across the EU community will inform recommendations on what improvements might be needed in this arena and how they might realistically be achieved.

Specifically then the project will:

- Assess the threat posed to European citizens when serious violent or sexual offenders travel between EU Member States (Stage 1, Report One), available at: [www.somec-project.eu](http://www.somec-project.eu)
- Identify the methods and effectiveness of mechanisms used by EU Member States in the management of serious violent or sexual offenders travelling across borders. (Stage 2, Report Two, Parts One and Two), available at: [www.somec-project.eu](http://www.somec-project.eu)

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<sup>4</sup> See European Commission (EC) (2010) Study on the status of information exchange amongst law enforcement authorities in the context of existing EU instruments. International Centre for Migration Policy Development JLS/2009/ISEC/PR/001-F3.

<sup>5</sup> The case of the murder of Moira Jones by Marek Harcar in Glasgow 2008. Harcar was originally from Slovakia, where he had 13 previous convictions, 4 for violence. Scottish Police were unaware of his potential and he entered Scotland unmonitored. Also the case of Antonin Novak who was known in Slovakia for a history of serious sexual offending who moved to the Czech Republic and his history was unknown to them. He was subsequently convicted for sexually assaulting and murdering a 9 year old boy.

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- Explore critical success factors and provide recommendations to facilitate the improved exchange of information for the prevention of crime. (Stage 2, Report Two and Stage 4, Operational guides), available at: [www.somec-project.eu](http://www.somec-project.eu)

## **The purpose of the mapping report of existing EU information exchange mechanisms and an overview of content**

This mapping report provides a review of relevant literature and builds the foundations for the SOMEK research. It primarily relates to the SOMEK project stage two in seeking to provide a brief analysis of existing information exchange systems and their utilisation by law enforcement and justice agencies across the EU, highlighting some of the currently observed challenges. The review is divided into four core areas:

1. A brief discussion of the literature review methodology adopted and the “best evidence” strategy utilised.
2. An overview of the context within which EU information exchanges have developed to date, including the key challenges of data protection, freedom of movement, privacy and human rights.
3. An overview of existing information exchange mechanisms that may be used for communications concerning serious violent or sexual offenders and a discussion of some of the implementation issues that have arisen.
4. Some concluding observations of the implications of this analysis for the SOMEK project.

The following pan European and international initiatives are included:

- The Swedish Framework decision
- Interpol Notices and Dissemination channels
- Europol
- The second generation Schengen Information System (SISII)
- European Criminal Record Information System (ECRIS)
- The Prüm Treaty

With attention being given to the additional mechanisms and protocols:

- Bilateral Agreements, Embassy relationships and informal regional arrangements
- Central Bureaux and Single Points of Contact

- The Convention on the Transfer of Prisoners 1983 European Treaty series ETS no 112 and additional protocol to the Convention on the Transfer of Sentenced Persons ETS No 167. Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union and 2008/947/JHA on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions.
- Carrier Communication of passenger data, Council Directive 2004 82/EC

## Definitions of Terms

Other commentators have highlighted some of the disparities across the EU Member States in the ways in which the terms “information” and “intelligence” are understood.<sup>6</sup> Terminology also warrants some clarification here. In the SOMEK project under the more generalised term of “criminality information” the following sub category distinctions are made:

- Conviction data- formal records of current and previous convictions and associated information such as modus operandi.
- Information and Intelligence- Referring to Article 2(d)(i) of Council Framework Decision 2006/960/JHA (the Swedish Initiative), the International Centre for Migration Policy Development (EC 2010 p16)<sup>7</sup> concluded that “information” is defined as any type of information or data which is held by law enforcement authorities, whereas “intelligence” is defined as information which has been evaluated and analysed and which has been identified as being of material value or potential material value, in an investigation for example.

In many Member States there is a clear distinction between the pre-investigation phase or inquiry where police officers have the autonomy to exchange “intelligence” aimed at establishing whether a crime has been committed and the formal investigation stage where evidence must meet the required national legal submission standards and is therefore subject to more formal procedures for exchange across the EU. More often than not this latter

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<sup>6</sup> See the European Commission (2010) Study on the status of information exchange amongst law enforcement authorities in the context of existing EU instruments. International Centre for Migration policy development. JLS/2009/ISEC/PR/001-F3

<sup>7</sup> Ibid

exchange in many Member States becomes the responsibility of the judicial, prosecutor's office. Exceptions to this are apparent in common law systems such as that of England, Wales, Scotland and Northern Ireland where the police have greater responsibilities for formal investigations.

- Proactive/preventative information exchange-In addition the SOMECE project ultimately seeks to ascertain the extent to which Member States engage in proactive/preventive forms of information exchange on serious mobile violent or sexual offenders. This pertains to information on offenders where there may be no current conviction or pending investigation, but rather a comprehensive understanding of a pattern of offending which poses a risk of serious harm to others, a high likelihood of further offending occurring, together with significant concerns regarding their mobility across the EU. The exchange therefore is seeking to prevent another serious crime occurring, rather than responding to one that already has.

This mapping review of existing information exchange mechanisms forms Part One of Report 2 of the SOMECE research project. Part One is complemented by Part Two which provides fieldwork analysis of semi-structured interview data conducted with law enforcement and offender management personnel across the EU Member States occurring between September 2013-March 2014. Report 2 Part Two can be found at: [www.somece-project.eu](http://www.somece-project.eu) and provides a comparative exploration of the current approach to information exchange on serious violent or sexual offenders taken by operational staff.

The fieldwork analysis is also informed by a series of task groups conducted across the EU in Stage 3 of the SOMECE project from May 2014 –September 2014, held in the UK, Latvia and the Netherlands. Report 2, Part Two culminates in a series of recommendations to improve communications across the EU community and increase the capacity to protect EU citizens from serious harm from mobile serious violent and sexual offenders.

Finally, the work undertaken in Stages 2 and 3 of the project described above concludes in Stage 4 of the SOMECE project with the production of two briefing/guidance documents, one for law enforcement and one for offender management/probation personnel. These guides highlight core principles to facilitate realistic improvements in the exchange of information on, and response to serious violent and sexual offenders moving across EU borders, and can be found at: [www.somece-project.eu](http://www.somece-project.eu).



## Section 1 - Literature Review Methodology

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Establishing an initial pool of resources via more routine academic research methods has proved challenging. In particular the diverse nature and varying sources of interest in the practice of information exchange across the EU concerns not only issues of justice and security, but raises debates in concepts of privacy, data protection and citizen's rights. This has resulted in commentary and scrutiny from a broad range of fora (academic, legal, media, think tanks etc.) but more poignantly where official "Governmental lines" and practical implementation guidance are less apparent at national, domestic levels.

The complex web of EU developments which has emerged as pertinent to this project has rendered it difficult to ascertain a selection of key word search criteria which supports a best evidence review methodology.<sup>8</sup> Therefore more liberal literature searching techniques have been adopted, which are time consuming and less systematic. The figures charted here are therefore illustrative of the challenges of using legal and criminal justice academic databases, rather than providing an accurate indication of the total range of subject literature available.

The review is limited by the following factors:

- Access to English language material only.
- The limited availability of official reports and documents, with no availability of internal documents from EU Member States.
- Some documents being listed as 'Restricted' and not available for full comment or reproduction within this review.

All key word searches displayed here have resulted in very large numbers of sources in the first instance, where any form of relevance to the core subject deteriorates rapidly upon further scrutiny. The first 100 results have been scanned in each instance for apparent relevance.

Where it has been possible to apply limiters on the database search engine the following parameters have been imposed, resulting in the final figures shown.

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<sup>8</sup> See Treadwell J R, Singh S, Talati R, McPheeters ML, Reston J T (2011) A Framework for "Best Evidence" Approaches in Systematic Reviews. Most systematic reviews of social and health research have two basic types of inclusion criteria. The first relates to publication characteristics, such as date periods, peer review etc. the second relates to relevance to the study subject and requires a clinical judgement by the reviewing team. The decisions made regarding subject relevance criteria can still be limited by the nature of the sources available, as was the case here.

- 2006- current date
- Periodicals/Journals Only
- Full text availability
- Available in English

Those sources which appeared to hold the greatest potential from an initial screening have been collated and sourced accordingly.

Database	Key Words				Violent Sex offenders Travel Abroad	EU Crime data and Human Rights	EU sex Offender
	EU or European Cross Border Crime	Schengen or Prüm Data	EU or European Crime Database	EU or European Information Sharing Crime			
Academic Search Premier (EBSCO)	104,108	75	17,271	25,893	482	2	964
Heinonline	1534	14	1395	1469	181	2548	344
Applied Social Sciences Index and Abstract	652	3	658	652	114	16439	165
Westlaw UK	1008	17	551	630	12	2571	115

In addition to the above, other searches have been made via the following sources for relevant material, screening any duplication with the relevant results from the database results.

- De Montfort University Law Library Catalogue
- Europa
- Howard Journal of Criminal Justice
- European Journal of Crime, Criminal Law and Criminal Justice
- International Journal of Policing Strategies and Management
- British Library
- European journal of Probation (via CEP)
- Centre for European Policy Studies (CEPS)

As the initial sources were obtained, they were reviewed via the completion of a screening template,<sup>9</sup> enabling clearer decisions to be made about their significance to the SOMEK project. They also indicated additional sources which were likely to prove useful and which were also subsequently sourced wherever possible.

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<sup>9</sup> See Appendix 2 for copy of template and Appendix 3 for a core list of all sources accessed and reviewed.



## Section 2 - The Context of EU Developments in Information Exchange

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### 2.1 The legal construction of the European Union

Historically, the internal and external security of European Countries has developed as a matter of sovereignty, with citizens holding the right to be protected from harm both by the State and from the State (Puntscher Riekman 2008 p19). However this landscape has shifted as European integration has evolved and matters of international organised crime, terrorism and illegal immigration have emerged.

The European Union was legally organised under three pillars from 1993 to 2009. Established by the Treaty of Maastricht on the 1st November 1993.<sup>10</sup>

1. The European Communities pillar handled economic, social and environmental policies and was originally the only pillar with legally binding characteristics.

The subsequent development of two additional pillars occurred in response to opposition from some Member States to the EU Community having powers in areas which impacted on issues of National Sovereignty and independence. It was held that it was better for these matters to be handled at intergovernmental levels where consensus was sought.

2. The Common Foreign and Security Policy (CFSP) pillar was concerned with foreign policy and military matters.
3. The third pillar of Justice and Home Affairs (JHA) focused on issues of cooperation in law enforcement and combating racism. It was created on the foundations of the TREVI cooperation, a much smaller forum for internal security cooperation amongst European Commission interior and justice ministers. Decisions under the third pillar are made by consensus rather than the majority, to advance cooperation in criminal and justice fields without Member States surrendering concepts of their own national security and independence.

Amendments to the construction of the three pillars were made via the Treaty of Amsterdam<sup>11</sup> which transferred policy on asylum, migration and judicial co-operation in civil

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<sup>10</sup> See Treaty on European Union (Treaty of Maastricht) OJ C 191 of 29.7.1992

matters to the first, Community pillar. At this point the third pillar was renamed Police and Judicial Co-operation in Criminal Matters, or PJCCM which reflected its reduced range of responsibilities.

The Treaty of Lisbon,<sup>12</sup> which entered into force in December 2009, brought an end to the entire pillar system and replaced it with a merged legal personality. Police and judicial cooperation now falls under the Area of Freedom, Security and Justice (AFSJ). This also includes extradition arrangements between Member States, policies on internal and external border controls, common travel visa, immigrations and asylum policies.

## 2.2 Globalisation and the increase in transnational crime

The rise in transnational crime has increased over recent years (Alain 2001; Puntischer Riekman 2008, Magee 2008), with the internet, modern travel, and globalization<sup>13</sup> all contributing to the rise in crimes committed across State borders (Messenger 2012). There is also growing evidence of the increased “internationalisation” of crime (Alain 2001). Law enforcement agencies now have to find ways of contending with internationally organised crime gangs with trade routes across the EU and indeed across the world. They are involved with people trafficking, the trading of adults and children for servitude or the sex industry, drug and firearms trafficking, fraud and acquisitive crime.

The ease and low cost of travel has also enabled child sexual offenders to travel overseas to commit crimes, typically to Vietnam, Cambodia and Thailand (Messenger 2012; Bertone 2004), but also within the EU. For example, the number of UK nationals travelling overseas has increased significantly over recent years with 30 million travelling in 1987 to 70 million in 2007 (Bowling 2009 p151 cited in Messenger 2012 p20). In the year ending February 2012 43.5 million UK nationals had travelled to other parts of Europe (Office for National Statistics 2012). In 1950 there were 25 million arrivals at international airports, by 2010 this had reached over one billion (see Kirby and Penna 2011). Travel, migration and employment within the EU has also significantly increased within recent years. During 2011 there were an estimated 1.7 million immigrants to the EU from a country outside the 27 EU Member

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<sup>11</sup> See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, as signed in Amsterdam on 2 October 1997. OJ C 340 of 10.11.1997

<sup>12</sup> See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 2007/C 306/01

<sup>13</sup> The term ‘globalization’ is not without its difficulties (see for example Hirst and Thompson 2000; and Rosenberg 2002); with Kirby and Penna (2011) criticising the term for an unhelpful generality. However, it is accepted by most commentators that increased levels of global connectedness by both travel, media and technology has resulted in increased levels of transnational crime and a permeability of national borders to criminality. See also Sheller and Urry (2006) on mobility and crime.

States.<sup>14</sup> In addition, 1.3 million people previously residing inside one of the Member States migrated to another Member State. In 2011 there were 33.3 million foreign citizens resident in the EU, 6.6% of the total population. The majority, 20.5 million, were citizens of non-EU countries, while the remaining 12.8 million were citizens of other EU Member States (Vasileva 2012-Eurostat 31/2012). This highlights that the EU is in the position of managing not only the mobility of its own citizens, but often also that of third country citizens who have entered the European domain.

The globalised and transnational nature of crime has created challenges to traditional state based policing (Benyon 1992; Harfield 2006; Messenger 2012; Shearing 2007) and has required innovations in cross border policing and information exchange. One such initiative falls under the EU Council Framework Decision 2006/960/JHA, the Swedish Framework Decision, where all EU Member States are required to simplify the exchange of information and intelligence between law enforcement authorities of the Member States of the EU. The EU Council Framework Decision 2009/315/JHA set the objective to improve and mandate the exchange of criminal records and streamline the mutual exchange of information on convictions between the Member States. EU Council Framework Decision 2009/316/JHA established the European Criminal Records Information System (ECRIS) as a means of computerising the interconnection of criminal records. Now, when a foreign EU National has committed a crime, all EU Member States can request information on previous convictions from the Member State of Nationality, which they are then obligated to provide. This is a significant development in assessing and managing cross border criminals.

However, transnational police co-operation actually has a much longer history. Alain (2001) for example notes the establishment of Interpol by the 1923 Vienna Treaty, and that the need for countries to co-operate on policy matters precedes this date. However the creation of the EU and the progressive abolition of European internal borders to promote trade and the free movement of goods and persons has resulted in the need for increased police and judicial co-operation to manage the movement of crime (Alain 2001; Finjaut 1993; Junger-Tass 1993). The post 9/11 terrorist threat has also given impetus to transnational policing, in particular the establishment of 'more effective mechanisms for cross national criminal information sharing' (Jacobs and Blitsa 2008 p126).

“Increasingly, criminal justice officials want to know about the criminal background of visitors to their country and about their own citizens’ criminal activities abroad” (Jacobs and Blitsa 2008 p126)

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<sup>14</sup> The EU was enlarged to 28 states on 1st July 2013 when Croatia joined.

The focus is not only on terrorism and organised crime, but also on serious violent or sexual crime that has a significant impact on the lives of EU citizens (Nagy 2011). The principles of exchange emphasised by the European Council have been ones of mutual trust and cooperation between European law enforcement personnel and the principle of availability of information from one Member State to another as stipulated by the EU Council Framework Decision 2006/960/JHA.

When the focus is on an issue of collective organised crime, by organised gangs, who are operating transnationally across two or more EU Member States, the need for Member States to work together in this way appears to receive little opposition. The international issue of football hooliganism was met with a coordinated European response which sees the effective exchange of information on known high risk perpetrators who are travelling to events with the primary purpose of engaging in violence (Frosdick and Marsh 2005). Legislative provisions which enable a ban on international travel to be adopted in such circumstances have also endured and have been proactively utilised. However when seeking to exchange information on the serious harm posed by an individual violent or sexual offender, whose next target may currently be unknown, the process appears to become more challenging, albeit that the likelihood of further serious offending occurring may remain high.

Offending which is organised by parties with connections across borders, pan European and international connections between criminals provide law enforcement agencies with the evidential impetus for cooperation across Member States, with joint investigations, cross border policing and judicial agreements. However the concept of exchanging information to prevent the commission of an offence by a single transient violent or sexual offender appears to present Member States with a greater number of ideological, legal, political and procedural conflicts. Whilst high profile case studies<sup>15</sup> have resulted in developments in employment vetting and the exchange of information to prevent child sexual offenders working with children in other EU Member States, efforts to secure a more comprehensive approach to the pan European identification and management of serious violent or sexual offenders have achieved far more limited results.

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<sup>15</sup> In 2004, the case of Michel Fourniret in Belgium highlighted a serious failure between neighbouring Member States to share information, which resulted in a convicted sex offender from France gaining employment in a school in Belgium. In the UK, the June 2004 report of the Bichard Inquiry, which was prompted by the conviction of Ian Huntley for the murder of two children in Soham, referred specifically to the difficulty of checking the background of overseas workers and concluded that, 'this is clearly an area of potential weakness in the protection of young people'. (NSPCC 2007)

The case of the murder of Moira Jones by Marek Harcar in Glasgow 2008. Harcar was originally from Slovakia, where he had 13 previous convictions, 4 for violence. Scottish Police were unaware of his potential and he entered Scotland unmonitored

“The intrinsic nature of [sex] offending (covert; much under-reported; in jurisdictions with highly variable systems of policing and criminal enforcement and/or different cultural norms as to child protection) is such that hard quantitative data is, and will remain, elusive.....It cannot however operate as a licence for inaction by any State, including the UK, to fail to ensure an effective regime is in place to address travel to vulnerable countries by likely offenders.” (Davies 2013 p8, 3.2 & 3.4)

Whilst more detailed comparative research is required, commentators such as McAlinden (2012) look to the varying history and development of penal policy relating to such offenders across the EU, citing historical as well as contemporary social factors which have inhibited the adoption of a risk management, incapacitation approach to sex offending across much of Western Europe. The risk led, public protection agenda, she argues, is primarily led by the USA, England and Wales, and is largely an Anglophone jurisdiction phenomenon characterised predominantly by a more exclusionary approach to sex offending which has only been partially embraced by a small number of other continental jurisdictions (see also Kemshall 2008; Thomas 2011). Other Western EU Member States have sustained a generally more treatment based, rehabilitative stance, together with varying perceptions of certain forms of sexual relations (McAlinden 2012 p183), often coupled with a greater emphasis upon a rights and privacy agenda. The active “management” of an offender, particularly beyond any completion of a formal sanction is not a strategy which is universally adopted or endorsed.

There remains a residual tension between strongly held ideologies supporting the rights of an offender to become a rehabilitated citizen, free of any form of State control and the alternative priority held elsewhere of the rights of the general population to be protected from those who are considered to remain a “risk”. What has also emerged is the adoption by some EU countries of a ‘blended approach’, where reintegrative methods of support are combined with strategies for surveillance and control (Kemshall 2008).<sup>16</sup> This hybrid model seeks to establish, often by overt means of supervision and surveillance in the first instance, a process by which the offender ultimately manages their own risk in the longer term, knowing that any relapse may be subject to further official scrutiny. This complex and diverse package of EU philosophies may result in an element of caution when requests for exchanging information are received. There may be varying perceptions of how that information might then be used by the other Member State, together with contrasting domestic laws regarding the privacy rights of the citizen, offering different levels of data protection.

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<sup>16</sup> Kemshall labels this ‘protective reintegration’ see: Kemshall, H. (2008) *Understanding the Community Management of High Risk Offenders*. Open University Press.

A report to the Council of Europe Committee on Legal Affairs and Human Rights in 2010 concluded that the establishment of a European Sex Offender register would be significantly impeded by the differing methods of managing this group of offenders and diverging criminal laws across the EU community. However it was held that significant strides could be made in the development of comprehensive systems for the management of high risk offenders in every Member State, together with an increase in the quality and regularity of information sharing on sexual offenders across the EU (De Pourbaix-Lundin 2010). EU Directive 2011/93/EU<sup>17</sup> partially addressed this point as it stated that: ‘Member States may consider adopting additional administrative measures in relation to perpetrators, such as the registration in sex offender registers of persons convicted of offences referred to in this directive’ (para 43). The directive also focused on combating sexual tourism, and disqualification from professional activities involving direct work with children. However whilst there may be some appetite for developments in this arena from a number of individual Member States at a national level, developments in cross border cooperation in the management of these offenders appears slower to permeate.

### 2.3 Freedom of movement and tensions with security

Freedom of movement was enshrined as a core principle of the European Economic Community (EEC) in 1957 (the Rome Treaty), and see for example the Treaty Establishing the European Community, Dec. 24, 2002, O.J. C 325 (as amended); art. 3(c).<sup>18</sup> The core principle of freedom of movement in the EU and the right to move across EU borders in order to secure employment is to be found in Article 39 of the EC Treaty. This provision allows EU citizens to enter and move freely about other Member States in order to accept offers of employment, or while looking for employment during a reasonable amount of time (Shimmel 2006 p765). There are important exceptions however and Member States can limit freedom of movement on the basis of “public policy, public security or public health” (Directive 64/221 p62; Shimmel 2006 p768). However, such limitations must be based exclusively on the personal conduct of the individual concerned.

Freedom of movement has been given added impetus since the mid-1980s with continental European countries progressively abolishing border controls on shared national frontiers, and in effect creating an external perimeter around an ‘open space’ (Zaiotti 2007 p32). The

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<sup>17</sup> See EU Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA; available at: [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_trafficking\\_in\\_human\\_beings/jl0064\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_trafficking_in_human_beings/jl0064_en.htm); accessed January 9th 2014.

<sup>18</sup> Free movement across the EU is now governed by EU regulation No 492/2011 and EU Directive 2004/38/EC.

original Schengen<sup>19</sup> Members were France, Germany and the Benelux countries (Belgium, The Netherlands and Luxembourg), with expansion over time to include all EU countries with the exception of the UK and Ireland (Zaiotti 2007). Schengen also focused on legal and policy harmonization in the areas covering the movement of people across Europe, with a number of ‘compensatory measures’ around the security consequences of creating an ‘open space’ (Zaiotti 2007). In brief, these were judicial and policing co-operation, data sharing on criminal convictions, (including the establishment of the common data bank of police data Schengen Information System (SIS)<sup>20</sup>), the exchange of information on illegal immigrants, cooperation between drug enforcement agencies and common standards and approaches to border control.

A number of commentators have identified the tension between open borders and the free movement of goods and persons on the one hand; and the desire for greater security on the other (Bigo 1998; 2000; Nanz 1996; Zaiotti 2007 p39). Key difficulties appear to be around the need to address common threats such as terrorism, organised crime, drug trafficking (Stelfox 2003, Council of EU 2010 5842/2/10 REV2), the prevention of illegal immigration and more recently a recognition that sexual and violent offenders (particularly the former) are increasingly mobile (Thomas 2011). This has resulted in attempts by some Member States to police their borders more intensively, (for example challenges to Schengen and free movement during 2011 and early 2012, see Carrera 2012 for a review).<sup>21</sup>

Hobbing (2011) offers a critique of tighter border control developments arguing that they demonstrate poor cost effectiveness, a lack of efficiency and disproportionality. He contends that:

“.. border-based checks are highly inefficient compared with modern cross-border co-operation among law enforcement authorities” (2011 p7).

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<sup>19</sup> The Schengen regime was formally incorporated under the ‘Justice and Home Affairs’ domain with the entry into force of Treaty of Amsterdam (1999), (Zaiotti 2007). See also: Den Boer, M. (Eds.) (1997) Schengen: Judicial cooperation and policy cooperation. Maastricht: European Institute of Public Administration.

<sup>20</sup> Currently operated as SIS II (Schengen Information System second generation). The UK will take part in SIS II from 2014. SIS II is discussed in more detail in sections 2.4.1 and 3.4

<sup>21</sup> The Statement by Sarkozy during the French Presidential election campaign in 2012 threatening to suspend France’s participation in Schengen. Also the Netherlands proposal to install surveillance on border roads with Belgium and Germany to fight “illegal immigration and illegal residence in the Netherlands” (Carrera 2012 p2); and “Netherlands defends border control project”, EUobserver.com, 3/1/2012. (<http://euobserver.com/22/114751>). See also the implementation and subsequent repeal of stringent border measures by Denmark in 2011 (Hobbing 2011); and: “Commission says Danish border controls ‘unjustified’”, EurActiv, 19 July 2011 (<http://www.euractiv.com/justice/commission-danish-border-controls-unjustified-news-506636>); “New Danish government rolls back border controls”, EUobserver.com, 4 October 2011 (<http://euobserver.com/22/113809>).

He continues that:

“.. border controls, even when supported by ample resources and the most refined technology, represent a rather blunt weapon in the fight against crime, whereas cross-border and EU-wide police cooperation promise far better results. Illicit traffic tends to follow the path of least resistance, so if official border crossings are (more intensely) controlled, traffic routes switch to the open green and blue borders. If fences or other obstacles are erected, criminal organisations will find a way around or across them.” (Hobbing 2011 p6).

Hobbing goes on to argue that security challenges can be dealt with more appropriately by the “sophisticated mechanisms of police and border cooperation” provided by the EU (2011 p7). However the transition to an EU collaborative, unified approach to policing and border controls remains vehemently opposed in some quarters. A number of security professionals still consider that a government should have control of its own specific territory to ensure the protection of its citizens and should make its own decisions regarding the exchange of information with others (Bigo 2008 p92). Magee’s (2008) review on the exchange of criminality information similarly concluded that there was an apparent will for coordination to be achieved across the EU, but less willingness from Member States to “have themselves coordinated” (2008 p62).

## **2.4 Information Exchange and the challenges of data protection, protecting human rights and privacy**

The rate by which freedom of movement and cross border arrangements such as Schengen (Treaty of Amsterdam 1999) grew across the EU in the 1980s and early 1990s failed to ensure that adequate safeguards were established in the relation to the provision, exchange and use of personal data on EU citizens (Mahmood 1995). The first step to address this and harmonise data protection laws across Member States can be seen in the Data Protection Directive of 1995 (95/46/EC). It had two core objectives: to protect the fundamental right to data protection and to guarantee the free flow of personal data between Member States. Cultural and historical differences across the EU resulted in difficulties in reconciling the variable levels of privacy rules and traditions (Koustias 2012), many seeing data protection law as a process to limit the amount of information available to the police in the interests of stopping oppressive government surveillance (Bignami 2007). However for some Member States the concept of privacy embedded in the Directive and the European Convention on Human Rights (ECHR) was not linked to any similar precedent in their national laws. This

became particularly challenging when seeking to introduce the directive into their own legislative provisions (Taebi 1996).

The Directive did not apply to the EU's third pillar of Justice and Home Affairs, relating to policing and criminal law (Peers 2012). This deficit was later addressed by the Council Framework Decision 2008/977/JHA, on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350/60 (De Busser 2010, O'Neill 2011).

Concerned with the transmission of data for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, the Framework Decision 2008/977/JHA stipulated the now familiar protocols for data transfer, in that it must be fair and lawful, accurate, adequate, relevant and not excessive to the legitimate purpose for which it is required. However the Framework Decision only applied to the processes of exchanging data across borders and not to the internal data processing activities of the national police and judicial authorities. For example there might be no confirmation that the data being exchanged had been legally handled in the requesting or by the requested State (De Busser 2010). Member States were also given a lot of discretion in their interpretation of the Framework Decision, and there was no provision made for any strategy or advisory group under the third Pillar to address this (De Busser 2010).

A further key policy area which has not yet been fully embedded into data exchanges is the Hague Programme principle of availability (O' Neill 2011), which requires that if data is held by a Member State then it can be shared between law enforcement agencies. The Stockholm Programme (OJ 2010 C 115/01),<sup>22</sup> pursuing amongst other measures, new legislation in the areas of child sexual abuse, child sexual exploitation and child pornography called for a review of this principle's implementation. It also sought an evaluation of all instruments adopted across police and judicial affairs scrutinising data protection issues. The Stockholm programme stipulated a number of underlying principles which continue to underpin the EU's approach to data collection, storage and exchange, namely:

- The clear purpose of data collection, storage and exchange.
- Proportionality and legitimacy of processing.
- Limits to storage time.
- An appropriate level of data security and confidentiality.
- Respect for the rights of the individual.

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<sup>22</sup> See The Stockholm Programme — An open and secure Europe serving and protecting citizens 2010/C 115/01.

- Data storage and exchanges to be monitored by an independent authority.<sup>23</sup>

### 2.4.1 The second generation Schengen Information System (SISII) Data handling – an example of developing a data handling system

An overview of this exchange mechanism is provided at 3.4. Here, a brief discussion of this mechanism in the context of data protection illuminates some enduring issues regarding the nature of information which is exchanged on the data subject, its accuracy and rights of access and privacy by the individual.

The Schengen Agreement (1985) originated from the interests of France and Germany in establishing a free passage of market goods across their national borders. Realising the economic benefits of this freedom of movement the agreement has extended to other Member States (Jacobs and Blitsa 2008). However, as previously highlighted the reduction of border controls became recognised as a “security risk” which could result in an increase in crime, requiring a response which should include strengthened police cooperation. These concerns were largely raised by transnational groups of law enforcement professionals themselves, advising the Schengen working committees (Parkin 2011).

A key source of data exchange on criminality across the EU is SISII<sup>24</sup> which went live on the 9th April 2013, taking over from its predecessor SISI.

SISII is a pan European system of exchanging information on persons and objects of interest to law enforcement registered via a series of “alerts”, including those who are to be refused entry or whose movement is restricted. It is one of the world's largest IT systems in the field, and consists of three components: a Central System, EU States’ national systems and a communication infrastructure (network) between the Central and the national systems. Alongside a centralised entry point for this data each Schengen State has a national copy of SISII which they are responsible for maintaining. They are accountable for the accuracy of the data that they have initiated into the system and must appoint a supervisory authority for their Schengen list. Each Schengen country’s Central Bureau for SIRENE (Supplementary Information Request at the Point of National Entry) is responsible for any liaison with the initiating Member State, if a “hit” against a person or object subject to a SISII alert is made. SISII has two strands, Visas, Asylum and immigration; and Police and judicial cooperation in

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<sup>23</sup> See for example: Council of the EU (2009), The Stockholm Programme – An open and secure Europe serving the citizen, 14449/09 Brussels, October 2009; Council of the EU, Draft Internal Security Strategy for the EU: Towards a European Security Model, 5842/2/10 REV 2 JAI 90, 23 February 2010, <http://register.consilium.europa.eu/pdf/en/10/st05/st05842-re02.en10.pdf>.

<sup>24</sup> Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

criminal matters (PJCCM). The United Kingdom and Ireland have opted into the law enforcement aspects of the Second Generation SIS (SISII) and which in the UK is anticipated to be operational by the end of 2014.<sup>25</sup>

Articles 95,<sup>26</sup> 96<sup>27</sup> and 99<sup>28</sup> of the earlier Schengen Convention<sup>29</sup> did not provide any specific criteria for the entry on to the SIS of those anticipated to be involved imminently in the commission of serious crime. There was a lack of clarity of terms such as “clear evidence” of an “intention to commit” serious offences and a lack of harmony across the EU in definitions and perceptions of threats to public order, national security and safety. The internal national mechanisms for data protection were also unmonitored (Mahmood 1995). Other weaknesses in the implementation of the original SIS primarily centred around poor data quality, caused by the variable practices of national authorities and the lack of practical access to judicial redress for individuals to contest SIS data that may be held on them (Parkin 2011). The right of access to data is still governed by National domestic laws.

Data Protection for SISII is governed by Convention 108 and Recommendation No. R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe<sup>8</sup> constitute the current data protection regime applicable to the SIS Convention. There are also specific SISII data protection obligations within Council Decision<sup>30</sup> 2000/365/EC most notably; each Member State shall ensure that an independent authority (the national supervisory authority) monitors independently the lawfulness of the processing of SISII personal data on their territory and its transmission from their territory, and the exchange and further processing of supplementary information. SISII involves more Member States and also provides for more functions, such as the inclusion of biometrics in the form of photographs and fingerprints.

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<sup>25</sup> 2000/365/EC: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis

<sup>26</sup> Article 95- Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting contracting party.

<sup>27</sup> Article 96- Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.

<sup>28</sup> Article 99- Data on persons or vehicles shall be entered in accordance with the national law of the contracting party issuing the alert, for the purposes of discreet surveillance or of specific checks in accordance with paragraph 5.2. Such an alert may be issued for the purposes of prosecuting criminal offences and for the prevention of threats to public security:(a) where there is clear evidence that the person concerned intends to commit or is committing numerous and extremely serious criminal offences, or (b) where an overall assessment of the person concerned, in particular on the basis of past criminal offences, gives reason to suppose that that person will also commit extremely serious criminal offences in the future.

<sup>29</sup> The Schengen acquis. Convention implementing the Schengen Agreement of 14 June 1985 between Governments of the States of the Benelux Economic Union, The federal Republic of Germany and the French republic on the gradual abolition of check at their common borders OJ L239 22/09/2000 P 0019-0062. Chapter Two of Title IV deals with the operation and usage of the SIS and details of persons who might be included in the SIS (Art 94(2) & (3))

<sup>30</sup> Recitales: 24, 26 & 27 and Articles: 9(g), 13, 19, 46, 49, 58, 60, 61 & 62.

The legal basis for the Regulation 1987/2006 on SISII also introduces a number of measures which may improve the accuracy and legality of data entered and retained on the system. For instance there is an additional requirement that each decision to issue an alert must be individually assessed (Article 24.1). There is also a proportionality clause attached to this which specifies that before issuing an alert, it has to be determined that the case is adequate and relevant. The Regulation also provides for more stringent measures on data retention (Article 29) and the obligation to impose penalties for data which is inaccurately entered or unlawfully stored (Article 48) (Parkin 2011). This scrutiny may be appropriate to address the abuses of discretion which might have formerly occurred (Mahmood 1995). However, its presence, together with the ongoing lack of uniformity in how assessments of those posing the greatest risk are made by Member States, may have the potential to inhibit the level of detail contained in some inclusions on the SIS II in a similar manner to those recognised previously (Mahmood 1995).

The changes implemented with SISII are set in the context of broader revisions to the PJCCM and data protection. The Commission stipulated in the action plan to implement the Stockholm Programme (2010)<sup>31</sup> that the fundamental right to personal data protection must be consistently applied in the context of all EU policies and that the challenges of preserving privacy in a global world of high technological advancement must be met. In January 2012, the Commission proposed a comprehensive overview of the Data Protection Directive and Framework decisions (COM 2012 10 Final 2012/0010 (COD)). The 1995 Data Protection Directive would be replaced by a Regulation and the Framework Decision would be replaced by a Directive, which would also be binding. Much of the existing discretion of Member States would be removed. The former tensions between the different Pillars are addressed via a move to incorporate all provisions under one pillar. The rights of the individual are advocated strongly with clearer provisions to challenge and request deletion of data which is held.

As highlighted previously, the SISII includes operational access to fingerprints and photographs for the verification of an individual's identity once an initial "hit" on an alert has been made. The use of biometrics to combat identify fraud, combat crime and increase security has been criticised by some commentators for its potential for extensive and unregulated use, and is an area where EU concerns with freedom of movement, security, and privacy coalesce. Biometrics are increasingly used in criminal conviction databases and in travel documents to 'enhance the security of the EU' (Commission of the European Communities, COM (2008) 69 final (13 February 2008)). However this development has been

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<sup>31</sup> Action Plan to Implement the Stockholm Programme COM(2010) 171 Final

challenged on a number of grounds including claims that such technical developments are outpacing ethical considerations and both regulatory frameworks and governance systems, resulting in a temptation towards indiscriminate use. For example, to potentially routinely track the movements of citizens (Lodge 2010). The use of biometric data should therefore be governed by a clear legal framework of stipulation for its use (EIXM)/COM/2012/0735 final \*/.<sup>32</sup>

Whilst seeking to maximise the opportunities presented by advances in technology for improving EU citizens' security, developments need to occur within a framework of scrutiny and accountability which also respects the rights to privacy and data protection (EU 2010 5842/2/10 REV). A balance needs to be achieved where the data subject's rights are protected and assessments of the level of information exchange that needs to occur are evidence based and proportionate to the level of harm posed. However the quality of the information provided also needs to be adequate to ensure that an appropriate response to that information can be made by the receiving Member State. Above all the fundamental rights of victims and the protection of all EU citizens must be recognised with a stronger focus on:

“.. the prevention of criminal acts ... before they take place to help reduce the consequent human or psychological damage which is often irreparable” (EU 2010 5842/2/10 REV).<sup>33</sup>

Accuracy and reliability of information, and the rights of access and privacy for the individual are key challenges to any information exchange system. SISII has attempted to resolve these issues by addressing proportionality, alongside stringent data retention, security and storage measures. Whilst the development of SISII had its critics (e.g. Lodge 2010), it has attempted to develop an appropriate framework of scrutiny and accountability for data collection, retention and exchange.

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<sup>32</sup> For further detail see Communication from the Commission to the European Parliament and the Council Strengthening law enforcement cooperation in the EU: The European Information Exchange Model (EIXM)/COM/2012/0735final\*/

<sup>33</sup> For further detail see Council of the EU (2010) Draft Internal Security Strategy for the EU: “Towards a European Security Model” 5842/2/10 REV2.



## Section 3 - An Overview of Existing Information Exchange Arrangements

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As crime seizes the opportunities provided by a globalised society, law enforcement strategies need to respond accordingly. The exchange of information across borders has therefore become an essential part of law enforcement practices internationally with the development of a number of now well established bilateral and multilateral arrangements. However over time these individually negotiated protocols have been supplemented by other EU information exchange mechanisms, each with a slightly different purpose. The main EU systems for the exchange of data on criminality are detailed here:

### 3.1 The Swedish Framework decision

The Swedish Framework Decision 2006/960/JHA, so called due to having originated from a proposal from Sweden in 2004, establishes rules and timescales for the exchange of information between Member States for the purpose of criminal investigations or criminal intelligence operations prior to prosecution. The exchanges pertain to the investigation of serious crimes and apply the principle of availability as stipulated in section 2.2.1 of the 2005 Hague programme on Strengthening Freedom, Security and Justice in the EU. The concept of equivalent access, seeks to ensure that the conditions for providing the information to the requesting Member State are not made any more stringent than they would be at a national level.

Most Member States have incorporated the principle into their domestic legislation or have claimed that it was already embedded within it. However the request documentation has been considered by some to be cumbersome and time consuming and other alternative methods of communication have been seen as adequate.<sup>34</sup> The exchanges occur between competent law enforcement authorities, which is interpreted variably depending on the demarcation of law enforcement responsibilities within each Member State. The framework makes it clear that other procedures of cross border authorisation need to occur before any information received can be used as evidence in criminal proceedings.

The Framework Decision 2006/960 JHA stipulates that a Member State can only refuse to provide access to criminality information to another Member State under the following circumstances as described in Article 10, in that to do so:

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<sup>34</sup> See evaluation from Communication from the Commission to the European parliament and the Council Strengthening law enforcement cooperation in the EU: the European Information Exchange Model (EIXM)\* COM/2012/0735 final\*/.

- May harm essential national security interests
- May jeopardise the success of a current investigation or a criminal intelligence operation or the safety of individuals
- Is disproportionate or irrelevant with regard to the purposes for which it has been requested
- The relevant judicial authority has not been agreed, where appropriate.

The level of seriousness of the offence being investigated is also a determining feature and where it is punishable by imprisonment of 12 months or less in the Member State making the request, the request may be considered as inappropriate and a refusal made. Distinctions are also made between urgent requests which should receive a response within eight hours, whilst all other information should be provided within a week. The concept of accessibility and the setting of timescales has been seen as the most positive development introduced by the Swedish Initiative (EC 2010). The channels for the communication are not stipulated and may occur via a variety of different methods as detailed in the latter part of this section.

### **3.2 Interpol Notices and Dissemination Channels**

Interpol has a longer history than its communication counterparts. Efforts to formalise international police cooperation commenced in the early 20th Century. The founding members of Interpol in 1922 were Poland, Austria, Belgium, China, Egypt, France, Germany, Greece, Hungary, Italy, the Netherlands, Romania, Sweden, Switzerland and Yugoslavia. The United Kingdom joined Interpol in 1927 and the United States considerably later in 1938. During the Second World War Interpol fell under the control of Nazi Germany, to be re-established as the International Criminal Police Organization in 1945. With Headquarters based now in Lyon, Interpol has 190 Member countries. Its primary function is to facilitate information exchanges internationally to track down wanted persons, assist with criminal investigations and the detection and prevention of transnational crimes across the world.

Interpol's I-24/7 communication network allows all member countries to send and receive information to any or all members via a secure link. This has established direct access to databases containing information on missing and wanted persons, terrorism suspects, fingerprints, DNA profiles, lost or stolen travel documents and stolen vehicles. In reality the range of "seriousness" of the criminal activities included on the various strands of the Interpol communication system will vary significantly, requiring a routine evaluation of the priority and significance to be attributed by other Member States. However targeted forms of dissemination, known as diffusions are also available with Member States able to send an email via Interpol to single states, groups, zones or all members. This allows for a direct

communication with specific others, used to request the arrest or location of an individual or additional information in relation to a police investigation. A diffusion is circulated directly by the National Central Bureau concerned to the member countries they wish to target, whilst simultaneously being recorded in Interpol's Information System.

Interpol Notices are global forms of communication which all 190 members receive.

- Red Notice - To seek the provisional arrest of a wanted person with a view to extradition based on an arrest warrant or court decision.
- Blue Notice - To collect additional information about a person's identity, location, or illegal activities in relation to a criminal matter.
- Green Notice - To provide warnings or criminal intelligence about persons who have committed criminal offences and are likely to repeat these crimes in other countries.
- Yellow Notice - To help locate missing persons, especially minors, or to help identify persons who are not able to identify themselves
- Black Notice - To seek information about unidentified bodies
- United Nations Security Council Special Notice - To alert police to groups and individuals who are targets of UN sanctions.
- Orange Notice - To warn police, public entities and other international organisations of dangerous materials, criminal acts or events that pose a potential threat to public safety.

Whilst Interpol channels still tend to dominate as a method of information exchange between law enforcement agencies (EC 2010) there are also some residual concerns within the EU community regarding how information may be received and treated outside of the EU, where national data protection laws and concepts of privacy may vary even further and are not subject to EU regulation.

Of greatest relevance to the SOMEK project are the use of Interpol Green notices. Once a green notice is issued, should the person then be identified in another country, the receiving state is at liberty to determine its course of action within its own legal framework. Interpol have highlighted the use of Green Notices and partnership initiatives such as Project Childhood<sup>35</sup> as part of an international strategic effort to address issues of sex tourism and

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<sup>35</sup> See-Project Childhood. Protection Pillar: 'Enhancing law enforcement capacity for national and transnational action to identify and effectively act upon travelling child-sex offenders in the Mekong' (XSPT33) accessed from [http://www.unodc.org/southeastasiaandpacific/en/Projects/2010\\_08/project\\_childhood.html](http://www.unodc.org/southeastasiaandpacific/en/Projects/2010_08/project_childhood.html) on 13/3/14

child sex offenders who seek to travel abroad to increase their opportunities to offend undetected. However the focus in this respect is primarily on those travelling to South East Asian countries. Where the relative affluence of the offender in comparison with the poverty of the victim and their family are often far more marked, cultural concepts of child protection may differ and policing strategies for such crimes remain underdeveloped, there is likely to be a greater perceived opportunity for the sexual exploitation of children to occur.<sup>36</sup> Whilst Interpol is also actively involved in other training and partnership strategies in Romania, the Ukraine, Spain and Poland, the patterns of travel of such offenders across the EU community are not currently subject to the same level of scrutiny.

It is also the case that Green Notices are used for other types of criminal activity and they are not reserved for sexual offending warnings alone. The type and level of seriousness of the harm posed by the individual who is subject to the notice may also differ. Indeed whilst there is clear criteria for issuing a notice and ensuring appropriate data protection, Interpol green notices are reportedly under used in relation to the tracking of sexual offenders. The volume of notices made overall via Interpol each year is also extremely high, calling for some form of review, rationalisation and prioritisation (De Pourbaix-Lundin 2010). It is possible that the volume of communications received contributes to the quality of the response from the recipient destination country. This is also highly variable and often subject to lengthy delays, leading to Interpol being currently described by some as “a useful international vehicle for the exchange of intelligence, but with a limited pro-active investigative function”. (Davies 2013 4.39).

### 3.3 Europol

Europol was developed in the 1980s recognising the need for increased cooperation in pan European police investigation and detection of crime. Europol was preceded by TREVI, formed in 1975, which was a forum for internal security cooperation amongst European Commission interior and justice ministers. Europol was given formal status by Article K3 of the Maastricht Treaty which was agreed in 1995 and following ratification by the Member States, it then came into force on 1 October 1998. Europol commenced its full range of functions in 1999.<sup>37</sup>

Europol supports Member States in addressing issues of organised crime, terrorism and other forms of serious crime, affecting two or more of the Member States. The Europol Information System (EIS) is a database of information supplied by member States on serious

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<sup>36</sup> See Interpol- Travelling Sex offenders. <http://www.interpol.Crimes-against-children/Sex-offenders>

<sup>37</sup> Europol as accessed from <https://www.europol.europa.eu/content/page/about-europol-17> on 30/01/14

crimes occurring across EU borders. Member states engage through their Europol National Units (ENU) and since 2011 also other designated law enforcement authorities. SIENA, Europol's Secure Information Exchange Network Application provides a secure mechanism for the exchange of information with Europol and between Member States. Europol liaison officers from each Member State are recruited from EU and non EU law enforcement agencies and are based at the Europol headquarters in The Hague. Communication also occurs directly between the Europol liaison officers posted there, each a member of their own ENU.

Although the remit of Europol stipulates its priority as a tool for addressing organised crime, the implementation of SIENA introduced the capacity for direct bilateral cross border exchanges on a full range of actual or suspected criminal activity and is favoured as a channel of communication by a number of Member States (EC 2010). However a 2012 evaluation concluded that Europol was still not being adequately used and recommended that its legal standing should be reviewed [COM (2010)171].

The Stockholm programme also considered that Europol should be at the centre of EU police operations. On 27 March 2013, the EU Commission adopted a proposal for a new Europol Regulation which pursues that aim. The proposal seeks to establish Europol as the coordinator of all forms of information exchange between law enforcement authorities in the Member States, to establish a reliable and resilient data-protection regime and to develop better compatibility across EU Member States by providing support for policing, assigning Europol with the responsibility for police training functions formerly carried out by the European Police College (CEPOL) (The Law Society of England and Wales 2013).

### **3.4 Schengen SISII**

The origins of the Schengen Information System have been discussed previously. Council decision 2007/533/JHA - regulates the criminal law and policing aspects of the Schengen Information System II (SISII). Articles 26 onwards highlight the categories of alerts which can be made on the system, which are then available to all Schengen States. It also stipulates the rules for the length of an alert, confidentiality and security management. There is a general principle that alerts should only be placed on the database in matters where there are serious concerns for the individual's protection or in order to prevent other serious threats. It is also the mechanism through which information on European Arrest Warrants is transferred.

Categories of alert include those wanted for arrest for failure to surrender, missing persons and those needed to progress judicial proceedings. Discreet checks and the seizure of evidence are also possible where a serious threat to security is identified under Article 36.

This may cover information on some serious violent or sexual offenders who are mobile across the EU and assessed as highly likely to cause serious harm, although more exact definitions of which type of offences this pertains to may need to be clarified in the pursuit of the SOMEK project aims.

Specifically, Article 36 objectives and conditions for issuing alerts are as follows:

1. Data on persons or vehicles, boats, aircrafts and containers shall be entered in accordance with the national law of the Member State issuing the alert, for the purposes of discreet checks or specific checks in accordance with Article 37(4).
2. Such an alert may be issued for the purposes of prosecuting criminal offences and for the prevention of threats to public security:
  - a. where there is clear indication that a person intends to commit or is committing a serious criminal offence, such as the offences referred to in Article 2(2) of the Framework Decision 2002/584/JHA;<sup>38</sup> or
  - b. where an overall assessment of a person, in particular on the basis of past criminal offences, gives reason to suppose that that person will also commit serious criminal offences in the future, such as the offences referred to in Article 2(2) of the Framework Decision 2002/584/JHA.
3. In addition, an alert may be issued in accordance with national law, at the request of the authorities responsible for national security, where there is concrete indication that the information referred to in Article 37(1) is necessary in order to prevent a serious threat by the person concerned or other serious threats to internal or external national security. The Member State issuing the alert pursuant to this paragraph shall inform the other Member States thereof. Each Member State shall determine to which authorities this information shall be transmitted.

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<sup>38</sup> See Article 2 (2) of Council Framework Decision 2002/584/JHA on the European arrest Warrant and the surrender procedure between Member States. Relevant offences include: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

4. Alerts on vehicles, boats, aircrafts and containers may be issued where there is a clear indication that they are connected with the serious criminal offences referred to in paragraph 2 or the serious threats referred to in paragraph 3.

It is a large scale system with over 43 million alerts accessible on a hit or no hit basis to front line law enforcement officers (EC 2010). The main task of the "SIRENE Bureaux" established in all Schengen States, is the exchange of additional or supplementary information on alerts between the states. This additional information is provided to ensure that further details are available so the appropriate action is taken if, for example, a wanted person is arrested, a person who has been refused entry to the Schengen area tries to re-enter, or a missing person is found. The SIRENE Bureaux also manage data exchanges for other forms of police and judicial co-operation, including cross-border operations.

Controversies relating to Schengen open borders have occurred, including the reintroduction of border controls by France and Denmark in 2011. The former was a reaction to Italy providing citizen residency permits to Tunisian refugees, granting them freedom of movement across the Schengen Member States. Hobbing (2011) cites the rise in nationalism, far right political parties and a populist background which is against migration and mobility as contributory to this retreat to national controls. The Council of the EU (EU 2010 5842/2/10 REV.) highlighted that a European model of Security has to be underpinned by a number of jointly shared principles including transparency and accountability, solidarity and mutual trust. However whilst some common threats to security are broadly agreed by Member States, such as terrorism and human trafficking, they continue to wrestle with others, with some retreating to a sovereignty approach to secure the "best interests" of their citizens, which sees an intermittent disengagement with their EU identity (Hobbing 2011).

So whilst there is potential for information on serious violent or sexual offenders to be entered on to the SISII as an Article 36 alert, where a threat to public security is identified, experiences of SIS I suggest that alerts are more likely to occur in relation to organised crime than single transient offenders (Mahmood 1995, Parkin 2011).

### **3.5 European Criminal Record Information System (ECRIS)**

The computerised system ECRIS was established in April 2012 to achieve an efficient exchange of information on criminal convictions between EU countries. It was developed in response to concerns that the sentencing of offenders frequently occurred without any acquired information on crimes which may have been committed in other countries, thereby creating a false impression of the possible patterns of behaviour demonstrated by an offender and the level of harm posed.

ECRIS establishes an electronic interconnection of criminal record databases to ensure that information on convictions is exchanged between EU countries in a standardised, prompt and technically compatible manner. The system provides prosecutors and judiciary members with straightforward access to comprehensive information on the offending history of any EU citizen, regardless of how many different jurisdictions he or she may have offended in. The weight and nature of the sentence imposed should then be able to facilitate the best opportunity for securing public protection in the future.

Requests for criminal conviction data may also be made for purposes other than criminal proceedings. However the framework decisions 2009/315 JHA and 2009/316 JHA do not stipulate any obligation to respond to non-criminal proceedings requests and any decision to do so must be guided by the requested Member State's national laws. Never the less where appropriate requests are made there is a capacity, for example, for employment vetting checks to be made and to prevent mobile sex offenders from acquiring employment with children in other Member States.

The Member State of Nationality is the central coordinator, responsible for compiling all of the convictions handed down to a Home National in any other EU Member country. This information must be stored and updated as required, available for transmission when requested. In order for this to be achieved an EU country convicting a foreign EU national is obliged to immediately send information on this conviction to the Member State of Nationality. The transmission of information on convictions is made electronically, through a standardised format, applying two reference tables, listing offence categories and penalties. These categories are immediately recognisable in any EU Member State, having been mapped against each national legal and criminal offence framework. General principles governing the exchange of information and the functioning of the ECRIS system are provided by the EU Council Framework Decision 2009/316/JHA. Article 8 of the 2009/316 JHA clarifies the timescales for responding to requests, which in all cases should be prompt and in any case no longer than 10 days.

Every Member State has a central authority responsible for the management of national criminal records and ECRIS transmissions. The General Secretariat of the EU ensures the distribution of this contact information across the EU community. However the central authority's responsibilities for ECRIS are housed within varied law enforcement and judicial departments across the Member States, once again reflecting the varied police functions and criminal justice structures which exist.

Although supplementary information codes are also provided as part of the ECRIS framework which highlight the level of participation in the offence and issues of criminal

culpability, such as diminished responsibility and insanity (Article 4 of the Council decision 2009/316 JHA on the Establishment of ECRIS), ECRIS primarily deals with historical, factual information and appears to have been met with little opposition to its implementation.

It could be speculated that two main reasons for this broadly held acceptance are firstly, that there is no extensive assessment process required of what information should be sent, or any major concerns held as to what purpose it might then be used for. Where this pertains to criminal matters, this has all been clearly specified. Secondly the transmission is mandatory at the point of conviction and is restricted to historical factual information on criminal acts, prosecutions and sentencing. However what is essential for this system to work is that all national data on criminal records is current and accurate. There have been delays in some Member States obtaining the electronic means to transfer the data, resulting in paper transfers in some instances. A number of Member States also only have electronic records dating back 10 years. Whilst older convictions may be considered to be “spent”, their relevancy to a Judge’s view of seriousness may still be significant, however they may not be included in a database transmission. Also the realities of the storage and transfer of data via the ECRIS system being initiated by a range of different law enforcement and judicial departments across the EU community, serves as a further anomaly which may impact on shared understandings and a clarity of communication.

### **3.6 The Prüm Council Decisions**

Originally based on the Prüm Treaty signed by Germany, Spain, France, Luxembourg, the Netherlands, Austria and Belgium in 2005, the EU Council adopted the Prüm decision in 2008,<sup>39</sup> binding all Member States. It is promoted as an opportunity to develop more effective European Law Enforcement cooperation, with a focus not only on terrorism and organised crime, but also on the more widespread impact of crime upon EU citizens at a variety of levels. The Prüm decision provides for the automated exchange of fingerprints, DNA and vehicle registration data between EU Member States.

Access to national databases is provided initially on an anonymous basis. If a “hit” is made then a follow up request for additional information occurs. Therefore the initiating officer does not have direct access to any information or personal details until the further request for information is made, which will be assessed by the receiving Member State(s), according to the principle of availability stipulated by the Swedish Framework decision discussed previously.

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<sup>39</sup> See the Prüm Decision [2008] OJ L 210/1, Council Decision 2008/615/JHA

There have been considerable delays in many Member States being able to exchange data in this way even though the deadline for implementation was August 2011. Prüm was brought in under the third pillar and therefore infringement proceedings cannot be pursued until this legal standing changes in 2014.<sup>40</sup>

According to earlier studies (EC 2010) for those Member States where Prüm has been fully implemented, the possibility of almost instantly knowing if a certain type of information is available in another Member State, without the requirement for a formal request, is regarded as being extremely helpful during investigations, avoiding unnecessary time wasting and increasing efficiency. Difficulties arise mostly at the stage of follow-up requests where the choice of communication for the exchange of further information varies and the different legal and procedural formats for obtaining follow up information are orchestrated by a range of law enforcement and judicial authorities.

Where Member States are not yet engaging at all with the Prüm system, key issues raised pertain to a lack of available resources to implement the technical and human resource infrastructure required. Although EU funding was provided to assist countries in establishing the necessary framework, a number of Member States did not have the facility to routinely collect and store the quantity of DNA and biometric data held by their EU partners elsewhere (Bellanova 2008) and have had to address this significant and costly deficit. There have also been concerns cited pertaining to the level of accuracy of the tests applied to the DNA analysis within Prüm, which it is thought may lead to false positive results.

In 2007 The House of Lords EU Committee<sup>41</sup> of the UK produced a report on the Prüm Convention raising concerns regarding a wider EU access to databases which were subject to each individual, Member State's processes of quality assurance. As well as the aforementioned issues of accuracy, they stressed that future evaluations of Prüm also need to ensure that security is maintained by the receiving State, which has yet to be assured in a number of cases.<sup>42</sup>

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<sup>40</sup> See the Communication from the Commission to the European parliament and the Council Strengthening law enforcement cooperation in the EU: the European Information Exchange Model (EIXM)\* COM/2012/0735 final\*/

<sup>41</sup> The House of Lords EU Committee (2007) Prüm: An effective weapon against terrorism and crime. 18th Report of session 2006-07

<sup>42</sup> Ibid

### 3.7 Bilateral Agreements, liaison officers, regional developments and informal arrangements

Whilst a number of EU wide provisions for information exchange have been in existence for some time, police cooperation and information exchanges continue to rely heavily on individually negotiated bilateral and multilateral arrangements. These are not just reserved for relationships with countries outside of the EU, they also continue within the EU itself.

Spapens (2008) discusses the practical solutions that were explored in the Meuse-Rhine Euro region between Belgium, Germany and the Netherlands, including the development of a joint information centre. The police and legal cooperation required with regard to various types of criminality across common shared borders, was considered to be able to encompass more far reaching methods if established via bilateral and multilateral arrangements, rather than via the opportunities and systems available to the EU overall (Spapens 2008 p239).

The centralisation of key processes of information exchange are often seen to be overly bureaucratic and time consuming and where appropriate regional protocols have been agreed, the response to requests for assistance in the investigation of crime, the detection and apprehension of criminals is far more immediate. However, the harmonisation of bilateral agreements within wider EU directives on criminal law and information exchange needs to be assured, to ensure that core principles of data protection and privacy remain secure.

Bilateral agreements predominantly occur where particular issues of transnational crime have emerged between countries either due to shared borders and/or where particular patterns of migration and freedom of movement have developed. Typically they are put in place to allow an exchange of information and cooperation between law enforcement agencies on issues of organised crime, such as illicit drug trafficking, money laundering, trafficking in persons, terrorism, financial and economic crimes. Agreements will cover procedural matters such as the use and security of data, criteria for a refusal to exchange information and how the financial costs and resource implications of joint working will be met. It may also involve joint initiatives in training to improve the capacity of Member States to work together to share expertise in the prevention, detection and investigation of criminal activities.<sup>43</sup>

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<sup>43</sup> As an example see Department of Justice and Equality for Republic of Ireland, Bilateral Agreement of cooperation between Ireland and Romania in combating serious crime (2013) accessed at: <http://www.justicee.ie/en/JELR/Pages/PR13000011>. There is also a Memorandum of Understanding between the Republic of Ireland and Northern Ireland on information exchange on those sex offenders who move across their shared land border, this has extended to regular information exchange on cases of concern, and has involved joint training on, and joint adoption of, risk assessment methods.

Informal networks of information exchange are also used. Alain (2001) for example noted the pragmatic use of informal networks and contacts by operational police personnel in order to 'get the job done'. This can at times result in alternative systems to more formal information exchange mechanisms. However, Single Points of Contact (SPOCs) have been recognised as critical to streamlined and effective communication systems.<sup>44</sup> Liaison officers are also used across EU Member States (see Block 2010) in order to support existing formal mechanisms of information exchange, often used to expedite investigations and speed up operational matters.<sup>45</sup>

'Liaison' is a fundamental aspect of policing and despite the agreements that are in place as described in this chapter or central points of contact, there will always exist in practice channels that are developed by staff across Member State boundaries. Law enforcement personnel may be posted on behalf of their agency in another Member State, often located in their national embassy within the host country. The exact role of the liaison officer varies according to the identified needs of the national and host member states but the officer is likely to maintain a number of privileged contacts.<sup>46</sup> At times such channels will be proactively used to share information about crime and terrorism.

Regional arrangements also exist, with recent work undertaken to strengthen regional co-operation on combating organised and economic crime in south east Europe for example (see: CARDS Regional Police Project, Council of Europe; [http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/projects/CARPO/carpo\\_en.asp](http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/projects/CARPO/carpo_en.asp); accessed January 9th 2014).

In Nordic Member States, including Norway which is not a Member of the EU but is part of the European Free Trade Area, law enforcement cooperation exists, again largely in response to serious organised crime, and there is a Nordic Liaison Officer Network (see: Study on the status of information exchange amongst law enforcement authorities in the context of existing EU instruments (2010), available at: [http://ec.europa.eu/dgs/homeaffairs/doc\\_centre/police/docs/icmpd\\_study\\_lea\\_infoex.pdf](http://ec.europa.eu/dgs/homeaffairs/doc_centre/police/docs/icmpd_study_lea_infoex.pdf); accessed January 22nd 2014).

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<sup>44</sup> Communication from the Commission to the European parliament and the Council Strengthening law enforcement cooperation in the EU: the European Information Exchange Model (EIXM)\* COM/2012/0735 final\*

<sup>45</sup> Operational issues are further discussed in Section 3.12.

<sup>46</sup> See Block, L (2010) Bilateral Police Liaison Officers. Practices and European Policy in Journal of Contemporary European Research Vol 6 No 2

### **3.8 Single Point of Contact, Central Bureaux**

The varied assignment of responsibility for the coordination of information exchanges on cross border criminal activity issues is a recurring topic in the discussion of existing mechanisms for communication between Member States. A variety of national structures exist to facilitate the various mandatory and voluntary opportunities for increased cooperation in policing matters across the EU community.

Having a national Single Point of Contact (SPOC) where all information exchange channels converge, to confirm requests as being necessary and appropriate and where access to all relevant registers and databases can be acquired, has been promoted as a key strategy for Member States to strengthen their contribution to a European Information Exchange Model (EU 2012). Most Member States have international police cooperation departments, but not all of them have the multi-agency police/judicial connectivity characteristics promoted for SPOCs. It is held that the responsibility for coordinating the various national competences for the collection, storage and transfer of different types of criminality information held nationally lies with the receiving Member State and the requesting Member State should not be required to appraise themselves of all 28 National structures for data retention and exchange. However in order for a SPOC to be effective as a first point of contact where all enquiries can be facilitated or redirected to the appropriate authority, the purpose of the request being made must also be clearly explained (EC 2010).

### **3.9 The Convention on the Transfer of Prisoners 1983 European Treaty series ETS no 112 and additional protocol to the Convention on the Transfer of Sentenced Persons ETS No 167. Framework Decision 2008/909/JHA**

Although not an information exchange mechanism utilised in the investigation or prevention of crime, the extent to which EU Member States engage in a joint proactive management of offenders across the EU community is illustrated in the implementation of the conventions on the Transfers of prisoners and sentenced persons. The provision mandates for the consideration between Member States of a sentenced prisoner's return to their national Home State to serve their sentence, following the key principle that it is in the interests of the offender to be in closer proximity to their family and cultural community to further assist in their rehabilitation. There are a number of conditions that have to be met for this to occur, including assessments regarding the safety of the prisoner.

The responsibility for the sentencing judgement remains with the sentencing State. Dual liability has to be determined, that is that the offence is also considered a crime in the

receiving State. Requests are initiated and responded to by the Ministry of Justice in each State. It is a framework of cooperation not obligation and receiving Member States are not compelled to agree to a transfer request.

In addition there are protocols for cooperation where a sentenced prisoner has fled back to their Member State of Nationality to avoid the execution of their sanction in the sentencing State. Similar principles apply for the conversion or continued enforcement of the original sentence by the Member State of Nationality. The additional protocol ETS 167 removed the need for consent due to the low rate of voluntary agreements made under ETS No 112.

### **3.10 The Council Framework Decision 2008/947/JHA, “the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions”**

As of December 2011 a mechanism for the transfer of the community supervision of offenders across EU Members States also came into effect. FD 2008/947/JHA facilitates “the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions.” It enables the social rehabilitation of convicted foreign EU national offenders by transferring a probation measure or alternative sanction, from the EU Member State in which they are sentenced, to their home country within the EU, in order for them to undertake their community sentence.

There are a number of grounds by which a Member State of Nationality may also refuse to accept a transfer. The receiving State has to be able to provide the sanction imposed and it cannot contravene their own domestic law, which may occur for example in cases where definitions of offences vary across Member States, such as ages of sexual consent. The transfer of supervision can also be declined if it is for a period of less than six months. The overall philosophy is to facilitate the offender travelling to an environment which may be more conducive to their positive rehabilitation, but where any risks of harm posed can also be managed effectively.

The challenges remain for each EU Member State to make this Framework Decision work within its own national jurisdiction (O’Donovan 2009). The nature of how the community supervision of offenders is managed and funded varies significantly across the EU community. The disparities between national probation systems and community sanctions across the EU remain stark, with varying competencies, requirements of consent and use of other intervention strategies such as electronic monitoring (ISTEP 2013). A number of

Member States, including the United Kingdom have not yet transposed the framework decision into domestic law.

The experiences of supervision transfers between Scotland and England and Wales demonstrate that a plethora of issues have to be resolved to ensure that a proportionate response to the index offence, as imposed by the sentencing court, can be achieved by the receiving country. Achieving this within the EU framework sixty day decision time limit may prove unrealistic where protocols for transfer have not already been clearly established.<sup>47</sup>

### **3.11 Carrier Communication of passenger data, Council Directive 2004 82/EC**

Whilst the overview provided so far has concentrated on the exchange of information pertaining to criminal activity, key to the SOMEK project aims is also the consideration of to what extent the movement of EU citizens can and should be scrutinized. According to this Directive, air carriers are required to communicate information concerning their passengers travelling to an EU border crossing. This information is supplied, at the request of the authorities responsible for carrying out checks on persons at the external borders of the EU, to improve border control and to combat illegal immigration more effectively. The data is forwarded to these authorities for passenger registration purposes and in principle they should be transmitted electronically. Once scrutinized the data should be deleted by these authorities within 24 hours of the transmission, provided that the passengers have arrived safely within the territory of the Member States.

Following the terrorist acts of September 11th 2001, The EU was under increasing pressure to establish more robust passenger information sharing protocols with the United States of America (USA). However USA data protection provisions were incompatible with the EU framework, requesting far more information and retaining the data for far longer than their EU counterparts (Yadar 2009, Nino 2010). The EU subsequently concluded negotiations for three additional bilateral agreements on the provision of passenger name records (PNR) with the USA, Canada and Australia. In 2010 the EU Commission adopted a strategy for the approach to transfers of PNR data to non EU countries and that bilateral agreements to do so should observe the following conditions:

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<sup>47</sup> See National Objectives for Social Work Services in the Criminal Justice System: Standards - Probation Chapter 5. Sec 116. The legislation governing transfers from Scotland to England and Wales is to be found in section 234 of the Criminal Procedure (Scotland) Act 1995. The provisions for transfers from England and Wales to Scotland are to be found in the Powers of Criminal Courts Act 1973 and in Schedule 2 to the Criminal Justice Act 1991.117. The same procedures as outlined in paragraphs 96 to 99 above should apply to cross-Border transfers as they would apply to transfers within Scotland.118. Both the officer seeking the transfer and the new Supervising Officer should inform the probationer that the court transferring the order retains residual powers to deal with breach of the order. Only the court transferring the order can in such circumstances sentence the probationer for the original offence.

- PNR data should only be used to fight terrorism and serious transnational crime.
- The categories of PNR data that may be exchanged should be limited to what is necessary for that purpose and be clearly listed in the agreement.
- Passengers should be given clear information about the exchange of their PNR data, as well as have the right to access their PNR data and the right to effective administrative and judicial redress. This helps ensure full respect for privacy and that any violation of privacy will be remedied.
- Decisions having adverse effects on passengers must never be based on an automated processing of PNR data. A human being must be involved.
- Non-EU countries must ensure a high level of data security and an effective independent oversight of the authorities that use PNR data.
- PNR data cannot be stored longer than necessary to fight terrorism and serious transnational crime, and non-EU countries should gradually limit access to the data during the retention period.
- A non-EU country may share PNR data with other countries (onward transfer), but only if those countries respect the standards laid down in the PNR agreement between the EU and the non-EU country and only on a case-by-case basis (Com 2010 492 final).

### 3.12 Deportation

Again, whilst not a mechanism for information exchange, deportation is a process whereby the communication of information on known serious violent or sexual offenders being returned to the Member State of Nationality is relevant to a number of law enforcement and offender management agencies. However should varying concepts of “who needs to know” continue to prevail, then the deportee may quickly be able to avoid any further official scrutiny upon their return to their Member State of Nationality.

The deportation of EU Nationals from other EU Member States can only occur under a very specific set of circumstances. Deportation from the UK is possible for Non EU foreign nationals who have offended and received a custodial sentence of 12 months or more, for EU Nationals this increases to a sentence of 2 years imprisonment or more. The issue of a deportation order on an offender is conditional on the requirement that the conduct of the individual concerned represents a genuine, serious and present threat to the sentencing State. However this is also balanced with a judicial consideration of Human Rights and the risks of harm posed to the offender following their return to their home country. In principle the latter should be less contentious across EU Member States who are obligated to ensure

that a number of fundamental principles of justice and humanity are sustained across the EU community.

Deportation issues are negotiated by immigration departments. However when the subject concerned is a serious violent or sexual offender their return has a particular significance for the receiving Member State of Nationality. Law Enforcement Agencies are frequently involved in information exchanges to secure the safe transit of a subject, but to what extent this then results in an ongoing management or surveillance of the individual upon their return is less clear. There are positive examples where an assessment for the need to disseminate additional information to the Member State of nationality are made. Mechanisms such as Interpol diffusions may then occur to highlight to the relevant country that the offender has concluded a custodial sentence with details of the index offence, the sentence imposed and intended travel dates and flights. However the obligation to continue to monitor an individual in any manner once a formal sanction has been completed differs significantly across the Member States. Therefore the provision of such information and any active response to its receipt is inconsistent.

### **3.13 Mechanisms for the Exchange of Criminal Information and their potential in relation to a proactive/preventative approach**

Table 3.1 details the main existing mechanisms for information exchange between law enforcement agencies across the EU community as relevant to the SOMECE project. These are instruments which are currently utilised by Member States for a variety of purposes including the investigation, detection and prevention of crime. The latter is of the greatest interest to the SOMECE project aims and some initial observations are made here on the potential of these mechanisms to be utilised further in the exchange of protective/preventative exchanges on serious violent or sexual offenders, but also identifying some of the most immediately apparent challenges in pursuing this aim.

The field work analysis report gives further insight into how many Member States are actually already utilising one or more of these exchange mechanisms to engage in preventative information exchanges on serious violent or sexual offenders and perceptions of their effectiveness. The field work commentary also examines the current disparities in EU practice and the varied interpretation of the threshold criteria which needs to be met prior to any preventative exchange of information being considered by a Member State.<sup>48</sup>

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<sup>48</sup> See SOMECE field work report accessible at [http://www.cep-probation.org/default.asp?page\\_id=553](http://www.cep-probation.org/default.asp?page_id=553)

This table starts to highlight the complex array of possible forms of communication that may occur under the banner headings of Interpol and Europol and indeed the diversity of bilateral, multilateral and liaison officer relationships. It must be noted therefore that when references are made to such options in broad terms such as this, that in reality this may relate to a varied collection of options that Interpol, Europol and individual formal agreements provide.

It is also the case that some mechanisms such as informal/regional arrangements may not immediately signify a high level of relevance in terms of how they might be developed to improve effectiveness in the preventative exchange of information on serious violent or sexual offenders. However they still retain a level of significance for the SOMEK project in terms of the identification of critical factors for success, in this case the establishment of professional relationships of trust, mutual respect and shared understandings of the issues of criminality and public protection being identified.

Table 3.1, Mechanisms for the Exchange of Criminal Information and their potential for a proactive/preventative approach

Mechanism	Primary purpose	Accessibility/Utilisation across the EU	Challenges/Benefits	Potential for use in Proactive/preventative exchanges
Interpol Dissemination processes	Interpol National Central Bureaux (ICB) To track down wanted persons, facilitate international information exchanges for the detection and prevention of transnational crimes. Operates I-24/7 and other communication channels	I 24/7- A restricted access Internet portal for Global police communication. Predates Europol and accessible also for countries bordering, but currently outside of the EU. Other Interpol dissemination channels- Diffusion- an email which can target single states, groups, regions or all of the Interpol members	A vast amount of information is contained on the I 24/7 which authorised personnel can access at a National level, running various types of search for information. 190 Member States, so information placed on the Interpol system by i-link is accessible outside of the EU. Targeted dissemination channels allow for direct communication with other Member States relating to serious violent or sexual offenders. But specific details of an intended destination would be needed, which with "open borders" may lead to wider dissemination There is some reticence in the use of Interpol channels from some EU Member States, advocating Europol as the primary source of exchange (EC 2010). I 24/7 data is accessible outside the EU where data protection rules may vary even further.	Whilst it is the case that I 24/7 is accessible to all States who are Members of Interpol, targeted disseminations can be made to single states/groups and regions. For this to be of further use to SOMECE - States can actively assess which form of Interpol communication is appropriate depending on the nature of the communication to be made.
Interpol Green Notices	Provides warnings and criminal intelligence information on serious criminals who are likely to reoffend posing a serious threat elsewhere.	Used for a variety of serious offences on offenders who may be travelling extensively so requiring systematic review by Interpol Central Bureaux.	Green notices are reportedly used for the tracking and monitoring of sexual offenders. Notices are used for a wide range of offenders and the volume of notices issued overall is high (De Poubax Lundin 2010); this can have operational challenges for individual Member States. There is no obligation for action upon receipt of a Green Notice and or an individual who is the subject of a Green Notice and therefore responses can vary.	There is potential for Interpol Green Notices to contribute to the management of serious sexual or violent offenders known to be travelling but there are operational challenges such as volume and individual Member State responses to notices, which are not obligatory.
Europol (liaison officers, Information system)	Investigation of Organised Crime, terrorism and other serious crime affecting two or more Member States. Joint cross border investigations.	Europol is primarily mandated to assist EU member states in combating serious organised crime. The Europol Information System (EIS) is a database of information supplied by member States on such crimes occurring/linked across EU borders. Member states engage through their Europol National Units (ENU) and since 2011 also other designated law enforcement authorities. SIENA, Europol's secure information Exchange Network Application provides a secure mechanism for the exchange of information with Europol and between member states. Each member State maintains a liaison bureau in the Europol Headquarters in the Hague. Communication also occurs directly between the Europol liaison officers posted there, each a member of their own ENU. Also via specialist intelligence analysis units, called focal points, who provide strategic and tactical intelligence reports on various areas of organised criminal activity. Analysis work files allow Europol to provide operational analyses to support cross border investigations.	There are European Commission proposals for a significant reform to increase the role of Europol as a central coordination point of all types of information exchange between Member States. "SIENA messages are structured, can handle large data volumes and are exchanged with a high level of security" (EXIM) / COM/2012/0735 final */ The Europol Council decision 2009 2009/936/JHA sets out the criteria for information sharing across the EU via the Europol network. In addition to Terrorism and organised crime, a further annex list of serious offences which Europol may become involved with are listed. See end of table Access to Europol data is defined and restricted by 4 Classifications, Restricted, Confidential, Secret and Top Secret. The data protection and management of information is clearly stipulated by Directive 95/46/EC (8). Proposals to amend and develop this are pending	Some Member States have moved to a more systematic use of Europol channels (EC 2012). It would need to be established that SOMECE offenders would meet the criteria set out by the annex list There may be guidance required in terms of the level of detail provided and the concerns identified regarding the imminent commission of a further serious offence. This may be interpreted differently by Member States in relation to SOMECE offenders, where the sharing of such information via Europol may not be commonplace. Europol's analytical function for these type of offenders may be limited if there is huge inconsistency in utilising this channel for this purpose across the EU

Mechanism	Primary purpose	Accessibility/Utilisation across the EU	Challenges/Benefits	Potential for use in Proactive/preventative exchanges
SISI/ SIRENE	SIRENE Bureaux established in all Schengen States. Alerts on persons and objects to maintain security, following the lifting of internal borders.	A large scale system, over 43 million alerts ((EXIM) /COM/2012/0735 final *) accessible on a hit or no hit basis to front line officers. For SISI II, alerts to support police cooperation between police and judicial authorities in criminal matters will be accessible to all EU Member States.	Can be directly accessed on a hit/no hit basis by frontline operational law enforcement officers. Article 36 alerts. Discreet checks and the seizure of evidence are possible where a serious threat to public security is identified "a) where there is a clear indication that a person intends to commit or is committing a serious criminal offence. b) Where an overall assessment of a person gives reason to suppose that that person will also commit serious criminal offences in the future." For relevant offences see end of table. The limited evidence available suggests that SISI II is more likely to be used for serious organised crime rather than the sole transient serious sexual or violent offender.	SOMEc offenders are likely to require an assessment under criterion (b). There is potential to increase the relevance of SISI II for SOMEc offenders but this may well require further guidance and agreement on how to operationalise criterion (b).
ECRIS	Conviction data exchange. Establishing a standardised electronic connection of criminal record databases across the EU.	A mandatory procedure across all EU Member States, to notify a Member State of Nationality of any convictions handed down to national from their country in another EU member states. In many Member States this is a judicial function and the police do not have direct access to such information. Deals with historical, factual information.	A few Member states have yet to link electronically and paper transfers still occur in such cases. Managed by different types of personnel and departments in different states. Varying national laws as to whether convictions occurring in other member states can be formally noted in the national state of origin.	Not directly relevant in relation to proactive/preventative exchanges without conviction.
PRŪM	Automated access to national databases for the exchange of DNA, finger prints and vehicle registrations. Can be utilised for all forms of crime.	Operates on a hit or no hit basis in the first instance. A supplementary request for information can then be made to the Member State where the data match has occurred. Again a number of Member States have not yet engaged with PRŪm.	Assists with investigatory work, detection and confirming identities. May have a supplementary role in tracing a mobile serious or violent offender and/or quickly ascertaining their identity when they have come to the attention of another law enforcement authority.	Reactionary rather than preventative, but can assist in identifying patterns of movement across the EU by an offender.
Embassy Liaison Officers	Law Enforcement Officers posted on behalf of their agency in another Member States.	Usually seconded to their country's embassy in the host member state.	The exact role of the liaison officer is subject to national differences and regulations in their host country and can differ between different Member states. They develop and maintain a network of privileged contacts. Can provide an intelligence and support role, facilitate joint investigations and requests for information sharing, arrests, extraditions.	Some Member States may prioritise this connection above other forms of information exchange. May be useful for single high risk cases, but generally less systematic in relation to SOMEc. The issue for SOMEc may be more about avoiding miscommunications and/ or a duplication of efforts and ensuring there is clear guidance and protocols on how different issues of criminality are addressed between Member States.

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Single Point of Contact (SPOC)	The central National coordination of all forms of EU information exchange on criminality.	Not an exchange mechanism but the central coordination of all channels of communication which brings together the SIRENE Bureau, ENU and Interpol National Central Bureau and contacts for other channels. Whilst there are a number of International Police Cooperation departments only some contain all the mechanisms proposed via a SPOC. It is advocated that it should include all law enforcement agencies (EC 2012).	Places all key mechanisms for exchange together into a single organisational structure. It is thought that this makes it easier to ensure a prompt validation of a request and an appropriate response. Filters what is coming in and what goes out. Needs to improve efficiency rather than add an additional layer of bureaucracy.	A number of Member States already have SPOCs or integrated Bureaux and comment on their effectiveness (EC 2010). There may be resource implications and additional challenges for Member States with multiple jurisdictions. Connectivity between law enforcement and judicial departments may also need to be considered where different responsibilities for data retention are held nationally.
Formal Bilateral/Multilateral	Formal exchange cooperation agreements between one or more Member States addressing shared interests in particular criminal and judicial matters.	Various examples Nordic, East European, and Memorandum of Understanding between UK and Republic of Ireland on mobile sex offenders.	Mainly addresses specific cross regional issues; or where countries share borders; or have historical and operational experience of mobile offenders across mutual borders. For example, the management of serious sexual offenders across the Northern Irish border with the Republic of Ireland- this is supported by a Memorandum of Understanding between the UK and the Republic of Ireland. However, benefits tend to be local or regional with limited pan European relevance, and in some instances the target group of such formal bilateral and multilateral arrangements is serious organised crime.	Further independent evaluations are required on the successes of such initiatives. The relevance for SOMECS offenders is also likely to be determined at a political/ policy level between Member States where recurring issues regarding travelling violent or sexual offenders are identified. Also where interim measures are agreed between Member States, pending wider pan European initiatives.
Informal regional arrangements	Where policing Units have close geographical relations.	Occurs informally, as part of other regional meetings, ad hoc communication.	Informal arrangements are seen to be more expedient by operational law enforcement officers, with personnel retreating back to more centralised formal mechanisms if information then has to be utilised in a particular way for prosecutions etc. It relies on relationships/good will/trust- all of which can be lacking in more formal centralised channels of communication where things may be more restricted in terms of sharing as a result. However, there are issues with accountability and audit trails of decision making, particularly in the cases of failure or challenge on human rights grounds.	The lack of formalisation raises concerns regarding consistency and accountability. However the successes to be had in the development of good professional relationships, joint training activities, shared understandings and consultations between key Law Enforcement personnel across EU Member States when implementing new measures are useful considerations for SOMECS.







1. Europol Council Decision (ECD) 2009 Annexe. 2009/936/JHA. Other serious offences that Europol may assist with where two or more Member States are affected:

unlawful drug trafficking, illegal money-laundering activities, crime connected with nuclear and radioactive substances, illegal immigrant smuggling, trafficking in human beings, motor vehicle crime, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage taking, racism and xenophobia, organised robbery, illicit trafficking in cultural goods, including antiquities and works of art, swindling and fraud, racketeering and extortion, counterfeiting and product piracy, forgery of administrative documents and trafficking therein, forgery of money and means of payment, computer crime, corruption, illicit trafficking in arms, ammunition and explosives, illicit trafficking in endangered animal species, illicit trafficking in endangered plant species and varieties, environmental crime, illicit trafficking in hormonal substances and other growth promoters.

2. Schengen SISII Article 36 alerts relevant offences:

participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.



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## Section 4 - Implementation Issues

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A review of existing exchange mechanisms for information sharing on criminality across EU Member States starts to suggest some core themes in relation to the varying perceptions, interpretations and practices across the EU, albeit any conclusions are drawn in acknowledgement of some of previously stated limitations of the review methodology.

O'Neill (2011) highlights the varied patterns of responsibility across law enforcement agencies within the EU, with similar functions being undertaken by the police, investigatory magistrates and prosecutors, answerable to various different types of governmental divisions and departments dependent on the national jurisdiction. A uniformity of approach to cross border functions becomes ever more challenging as a result.

Alain (2001) has noted that the incremental development of EU information exchange mechanisms over time has made them complex. Within such a context formalising police co-operation can be difficult to translate into useable, operational procedures. Formal procedures and systems tend not to fit with existing police practices and structures, and attempts to 'bolt them on' can fail (Alain 2001 p126). The 'executive driven' nature of much policy development of EU instruments in the area of information exchange has been seen as the main reason for their lack of 'practical orientation', exacerbated by the limited participation of operational law enforcement personnel (Block 2010 p195; see also: Bigo 2000; Block 2008). Consequently there can be limited impact on police information exchange practices. Grijpink (2006) has argued that better communication and cooperation is required rather than a centralisation of systems.

Currently police within the EU can utilise a number of differing information exchange mechanisms including Europol, Interpol, ECRIS, SIS II, Prüm and designated liaison officers (Block 2010). Interestingly, of the 541 liaison officers deployed by Member States in 2008 to other countries in order to aid information exchange and police cooperation, 38% were located in the EU itself, despite the existence of other channels for information exchange (Block 2010: p200 citing Council 2008). Whilst speculative, it is possible that multiple channels can create confusion if the rationale and purpose of each channel is not clear. Hobbing for example has argued that sensitivity, urgency, complexity and the requirement for 'active support' all impact on the choice of channel, including the choice of informal ones, regional arrangements or the use of known and trusted liaison officers (2008).

Informal networks and procedures can become the preferred option for on the ground officers. Alain also notes that research into this area will encounter a key problem, notably that senior policy personnel may offer an 'official discourse' that all is well. However, field

officers will note operational problems, usually that formal agreements can be complicated and time consuming, and result in delays to investigations for example (2001 p127). Information exchange can also be asymmetrical, i.e. one country gets more out of it than another and this can be resented (2001 p125).

Magee (2008 p60) highlighted the lack of awareness and confusion exhibited by frontline police officers of the sources of international exchange information available to them and their accessibility. This was exacerbated he contends by the confusing array of possibilities for exchange which were utilised to varying degrees by different countries, jurisdictions and governmental departments and calls for a rationalisation and clarity of approach across the EU. Recommendations have been made for a Single Point of Contact for all forms of International Police Cooperation, to streamline communication systems.<sup>49</sup> The need for staff training resources to be deployed in this area is also key (Magee 2008).

Magee (2008) has also commented on the residual reactionary approach to sharing data on criminality across borders and the barriers to operating formal agreements, for example police rivalry across national borders and within national borders. This can result in lack of co-operation and inefficiencies which are intensified by supra-national agreements (Alain 2001 p125). Further barriers to operationalising formal agreements exist, most notably, that perceptions of a crime problem are not shared across EU Member States. This can result in friction or lack of co-operation, exacerbated 'when a country considers its effort against a problem as being optimum, but not considered as such by others' (Alain 2001 p124). This can be exacerbated by distance between EU bureaucrats and operational staff; and the potential that negotiated agreements at the 'supra level' are often difficult to implement at the national or local level. This can result in significant gaps in the system. As Alain puts it: 'the translation of negotiated agreements into realizable practices is still restricted to each partner's capacity to do it as effectively as it was intended at the negotiation table' (p126).

In addition, law enforcement personnel appear wary of sharing "nonfactual" information Mahmood (1995) and Parkin (2011). Assessments and judgments of the level of harm an offender may pose are not commonly seen to be a primary function of many police authorities, exacerbated by the police focus on crime solving rather than crime prevention.<sup>50</sup> Therefore whilst some contextual, background information may be provided, it is often only

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<sup>49</sup> Communication from the Commission to the European parliament and the Council Strengthening law enforcement cooperation in the EU: the European Information Exchange Model (EIXM)\* COM/2012/0735 final\*/

<sup>50</sup> It is possible to contend that there has been some movement towards crime prevention in policing work since 2001, given impetus by prevention of terrorism, prevention of crime by high risk child sexual offenders, preventative work on drug and people trafficking, and the prevention of serious organised crime. However, Alain's basic contention that information exchange tends to be driven on a 'case by case basis' may still be the predominant position, and with most information exchange occurring post-conviction rather than proactively to prevent crime.

where it is supported in the first instance by more tangible evidence of criminality such as a prior offending history. The seriousness of the offending of an individual is therefore determined by criminal records alone in the main.

Exchange across national borders does not necessarily mean that information will filter down to the local level of policing for appropriate actions to be taken in individual cases. Block (2010 p200) notes that 'only a small number of police officers in Europe are engaged in full time transnational co-operation', most police officers are not, and there can be significant challenges in linking "local to global".<sup>51</sup>

Difficulties in 'on the ground' change implementation can be underestimated, particularly that differing levels of police discretionary powers within and across nations can result in differing levels of resistance to procedures, or differing levels of negotiating around formal procedures as officers seek to save time by using informal networks. This is a position supported by Walsh (2006) who has argued that police officers can be reluctant to share information to avoid compromising confidential sources or ongoing investigations, preferring to speak to police personnel they know rather than trusting data exchange mechanisms. Speed, trust and knowledge of the person can be instrumental in the informal network of information exchange used by police officers (see Block 2010 for example. See also Alain 2001 p124-127; see also: Bigo 2000; Grijpink 2007; Hobbing 2008; Jacobs and Blitsa 2008; Stelfox 2003).

However, Brunnée and Toope have argued that not only do practitioners adapt to new structures and demands, sometimes the 'on the ground' urgency and need to do things itself creates a pressure from practitioners for further change (2001 p70; see also Walsh 2006). In these circumstances police themselves begin to build pressure for greater co-operation even if EU structures and political will lags behind. For example, as crime has become more transnational, police personnel have recognised the need for increased information exchange and co-operation (Jacobs and Blitsa 2008).

However, this pressure and change at both political and operational levels has largely been driven by concerns over terrorism or organised crime which is occurring transnationally, operating across borders, and where international police cooperation appears far more acceptable to Member States. In contrast, increased co-operation and information exchange continues to remain challenging when it relates to the activities of the individual transient offender. It appears to be the individual assessment of the level of harm posed by a

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<sup>51</sup> See HM Government (2011) *Local to Global. Reducing the Risk from Organised Crime*. London: HM Government. See also HM Government (2013) *Serious and Organised Crime Strategy*. London: HM Government.

particular offender and differing perceptions of the rights of the Member State of Nationality to convey their concerns to others, where police cooperation across borders continues to meet its greatest challenges.

## Section 5 - Implications for the SOMEK Project

The challenge of globalised and transnational crime is becoming more acute. Serious sexual and violent offenders are becoming increasingly mobile, and in some cases are actively seeking crime opportunities and decreased regulation, avoiding any formal scrutiny and oversight of their actions by travelling to other Member States and other non EU countries (Messenger 2012). EU mechanisms to manage the increased transnational nature of serious crime, including by serious sexual or violent offenders, have been growing, but this has tended to be in an incremental and non-systematic way (Alain 2001; Magee 2008). This has resulted in a range of measures which can be challenging for practitioners to fully understand and operate, and at times an unhelpful divide between 'executive driven' initiatives and practical operation (Alain 2001). The in-depth interviewing stage of SOMEK will to some extent test these findings and establish the current situation across law enforcement personnel in differing Member States.

'Local to Global' to local remains a perennial challenge, exacerbated by a lack of knowledge and an under-use of key information exchange mechanisms ((EIXM) /\* COM/2012/0735 final \*/ and De Poubaix Lundin 2010), but also by different policing and judicial systems within the Member States. The penetration of information received at a Member State level to local policing levels is also problematic, hindering the extent to which knowledge of individual cases 'passes down' and preventing effective actions being taken by local law enforcement officers

However, good practice examples of effective co-operation and information exchange do exist. As noted within this review where the crime issue is organised and crosses borders (for example football hooliganism), little opposition to co-operation and proactive information exchange is experienced (ICFGHK 2013<sup>52</sup>).<sup>53</sup> However, the prevention of crime by a single mobile violent or sexual offender appears to present Member States with a greater number of legal, political, cultural, and procedural challenges. The tension between risks, rights, and freedom of movement presented by increased regulation of serious mobile sexual or violent offenders is acute. However, this is not necessarily insurmountable. The Council of Europe (2010) has recognised that the rights of victims and EU citizens to protection are

<sup>52</sup> (ICFGHK 2013) Study on possible ways to improve the exchange of information on travelling violent offenders including those attending sporting events or large public gatherings. Final Report for Directorate-General for Home Affairs. Available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/police-cooperation/general/docs/study\\_on\\_improving\\_the\\_info\\_exchange\\_on\\_travelling\\_violent\\_offenders\\_march\\_2013\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/police-cooperation/general/docs/study_on_improving_the_info_exchange_on_travelling_violent_offenders_march_2013_en.pdf); accessed January 9th 2014.

<sup>53</sup> Similarly information exchange and co-operation to combat terrorism receives little if no opposition; and see for example: Council of the EU (2010) Draft Internal Security Strategy for the EU: "Towards a European Security Model" 5842/2/10 REV2.

fundamental, with crime prevention making a critical contribution to the reduction of physical and psychological harm. The key is to achieve a reasonable and defensible balance between rights of (ex) offenders and victims, potential victims and citizens.

The De Pourbaix-Lundin report to the Council of Europe in 2010 recommended improvements in the management of high risk offenders by Member States and an increase in the quality and regularity of information sharing on sexual offenders across the EU. This in part recognised the increased risks presented by this group of offenders and the actions that will be required to manage them across Europe more effectively. In addition, high profile cases can (and have) changed a Member State's view of the need for increased domestic management of serious violent or sexual offenders,<sup>54</sup> and change perceptions on the need for improved pan European information exchange upon them. Changes in the vetting of sexual offenders for employment with children are also a case in point. However, it is difficult to discern the extent to which high profile cases are a significant lever for pan European change.<sup>55</sup> In addition, Interpol Green notices potentially offer an important instrument in the tracking and reduction of serious crime by travelling sexual or violent offenders. However, whilst the problem arising from travel to south east Asia has been well targeted, the travel of such offenders within the EU receives far less scrutiny. SISII is also more likely to use alerts related to organised crime than on individual, transient sexual or violent offenders although there is potential perhaps for developments in this area with broader shared understandings of threshold criteria.

Acceptability of ECRIS (notwithstanding remaining implementation issues) is a useful starting point for considering methods of information exchange which have received little opposition and are relatively consistent in their pan European application. However, data is limited to conviction data only, requiring no additional assessment or use of 'soft data; and exchange is

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<sup>54</sup> The French sex offender register (Fichier Judiciaire national automatise des Auteurs d'Infractions Sexuelles (FIJAIS)) was implemented on June 30th 2005, following a high profile case with 66 people charged with raping, prostituting and failing to protect 45 children (Lichfield 2005; Thomas 2011). The French register has been challenged in the ECHR on the grounds of being punitive, but this was dismissed as it was seen as having a 'purely preventive and dissuasive aim'. Registration was not seen as onerous enough to justify the label punishment. The retrospective nature of the register was also upheld; again because the register was seen only as a crime prevention measure and not seen as punishment. The right to privacy (Article 8) was not contravened as the register is confidential and only open to certain professionals in the course of their duty. (See Thomas 2011: 84; Bouchacourt v France (Application no. 5335/06); Gardel v France (Application no. 16427/05); and MB v France (Application no. 22115/06). The Czech Republic initiated a sex offender register following the case of Antonin Novak, who entered from Slovakia with a history of serious sexual offending by was unknown in the Czech Republic. Novak sexually assaulted and murdered a 9 year old boy. This case also highlighted the need for information exchange across borders.

<sup>55</sup> Robert M was originally from Latvia. He left Latvia and lived in Germany for a while where he worked in a daycare centre. He left Germany after having served a prison sentence for distributing child pornography in 2003. Then he moved to The Netherlands. There was no exchange of criminal information and he managed to get a job in The Netherlands at other daycare centres, child care facilities and as a private baby sitter. The manager of the main centre where he worked did not follow the national employment vetting rules. But even if this had occurred it is not known if Robert M's previous convictions in Germany would have come to light. Robert M managed to sexually assault dozens of children in his care from 2007-2010. He was charged with 67 counts of raping a minor and sentenced in April 2013 to 18 years imprisonment, increased on appeal to 19 years.

mandatory. Extending the criteria and remit for information exchange is likely to prove politically challenging across the EU; and legislatively and culturally challenging in individual Member States. Spapens (2008) has suggested that Pan European challenges can be partially alleviated via bilateral and multilateral arrangements rooted in common borders and shared policing concerns rather than relying on Pan European systems. Whilst pragmatically attractive and potentially serving as an important starting point, such an approach risks a piecemeal response to a Pan European problem.

Notwithstanding some progress, significant barriers are indicated by this review. In brief these are:

- A lack of knowledge and a lack of experience in operationally using many of the EU information mechanisms amongst most law enforcement officers. This can mitigate against the 'local to global' intention of information exchange.
- A resistance to move beyond factual information into broader based assessments of seriousness and risk.
- Residual opposition in Member States to information exchange, and particularly to information exchange post sentence or on the grounds of crime prevention, particularly where it is difficult to precisely specify what the one mobile offender might do. Varying views on the balance between public protection, liberty, privacy and the rights of all EU citizens' rights, including (ex) offenders, remain. Crime prevention in respect of the individual serious mobile violent or sexual offender may not be as readily acceptable as crime prevention in terms of terrorism, organised crime, and crime conducted by groups or gangs.
- The possible circumvention of formal procedures in favour of informal local procedures. Whilst not always problematic, and at times positively effective, this can present challenges if formal procedures are rendered operationally ineffective or redundant.
- Residual concerns within Member States over privacy, data security and appropriate governance of data management, storage and exchange. This includes concerns over the quality of data collection and accuracy at the Member State of Nationality level, in addition to how such data is stored and exchanged at a pan European level. SISII and ECRIS appear to have largely overcome these difficulties. However, where there is increased use of biometric data and intelligence rather than prior criminal record data concerns grow and challenges to data storage and exchange are reasserted.

- The existence of a complicated array of information exchange mechanisms, and potential resistance to adding to this without significant justification as to why additional measures are required.
- Despite the arguments of Hobbing (2011) presented in this review, there can still be a tendency for Member States to consider border control as a more effective option than developing effective mechanisms of information exchange and management of (ex)offenders across the EU.
- Political acceptance and will to accept changes in information exchange and management of serious mobile violent or sexual offenders across Member States may vary, particularly where such changes do not sit comfortably with legal approaches and procedures within Member States.

## Conclusion

Whilst significant improvements and progress have been made in the exchange of criminality information across Europe this has been largely driven by concerns over terrorism and organised crime. Criminal records exchange does exist on individual offenders at all levels of seriousness (primarily through ECRIS), but the proactive/preventative exchange of information on serious mobile violent or sexual offenders where there is no current conviction or investigation is less well developed. The plethora of mechanisms and procedures which have developed over time may itself be part of the problem (Magee 2008), and previous research does indicate that there is a gap between pan European procedures and operational implementation. However the tension between risks, rights and freedom of movement is also acute, and is potentially perceived and balanced differently across Member States. Data security and quality assurance are concerns, although there is some limited evidence in this review that SISII and ECRIS have been able to provide sufficiently robust systems to overcome them. It is too early to comment on the Europol regulation establishing Europol as the coordinator of all forms of information exchange between law enforcement authorities in Member States as it has yet to be adopted.

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## Appendices

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### Appendix 1 - European Criminal Record Information System (ECRIS)

#### Serious Violent and Sexual Offences

##### *Violent Offences*

Intentional Killing

Aggravated case of Intentional Killing

Unintentional Killing

Violence causing death

Causing grievous bodily injury, disfigurement or permanent disability

Torture

##### *Sexual Offences*

Rape

Aggravated Rape other than a minor

Sexual Assault

Rape of a minor

Sexual Assault of a minor



## Appendix 2 - SOMEK Information Exchange Mechanism Review Template

<p>Name of mechanism, protocol, directive</p>	
<p>Purpose of the information exchange mechanism, protocol or procedure</p>	
<p>Category of offender targeted</p>	
<p>Nature of the Mechanism. Directive. Legal requirement, obligation, Cooperation?</p>	
<p>Relevance to Project:</p> <ol style="list-style-type: none"> <li>1. Direct- EU Information Exchange on high risk offenders</li> <li>2. Secondary- Other form of exchange mechanism, but with the purpose of prevention, detection, investigation of transnational, pan European crime.</li> <li>3. Peripheral/Minimal- e.g. prisoner transfer, trial and post sentence</li> </ol>	
<p>What does the information exchange mechanism require MS to do?</p>	

<p>What are the benefits of the information exchange mechanism?</p>	
<p>Key points from the information mechanism relevant to SOME C</p>	
<p>Limitations (actual and potential) of the information exchange mechanism</p>	
<p>Overall assessment of the usefulness of the information exchange mechanism to SOME C population and issues</p>	
<p>Further areas of investigation to be pursued about this mechanism. Give details as appropriate</p>	

### Appendix 3 - List of literary sources accessed and reviewed. Full read and template completion

This list pertains to all texts and articles reviewed by the researchers, Media, Think Tank, EU legislation and communication sources accessed are currently omitted.

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