From Politics to Policing: The Rationality Gap in EU Council Policy-making

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Summary

In the past two decades, police cooperation has received increasing attention in both policy-making and scholarly literature and, although it is not a novel subject, much remains to be learned about it. Therefore, in an attempt to further unravel the deeper dynamics of police cooperation, this thesis examines the micro-cosmos of police cooperation in the European Union (EU). In particular, it explores the effects of the policy instruments of the Council of the European Union (hereafter, the Council) on the practices of police cooperation in the EU.

Only since the mid-1970s has the development of police cooperation in Europe been structurally considered in political cooperation between the Member States. Before that, it was largely the domain of police practitioners. With the coming into force of the Treaty on European Union (TEU) on 1 November 1993, police cooperation gained a solid position on the European political agenda. Since then, one explicitly expressed objective of the TEU’s Title VI has been to strengthen police cooperation among EU Member States by ‘developing common action among the Member States in the field of police and judicial co-operation in criminal matters’. Since 1993 the EU Council adopted hundreds of tangible policy instruments aimed at enhancing police and judicial cooperation.

Meanwhile, police practitioners have remained a constant factor in the innovation and development of numerous bi- and multilateral cooperation arrangements in Europe outside any formal political framework. Additionally, it has been argued that the characteristics of EU policy-making aimed at enhancing police cooperation have resulted in many non-binding instruments that can be regarded as symbolic agreements whose effects are questionable. Yet have these non-binding ‘soft law’ instruments really had no effect on day-to-day police cooperation in the EU? And have all binding ‘hard law’ instruments had a consistent effect on such cooperation? If not, which variables determine the effect of the Council instruments on police cooperation practices? Because the overall aim of the study is to analyse how practices of police cooperation in the European Union are being shaped, the primary research question is as follows:
To what extent do EU Council policy instruments aimed at enhancing police cooperation shape police cooperation practices in the EU?

In other words, what is the effect of EU Council instruments on police cooperation practices and how can differences in effect be explained? In relation to the differences in effect in this study two hypotheses are formulated. The first hypothesis assumes the following:

There is no significant correlation between the legal nature of EU Council instruments aimed at enhancing police cooperation and their effect on the practices of police cooperation in the EU.

The second hypothesis flows from the importance of the officer’s perspective in police cooperation practices, including shared beliefs and the significant professional discretion enjoyed by most police officers. Simultaneously the hypothesis takes into account the lack of practicality - observed by several authors - in the Council instruments on police cooperation, as well as the limited participation of police professionals in the JHA policy-making process. These observations are framed by Snellen’s (1987, 2002) four rationalities model and combining these notions produces the study’s second hypothesis:

There is a significant correlation between the extent to which an EU Council instrument aimed at police cooperation is grounded in the professional rationality of police practitioners and its effect on the practices of police cooperation.

Both hypotheses have subsequently been tested against data collected on a large number of Council instruments aimed at enhancing police cooperation.

Methodologically, the central question was addressed in two stages. The first stage comprises the gathering of existing insights into Council JHA policy-making and the practices of police cooperation. The research therefore began with a review of the literature and studies on police cooperation in the EU. Simultaneously, 12 unstructured exploratory interviews were undertaken to gain an understanding of key issues in Council JHA policy-making and in the practices of police cooperation. The insights gained were then used to formulate the two hypotheses and in the set-up and execution of the second stage of the study. This second stage involved the collection and analysis of data on several variables related to all 70 Council instruments for police cooperation enhancement adopted between 1995 and 2004, as well as two in-depth case studies of police cooperation arrangements in the EU.
Data collection for this study involved both the gathering of written documents and the administration of 36 interviews and a questionnaire. The data collected from these primary sources were supplemented through targeted collection of information from secondary sources on police cooperation, including articles in both academic and professional journals. The data gathered was subsequently collated and coded for quantitative correlation analysis. In addition to the quantitative analysis, a qualitative analysis was made based on two case studies: one on Joint Investigation Teams and one on liaison officers. The methodological technique thus employed was a combination of qualitative and quantitative research, and analysis techniques. The research took place from 2005 until 2010.

The findings show that, in line with the expectations expressed in the related literature, a large number of the Council instruments aimed at enhancing police cooperation (51%) are legally non-binding. In fact, a comparative analysis revealed that, in the decade under investigation, relevant instruments have been statistically significant more often of a non-binding legal nature than other Council instruments in the field of police and judicial cooperation. Additional findings on the policy-making process in relation to the instruments’ legal status also show that, on average, the Council takes 146 days longer to shape and decide on a binding instrument enhancing police cooperation than to shape and decide on a non-binding instrument. This difference further supports the assumption that existing sovereignty concerns still make Member States reluctant to agree on binding instruments in the field of police and judicial cooperation. At the same time, however, the findings indicate that Member States do use EU level policy-making to upload domestic issues, particularly when they occupy the Presidency: almost 80% of the instruments were initiated by a Member State when it held or was about to hold the Presidency.

In terms of the primary research question on the effect of EU Council instruments on police cooperation practices, the assessment carried out in this study indicates that 61% of the Council instruments aimed at enhancing police cooperation have had little or no effect at all on actual police cooperation practices in the EU. That being said, this conclusion should not be mistaken for an overall limited effect of ongoing European integration and resulting EU policies on police cooperation practices in Europe. Nevertheless, the findings of this study show that a large proportion of the Council policy instruments have not achieved their intended effect in spite of significant efforts in the policy-making.

The most interesting findings of the research, however relate to the potential explanations for these variations in the concrete effects of Council instruments. In response to the second sub-question of how these differences in effect can be explained, the statistical analysis of the data
collected shows no correlation between the legal nature of the Council instruments on police cooperation and their effect on police practices. However, the findings strongly imply that the amount of professional rationality in EU Council policy-making aimed at enhancing police cooperation plays an important part in how much effect the instrument will have on actual police cooperation practices. Specifically, the statistical analysis identified a strong correlation between the extent of professional rationality in the Council policy-making and the effect of the resulting Council instruments. In fact, in line with Snellen’s (1987, 2002) four rationalities framework, it demonstrated that instruments not tested in the policy process against boundary conditions set by a professional rationality are likely to have less effect on police cooperation practices.

The findings of the quantitative analyses were reinforced by the two cases studies both detailing the association between a lack of professional rationality in the policy-making and a subsequent limited effect on police cooperation practices. The analysis on Joint Investigation Teams clearly shows, that the policy-making was driven particularly by the political ambition underlying the creation of a common EU Area of Freedom, Security and Justice. Joint teams were, and still are, heavily promoted as the solution for police cooperation with little consideration of their feasibility in the complex environment of the 27 different jurisdictions in which EU police cooperation occurs. In the policy process the concept was never tested against any professional requirements. Meanwhile, Joint Investigation Teams not only face the same obstacles as traditional methods of international cooperation in criminal investigations, they also fail to offer any clear advantage in overcoming these obstacles. The significant professional discretion that police and judicial staff have in choosing the form and method of their international cooperation is thus a likely explanation for the as yet limited use of Joint Investigation Teams.

This second case study mapped the significant number of policy-efforts at the EC/EU level aimed at coordinating and harmonising the work of liaison officers. Scrutiny of these efforts demonstrated that only the documents from TREVI Working Group III contain some residue of a discussion on the practical aspects of such work and testing the policy alternatives against professional requirements. The discussions on the common use of liaison officers in the other EU Council policy documents merely reflect considerable political ambition, usually related to the construction of a common EU Area of Freedom, Security and Justice. They therefore failed to consider the practical issues relevant to the work of liaison officers, such as the legal, organisational and cultural differences between police systems in the Member States. The observations from this case study underscore the findings in the quantitative analysis of a pre-disposition in the policy-making towards a political and legal rationality with
no attention to the subject matter’s professional rationality. They also provide further support for the assumption of a relation between professional rationality in and the effects of an instrument.

The most obvious (practical) implications of the study findings relate to EU Council policy-making aimed at enhancing police cooperation. Briefly stated, the findings indicate that in the shaping of such policy instruments, it is important to elevate substance (professional rationality) over form (legal nature). The new primacy of the Commission in formulating and forwarding proposals for Council instruments on police and judicial cooperation - as introduced by the Lisbon Treaty - creates an obvious opportunity for increasing the input of professional rationality into these policy discussions.

The study findings also have important implications for future research. One recurring finding is the relevance for police cooperation of professional discretionary powers, which as yet has not been an explicit focus in police cooperation literature. Further, applying a multilevel governance perspective to the interconnection and interaction between the different levels on which police cooperation in the EU is being shaped, could produce valuable additional knowledge on the governance of police cooperation in the EU.