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ADDENDUM TO NOTE

from : General Secretariat

to : Working Party on Mutual Assistance in Criminal Matters

No. prev. doc.: 5270/1/99 JUSTPEN 2 REV 1

Subject: Questionnaire on reservations in relation to the 1959 Council of Europe Convention on mutual assistance in criminal matters

Delegations will find enclosed the reply received from the Italian delegation to the questionnaire set out in document 9813/1/98 JUSTPEN 68 REV 1 of 6 October 1998.

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ITALY

Questionnaire on reservations in relation to the 1959 Council of Europe Convention on mutual assistance in criminal matters

1. Italy has not made any statement containing a reservation; consequently, in the matter of searches and seizures (as well as of any other request for judicial assistance), Italy supports all possible co-operation in favour of the requesting member country, subject to the limitations provided for in Article 2 of the Convention.
2. See answer to question 1.
3. See answer to question 1.
4.
 - We grant requests for searches and seizures based on an offence that is not an offence under our law.
 - We do so even when similar outgoing requests cannot be granted, subject to the limitations provided for in Article 2a) (with the exception of fiscal offences) and 2b).
5. In recent years (at least five years) there has only been one case of partial rejection of a foreign letter of request asking for a seizure.
6. The question does not appear to be correct. In fact, the purpose of the questionnaire is to collect data to establish the scope of the phenomenon (limitations on the application of reservations) on which, then, to base a discussion. Such question, instead, appears to substitute a common discussion for unilateral statements of individual countries as to their intent to change the article in question. If it had been considered appropriate to establish how much to change the 1959 Convention with a single questionnaire, how many of the 20 articles of this draft would have been written and how would they have been written ?

Thus, this question is not correct and is not consistent with the purpose of the questionnaire, as it was established at the working group's meeting of 11 and 12 June 1998.

7. It is to be pointed out that the answer to this question was not based on overall statistical data as:

- 1) the computer system of the Italian Ministry of Justice does not hold data on letters for judicial assistance requested and executed directly by the judicial authorities under paragraph 2, Article 15 of the 1959 European Convention and Article 53 of the Schengen Convention.
- 2) Even with respect to requests that transit through the Ministry, data that enables to have an overall view of the phenomenon is not recorded (in fact, the outcome of requests is only generally defined as "positive outcome", "negative outcome" "different outcome").

Therefore, we have had to resort to what individual operators and the judicial authorities recollected to be able to answer the question.

All the above implies an imprecise answer, possible problems are only generally established and there is no statistical data.

The reservations made by Member States have given rise to considerable problems with respect to judicial assistance in the matter of searches and seizures, especially with some countries; to confirm the above here are some cases that refer to the three requisites:

A) Reservation on dual criminality

The systems in the various countries are not perfectly identical: some offences present in our system are not present in the system of all Member States, or the offence is provided for but the elements constituting it are different.

For example:

- 1) Mafia-type criminal association
(In our legal system it is one of the most serious offences)

Within the Multidisciplinary Group the work started more than one year ago to draft an offence of criminal association common to all Member States has not been completed yet. This is a clear sign of how different our legal systems are in this matter. Such difference has created problems to Italy in the past with respect to judicial co-operation.

2) Unlawful funding of political parties

(This provision combats the tainting of political and institutional life and is an advanced means of protection in the fight against corruption. It is not an offence of fiscal nature)

Searches and seizures (banking investigations and seizures) are the essential tools to fight against this offence, if we consider that the offence is constituted by the unlawful payment of money, and if we also consider that the best way of concealing it is to transfer it to foreign banks. Judicial co-operation for the unlawful funding of parties was denied to Italy because said offence was not covered by the law of the requested State.

This refusal to give judicial assistance appears to be even more serious if we think that one of the objectives of the Action Plan against corruption, that the Multidisciplinary Group of the Council of Europe is called upon to implement, is the creation of the offence of unlawful funding of political parties common to all Member States, for the purpose also of fostering judicial co-operation in this field too.

3) Unlawful export of cultural property

(This offence is largely widespread in Italy. This provision hinders the non compliance of the provision on export license for works of art, archaeological remains, etc.)

The unlawful export of objects of art is often the only possible criminal protection our artistic heritage has, especially, but not only, considering the numerous property stolen through clandestine excavations on our territory. This offence is strongly felt by the Italian public opinion, as it affects the cultural roots of our people. Italy has been denied judicial assistance for this offence, in that it was not provided for by the law of the requested State.

B) Reservation on the compatibility of national law

This reservation is the largest obstacle to judicial co-operation between our countries, in that it imposes that the substantive and procedural rules of law of the requesting and requested States in the field of searches and seizures be perfectly identical. When said reservation is strictly applied, it becomes nearly impossible to get what one asks, as differences between the two legal systems are inevitable, especially as to procedures.

Said reservation has often brought about delays in the execution of our requests, the non execution of requests or an unsatisfactory execution of requests.

As to the problems concerning substantive law, please refer to what was said on the reservation on dual criminality. The following cases are also to be considered:

- 1) As to investigations within banks and the consequent seizure of funds and documents, our request was challenged and subsequently denied on the basis of the law on banking secrecy of the requested State;
- 2) In order to be granted the search and seizure of property we were asked to give the exact list and location of the objects. In most cases the judicial authority may at the most know the place in general (address, building, room) where the object is located, but not its exact location. Furthermore, following this criteria, it is possible to thwart a request by moving the object to the searched and seized every day, so as to make the information to be supplied by the judicial authorities outdated;

- 3) We were denied seizure as it was requested with respect to a person who was neither investigated nor a defendant (it is enough to resort to the provisional surrender of an object to a third person apparently in good faith to thwart requests);
- 4) In order to give effect to a seizure, the requested authority said that the offence on the basis of which the requesting juridical authority was proceeding had to be a "serious" offence. The seriousness of the offence is established by the law of the requested State, irrespectively of the opinion of the requesting judicial authority, who instead is the only one that can establish the seriousness of the offence. In some cases, the execution of requests was hampered for this reason.
- 5) In order to carry out a seizure, we were asked to supply "conclusive" evidence against the investigated person or defendant. In these cases it was the requested State that established whether the evidence was well grounded, although the latter did not have knowledge of all the documents concerning the foreign proceeding. This has often given rise to an endless exchange of information between the Italian requesting authority and the requested authority, with a negative outcome.
- 6) In those cases where our request for the seizure of evidence was granted, the property in issue was not surrendered to us under Articles 3 and 6 of the European Convention, as the interest of a third party in good faith was contested, and at that point the Italian State would have had to establish its right on the property before a civil judicial authority of the requested State. The request concerned a simple seizure evidence and the subsequent return of the property at the end of the Italian criminal trial, and the definite return of the property to Italy was not required, which fact would have made a civil decision in the matter appropriate. In other cases the seized property was not surrendered on the basis of the principle of proportionality (i.e. too many burdens compared with its interest for the trial), a principle which is not covered by the Convention, but which is covered by the legal system of the requested State.

- 7) A seizure request was contested by the requested State on the basis of its statute of limitation with respect to the offences and the suspension or interruption of said limitation. Instead, the time limitation with respect to the offence had not run out under our law.

C) Reservation on the possibility of extradition

Said reservation has not raised any specific problems.

8. One wonders whether this question, like question 6, is correct. Furthermore, for the Italian delegation, the intent of the Action Plan is to establish the priority of overcoming the reservations and statements, including those formulated in pursuance of Article 5 by the various Member States.

This objective has once again been brought to the attention of the Member States in the Action Plan for an area of justice, security and liberty, approved last December by the European Council in Vienna.

9.
