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REPORT

from: K.4 Committee

to : Permanent Representatives Committee/Council

Subject: Interim report on cooperation in the campaign against international organized crime

At its meeting on 10 and 11 December 1993 the European Council agreed to strengthen judicial cooperation, in particular in the fight against international organized crime (IOC), stating that this would be one of its targets for 1994.

At its meeting on 29 and 30 November 1993, the Council (JHA) considered that this was an area in which judicial cooperation between the Member States should be strengthened as a matter of priority, in the context of a European Area and with a view to the safety of the citizen.

Discussions held in 1994 have looked at how to follow up the conclusions, adopted by the Council on 29 and 30 November 1993 (9908/2/93 CRIMORG 1 REV 2 + ADD 1) and given in the report by the ad hoc Working Party on IOC, particularly with regard to measures to improve judicial cooperation between Member States (point 3 of the Recommendation).

Several questionnaires on the matter were issued (6724/94 JUSTPEN 31 and 8459/94 JUSTPEN 49). Also, the Group on IOC examined the situation in the Member States and exchanged views on the most appropriate ways of tackling IOC in the European Area.

This interim report highlights the key points of the discussion, which the Group feels it should continue.

Throughout the examination, the Group bore in mind that all national measures as well as any which might be taken at European level would take full account of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The K.4 Committee calls upon the Permanent Representatives Committee/Council to take note of the progress report on work carried out so far to combat IOC, as set out in the Annex.

Interim report on cooperation
in the campaign against
international organized crime

I. Possible measures to improve cooperation between Member States

1. Common charges and judicial cooperation

The Council considered that possibilities should be examined of having common charges throughout the European Union with regard to IOC. Realizing, however, that it would be difficult to have such a concept of common charges in view of the significant differences between the laws of the Member States, it gave instructions that alternative solutions should be sought to make the conditions easier for judicial cooperation.

The Group's discussions confirmed the difficulty of establishing common charges, even if such a solution would be advantageous.

Apart from the possibility of common charges, the Working Party should nevertheless examine the laws of the Member States more closely, particularly as regards what constitutes offences by criminal or similar organizations according to case-law and practice, in order to identify any gaps existing in the efforts to combat IOC.

The Group also discussed the possibility of improving efforts to combat IOC by establishing rules on conspiracy, attempted crime and preparatory acts. This matter should be included in the examination to be undertaken by the Group.

In addition, the Group examined the solution whereby conditions for judicial cooperation would be made easier, particularly with regard to dual charges. Discussions on extradition should take place in the Working Party on Extradition. Some delegations would be prepared to look into the possibility of making the principle of dual charges more flexible, but only as part of the fight against IOC.

The principle of mutual assistance does not apply in the same way as in other areas of judicial cooperation. With this in view, the Group would initially examine how it could make progress on Article 5(1) of the European Convention on Mutual Assistance, concluded by the Council of Europe. In so doing it would, however, have to examine all the possible exceptions which might occur.

2. Penal sanctions for legal persons

The Council asked for an examination of whether the possibility of having penal sanctions for legal persons should not be considered.

On this matter, discussions revealed that domestic legislation varied from one Member State to another. Several Member States recognized the penal responsibility of legal persons (either as a general rule of substantive law or in specific cases). On the other hand, some Member States did not recognize such liability; this did not prevent a judge, however, from taking security measures against the legal person concerned, such as cessation of activity for a certain period, closure of an establishment, or even dissolution of a legal person. Some of these States were at present considering the possibility of departing from this principle of criminal law and introducing criminal liability of legal persons.

However, even Member States which did not recognize the criminal liability of legal persons could, at least under certain circumstances, take action on a request for mutual assistance, including a request for enforcement action, where the offence named in the request was an offence in the State to which the request was made.

Problems concerning judicial cooperation by Member States might arise in the case of the enforcement of a pecuniary sanction or confiscation order.

In this context, for reasons of prevention the majority of delegations felt that Member States should be encouraged to recognize criminal liability of this kind bearing in mind Council of Europe Recommendation No 88 of 2 October 1988 in order to enable them to combat IOC.

3. Scope of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

The Council felt that it would be desirable for the Member States to ratify the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, drawn up at Strasbourg in 1990, bearing in mind the need to make it possible to confiscate all proceeds from IOC.

Several Member States have ratified the Convention. Two Member States have restricted its scope to proceedings relating to drugs. One Member State is considering abolishing this restriction in the near future, so that its scope can be extended to almost all serious offences. [In general, the other Member States have begun national procedures with a view to ratification.] The present situation regarding signatures and ratification is set out in the Annex.

Thus the discussions make clear that delegations share the view that it would be desirable if, in combating IOC, Member States were not to restrict the scope of the Convention to the proceeds from drug-related crime.

4. Confiscating proceeds from crime

The Council wanted the Group to examine the possibility of adopting measures which allowed the proceeds derived from offences to be confiscated whether or not their perpetrators had been convicted, or at least of enforcing such measures when they were taken in another Member State of the Community. These procedures should be examined subject to certain minimum guarantees.

During the discussions, it appeared that many Member States did not have any domestic arrangements allowing the proceeds of offences to be confiscated where sentence had not been passed beforehand or simultaneously, e.g. in the context of an "in rem" procedure.

Some Member States might study the possibility of confiscating certain proceeds under clearly defined conditions – where the security of persons was threatened or there was a serious risk that the objects in question would be used to commit further crimes.

However, the Group noted that the Strasbourg Convention would allow improvement of the procedures for enforcing confiscation of the proceeds from offences ruled on as such in another Member State.

In the course of the discussions, the Group noted that Member States would need more experience before they could consider the possibility of adopting measures which allow the proceeds derived from offences to be confiscated whether or not their perpetrators have been convicted. This question as well as others concerning confiscation could therefore be examined in more detail after the Convention on Money Laundering has been implemented.

5. Period of limitation

The Council felt that it would be useful to examine the possibility of taking into account only the periods of limitation for public prosecution applicable in the requesting State, in particular in the light of the discussions on extradition, and to provide for sufficiently long common periods of limitation for public prosecution for offences relating to IOC.

During the discussions it became apparent that periods of limitation varied considerably from one system of domestic legislation to another. Furthermore, the concepts of criminality to which the different limits applied were not comparable. Finally, the characteristics of the offences might vary considerably even in the case of comparable offences. In view of this, the impression emerged that it would be hard to achieve harmonization of the periods of limitation.

The Group considered, however, that the existence of different rules on limitation to some extent constituted an obstacle to judicial cooperation between Member States.

Taking account of the fact that these matters were closely linked to extradition, the Group agreed that it would be appropriate to go further into this question in the Working Party on Extradition.

Furthermore, several delegations thought it would be useful to encourage Member States to lay down sufficiently long periods of limitation for offences linked to IOC. However, the Group felt that the matter should be examined in more detail, but did not look further into the sort of period which might be envisaged.

Member States which did not recognize any period of limitation for their public prosecution procedures saw no need for fixing such a limit. In those States, it was for the court to fix the period of limitation depending on the case.

6. Laundering of proceeds from crime

The Council considered that the offence of money laundering in Member States' laws should not be restricted to the proceeds of illicit traffic in narcotic drugs and psychotropic substances, but that all proceeds of IOC should be covered, since only such a definition of the crime would facilitate effective judicial cooperation in this area.

(see point 3).

[Handwritten signature and notes]

7. Extension of the duty to report

The Council considered that the obligation to pass on information, when transactions are considered suspect, as laid down in Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, should be extended to all proceeds of criminal activities arising from IOC. It therefore exhorted the Member States to apply the obligation under that Directive to all proceeds arising from the activities of international criminal organizations.

Furthermore, it considered that there should be an in-depth examination of the desirability of applying the duty to report pursuant to Directive 91/308/EEC of 10 June 1991 to professions and categories of undertaking other than the financial institutions covered by that Directive, pursuant to Article 12 thereof.

Most Member States considered that it would be appropriate to extend the reporting requirement to all proceeds of criminal activities stemming from IOC, bearing in mind Directive 91/308/EEC and in view of the discussions taking place in the GAFI.

The Group also noted that the Contact Committee provided for in Article 13 of Directive 91/308/EEC had the task of considering the possibility of including other professions whose activities might be used for laundering purposes.

In some Member States, extension of the duty to report suspect transactions was already applicable or might be envisaged with regard to bodies other than financial institutions (see in particular pp. 12 and 13 of 6788/94 ENFOPOL 65).

8. Telecommunications surveillance

The Council:

- considered that the basic principle should be to allow foreign requests for such measures to be acted on in all cases in which similar measures could be taken at the request of a country's own authorities;
- thought that specific consideration should be given in particular to the speed with which, and conditions under which, such a request was acted on ⁽¹⁾;
- saw a need to examine the implications of new telecommunications facilities for the effectiveness of such investigative methods ⁽²⁾;
- considered that the interception of telecommunications in the investigation of very serious offences should be ensured in new telecommunications systems.

⁽¹⁾ Especially the period for which authorization was to be given.

⁽²⁾ In particular, mobile telecommunications in a cross-border context, as well as other forms of observation and especially interception of communications, and cooperation on such measures.

All Member States had national measures enabling telecommunications to be intercepted, even though the technical means were not the same in all cases.

Throughout the discussions it was borne in mind that nearly all the Member States were able to cooperate on the basis of the European Convention on Mutual Assistance on Criminal Matters and other relevant agreements, subject to certain conditions. A considerable number of Member States were accordingly prepared forthwith to allow foreign requests to be acted on.

However, the Group noted that there were deficiencies in judicial cooperation as regards the interception of telecommunications in investigating very serious offences, as regards new telecommunications systems and in respect of other modern methods of communication.

The Group noted that this was an important issue to which particular attention would have to be paid. All of these matters should be looked at, bearing in mind the division of responsibilities internally between the judicial authorities and the police.

Against this background, the Group therefore considered that it would be advisable to consider how far it might be useful to adjust or supplement the machinery for mutual assistance in criminal matters in order to deal with IOC.

9. Protection of witnesses and others involved in the judicial process

The Council suggested considering measures likely to encourage witnesses to give evidence, while safeguarding their security, as well as others involved in the judicial process, against intimidation, threats or violence, and to ensure that such acts were suitably punished.

As regards the first aspect, the Group noted that encouraging witnesses to give evidence in cases of IOC was a very effective method of combating international crime. Member States' laws in this area should, it felt, be examined in greater detail, the laws regarding police informants included. A preliminary exchange of views on the protection of witnesses has already been conducted, focusing on the question of whether a witness who had supplied information should remain anonymous. In the light of the overall review of this question, Member States would be able to see whether some of these measures should be adopted at national level.

In an effort to improve cooperation between States, the Group proposed looking for ways to encourage people to testify, as for example testimony by remote link.

It accordingly agreed to continue proceedings, taking into account the measures under discussion in the Council of Europe Working Party on the Protection of Witnesses and the Rights to a Defence.

The Group agreed to leave the question of other persons involved in the judicial process until these matters were discussed again.

II. New method for future meetings

Steering Group III agreed on a new method for expediting work. The delegations would be asked by the Group to prepare certain issues within the framework of the terms of reference and the priorities laid down.

Table showing
 signing and ratification of the 1988 Vienna Convention
 and 1990 Council of Europe Convention by Member States
 of the European Union

Member State	Vienna Convention		Council of Europe Convention	
	Signed	Ratified	Signed	Ratified
BELGIUM	YES	NO (*)	YES	NO (*)
DENMARK	YES	YES	YES	NO
FRANCE	YES	YES	YES	NO (*)
GERMANY	YES	YES	YES	NO (*)
GREECE	YES	YES	YES	NO (*)
IRELAND	YES	NO (*)	NO	NO (*)
ITALY	YES	YES	YES	YES
LUXEMBOURG	YES	YES	YES	NO (*)
NETHERLANDS (**)	YES	YES	YES	YES
PORTUGAL	YES	YES	YES	NO
SPAIN	YES	YES	YES	NO
UNITED KINGDOM	YES	YES	YES	YES

(*) Ratification is due to take place within the next twelve months.

(**) The reply does not cover the overseas territories.

NB: Survey by the GAFI, updated in March 1994.