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NOTE

from : German delegation

to : Steering Group III, Judicial Cooperation in Criminal Matters, Working Party on Mutual Assistance
~~in Criminal Matters~~

Subject: Note from the German delegation on modern methods of cross-border investigation

Please find attached a note from the German delegation on modern methods of cross-border investigation.

Note from the German delegation

Modern methods of cross-border investigation

I.

Conventional methods of assisting foreign investigations include:

- (a) examination of witnesses, experts and accused persons,
- (b) participation in these examinations by the authorities and persons involved,
- (c) search and seizure of property as evidence,
- (d) surrender of property, records or files,
- (e) service of writs and records of judicial verdicts,
- (f) transfer abroad of a person in custody to appear as a witness or for purposes of confrontation,
- (g) communication of excerpts from judicial records.

These are unanimously regarded as judicial mutual assistance in criminal matters, and in Europe their statutory basis is to be found in the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters.

II.

Telephone tapping on conventional networks is certainly common in practice, but is not regulated by the European Convention on Mutual Assistance in Criminal Matters. In the past it has only been covered by Recommendation R(85)16 of the Council of Europe. New technological developments and new forms of distribution and organization have had a major impact on the feasibility of interception measures.

On mobile phone networks the "subscriber relationship" is not established by installing a fixed connection, as it is on conventional networks, but usually through acquisition of a chip card, to which a telephone number has been allocated. The actual telecommunication is conducted through one's own, or other, unregistered, terminal units. For surveillance purposes, only the telephone number allocated to the chip card matters. Although the chip card carries a personal identification number (not to be confused with the designated telephone number), it can be given to third parties.

An important aspect of the problem is the difficulty faced by prosecuting authorities or network operators in determining the telephone number of the person under surveillance, this being a technical requirement for the interception operation.

Here the following arrangements must be borne in mind:

- network operators quite often assign whole blocks of telephone numbers to service providers, who then pass on either individual numbers or quotas of numbers to their customers (individuals or firms, e.g. car-hire firms). Within these subscriber relationships, the customers of the car-hire firm, for example, are then free to make calls as they wish. This means that the person making the call is at some remove

from the data available to the network operator. In particular, the latter does not know to whom the service providers have allocated numbers from a quota.

Prepaid cards (so-called debit cards) are already available on the market. These are cards with a credit limit and a set expiry date. International mobile communications networks already allow domestic calls to be made with user cards obtained from foreign, e.g. non-European, network operators or service providers if a so-called roaming agreement has been concluded between the network operators concerned. In addition to these problem areas, mention should also be made of the recent innovation of mail boxes and voice boxes, as well as corporate networks.

A large number of mail boxes and voice boxes are already on offer. Mail or voice boxes are computer-based storage devices in which written or oral information can be filed and then retrieved when desired, e.g. by password, by certain addressees or – in other applications – by several people, e.g. by means of telephone calls from different connection points, such as hotels.

Corporate networks, telecommunications networks for oral communication within closed user groups (e.g. inside a firm, between firms or between a production firm and its network of dealers), are not public networks. Corporate networks may be operated by the firms themselves or by commercial services and may form a platform for all internal

communications. However, they can be linked to public networks and designed in such a way that subscribers to public networks can be reached from a corporate network and vice versa, i.e. subscribers to the corporate network can be dialled directly from other networks, for instance public networks.

There will need to be clear legal provisions covering all these modern methods of communication – presumably the Internet too – if criminal law cooperation between States is to be possible in this area as well. However, in order to draw up the relevant provisions of international law, e.g. in the Council of Europe, there must first be absolute clarity as to what the existing technical possibilities are. The work of the European Union Working Party on Police Cooperation may prove valuable in preparing the ground in this respect.

III.

Other new investigation methods used by criminal prosecuting authorities.

While technical developments are presenting new challenges to criminal prosecuting authorities at national and international level, the authorities themselves are also using investigation methods that were unknown when the European Convention on Mutual Assistance in Criminal Matters was being drawn up, almost 40 years ago. Let us leave aside for the moment the question of whether these methods are viewed by States as judicial measures or as purely police measures (with the result that not all States regard cross-border use of these methods of investigation as judicial mutual assistance in criminal matters).

Particular attention must be drawn here to:

- (a) cross-border controlled deliveries of illegal drugs, arms, etc.;
- (b) cross-border surveillance;
- (c) cross-border use of technical equipment, e.g. using direction finders on suspect vehicles;
- (d) cross-border hot pursuit, or at least national provisions allowing temporary arrest of criminal offenders who have taken flight, even before receipt of a request for arrest for extradition purposes;
- (e) cross-border use of undercover investigators;
- (f) cross-border use of co-called informers and undercover agents ("Vertrauenspersonen");
- (g) joint investigation teams.

The new methods of investigation

- (a) Cross-border controlled deliveries of illegal drugs, arms, etc.

According to our understanding, controlled transit is the illegal transport through the country concerned, under surveillance by the prosecuting authorities, of narcotics, arms, stolen goods, etc. which come from abroad and are heading for a third country. Controlled export is the illegal transport of goods, under surveillance, from the country concerned to a destination abroad, and controlled import is the illegal transport of goods, under surveillance, from a foreign country to the country concerned. These procedures are all covered by the generic term of controlled transport.

The possibility of controlled transport is only considered if there is no other way of identifying the people operating behind the scenes or discovering their distribution routes. The surveillance has to be organized in such a way as to ensure that the prosecuting authorities are able to apprehend the offenders and seize the goods involved at any time.

Under German law, foreign States are also required to make the following declarations in respect of transit and exports:

- (a) consent to the import or transit;
- (b) an assurance that the transport operation will be kept under constant surveillance;
- (c) an assurance that investigations will be carried out in respect of couriers, people operating behind the scenes and buyers; that narcotics, arms, stolen goods, etc. will be seized; and that efforts will be made to convict and punish offenders;
- (d) an assurance that the German prosecuting authorities will be kept constantly informed of the progress of proceedings.

This kind of controlled delivery is already in use today – especially in combating illegal drug trafficking – as a measure of international cooperation in criminal matters. It is notable that this special method of investigation is at present restricted, at least in some States, to the fight against illegal drug trafficking. We shall have to consider carefully how far – over and above the largely declaratory provision in Article 11 of the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 – there is a need to introduce further rules on international cooperation. Due consideration will also have to be given to whether the police and customs authorities can be relied upon to cooperate properly with each other in all States, so that the success of such measures is not jeopardized by overlapping national responsibilities.

(b) Cross-border surveillance

Keeping suspects under surveillance has long been a weapon in the authorities' armoury. With border controls disappearing, whether de jure or de facto, there is a growing need for cross-border surveillance. Although the European Convention on Mutual Assistance can be taken as a legal basis in certain cases, it does not cover all the situations and problems that may arise in specific cases. For example, as the law stands at present, there is no legal basis for cross-border surveillance in emergencies, i.e. where a request for mutual assistance cannot be made in time because of the urgency of the situation. But even in cases where there has been a prior request for cross-border surveillance, a number of questions remain: What are the powers of officials engaged in surveillance operations? What is their legal status? Who is liable for any damage they might cause? What is the position under criminal law if these officials commit criminal offences or fall victim to such offences on the territory of another State? These questions were first dealt with in the Convention Applying the Schengen Agreement of 19 June 1990. Here it might be advisable to make a supplementary amendment to the European Convention on Mutual Assistance in Criminal Matters, in the form of an additional protocol.

(c) Cross-border use of technical equipment

One of the technical options now available to investigating authorities is to attach devices to vehicles, in order to locate them or to monitor what is being said in them. If a vehicle which has been fitted out in this way leaves its own territory, it enters a legal

no-man's-land. There are no clear international provisions on whether, and in what circumstances, this kind of action may be permitted by a neighbouring State.

(d) Cross-border hot pursuit

The abolition of checks at internal borders between Schengen States, as provided for in the Agreement itself, led to a provision in the Convention Applying the Schengen Agreement to the effect that officials pursuing an individual in their country who has been found in the act of committing, or participating in, certain criminal offences, are allowed to continue their pursuit on the territory of another Contracting Party without prior authorization. This arrangement will not necessarily be appropriate for all the States of Europe. However, today's mass transport has shown that the legal instruments available to European States are not adequate in the following cases:

If somebody commits a criminal offence on the territory of one State and flees to a neighbouring State so as to be able, for instance, to continue his escape by air, the prosecuting authorities in that neighbouring State have no powers to arrest that person, even if they learn of the offence through police channels. Under the European Convention on Extradition, such persons can only be arrested if a request has been made for arrest for extradition purposes, which in turn presupposes that an arrest warrant has been issued. As we have seen in practice, this is not always possible for reasons of urgency. The Federal Republic of Germany has made provision for this type

of case by allowing provisional arrest for extradition purposes under domestic law, even when there has been no prior request for provisional arrest within the meaning of the European Convention on Extradition, in cases where the German prosecuting authorities assume that a request for extradition will shortly be made in the light of the circumstances of the case.

Provisions of this nature could be introduced into domestic law by the States of Europe, instead of hot pursuit arrangements.

(e) Cross-border use of undercover investigators

German law on procedure has made express provision for the use of undercover investigators. To aid comprehension I should like at this point to quote the provisions of the German Criminal Procedure Code and outline the conditions governing their deployment, as given in joint guidelines from the Ministers for Justice and for the Interior of the States of the Federation (the "Bundesländer") of the Federal Republic of Germany concerning the use of undercover investigators.

Under Section 110a et seq. of the Criminal Procedure Code (the "Strafprozeßordnung – StPO"), undercover investigators may be used when there is sufficient evidence that serious criminal offences are being committed

1. in the field of illegal trafficking in narcotics or arms, counterfeiting money or official stamps,
2. in the field of State security,
3. on a professional or habitual basis, or
4. by a member of a gang or in some other organized way.

Undercover investigators can also be used to clear up crimes where certain factors indicate a risk of repetition. They can only be used if other means are not likely to succeed or would make it much more difficult to solve the crime. Undercover investigators may also be used to clear up crimes if the special nature of the offence necessitates their use and other measures offer no prospect of success. Within the meaning of this provision undercover investigators are police officers who carry out investigations using a changed identity (cover) on a permanent basis. "Cover" means that the police officer changes his identity for an indefinite – not just temporary – period; the officer's real name, occupation, address, and other family and personal particulars are replaced by fictitious ones to enable him to engage in covert surveillance.

Undercover investigators may only be used with the consent of the public prosecutor's office. Only if delay would jeopardize the investigation and the public prosecutor's office's decision cannot be obtained in time can an undercover investigator be used without such prior consent. In these cases the operation has to be terminated if the public prosecutor's office does not give its consent within three days. Consent has to be given in writing and for a limited period. If an undercover investigator's operation is aimed at a particular accused person or if it relates to entry of a private home that is not generally accessible, consent by the public prosecutor's office is no longer sufficient. This kind of operation requires the consent of a judge. Finally, perhaps it ought to be mentioned that under German procedural law an undercover investigator's identity can be kept secret even after the operation has ended. The public prosecutor and the

judge responsible for the decision authorizing the operation may, however, demand that the undercover investigator's true identity be disclosed to them.

As already stated, these statutory provisions are supplemented by national guidelines, from which I should like to quote the following excerpts:

- undercover investigators are not allowed to commit criminal offences;
- the decision on consent is to be taken at senior level, either by the head of the authority himself or by a public prosecutor whom he has specially designated;
- the police must refer any problems of substantive or procedural law which arise during the operation to the public prosecutor's office. The latter will then take its decision, working together with the police in a spirit of close cooperation and trust;
- the undercover investigator is not exempt from the duty to bring a criminal prosecution under the principle of mandatory prosecution;
- investigative measures within the undercover investigator's remit can be deferred for tactical reasons;
- the public prosecutor's office is to draw up memos on discussions held with the police, on the undercover investigator's collaboration and on the decisions taken – without mentioning the name of the undercover investigator; the police will be given a copy of these memos.

All in all, it will be apparent from this description of the position under German national law that the aim is to provide a clear legal framework for the use of undercover investigators and to bring these police officers within the bounds of justicial responsibility.

One important question in future deliberations on how States could cooperate on the use of undercover investigators will be the extent to which an undercover investigator can contribute to a criminal offence while still remaining within the law. It has consistently been recognized by the German courts that conduct such as to provoke an offence is only permissible within the limits set by the principle of the Rule of Law. In assessing whether this is the case, major factors to be taken into consideration include the basis and the extent of suspicion in respect of the offender, the type, intensity and purpose of the undercover investigator's influence, the willingness on the part of the person whom he influences to commit an offence and that person's own activities, not directed by others. This means that an undercover investigator's actions will exceed the bounds of legality if he has somebody in his power to the extent that that person absolutely has to comply with his wishes. In the view of the supreme court, the same also applies if the investigator exerts considerable pressure on the other person to commit renewed criminal action and then, in the course of events, co-determines and directs the offence through every phase. According to the courts, the State prosecuting authorities' contribution towards the offence is unjustifiably great in such cases.

This method of investigation seems to be known, and to be applied, in almost all the States of Europe.

The peculiarity of this investigation method lies in the fact that there is no statutory regulation of it in most European States, with the probable exception of Germany, Denmark and France – and there it is confined to illegal drug trafficking. As regards cross-border use of undercover investigators, the following sets of circumstances might arise:

- deployment of an undercover investigator abroad as part of a national investigation;
- deployment of undercover investigators abroad as part of foreign investigations;
- deployment of foreign undercover investigators in the home country as part of foreign investigations; and
- deployment of foreign undercover investigators in the home country as part of national investigations.

If cross-border deployment of undercover investigators is being contemplated, the following problems arise:

- the undercover investigator will need papers and, when using a vehicle, number plates to match;
- depending on the operation he is involved in, the undercover investigator will have to carry weapons, and this will have to be permissible under the statutory provisions of the host State;
- in Germany's view, it is essential that the undercover investigator receive his directions and briefing only from the person directing his operations; however, the authorities of the State on whose territory the undercover investigator is operating must be able to contact that person at any time;
- the undercover investigator's identity must be kept secret in any criminal proceedings on the territory of the State where he is operating – particularly his name, home address and appearance.

There are considerable differences in the way European States categorize covert investigations in legal terms. In Germany, and, it seems, also in the Benelux States, Italy, Spain and Austria, such operations require an order by, or the consent of, the judicial authorities when conducted at national level – as described above – and where there is an international dimension they are regarded as mutual assistance in criminal matters. The Nordic and Anglo-Saxon countries probably view the matter differently.

Even if we agree that the use of undercover investigators constitutes mutual assistance in criminal matters and that this can be undertaken on the basis of a prior request for mutual assistance, this does not solve all the problems arising from cross-border use of undercover investigators. In particular, falling back on the principles of the European Convention on Mutual Assistance in Criminal Matters does not suffice in situations where the undercover investigator is unexpectedly required to take cross-border action during an ongoing operation and is unable to refer back to those responsible under the mutual assistance procedure. Such a case might arise in operational situations where the undercover investigator is unexpectedly pressed by targeted persons or contacts to make a telephone call or a journey abroad and where he cannot plausibly refuse to do so on account of his cover. In these cases the law requires the covert operation to be abandoned, thus jeopardizing the outcome of the investigation with the risk of compromising the undercover investigator's cover, and perhaps putting the undercover investigator himself at risk. Acting from practical considerations, undercover investigators have, so far as we know, made essential foreign contacts without

making a prior request to the State whose sovereignty is affected. This is an unsatisfactory situation and a legal solution must be found, perhaps by keeping requests for assistance "in reserve" in special cases where operations in third States seem to be a possibility or by imposing an obligation to make a full report to the third State thereafter together with a retrospective request for its consent.

Experience has shown, moreover, that it is essential for the safety of undercover investigators to adopt a consistently conspiratorial mode of proceeding and maintain particular secrecy as regards persons and measures. Accordingly, it is of particular importance that the authorities requested to authorize the use of undercover investigators deal with the information they acquire in the process in absolute secrecy and confidence.

Finally, another legal problem with the cross-border use of undercover investigators is that European States have very different ideas as to the point at which an undercover investigator's actions become those of an "agent provocateur", (meaning that the offender can no longer be prosecuted for the offence to which he was incited). If the powers of an undercover investigator under national law are in conflict with the fundamental legal principles of the State on whose territory he is operating, that operation will be illegal by virtue of the general principles of international cooperation.

More than with other modern methods of investigation, there seem to be major differences as regards assigning national responsibility for the use of undercover investigators and therefore as regards their legal status. Ultimately this leads to a situation where, in practice, the use of cross-border investigators is often devoid of any legal basis and therefore illegal. But if we look at the declarations that Member States

have made in respect of Article 24 of the European Convention on Mutual Assistance in Criminal Matters, it quickly becomes apparent that this is not an insuperable obstacle. Because of different State responsibilities the Nordic States particularly have designated their police authorities "judicial authorities". In any event, what is needed is a clear instrument of international law identifying for practical purposes in a predictable and unambiguous manner, who can authorize the cross-border use of undercover investigators, under what circumstances, and with what legal consequences.

(f) Cross-border use of informers and of undercover agents

The use of informers and undercover agents is not regulated by statute in Germany; there are merely joint guidelines from the Ministers for Justice and for the Interior of the Länder of the Federal Republic of Germany. According to previous decisions by the Federal Constitutional Court, the Federal Court of Justice and the higher courts, the use of such persons is acknowledged to be a legitimate method of criminal investigation. An informer is a person who is willing, in return for an assurance of confidentiality on the part of the prosecuting authority, to give information in an individual case; a private undercover agent is a person who, without being on the staff of a prosecuting authority, is willing, on a confidential basis, to support that authority in clearing up crime over quite a long period of time and whose identity is kept secret as a matter of principle.

Nationally, it is acknowledged that the use of informers and undercover agents, with confidentiality or secrecy guaranteed – with the result that they are not available as witnesses at the trial – means weighing up the procedural requirements of providing

direct evidence and discovering the full facts against the discharge of public duties by maintaining confidentiality or secrecy. Here there has to be compliance with the principle of fair proceedings under the Rule of Law. From this we may conclude that:

- (a) a guarantee of confidentiality or secrecy may be contemplated in regard to serious crime, organized crime, illegal trafficking in narcotics and arms, counterfeiting offences and offences involving State security;
- (b) in regard to crimes of medium gravity there needs to be very careful examination of the specific case in question. Here a guarantee of confidentiality and secrecy may be envisaged, by way of exception, if, because of an accumulation of similar criminal offences, there is a risk of serious damage, posing a threat to the discharge of public duties or to the public.

Informers or undercover agents with guaranteed confidentiality or secrecy should only be used if other means are not likely to succeed or would make it much more difficult to solve the crime. If an informer or an undercover agent is used, the aim of further investigations will be to procure evidence that fulfils the procedural requirement of providing direct evidence and makes it unnecessary to have recourse to these persons.

It seems that other European States also call on the services of such informers or undercover agents in a similar fashion. There are calls for their cross-border use to be

regulated so as to be able to combat international organized crime more effectively.

The use of informers and undercover agents differs in one very important respect from the cross-border use of undercover investigators: in the German understanding of the law such people are merely witnesses, regardless of their actions on behalf of the prosecuting authorities; they do not have any more rights or duties than other private individuals and so they are not subject, either *de facto* or *de jure*, to the instructions of the prosecuting authorities. The same would probably apply in those States that also use this form of investigation. But then a problem arises for which there is no imminent prospect of a solution:

Criminal law cooperation between States is only possible to the extent that the conditions imposed by the one State can be observed, and assurances to that effect can be given. Both these things presuppose action by bodies that can be influenced by State authorities and ultimately by governments. But this is not the case when private individuals act on behalf of prosecuting authorities who cannot, for legal reasons, give guarantees that they will comply with conditions and instructions. Hence, it seems doubtful whether the cross-border use of such persons is legally possible or can be regulated by law.

IV.

To sum up, it must be pointed out that this survey of modern methods of investigation cannot be described as exhaustive. For example, no mention has been made of investigation by computer screening and of access to foreign data banks. All in all, the European Convention on Mutual Assistance in Criminal Matters is in urgent need of amendment so that

the cross-border investigation measures which prosecuting authorities need to be able to combat cross-border international crime successfully – particularly international organized crime – can be taken on secure legal foundations. Care must be taken to make amendments of a general nature and not, as so often in the past, to confine them to particular offences. Finally, the guiding principle will have to be that States commit themselves to criminal law cooperation only insofar as the requested method of investigation does not run counter to the national "ordre public".