

6556/97

LIMITE

JUSTPEN 18

OUTCOME OF PROCEEDINGS

of: Working Party on Mutual Assistance in Criminal Matters

on: 26 and 27 February 1997

1. Adoption of the agenda

The agenda set out in telex n° 0768 of 20 February 1997 was adopted with the addition of the points set out below under other business.

2. Continued examination of "modern cross-border investigation methods":

- a) Controlled deliveries, technical equipment attached to vehicles or other objects and undercover investigators - examination of the questions set out under item 4.B.1. of 5816/97 JUSTPEN 9 .

docs 5816/97 JUSTPEN 9
6414/96 JUSTPEN 47
9683/96 JUSTPEN 114

- b) Joint investigation teams

doc 6091/97 JUSTPEN 12

The following two documents were distributed to delegations at the meeting on 21 and 22 January 1997 as background information for the purpose of the examination of this item:

- European Union manual on controlled deliveries
(10465/1/96 ENFOPOL 151 REV 1)
- Operational practices and techniques relating to drugs matters in the European Union (The Hague, 12 August 1996, Europol Drug Unit (EDU))

The Working Party examined at its meetings on 21 and 22 January and 26 and 27 February 1997 the following modern cross-border investigation methods:

1. Controlled deliveries.
2. Cross-border surveillance.
3. Cross-border use of technical equipment attached to vehicles or objects in order to monitor the movements thereof.
4. Cross-border use of technical equipment attached to or installed in vehicles to monitor communications taking place therein.
5. Cross-border hot pursuit.
6. Cross-border use of undercover investigators.
7. Cross-border use of informers and undercover agents.
8. Joint teams.

The aim of the proceedings was to establish whether it would be appropriate to include provisions regarding one or more of the above subjects in the draft Convention on mutual assistance in criminal matters. For that purpose it was examined to which extent and by which authorities the different investigation methods referred to were used in Member States, and whether the methods could be applied by Member States on request from another Member State. To the extent that judicial authorities at least in some Member States were competent to authorize the use of a given method, it was discussed whether the existing international rules provided a sufficient legal basis for assistance or there was a need for the introduction of specific provisions in the draft Convention on mutual assistance.

The Presidency has on the basis of the debate established the following conclusions regarding the different investigation methods:

1. Controlled deliveries.

The United Nations 1988 Convention against illicit traffic in narcotic drugs and psychotropic substances⁽¹⁾ provides in its Article 1(g) a definition of controlled deliveries, which basically covers the technique of allowing illicit or suspect consignments of drugs to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of certain drugs-related offences. Article 11 of the Convention contains an obligation for the parties to allow for controlled deliveries under certain conditions if permitted by the basic principles of their domestic legislation.

The European Union manual on controlled deliveries set out in 10465/1/96 REV 1 ENFOPOL 151 shows that all Member States consent to the use of this method.

However, the 1988 Convention only covers drugs and there are no general international rules in existence regarding controlled deliveries of other property (arms, money etc), although there appears to be a need for such rules.

Furthermore, in some Member States the police or the customs authorities are competent to authorize controlled deliveries, whereas in a number of other Member States the competent authority is a judicial authority. Direct contacts between the competent police, customs and judicial authorities of different Member States are therefore important in this area. However, there are currently no provisions in existence providing for such direct contacts.

The Working Party concluded the following:

The Convention on mutual assistance should contain:

- a. A substantive rule to the effect that Member States undertake to provide mutual assistance regarding controlled deliveries of not only drugs, but of all kinds of goods, in cases concerning the investigation of serious offences and offences related to international organized crime. Minor offences should not be covered.

⁽¹⁾ Signed by all Member States, and ratified by all Member States except Austria.

- b. A procedural rule to the effect that requests for assistance may be exchanged directly between the competent authorities of the Member States, both in the case where judicial authorities are competent in both Member States involved and in the case where a judicial authority is competent in one Member State and a customs or police authority is competent in the other Member State. A provision on the exchange of requests in the case where police or customs authorities are competent in both Member States involved would fall outside the scope of the Convention.

2. Cross-border surveillance.

Extensive rules on cross-border surveillance are provided for in Article 40 of the 1990 Schengen Convention. These rules are adequate. The two Member States not having adhered to the Schengen Convention (IR and UK) would need an opting out clause if a similar provision were to be introduced at European Union level.

The Working Party concluded the following:

There is no need for a provision on cross-border surveillance in the draft Convention on mutual assistance.

3. Cross-border use of technical equipment attached to vehicles or objects in order to monitor the movements thereof.

Although there are considerable differences between the national laws of the Member States in this area, this is a method which is used in all Member States and it is in general authorized at police level. In some Member States national law provides that authorization from a judicial authority is necessary where assistance is requested from another country to place or replace monitoring equipment on vehicles or objects. However, assistance can be requested in the latter cases on the basis of the existing mutual assistance conventions.

The Working Party concluded the following:

There is no need for a provision on cross-border use of technical equipment attached to vehicles or objects in order to monitor the movements thereof in the draft Convention on mutual assistance.

4. Cross-border use of technical equipment attached to or installed in vehicles to monitor communications taking place therein.

Most Member States do not provide for the use of this method in their national law. In some of these Member States the application of the method is expressly forbidden.

Member States where this method is allowed may provide mutual assistance on request on the basis of the existing mutual assistance conventions.

The Working Party concluded the following:

Due to the differences between the national laws of Member States, a substantive rule on cooperation can not be established. There is no need for a procedural rule in the draft Convention on mutual assistance concerning cooperation between the Member States applying this method since the existing mutual assistance conventions already provide a sufficient basis for such cooperation.

5. Cross-border hot pursuit.

Extensive rules on cross-border hot pursuit are provided for in Article 41 of the 1990 Schengen Convention. These rules are adequate. The two Member States not having adhered to the Schengen Convention (IR and UK) would need an opting out clause if a similar provision were to be introduced at European Union level.

The Working Party concluded the following:

There is no need for the introduction of a provision on cross-border hot pursuit in the draft Convention on mutual assistance.

6. Cross-border use of undercover investigators.

Undercover investigators are law enforcement agents as opposed to private persons.

Although undercover investigators are used in most Member States, the concept of undercover investigators varies considerably.

In some Member States, undercover investigators carry out investigation by long term infiltration under a changed identity in criminal organizations. In others the undercover agent can not go further than surveillance of persons without revealing his identity.

In some Member States undercover investigators may be used as a part of normal police work without any specific legal basis. In others national law contains more precise and direct provisions on the issue. In the latter Member States the authorities competent to authorize the use of undercover investigators are judicial authorities.

The Working Party concluded the following:

Due to the considerable differences between Member States regarding this issue, no rules on the substance of undercover investigators can be established at this stage.

On the other hand, procedural rules would be useful. These rules could ensure, that requests for assistance may be exchanged directly between the competent authorities of the Member States, both in the case where judicial authorities are competent in both Member States involved and in the case where a judicial authority is competent in one Member State and a customs or police authority is competent in the other Member State.

7. Cross-border use of informers and undercover agents.

Informers are private persons, who are willing - on the basis of confidentiality - to give information on criminal activities to the law enforcement agencies.

The choice by a private person to voluntarily give information to the law enforcement agencies in a given Member State, which may be a State other than the State of residence of that person, does not involve judicial cooperation but is a matter between the private person and the law enforcement agency concerned.

Undercover agents are persons, who are willing - on the basis of confidentiality - to support the law enforcement agencies in clearing up crime over a longer period of time.

Some Member States know this method, others not. However, all Member States recognize in some form or another the concept of individuals cooperating with the police or the judicial authorities.

The Working Party concluded the following:

In view of Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime⁽¹⁾, and in particular point D thereof, there is no need for a provision on informers or undercover agents in the draft Convention on mutual assistance.

8. Joint teams.

The Working Party established, that Articles 1 and 4 of the 1959 European Convention on mutual assistance in criminal matters and Article 47 of the Schengen Convention provide a sufficient legal basis for providing the legal assistance that may be needed in the framework of close cooperation between law enforcement officers of different Member States in the investigation of crime.

The Working Party concluded the following:

There is no need for the introduction of a provision on joint teams in the draft Convention on mutual assistance.

⁽¹⁾ OJ no C 10, 11.01.1997, page 1.

3. Examination of items transferred to the Working Party from the Working Party on Criminal and Community Law:

Steering Group III instructed at its meeting on 22 and 23 July 1996 the Working Party to examine Article 6(1) and (2) of the draft Second Protocol to the Convention on the protection of the European Communities' financial interests (see item 8 of 9364/96 JUST 13). At its meeting on 6 September 1996, the Working Party agreed that it was in favour of the deletion of Articles 6(1) and (2) of the said Protocol and of dealing with the issues covered by Article 6(2) within the framework of the draft Convention on mutual assistance (see item 4 of 10197/96 JUSTPEN 122).

At its meeting on 9 and 10 January 1997, Steering Group III instructed the Working Party to look further at the inclusion in the draft Convention of the matters covered by Article 6(1) and (2). Steering Group III also asked the Working Party to look at the possible inclusion in the draft Convention of provisions on admissibility of evidence on the basis of the former Article 7(5) of the draft Second Protocol (see item 5 of 5213/98 JUST 1). The background for these instructions was, that Steering Group III had decided that it was preferable to establish rules on mutual assistance of a general nature and avoid the proliferation of such rules in legal instruments related to specific types of offences.

a) Direct contacts (Article 7(2) of 6845/96 JUSTPEN 54) and investigations in concert (Article 7(3) of 6845/96 JUSTPEN 54)

It was agreed, that Article 7(2) of 6845/96 JUSTPEN 54 on direct contacts was covered by Article 4 of the draft Convention on mutual assistance set out in 12737/96 JUSTPEN 154.

It was the general view of delegations expressing their opinion on the issue of Article 7(3) of JUSTPEN 54, that it would not be appropriate to introduce a general provision along the lines of that paragraph in the draft Convention on mutual assistance. The Chairman concluded, that she would get in contact with the Chairman of the Working Party on Criminal and Community Law to see if it would be appropriate to reexamine the issue in that Working Party.

b) Admissibility of evidence regarding facts lawfully established by the competent authorities (Article 7(5) of 6845/96 JUSTPEN 54)

Regarding Article 7(5) of JUSTPEN 54 on the admissibility of evidence established in other Member States, the Chairman asked following the debate delegations to consider the following questions:

- a. Is evidence admissible in your Member State if established in another Member State in accordance with that of the State's law?
- b. Could we have a rule establishing, that evidence lawfully established in a Member State shall be admissible in other Member States unless basic principles of those have not been respected?
- c. Delegations could discuss with their colleagues from the Working Party on Criminal and Community Law if such an approach would be satisfactory regarding the protection of the European Communities' financial interests.

c) Mutual Assistance in administrative proceedings which may give rise to criminal proceedings (Article 6(1) and (2) of 10135/96 JUSTPEN 120).

The Working Party established, that the extension of the rules on mutual assistance to administrative proceedings which may give rise to criminal proceedings was dealt with in an adequate manner in Article 49(a) of the 1990 Schengen Convention.

The Working Party concluded the following:

14 delegations, subject to scrutiny reservations by two of these delegations, were in favour of extending the scope of Article 49(a) of the 1990 Schengen Convention by duplicating this provision in the draft Convention on mutual assistance. One delegation, although in favour of this type of cooperation, was not in favour of the duplication of the said Article in the draft Convention on mutual assistance.

4. Other business.

Delegations, which had not yet done so, were asked to forward their contributions to the Secretariat regarding

- the questionnaire on INTERNET (11911/96 JUSTPEN 146) before the 1 March 1997,
 - the questionnaire regarding the analysis of existing conventions in the field of judicial cooperation in criminal matters (11910/1/96 REV 1 JUSTPEN 145) before the 1 March 1997, and
 - the information on national law and practice on and case-law relevant to international cooperation in criminal matters along the lines of the information submitted by the UK to the Council of Europe (PC-OC/INF(96)10(REV)) before the 1 April 1997.
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