

5178/98

LIMITE

JUSTPEN 2

OUTCOME OF PROCEEDINGS

of : Working Party on mutual assistance in criminal matters

on: 16 December 1997

No. prev. doc.: 13437/97 JUSTPEN 117

Subject: Draft Convention on mutual assistance in criminal matters between the Member States of the European Union

At its meeting on 16 December 1997, the Working Party on mutual assistance in criminal matters examined Article 15a on covert investigations set out in 12323/97 JUSTPEN 103 and the Austrian proposal concerning data protection set out in 10671/97 JUSTPEN 79.

The result of the discussions on Article 15a is set out in the Annex.

Regarding the proposal on data protection, the Austrian delegation explained that the purpose of the proposal was that Member States should ensure that personal data used within the framework of the mutual assistance convention would be protected in accordance with the principles laid down in the 1981 Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data.

The Austrian delegation pointed out that the text proposed was not just a simple reference to the minimum requirements in the 1981 Convention but contained an obligation for Member States to apply the principles of the convention also in respect of information relating to organizations and data not processed automatically.

It is recalled that as a starting point, the 1981 Convention does not apply to information relating to legal persons or other organizations. Nor does it apply to data files which are not processed automatically. However, any party to the Convention may declare that it will also apply the Convention to information relating to organizations (Article 3(2)(b)) and/or to data files which are not processed automatically (Article 3(2)(c)). All Member States have signed and ratified the Convention and the Convention has entered into force. However, very few Member States have made declarations pursuant to the provisions mentioned⁽¹⁾.

Following the discussion, the Chairman concluded the following:

- the Commission supported in principle the Austrian proposal;
- the German delegation was positive but had not taken a final position on the issue;
- the other delegations thought that the provisions of the 1981 Convention and of the Directive 95/46 EC of 24 October 1995 on the protection of individuals with regard to processing of personal data and on the free movement of such data⁽²⁾ were sufficient and did not feel a need for introducing specific provisions on data protection in the mutual assistance convention.

The Austrian delegation suggested that another possibility could be to introduce a text along the lines of the provisions on the use of information in the draft second additional Protocol to the 1959 Council of Europe Convention on mutual assistance in criminal matters.

It was agreed to ask the Legal Service of the Council to examine the legal consequences of an adoption of the Austrian proposal set out in 10671/97 JUSTPEN 79.

⁽¹⁾ Austria and Italy have made a declaration pursuant to Article 3(2)(b). Belgium, France and Italy have made a declaration pursuant to Article 3(2)(c).

⁽²⁾ OJ No. L 281, 23.11.1995, page 31.

Article 15a

Covert investigations ⁽¹⁾

1. At the request of the requesting Member State, the requested Member State may authorize covert investigations on its territory in the framework of criminal investigations into extraditable offences.
2. The decision to carry out covert investigations shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that State.
3. Covert investigations shall take place in accordance with the procedures of the requested Member State. Competence to act and to direct operations shall lie with the competent authorities of that Member State.

Article 15(5):

5. ⁽²⁾ Subject to statements made in accordance with paragraph 3, paragraph 1 shall apply to requests for controlled deliveries, as referred to in Article 10 and to requests for covert investigations referred to in Article 15a. Where the competent authority is a judicial authority in one Member State and a police or customs authority in the other, requests shall be made and answered directly between those authorities. ⁽³⁾

⁽¹⁾ Text proposed by the Presidency for further consideration. Scrutiny reservation by several delegations.

The Irish delegation thought that the text of Article 15a(5) of 12323/97 JUSTPEN 97 should be reintroduced as paragraph 4:

"4. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by Article 15a or past thereof. Such declaration may be withdrawn at any time."

⁽²⁾ Scrutiny reservation by the French delegation on paragraph 5.

⁽³⁾ The Finnish delegation wondered if the wording of the last sentence would not be better contained in a separate general paragraph covering requests for assistance in general and not only requests for controlled deliveries.