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REPORT

from :	Coreper
dated :	22 March 2000
to :	Council
No. prev. doc. :	7046/00 COPEN 19 COMIX 278
Subject :	Draft Convention on mutual assistance in criminal matters between the Member States of the European Union

I INTRODUCTION

Coreper has submitted the draft Convention on mutual assistance to the Council in document 7046/00 COPEN 19 COMIX 278. Coreper re-examined certain questions on 22 March 2000. The present document contains below a revised list of the outstanding questions. A revised version of Articles 17(4) and 18(3) is set out in the Annex. The remaining text is unchanged as compared with Annexes I, II, III and IV of document COPEN 19.

II OUTSTANDING QUESTIONS NOT RELEVANT TO THE MIXED COMMITTEE PROCEDURES

A. General reservations

The Convention is subject to a general parliamentary scrutiny reservation by the Danish and United Kingdom delegations.

The Spanish delegation has maintained a reservation regarding the application of the Convention in relation to Gibraltar.

B. Interception of telecommunications

1. General

The provisions on interception of telecommunications are, in addition to the general parliamentary scrutiny reservations by the Danish and United Kingdom delegations referred to under II.A above, subject to a general parliamentary scrutiny reservation by the German delegation.

2. Article 17

On the basis of a proposal made by the Luxembourg delegation at the JHA Council on 2 December 1999, agreement has been reached on the revised version of paragraph 4 of Article 17 set out in the Annex.

The Italian delegation has maintained its reservation on paragraph 1 of Article 17. However, the delegation would further consider its position on this point.

The Council is invited to examine whether the reservation by the Italian delegation can be lifted.

At the meeting of the JHA Council on 2 December 1999 it was agreed that the proposal by the Commission for a Council declaration on Article 17 set out under point II.B.2 of COPEN 19 should be examined. On the basis of a proposal made by the Netherlands delegation and a further suggestion made by the Commission, the following draft declaration is submitted by the Presidency to the Council for approval:

"Declaration on the preparation of the application of the Convention

With a view to an effective implementation of the Convention on mutual assistance in criminal matters between the Member States of the European Union, the Member States shall, within a year after the adoption of the act establishing the Convention, consult each other on all practical and technical aspects related to the application of the Convention, in particular the provisions of Title III. The obligations contained in Articles 4 and 5 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector shall be taken into account. The Commission shall be fully associated."

The Council is invited to approve the declaration.

3. Article 18(3)

Agreement has been reached in Coreper on Article 18(3) as set out in the Annex.

Coreper also examined a list of questions to be addressed in the explanatory report to the Convention concerning Article 18(3). On the basis of comments made, the Presidency proposes the inclusion of explanations in the explanatory report along the lines indicated in points a to d in the footnote to Article 18(3) in the Annex. The Danish delegation would prefer the wording of the second sentence of point a set out in the end of the footnote.

The Council is invited to confirm the agreement on Article 18(3) and consider the suggestions of the Presidency concerning items to be addressed in the explanatory report to the Convention.

C. Quality drafting

The Working Party on Cooperation in Criminal Matters examined on 8 March 2000 the drafting suggestions proposed in document SN 1533/00 by the Legal Service in the light of the common guidelines for the quality of drafting of Community legislation.[1]

Agreement has been reached on a number of the suggestions made. The relevant parts of the text of the draft Convention have been changed accordingly. Certain suggestions on the provisions on interception of telecommunications have not yet been fully examined and are set out in Annex IV of COPEN 19.

The French delegation has maintained a scrutiny reservation on the amended version of Article 8.

The Council is invited to examine if the scrutiny reservation referred to can be lifted and to agree that further consideration should be given to the suggestions of Legal Service set out in Annex IV of COPEN 19.

III OUTSTANDING QUESTIONS TO BE EXAMINED UNDER THE MIXED COMMITTEE PROCEDURES

1. Article 6(1)

Article 6(1) is subject to a parliamentary scrutiny reservation by the United Kingdom delegation.

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[1] See Interinstitutional Agreement of 22.12.1998, OJ C 73, 17.3.1999, p. 1.

2. Article 6(3)

Parliamentary scrutiny reservation by the United Kingdom delegation on Article 6(3), and in particular on the last sentence of that paragraph.

3. Article 20a - data protection

Article 20a is subject to the following:

- The United Kingdom delegation has maintained a parliamentary scrutiny reservation on Article 20a;
- The German delegation has maintained a reservation and called for the deletion of the reference to "immediate" in Article 20a(1)(c). However, the delegation would further consider its position on this point;
- The Luxembourg delegation has maintained its reservation and its alternative proposal set out on pages 42 and 43 of COPEN 19. The proposal provides that each Member State shall declare which of two options it will apply concerning conditions for use of personal data transferred by it under the Convention to other Member States. Several delegations, including the Netherlands, Belgian, Danish, French, German, Austrian, Swedish, Greek and Italian delegations, stated that they could not accept the Luxembourg proposal. However, the delegations appeared in general to be willing to meet the concerns of the Luxembourg delegation in the form of a specific text on the application of Article 20a by Luxembourg.[1]

The Council is invited to examine the outstanding questions on Article 20a.

[1] Such a text could have the form of a declaration by Luxembourg to be annexed to the Convention and to form an integral part of it. Another solution could be to include an appropriate text in a new paragraph of Article 20a.

IV CONCLUSIONS

The Council is invited to examine the above questions, as far as the questions under point III are concerned in Mixed Committee procedure, with a view to reaching political agreement on the draft Convention.

ANNEX

Paragraph 4 of Article 17 is worded as follows:

"4. Nothing in this Article prevents Member States to request the Member State on whose territory the gateway is located the lawful interception of telecommunications in conformity with Article 16, in particular where there is no intermediary in the requesting Member State."

Article 18(3) is worded as follows:

3. The following shall apply where a Member State is notified pursuant to paragraphs 1 and 2:

(a) Upon receipt of the information provided under paragraph 2 the competent authority of the notified Member State shall, without delay, and at the latest within 96 hours, reply to the intercepting Member State, with a view to:

1. allowing the interception to be carried out or to be continued. The notified Member State may make its consent subject to any conditions which it would impose in a domestic case;

2. requiring the interception not to be carried out or to be terminated where the interception would not be permissible pursuant to the national law of the notified Member State, or for the reasons specified in Article 2 of the European Mutual Assistance Convention. Where the notified Member State imposes such a requirement, it shall give reasons for its decision in writing;

3. in cases referred to in subparagraph (a)(2), requiring that any material already intercepted while the subject was on its territory may not be used, or may only be used under conditions which it shall specify. The notified Member State shall inform the intercepting Member State of the reasons justifying the said conditions.[1]

4. requiring a short extension, up to a maximum period of 8 days, of the original 96 hours deadline, to be agreed with the intercepting Member State, in order to carry out internal procedures under its national law. The notified Member State shall communicate, in writing, to the intercepting Member State, the conditions which, pursuant to its national law, justify the requested extension of the deadline.

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[1] Following discussions in Coreper on 22 March 2000, the Presidency proposes that the explanatory report should:

a. Explain that in some cases, however, it might be necessary to use the material already intercepted in proceedings concerning claims for damages in relation to the interception carried out or action taken on the basis of Article 18(3)(b). Article 18(3)(a)3 does not prevent the intercepting Member State from fully informing any court in response to any legal action brought against that Member State;
b. explain in relation to Article 18(3)(a)3 that it is being understood that Member States will show flexibility regarding the use of already intercepted material for the purpose of taking urgent measures to prevent an immediate and serious threat to public security;
c. explain that the expression "for taking urgent measures to prevent an immediate and serious threat to public security" under Article 18(3)(b) should not be understood in a too restrictive manner and would cover for example measures taken in respect of crimes involving threats to human life, serious drugs offences and similar serious crimes;
d. Contain appropriate explanations on the consequences of failure by the notified Member State to reply within the deadlines (96 hours and 8 days), and explain that when a deadline of up to 8 days is running pursuant to Article 18(3)(a)4, the intercepting Member State may continue the interception and use the intercepted material under the conditions set out in Article 18(3)(b).

The Danish delegation would prefer the following wording of the second sentence of point a: "Such limited use should not be considered contrary to a decision by the notified Member State pursuant to Article 18(3)(a)3."

(b) [1]Until a decision has been taken by the notified Member State pursuant to points 1 or 2 of subparagraph a), the intercepting Member State:

- may continue the interception; and
- may not use the material already intercepted, except:
  - = if otherwise agreed between the Member States concerned; or
  - = for taking urgent measures to prevent an immediate and serious threat to public security. The notified Member State shall be informed on any such use and the reasons justifying it.

(c) The notified Member State may request a summary of the facts of the case and any further information, necessary to enable the notified Member State to decide whether interception would be granted in a domestic case. Such a request does not affect the application of subparagraph b), unless otherwise agreed between the notified Member State and the intercepting Member State.

(d) The Member States shall take the necessary measures to ensure that a reply can be given within the 96 hour period. To this end they shall designate contact points (to be on duty twenty four hours a day) under Article 21(e)."

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[1] See footnote to Article 18(3)(a)3.