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NOTE

from : German delegation
to : Police Cooperation Working Party
(EU/Iceland and Norway Mixed Committee)

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Subject : Initiative of the French Presidency on extending the scope of cross-border surveillance pursuant to Article 40 of the Schengen Convention

At the meeting of the Police Cooperation Working Party (EU/Iceland and Norway Mixed Committee) on 19 July 1999 the French Presidency presented its initiative on extending the scope of cross-border surveillance pursuant to Article 40 of the Schengen Convention under item I.3 on the agenda, and asked the delegations to provide information, giving pertinent examples from police experience.

The German delegation strongly supports the French proposal. The current scope of Article 40 deprives the investigating police officers of an important lead for gathering intelligence which could take them to the actual perpetrator. The following describes pertinent incidents which highlight the need for extending the scope of cross-border surveillance pursuant to Article 40.

1. In 1998 the police in Baden-Württemberg placed the wife of an accused who was wanted for arrest for fraud under surveillance, as allowed for under German law. In the course of the surveillance operation the woman crossed the border between Germany and France. As Article 40 of the Schengen Convention allows surveillance to be continued only when the person under surveillance is the principal or accessory to a crime, surveillance could not be continued on French territory.
2. In the same year, the Baden-Württemberg police placed a money courier under surveillance as part of investigations into extortion from several businesses. During the operation, the courier's journey briefly shifted onto French territory. The French side refused to allow surveillance to be continued in accordance with the current version of Article 40 on the grounds that the person under surveillance was not suspected of participation in the offence.
3. In 1997 a flying squad in Baden-Württemberg was deployed in investigations in which the exact whereabouts of the accused, an Italian violent criminal and Mafia member wanted for arrest, were not known at the time. There was evidence that the fugitive intended to contact relatives to secure his escape and that he might either be in France or flee there. However, the relatives to be placed under surveillance were not accused of participation in the offence, so that surveillance could not be based on Article 40.
4. In another case in 1998 an escaped prisoner was to be taken to Italy by his relatives. The meeting time and place were not known for certain at the time. It was to be assumed that contact would be made on Austrian territory. The relatives to be placed under surveillance were, once again, not the accused. Cross-border surveillance pursuant to Article 40 was therefore not possible.

5. In the course of a hunt for the murderer of several people, the police of North-Rhine Westphalia placed a contact of the fugitive under surveillance. In January 1998 that person crossed the border from Germany to Luxembourg and from there to France. The Luxembourg authorities authorised the North-Rhine Westphalian police officers to cross the border as well as the transfer of and back-up for the operation. However, neither the surveillance officers from Luxembourg nor the officers from Germany were allowed to cross the border from Luxembourg to France, since French law does not provide for the surveillance of a contact person. The surveillance had to be discontinued as a result.
6. On the basis of investigations by Austrian authorities into a German national for suspected fraud amounting to several thousand million, an international manhunt was under way for the accused, who had absconded. As the trail of clues led to Germany (it was discovered that the accused's wife intended to give up their home and have the contents conveyed to Hamburg by a removal firm) and it was to be assumed that the accused would contact his wife during the removal, which she was to accompany, the Austrian authorities sent the competent German authorities in Bavaria and Saxony an official request for judicial assistance with a view to cross-border surveillance in July 2000. The competent judicial authority in Saxony, however, did not authorise cross-border surveillance of the removal or the accused's wife because pursuant to Article 40(1) of the Schengen Convention a prerequisite for the surveillance, which had begun in Austria and was to be continued on German territory, was surveillance of the accused. There was no evidence that the accused's wife was herself involved in an extraditable offence.
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