



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

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NOTE

from : Presidency
to : Multidisciplinary Group on Organised Crime

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Subject : Council Resolution on simplifying the cross-border deployment of undercover officers in order to step up Member States' cooperation in the fight against serious cross-border crime

At the MDG meetings on 4 January and 5 February 2007, the vast majority of Member States expressed their support for an initiative on simplifying the cross-border deployment of undercover officers in order to step up Member States' cooperation in the fight against serious cross-border crime. Further to the discussions held at the MDG meeting of 2 and 29 March 2007, the Presidency has revised the draft Council Resolution.

The following delegations have a scrutiny reservation: CY, CZ, DK, IE, PL, SE and UK.

Delegations are invited to provide their comments on the revised text with a view to forwarding the text to the Article 36 Committee.

1. Background

Member States' law enforcement authorities need to cooperate efficiently if they are to be effective in combating serious cross-border crime, in particular organised crime and terrorism.

However, the cross-border deployment of undercover officers, an important and often crucial tool in clearing up serious crime, can be made more difficult or even be prevented by legal or practical constraints.

The legal basis and practices for deploying undercover officers in the Member States can vary considerably.

Further to the presentations by practitioners at the MDG meeting on 4 January 2007¹, it appeared that there is a need for more detailed EU level analysis of what action, including legislation, needs to be taken on the cross-border deployment of undercover officers in order to step up Member States' cooperation in the fight against serious cross-border crime. Whilst the presentations showed that cross-border practical cooperation between police and judicial authorities already works very well in many cases, they also pointed to a failure of a significant number of deployments (26 cases in Germany alone in 2005).

The present note aims to identify the main areas where differences between Member State's practice and legislation causes difficulties and where some sort of EU level action seems necessary to boost the efficiency of cross-border cooperation on the deployment of undercover officers and give some indications as to the ways in which to resolve it. [...]

These are:

- requirements and procedures for cross-border deployment of undercover officers;
- protection of undercover officers' identity;
- equal legal status for national and foreign undercover officers;
- possibility of seconding undercover officers abroad;
- cross-border assistance in providing operational cover for undercover officers.

¹ 5777/07 CRIMORG 19 RESTREINT UE and 5778/07 CRIMORG 20 RESTREINT UE.

[...]

2. Detailed description of the five areas requiring regulation

2.1. Requirements and procedures for cross-border deployment

Article 14 of the Mutual Assistance Convention merely enables Member States to reach an agreement on requirements and procedures. However, these rules do not help in cases where the need for spontaneous cross-border deployment of an undercover officer arises, no bilateral agreements between the acting Member States exist and Member States have no time to negotiate an agreement.

2.2. Protection of undercover officers' identity

When an undercover officer's identity is disclosed and he is openly questioned by police or examining magistrates, his life, limb and liberty and that of his family can be at great risk. His continued use as a covert officer is also put at great risk in such cases.

However, not all Member States guarantee to protect an undercover officer's identity, even if breaking his cover would put his life, limb and liberty at risk. This has considerable adverse repercussions on the deployment of undercover officers in cross-border criminal prosecutions. If, for example, an undercover officer is asked by a criminal group to accompany them to a neighbouring country to acquire a large quantity of drugs, he will have to find a pretext for refusing if his identity is not protected in the country concerned. Otherwise, he would run the risk of being unmasked, should the neighbouring state initiate investigations.

2.3. Equal legal status for national and foreign undercover officers

Undercover officers working on a cross-border basis are often not covered by the provisions which apply to national undercover officers.

As a result, there is sometimes legal uncertainty as to the law applicable, or the provisions which do apply do not take sufficient account of the special nature of undercover officers' work. One of the points of the future legal instrument should be that, in the event of cross-border deployment of an undercover officer, he would be treated by the Member State in which he is deployed as if he were a national undercover officer.

2.4. Possibility of seconding undercover officers abroad

It is often legally impossible for a Member State to "lend" an undercover officer to another Member State at present, although this could greatly improve the efficiency of criminal prosecution.

Past experience shows that, in certain circumstances, foreign undercover officers may find it easier to infiltrate criminal organisations. The use of foreign undercover officers can also reduce the risk of discovery. [...]

2.5. Cross-border assistance in providing operational cover for undercover officers

In many Member States it is not legally possible to assist in providing operational cover for undercover officers.

However, cross-border assistance with operational cover may be essential to the success of the covert deployment. Examples might include entry of a bogus firm in a foreign commercial register, or opening an account with a foreign bank. Measures such as these can make a cover story so credible that criminal organisations are more likely to cooperate with the undercover officers in question.

3. Type of instrument to be elaborated

The Presidency agrees with delegations that it is too early to specify the concrete form of any measures to be elaborated.

But they should address the following areas:

- the aim of the instrument, scope, definition of undercover officers,
- criteria for approving the deployment of an undercover officer (e.g. including a list of certain offences, or the principle of dual criminality, specifying the principle of proportionality, possibly including a subsidiarity clause),
- procedure for deciding on whether to deploy, e.g. which authority should be notified of the intended deployment, what the contents of this notification should be and the fact that the intended deployment will require prior approval by the requested Member State, and how to handle urgent cases in which approval cannot be obtained in advance,
- procedure and rules governing the deployment itself, e.g. according to the procedural law of the requested State, operational command by the requested Member State with the right for the requested State to require at any time that the deployment be ended if the criteria for its approval are no longer fulfilled, and rules on the carrying of weapons and other technical equipment,
- protection of the identity of the undercover officer deployed. If the Member State in which the undercover officer is to be deployed approves the deployment, it will protect the undercover officer's identity according to minimum standards yet to be agreed. This will apply in any event to cases where there is reason to fear that disclosure of the identity of the undercover officer would jeopardise the life and limb or the liberty of the undercover officer or of other persons,
- reciprocal assistance in providing operational cover for undercover officers. This can be made possible by giving the undercover officer of the Member State which requests assistance the same legal status as undercover officers of the State requested to provide assistance,
- secondment of undercover officers,
- rules concerning the use of the intelligence obtained as evidence in subsequent criminal proceedings.

4. Relationship between the future legal instrument and Article 14 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (MLA Convention)

The problem areas identified above exist in spite of Article 14 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Mutual Assistance Convention). Article 14 does provide for the possibility in principle of deploying undercover officers across borders; however, the practical requirements for deployment, the procedure and the legal position of foreign undercover officers remain subject to an agreement between the Member States concerned prior to any investigation measures.

As is apparent from the problem areas focused on in the presentations at the MDG meeting on 4 January 2007¹, Article 14 of the MLA Convention provides no guidance for cases where a cross-border deployment is imminent and no bilateral agreements exist².

Article 14 of the MLA Convention contains no provisions on precisely those areas identified as in need of regulation: protection of undercover officers' identity; equal legal status for national and foreign undercover officers; possibility of seconding undercover officers abroad and cross-border assistance in providing operational cover for undercover officers.

However, even after the adoption of a future EU instrument with rules governing these areas, Article 14 of the MLA Convention will retain its autonomous function. It should remain possible for Member States, on the basis of Article 14 of the MLA Convention or on the basis of Article 23 of the 'Naples II' Convention, to agree further rules on this topic.

5. Need to harmonise national legislation

[...] Whether national legislation would need to be harmonised pursuant to the EU action to be adopted, will ultimately depend on the specific form of the rules, which will be negotiated further to the Council Resolution.

¹ 5777/07 CRIMORG 19 RESTREINT UE and 5778/07 CRIMORG 20 RESTREINT UE.

² Two Member States (DK and EE) have moreover made a declaration to the effect that they are not bound by Article 14. IE intends to make such declaration upon ratification of the 2000 Convention.

6. Definition of "undercover officer"

The definition of undercover agents should be the same as that in Article 14 of the MLA Convention. This would define an undercover officer as an officer acting under covert or false identity. Civilians acting undercover and informants would thereby be excluded from the scope of a future EU instrument.

7. Desired procedure

In presenting the current draft Council Resolution, the German delegation's intention is first of all to secure a political decision on the need of an examination of the existing legal and practical hindrances in cross-border cooperation on undercover officers. In a second step, if, following the examination there is a need for, Member States or the Commission should submit an initiative to address those areas that have been identified as in need of EU legislation.

Council Resolution
of 2007
on simplifying the cross-border deployment of undercover officers in order to step up
Member States' cooperation in the fight against serious cross-border crime

THE COUNCIL OF THE EUROPEAN UNION –

Whereas:

- (1) There is a need to step up practical cooperation between law enforcement authorities in the Member States and to continue to dismantle the remaining obstacles to cross-border cooperation, in order to combat cross-border organised crime and other types of serious crime and terrorism effectively.
- (2) The deployment of undercover officers is an important tool in clearing up serious crime, often the only one to hold out any promise of success. It should be possible to employ this tool efficiently in cross-border cases too.
- (3) Article 14 of the Convention of 29 May 2000 on mutual assistance between the Member States and Article 23 of the Convention of 18 December 1997 on mutual assistance and co-operation between customs authorities allow for bilateral agreements to deploy undercover officers on a cross-border basis and should as such be retained, but do not contain sufficiently detailed mechanisms for swift and efficient co-operation in all cases in which no bilateral agreements exist.
- (4) Existing legal and practical hindrances in cross-border cooperation on undercover officer should be identified and addressed in the interests of combating cross-border crime effectively.

HEREBY instructs the relevant Council Working Party to examine in particular the following areas in order to determine to what extent they should be covered by EU level action, including if appropriate a future EU legal instrument, concerning cross-border cooperation between undercover officers, whilst respecting the different legal systems and traditions in Member States:

- requirements and procedures for the cross-border deployment of undercover officers (e.g. definition of undercover agents; definition of the scope of application; the principle of dual criminality; the principle of proportionality, possibly including a subsidiarity clause; exercise of powers in compliance with the domestic law of the state where these powers are to be exercised; carrying of weapons and operational command,)
- protection of undercover officers' identity
- equal legal status for national and foreign undercover officers
- possibility of seconding undercover officers abroad
- cross-border assistance in providing operational cover for undercover officers

DEEMS that the scope of future EU action concerning cross-border cooperation between undercover officers should be confined to officers acting under covert or false identity for the purpose of investigation of crimes.

DEEMS that such an instrument should be flexible and based on the principle of voluntary participation for Member States as set out in Art.32 TEU.

CALLS upon Member States or the Commission, if following the examination it is deemed to be expedient, to submit an initiative for an instrument on the basis of Article 34(2) of the Treaty on European Union, no later than 31.12.2008, to address those areas that have been identified as in need of EU legislation.

Done at Brussels, on 2007

For the Council
The President