



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from : future Presidency  
to : Multidisciplinary Group on Organised Crime  
Subject : Council conclusions 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

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Delegations will find attached draft Council conclusions 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.

**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, is often hindered or prevented by legal or practical constraints.

The legal basis for deploying undercover officers in the (...) Member States can vary considerably. In some Member States the use of undercover officers as an investigation tool is not regulated at all.

Selected practitioners have identified a total of five areas where regulation at EU level seems necessary to boost the efficiency of cross-border cooperation on the deployment of undercover officers.

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.

These problems 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.

#### **Purpose of the draft Council Resolution:**

This draft Council Resolution is intended to draw attention to the problems which exist and secure a political decision to the effect that certain aspects of the cross-border deployment of undercover officers should be regulated at EU level, for example in a framework decision or convention. There are no plans, nor is there any need, to harmonise national law on the use of covert investigators. Quite the reverse: laying down uniform regulations solely for cross-border cooperation cases, e. g. in a convention, should suffice.

## **Detailed description of the five areas requiring regulation:**

### **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 and Member States have no time to negotiate an agreement.

### **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 are always 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.

### **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.

### **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. In a specific case, for instance, a criminal organisation was planning to extend its criminal activities to another Member State. An undercover officer from that Member State managed to infiltrate the organisation. In this case the law enforcement authority actually benefited from the fact that the criminal organisation was trying to tap the foreign undercover officer's know-how and contacts.

The use of foreign undercover officers can also reduce the risk of discovery. Law enforcement authorities know from past experience that criminal organisations think they are less likely to be infiltrated by undercover officers from abroad.

### **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.

**Council Resolution  
of 2007**

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. This tool should be employed efficiently in cross-border cases too.
  - (3) Legal and practical uncertainties still stand in the way of the cross-border deployment of undercover officers and other types of cooperation between Member States in this field. These uncertainties should be removed in the interests of combating cross-border crime effectively.
- (...)

HEREBY INSTRUCTS the Multidisciplinary Group on Organised Crime to draft and submit to the Council a proposal concerning cross-border cooperation between undercover officers no later than xx.xx.2008, to address the following areas in particular:

- **requirements and procedures for the cross-border deployment of undercover officers** (in particular approval requirements, gravity of relevant offences, exercise of sovereign powers, 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.**

Done at Brussels, on ... .... 2007

For the Council  
The President

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