



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 January 2008

5001/08

LIMITE

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NOTE

from : General Secretariat
to : Multidisciplinary Group on organised crime

No. prev. doc. : 12264/07 CRIMORG 132 ENFOPOL 145 ENFOCUSTOM 86

Subject : Overview of replies to questionnaire on undercover officers

Introduction:

On 12 June 2007 the Council adopted the 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 (6678/3/07 REV 3 CRIMORG 39). In this resolution, the Council mandates the competent Working Party (i.e. the MDG) to further examine the cross-border deployment of undercover officers and to clarify if and to what extent there is need for action at EU level. Should the MDG come to the conclusion that there is a legislative gap to fill, a draft instrument aimed at filling this gap should be submitted no later than 31 December 2008.

As a first step to fulfil the Council's mandate, the Member States were asked to fill out the questionnaire set out in 12264/07 CRIMORG 132 ENFOPOL 145 ENFOCUSTOM 86 by 31 October 2007. At the beginning of 2008, 19 Member States have sent in their replies to the questionnaire.

The annex is aimed at providing an overview of the replies received so far. The attempt to present these replies in comparative tables obviously necessitated a certain level of ‘simplification’ of the replies provided by delegations. Inevitably, some nuances in the replies provided by delegations cannot be not reflected in these tables. Nevertheless, it is hoped that these comparative tables, which will be updated once the missing replies will be received, will allow the MDG to assess whether and where there is a need for further action at EU level.

Any comment with regard to these tables, can be sent to Guy Stessens:

guy.stessens@consilium.europa.eu

I. General:

I.1.a) Is the deployment of undercover officers legally admissible in your Member State?

	FR	AT	FI ¹	LT	EE ²	HU	LU ³	SK	BG ⁴	PT	NL ⁵	IE	RO	LV	CY	SI	PL ⁶	BE	DE	
Yes admissible	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X
No, not admissible							X													
Existence of other measures	X		X		X				X		X									X

¹ In FI, the general use of human intelligence sources is considered to be the other measure.

² In EE, there are similar procedures, but with different legal meaning, in place in the Surveillance Act and the Code of Criminal Procedure

³ In LU, the undercover officers cannot be deployed for the moment due to a legislative gap. The bill introducing undercover operations is presently being discussed in Parliament.

⁴ The law in BG provides for the conduct of controlled deliveries and confidential transactions with the participation of an undercover officer.

⁵ NL indicates there are three regulations that can serve the same purposes, namely Special Investigative Powers (Cooperation) Decree, Regulation governing infiltration teams, Regulation governing the financial management of infiltration

⁶ PL refers to the existence of several law enforcement agencies that have undercover units: the Police, the Border Guard, the Internal Security Agency, the Central Bureau of Anticorruption, the Military Police.

II. Incoming requests for the deployment of a foreign undercover officer on your territory

II. 1) a) Under what conditions may the deployment of a foreign undercover officer be approved?

	FR	AT ¹	FI	LT	EE ²	HU	LU	SK	BG	PT	NL	IE ³	RO ⁴	LV	CY ⁵	SI	PL	BE	DE
limitation to certain offences/specific criteria	X	X	X	X	X	X	X	X	X	X	X			X	X	X	X	X	X
double criminality	X		X ⁶	No		No	No	X			No			X			No	X	X

¹ AT links this investigation tool in general to the EAW conditions.

² EE has made the reservation to the Article 14 of MLA, but in practice of the State Prosecutor Office “the deployment is not obligatory, but allowed (decided case by case)”

³ IE introduced as a general remark, that while there is nothing explicitly stated, there is nothing in Irish law to prevent Garda officers from operating undercover in this jurisdiction. Garda and Revenue enforcement officers are deployed in drug interdiction and fiscal anti-smuggling operations in this jurisdiction specifically in “controlled delivery” operations and also for surveillance. In conducting such operations, Irish law enforcement agencies are extremely conscious of the rules concerning “agent provocateur”.

⁴ In RO, the Romanian legislation does not allow currently the use of foreign undercover investigation officers. However it appears that foreign collaborators (in trafficking drugs cases) and informers (in human beings trafficking cases) are authorised.

⁵ At present, in CY, there is no domestic legislation concerning the deployment of foreign undercover officers. However, the deployment of foreign undercover officers may take place, following:

- a request under articles 13 & 14 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union in accordance with Article 34 of the Treaty on European Union,
- bilateral, multilateral agreements or other arrangements under Articles 19 & 20 of the United Nations Convention against Transnational Organized Crime,
- bilateral, multilateral agreements under the United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances,
- an agreement with a Member State or a Third Country on police cooperation.

⁶ Yes, when coercive measures required.

Proportionality and/or subsidiarity	X	X	X	X	X	X		X	X	X	X			X	No	X	No		X
authorisation by judicial authority	X	X ¹		X	X	X	X	X	X	X	X			X	X	X		X	X
authorisation by Police or Ministry of Interior			X	X				X ²		X				X	X		X		
request of the judicial authority needed		X	X, the MLA			X		X	X					X					

Supervising authority	FR	AT	FI	LT	EE	HU	LU	SK	BG	PT	NL	IE	RO	LV	CY	SI	PL	BE	DE
judicial authority (court, public prosecutor)	X			X			X		X										X

¹ As from 1 January 2008 the prosecutor will have to order to undercover investigation (instead of the current authorisation given by the court of first instance).

² In SK, in general, there are no supervision possibilities of the office granting this authorisation.

II. 2.

a) Are there any other requirements imposed with regard to the person, qualification or status of the undercover officer?

No: NL, RO

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
must be a trained officer acting undercover	X	X				X			X					X	X			X		X	X				X	X	
written undertaking required			X																								
Special agreement from authorities										X																	
Cf. MOU				X																							

b) What status does the foreign undercover officer have under your domestic law?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK	
Bound by law of MS where he is acting	X			X															X									
Same status as domestic UCA		X	X			No, different ¹				X				No, different						X				X	X ²	No, different		
See MOU														X														

¹ DE: confidence person.

² SK: but not all the same investigation powers.

II. 3. Which information is requested with regard to the person of the undercover officer by the requesting state? Do you demand the undercover officer's identity? If so, who has access to such information?

	AT ¹	BE	BG	CY ²	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	
experience background												NA		x	x	x											
status of the officer		x										NA			x	x											x
number UCA		x	x									NA						x									
pseudo UCA identity									x	x		NA				x					x						
true identity UCA						No ³			(x)			NA							x	x	x	x			x	x	
accessible to police (dedicated unit -												NA							x	x	x						

¹ No information requested.

² Information stipulated in the agreement.

³ DE: but exceptions possible.

officer)																											
accessible to prosecutor				x								NA									x	x				x ¹	

II. 4. Do your authorities supervise the undercover officer?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK	
Interior Ministry	X																											
Police (specialised Officer)		X		X		X				X ²				X		X		X	X	X	X				X		X	
Magistrate		X								X						X			X		X							
Not specified			X						X ³						X								X			X		

1 In case of court proceedings.
2 FR: in case of customs UCA.
3 See answer II. 1. e)

II. 5. Is the authorization restricted to specific measures, restricted in time and/or granted on the condition that the deployment can be stopped at any time?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Restricted to specific measures		X		X					No	X ¹					X ²	X		X	X ³		X	X				X	
Limited In time	1m R ⁴	3m R	2m 1R	X R		X			No	4m R				X	X	4m R		X	X	X	X	X		2m R	6m R		
Stoppable At any time		X ⁵	X ⁶			X			No					X					X	X	X				X		

¹ FR: offences, identity of UCA and time period of maximum 4 m have to be specified in the habilitation.

² LT: judge must indicate in his ruling: UCA, the persons against whom will be acted, criminal offences concerned, actions to be carried out, results sought and time period.

³ NL: offences which the UCA is 'authorised' to commit.

⁴ R= renewable.

⁵ BE: in case conditions are not respected.

⁶ BG: aims achieved or no (further) results achievable. Danger of disclosure of the UCA identity.

II. 6. Can a person affected by the deployment of a foreign undercover officer request information from your authorities about the identity of the undercover officer (e.g. after an incident)?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
No		X	X	X					X	X				X	X			X		X				X	X		
Only, if secrecy has been lifted	X					X																					
In theory, but in practice not																X		X		X	X						
Yes																										X	

II. 7. a) Does the foreign undercover officer have the same rights as an undercover officer in a domestic investigation procedure in your Member State?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes	X	X	X						X	X				X		X		X		X	X	NA		X	X	X	
No						X									X				X								

b) Is a foreign undercover officer allowed to carry technical means and arms on him/her?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes	X	X	X	X						X					X ¹	X			X ²		X ³				X	X	X ⁴
No																											
Only technical means						(X) ⁵			X					X	X			X		X		X ⁶					

¹ LT: subject to special authorisation.

² NL: subject to special authorisation.

³ PT: subject to special authorisation.

⁴ FI: subject to special authorisation.

⁵ DE: depends upon bilateral MOU.

⁶ RO: only technical means, but subject to special authorisation.

c) May he/she enter third-party flats/houses?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes				X ¹					X	X					X	X		X	X	X							
No			X																			X					
With owner's consent	X	X		X		X								X								X		X	X	X	

d) May he/she incite others to commit criminal offences?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes																X											
No	X	X	X			X			X	X				X	X			X	X	X	X	X		X	X ²	X	
Unclear				X																							

¹ CY: only with special license.

² SK: except in some corruption cases, under specific circumstances.

II. 8. Can the state deploying the undercover officer use the information in subsequent proceedings in accordance with its own principles, or to a limited extent only (e.g. in accordance with certain conditions)?

SI: No

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Under national law	X					X												X ¹		X		X					
Yes, except for security intercepts		X																									
Only, after MLA request			X																								

¹ HU: but UCA will always have to enjoy special witness status.

For agreed purposes				X					X	X ¹				X	X				X						X ²	X	
In accordance with int'l agreements																				X							

II. 9. Under what conditions can foreign undercover officers be held responsible under criminal or civil law for activities related to their deployment?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Schengen provisions	X																										
Articles 14-16 2000 MLA Convention	X																								X		
Articles 21-22 of 2nd Protocol to			X																								

¹ FR: discretion of magistrate to communicate, under conditions to be determined by him/her, information to the other Member State.

² SK: only if the offence is punishable by at least 5 years imprisonment, or is on an offence of corruption, abuse of authority by a public official or money laundering.

IV. Cross-border deployment of undercover officers:

IV. 1. What is your experience with regard to the application of Article 14 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and of Article 23 of the Convention on mutual assistance and cooperation between customs administrations (Naples II) ?

	A T	BE	B G ¹	CY	C Z	D E ²	D K	E S	E E	F R ³	G R	IE	IT	L V	LT	LU	M T	H U	NL	P L	P T	R O	S E	FI ⁴	S I ⁵	SK	U K	
UCA not regulated in other countries		x																										
UCA techniques not allowed in other countries		x																										
Insufficient guarantees for protecting UCA true identity		x																										

¹ MLA Convention not yet in force in BG.
² DE: good experience.
³ Long experience.
⁴ Not enough possibility to allow UCA for the purpose of prevention of offences.
⁵ SI: Very good experience.

IV. 3. In how many cases – if possible per year as from 2002 – has your Member State made a request for mutual assistance to another Member State, aimed at the deployment of an undercover officer? (If no figures are available, please estimate).

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Deployments abroad		5	0	0		50-70				5		0		10 ²	0		14		10-15 ³	5-6	1		3	6-10 ⁴	X		
Foreign requests received		6		0								0															
No statistics	X								X										X								

¹ Little role for Europol.

² Since 2002 appr. 15 requests in context of operational co-operation.

³ 10-15 by the police + Plus 2-3 by Border Guard.

⁴ For intelligence purposes, none for judicial purposes.

IV. 4. In how many of these cases was such request refused by another Member State? (If no statistics are maintained or are available, an estimate in percentages would suffice).

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
		V ¹				26 ²				1				10-20%	0	0		0		0	0	0		0	0		
No statistics or NA	X		X	X					X			X							X							X	

IV. 5. In how many cases was the reason provided by the other Member State for the refusal:

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
a) principal incompatibility with domestic law	NA	NA	NA	NA					NA	0		NA		NA	NA		NA	NA	X	X	X		X	X	X	NA	

¹ V = variable figures.

² DE: 2005 = 26. Based on this experience, less requests were made in 2006, as a result of which only 2 were refused.

IV. 7. In how many cases– if possible per year as from 2002 – have requests for mutual assistance aimed at the deployment of an undercover officer *not* been made to other Member States, because (If no figures are available, please estimate).

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Not available	X		X	X					X			X				X			X	0	0	0		0	0		
No chances of success		1+								0				0				0									
Required conditions impossible or unacceptable		1+				20				0				0				0									
Other reasons														0	3 ¹			0									

¹ Legislation of other states made deployment impossible.

V. Provision of operational cover:

V. 1 Which means are used for operational cover of an undercover officer in the context of a national investigation proceedings?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Fictive identities - Legal documents	X	X	X			X			X					X				X	X		X	X		X	X		
Store fronts		X	X											X				X									
Premises		X																									
Technical means (e.g. direct video/audio control – protection unit)			X			X				X					X			X	X					X			

V. 2. Can these measures also be used in favor of an undercover officer of another Member State which you allowed to be deployed on your territory?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes	X	X	X	X	X	X			X	X		NA		X	X			X	X	X	X			X	X	X	
No																X						X ¹					

The foreign UCA must have its own fictive identity: BE, BG

V. 3. Has your Member State already provided operational cover support to other Member States for undercover officers in the past?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes	X	X	X			X			X	X		NA		X	X			X	X	X	X			X	X		
No				X												X						X				X	

¹ No foreign UCA can be deployed on Romanian territory, but foreign informers and collaborators enjoy the same status as Romanian ones.

V. 4. If the answer to question 3 was no: specify what kind of measures for the provision of operational cover were refused for which legal or factual reasons?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Not applicable	X	X	X			X			X	X		X		X	X			X	X	X	X			X	X		
No request received				X																		X					
Legal reasons				X												X											

V. 5. Do you consider cross-border support as an appropriate means in the provision of operational cover, capable of increasing the investigation success? - Member States that have answered “yes”, have provided the following examples :

- *International nature of organized crime*
- *Heightened credibility of UCA (language skills, regional origin) – more difficult for the suspects to ‘uncover’ UCA*
- *Better protection of UCA, who can return to his home country*

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes	X	X	X	X		X			X	X		NA		X	X	X		X	X		X	X		X	X	X	
No																				X							

VI. Secondment of undercover officers abroad:

VI. 1. Did your Member State already use undercover agents of other Member States in its own investigation proceedings?

- If the answer is “yes”, please specify legal basis and experience: *domestic legislation and international agreements on police co-operation and judicial co-operation, domestic criminal procedure legislation, sometimes MOU*
-
- If the answer is “no”, the explanation often provided was: *no requests received, or lack of legislation (LU)*

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes	X	X				X			X	X		X			X			X	X	X	X			X	X	X	
No				X												X						X					

VI. 2. Did your Member State already “lend” its own undercover officers to other Member States for their investigations?

- If the answer is “yes”, please specify (legal basis, experience): *domestic legislation and international agreements on police co-operation and judicial co-operation, domestic criminal procedure legislation, sometimes MOU*
- If the answer is “no”, the explanation often provided was: *no requests received*

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes	X	X ¹				X			X	X				X	X			X	X	X	X	X		X	X	X	
No			X	X								X				X											

VII. Improvements

VII. 1. In 6678/3/07 REV 3 CRIMORG 39 the following areas are highlighted in which a need for action may be needed at EU level. Please specify for each item on a scale from 0 to 10 in how far you agree with this assessment (0 = no agreement, 10 = full agreement):

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
a) requirement & procedures for cross- border deployment of undercover officers	10	10	7	10		10			5	7		NA		8	10	10		X ²	5	0	10	10		10	7	8	
b)Protection of UCA's identity	10	10	9	10		10			10	10				10	10	10		10	1 ³	10	10	10		10	7	8	

¹ BE: 15 demands a year.

² HU: / = subject to further discussion.

³ NL: UCA identity protection is an important prerequisite, but this is a highly complex issue for domestic legislation. Much more important to focus on good practical co-operation.

c) Equal status for national and foreign undercover officers	10	10	10	10		6			5	10				10	10	10		X	1	10	9	10		10	8	6	
d) Possibility of seconding UCA's abroad	10	10	9	10		8			5	8				10	10	10		6	5	10	9	10		10	10	7	
e) Cross-border assistance in providing operational cover for UCA's	10	10	7	10		7			10	X				10	10	10		10	5	10	9	10		8	7-10	8	

VII. 2. Is there a further need for action in areas not mentioned above?

The following areas have been mentioned:

BE: *designation of a single contact point in each Member State;*

DE: *contact with competent authorities in other Member states should be facilitated; clarification as to who is competent*

LV: *harmonisation of legislation*

HU: *concentrating on law enforcement (no prevention), further use of evidence obtained through UCA, EAW list, JIT-type model agreement, cost effectiveness, co-operation with FRONTEX, harmonization of civil/criminal liability rules (cf. Prüm)*

NL: *standardised training by EU, interpretation support by EU*

PT: *training programmes, increased meetings between relevant units, continuous upgrading of competences*

SI: *court testimony by UCA – protection of identity*

SK: *legal regulation for carrying a weapon; contact policeman for foreign UCA*

FI: *improving int'l co-operation for the prevention of offences*

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes		X		X		X			X									X	X					X	X	X	
No	X		X							X				X	X	X				X		X					

VII. 3. Do you see any need for action to support or facilitate practical cooperation through organisational measures?

	AT	BE	BG	CY	CZ	DE	DK	ES	EE	FR	GR	IE	IT	LV	LT	LU	MT	HU	NL	PL	PT	RO	SE	SI	SK	FI	UK
Yes		X	X	X		X								X		X			X					X	X		
No										X					X											X	

BE: appropriate legal framework exists, only assistance by members from experienced teams is necessary

DE: designation of contact points in each Member State, possibly co-ordinated by Eurojust/Europol; documentation on legal regimes in all Member States; model request form

CY: coordination of various activities

NL: very limited need to provide Eurojust & Europol with a facilitating role. Greater use could be made of existing networks, without formalising them or embedding these into the structure of the EU

PL: court testimony by UCA – protection of identity

SK: mutual meetings, exchange of best practices