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From: General Secretariat of the Council
To: JHA Counsellors on Judicial Cooperation in Criminal Matters (COPEN)
Working Party on Judicial Cooperation in Criminal Matters (COPEN) (General matters)
CATS

Subject: Non paper on cross-border bugging and tracking of vehicles and the EIO

Delegations will find in the Annex a non-paper by the Netherlands, Germany and France, regarding "cross border bugging and tracking of vehicles and EIO".

Non paper on Cross-border bugging and tracking of vehicles and the EIO

Introduction

Transnational organised crime is one of the big challenges within the European area of freedom, security and justice, as was also set out in the Commission Communication on the EU Strategy to tackle Organised Crime 2021-2025¹ and the Commission Communication on the EU roadmap to fight drug trafficking and organised crime². Criminal groups active in EU Member States are often composed of members from multiple nationalities and operate across different jurisdictions in- and outside the EU. In the fight against organised crime, effective cross-border cooperation between Member States is therefore essential. One of the EU-instruments that facilitates this cooperation is Directive 2014/41/EU regarding the European Investigation Order (hereafter: the EIO-Directive), allowing for Member States to obtain evidence available in other Member States.

In criminal investigations, specifically in those concerning organised criminal groups, the use of electronic (surveillance) measures, such as interception of telecommunications and GPS-tracking and bugging of vehicles, can be crucial in order to identify the persons involved, to map movements, to trace illicit goods and to gather important evidence about the crimes being committed.

Unlike for the interception of telecommunications, there is no specific provision in the EIO-Directive allowing Member States to continue bugging³ and GPS-tracking of vehicles⁴ on the territory of another Member State. In practice this leads to difficulties. It is clear, also from surveys from Eurojust⁵, reports from the European Judicial Network (EJN)⁶ and initial findings of the tenth round of mutual evaluation concerning the EIO-directive, that Member States are struggling with this issue.

Proposal

- We would like to advocate amending article 31 of the EIO-directive or, if considered necessary, adding a new provision to the EIO-directive. While the first option would be easier and could provide a neutral provision capable to adapt to future new technical instruments both options would have the advantage of providing for a solid basis for continuing a GPS-track or the bugging of a vehicle on the territory of another Member State.

Rationale and draft article

For the interception of telecommunications the EIO offers – in article 31 – the possibility to continue this interception on the territory of another Member State in cases where no technical assistance is needed from that other Member State.

When it comes to bugging and GPS-tracking of vehicles, the EIO-Directive allows Member States to issue an EIO to the Member State in whose territory the vehicle is located, since the EIO-Directive is applicable to the cross-border execution of any type of investigative measure to obtain evidence. However, specific rules on these investigative measures are lacking. This means that the general regime of the EIO-Directive applies. Unlike for the interception of telecommunications, there is no specific provision in the EIO-Directive allowing Member States to continue GPS-tracking or the bugging of a vehicle on the territory of another Member State (only requiring them to send a notification to the other Member State).

As for GPS-tracking, one could argue that article 40 of CISA provides a basis to continue a GPS-track on the territory of another State. We would like to point out however that – apart from the fact that the CISA works within the Schengen Area and concerns police cooperation – article 40 has some requirements that are more restrictive than article 31 of the EIO-Directive. An example is the restriction that continuing the surveillance without prior consent is only allowed in case of certain criminal offences (see article 40(7) CISA). Also, article 40 CISA requires that the requested State gives its consent (within five hours) (article 40(2) CISA), while article 31 of the EIO does not require consent, but only that the notified Member State does not object within 96 hours.

¹ COM(2021) 170 final.

² COM(2023) 641 final.

³ Installing a technical device inside a vehicle in order to record communications between persons seated in the vehicle. Since this concerns areal voice recording, where persons do not talk to each other through telecommunication equipment but face to face, this does not fall within the scope of article 31 EIO.

⁴ Installing in or attaching a technical device to a vehicle in order to record its movements.

⁵ Operational topic on interception of telecommunications. Summary and compilation of replies, Eurojust ID 67795.

⁶ Comments and Conclusions of the 59th Plenary Meeting of the European Judicial Network (EJN) (Prague 9-11 November 2022), 15296/22.

In practice this can lead to the following situation. A GPS-tracking or bugging device is installed on a car in Member State A, for example in the context of an investigation into drug trafficking or trafficking in human beings. Given the cross-border nature of the crime, the car involved passes – within the timeframe of day – through several Member States (Member States B, C and D), before it returns to Member State A. Within this timeframe – and given the fact that the car is moving around all the time – it would not be possible for Member States B, C and D to execute an EIO requiring them to GPS-track or bug the car themselves. Because article 31 EIO is not applicable in this situation, Member State A cannot use annex C of the EIO-directive to continue the GPS-track/bugging itself on the territory of Member States B, C and D. Nor does the EIO-Directive provide for any rules in cases in which Member State A would only become aware that the vehicle is or has been on the territory of Member States B, C and D after it has already entered the territory of those Member States.

To provide an idea about what a separate provision could look like, we have added a draft article.

Draft article 31a - to be added to the EIO Directive

1. *Where on the territory of one Member State (the 'investigating Member State'), for the purpose of carrying out an investigative measure, a technical device is installed in or on a vehicle to record communications between persons or to record that vehicles movements, and the vehicle enters the territory of another Member State (the 'notified Member State') from which no technical assistance is needed to continue the investigative measure, the investigating Member State shall notify the competent authority of the notified Member State as soon as it becomes aware that the vehicle is or will be on the territory of the notified Member State.*
2. *The notification referred to in paragraph 1 shall be made by using the form set out in Annex C. Article 5(2) shall be applicable mutatis mutandis to the notification.*
3. *The competent authority of the notified Member State may, in case where the investigative measure, referred to in paragraph 1, would not be authorised in a similar domestic case, notify, without delay and at the latest within 96 hours after the receipt of the notification referred to in paragraph 1, the competent authority of the investigating Member State:*
 - (a) that the investigative measure may not be carried out or shall be terminated;*
 - (b) where necessary, that any material already recorded while the vehicle was on the territory of the notified Member State, may not be used, or may only be used under conditions it shall specify.*

Relationship between a new provision and article 40 of CISA

In the course of the amendment of article 31 EIO Directive or the insertion of a new provision a clear demarcation from article 40 of CISA is needed for the following reasons.

If a Member State keeps a person under surveillance who is presumed to have participated in certain criminal offences, Article 40 CISA will provide for the possibility to continue the surveillance in the territory of another Member State where the latter has authorised cross-border surveillance in response to a request for assistance. In this context, the use of technical means necessary to conduct the cross-border surveillance is considered to be an additional measure within the meaning of Article 40 (6) CISA, that can be dealt with at bilateral level. Therefore, Council Recommendation (EU) 2022/915 of 9 June 2022 on operational law enforcement cooperation recommends that Member States allow officers from the law enforcement authority of another Member State conducting cross-border surveillance on their territory to use, in accordance with national law, any technical means necessary to conduct the cross-border surveillance, including GPS trackers, drones, audio and video equipment.

The Netherlands

Germany

France