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ENFOCUSTOM 64
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NOTE

from : Presidency
to : Police Cooperation Working Party (Mixed Committee EU/Iceland, Norway and Switzerland)

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Subject : Police co-operation arrangements concerning assistance between police authorities in crisis situations

1. In the meetings of the Police Cooperation Working Party on 27 October and 11 November, delegations expressed their views concerning the Presidency's proposal for a new Article 41(a) of the Schengen Convention which could set out the appropriate police co-operation arrangements concerning assistance between police authorities in crisis situations.

Presidency's proposals for handling Article 41a

2. In the meeting on 11 November, consideration was given to the three ways suggested by the Presidency for handling the proposal. These were:
 - (i) the proposal could be added as a new Article 41(a) of the Schengen Convention and included in the Commission's proposal for a draft Council Decision on cross-border crime.

- (ii) the proposal could not be considered as a new Article 41(a) of the Schengen Convention, but may still be included in the Commission's proposal but as a separate and distinct Article.
 - (iii) the proposal would need to be tabled as a separate initiative – a new draft Council Decision.
3. No conclusion was reached in the meeting on which of those three options should be pursued. The Presidency therefore proposes that the matter be left open pending further discussions in the Police Cooperation Working Party and in particular to see if options (i) or (ii) become more viable as the content of the proposal is developed. The Presidency also proposes that at least while the matter remains open, it should continue to be discussed in the Mixed Committee.
4. **So the Presidency would ask for any further reactions to the content of the proposal as set out in Annex A as attached.**

Collateral damage

5. In the meeting on 11 November, France suggested, and the Presidency agreed, that consideration should be given to complementing the provisions on liabilities in Articles 42 and 43 of the Schengen Convention with additional provisions in Article 41a dealing explicitly with the question of collateral damage. The Presidency has accordingly included proposals on collateral damage in the revised draft of Article 41a in the attached Annex B.
6. These proposals are based on provisions in the First Additional Protocol of 1977 to the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War. Although Article 41a is not about crisis situations arising from war, the concept of collateral damage has its origins in war situations. The First Protocol does not use the term “collateral damage”, but addresses the matter in Articles 57 and 58 on precautionary measures in relation to attacks and the effects of attacks. Article 86 of the Protocol imposes liabilities, on superiors as well as subordinates, in relation to breaches of the Geneva Conventions and the Protocol.

7. The proposals also include provisions based on Article 3 of the Second Additional Protocol of 1977 to the Fourth Geneva Convention. Briefly, Article 3 of the Protocol provides that it is without prejudice to State sovereignty.
- 8. The Presidency requests delegations to come to the meeting of the Police Cooperation Working Party on 5 December prepared to give reactions to Annex B and to indicate if:**
- (i) They agree there is a need to include provisions on collateral damage and State sovereignty in draft Article 41a (as set out in Annex B)**
 - (ii) To indicate if the text in Annex B is considered adequate for those purposes or if this issue could be accommodated by a slightly lighter and shorter provision/series of provisions in the proposal.**

1. [Article 41a]¹
 1. For the purposes of this Article:
 - “Special Task Force” shall mean any law enforcement authority², which is specialised in the control of a crisis situation.
 - (...)
 - “crisis situation” shall mean any situation in a Member State presenting a serious direct physical threat to persons or institutions in that Member State, in particular hostage-taking, hijacking and comparable incidents.³
 2. At the request of the competent authorities of a Member State, officers of the Special Task Force of another Member State may be authorized by the competent authorities of the requesting Member State to act in a supporting capacity on its territory in order to assist its Special Task Force to prevent, control or resolve a crisis situation.
 3. Without prejudice to Articles 42 and 43 [of the Schengen Convention, on criminal and civil liabilities of officers], the officers (...) acting in a support capacity on the territory of the requesting Member State in accordance with paragraph 2 shall operate under the responsibility of the Special Task Force of the requesting Member State and in accordance with the law of the requesting Member State. The officers of the requested Member State shall operate within their competences in accordance with their national law.⁴

¹ The Presidency notes that the Article number would need to be determined once the Schengen relevance of the proposal has been clarified.

² A number of delegations suggested the definition be limited to police authorities but the Presidency would suggest that some specialist personnel (e.g. hostage negotiators or forensic scientists) may work for authorities other than police authorities. The definition “law enforcement authorities” would therefore cover police and other relevant law enforcement authorities.

³ COM suggested it should be clear whether the definition covered man-made disasters only or included natural disasters as well.

⁴ A number of delegations indicated the provisions on liabilities would need to be examined closely. The Presidency suggests these provisions are determined once the question of the Schengen relevance of the instrument is settled but that the provisions set out in Articles 42 and 43 of the Schengen Convention would provide a useful model for arrangements in this proposal too.

4. Every Member State shall, on the entry into force of this Article, state in a declaration deposited with the General Secretariat of the Council which authorities are covered by the concept of Special Task Force, and which competent authorities may make requests and (...) provide authorizations as in paragraph 2. Any such declaration may be modified at any time.
5. The provisions of this Article shall not preclude more detailed present or future bilateral or multilateral agreements or arrangements between Member States (...) insofar as such agreements or arrangements allow the objectives of this Article to be extended or enlarged. The Member States shall inform the General Secretariat of the Council of such agreements and arrangements.
2. [In Article 42, after “Articles 40” delete “and 41” and insert “, 41 and 41a”]⁵
3. [In Article 43, after “Articles 40” delete “and 41” and insert “, 41 and 41a”]

⁵ The Presidency suggests these provisions, concerning liabilities, should be examined once the question of the Schengen relevance of the proposal has been settled.

POSSIBLE PROPOSAL FOR PROVISIONS CONCERNING COLLATERAL DAMAGE

- [6]. Those who plan or decide upon the action to prevent, control or resolve a crisis situation, in relation to which, in accordance with paragraph 2, the officers of the Special Task Force of another Member State are authorized to act in a supporting capacity, shall:
- (a) take all feasible precautions in the choice of means and methods of action with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (b) refrain from deciding to commence any action which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct law enforcement objective anticipated;
 - (c) cancel or suspend any action if it becomes apparent that the action may be expected to cause incidental loss of civilian life, injury to civilians , damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct law enforcement objective anticipated;
 - (d) to the maximum extent feasible, take the necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from the action or anticipated action.⁶

⁶ The Presidency has drafted this paragraph on the basis of provisions in Articles 57 and 58 of the Second Additional Protocol of 1977 to the Fourth Geneva Convention of 1949.

- [7] **The Member States shall ensure that any failure of any person to act in accordance with the requirements of paragraph 4 when under a duty to do so renders that person liable to penal or disciplinary measures under national law. The fact that any such failure was by a subordinate does not absolve his superiors from penal or disciplinary responsibility if they knew, or had information which should have enabled them to conclude in the circumstances of the time, that he was failing or was going to fail to act as required by paragraph 4 and if they did not take all feasible measures within their power to ensure compliance with that paragraph.**⁷
- [8] **Nothing in this Article shall be invoked for the purpose of affecting the sovereignty of a Member State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the Member State or to defend the national unity and territorial integrity of the Member State. Nor may this Article be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in a crisis situation or in the internal or external affairs of the Member State in which that crisis situation occurs.**⁸
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⁷ The Presidency has drafted this paragraph on the basis of provisions in Article 86 of the First Additional Protocol of 1977 to the Fourth Geneva Convention of 1949.

⁸ The Presidency has drafted this paragraph on the basis of provisions in Article 3 of the Second Additional Protocol of 1977 to the Fourth Geneva Convention of 1949.