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NOTE

from :	Presidency
to :	Multidisciplinary Group on Organised Crime (MDG)
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Subject :	Replies to questionnaire on undercover officers- Discussion paper

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 mandated 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, 25 Member States have sent in their replies to the questionnaire. Document 5757/1/08 REV 1 CRIMORG 1 ENFOPOL 1 ENFOCUSTOM 1 provides an overview of the replies received so far.

On the basis of the replies, the Presidency has drafted this note. This note both seeks to summarise the main findings from these replies and to serve as a basis for discussion among delegations. The numbers between brackets refer to the corresponding questions of the questionnaire and the replies thereto.

General possibility of and conditions to the deployment of foreign undercover officers

The replies have demonstrated that in all Member States (except one, where a Bill is currently pending) the deployment of undercover officers is legally admissible and the deployment of a foreign undercover officer can also be approved. The vast majority of Member States have expressed the great importance they attach both to the domestic and the *cross-border* deployment of undercover officers for investigating (cross-border) serious criminal offences (III). The vast majority of Member States has already used undercover agents of other Member States in their own investigation proceedings (VI. 1.), on the basis of domestic legislation and/or international agreements on police co-operation and judicial co-operation, as well as on the basis of domestic criminal procedure legislation. An almost equally significant number of Member States has already “lent” its own undercover officers to other Member States for their investigations (VI. 2.). The authorities competent for such approval as well as for the supervision of deployed undercover officers differ considerably from one Member States to another (II.1), a and II.4.), just as the question whether such decision is subject to judicial review (II.1., f), but the Presidency deems that this does not hinder effective co-operation and finds it hard to see anyway, how this could be harmonised, as such competencies are intrinsically linked to the domestic criminal procedure for each Member State. In most cases the possibility to authorise the deployment of foreign undercover officers is limited to certain offences. As to the condition of double criminality, only five Member States have replied that there is no such condition, but as those Member States also limit the possibility to deploy (foreign) undercover officers to certain offences, there may also be an implicit condition of double criminality in those countries as well. In all but two Member States there appears to be some kind of proportionality and/or subsidiarity principle.

The Presidency invites delegations to discuss whether they deem it expedient and feasible to harmonise the list of offences for which the deployment of foreign undercover officers is possible and to abolish the condition of double criminality for such offences.

Information and conditions posed with regard to foreign undercover officers

In most Member States the main requirement imposed with regard to the qualification of the undercover officer, seems to be that he or she must be a trained undercover officer (II. 2. a). There seems to be considerable variety in the type of information that is requested with regard to foreign undercover officers (II, 3.). In the majority of Member States, but not in all Member States the true identity of the undercover officer must be provided to the local authorities. Sometimes the pseudo identity must also (or alternatively) be given. In some Member States the status or the background of the undercover officer must also be provided. There appears to be an equal degree of variety in the question (police and/or prosecutor) as to whom has access to such information.

As to the question whether a person affected by the deployment of a foreign undercover officer can request information from the authorities of the Member State about the identity of the undercover officer, this seems to be possible almost nowhere, except in a few Member States once the investigation secrecy has been lifted (II. 6.)

The Presidency invites delegations to discuss whether they deem it expedient and feasible to harmonise the type of information that is requested with regard to foreign undercover officers in case of deployment of foreign undercover officers and the status of the foreign undercover officer.

Limitations of authorisations for the deployment of foreign undercover officers

In about half of the Member States the authorisation is restricted to specific measures. In most Member States the authorisation is restricted in time, but the time period and the question whether and how often it is renewable, varies considerably (as does the possibility to stop the deployment at any time) (II. 5.). It is clear that any attempt to harmonise the rules for the cross-border deployment of undercover officers in this regard would also imply a certain degree of harmonisation of domestic criminal procedure rules regarding the use of undercover officers in purely domestic investigations.

The Presidency invites delegations to discuss whether they deem it expedient and feasible to harmonise the measures and/or the time period for which foreign undercover officers may be deployed on the territory of another Member State.

Status of foreign undercover officers

In about half of the Member States the foreign undercover officer has the same status as a domestic undercover officer, but this clearly not the case in all Member States (II. 2. b), even though most Member States have indicated that foreign undercover officers have the same rights as undercover officers in a domestic investigation (II., 7.a). In almost all Member States, undercover officers have the right to carry technical equipment, but only half of the Member States allow them to carry also weapons (II. 7., b). In less than half of the Member States the foreign undercover officer is entitled to enter third-party flats/houses without the owner's consent (II. 7., c). Inciting others to commit criminal offences (II. 7., d) seems to be excluded almost everywhere. Again, it is clear that any attempt to harmonise the rules for the use of weapons or the possibility to carry out search of premises by foreign undercover officers would almost inevitably also imply a certain degree of harmonisation of domestic criminal procedure rules regarding the use of undercover officers in purely domestic investigations.

The Presidency invites delegations to discuss whether they deem it expedient and feasible to harmonise the rules for the use of weapons or the possibility to carry out search of premises by foreign undercover officers.

Use of evidence/information obtained through the use of foreign undercover officers

In eight Member States, it is apparently possible to use the information obtained through the deployment of the undercover officer in subsequent proceedings in accordance with its own principles, whereas in another eight Member States this is possible only for mutually agreed purposes (II, 8.).

The Presidency invites delegations to discuss whether they deem it expedient and feasible to establish a (and if so, which) harmonised rule for the use of evidence/information obtained through the use of foreign undercover officers.

Civil and/or criminal rules for the activities of foreign undercover officers

The conditions under which foreign undercover officers can be held responsible under criminal or civil law for activities related to their deployment seem to be governed in the vast majority by national law (II.9). A few delegations have referred to existing European rules, like Articles 14-16 2000 MLA Convention or the Schengen provisions. One delegation has argued in favour of the introduction of rules similar to those contained in the Prüm Treaty/Decision.

The Presidency invites delegations to discuss whether they deem it expedient and feasible to establish harmonised rule for civil and criminal responsibility for foreign undercover officers.

Provision of operational cover to (foreign) undercover officers:

As to the means which are used for operational cover of an undercover officer in the context of a national investigation proceedings (V. 1), most Member States seem to use fictive identities and legal documents, with fewer Member States resorting to front stores. A significant number also uses technical means (e.g. direct video/audio control – protection unit). In almost all Member States these measures can also be used in favour of an undercover officer of another Member State, which was deployed on the territory of that Member State (V. 2). The vast majority of Member States has already provided operational cover support to other Member States for undercover officers (V. 3.). It appears that in almost no cases measures for the provision of operational cover were refused for legal or factual reasons (V. 4.).

All but one Member States consider cross-border support as an appropriate means in the provision of operational cover, capable of increasing the investigation success (V. 5.). Among the reasons therefore, were cited: the international nature of organized crime, the heightened credibility of undercover officer (language skills, regional origin) – more difficult for the suspects to ‘uncover’ undercover officer, better protection of undercover officer (who can return to his home country) and the increased flexibility and continuity to investigation, which could be otherwise slower or more risky.

The Presidency invites delegations to discuss whether they deem it expedient and feasible to establish formalised rules for the provision of operational cover to for foreign undercover officers, which seem to be working well.

General discussion on the need for a European instrument on the cross-border deployment of undercover officers:

The majority of Member States that have 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) , generally describe those experiences as positive (IV. 1.). An important number of Member States also describe the role of Eurojust, EJM and Europol as important in the cross-border deployment of undercover officers (IV. 2.).

The number cases in which Member States have made a request for mutual assistance to another Member State, aimed at the deployment of an undercover officer, vary greatly between Member States. Many Member States have (almost) no cases, whereas a few Member States have between ten to twenty cases a year, and one Member State has between 50 to 70 cases a year. The number of refusals experienced by Member States (as well as failures because it was not possible to request the authorization for a deployment in time or no request was made because there were no reasonable chance of success or the required conditions are impossible or unacceptable) seems to be very low, with the notable exception of one Member State (IV. 4. and 6).

With regard the five areas highlighted in 6678/3/07 REV 3 CRIMORG 39 ((a) requirement & procedures for cross-border deployment of undercover officers; b) Protection of undercover officer's identity; c) Equal status for national and foreign undercover officers; d) Possibility of seconding undercover officer's abroad; e) Cross-border assistance in providing operational cover for undercover officer's), the vast majority of Member States seem to support the need for further action at EU level (VII. 1.).

As to the specific other topics on which there is a further need for action (VII. 2 and 3), several Member States have mentioned the need for the designation of a single contact point in each Member State and the need for EU-supported training. Some Member States have expressed a preference for increased operational co-operation rather than for harmonizing legislation.

On the basis above, the Presidency invites delegations to discuss whether they deem it expedient and feasible to establish EU rules for some of the aspects for which the replies to questionnaire have demonstrated considerable differences between the Member States' legal systems and/or with regard to areas where Member States have themselves indicated they see a need for EU action (VII. 1.).

The Presidency also invites Member States to discuss what form a possible EU instrument should take.
