

**13867/04**

**LIMITE**

**CRIMORG 115  
CATS 47  
COMIX 659**

**NOTE**

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From : Presidency  
To: Article 36 Committee

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No. prev. doc. : 13869/04 CRIMORG 116 ENFOPOL 152 COMIX 658 ENFOCUSTOM 75

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Subject : Draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the member States of the European Union, in particular as regards serious offences including terrorist acts.

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The Multidisciplinary Group on Organised Crime discussed the initiative of the Kingdom of Sweden at its meeting on 21 and 22 October 2004 on the basis of document 13178/04 CRIMORG 94 ENFOPOL 130 COMIX 596 ENFOCUSTOM 65.

The outcome of proceedings is contained in document 13869/04 CRIMORG 116 ENFOPOL 152 COMIX 658 ENFOCUSTOM 75.

At the meeting, considerable time was devoted to discussion of the limits between police cooperation and judicial cooperation. Attention was focused on Article 2 (a), which in the current text provides that:

"(a) 'competent law enforcement authority': a national police, customs or other authority, that is authorised by national law to detect, prevent or investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities. [A judicial authority is regarded as competent law enforcement authority if the information or intelligence, according to national law, is only held by or accessible to that judicial authority];"

and Article 2 (b) which provides that:

"(b) 'crime investigation': a legal framework within which measures are taken by competent law enforcement or judicial authorities, including public prosecutors, with a view to establishing and identifying facts, suspects and circumstances regarding one or several identified concrete criminal acts;"

The Swedish delegation considered that, since the instrument only covered existing information (article 1:1), information and intelligence provided under the Framework Decision could not be used in criminal proceedings (Article 1:3) and no coercive measures could be taken in accordance with the instrument (article 1:4), there could be no confusion with judicial cooperation. It explained that the reference in Article 2 (a) to judicial authorities was only for those cases where a requesting police authority was dealing with a case at such an early stage that a judicial authority had not yet been involved in the requesting country (pre-investigation phase) but in the requested country the judicial authority was the "owner" of the information or intelligence.

Several delegations thought however that the delimitation in the initiative between police and judicial cooperation was not clear and suggested the deletion of all references to judicial authorities.

Under Articles 1 and 3 of the 1959 Convention on Mutual Legal Assistance in criminal matters, assistance is provided in proceedings in respect of offences; letters rogatory are sent for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

It would therefore seem to the Presidency, at first sight, that judicial cooperation is not contemplated by the initiative, since under Article 1.3 information and intelligence to be used as evidence before a judicial authority is excluded unless consent is given. However, the analysis cannot stop there.

Under Article 39.1 of the Schengen Convention police authorities shall assist each other for the purposes of preventing and detecting criminal offences, insofar as national law does not stipulate that the request has to be made and channelled via the judicial authorities.

On the other hand, article 6, para 5 of the European Union Convention on Mutual Assistance in Criminal Matters (May 2000) mentions that requests for some forms of assistance (controlled delivery, infiltration, joint team) can be done directly from judicial authorities to police- or customs authorities and the other way around, when in one Member State a judicial authority is competent and in the other Member State a police- or customs authority.

The practical problems that the proposal tries to tackle, can be illustrated as follows. If one takes the example of a secret telephone number that is found on a "red list", police authorities in some Member States do not have access to such lists, but have to make requests to a judicial authority. If the request comes from a foreign police authority, it seems that the practice is to ask the foreign police authority for a letter rogatory. It may also be that the law of the requested State provides that information may not be provided unless the request has been made by a (foreign) judicial authority (in the context of a criminal investigation or proceedings). It is then that the question arises that a judicial authority in the requesting State may not be involved in the criminal investigation since the intelligence and information gathering is at such an early stage that the judicial authorities are not, under the law of the requesting State, involved in the pre-investigation phase and therefore the requesting State's police authorities cannot legally obtain a letter rogatory. The situation may also be such that the pre-investigation phase may be held up while awaiting an answer to the letter rogatory.

It would seem to the Presidency that here rules for judicial cooperation to some extent interfere with rules for police cooperation. The reason would be that when the information is of a particularly sensitive nature ("red list" telephone numbers, DNA evidence, holders of bank accounts, criminal records, tax information, etc), the legislation in at least some Member States

seem to require that a judicial authorisation be sought. When a request for such information comes from abroad, a letter rogatory is asked for since the type of information is considered to be "judicial".

In the perception of the Presidency this problem might be dealt with along the following lines:

1. There seems to be a common understanding that a clear distinction should be kept between police cooperation and judicial cooperation. Therefore the scope of the proposal should be restricted to police cooperation, as is reflected by the legal base stated in the preamble (Article 30 (1) (a) and (b) TEU). The purpose should be to improve police cooperation by enhancing and – as the title of the proposal states – simplifying the exchange of information and intelligence between law enforcement authorities.

2. It seems that the proposal broadens the scope of police cooperation *stricto sensu* in two respects. In the perception of the Presidency these extensions are of a limited nature.

a. The proposal not only covers exchange of information between police authorities but also between other ‘competent law enforcement authorities’, that is ‘authorities authorised by national law to detect, prevent or investigate offences or criminal activities’ (Article 2 (a)). This includes amongst others customs authorities.

b. The proposal also aims to make ‘exchangeable’ information which the requesting law enforcement authority needs for investigative purposes but, according to the national law of the requested member state, is only held by or accessible to a *judicial* authority (Article 2 (a) second sentence).

3. In the opinion of the Presidency the elements of the proposal mentioned under a and b above do not change the nature of the proposed instrument. More specifically, they do not make it an instrument of judicial cooperation. In this respect it should be borne in mind that the exchange of information held by or accessible to a judicial authority, is bound by important conditions. First of all, the information exchanged may not be used in criminal proceedings, that is for judicial purposes. Secondly, the proposal does not relate to information which is accessible only by means of coercive measures. Finally, it seems to follow from Article 4 (2) that information held by a judicial authority may only be requested by and provided to for example a police authority, *to the extent* that at the national level such police authorities are entitled to receive the relevant information.

*The Article 36 Committee is requested to confirm whether the analysis above is correct. Members are invited to indicate under what conditions they would be prepared to include information held by their judicial authorities in the proposal, with a view to giving guidance to the future work of the MDG on this issue.*

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