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**NOTE**

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From : The United Kingdom and German Delegations  
To : Working Party on Cooperation in Criminal Matters  
Subject : Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.  
- Proposal of United Kingdom and Germany

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Delegations will find in annex a joint proposal from United Kingdom and Germany regarding the exclusion of undercover investigations from the scope of application of the EIO.

## Exclusion of undercover investigations from the scope of application of the EIO

The final decision on the scope of application pursuant to Article 3 of the EIO has been deferred until consultations on the entire text have taken place (see council Document 10749/1/11 REV 1 COPEN 130, footnote 7 to Article 3). In particular, the question of whether undercover investigations should be included within the scope of application of the European Investigation Order in Criminal Matters (EIO) has not yet been finally decided.

The UK and Germany again advocate the exclusion of undercover investigations, i.e. both the instrument of the undercover investigator (UI) and that of the confidential informant (CI), from the scope of application of the EIO. In this regard, the UK and Germany request the addition of an express rule in Article 3 patterned after the rule on joint investigations.

In our view, the following aspects speak in favour of this:

The cross-border use of UI and CI is not conducive to a rule in a legal instrument of mutual recognition with strict deadlines and a fundamental obligation to recognise foreign investigation orders. At the national level, carrying out undercover investigations requires a careful assessment of each case and decisions that must not be subject to deadlines, because these cases involve careful assessment of a series of sensitive issues. In particular, the following is to be taken into account in carrying out undercover investigations:

- the special need for confidentiality and protection for the operational UI and CI; the principle of “protection of the UI or CI takes priority over gaining information” applies in this context;
- the special need for confidentiality and protection for the offices and their operational units responsible for undercover investigations; the danger exists that a Member State – potentially even several Member States at the same time – would issue EIOs without previously taking up contact to the responsible offices and thereby taking into account the sensitivity of the area;

- the particular complexity of measures that
  - necessitate a more extensive legal assessment and
  - require more comprehensive preparation and follow-up (establishment of a story, establishment of contacts to the targets of the measure or to the CI, etc.),
  - are usually linked with other measures (observations, telecommunications interception, etc.),
  - are usually planned to last for a longer period of time,
  - require particularly close coordination with the competent public prosecution office.
- the particular depth of the intrusion for the targets of the measure;
- the fact that cooperation is not restricted to actual implementation of the measure, but rather must be in place continually from the beginning of the investigation to criminal prosecution; the fact that such operations are usually prepared at the police rather than the judicial level due to the multitude of preliminary practical questions which require clarification; the cross-border use of undercover investigations requires a very special relationship of trust between the offices concerned;
- throughout Europe, various degrees of rules and minimum standards exist with regard to undercover operations, above all in the area of CIs (no special statutory rules in many States);
- various rules exist throughout Europe regarding the appearance of UI or CI in court (e.g. examination via audiovisual means).

As noted above most, if not all, requests in this area fall under the heading of police co-operation. This gives all States maximum discretion as to whether or not to accede to such a request and full operational control should they choose to do so. We do not want to see a situation whereby a police-to-police request is refused and the EIO is then used to circumvent this refusal - it allowing the executing State less discretion.

For these reasons, it is necessary for every case of police and judicial cooperation in this area to be subjected to a separate and comprehensive discretionary decision. Merely including a special ground for refusal in Article 27 of the EIO would not do justice to this necessity. Likewise, falling back on the general grounds for refusal in Article 10 in conjunction with Article 9 EIO is, in our view, neither appropriate nor adequate to take account of the special situation of undercover investigations.

The UK and Germany do not consider a rule in the EIO regarding undercover investigations to be necessary; as such, declining to establish a rule within the framework of the EIO does not result in weaker cross-border law enforcement. The existing rule in Article 14 of the EU Convention on Mutual Assistance in Criminal Matters of 2000 is sufficient and appropriate. We are not aware of any problems between the competent offices as regards international cooperation which would require or could lead to a solution by a new rule in the EIO.