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CRIMORG 28

NOTE

from: Spanish delegation
to: Presidency of Multidisciplinary Group on Organised Crime (MDG)

Subject: Conclusions of the International Seminar on "The use of undercover agents in combating organised crime", held in Madrid from 25 to 29 October 1999
An "International Seminar on the use of undercover agents in combating organised crime" was held in Madrid from 25 to 29 October 1999, under the aegis of the European Commission ("Falcon" programme).

The aim of this meeting was to examine in detail the development of this legal instrument, as reflected in specific European Union legislation, for example, the following texts:
Convention implementing the Schengen Agreement (Art. 39)

"The Contracting Parties undertake to ensure that their police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offences ..."

Naples II Customs Cooperation Convention (Art. 23)

"1. At the request of the applicant authority, the requested authority may authorise officers of the customs administration of the requesting Member State or officers acting on behalf of such administration operating under cover of a false identity (covert investigators) to operate on the territory of the requested Member State. The applicant authority shall make the request only where it would be extremely difficult to elucidate the facts without recourse to the proposed investigative measures. The officers in question shall be authorised in the course of their activities to collect information and make contact with subjects or other persons associated with them.

2. Covert investigations in the requested Member State shall have a limited duration. The preparation and supervision of the investigations shall take place in close cooperation between the relevant authorities of the requested and applicant Member States.

3. The conditions under which a covert investigation is allowed, as well as the conditions under which it is carried out, shall be determined by the requested authority in accordance with its national law. If, in the course of a covert investigation, information is acquired in relation to an infringement other than that covered by the original request, then the conditions concerning the use to which such information may be put shall also be determined by the requested authority in accordance with its national law."
4. The requested authority shall provide the necessary manpower and technical support. It shall take measures to protect the officers referred to in paragraph 1, while they are active in the requested Member State.

5. When depositing its instruments of adoption of this Convention, a Member State may declare that it is not bound by this Article or part thereof. Such declaration may be withdrawn at any time."

EU Global Action Plan to combat organised crime in the European Union
(Recommendation 16 of the Detailed Action Plan)

"Specific consideration to the needs to fight organised crime should be given in the ongoing work on the draft Convention (on Mutual Assistance in Criminal Matters). To this end, the competent working party should examine how...

(b) a legal basis could be created for the trans-boundary application of certain modern investigative methods, such as controlled delivery, deployment of undercover agents and the interception of various forms of telecommunications."

and in other international instruments, such as the United Nations' Draft Convention against Transnational Organised Crime.

The Madrid seminar was attended by the fifteen EU Member States and the Secretary-General of the Council of the European Union, as well as by another fifteen countries (Canada, Cyprus, the Czech Republic, Estonia, Hungary, Iceland, Latvia, Lithuania, Malta, Norway, Poland, Romania, Slovenia, Switzerland and the United States), and representatives of international bodies such as Europol and Interpol.
In the course of the meeting, participants were asked about the situation in their respective countries regarding the use of undercover agents. The questions put and answers received were as follows:

**Are undercover agents regulated in your country?**

66% of EU Member States legally regulate undercover agents; among the other participant States, the percentage was the same.

**Is it legal for a foreign undercover agent to operate in your country?**

87% of EU Member States allow foreign undercover agents to operate in their territory, as does the same percentage of the other participant countries.

**Do you have police units specialising in the use of undercover agents?**

60% of EU Member States and 53% of the other participant countries have specialised units.

**Does your country have rules about the selection of individuals wishing to work on undercover operations and do you provide training for those selected?**

53% of EU Member States and the same percentage of other participating States regulate the selection and training of potential undercover agents.
From the discussions that took place, statements made and workshops held throughout the seminar, the conclusions drawn were as follows:

2. It would be helpful to attempt to achieve approximation or harmonisation of international legislation on undercover agents, in order to:
   - improve their legal and personal security,
   - promote and facilitate their scope for cross-border operations,
   - enable their testimony and other evidence legally obtained or contributed to the case to be accepted and fully exploited.

2. Undercover operations should be seen as an investigative technique, carried out on a voluntary basis and in exceptional circumstances, covered by legal and personal guarantees, internationally recognised and aimed at actively combating organised crime.

3. The use of undercover agents must be governed by principles of:
   - investigative purpose,
   - absolute necessity,
   - proportionality of action,
   - lack of provocation.

4. Individual domestic legislation should cover at least the following aspects:
   - who may become an undercover agent,
   - procedure for doing so,
   - authorising body,
content, powers and limits of the use of such agents,
mechanisms for protecting their identities,
liability requirement and causes for exemption,
value of information obtained and form in which it is provided.

The safety of the undercover agent must always take precedence over the operational objective sought.

Any deployment of an undercover agent in foreign territory must in any event be carried out in compliance with the legislation in force in the host country.

Communication should be carried out via established channels, combining operational flexibility and coordination. To this end, account must be taken of the Draft EU Convention on Mutual Assistance.

Requests concerning undercover operations made to other countries must always be accompanied by all existing documentation and information, to allow the objectives pursued to be attained.

It would be useful to draw up a handbook for each country to ensure that undercover police activity complies with an ethical code, with a view to standardising such activity.

The use of undercover agents should always be directed by those in charge of the investigative operation.

It is absolutely necessary to stress the essential role of the undercover agent's controller or supervisor in monitoring him and as a vector for the exchange of information between agent and investigators.
the technical and human resources deployed should be in proportion to the investigation and crime being investigated, bearing in mind also the degree of risk to the agent.

1. Undercover agents should be placed on a professional footing, based on appropriate selection and training, through the establishment of a body which could carry out these tasks in a suitable way.

2. Psychological aspects are important, both in the selection and development of the role of the undercover agent, and in his reintegration into "normal" police tasks.

3. The purpose of psychological checks must be to find candidates with a suitable profile and to detect dangers, in order to avoid the work having a negative impact on the agent's psychological well-being; these must be uncovered by means of interviews, psychometric tests, biographical resumés, etc.

4. Introduction of medical tests as an additional evaluation and control mechanism during the selection and service of the undercover agent.

5. Evaluation reports by superiors must be seen as a further element in the selection process.

6. Control mechanisms must be envisaged to guarantee the integrity of undercover agents.

7. The controller or supervisor must be the first link in evaluating the undercover agent's work and safety.
1. It would be advisable for the undercover agent to receive general training, which would be compulsory and continuous, and encompass three aspects: legal, technical and psychological.

2. In addition, he should receive specific training to develop his abilities and skills, concentrating in particular on safety aspects.

3. Special emphasis should be placed within this process on experience in the field, with this being continually evaluated; here, the importance of the controller or supervisor is clear.

4. It would be useful to organise exchanges of teaching experience between Member States, by encouraging the holding of seminars of training centre directors, with a view to identifying selection and training criteria.

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Lastly, it should be noted that the Spanish delegation intends to continue working on this issue, and will contact the respective Presidencies with a view to preparing a legal instrument on the use of undercover agents in combating organised crime, so as to ensure that all police officers will be able, as quickly as possible, to operate in any Member State, bearing in mind their testimony in all the courts in that State.

All of this is in line with the agreement reached at the Tampere extraordinary Council, especially point 6 thereof:

"People have the right to expect the Union to address the threat to their freedom and legal rights posed by crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union."

The same ideas underlie recommendations 29 and 30 of the new Action Plan on the EU Strategy for the new Millennium to combat Organised Crime (CRIMORG 80/2000).

Madrid, February 2000