

6195/1/99

REV 1
LIMITE

JUSTPEN 7

REPORT

from : Coreper

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to : Council

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Subject: Draft Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
- application of the "remote approach" regarding interception of satellite telecommunications

I INTRODUCTION

The most recent version of the draft provisions on interception of telecommunications is set out in Articles 11a to 14a of document 13144/98 JUSTPEN 108.

At its meeting on 24 September 1998, the Council examined the "remote approach" in respect of interception of satellite telecommunications. The starting point was that the Member State interested in the interception would need technical assistance from the Member State hosting the relevant ground station to carry out the interception. However, this need for technical assistance, which could delay matters in concrete cases, could be avoided by the application of the "remote approach". That approach implies that the interception is carried out by remote control in the Member State interested in the interception at a service provider of the operator of the satellite telecommunications system in that Member State. There was general agreement in the Council that the "remote approach" was a convenient option. In conformity with the instructions given by the Council, the technical and legal aspects of the application of the "remote approach" were examined by the Working Party on Mutual Assistance in Criminal Matters on 11 and 12 January and 17 and 18 February, by the K.4 Committee on 23 and 24 February and by Coreper on 4 March 1999. The result thereof is set out under point II below.

It is noted that the Council, at its meeting on 3 and 4 December 1998, discussed a number of other outstanding issues regarding the provisions on interception, including in particular the difficulties the United Kingdom delegation had with the obligation under Article 13 for the intercepting Member State to inform the Member State where the target of the interception is. In conformity with the instructions given by the Council, the Presidency and the United Kingdom delegation are actively examining how a solution may be found with a view to submitting a concrete proposal to the other delegations as soon as possible.

II OUTCOME OF PROCEEDINGS

In most cases of interception of telecommunications the Member State interested in the interception wants to intercept a target present in its own territory. The Working Party therefore examined the case where a Member State wants to intercept a target present in its own territory via a satellite telecommunications network and the relevant ground station is situated in another Member State.

The application of the "remote approach" in the described case implies that the interception may take place by remote control via a service provider in the Member State where the target is without any technical assistance from the Member State hosting the ground station.

The following views were expressed regarding the application of the "remote approach" in the case described:

- 15 delegations agree that the "remote approach" should be available for interception for the purpose of a criminal investigation;⁽¹⁾

⁽¹⁾ Without prejudice to how the expression "criminal investigation" may be more accurately defined.

- 13 delegations consider that in cases of interception of a target present in the territory of the intercepting Member State via a ground station in another Member State by use of remote control, no conceivable rights of the ground station Member State can be infringed. The ground station Member State should therefore not be involved. In particular the following remarks have been made:
 - = Regarding traditional interception of telecommunications by the use of fixed telephones any Member State may intercept a target on its own territory in conformity with its own national law without consulting other Member States. This applies where the target of the interception receives a call from, or makes a call to, a telephone in another Member State. It also applies where the signal simply passes through the network of the territory of another Member State (for example, a call is made from State A through the network in State B to a telephone in State C). In the case of interception of satellite telecommunications, the signal passes through the ground station. There is no reason to apply a different approach in this case;
 - = The interception by a Member State of a target present on its own territory is subject to the law, including the constitutional principles, of that Member State. The Member State hosting the ground station cannot export its constitutional principles to other Member States;
 - = It could be complicated in practice if each Member State hosting a ground station had individual sets of rules which would have to be considered by the intercepting Member State in the context of individual interceptions. Such rules could also complicate criminal proceedings;
- The Italian delegation agrees that the ground station Member State should not be involved in each individual case. However, the delegation is of the opinion that the ground station Member State should have a role to play for the purpose of the protection of its constitutional principles and national security. The delegation considers that the ground station Member State should be able to make a declaration for that purpose specifying certain limits for interception via the ground station by remote control which other Member States must respect. These limits may in particular imply that certain persons or categories of persons may not be the subject of interception. The Italian delegation has explained its position in detail in document 6284/99 JUSTPEN 9;

- The German delegation considers that the Convention should provide explicitly that the "remote approach" may be applied in the case described above for the purpose of a criminal investigation. This would make it clear that the operators have the necessary legal basis in relation to the ground station Member State to comply with orders for interception in other Member States by application of the "remote approach";
- The French delegation has reserved its position. If the delegation accepted the principle that the ground station Member State should not be involved, it would also favour the inclusion of a provision along the lines proposed by the German delegation.

III CONCLUSION

The Coreper invites on this basis the Council to:

- a) examine if, and, in the affirmative, to what extent, the ground station Member State should be involved;
- b) decide that for the sake of clarity a provision establishing a clear legal basis for the application of the "remote approach" between Member States should be introduced. The exact content of such a provision would depend on the solution to the political question under a).