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Judicial collaboration versus police collaboration

Subject submitted for discussion in the PC-OC at its 43rd meeting in 2001 by Mr M. Knaapen (Netherlands)

Issue:

In a number of middle and eastern European countries, the police have far-reaching powers while carrying out a criminal investigation. During the investigation phase, the police are often empowered to operate independently in the performance of investigative acts. The judicial authorities are not involved with the investigation itself and only become involved when an investigation has been concluded for the purpose of bringing the case to court.

In a number of western European countries, including the Netherlands, a criminal investigation takes place under the auspices of the judicial authorities. In the Netherlands, the police are responsible for carrying out a criminal investigation, but need the permission of the Public Prosecution Service if they wish to perform certain investigative acts during such an investigation. These acts include the use of coercion and other special investigation methods such as surveillance or infiltration.

This inconsistency in the powers of the police gives rise to the following problem. A request from a foreign police authority in which, for instance, the use of a means of coercion is requested during the course of an investigation is treated in the Netherlands as a judicial request for legal assistance because the permission of the Dutch judicial authorities is needed in order to comply with the request. A judicial request for assistance is usually made on the basis of the 1959 European Convention on Mutual Assistance in Criminal Matters. The terms of this Convention specify that a judicial request for assistance should be submitted by a judicial authority. In a statement regarding Article 24 of the Convention the member states have made a declaration to define which authorities they deem “judicial authorities” for the purposes of Article 24. As a result of the specific powers given to the police authorities, some countries (for example Denmark and Latvia), also consider police authorities to be authorised judicial authorities in the declaration. In other countries, the ‘police’ requests are dealt with by a specially designated judicial authority (for example, Legal Counsel in the United Kingdom). Judicial collaboration under the terms of the Convention on Mutual Assistance is therefore possible in both these ways.

Other countries, however, argue that in the requesting country, the competent body in terms of investigative acts is not the judicial authorities, but the police. Such a request is viewed in these countries as a request for police collaboration, and can therefore only be made by a police authority.

Questions:

What experiences do the other member countries have in this respect? Where should the solution to this problem be sought?

Possible areas in which the solution could lie:

1. The Convention on Mutual Assistance in Criminal Matters is not applicable; the request is not viewed as a request under the terms of a convention and therefore does not have to be issued by a judicial authority. This could, however, possibly rule out many forms of collaboration.
2. The member countries concerned designate the police authorities as “judicial authorities” within the meaning of Article 24 of the Convention.
3. Competent police authorities send their requests via a specially designated (judicial) authority. This authority should then be designated “judicial authority” for the purposes of the Convention.

The discussion held by the PC-OC

(Extract from the Summary Report of the 43rd meeting, Strasbourg, 24 – 26 September 2001, Document PC-OC (2001) 21.)

In some countries only Courts and Public Prosecution are entitled to issue requests for assistance. With respect to such countries, any request issued by a police authority must be refused by the requested State.

In other countries, police authorities are entitled to issue requests. In such cases it is indispensable that a formal declaration to that effect be made under Article 24 of the Convention.

In some cases, where requests are issued by the police, the question arises of determining which authority takes responsibility for obligations resulting from the request being granted. A typical such case occurs with requests concerning controlled deliveries. Some think that a judicial authority should also stand behind the requesting and/or the executing police authority. The question remains of distinguishing the cases where the term “judicial authority” is used in its proper sense from the cases in which it is used in the sense given to it by declarations entered by States. In the latter cases, a police authority may be a judicial authority.

It appears that the borders between judicial and police co-operation are not always clear. For example, some see the 2nd Additional Protocol as an unhappy development consisting of introducing police co-operation into the framework of the Convention on Mutual Legal Assistance. Others however welcome that same development, considering it rather as a method of controlling police activities by judicial authorities.

Another example of border unclearness results from the above-mentioned practice that consists in States declaring that authorities which are clearly police authorities must be considered judicial authorities for the purposes of the Convention.