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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters
- Use of an agent in investigations of serious crime
= Paper by the Slovak delegation

Delegations will find attached a paper by the Slovak delegation concerning the EIO Directive and the use of an agent in investigations of serious crime (classified investigations).

The EIO Directive and classified investigations

Paper by the Slovak delegation

In investigation of serious crime there are grounds for ordering the use of an agent (classified investigation), who will operate exclusively in the territory of the state whose competent authorities conduct a criminal investigation (hereinafter 'State A'). However, in certain circumstances, the role of the agent cannot be fulfilled by any member of the police force in State A. Within the context of informal cooperation between the relevant specialised police units, it is sometimes felt that a policer officer from another State ('State B') could be better suited to carry out this task.

In order for the police officer from State B to be used in the criminal investigation conducted by the competent authorities of State A in the territory of State A, it is usually necessary for:

- 1) the competent authority of State A to ask the competent authority of State B to provide its consent for such a procedure;
- 2) the competent court of State A, following receipt of such consent, to order the use of the police officer from State B as an agent in the criminal proceedings in State A.

The above-mentioned form of cooperation is sometimes explicitly regulated by bilateral treaties between States. However, the question arises whether such a form of cooperation is now (exclusively) governed by Directive 2014/41/EU on the European Investigation Order ('EIO Directive'), and in particular Article 29 thereof on 'covert investigations'.

Some take the view that the execution of an EIO under Article 29 of the EIO Directive should be seen as, and could encompass, the *execution of classified investigations ordered by the judicial authority of the issuing state in the territory of the executing state*.

It is recalled that Article 1(1) of the EIO Directive stipulates that: '*A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State (hereinafter "the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive.*'

In the case of the classified investigation described above, however, the specific investigative measure is not to be carried out in *another Member State*, but in the very Member State that is requesting another Member State to 'lend' a certain police officer.

It could therefore also be argued that such a procedure should not be seen as an investigative measure falling under the EIO Directive (or under any other form of *judicial* cooperation), but should be regarded as a form of *police* cooperation.

In order to clarify matters and seek a uniform application of the EIO Directive, it is suggested that delegations provide their views on the following question:

'Does a classified operation, whereby the authorities of State A ask for the involvement of a police officer from State B in criminal proceedings that are conducted in State A, fall under the scope of the EIO Directive?'
