

**JOINT INVESTIGATION TEAMS:
BASIC IDEAS, RELEVANT LEGAL INSTRUMENTS
AND FIRST EXPERIENCES IN EUROPE**

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I. INTRODUCTION

Tackling organized cross-border crime more efficiently and aiming at a closer co-operation between judicial authorities, in particular by speeding up, simplifying and improving mutual legal assistance, the Council of the European Union took a double-sided approach: on the one hand building up personally bound institutions like Europol, OLAF, the European Judicial Network and Eurojust; on the other hand creating several new European conventions on extradition and legal assistance emphasizing direct contacts, technical developments and modern methods of investigation. Experience had shown that investigations with a cross-border dimension could benefit greatly from the participation of law enforcement personnel from other countries in which there were links to the offences in question. The importance of operational co-operation among law enforcement agencies, in particular, had already been specifically recognized by Article 30 of the Treaty of the European Union. Next, the European Council meeting in Tampere, Finland in October 1999, an event which has produced many pioneering ideas in the field of judicial co-operation in Europe (like the principle of mutual recognition of judicial decisions or the establishment of Eurojust), stressed that Joint Investigation Teams “were to be set up without delay, as a first step to combat trafficking in drugs and human beings as well as terrorism”.

II. LEGAL BASIS

In accordance with Article 34 of the Treaty of the European Union, the EU Council of 29 May 2000 adopted the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.¹ This convention provided a bundle of modern investigation methods to fight cross-border criminality such as

- Hearing by video conference in Article 10 (see the author’s third UNAFEI paper titled “*Testimony through an international video conference*”);
- Hearing by telephone conference in Article 11;
- Controlled deliveries in Article 12;
- Joint Investigation Teams in Article 13;
- Covert investigations in Article 14;
- Interception of telecommunications in Articles 17 – 20.

This legal instrument (the 2000 Convention) needed to be ratified by (at least eight) Member States to enter into force. Due to an incredible lack of ratifications, and taking into account the importance attached to joint investigation teams, the Council on 13 June 2002 considered that a legally binding instrument was more appropriate and adopted a Framework Decision on Joint Investigation Teams,² reproducing the wording of Article 13 of the 2000 Convention and obliging the Member States to take necessary steps to comply with the provisions of the Framework Decision by 1 January 2003.

The Member States again reacted reluctantly - at least in the first two years after the decision had been adopted - to this second approach of the Council (it took until January 2005 for 17 Member States to take measures to comply with the Framework Decision and in November 2005 - when the decision was already no longer applicable since the 2000 Convention had finally entered into force - 21 Member States had implemented it). Policy makers inside the European Union showed distinct signs of relief when the 2000 Convention entered into force on 23 August 2005 (more than five years after its adoption!) and the

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¹ Official Journal of the European Union (OJ) C 197 of 12.7.2000, page 1.

² OJ L 162 of 20.6.2002, page 2.

Framework Decision lapsed.

Frustration among the practitioners was therefore understandable (and audible!). Two years, 2000 – 2002, without any legal basis and another three years, 2002 – 2005, filled with uncertainty about the legal backgrounds did not make things easier for prosecutors and police officers to set up joint investigation teams, although their own wish to start with the new instrument and partly also a kind of pressure from the media, was obvious. This wasted time has caused and still causes problems in daily work on an international basis and makes it difficult to describe experiences and success-stories (which I shall point out later on).

III. CONTENT OF ARTICLE 13/CONVENTION 2000

The basic rule for the establishment of a joint investigation team (JIT) is the need for an agreement between the competent authorities of the Member States concerned (Art. 13, paragraph 1). Already, at this stage, it is important to underline that the Member States are not obliged to set up those teams.

A JIT may be set up by initiative of two or more Member States to carry out investigations in one or more Member States for:

- a particular purpose (meaning that it is not possible to set up a team without indicating the case(s) or investigation(s) it is intended to work on);
- a limited - possibly extended - period (making clear that it is not possible to set up a permanently operational team).

Paragraph 1 also gives concrete examples for situations in which the setting up of a JIT is appropriate, for instance when:

- an investigation into criminal offences requires difficult and demanding investigations with links to other Member States;
- several Member States are conducting investigations into criminal offences in which the circumstances of the case(s) necessitate co-ordinated and concerted action in the Member States involved.

As to the composition of a team and its needs, members must be specified in the agreement. They can be law enforcement officers as well as prosecutors and judges. According to paragraph 3, the leader of a team has to be a representative of the Member State in which the team operates. The leader and the team are obliged to fully respect the national law of the Member States where they operate. The leadership inside a JIT will change if investigations are carried out in more than one Member State.

Experts may participate in a team as: members (of the Member State where the operation is carried out); seconded members (not operating in their own countries [paragraph 4]); non-members (Visiting Members) coming from Third States or from organizations inside the European Union like Eurojust, Europol and OLAF (paragraph 12).

The rights conferred upon members and seconded members do not apply to non-members unless the agreement setting up a team provides for differently.

According to paragraph 5, seconded members are entitled to be present when investigative measures are taken in the Member State of operation. However, the team leader may, for particular reasons, like for example in cases of sexual crimes, especially when the victims are children, decide otherwise. Under paragraph 6, the team leader may entrust seconded members with the task of carrying out certain investigative measures in the Member State of operation in accordance with the national law there, on the instructions of the team leader and with the approval of the competent authorities of the Member State of operation and of the seconding State. Such approval may be included already in the agreement setting up the team or it may be granted at a later stage on an ad hoc basis. It may apply in general terms or be restricted to specific cases.

One of the most innovative aspects, provided for in paragraph 7, is enabling a seconded member to request his or her own national authorities to take measures required by the JIT. The Member State of operation does not have to submit a separate letter of request for mutual legal assistance (letter rogatory). The relevant measures will rather be considered in accordance with the conditions that would apply had they

been sought in national investigations. If beyond these very progressive ideas there should still be a need for traditional requests from non (JIT) Member States or Third States the procedure has - in paragraph 8 - also been simplified by designating the residential state of the JIT as the responsible authority for letters rogatory.

Paragraphs 9 and 10 deal with a situation where information being not otherwise available, it is lawfully obtained by a member or seconded member while part of a JIT. This information may only be used for the purposes:

- for which the team has been set up;
- of detecting, investigating and prosecuting other criminal offences with the consent of the Member State where the information has become available (this consent may only be withheld where its use would endanger criminal investigations or in respect of situations where mutual legal assistance may be refused in general);
- of preventing an immediate and serious threat to public security; or
- for any other purpose agreed upon between Member States having set up the team.

Trying to influence Member States in a practical sense and to handle the subject of implementing Article 13 of the 2000 Convention (or, as a substitute, the Framework Decision on joint investigation teams) as far as possible in a similar way, the EU Council adopted on 8 May 2003 a Recommendation on a Model Agreement for setting up joint investigation teams.³ In 2005, on the basis of the Hague Programme,⁴ launched by the Dutch Presidency in the European Union with a view to enhancing police and judicial co-operation, the Council stated furthermore that “experience in the Member States with the use of joint investigation teams is limited. With a view to encouraging the use of such teams and exchanging experiences on best practices, each Member State should designate a national expert”, which led to the designation of national expert contact points on JITs. These measures were followed by two declarations on combating terrorism in 2004 and 2005, urging member States again to make full use of JITs.

The first meeting of the national JIT contact points was convened at Eurojust premises, in co-operation with Europol, on 23 November 2005. The participants of the meeting described their mission as to enhance still limited awareness and use of JITs, to overcome existing obstacles, to exchange information on experiences and best practices, and to disseminate information about existing JITs.

The experts believe that a pro-active approach will be crucial for an effective performance of their tasks and stressed the importance of identifying relevant investigations for which the establishment of a joint investigation team could be an added value. They also welcomed the joint initiative of Eurojust and Europol (“Eurojust/Europol JIT project”) aiming at drawing up a manual (“Guide on EU-Member States’ Legislation on Joint Investigation Teams”).

Also in this context, it should be expressly mentioned that coercive measures shall be the exclusive responsibility of the competent national authorities.

IV. FIRST EXPERIENCES

A. Under-use of JITs

“Joint Investigative Teams are not used enough!” This is the key sentence to be heard in European circles whenever the awareness and use of JITs is discussed. But one cannot blame the users for the omissions of the politically responsible. As I have pointed out before, the long-lasting period in which the 2000 Convention and the Framework Decision on JITs had not been respectively implemented was not encouraging for practitioners to step forward themselves and set signs of their own. Nevertheless, and fortunately, some countries did!

1. Spain and France

These countries have reported about three bilateral JITs having been set up in 2005; two for the investigation into drug trafficking offences, both with excellent results as they culminated in the dismantling

³ OJ C 121 of 23.5.2003, page 1.

⁴ OJ C 53 of 3.3.2005, page 1.

of criminal groups, the arrests of several suspects and the seizure of drugs, documents and money; and one for an investigation into terrorist offences. The experiences in the latter case have encouraged the Spanish prosecutors in preparing for the intervention of at least two more teams in anti-terrorism matters taking up their work in 2006. The most outstanding feature for the requesting Spanish side has been the immediacy of the investigations with the results passed to the authorities of the seconding State in real time to continue on their cases or start new cases without the issue of a separate letters rogatory needed, and - once enriched - with information returned by means of interactive proceedings to the authorities of the Member State of operation afterwards.

The main conclusion to be drawn was that the work of a joint investigation team can improve the operating capacity of international co-operation in a double sense: by widening the range of the investigation and speeding up the obtaining of results, interactively and online.

2. Project Group

In early 2004, (after comprehensive work in advance, begun in 2002) a project group, initiated by the upcoming Dutch Presidency in the European Union, which had expressed their clear aim to be the first ever to establish a Joint Investigation Team, the European Police Chiefs Task Force (EPCTF) and Europol (Analytic Work File "Maritsa"), began work on the establishment of a JIT in a multilateral case of trafficking in human beings from and through the (non-EU-Member State) Bulgaria. This project team was composed of specialized police officers and analysts from the countries involved (Belgium, Bulgaria, Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland) and assisted by an international and interdisciplinary research group from the universities of Tilburg, the Netherlands; Ghent, Belgium; and Freiburg (Max-Planck-Institute), Germany, to monitor and analyse the project.⁵ As the JIT instrument had not been practised before, the core aim of the project was to gain insight into the way a JIT may function and to identify the obstacles and conditions to be met for a JIT to be effective. Although the members of the project group were fully committed and showed great willingness to drive the project forward, the objectives initially intended could not be achieved in the end. In the first instance, because a concrete case could not be identified (pointing out that the defined project was not 'JIT worthy') and secondly because of lack and/or uncertainty of legislation. For both reasons Belgium, Bulgaria and Germany left the project and continued their investigations on trafficking in human beings from Bulgaria with conventional instruments of transnational police co-operation. Finally, the Netherlands and the United Kingdom could not redefine a new common goal in this project, but both countries, insisting that the way to establish a JIT had been successfully paved in general during the Bulgarian project, continued their work in setting up a different joint investigation team, this time on a bilateral basis on a drug trafficking case, and under the umbrella of Eurojust. Although a National Prosecutor from the Netherlands involved in this operation admits - when talking about it later at an international forum⁶ - that neither the complexity of the case nor its large international dimensions but rather the clear wish of the Dutch Presidency to be the first to have a joint investigation team, had the catalytic effect for setting up this JIT. It was launched in January 2005, and started work - on Dutch soil - soon after. The Dutch prosecutor already cited concludes that the team members had to face several problems but were successful in the end.

Since the JIT was a new instrument and the participants did not know in advance how the respective courts would rule on this enterprise, the Dutch and UK members decided to start the JIT as a parallel investigation, protecting the ongoing investigations in the UK. The second problem to tackle was the uncertainty about the Dutch and UK legislation on the coercive powers of seconded members (wire tapping, executing search warrants, and making arrests). Other points of discussion were the legal problems encountered, as according to Dutch law, a JIT has to be based on a treaty, but the 2005 Convention had not yet entered into force and the Framework Decision on JITs is not a treaty.

Another problematic topic encountered was the sharing of information, as the UK intelligence came from different sources, some of them not being part of the JIT and therefore refusing to let their information be shared in the JIT channels. Overcoming all these problems and also the daily difficulties in organizational

⁵ C. Rijken; G. Vermuelen (Ed.s) "Joint Investigation Teams in the European Union: From Theory to Practice", T.M.C. Asser Press, The Hague, 2006.

⁶ B. Den Harthing "Joint Investigation Teams, the Dutch Experience", Academy of European Law (ERA), Trier, 17-19 May, 2006.

matters (transportation, communication, costs), the members of this JIT estimate that the intensive personal contacts inside the group were the real added value, daring to call their bilateral work a success, resulting in several arrests and in the seizure of a large amount of money in cash. Pointing out the lessons to be learned, in particular with a view to have necessary pre-agreement discussions and to introduce a strategic steering group, the team members think that JITs can be a valuable instrument in fighting cross-border crime but "to make a real difference to conventional methods, the JIT still has a long way to go."

3. Slovakia, Sweden and Germany

After my country of origin, Germany, had several times refused to grant the green light for the establishment of JITs involving German members, only last month - again under the umbrella of Eurojust - another agreement on legal co-operation in criminal matters was signed, between Sweden, Slovakia and Germany, setting up a joint investigation team in a multilateral drug trafficking case to be carried out on Slovakian soil.

Although details about this (ongoing) JIT cannot be revealed due to tactical reasons it can already be said that this concrete project, having been set up after long deliberations, comprehensive work in advance both from prosecution offices and police in the three countries concerned, and partly very reluctant treatment, again in particular by the German Ministry of Justice, could be a signpost on the way to practical improvements and more detailed experiences when making use of joint investigation teams.

V. CONCLUSION

Although the basic instruments for the creation of joint investigation teams were already adopted some years ago, putting the idea into action is still in its childhood. The lack and/or uncertainty of the legal background (both at EU level and inside the domestic legislations) is obviously the main reason for this. Only in 2005 were the first formal steps to establish JITs taken (although work in advance had been underway since 2002). Recently, a growing acceptance of JITs can be recognized.

Joint investigation teams will be of added value in fighting transnational crime, even though one should not overestimate the role they can play. Success stories cannot be expected on short notice. To achieve consistent positive results, the awareness of the necessity for progressive instruments of intensified judicial and police co-operation must grow and reservations, based on feelings of national sovereignty, must decrease. With partners in international co-operation having confidence in each other and being ready for new ideas and initiatives, the success of JITs is only a question of time.