Joint Investigation Teams: The participation of Europol officials*

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Abstract The first part of the article deals with the general concept of the Joint Investigation Team (JIT). After presenting the relevant legal instruments, the author focuses on Article 13 of the EU's 2000 Mutual Legal Assistance Convention which includes the rules for setting up a JIT, its composition and competences and the information flow. The second part of the article analyses Europol's involvement and its competences in JITs (communication, analytical and logistical support) and introduces the protocol amending the Europol Convention which establishes a proper legal basis for Europol's involvement. Here, the focus is on Article 3a, which lays down Europol's participation in detail. In the last part of the article, the author describes the tools and services offered by Europol, with a special focus on JITs.

Keywords Mutual legal assistance · Joint Investigation Teams · Europol · Protocol amending the Europol Convention

1. The concept of JITs

The principle of JITs was introduced into the Treaty on European Union (TEU)¹ by the Amsterdam Treaty:

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¹ Article 30(2)(a) TEU.

‘... enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity; ...’

This article expressly mentions Europol within the context of ‘operational actions of joint teams’ though the organisation’s role is at the same time limited to a support function.

The European Council of Tampere² concluded in recommendation 43:

‘... Maximum benefit should be derived from co-operation between Member States’ authorities when investigating cross-border crime in any Member State. The European Council calls for joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism. The rules to be set up in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity.’

Following the events of 11 September 2001, the extraordinary meeting of the European Council of 21 September 2001 reinforced the need to set up JITs:

‘... The European Council calls upon the Justice and Home Affairs Council to undertake identification of presumed terrorists in Europe and of organisations supporting them in order to draw up a common list of terrorist organisations. In this connection improved cooperation and exchange of information between all intelligence services of the Union will be required. Joint Investigation Teams will be set up to that end.’

Although mentioned in many different political declarations, the term *Joint Investigation Team* was never clearly defined. There was no guidance or indication from the political level as to the content or scope of such a team.

1.1 Overview of the relevant legal instruments

The most far-reaching concept of a JIT so far was introduced by Article 13 of the European Union Convention on Mutual Legal Assistance.³ This article offers the Member States a framework for setting up a team consisting of representatives of law enforcement and other authorities of different Member States jointly investigating cases of international crime or cross-border crime.⁴

The purpose is to introduce a common set of general rules by elaborating in detail the composition of the team, the competence of the team members (in particular the *foreign* members), the relationship with the competent authorities of the Mem-

²) 15 and 16 October 1999.

³) OJ C197 of 12.7.2000, p. 1.

⁴) Paragraph 1 of Article 13 clarifies the scope of the JIT for ‘... criminal offences require difficult and demanding investigations, having links with other Member States ...’.

ber States, information flow to and from the team and the possibility to expand the team by including representatives other than those of the competent authorities of the Member States.⁵

The provisions of Article 13 were therefore incorporated into a Framework Decision: the Framework Decision of the Council of the European Union on Joint Investigation Teams⁶ (the instrument was adopted on 13 June 2002 and has been in force since 20 June 2002).

Furthermore, a Council Recommendation of 8 May 2003⁷ proposed a model agreement to facilitate the setting up of JITs as referred to in Article 13 of the Convention on Mutual Legal Assistance. It is intended to help the smooth implementation of Article 13 Joint Investigation Teams.

1.2 The main principles of Article 13 JITs

Article 13 standardises and facilitates the operation of joint teams by setting up a team leader, making possible executive action on foreign soil, defining the applicable law for the team, and by introducing the possibility of replacing traditional mutual legal assistance between the participating countries by a simple national request emanating from the respective national member[s], etc.

The first paragraph of the article states as a general rule the principle of setting up a JIT by two or more Member States for a specific purpose and a limited period. There is in principle no limitation in relation to the areas of criminality in respect of which a JIT can be set up. Even the element of cross-border crime is not a prerequisite for setting up such a team.⁸

The following paragraphs⁹ relate to the composition of the team. The team leader shall be a representative from the Member State in which the team operates. Seconded members are the representatives from the relevant competent authorities of the participating Member States other than the Member State in which the team operates. They shall carry out their tasks under the leadership of the team leader in accordance with the law of the 'host' Member State.

Paragraphs 5, 6 and 7 regulate the competences of the seconded members of the team. Team members will – regardless of their nationality – be treated in the same manner as officials of the Member State in which they are operating. The minimum standard is set out in paragraph 5 of the Article. Seconded Members shall be entitled to be present during investigating actions of the JIT. The most innovative provisions of this Article are those regarding the possibility to extend the competences of the seconded members and the possibility for seconded members to request their own competent authorities for investigative measures in their Member States. In principle, seconded members may be tasked to act on foreign territory and be entrusted by the

⁵) Such as officials of bodies set up pursuant the TEU.

⁶) 2002/465/JHA, OJ L162 of 20.6.2002, p. 1.

⁷) Council Recommendation of 8 May 2003 on a model agreement for setting up a Joint Investigation Team (JIT), OJ C121 of 23.5.2003, p. 1.

⁸) The wording is 'A Joint Investigation Team may, in particular, be set up where: ...'

⁹) Paragraphs 3 and 4.

team leader, in accordance with the law of the Member State where the team operates, to take some investigative measures:

*'Seconded members of the Joint Investigation Team may, in accordance with the law of the Member State where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the Member State of operation and the seconding Member State.'*¹⁰

Most important of all, the article introduces the possibility for seconded members stationed abroad with the team to request investigative measures from their competent national authorities without the need for any further requests under the traditional mutual legal assistance regime. Such requests shall be regarded as if they were made on national territory within a national investigation:

*'Where the Joint Investigation Team needs investigative measures to be taken in one of the Member States setting up the team, members seconded to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation.'*¹¹

The wording in both paragraphs *'may be entrusted, in accordance with the law of the Member State where the team operates'* and *'may request'* does however leave a wide margin of discretion for the Member States to implement these innovations.

Paragraph 9 and 10 regulate respectively the exchange of information within the JIT and the information flow back to the Member States. These provisions allow the direct provision of information available in the participating Member States to the other members of the team for the purpose of the criminal investigations conducted by the team.

In turn, paragraph 10 sets out the rules for the information flowback to the Member States and enumerates the possible uses for information obtained during the operations of a JIT.

Paragraph 12 of the Article relates to the possibility of including representatives other than those of the competent authorities of the Member States. It indicates as an example *'officials of bodies set up pursuant to the Treaty on European Union'*. Europol as a body set up under the TEU falls under this definition. It can therefore be concluded that the Framework Decision foresees the possibility for Europol staff to participate in JITs set up by the Member States.

While this provision does not oblige the Member States to ask Europol for its participation, the intention of the European legislator was to create a formal role for Europol in the setting up of JITs. To reflect this intention, some of the details concerning Europol's possible participation (competences, modalities for setting up

¹⁰⁾ Article 13(6).

¹¹⁾ Article 13(7).

a joint team with Europol participation, corresponding agreements with the Member States, legal status of participating Europol staff) were laid down in the Council Act of 28 November 2002 which provides the basis for an amendment to the Europol Convention.¹²

1.3 The model agreement for JITs

A Council Recommendation of 3 May 2003 introduced a model agreement for setting up a JIT in accordance with the terms of Article 13 of the European Union Convention on Mutual Legal Assistance.

The model agreement contains provisions on participating authorities (*parties*), the goal of the JIT (*purpose*), the duration (*period*), the identification of the leaders and the members of the team (*JIT leaders and members*), etc. to be agreed between the competent authorities of the participating Member States.

Section 7 of the model agreement offers the possibility for the parties to accept the proposal for participation by Europol/Eurojust/the Commission (OLAF). The exact arrangements under which these entities can participate shall be subject to a separate agreement (a model of this separate agreement is attached as an appendix to the model agreement).

2. Europol's involvement in JITs

The involvement of Europol in JITs was laid down by Council Recommendation 30 November 2000 '... on Europol's assistance to JITs set up by Member States'. The main principle is that Europol is to provide its *support* to JITs in accordance with the Europol Convention.¹³

By 'support' is meant that Europol should place its knowledge at the disposal of JITs; assist with the coordination of operations by JITs; provide advice on technical matters and help with the analysis of the offences.¹⁴

But Europol's involvement in JITs is subject to certain conditions.¹⁵ First, its involvement must be expressly requested by one or more Member States participating in the JIT; second, the JIT must include amongst its participants at least two Member States and/or third States with which Europol has concluded a Cooperation Agreement; third, the offences investigated by the JIT requesting the involvement of Europol must fall within the scope of Europol's mandate. Regarding the last condition, some factual indications of the involvement of an organised criminal structure should exist.

¹² OJ C312 of 16. 12. 2003, p. 1. Europol's competence to support JITs is discussed in detail under point 4 below.

¹³ See in particular Articles 3 and 4 thereof.

¹⁴ De Buck, B.: Europol's possibilities to support Joint Investigation Teams, unpublished paper delivered at second Meeting of the national experts on JITs, 10 November 2006.

¹⁵ Ibid.

3. Europol's competence to support JITs¹⁶

Taking into account that the scope of the project of a JIT is within the mandate of Europol,¹⁷ Europol's support for such a team is threefold in character.¹⁸

3.1 Communication channel

Europol can offer the participants of the team a fast and secure telecommunications network between twenty-seven Member States.¹⁹

While respecting the principle in the Europol Convention of exclusivity of information exchange through the Europol National Units, it could be envisaged that the members of JITs be designated as representatives of these national units.

3.2 Analytical support

Information and intelligence gathered by the JIT can be analysed within the more formal concept of an analytical workfile. Information gaps can be identified, leading to a more focused gathering of new information. Europol can disseminate analytical reports containing assembled intelligence such as an overall description of criminal organisations, description of criminal roles, responsibilities, *modus operandi* and activities, links between criminals, identification of threats, identification of new targets and an assessment of evidence gathered.

Consideration could even be given to setting up a specific analytical workfile for a particular JIT and appointing all the members of the team as members of the analysis group.

3.3 Logistical support

Europol can offer meeting facilities including the organisation of large meetings and can monitor and co-ordinate such meetings. Europol can also maintain an 'operations support centre' and can provide language and interpretation support. Europol can provide the team with expertise, advice on best practice (centre of excellence concept) and involve its specialised units or other law enforcement agencies based in the Member States.

¹⁶ as defined before the entry into force of the JIT Protocol (see point 4)

¹⁷ Europol's mandate extends to the forms of crime specified in Article 2 and in the annex to the Convention; there must be indications of an organised criminal structure and the participation of at least two Member States.

¹⁸ See further elaboration in Europol document 'Europol's present competence to support Joint Teams', 2510-94r1, 24 October 2001.

¹⁹ This network may be further extended to third States and organisations with which Europol has concluded a cooperation agreement.

4. Europol's new possibilities to support JITs: new Article 3a and the JIT Protocol

4.1 The introduction of a new Article 3a

The European legislator considered it appropriate to establish a proper legal basis for Europol to participate in JITs as suggested by paragraph 12 of the aforementioned Article 13. A protocol amending the Europol Convention was therefore adopted by the Council on 28 November 2002.

4.1.1 Europol's assistance in all activities of the JIT

The Protocol formally introduces a new Article 3a into the Europol Convention adding to Europol's principal tasks the participation in JITs. Specific rules on Europol's participation in joint investigative teams are laid down in detail.

While it is clarified that Europol's role in a JIT remains one of a supporting nature, it is also announced that corresponding Europol staff can assist in any activities of the team:

Indeed, Article 3a(1) 1 reads:

'Europol officials may participate in a support capacity in Joint Investigation Teams ... as far as those teams are investigating criminal offences for which Europol is competent under Article 2. Europol officials may, within the limits provided for by the law of the Member State where the Joint Investigation Team operates and in accordance with the arrangement referred to in paragraph 2, assist in all activities and exchange information with all members of the Joint Investigation Team, in accordance with paragraph 3. However, they shall not take part in the taking of any coercive measures.'

4.1.2 Europol and the leadership of the JIT

The new Article 3a also integrates Europol staff into the chain of command of the JIT. Article 3a, paragraph 3 reads: *'Europol Officials shall carry out their tasks under the leadership of the leader of the team'*. Article 3a paragraph 2 also provides that the administrative implementation of the participation of Europol officials in a JIT must be laid down in an arrangement between the Director of Europol and the competent authorities of the Member States participating in the Joint Investigation Team, with the involvement of the national units.

4.1.3 Direct liaison

Furthermore, Article 3a(4) provides for 'direct liaison' between the members of the Joint Investigation Team and the Europol officials participating to the team. Article 3a(4) reads:

'[...] Europol Officials may liaise directly with the members of the Joint Investigation Team and provide members and seconded members of the Joint

Investigation Team [...] with information from any of the components of the computerised system of collected information referred to in article 6'. (underlining added)

In cases where direct liaison takes place, the relevant Europol national units shall be informed simultaneously.²⁰

4.1.4 Disposal of information obtained through JITs

Article 3a paragraph 5 places a limitation on the use of information obtained by Europol officials while taking part in a JIT. The inclusion of such information into the Europol computerized system is subject to the prior approval of the Member State which provided the information. Such information may also be included in the analytical work files.²¹

4.1.5 Immunity

Europol officials participating in a JIT will not have the immunity normally granted to them.²² They will also be subject to the national legislation of the Member State where the team operates in relation to offences committed against or by them.²³

4.2 Entry into force of the Protocol amending the Europol Convention

The Protocol amending the Europol Convention is an 'old-fashioned' international legal instrument which requires adoption by the Member States in accordance with their respective national legal framework (the so-called 'ratification' procedure). Finally, nearly five years after its adoption by Council, this Protocol entered into force on 29 March 2007. From that day on, Europol is able to make use of the possibilities offered by the new Article 3a inserted in its Convention by the JIT Protocol.

4.3 The issue of coercive measures

The wording of Article 3a(1) has been deplored as 'unfortunate'.²⁴ It seems that there is a contradiction between '*can assist in all activities*' and '*shall not take part in the taking of any coercive measures.*' Similarly, the article in the draft Constitution for Europe does not help shed any light on this issue.²⁵ As a consequence, the

²⁰ Storbeck, J.: Joint Investigation Teams – Participation of Europol, unpublished paper delivered at European Judicial Network Plenary Meeting; Rome 3–5 December 2003, p. 7.

²¹ Subject to the normal conditions of the Europol Convention.

²² The Protocol therefore amends the Protocol on immunities and privileges in this respect (see Article 2).

²³ Storbeck, op. cit., p. 8.

²⁴ Storbeck, op. cit., p. 7.

²⁵ Article III-178(3) states: 'Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities'.

exact scope of the competences of Europol officials participating in JITs will remain unclear.

For instance, it is not clear whether Europol officials may assist or even be present while operational actions planned by a JIT are carried out by the competent authorities of the Member States. By the same token, it is not clear whether this provision precludes Europol officials from assisting or being present during the execution of a house search or during the hearing of a suspect.

But most importantly, the wording ‘the *taking of* coercive measures’²⁶ is in itself highly ambiguous: does it involve the use of physical force? Does it imply a certain degree of legal authority or does it simply refer to a power of decision?

Europol officials should not be responsible for the execution of coercive measures. It is clearly not the intention to grant Europol officials genuine police competences carrying fire-arms and arresting criminals all over Europe.²⁷ However, allowing Europol officials to assist national competent authorities responsible for the carrying out of these coercive measures might prove beneficial under certain circumstances. The expertise of a Europol official would be valuable to the representatives of the competent authorities carrying out those coercive measures because it features a unique European-wide expertise of exchange of information and intelligence.²⁸ Europol officials are able to provide police officers in the field with an overview of (organised) criminality spread over Europe and beyond, and most of all with an analysis of such criminal phenomena. Thus, during a house search, the indications provided by Europol officials to police officers on what information should be seized could be time-saving; the Europol officials would not however necessarily have to participate formally in the execution of the house search.

The tasks of the Europol officials within a JIT could be clarified by granting them an ‘expert’ status allowing them to assist national police officers in the carrying out of coercive measures, while the latter would retain sole responsibility for enforcing such measures by virtue of the powers attributed to them by the law and the constitution of the Member State concerned.²⁹

Additionally, one could even imagine that a Europol official could be entrusted by the leader of the JIT, on an ad hoc basis, with the power to perform certain investigative measures. To this end, a footnote in the text of the Council Recommendation on a Model agreement for JITs states that the separate agreement regarding the participation of the officials of Europol, Eurojust or the Commission (OLAF) should specify whether the rights conferred upon the seconded members by virtue of the Framework Decision should also apply to them.³⁰

²⁶) Storbeck, op. cit., p. 7.

²⁷) Ibid., p.13.

²⁸) And because of the cooperation agreements of Europol with third States, which even extends experience beyond the European Union.

²⁹) Storbeck, op. cit., p. 13.

³⁰) Section 7, footnote 4.

5. Products and services offered by Europol

Europol offers a wide range of products and services which revolve around two main ideas: on one hand, products aimed at facilitating access to information and, on the other hand, products designed to provide an analysis of such files.³¹

5.1 Facilitating access to information

Europol aims at facilitating the access to information by providing a communication platform commonly referred to as “info-ex” (‘information exchange’). This communication platform is embodied by the operation of a Virtual Private Network connecting the Europol national units within the different Member States and by the operation of encrypted lines with third States. Those communication channels purport to be safe, sound and complete. Moreover, every Member State and every third States with which it has concluded a cooperation agreement has designated one or two liaison officers who are located in the Europol building in The Hague. In other words, representatives from law enforcement authorities of around forty states are physically located in the one building within the Europol premises. Needless to say, this offers immense added value for police cooperation.

Europol also strives to facilitate the availability of information. Its main product in the matter is the *Europol Information System* and the *Index System*. The major feature of Europol’s I.S. is attributable to the identification of international links by cross-checking national criminal information and intelligence by linking national information with information available at the international level.

5.2 Criminal analysis of information: the Europol Analytical Workfiles (AWF)

Through temporary data files, its so-called ‘Analytical Workfiles’ (AWFs), Europol gathers all information related to one criminal event or phenomenon for the purpose of analysis. The criminal analysis provided in the AWFs purports to go beyond the known facts by using complex IT techniques and tools in order to develop hypotheses, to identify and fill in the information gaps and to draft analytical reports providing the description of criminal organisations, the roles and responsibility of their members, the relationships between them, the *modus operandi* and so on. Overall, the criminal analysis offered by Europol endeavours to provide Member States with valuable guidance in the fight against organised and/or cross-border criminality.

6. Europol products and services applied to JITs

All the aforementioned products and services offered by Europol can find an application both before a JIT is set up and during the operation of a JIT.

³¹ De Buck, B.: Europol: Joint Investigation Teams, Europol’s support, the Europol-Eurojust Project, unpublished paper presented at Durbuy, 5 October 2006.

6.1 Before the establishment of the JIT

Providing an international picture

Europol can provide the Member States with the international links identified by the Europol Information System and Index System, thereby giving a wider dimension and a more accurate overview of the cases under investigation and their possible connection with other investigations in other Member States. These systems provide the national competent authorities with the possibility to measure the international component of their (national) investigation.

Convene “operational” meetings

In case of a major connection between different cases of several Member States – e.g. criminal activities are connected to the same criminal organisation – Europol can convene operational meetings of the national authorities³² concerned in its headquarters in The Hague (Netherlands), bringing together all the investigators.

Analytical support

If deemed necessary and required for the case (e.g. if the amount and complexity of information processed require appropriate processing systems) a common information management or ‘house holding’ can be considered and Europol can open a new Analytical Workfile (AWF).

Assistance in the setting up of the JIT

The next step in the process is assessing whether it would be useful to set up a JIT. The national authorities concerned by the ‘common’ case can evaluate whether it is necessary for the success of the different investigations to set a more formal structure allowing them to investigate the case jointly. If yes, the setting up of a JIT can be decided. Europol can offer its expertise and support in the setting up, such as providing assistance to the drafting of the agreement setting up the JIT.

6.2 During the operation of the JIT

Facilitating access to information

Europol can provide the members of the JIT with access to its databases and its communication network. Access to both systems can be accomplished by means of a Europol ‘mobile’ office located where the JIT is operating. Team members can be given direct access to Europol’s Information System and Index System providing the team members with the necessary tools to cross check the information derived from the activities of the JIT with information available at the international level, in particular with information of those Member States which do not participate to the JIT. Secondly, Europol’s communication network, the Virtual Private Network (VPN), connecting all the Member States and third States with whom Europol cooperate, provide the members of the JIT with the perfect tool to communicate and exchange information with the law enforcement community of the European Union and beyond while at the same time providing guarantees of speediness and security.

³²⁾ The meeting can be convened also at the request of the national authorities.

Analytical support

Europol's analytical products serve before the creation of a JIT and during the operation of a JIT. Once a JIT has been set up, the analytical products of Europol may be more specifically tailored in order to meet the needs and the purpose of a given JIT. Notably, a new AWF may be opened or a subproject in a existing AWF ("target group") can be created to meet those needs.

Logistical support

Europol may initiate, monitor or co-ordinate the meetings of the competent authorities of the participating Member States and enhance the outcome of such meetings by providing language support, expertise and advice on best practices as a centre of excellence.

Forensic support

Europol Officials can assist the participants to a JIT in their gathering of evidence on the spot. They may notably offer their expertise on the quality of seized material such as Euro Counterfeits or counterfeited credit cards.