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JOINT INVESTIGATION TEAMS

a step forward to the European integration

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TABLE OF CONTENT

I. Introduction - what is a Joint Investigation Team?	p.2
II. The evolution of the JIT and its legal grounds	p.2
III. The concept of the JIT and its advantages	p.6
IV. General conditions of setting up the JIT	p.7
V. The JIT Agreement	p.9
VI. The structure of the JIT	
1. The team	p.10
2. The leader	p.11
3. Seconded members	p.12
4. Participants in the JIT	p.13
5. The role of Europol and Eurojust	p.13
VII. Purpose of the JIT	p.14
VIII. The role of the investigation plan in the JIT agreement	p.15
IX. Relation of the JIT to the third States	p.15
X. The JIT's members liability	p.17
XI. Covering costs and JIT financial support	p.17
XII. Conclusion	p.19
XIII. Bibliography	p.19

I. Introduction - what is a Joint Investigation Team?

The instrument of a Joint Investigation Team (JIT) is a special form of cross – border legal assistance in criminal matters. The team is set up on the basis of an agreement between two or more Member States and/or other parties, for a specific purpose and limited duration. The aim of our work is to present an idea of the JIT, focus on advantages of this legal measure and analyze the obstacles that may occur in establishment and operation of the JIT.

II. The evolution of the JIT and its legal grounds

The reference to a concept of the JIT was introduced in the Treaty of European Union (EU Treaty). Article 29 of the EU Treaty stipulates that European citizens shall be provided with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters. Article 30 of the EU Treaty in respect to common action in the field of police co-operation further prescribes that Europol must be enabled to facilitate and support operational actions of joint investigation teams and to promote liaison arrangements between prosecuting/investigating officials specializing in the fight against organized crime. The legal framework as well as purpose of the JIT were drafted during the European Council Summit in Tampere, Finland, on 15 and 17 October 1999¹.

Finally an instrument of the JIT was adopted in detail in Article 13 of The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 MLA Convention) that was declared on 29 May 2000 and based on Article 34 p. 2 (d) EU Treaty² regulating an available measures in a field of a common foreign and security policy. Due to the slow progress in a ratification of the 2000 MLA Convention³ the provisions of Article 13, 15 and 16 were incorporated into the Framework Decision on Joint

¹ Tampere Summit Conclusions, 15-16 October 1999, point C./VX A, Conclusion no 43, Unionwide fight against crime, Stepping up co-operation against crime: “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, www.statewatch.org/news/2008/aug/tamp, 14 April 2012.

² According to Article 34 p. 2 letter d the Council may establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.

³ Provisions other than Article 13 resulted in objections in some countries what delayed the ratification of the 2000 MLA Convention.

Investigation Teams (2002 Decision on the JIT) adopted on 13 June 2002 which the Member States were to implement by 1 January 2003. The attacks of 11 September 2001 in USA need to be considered as a factor that accelerated an adoption of 2002 Decision on JIT⁴. Therefore the legal framework for the JIT is set up in 2000 MLA Convention as well as in 2002 Decision on the JIT. The latter contains the same wording as 2000 MLA Convention in articles with respect to the JIT instrument what creates a dual basis for this institution. The 2002 Decision on JIT was implemented by the Member States in different ways by:

1. adopting specific laws on the JITs (e.g. in Austria, Cyprus, Luxemburg, Spain);
2. inserting provisions regarding the JIT in codes of criminal procedure (e.g. in Bulgaria, Poland, Czech Republic, France, The Netherlands, Slovakia);
3. referring to the direct applicability of the 2000 MLA Convention in the national legal order (e.g. in Denmark, United Kingdom).

Article 5 of the 2002 Decision on JIT stipulates that this decision will cease to have effect when the 2000 MLA Convention has entered into force in all Member States. As far only Italy has not yet ratified the Convention or implemented the Decision. Due to the lack of legal basis for the JIT in Italy the first Polish attempt to create the JIT turned out to be unsuccessful.

Case illustration: Italian “work camps in Puglia” – no legal framework for the JIT

Facts: *The trafficking ring recruited Poles for seasonal work on Italian farms through newspaper adverts, promising them well – paid and safe jobs. Those who applied were charged 100-200 euros plus another 150 euros when they reached Italy’s Puglia region. Once in Italy, the workers were kept in barracks without heating and light and were watched by armed guards. They had been forced to work for up to 15 hours a day earning between two and five euros an hour. They had to pay for their accommodation and food, which pushed most of them into debt. Those who tried to escape were reportedly raped and tortured. In July 2006 carabinieri (Italian police) freed at least 100 Poles. At least 20 members of the suspected ring were arrested during a joint operation codenamed Promised Land conducted by Italian and Polish police. There were 880 Polish injured persons revealed⁵.*

⁴ Extraordinary Council Meeting, Justice, Home Affairs and Civil Protection, Brussels, 20 September 2001, 12019/01 (Press 327, p. 4). The crucial words at the meeting were: “the seriousness of recent events has led the Union to speed up the process of creating an area of freedom, security and justice and to step up cooperation with its partners, especially the United States”. G. Janicki, *Wykorzystanie wspólnych zespołów dochodzeniowo – śledczych jako instrument zwalczania przestępczości o charakterze transgranicznym*, Przegląd Policyjny 2008, number 1 (89). The Polish website: http://www.wspol.edu.pl/przegladpolicjny/index.php?option=com_content&view=article&id=21&Itemid=13#footnote-912-18-backlink, 14 April 2012.

⁵ K. Karsznicki, *Wspólne zespoły śledcze*, Prokuratura i Prawo 2011, number 7-8, page 14 and the discussion with the author of the publication on 5 April 2012.

Issue: Two parallel investigations to a crime of organized criminal group were conducted. In Poland charges were made against the suspects who had organized human traffic as well as against drivers whereas in Italy pretrial criminal proceedings concerned guards at camps and plantation owners. At the moment of investigation all 880 victims of the crime resided already in Poland. The huge number of injured persons constituted a problem in hearing all of them twice – in the purpose for the two abovementioned investigations. Hence the prerequisites for setting up the JIT between Italy and Poland were fulfilled. However, the JIT was not constituted as Italy had neither ratified the 2000 MLA Convention nor implemented the 2002 Decision on the JIT. The efforts to establish the JIT based on article 19 UN Convention against Transnational Organized Crime, 15 November 2000 (signed in Palermo)⁶ were also unsuccessful as internal legal system in Italy had not regulated the JIT's institution. It is worth saying that after unsuccessful attempt of creating JIT between Poland and Italy to co-operate in case of labor camps in Italy, Polish requests for mutual assistance were executed instantly, what shortened time of investigation in both countries (in Italy the process is now finished, while in Poland the case is conducted in court) without using the institution mentioned in Article 13 of the 2000 MLA Convention.

To sum up, the general rule is that for the JIT between Member States of the European Union legal basis are: article 13 of the 2000 MLA Convention and the 2002 Decision on JIT. However, problems regarding setting up the JIT may arise even if the states formally have legal basis for the JIT.

Case illustration: British – Dutch JIT on drugs

Issue: During the British investigation on drugs, it occurred that substantial amount of drugs being held in the Netherlands. In that case JIT was set up only to investigate in the Netherlands territory with the support of Europol and Eurojust while British officials in the UK acted separately. Both States had already implemented provisions regarded the JIT in place at the moment when the establishment of the drugs JIT was considered (autumn 2004). However deep inside into the case revealed some legal obstacles. According to Dutch law⁷ the JIT may be set up insofar as a treaty allows this possibility whereas the English regulation

⁶ Article 19 UN Convention against Transnational Organized Crime, 15 November 2000 stipulates that States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case – by – case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

⁷ Article 552qa(1) of the Dutch Code of Criminal Procedure.

was the implementation of 2002 Decision on the JIT (which is not considered as a treaty). This clash between domestic legal system was finally overcome. Rotterdam District Court decided on the legal basis of the Drugs JIT and stated that the Framework Decision was binding upon the Member States and had a supranational character. Consequently, there was sufficient legal basis between the UK and the Netherlands to establish a JIT despite the treaty requirement in Dutch national law⁸. It was the first successful effort to set up the JIT.⁹

The JIT can be established with and between countries outside of the European Union. The fundamental provision is that a suitable and applicable legal basis for such an institution exists. The legal grounds may arise from an international legal instrument, a bilateral agreement, a multilateral agreement or national legislation. The available international legal instruments are as follows: Article 20 of The Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (The Second Protocol to the 1959 Convention), Article 19 of the UN Convention against Transnational Organized Crime, 15 November 2000, Article 24 of the Convention on mutual assistance and co-operation between customs administrations (Naples II Convention), 18 December 1997, the Article 27 of the Police Cooperation Convention for Southwest Europe (PCC SEE), 5 May 2006, and Agreement on Mutual Legal Assistance between the European Union and the United States of America (Article 5 and the national implementation thereof).

Case illustration: The airplane catastrophe in Smolensk (10 April 2010) – no legal grounds for the JIT

Issue: *On 10 April 2010 in Smolensk on a territory of Russian Federation occurred an airplane catastrophe in which 96 Polish citizens died. Russian Federation had not ratified any international agreements on setting up a JIT. It is essential to notice that Russia had signed UN Convention against Transnational Organized Crime, 15 November 2000 and UN Convention against Corruption, 31 October 2003. These international agreements stipulate setting up a JIT but the scope of the JIT is limited by the subject i.e. organized crime or corruption. There is no doubt that subject of investigation in airplane catastrophe exceeds the abovementioned category of crimes. Hence the Convention on the JITs ratified by Russian Federacy shall not be applicable to the case. Besides, under Russian criminal procedure code*

⁸ See: Conny Rijken, *Joint Investigation Teams: principles, practice, and problems Lessons learnt from the first efforts to establish a JIT*, Utrecht Law Review, page 110.

www.utrechtlawreview.org/index.php/ulr/article/viewFile/28/28, 14 April 2012.

⁹ More about the case: G. Janicki, *Wykorzystanie ...*

there are no provisions regarding the institution of the JIT. Under such circumstances the rule of reciprocity prescribed in article 589b Polish procedure code is excluded.

III. The concept of the JIT and its advantages

The main goal of setting up a JIT is to improve effectiveness in investigating offences with a cross-border dimension, particularly in relation to organized crime. The idea is that the investigation will benefit from the participation of law enforcement and other relevant personnel from another State in which there are links to the offences in question. The major advantages of the JIT are:

1. Direct exchange of information

The JIT members share information directly what means that they can avoid formal requests. Article 13 p.10 of the 2000 MLA Convention stipulates the conditions for the use of information lawfully obtained by a member or a seconded member of a joint team where the information in question would not otherwise be available to the competent authorities of the Member States concerned¹⁰. The quick flow of information definitely is a factor that shortens a length of pretrial proceedings and therefore improves a quality of investigation.

2. Ability to undertake investigative measures without Letters Rogatory

Instead of executing the investigative measures themselves in their home countries on the basis of a formal request, seconded members may ask their colleagues in the home country to take those measures¹¹. An elimination of formal request means that a motion of a member of the JIT is considered as if it were a request in a national case¹². Consequently, information obtained from such a measure will be used in further investigation by that team irrespective of the country where the investigation took place. Additionally pursuant to the Article 13 p. 6 of the 2000 MLA Convention there is a possibility to participate at house searches, examinations, obtaining documents and exchange informal specialized knowledge.

Case illustration: The successful JIT between Switzerland and Poland

Issue: *In 2009, November Switzerland and Poland set up a JIT for the following investigations: BA/SV 11111/09 for Swiss Federal Prosecutor's Office and Ap V Ds. 99/09 for*

¹⁰ According to the Article 13 p. 10 the information may be used for the purpose for which the team has been set up, subject to the prior consent of the Member State where the information became available, for detecting, investigation and prosecuting other criminal offences, for preventing an immediate and serious threat to public security, for other purposes to the extent that this is agreed between Member States setting up the team.

¹¹ See article 13 p. 7 of the 2000 MLA Convention.

¹² Conny Rijken, *Joint Investigation Teams...*, page 103,

Appellate Public Prosecutor's Office in Wroclaw, Poland. Swiss and Polish investigations concerned crimes committed in the period of 1998-2002. Swiss investigated crimes on documents' forgery and corruption of an official while Polish pretrial proceedings focused on money laundering. Both public prosecutor's offices instituted their inquiries against the same suspect. Both investigative bodies were in a possession of evidence of great significance for each other. A settlement of the JIT enabled Polish to obtain documents regarding banking operations without formal requests. Firstly Polish investigators would have communicate with the Swiss ones via central institutions such as Ministry or General Public Prosecutor. Then, the Swiss procedure on quashing a bank secret involves activity of public prosecutor and court seating. The typical way of Letter Rogatory would be not only complicated but also time – consuming. The JIT accelerated Polish criminal proceedings and the cooperation was extended for the next year¹³.

3. Promotion of mutual trust between investigative bodies from different jurisdictions and legal environments

The JIT is a platform to coordinate efforts on the spot and to plan investigation strategies. Participation in the JIT helps to overcome formalities and delay in communication between the states as well as language and cultural barriers. Participation in the JIT' project builds a framework for further cooperation and promotes the idea of European integration.

IV General conditions of setting up the JIT

According to Article 13 of the 2000 MLA Convention, Article 1 of the 2002 Decision on the JIT and Article 20 of The Second Protocol to the 1959 Convention a joint investigation team may be set up particularly when:

1. a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States;
2. a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved.

It is an open catalogue of general conditions of setting up the JITs, what means that they may be created always when the Parties concern that the investigative measures need to be taken jointly by the services of a number of Member States. Because of high charges of this form of international co-operation it is necessary to take under consideration if exploiting other forms

¹³ Case review prepared on the basis of discussion with Krzysztof Karsznicki, 5 April 2012.

of mutual assistance, such as videoconference, telephone conference, examination of witnesses in the place of his residence or request for information on bank accounts are not sufficient to achieve the purposes of criminal proceedings.

In investigation including actions carried out in the same time in a number of countries, as well as when the case needs quick operation with other State's participation, it is usually better to act in a JIT than submit ordinary requests of mutual assistance. Setting up a JIT helps to avoid doubling acts of legal procedure, mainly witnesses hearing, and shortens time of expectation for request of international assistance to be realised. The reason is that if the members or seconded members of a team ask their Member State's authorities, officers or courts to perform a particular legal action, it is realised as ordinary act of investigation for a prosecutor in his country, not as an act of mutual assistance - but the results of an action are submitted to all members of the JIT (Article 13 p. 7 and 9 of the 2000 MLA Convention). To emphasize it was the main cause of establishing the JIT between Poland and Switzerland in 2009.

There is no list of crimes for detection which JITs are possible to be set up, however, it is necessary to point out the exemplary features of such crime which make JITs be usefully employed. It may be considered when investigating serious, cross-border crimes committed by organised groups, which claim co-ordinated common process or complex act performance i.e. the JIT between France and Spain in 2005¹⁴ or Sweden, Germany and Slovakia¹⁵). It is recommended, in order to facilitate international co-operation and mutual trust, to use JITs also in smaller cases with an international elements¹⁶. Unfortunately, the last solution is faced with the problem of funding while costs of operation highly exceed expected effect. In spite of steps undertaken by the European Union to help Member States in financial matters (what will be described later), JITs still remain an exceptional way of international co-operation.

Finally, setting up a JIT is worth considering while in the case appears a problem of a cultural background, peculiar for authorities of other state, what makes an investigation easier to be carried out in co-operation with representatives of a second State. It seems as if the problem touches only exotic cultures, such as African or Asian, but even the officials working on the

¹⁴ Jürgen Kapplinghaus, *Joint investigation teams: basic ideas, relevant legal instruments and first experiences in Europe*, page 31-32 http://www.unafei.or.jp/english/pdf/RS_No73/No73_07VE_Kapplinghaus2.pdf, 14 April 2012.

¹⁵ *Ibidem*, page 33.

¹⁶ Joint Investigation Teams (JITs) Manual, Council of the EU, 15790/1/11, REV 1, <https://www.europol.europa.eu/sites/default/files/st15790-re01.en11.pdf>, 14 April 2012

An example for this concept is a case of the JIT between the UK and The Netherlands that was discussed above. The Rotterdam District Court proceeding with this case held that it was understandable and acceptable that a rather easy case was the subject of the first operational JIT.

Golf case may have observed that knowledge on local habits and criminality was useful during searches and arrests of citizens of Romania.

Case illustration: Human trafficking against the Roma community

Issue: *In October 2010 a joint investigation team was set up between the UK, Romania, Europol and Eurojust to investigate a case of human trafficking against the Romanian citizens from the village named Golf. Two Romanian police officers were delegated to London and worked with Metropolitan Police officers. It facilitated to understand cultural backgrounds and legal differences. The Romanian police officers provided their English colleagues with contacts to administrative bodies in Bukarest. Participation of the Romanian helped to overcome language barriers. It was a successful operation which led to rescue 28 children and identify 181 victims of human trafficking. Four members of the organized group were sentenced for 24 year imprisonment ¹⁷.*

Even if those general conditions are fulfilled creating JITs may encounter formal or factual barriers which make joint operations impossible or useless to carry out.

Case illustration: Factual barriers against creating the JIT

Facts: *In 2009 the UK asked Poland to set up a JIT to investigate the case of human trafficking linked with fraud of social service system in the UK. Frauds were committed by the Poles who were trafficked to the UK and registered in social office with using their ID cards taken previously by the members of organised criminal group.*

Issue: *The problem was that under the British law the registered people were treated as preparatores of fraud while due to the Polish law they were the victims of human trafficking. It was impossible to combine these two procedural roles (of a suspect and a grieved person) connected with different rights and obligations. Hence, the JIT was not set up.*

V. The JIT Agreement

The 2000 MLA Convention stipulates that JITs are established on the basis of a written agreement. The fundamental rule of drafting a JIT agreement is flexibility in wording in order to avoid constant amendments to the document. The agreement shall be compatible with the progressive investigative actions. The Council of the European Union first adopted a

¹⁷ More about the case: <https://www.europol.europa.eu/content/page/operational-successes-127>, 14 April 2012. The European Investigator, page 19 <https://www.europol.europa.eu/sites/default/files/publications/investigator.pdf> - page 19, 14 April 2012.

Recommendation on a Model Agreement¹⁸ for setting up a Joint Investigation Team on 8 May 2003, then a Resolution on 26 February 2010¹⁹. The legal framework to set up and operate a JIT allows for a wide range of discretionary powers and therefore the agreement is of crucial importance to all parties. A minimum standard in a drafting of the agreement covers naming members and/or participants, targets (suspected persons and the offences), leader or leaders of the JIT with their competences and clear responsibilities, language of communication, use of weapons and cars, organization and division of costs and finally time frame for the JIT²⁰. The technical remark is that the identity of the team members can be annexed or sent separately not to disclose identities of undercover officers, specialists, etc²¹.

According to Article 13 p. 1 of the 2000 MLA Convention, Article 20 of The Second Protocol to the 1959 Convention and Article 1 p. 1 of the 2002 Decision on JIT, a team is set up for the limited period, which shall be pointed in the agreement. It may be extended if needed by further agreement. In other words, there is no possibility of creating a permanent team.

VI. The structure of the JIT

1. The team

Article 13 p. 1 of the 2000 MLA Convention stipulates that JITs are set up in order to follow investigation in one or more of Member States and shall be created in the territory of this Member State in which the investigations are expected to be carried out. No limitation has been placed on the number of Member States which may be involved. We should yet remember that there is no one investigation led by the JIT's members but each Member State carry out its own criminal process. At this point we shall focus on the factor that the basic idea of the JIT is to facilitate sharing information and to avoid undertaking doubled actions. As far as the concept of the team is concerned it is crucial to take into account geographical basis and to allow flexibility if the investigation reveals a different area of operation²². The JIT based on the agreement between two Member States may act in two ways:

1) the officers of both Member States operate only in the territory of one of them or

¹⁸ Council Recommendation of 8 May 2003 on a model agreement for setting up a Joint Investigation Team (OJ C 121 of 23 May 2003, p.1).

¹⁹ Council Resolution of 26 February 2010 on a Model Agreement for setting up a Joint Investigation Team (JIT) 2010/C 70/01 of 19 March 2010.

²⁰ Mariana Lilova, *Joint investigation teams/JITs. The role of Eurojust and Europol in establishing and supporting JITs*, www.rai-see.org/doc, 14 April 2012.

²¹ Report on Joint Investigation Teams (JIT's) and Eurojust's JIT's funding 2/2011, 1 February – 30 April 2011, www.nij.bg/FileHandler.ashx?folderID=153&fileID=1954, 14 April 2012.

²² Joint Investigation Teams Manual, page 9.

2) members of the JIT act in the territories of both or more States, though it does not mean that each member is obliged to stay in the territory of the Member State's operation. The agreement on setting up the JIT should list members who operate in the territory of the second Party. It may also provide that the whole team is moving constantly from one country to another. What is more, it is possible that the JIT consists only of the officials who work in their own country and communicate with each other using cell phones or other means of communication. At this aspect the role of JIT is to coordinate measures undertaken separately in both States by their national officers.

2. The leader

Article 13 p. 1 (a) of the 2000 MLA Convention lays down that the leader of a team shall be a representative of the competent authority participating in investigations from the Member State in which the team operates. The assumption is that a JIT is headed by one person. However, while the place of the JIT's operation changes, there is a need to appoint a new leader from the state where the investigation is carried out at particular moment of JIT's operation. It means that the leadership will change if investigations are carried out in more than one Member State.

The change in leadership structure can be done without any amendments to the agreement while the team is moving from the territory of one State to another. This scheme of management we may qualify as "flowing-leadership" or concept of "multi-leadership". There is a risk of unclear leadership structure what may disorganize communication or dislocate responsibility for due tasks' fulfillment. This problem needs to be anticipated at the JIT's negotiation level with respect to the cooperation between more than two members. The solution is that one leader for the JIT is selected from each country. Agreement from all leaders is needed to decide on common issues i.e. allocating funds²³. At operational level, following the national legal framework, the leadership is divided, the JIT leaders are given the power to head the entire project when operating in their own countries.

There are no limitations whether the team leader should be a public prosecutor, a judge or a senior Police or customs officer. This provision in the JIT's agreement depends on national regulations, e.g. in Poland a team leader is a public prosecutor. The JIT operates under the law of the Member State in which the action is carried out. The leader of the team must act within the requirements of his national law.

²³ Eurojust Report on Enhancing the work of Eurojust in drug trafficking cases, January 2012, page 33, 14 April 2012. The information received by the Polish Prosecutors.

3. **Seconded members**

With regard to the issue of parties to the JIT arises the idea of seconded members. Article 13 p. 4 of the 2000 MLA Convention prescribes that members of the JIT from Member States other than the Member State in which the team operates are referred to as being “seconded” to the team. With the scope of an efficiency of the JIT the most important legal tool is provided for in article 13 p. 7. Where the JIT 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 in accordance with the conditions that would apply if they had been sought in a national investigation. This solution enables to avoid lengthy way of submission letters of request and illustrates the concept of the JIT.

Then it is worth to notice that seconded members are allowed to participate in certain investigative measures in the operation of Member State. The team leader has a prerogative to decide otherwise, in accordance with the law of the State where the team is operating. There are no stipulations concerning grounds for a denial to the seconded member presence so it remains to the leadership discretion. There is also a requirement of an approval for the seconded member’s participation in the activity. This approval is granted by both the competent authorities of the Member State of operation and the seconding Member State. Such approval may be included in the agreement establishing the team or it may be granted at a later stage. It may also apply in general terms or it may be restricted to specific cases or circumstances²⁴.

At this point we can serve an example of a witness’ examination that is conducted by the police officer within the scope of the JIT’s operating in Member State X. A relevant person (e.g. public prosecutor, another police officer) representing a seconded member to the JIT from state Y participate in the hearing. Personalities and the rank of this person are inserted into the protocol of hearing as well as questions delivered by him or her. The aim of the JIT is to coordinate two parallel investigations in two different countries. Hence the ability to participate in the hearing grant on the seconded member a real influence on the course of the investigative measure. After all each party to the JIT has its own goals to achieve in its criminal proceeding at national level.

²⁴ Explanatory Report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, www.eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi, 14 April 2012.

According to article 13 p. 9 of the 2000 MLA Convention the seconded member is entitled to share with the JIT information which is available in his Member State and is relevant to the investigations being conducted by the team. However, the seconded member may provide the JIT with information due to his national law and within the limits of his competence.

4. Participants in the JIT

Article 13 p. 12 of the 2000 MLA Convention regulates the status of “participants” in the JIT. The participants are persons other than representatives of the competent authorities of the Member States setting up the JIT. These persons are granted allowance to take part in the activities of the team. Such persons may include officials of bodies set up pursuant to the Treaty of European Union. This could include a body such as Europol or as Eurojust. The participation of Commission staff (OLAF) may also be considered. Participants are not permitted to exercise the functions conferred on members or seconded members of a team unless this is permitted under the relevant agreement between the Member States concerned.

5. The role of Europol and Eurojust

Europol and Eurojust have a status of a participant of the JIT. Pursuant to the Article 5 (d) of the Council Decision establishing Europol²⁵ and Article 6 (a) p. IV of the Eurojust Decision²⁶ they have also the capacity to ask Member States to consider setting up JIT. The competence of Europol regarding the JIT’s is limited by the provision of Article 6 that excludes the organization from taking any coercive measures.

The role of Eurojust and Europol is invaluable, especially when the agreement is signed by more than two Member States. Firstly, both institutions provide translations of written documents. Moreover it is possible to receive simultaneous translation during a phone conference between members of a team. Besides, in order to reduce problems with communication and differences of statutory regulations they deliver interpretation of the law. During the negotiations on setting up the JIT Europol and Eurojust may also assist in drafting agreements or organize meetings in their head office. They advice the national authorities and prepare analysis on the JIT’ operation after closing the project.

Europol helps as intelligence and analytical support to Member States, particularly preparing analysis, reports or forensic expertise and providing advice on investigations. Europol

²⁵ Council Decision of 6 April 2009 establishing the European Police Office (Europol).

²⁶ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

investigators may communicate with members of the JIT, either sharing information with them and national authorities or taking part in identifying people involved in a crime. Finally Europol and Eurojust assist in logistic matters of arranging JIT members' meetings.

VII. Purpose of the JIT

According to regulations stipulated in the 2000 MLA Convention and 2002 Decision on the JIT, a team shall be set up for "a specific purpose". In this context one of the most important thing is to decide whether the purpose mentioned in the agreement should be described precisely or generally. A general formula which deserves a recommendation is more flexible solution. It allows working on many aspects of the case which could not be predicted at the moment of establishing the JIT. Then, it eliminates delays due to amending an agreement or achieving obligatory consent for using information obtained by the State through the JIT.²⁷ Nevertheless, in specific situation, it may occur that it would be necessary to define the purpose more precisely.

First of all, we should take into account the fact that the JIT is be set up in those cases where it is beneficial for national investigations. It means that in defining the purpose of the JIT we have to take into consideration aims of the national investigations which do not have to be the same in every aspect (even if this investigations deals with the same case). An example may be the abovementioned case of trafficking Polish citizens to United Kingdom. The aims of national investigations differed in some way. It was not affordable to cumulate a procedural role of a suspect and harmed person. Hence the JIT was not established in this case. To assume, if the JIT were set up in this case, the purpose would have excluded the lead of fraud.

Secondly, there are situations where generally defined purpose may cause risk for domestic investigation. This will happen when one's States law system requires to disclose evidence to suspect on early stage of investigation.

The JIT may be also determined by national legislation or other factors (e.g. lack of consent to share information obtained by assistance of the third State) limiting the possibility of sharing information crucial for some case's leads. This problem is of great significance not only at the commencing stage at the moment of setting up the JIT (when States are defining the JIT's

²⁷ According to Article 13 p. 10 of the 2000 MLA Convention the information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the Member States concerned may be used only for purposes for which the team has been set up and for preventing an immediate and serious threat to public security. Using such information for other purposes requires a prior consent or must be agreed between States.

purpose) but also (or even – mostly) during the JIT's investigation. It was especially noticeable during the work of the first JIT established between Dutch and UK which dealt with the drug trafficking case. Although the JIT's aim was limited (the JIT was established only for the Dutch side of this case) there were problems related to the fact that some of the UK intelligence sources refused to let their information being shared in the JIT channels. To make things worse, the exchange of information within this JIT was even more complicated by the British strict rules of disclosure²⁸.

VIII. The role of the investigation plan in the JIT agreement

To define the scope of the JIT's investigation even more precisely the states may also draw up a plan of investigation and make it a part of an agreement of setting up the JIT. Such plan should enlist number of measures to undertake and define people responsible for executing particular activities. The plan of investigation, otherwise than the JIT's purpose, is not mandatory element of an agreement and in most cases it is better not to include it into an agreement. It will help to allow members of the JIT to make their own plan of investigation which could be changed easily, as the investigation goes forward, without necessity of changing the agreement. The plan prepared by members of the JIT has also an additional advantage, because it is directly prepared with details by investigative bodies conducting peculiar criminal proceeding e.g. police officers or public prosecutors whereas the JIT agreement is usually prepared by central investigative bodies such as Ministry of Justice or General Prosecutor.

IX. Relation of the JIT to the third States

The JIT should be established as early as possible in early phase of the investigation. It is advisable to avoid time – consuming negotiations and focus on the fact that investigative action must commence quickly in order to gather evidence. In view of the fact that knowledge about the details of crime at this phase is limited it is quite natural that during the investigation it may occur that the particular criminal proceeding is related to more countries that it had seemed at the beginning. Therefore, it constitutes a question about the possibility of changing a prior agreement on the JIT so that a new State could join it. Neither the 2002

²⁸ According to the British law sensitive information gathered during the investigation, but not used in a trial, cannot be disclosed, if the judge decides so, whereas in the Netherlands any information used as a basis for investigative powers have to be disclosed in court and may as well become known to the defense. The fact that the British investigators were obligated to safeguard sensitive information from being disclosed caused problems, which were finally solved by using Europol channel.

Decision on the JIT nor the 2000 MLA Convention mentions clearly this possibility. Provisions of the Vienna Convention on the Law of Treaties are not applicable to the JIT agreement. A legal act that sets up the JIT is not a treaty in the meaning of this convention)²⁹. Nevertheless, it seems obvious that such possibility exists – there is no reason why states, which are able to set up the JIT and then terminate it, should not be able to make any amendments to its composition by inviting a new State to co-operation.

The situation complicates when there is no necessity to make another State a member of the JIT but then during the investigation it turns up that it is required to obtain some information or evidence from such a country. According to art. 13 p. 8 of the 2000 MLA Convention where the joint investigation team needs assistance from a Member State other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operations to the competent authorities of the other State concerned in accordance with the relevant instruments or arrangements.

Although it is not mentioned straightly, this request should mention about the existing JIT (and its purpose) and explain which countries participate in it, so that the third State's authorities know who is a beneficiary of its assistance³⁰. If the composition of the JIT changes during an operation by adding a new State (eventually replacing one by another) or assistance is provided before setting up the JIT, the third State's approval for sharing this information with new States shall be granted again³¹. We do not concur with the opinion that a general clause in request for mutual assistance indicating that the information can be used by the JIT regardless of its composition is enough to avoid the procedure of obtaining new approval³². This solution does not give providing State enough certainty about the States which would benefit from their assistance. This solution may be applicable in the case of the JIT's purpose change. In spite of the fact that JIT's purpose defines to what extent such information can be used (according to Article 13 p.10 (a) of the 2000 MLA Convention)³³, which also concerns information which became available through a third State), such information may be used mainly for the purposes for which the team has been set up. At this aspect it seems that the third State's consent would not be necessary in every case of change in this scope. In our

²⁹ Such an agreement is not a source of law but it executes existing law.

³⁰ And therefore to avoid situation when the JIT is used as a way to bypass a law - when one state use another, to receive some information from a third one (which wouldn't give this information straightly to the first)

³¹ Of course, if this information is of great importance for the case, it may be reasonable to achieve such approval before setting up/changing the composition of JIT.

³² Conny Rijken, *Joint Investigation Teams*, page 101.

³³ Article 1 p. 10 (a) of 2002 Decision on the JIT.

opinion, it would be required only in regard with major changes when new aim would be wider than previous one and passed information would be valuable for a plots arising after adding by a new purpose.

X. The JIT's members liability

Article 15 and 16 of the 2000 MLA Convention deals with criminal and civil liability regarding officials participating in a JIT. Under Article 15 during the operations of the JIT, seconded members shall be regarded as officials of the Member State of operation with respect to offences committed against them or by them. It means that if the statutes of Member State of operation set forth severer statutory penalty for assaulting officials, the same punishment is provided for assaulting seconded members of the JIT. On the other hand, seconded members are also treated equally if the Member State's statutes stipulates severer statutory penalty for officials who committed a crime.

Article 16 provides that seconded members are liable for any damage caused by them during the actions of the JIT, on the basis of the law of the Member State in whose territory they are operating. The Member State of operation is obliged to compensate for the damage caused by seconded members in its territory as for damage caused by its own officials. Nevertheless, it has a recourse to the Member State whose officials are liable for causing damage. Excluding those regulations, Member States shall not request reimbursement of damages it has sustained from another Member State. In spite of the fact that establishing the JIT and all details related with its activity are included in the agreement between the Member States, regulations provided in Articles 15 and 16 of the 2000 MLA Convention are imperative since there are no clauses referring to those articles which allow including different solutions in the agreement.

On the contrary, Articles 21 and 22 of The Second Protocol to the 1959 Convention, which are similar to regulations mentioned above, provide possibility to exclude or change those rules of bearing liability in the agreement of setting up a JIT.

XI. Covering costs and the JIT's financial support

Due to the Council Resolution on a Model Agreement for setting up a Joint Investigation Team it is suggested that sharing the expenses shall be one of the point of the agreement of setting up a JIT. The Resolution stipulates that the Member State, in which investigative measures are taking place, is bound to pay all expenses connected with actions taken in its territory and to provide technical equipment. However, it is the agreement between Member

States which sets forth the rules of reimbursing costs and it may differ from a Model Agreement. For example, in the drug trafficking case where the JIT was created between the UK and the Netherlands the cost of officials accommodation was covered by the national police of both States.

It is important to say that expenses linked with the participation of Europol or Eurojust officials including accommodation, transport, communication and salaries bear those bodies.

Travelling, accommodation and communication cost is one of the main causes of the fact that since twelve years after the signification of the 2000 MLA Convention JITs are still used exceptionally. It is worth mentioning that during the operation between the UK and the Netherlands extraordinary costs were caused by using cell phones between the JIT members (at the moment the most economic form of communication between members of a team is videoconference since it uses Internet connection to data transfer).

To solve this problem Eurojust, who has received a grant from the European Commission under the "Prevention of and Fight Against Crime" Programme³⁴, tries to give a financial support to Member States creating JIT. The first Eurojust JIT Funding Project lasted eighteen months - till 31 December 2010. Currently Eurojust provides second Project which has started on 1 October 2010 and shall be run until 30 September 2013³⁵.

The material support gained under the current JIT Funding Project (which is maximum 50 000 euro per one application) may be designed for defray expenses of transport, accommodation, translation and interpretation - on the condition that they are directly connected with JIT's operation. The actions financed with the Eurojust support shall be realized in 12-week period after receiving the award decision. Since the fund continues to be the way of reimbursing, not pre-financing costs of JIT's activity, after 12 weeks destined for completing an action a Member State which applied for funding is obliged to submit a statement separating each type of expenses with originals or certified copies of documents confirming expenses which shall be covered under JIT Funding Project.

Besides, within the framework of Project, Eurojust lends technical equipment, particularly means of communication for the 6-month period, which cannot be extended. It is possible to apply for a second loan before the expiration of this period if the equipment is still needed.

³⁴ Council Decision 2007/125/JHA of 12 February 2007 establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme 'Prevention of and Fight against Crime', OJ L 058, 24 February 2007.

³⁵ www.eurojust.europa.eu/Practitioners/Eurojust-Support-JITs/JITS-Funding/Pages/jits-funding-project.aspx

Only members listed in a valid agreement which is in force at the moment of taking actions specified in application shall be beneficiaries of the Project unless they are Third States or subjects maintained by the European Union (Europol, Eurojust or OLAF).

XII. Conclusion

The JITs are designed as a flexible tool for supporting transnational investigations and building mutual trust. It allows close co-operation and immediate communication of prosecutors and investigators by the participation in a common project. Nevertheless, in order to achieve satisfactory results we constantly need to work on the positive attitude towards judicial and police co-operation. The team is a way of building a confidence and prospect reliability between the partners which may be successful if only there is Member States' readiness to use it.

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