

POSITION PAPER OF TEAM SPAIN 2

REGARDING THE DEBATE BETWEEN ROMANIA 2 vs. FRANCE 2

The debate centered on a practical case in which the main issue was how evidence gathered by the JIT acting in and on the territory of EU country B can be transmitted to EU country A if it is considered also relevant to country A's investigation.

Both teams contributed to an excellent debate. However we feel that they both somehow presented the facts in a position slightly partial to their interests. As was apparent in the discussions and upon the questioning of the jury Romania 2 centered their argumentation on the evidence regarding facts and suspects that are different in the concurring investigations, while France 2 did not really focus on this issue, but more on the transfer of evidence in general.

Moreover we also think that none of them really paid attention to the fact that the issue that had to be debated arose prior to the writing of the agreement of the constitution of the JIT. This is in our view a fundamental point. According to the Joint Investigation teams Manual, annex to the Guide to EU Member States legislation on Joint Investigation teams drawn up in Brussels on November the 4th 2011 the conclusion of this agreement is of crucial importance. The legal framework to set up and operate a JIT allows for a wide range of discretionary powers and therefore it must be specified in an agreement between the Member States concerned.

If there is awareness of the problem at the time when the agreement is drafted it is possible to include a provision in that agreement dealing about the issue of transfer of evidence. If that is too time-consuming and priority is given to the quick setting up of the JIT it is as well possible to amend the agreement later on or to specify certain issues in the operational action plan. Therefore we do not see any difficulties in dispensing with letters rogatory by agreement. Letters rogatory are a traditional cooperation instrument that is necessarily formalistic and time-consuming; it is not in the spirit of cooperation in criminal matters and the principle of mutual trust to continue using them, especially in circumstances in which a JIT is set up. There is no obligation for a Member State to accept a request for the setting up of a JIT submitted by another

Member State; if such a request is accepted it seems contradictory to continue using letters rogatory.

As regards the submission of the Romanian team that based its argumentation on the principle of specialty, we think that art. 10 b) indeed covers the situation in which the information is used for detecting, investigating and prosecuting offences that fall outside the JIT's scope of application. It is true that this requires the prior consent of the MS where the information became available, but also, and this was omitted, that such consent can only be withheld in certain specified circumstances. In order to avoid confusion the agreement might even specify that such usage is allowed, unless the other MS objects. We see this as a matter of drafting.

The conceptual difference between information and evidence and the confusion around the use of both terms was extremely interesting, we were convinced by the submission that evidence is information that is processed by law and used in the criminal procedure. In practice and according to our knowledge this issue plays a minor role given the context of mutual trust that presides the voluntary setting up of a JIT.