



## SETTING UP AND OPERATING JOINT INVESTIGATION TEAMS

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### Abstract

The term 'joint investigation team' (JIT) is used worldwide in respect of various forms of law enforcement investigative cooperation and this paper will focus on such teams at EU level. The EU Council of Ministers adopted the Convention on Mutual Assistance in Criminal Matters on the 29<sup>th</sup> of May 2000 (2000 MLA Convention). The potential establishment of joint investigation teams is provided for in Article 13 of the Convention, although, owing to the delay in ratifying the 2000 MLA Convention, the Council adopted a Framework Decision on JITs on 13 June 2002. For the moment both the Convention and Framework Decision are in force as legal bases for creating JITs. This paper will highlight the special dual legal regulation for JITs and also analyse the valid legal provisions. The author will finally detail some practical problems in the field of the admissibility of evidence.

### REQUEST TO SET UP A JIT

2000 MLA Convention Article 13 (2) provides that the establishment of a JIT will be preceded by a request by one of the Member States. Although it does not directly refer to a request for mutual assistance, the provision refers to Article 14 of the 1959 MLA Convention. This deals with the obligatory content of the MLA request (such as the authority making the request, the object of and the reason for the request, where possible, the identity and the nationality of the person concerned and, where necessary, the name and address of the person to be served). Therefore, the term 'request' in the cited provision must be considered as a formal MLA request and the general requirements from the 1959 MLA Convention for making such a request must be met.

### LEADERSHIP OF THE JIT

Every JIT needs a team leader or leaders. Under MLA Convention Article 13 (3) (a) the leader of the team shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates.

One interpretation of this is that the JIT is under one permanent leadership, based on the JIT's main seat of operations. Another interpretation is that the leader should come from the Member State in which the team happens to be whenever carrying out its operations. Experiences so far suggest that Member States prefer the option of having more than one team leader rather than opting for one with overall responsibility.<sup>1</sup> Naturally a clear leadership structure is essential for members of the JIT.

(<sup>1</sup>) Joint Investigation Team Manual, Council of the European Union, 15790/1/11 REV 1, 4.11.2011, p. 9-10.



Because JITs are mainly initiated in more complex cases in which more countries are involved, it is not clear from the outset from which country the team leader must be chosen when more states are involved. It is likely that more team leaders will be nominated and that each of them takes the lead for those operations taking place in their own country and that the coordination is done by the team leaders together. When, during the existence of the team, the focus of the investigations moves from one state to another, it must be possible to move the team to the other state and to nominate a team leader from that Member State.<sup>2</sup>

Let us examine a case where a JIT was set up with the assistance of Eurojust. The case was opened at Eurojust for 'VAT carousel' fraud and there were ongoing parallel investigations conducted in three Member States. Three persons were designated as team leaders from the Member States involved (two prosecutors and one police officer). This example supports the practice that Member States are more willing to assign a leader from each participant State rather than only one with an overall responsibility.

## SUBDIVISION OF JIT MEMBERS

According to Article 13 (4)-(6) and (12) of the 2000 MLA Convention JIT members could be subdivided into three groups: members, seconded members and so-called 'visiting' members.

### MEMBERS

These law enforcement or judicial practitioners are from Member States where the team operates. They have full authorisation in the JIT and there is no further need to define their status.

### SECONDED MEMBERS

Possibly the most exciting question related to the JIT is the procedural position of the JIT member who operates in another Member State. According to Article 13 (4) of the 2000 MLA Convention,

members of the joint investigation team from Member States other than the Member State in which the team operates are referred to as being 'seconded' to the team. This means that these members operate within a criminal justice system that is not their own; they may have little or no knowledge of the local language and the criminal justice system of this state.

The first distinction is that, according to the first sentence of Article 13 (3) (b) of the 2000 MLA Convention the team shall carry out its operations in accordance with the law of the Member State in which it operates. This provision is supported by subparagraph 10 of the Preamble of the Framework Decision. Under this subparagraph a joint investigation team should operate in the territory of a Member State in conformity with the law applicable to that Member State. These provisions are based on the general principle articulated in Article 3 (1) of 1959 MLA Convention, which Convention serves as a legal basis for the 2000 MLA Convention. As a result of this requirement, a seconded member needs to be aware of both substantive and procedural law of the host country.

The other delicate question in connection with the status of the seconded member that should be resolved is organisational. The seconded member is under the authority of the team leader. This person can entrust the seconded member as well as excluding him from carrying out certain investigative measures. At the same time the seconded member remains part of the hierarchy in his home country. In this respect he has two superiors: the JIT leader as well as his superior in the country of origin. The seconded member might receive instruction from both sides. In cases where these instructions differ or even contradict one another, the seconded member will face a dilemma. The 'collective leadership' requires that the JIT leader stays in close contact with the superiors of the seconded members of his team in order to coordinate the strategy of the investigation and to avoid contradicting instructions. If this coordination is not carefully realised, the outcome of a JIT can be seriously affected.<sup>3</sup>

(<sup>2</sup>) Rijken, C. & Vermeiden, G. (2006), „The legal and practical implementation of JITS: The bumpy road from EU to Member State level”, in: Rijken, C. & Vermeiden, G. (eds.), *Joint Investigation Teams in the European Union*. TMC ASSER PRESS, The Hague, p. 15.

(<sup>3</sup>) Mayer, M. (2006), „Sociological aspects regarding the set up and management of a joint investigation team”, in: Rijken, C. & Vermeiden, G. (eds.), *Joint Investigation Teams in the European Union*. TMC ASSER PRESS, The Hague, p. 212-213.



The second substantial distinction stems from Article 13 (5) of 2000 MLA Convention. In accordance with this provision seconded members of the joint investigation team shall be entitled to be present when investigative measures are taken in the Member State of operation.

### VISITING MEMBERS

We have to mention the third group of non-members (the so-called visiting members) coming from Third States or from organisations inside the EU (e.g. Eurojust, Europol and OLAF). The rights conferred upon members and seconded members do not apply to non-members unless the agreement setting up a team provides otherwise [Article 13 (12) of 2000 MLA Convention].

## DISPENSING WITH THE ISSUING OF LETTERS ROGATORY: THE HEART OF THE MATTER OF THE LEGAL INSTRUMENT

The substance of the JIT instrument is inherent in Articles (7) and (9) of the 2000 MLA Convention. According to these provisions 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. The purpose of these provisions is to avoid the need for an MLA request, even when the investigative measure requires the exercise of a coercive power, such as the execution of a search warrant. This is one of the main benefits of a JIT. The consequence of these provisions is that information from such a measure will be directly available for the JIT and be used in further investigations by that team irrespective of the country where the investigation took place. The fact that, in this case, information can be shared without any formalities is based on the principle of mutual trust between the members of the JIT.

## ADMISSIBILITY OF EVIDENCE

Under Article 13 (10) (a) of the 2000 MLA Convention, 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 for the purposes for which the team has been set up. This provision necessitates dealing with the admissibility of evidence.

As mentioned above, a joint investigation team should operate in the territory of a Member State in conformity with the law applicable to that Member State. Therefore the information could be regarded as lawfully obtained only in the case when evidence-gathering process was in accordance with the procedural rules of the given Member State where the investigative action was carried out. The problem is that the rules in the Member States related to gathering and admissibility of evidence may differ significantly.

One delicate topic should be mentioned in this context. The admissibility of evidence gained from the interception of telecommunications could be judged in a very different way in various Member States. There are some Member States where the admissibility of these data is permitted by the examining or investigative judge. This is the situation in Hungary for example, where the prosecutor applies to the investigating judge to obtain permission,<sup>4</sup> although it is known that in the UK, for example, such information is inadmissible.

## CONCLUSIONS

Joint investigation teams are a welcome enrichment of the traditional instrumentation available in the field of international mutual assistance in criminal matters. To a certain extent, this novelty is a response of law enforcement to the challenges of modern, increasingly sophisticated and cross-border criminality. Joint investigation teams will be an added value in fighting transnational crime, even though one should not overestimate the role they can play.<sup>5</sup>

(<sup>4</sup>) Act XIX of 1998 on Criminal Proceedings Article 206/A.

(<sup>5</sup>) Kapplinghaus, J. (2006), „Joint investigation teams: basic ideas, relevant legal instruments and first experiences in Europe”, in: *134th International training course visiting experts' papers*, Tokyo, p. 33.



At the same time JIJs are tools involving the building of mutual trust between Member States. To make this tool functional and effective, not only are states required to create the necessary legal framework, both

at international and domestic levels, but also the right atmosphere is indispensable. The latter element entails the trust between law enforcement authorities and their members across borders.