



Council of the
European Union

104887/EU XXV. GP
Eingelangt am 25/05/16

Brussels, 25 May 2016
(OR. en)

9456/16

JAI 488
CATS 42
ASIM 81
COPEN 180
FREMP 91
JAIEX 49

COVER NOTE

From:	EUROJUST
To:	Delegations
Subject:	Tactical meeting on judicial challenges in illegal immigrant smuggling - Outcome Report

Delegations will find attached an outcome report of the tactical meeting on judicial challenges in illegal immigrant smuggling.



ANNEX

Tactical meeting on judicial challenges in illegal immigrant smuggling

Eurojust, The Hague, 4-5 February 2016

OUTCOME REPORT

1. Introduction

The tactical meeting on judicial challenges arising from illegal immigrant smuggling was organised by Eurojust and held at its premises in The Hague on 4 and 5 February 2016.

The participants included practitioners from the Member States, Norway, Switzerland and the USA, as well as representatives from the European Commission, Europol, the JITs Network Secretariat, Frontex and the United Nations Office on Drugs and Crime (UNODC).

The focus of the tactical meeting was to discuss in five different sessions the (common) obstacles, best practice and solutions that could help overcome challenges in the prosecution of this serious crime type, as well as specific judicial cooperation issues in relation thereto. In the **first session**, participants were given an introduction to the work of key EU partners in the fight against illegal immigrant smuggling. The **second session** was dedicated to the experience of national prosecutors in the Hotspots. The **third, fourth and fifth sessions** consisted of presentations from national prosecutors of selected Member States.

Prior to the tactical meeting, Eurojust circulated a questionnaire on recurring challenges in Illegal Immigrant Smuggling cases, with a list of potential challenges regarding the prosecution of illegal immigrant smuggling based on a preliminary analysis of Eurojust's cases and of selected national case law. The national authorities were requested to provide feedback on these and other possible recurring obstacles/issues that they might have encountered while dealing with these cases. The main findings of the responses were summarised in a *Background document* which was provided to the participants of the tactical meeting.

2. Opening session

Ms Michèle Coninsx, President of Eurojust, opened the meeting, highlighting the importance of the tactical meeting as a forum to foster a common and effective judicial response to illegal immigrant smuggling. Ms Coninsx stressed that Eurojust operational tools are already available to support Member States in the fight against this crime type, and noted the sharp increase in the number of cases referred by national authorities to Eurojust in 2015. In addition, Eurojust, *inter alia*, set up the Thematic Group on Illegal Immigrant Smuggling, increased strategic cooperation with EUNAVFOR MED, supports the Hotspot approach and appointed Eurojust Contact Points in key third States. Ms Coninsx emphasised the importance of removing the attractive financial incentive of illegal immigrant smuggling and ensuring a prompt exchange of information. A common denominator concerning both the definition of the crime and corresponding sanctions is essential.

3. Plenary sessions

3.1. First session – European partners against illegal immigrant smuggling

Mr Cyril Lacombe, Eurojust Contact Point for Smuggling of Migrants and Assistant to the National Member for France, presented the objectives, tasks and initial results of the Thematic Group on Illegal Immigrant Smuggling (the Thematic Group). The tactical meeting is a tool for implementing the goals of the Thematic Group by examining complex cases, analysing challenges and best practice derived therefrom and raising awareness in relation thereto, consequently supporting investigations and prosecutions of into illegal immigrant smuggling. Mr Lacombe noted that intelligence shows links between illegal immigrant smuggling and terrorism and trafficking of weapons and drugs. An effective judicial response is crucial. Eurojust is a key player in this regard. Mr Lacombe also underlined the importance of being able to identify, seize and confiscate the proceeds of the organised criminal groups (OCGs) behind the smuggling rings and to ensure that relevant information gathered can be used as evidence in judicial proceedings.

Mr Antonio Saccone, Head of Operational Analysis Sector at Frontex, presented the latest trends in illegal immigrant smuggling. The routes and *modi operandi* of OCGs have shifted. During the period from September through October 2015, approximately 10 000 migrants crossed the EU borders daily. The flow of migrants has been such that border authorities of the concerned Member States encountered significant difficulties in registering and fingerprinting each of them as per the Schengen system, or in systematically checking criminal records. A slight decrease in the number of migrants arriving in Italy was registered in 2015, as families opted for the less dangerous journey via Greece. The Arctic route (through Russia towards Norway or Finland) became popular. The Balkans route remains attractive, as the authorities in the transit countries assist in migrants' transportation. This complex overall situation required the establishment of new approaches by the European Union in general and Frontex in particular, e.g. Hotspots.

Mr Álvaro Rodríguez Gaya, Focal Point Checkpoint's Project Manager, underlined Europol's support to Member States regarding complex investigations on illegal immigrant smuggling, e.g. through its unique information analysis capabilities, the added value of cross-checking data against Europol's database, and on-the-spot support to competent authorities including via the newly implemented Europol Support Mobile Teams. JITs provide a good opportunity for concerted action by Member States, Europol and Eurojust. Mr Gaya noted some challenges faced by Europol, e.g. gathering accurate and complete qualitative information at the earliest possible stage. Mr Gaya referred to other relevant initiatives recently taken by Europol in this field, such as the creation of the European Migrant Smuggling Centre (EMSC) and the successful project JOT MARE. Mr Gaya further highlighted the regular and intensive cooperation established with Eurojust in this field.

3.2. Second session - First experiences of prosecutors posted in the Hotspots

Co-Chair: Ms Teresa Camelio, Assistant to the National Member for Italy

Co-Chair: Mr Nikolaos Ornerakis, National Member for Greece

Mr Filippo Spiezia, National Member for Italy, and Mr Andrea Bonomo, Public Prosecutor, Prosecution Office of Catania, jointly presented the Italian experience. Mr Spiezia explained the role of the *Direzione Nazionale Anti-Mafia* (DNA) and its special coordinating competences in the investigation and prosecution of organised crime. The DNA can channel relevant information to EU partners, including Eurojust. Therefore, the DNA fosters multilevel and interinstitutional cooperation. Mr Spiezia also noted that the DNA issued Standard Operating Procedures regarding the conduct of all authorities involved and the flow of information, as well as guidelines on cooperation of the judiciary with other relevant stakeholders, including EUNAVFOR MED. According to Mr Spiezia's experience, one of the main challenges encountered by judicial authorities in dealing with illegal immigrant smuggling cases includes cooperation with key third States, especially in respect of extradition proceedings, as some countries are not willing to exercise jurisdiction. In such situations, identification of additional partners is important, e.g. Member States willing and able to administer justice.

Mr Bonomo explained the development of Italian caselaw, particularly through landmark decisions of the Supreme Court of Cassation, through which Italy is currently able to assert jurisdiction (including executive jurisdiction) on the high seas. This innovative jurisprudence rests significantly on the so-called *autore mediato* doctrine, which in turn draws upon national and international law. Mr Bonomo also explained the challenges related to cooperation with third States regarding (i) extradition proceedings that often fail to meet the double criminality requirement, and (ii) execution of letters of request on identification of suspects and tracing and seizure of assets. Despite some clear steps forward in the fight against illegal immigrant smuggling, Mr Bonomo believes that real progress is difficult to achieve without the cooperation of key North African countries, that the operation of OCGs smuggling people into Italy mostly operate from that area.

Mr Nikolaos Poimenidis, Deputy Prosecutor, Court of Appeal of Piraeus and Eurojust Contact Point in the Hotspot, and Mr Christos Naintos, Deputy Prosecutor, Court of First Instance of Alexandroupolis jointly presented the Greek experience. Mr Poimenidis explained key challenges and possible ways forward for the Greek Hotspot. A major challenge in investigations and prosecutions relates to the difficulty in identifying and/or tracing the leaders of OCGs, whose *modi operandi* changes constantly. Often, perpetrators do not accompany the victims into Greek territory. They take precautions to ensure that crucial items of evidence is destroyed in the event they are detained by the authorities. Additionally, judicial cooperation with Turkey remains problematic, although Greek authorities remain hopeful of progress in this respect. These challenges may only be effectively addressed through close cooperation with the affected countries and via prompt exchange of information between the relevant authorities.

Mr Naintos explained in detail, using actual cases, the *modi operandi* of OCGs smuggling people by land and by sea from Turkey into Greece. He explained the difficulties encountered by the authorities when attempting to uncover the layered structure of OCGs. OCG intermediaries often do not have much information (location or identity) on the leaders of the criminal network operating in Turkey. Standard investigations are not sufficient to overcome these obstacles. Close police and judicial cooperation between the countries involved is essential in countering illegal immigrant smuggling.

3.3. Third session - Information-sharing and collection/admissibility of evidence

Co-Chair: Ms Jolien Kuitert, Deputy to the National Member for the Netherlands

Mr Gábor Schmidt, Public Prosecutor, and Mr László Venczl, National Member for Hungary, jointly presented the so-called *Parndorf* case, which culminated in the death of 71 migrants by asphyxiation in a truck. The migrants entered Hungarian territory by land, via Serbia. Mr Schmidt highlighted the legal framework and prosecutorial core practice related to illegal immigrant smuggling. He underlined the evident cross-border nature of this case (which also involved Austria, Germany, Bulgaria and Serbia), as well as challenges and possible solutions.

Ms Hester van Bruggen, Dutch Liaison Magistrate in Rome, and Ms Debby Homans, Public Prosecutor, presented specific cases that the Dutch authorities were investigating and or prosecuting, and in relation to which cross-border links became evident and international cooperation was essential to the proper administration of justice. *Mr Warner ten Kate, Public Prosecutor,* further stressed the added value of information-gathering and -sharing, as well as the importance of multidisciplinary and international cooperation to address illegal immigrant smuggling. He noted that because criminals cooperate efficiently at international level, law enforcement and judicial authorities will inevitably also need to do so. Mr ten Kate then underlined the tools, key elements and envisaged results, challenges and possible best practice in a robust strategy to counter illegal immigrant smuggling.

3.4. Fourth session – Judicial cooperation among Member States and with key third States

Co-Chair: Ms Elisa Hopley, Seconded National Expert for UK

Ms Samantha Thompson, Specialist Prosecutor from the Crown Prosecution Service (CPS), highlighted the UK response to Illegal Immigrant Smuggling. She set out the extent of the UK's commitment through the strengthening of the Organised Immigration Crime Task Force and outlined the mandate and powers of the CPS and relevant UK law enforcement agencies. CPS prosecutors are being deployed in Tunisia, Ethiopia and Senegal (deployment in Turkey is in the pipeline), and, in addition, have a roving role covering Greece, Malta and other Mediterranean jurisdictions. On the basis of case studies, Ms Thompson highlighted key difficulties and best practice encountered in situations requiring different responses. In the first case, unexpected scenarios prompted quick reactions and fast-track decision processes, while a more proactive approach was followed in the second case study, with the setting up of a JIT and creation of a clear prosecution strategy leading to a joint action supported by a coordination centre with Eurojust and Europol. Ms Thompson concluded her speech with some thoughts on how the UK and other countries might build on the good relationships and best practice already established.

Mr Bernard Lavigne, French Liaison Prosecutor in Turkey, informed participants about the issue of illegal immigrant smuggling and the encountered judicial challenges in Turkey.

3.5. Fifth session – Translation & interpretation issues/opportunities offered by JITs

Co-Chair: Mr Klaus Meyer-Cabri, National Member for Germany

Mr Martin Freudling, Prosecutor, noted that, especially in illegal immigrant smuggling cases, the issues arising from translation and interpretation increase as migrants and facilitators communicate in lesser-known languages. He presented some examples of judicial and practical solutions to these issues. He highlighted advantages of mirror investigations, as these are usually more effective than execution of letters of request. He also mentioned the value of one member of the investigating team in cross-border investigations having a good command of a common working language to make communication faster and reduce the cost of translations. Mr Freudling also recommended an agreement between the Member States involved that translations are done in only one working language understood by all. He highlighted the advantages offered by JITs and JIT funding, mainly with regard to third States. Mr Freudling recommended the drafting of a model agreement on JITs for illegal immigrant smuggling cases to speed up the process of setting up a JIT.

Mr Vincent Jamin, Head of the JITs Network Secretariat, presented opportunities offered to practitioners by JITs and Eurojust's JITs Network Secretariat. He highlighted the differences and advantages of JITs compared to MLA requests. He informed participants about the technical and operational support provided by Eurojust to the practitioners, such as the initiation of parallel proceedings, assistance in drafting the agreement and coordination throughout the existence of the JIT. Mr Jamin introduced relevant features in the JITs funding programme and highlighted the latest changes, especially concerning the costs incurred by third State parties involved in JITs, as well as translations and interpretations. Mr Jamin provided the participants with a leaflet on the legal basis of JITs with third States. He also informed participants about the Network of National Experts on JITs, consisting of at least one National Expert per Member State, which can facilitate the work of practitioners in the Member States.

4. Conclusions and closing remarks

Mr Cyril Lacombe, Eurojust Contact Point for Smuggling of Migrants and Assistant to the National Member for France, summarised the main points expressed by the participants during the meeting, starting with the main challenges identified in prosecuting illegal immigrant smuggling cases.

After listing the main difficulties identified in prosecuting illegal immigrant smuggling cases, Mr Lacombe then reviewed some of the best practice identified by the participants on the basis of practical experience.

Finally, Mr Lacombe thanked all participants for their contributions and their personal involvement, which allowed a fruitful exchange of experience to take place. He listed some possible suggestions for the future work of Eurojust as expressed during the meeting by the participants.

The detailed main outcome of the meeting is presented in a separate annex below containing three main sections:

- Main challenges;
- Best practice; and
- Suggestions for the future.

Annex: Outcome of the meeting

1. Main challenges

- Organised crime groups' (OCGs) *modi operandi* is very flexible. Authorities cannot easily keep pace with such developments and follow the constant variation in routes, means of transportation, counter-surveillance techniques and financial flows.
- Gathering evidence from other Member States may be challenging in view of different legal requirements. For example, different data retention regimes are a potential obstacle in collecting information from internet service providers (ISPs). Furthermore, the (lack of) data retention schemes in some countries may be an issue in respect of access to information/potential evidence, also at domestic level.
- Admissibility of evidence gathered abroad through the execution of MLA requests is hampered when the legal requirements of the forum State are not entirely met. For example limitations may be present both in activating and also in using telephone interceptions or special investigative techniques (e.g. undercover agents).
- In addition to *stricto sensu* conflicts of jurisdiction, other difficulties may arise when the same OCG is prosecuted in more than one country. For example, in some Member States, if the crime has been committed with the involvement of an OCG, the conduct of all suspects must be prosecuted in a unified procedure. Accordingly, the conviction of a suspected smuggler by another country may undermine prosecutions in the initial Member State on grounds of the *res iudicata* effect that a single prosecution may have in respect of the overall OCG case.
- Different legal basis in the countries concerned may pose obstacles to effective cooperation and/or to effective domestic investigations. For example, national law may not allow for telephone interceptions unless the crime was committed with the involvement of an OCG, endangered the life of the migrants, or is a qualified offence. Some offences related to illegal immigrant smuggling fall under administrative, rather than criminal, law.
- Conflicts of interest are inherent in different prosecution strategies. One approach is to target the entire organised criminal network behind the smuggling of migrants, but, conversely, quick action is often necessary so as not to miss opportunities to gather evidence.
- Translation was mentioned by several participants as a serious problem, including the lack of reliable interpreters (especially for rare dialects) for investigative activities (e.g. telephone interceptions). Moreover, some countries collect a huge quantity of investigative material, but the use of this material abroad is limited due to translation costs and other issues.
- Cooperation with key third States is crucial, but is influenced by the political situation and different social systems and cultures.
- Reluctance of victims, who often come from different social systems and culture, to cooperate with authorities was mentioned by several participants.

2. Best practice

- A prompt exchange of information, even partial information, can effectively pave the way for a successful cross-border case. In this respect, international cooperation is facilitated by the use of SIENA, MLA requests and JITs. Practice has shown that this approach is likely to lead to the early detection of links with other crimes, *modi operandi*, perpetrators or cases, as well as bring additional relevant information to investigators and prosecutors. This approach further enables practitioners to switch from a 'national' to an 'international' perspective.
- Migrants' statements are often crucial in understanding the *modi operandi* and dynamics of OCGs, and, consequently, in building up cases for prosecution.
- A common prosecutorial strategy in an early stage of the case is vital to respond to challenges encountered in illegal immigrant smuggling cases (including deliberations on, if appropriate, the transfer of proceedings).
- A financial investigation is useful to avoid that the crime could pay but also ascertain the quality of the prosecution. In some cases, analysis of telephone data together with bank transactions can be decisive to convince a judge of the involvement of an individual in a criminal network.
- The setting up of JITs at an early stage is considered useful to resolve several of the problems identified above, including those related to transfer of evidence and translation. In this context, best practice was identified in several areas: the early involvement of Eurojust to provide legal advice and support, the simplification of the process of signing JIT agreements (e.g. JIT agreement only in a common working language), and the combination of JITs and MLA with Member States that do not or cannot join the JIT. Several third States have the legal framework to join JITs as members.
- The early involvement of Europol and Eurojust is considered best practice in cases requiring close police and judicial cooperation, which can help to overcome some of the difficulties mentioned above. Building mutual trust through dynamic and personal contacts remains a tool for cooperation.
- A comprehensive and multidisciplinary approach to the phenomenon like the 4 P's approach (Prevention, Protection, Prosecution and Partnership) and the 'barrier model'¹ - as revealed promising in the fight against THB - is likely to produce the same effect in respect of this crime type. Bringing together law enforcement, border forces, immigration services, financial experts and prosecution offices, and including contacts with NGOs and universities, allows to think outside the box and find solutions to some of the problems encountered in prosecution.
- The best use of available channels and lessons learned. For instance, liaison magistrates/prosecutors already posted by other Member States (e.g. NL and UK experience) might be used by other Member States. Likewise, the lessons learned from other Member States in their bilateral cooperation with third States should be shared. Judicial authorities should be creative in resorting to available lawful and informal venues of cooperation, e.g., the particular commitment or willingness of a magistrate in a key third State may considerably speed up instances of international judicial cooperation.

¹ The barrier model is a method that has been used in the Netherlands for several years (particularly, but not exclusively, in the field of THB). It looks at the criminal structure as a business enterprise that must overcome a series of barriers before perpetrators achieve their goal, especially concerning profit. The objective is to increase the 'height' of the barriers faced by criminals, so that the crime type at stake becomes more difficult, less lucrative and thus less attractive. See, e.g., https://www.coe.int/t/dghl/monitoring/trafficking/Source/Public_R_Q/GRETA_RQ_NLD_en.pdf.

3. Suggestions for the future

- Consider the possible development of an informal network of specialised prosecutors, who meet regularly to discuss illegal immigrant smuggling issues, could be a useful tool to promote personal contacts/trust and exchange experience on cases (including on new *modi operandi*). EMPACT meetings provide a forum at law enforcement level, while Eurojust could provide a similar platform for prosecutors. Eurojust may consider holding ad hoc meetings with affected Member States to detect criminal patterns and links between cases/crimes/OCGs and prepertrators.
- A harmonisation of national (procedural) laws could help to overcome legal obstacles, e.g. with reference to data retention issues. Eurojust could prepare a list of the main difficulties identified in cases and bring them to the attention of policymakers. Illegal immigrant smuggling should be considered a serious crime *per se*, regardless of the involvement of OCGs.
- To refer more cases to Eurojust requiring judicial coordination and fully use the National Desks and Eurojust National Coordination System (ENCS) to exchange information and facilitate judicial cooperation. For example, coordination meetings can be used to decide upon a common strategy, division of tasks and transfer of proceedings to avoid *ne bis in idem*. Analysis of relevant operational information is to be carried out by Europol and Eurojust according to their respective mandates. This analysis, in the form of summary reports, could also assist with the problem of translation, especially when a huge amount of information is collected in one national investigation, but only some elements are relevant to the other involved countries.
- Simplifying the process of signing JIT agreements could be helpful, for example by having a draft in a common language. Eurojust could consider further ways to simplify the process, also with reference to funding. A JIT model agreement for illegal migration smuggling cases could be provided in order to speed up the process of setting up JITs in this field.
- To enhance relations with key third States, such as Turkey. Eurojust will engage in a dialogue with its judicial contact points in Turkey to promote mutual understanding of the priorities in illegal immigrant smuggling cases. Furthermore, capacity building in key source and transit countries is likely to address some of the difficulties encountered in cooperation with third States.
- A list of trustworthy interpreters (particularly for rare dialects) could be created in each Member State, if appropriate. Furthermore, extra funding by the European Union, especially for translations within in the framework of JITs, would be needed.