



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 March 2014

7259/14

**GENVAL 15
CRIMORG 24
EUROJUST 55
ENFOPOL 64
EJN 37
COPEN 79
ENFOCUSTOM 34**

COVER NOTE

from: General Secretariat of the Council
to: Delegations
Subject: Conclusions of the 9th Annual meeting of the National Experts on Joint Investigation Teams (27 - 28 June 2013, the Hague)

Delegations will find in the Annex the conclusions from the 9th Annual meeting of the National Experts on Joint Investigation Teams held on 27 and 28 June 2013 in the Hague.



Conclusions of the

Ninth Annual Meeting of National Experts on Joint Investigation Teams

27 and 28 June 2013, Eurojust, The Hague

On 27 and 28 June 2013, the 9th Annual Meeting of National Experts on Joint Investigation Teams was hosted by Eurojust in cooperation with Europol, and organised with the support of the JITs Network Secretariat.

The meeting –jointly opened by Michèle Coninx, President of Eurojust, and Rob Wainwright, Director of Europol – was attended by National Experts and practitioners from a vast majority of Member States, representatives of Eurojust, Europol, the European Commission and the General Secretariat of the Council.

1. Achievements and deliverables

Substantial progress for the Network were achieved during the meeting.

- ❖ The *JITs Network restricted area* was officially opened.

In line with the conclusions of the Fifth Meeting, this tool – which is accessible to appointed National Experts as part of the Eurojust website – is intended to serve as a platform for communications between the experts and to support the sharing of knowledge, best practice and lessons learned.

- ❖ In line with the conclusions of the Eighth Meeting and based on a proposal from the JITs Network Secretariat, the JITs Network approved the format and content of a *JIT evaluation template*.

The form is intended to assist the work of National Experts on JITs, JIT leaders, or any other national competent authorities involved in the evaluation of the JIT tool in assessing the performance of the JIT and the results achieved, providing a comprehensive yet flexible model that could be adjusted to a particular case.

Evaluation should be initiated at the closure of the JIT and completed after the last trial in the involved countries has ended. When filling in the template, personal data and reference numbers of national proceedings in the different Member States should not be mentioned, as such data are not necessary for the purposes of the evaluation. Wherever practicable, submitting one form incorporating comments and views of all JIT partners is suggested.

JIT evaluation is expected to enhance and improve the use and functioning of JITs in the Member States. Furthermore, the systematic and centralised collection of information by the JITs Network Secretariat will allow the creation of a “bank of knowledge” accessible to the National Experts on JITs through the web-based platform and provide feedback to relevant actors. The completed evaluation forms will be made available to the Eurojust National Members of the Member States involved in accordance with Article 13.5 of the Eurojust Decision.

The National Experts should ensure the dissemination of the JIT evaluation form at national level and promote its effective use. Depending on the organisation chosen at national level, the National Experts, the JIT parties or the JIT leaders, where appropriate in liaison with other competent authorities/bodies, shall fill in the form.

Before its approval, the template had been “tested” for the purposes of the evaluation of two JITs supported by both Eurojust and Europol (Operations “Playa” and “Magellan”), and amended on the basis of the outcome of these evaluations.

As an example of the potential added value of the exercise, National Experts were given a presentation by UK and NL officers in charge of JIT “FRY-GELDERMALSEN” in the framework of which an assessment of the outcome of the JIT was made for the first time.

Finally, the JITS Network adopted its new *logo* (see header of this document).

2. National support to JITS

Examples of support provided at national level were given by National Experts from Belgium and Finland.

In Belgium, the Federal Prosecutor’s Office plays a central role as correspondent for almost all international cooperation matters (JITs expert, European Judicial Network and Eurojust correspondent) and approves all incoming and outgoing requests to set-up a JIT. In addition, the JIT National Expert provides guidance and supporting tools to practitioners: internal guidelines, standard correspondence (e.g. mutual legal assistance request to conclude a JIT). He is also in charge of updating a “JITs monitor”, which provides an overview of all JITs involving Belgium, for qualitative assessment and statistical purposes.

In Finland, the National Bureau of investigation (NBI) has set up the same kind of monitoring tool, in the framework of which certain data on JITs are systematically collected (national reference number, case summary, prosecution office involved, States involved, funding obtained and state of play). An annual report is drafted on that basis by the coordinator of NBI and disseminated to law enforcement authorities (police, customs and border guard) and among other JITs experts (Office of the Prosecutor General and Customs).

3. Eurojust's and Europol's support to JITs

a) Operation "Troppo 68"

French and German JIT leaders delivered a presentation on this investigation, targeting an Albanian-speaking criminal network involved in drug trafficking (heroin and cocaine) in the border area between France, Germany and Switzerland. The case provides a good example of the streamlining of operations allowed by a JIT set up between neighbouring countries, where criminals intentionally use national borders to distract law enforcement and judicial authorities from their activities.

Europol detailed the valuable analytical support provided to the case and the assistance in tracing of assets offered by the Camden Assets Recovery Interagency Network (CARIN). JIT Troppo 68 was funded by Eurojust, and offers an illustration of the added value of cooperation between Eurojust and Europol in the support provided to national authorities, which culminated in the operational phase, with 70 arrests, seizures of 13 kg of drugs, cash and luxury vehicles.

b) JITs funding

An overview of the implementation of the second JITs funding project – based on a grant awarded by the European Commission under the Prevention of and Fight against Crime (ISEC) Programme – was presented. The budget allocated to this project was EUR 2.272.800 (95% grant, 5% Eurojust contribution). Between October 2010 and September 2013, Eurojust received and processed 295 applications for funding, from 95 different JITs established between 22 Member States. Eurojust's financial assistance to JITs is generally recognised by JIT leaders as a quick, efficient and practical solution that facilitates the establishment and running of JITs.

Eurojust's Head of Operational Support officially announced that financial assistance to JIT activities will continue after 1 September 2013 under Eurojust's regular budget. The JITs Network Secretariat will be, as of this date, responsible for the implementation of JIT grants, including the drafting of a new procedure that will take into account previous experience and feedback from practitioners.

4. Workshops

In response to comments received from National Experts, a practical approach was followed in this Ninth Annual Meeting, and, therefore, discussions in workshops were based on a real case.

Operation "Playa", a JIT established between Sweden, Spain and France, targeted a criminal organisation composed of Swedish and Spanish nationals importing drugs from Colombia to Europe and investing the proceeds of crime mostly in the area of Barcelona. Close cooperation between Sweden, Spain and France led in June 2010 to the capture by French authorities, near the island of Martinique, of a sailboat operated by a Swedish citizen. Cocaine in the amount of 1.4 tonnes was found hidden on board. The suspected leader of the network was arrested in Colombia in December 2010 and deported to Sweden for trial.

The trial took place in Sweden in March 2012, but proceedings are still pending in Spain. Especially due to the different patterns of national proceedings in the countries involved, the case offers a good opportunity to consider and discuss from a practical perspective disclosure and admissibility issues that often arise in the context of a JIT. A presentation of the case was given by Eurojust National Member for Sweden.

Two workshops were conducted with the participation of Swedish and Spanish JIT leaders in "Playa" case. The workshop on disclosure and confidentiality issues was chaired by the Eurojust National Member for France. The workshop on admissibility of evidence was chaired by the Eurojust National Member for Spain.

Two other workshops – chaired by Europol - were conducted, one on the specific challenges to asset recovery in JITs established in cybercrime cases and one on future challenges and trends in JITs.

The main findings and conclusions of the four workshops can be found in following annex.

Annex

Workshop 1: Disclosure and Confidentiality Issues

Workshop participants considered that difficulties resulting from differences in disclosure rules at national level should be discussed prior to the setting up of the JIT. In that respect, a common understanding of national legislations was considered necessary to prevent untimely disclosure in situations where investigations are at different stages in the Member States involved in the JIT. A best practice, already applied in a number of JITs, is to include as an annex to the JIT agreement the applicable legislation of the participating Member States in the field of disclosure.

The importance of carrying out risk assessments on the added value of setting up JITs was also discussed. Should the potential risks related to disclosure outweigh the benefits from the JIT, other alternatives to JITs could be considered. Participants shared practical experiences and pointed out examples where, *inter alia*, the setting up of another JIT proved to be the best solution.

Difficulties stemming from different disclosure regimes often have an impact on the JIT, and, if not addressed or resolved during the operational phase of the JIT, may seriously affect the outcome of the investigation at a later stage. The most common issues include the use of undercover agents and interception of telecommunications. To avoid the risk of compromising the outcome of the investigation, transfer of criminal proceedings could also be considered.

Participants noted that practical issues are more likely to arise in cases in which more than two Member States are involved. In addition, special attention should be paid to the disclosure of evidence obtained via wiretapping or from expert reports.

Participants shared opinions on how confidentiality requirements affect the exchange of information within a JIT, and noted that the positive outcome of a JIT depends on good cooperation and exchange of information between the participants.

Restrictions on the use of the information exchanged may have an impact on the successful exchange of such information. In these situations, the *raison d'être* of the JIT could be affected, which makes discussion between JIT leaders at an early stage all the more necessary.

Attention was paid to the particularities of the exchange of information within a JIT depending on its nature – i.e. intelligence or evidence. Participants emphasized that materials need to be treated differently depending on their content. A best practice in relation to the handling of intelligence is that the parties agree on different classification levels.

A discussion took place concerning the time period during which confidentiality requirements or restrictions of use could apply, bearing in mind that evidence needs to be disclosed in all cases before the court.

Dialogue between the JIT parties is essential, both to agree on possible postponements of the time of disclosure and to satisfy strategic requirements related to the investigation. In situations in which full disclosure is required under the domestic law of one of the parties to the JIT, consideration should be given as to whether a JIT is the best tool for gathering evidence.

Participants also discussed how confidential information should be handled by Eurojust. Participants pointed out that open dialogue is essential if confidential material is discussed during a coordination meeting.

A universal approach is impossible due to the diversity of regulations at national level, *inter alia*, the variety of rules on whether the minutes of coordination minutes shall be included in the national case file. Nevertheless, participants stressed the importance of keeping minutes of coordination meetings short and to the point, focusing only on the essence of the discussions. The possible introduction of handling codes at Eurojust could be considered.

Participants exchanged views on whether confidentiality requirements shall be addressed in the JIT agreement or in the OAP, and pointed out that different approaches are taken in different Member States. While some Member States require a certain level of detail, others either avoid preparing OAPs or include provisions which guarantee that parties have to discuss and agree in advance before disclosing any confidential information.

The added value of the revised model agreement in providing guidance in that respect was considered. It was noted that confidentiality and use of information are matters that are already part of the check-list included in the model agreement. Some participants were of the opinion that an update of the model agreement could be beneficial, although not essential.

Conclusions and recommendations

The preparation of a checklist on issues to be discussed prior to the setting up of a JIT would be useful;

A common understanding of national legislations in the field of disclosure and confidentiality is necessary to prevent untimely disclosure in cases in which investigations in the Member States participating in the JIT are at different stages;

The preparation of a guide on national legislations on JITs, particularly in relation to admissibility of evidence, disclosure and confidentiality issues (fiches espagnoles) could be considered.

The inclusion of the applicable rules on disclosure in the participating Member States as an annex to a JIT agreement is a best practice;

Risk assessments on the feasibility and effectiveness of setting up JITs, particularly taking into account the legislation applicable to disclosure and confidentiality, should be regularly carried out;

The need for further European legislation in the field of JITs, particularly concerning disclosure and confidentiality, could be considered; and

Dialogue is essential when confidential material is discussed at coordination meetings held at Eurojust. In that respect, participants generally acknowledged that minutes of coordination meetings should be kept short and the possible introduction of handling codes at Eurojust should be considered.

Workshop 2: Admissibility of Evidence

Workshop participants shared experiences regarding cases in which the lawfulness of the evidence obtained by a JIT was challenged and focused in particular on cases in which evidence was produced via special investigative techniques.

Participants pointed out that all JITs are different and the issues relating to the admissibility of evidence may vary significantly depending on the Member States involved in the JIT. Therefore, the parties to the JIT should carefully consider not only the procedural requirements for obtaining evidence in the Member State of operation, but also, if needed, those of the Member States where the evidence will be used.

Participants agreed that the use of the JIT tool could not justify non-compliance with the procedural rules in the participating Member States; if special requirements exist in a Member State party to the JIT, they should be brought to the attention of the other parties. In some situations, if specific rules cannot be strictly followed in the Member State of operation, the evidence cannot be used in another Member State party to the JIT. The protection of fundamental principles and rights was emphasized. Attention was also drawn to the non-admissibility of unlawfully obtained evidence, i.e. “the fruit of the rotten tree”.

The role of seconded members in a JIT in securing compliance with admissibility requirements was considered. Participants pointed out that seconded members could play an important role in advising on domestic requirements concerning admissibility of evidence or in liaising with relevant domestic actors for the same purpose.

Participants exchanged views on the participation and presence of seconded members during investigative measures, agreeing that seconded members are beneficial to the underlying investigation and, therefore, their role could only be limited in exceptional circumstances, e.g. the protection of vulnerable victims (such as children) and for reasons of national security.

In addition, participants agreed that Eurojust National Members could play an important role in providing guidance on admissibility of evidence. However, disparities with regard to the possible participation of National Members in a JIT should be taken into account.

Participants at the workshop agreed that admissibility of evidence and settling potential conflicts of jurisdictions should be actively discussed during the setting up of the JIT and reflected in the JIT agreement to facilitate the fulfilment of the formalities and procedures in each jurisdiction.

Participants expressed opinions on some questions that should be provided for in the JIT agreement, e.g. (i) admissibility of evidence obtained prior to the setting up of the JIT; (ii) insertion of sensitive information in the JIT agreement and/or the OAP; and (iii) exchange of evidence obtained from third State members of the JIT.

Participants pointed out that a general clause in the JIT agreement regarding the admissibility of evidence should always be included. Advance clarification is crucial to determine whether the JIT agreement and/or the OAP shall be part of the case file, and, if inclusion is legally required by any of the parties to the JIT, inclusion of sensitive information should be avoided. If a mutual legal assistance request needs to be sent by one of the parties to a third State, the requesting party shall ask the requested party for authorisation to share the evidence obtained as a result of the execution of the MLA request with the other parties.

Concern was expressed regarding the admissibility of evidence obtained within an investigation supported by a JIT that falls outside the scope of the JIT. Participants agreed that such evidence should be carefully examined to assess its admissibility in trial proceedings.

Conclusions and recommendations

- In addition to the *lex loci* criteria, consideration should be given to the procedural requirements of the national law of the Member State where the trial is to be held;
- As a general rule, the admissibility of evidence gathered from the competent authorities of the parties to a JIT must be endorsed by the trial court unless a breach of fundamental principles or rights occurs;

- Seconded members should be available to provide expert advice with regard to domestic requirements concerning admissibility of evidence (e.g. in performing search and seizure, and in gathering witness testimony) and serve as a bridge between all parties to the JIT;
- The participation and presence of seconded members during investigative measures should only be limited to “particular reasons”, especially with regard to the protection of vulnerable victims (e.g. children) and for reasons of national security;
- Considering that *lex loci* criteria is the general rule for the functioning of a JIT, inclusion of a (general) clause in in the JIT agreement is recommended, providing that the evidence should be gathered according to the laws of the different Member States involved in ongoing proactive investigations; and
- The specialty rule should be taken into consideration regarding evidence gathered from third States or to be shared with other investigations.

Workshop 3: Asset recovery in JITs established in cybercrime cases

This workshop focused on the specific aspects of asset recovery and cybercrime within JITs. The discussion was facilitated via a number of questions tailored to the two topics, i.e. asset recovery aspects in JITs and challenges faced in JITs concerning cybercrime.

The following subjects were touched upon in the workshop:

- JIT agreements for a larger number of Member States and/or participants,
- Role of and support from other expert networks and platforms,
- Identification of best practice; joint awareness, and
- Impact of the nature and volume of data and ways for their secure transmission.

Participants agreed that the running of a JIT requires attention to different national procedures that are somehow combined in setting up a JIT.

With the help of the National Experts and Eurojust/Europol experts, either the proper legal basis can be established with greater speed, e.g. in the case of the involvement of third States, or a solution can be found to more effectively conduct the investigations through the setting up of mirror investigations/parallel investigations, etc., considering the need for a timely solution.

Participants agreed that questions related to admissibility of evidence and/or disclosure could be triggered from the investigative measures required, particularly in investigations related to cybercrime. The EU legislator should further investigate the subject to find solutions, particularly in facing challenges encountered with third States, e.g. difficulties experienced to find a suitable legal basis, etc.

Participants thought consideration of sharing of benefits (seized assets) and costs either in the JIT agreement or, if necessary, by way of legislation, to be useful.

Participants are aware that the clear distribution of tasks in OCGs to cells in different countries/continents frustrates efforts to dismantle criminal structures. Judicial authorities tend to press charges mainly for criminal activities committed within the European Union. These prosecutions cover more often to the preparatory stage of illegal data access; sentences are therefore often relatively low.

Participants acknowledged that questions relating to admissibility and disclosure should be discussed at a very early stage of the discussion of a particular JIT and/or mirror investigation/parallel investigation.

National Experts are aware of Eurojust's working group on these topics, and therefore encourage Eurojust to make the findings of this working group available to all National Experts via the JITs Network restricted area.

Participants reiterated the necessity to involve, where relevant, judiciary and (national) cybercrime/asset recovery experts in all discussions/meetings and briefings.

The National Experts acknowledged the necessity to interact with other expert networks that could support the success of a JIT.

Participants emphasized the importance of involving national asset recovery offices and officers from the Europol ECAB team as soon as any discussion on the establishment of a JIT with a focus on asset recovery takes place. This involvement will help to quickly clarify legal issues (legal basis of asset recovery) in the countries concerned.

Furthermore, participants expressed the need to involve those experts during all phases of the JIT, preferably by nominating the national asset recovery and/or Europol experts as JIT members/participants, thus ensuring active involvement of the experts during the day of simultaneous operations.

Subsequently, and to take advantage of the particular expertise of asset recovery actors that might appear less obvious when drafting the JIT agreement, chapter 7 of the model agreement shall be adapted accordingly, together with the operational action plan (OAP: expand the wording related to "financial investigations" to cover asset recovery).

To make this expertise and the tools better known, National Experts see the need to involve colleagues from asset recovery networks and/or cybercrime networks more frequently in their national awareness sessions/programmes.

Consideration should be given to expanding CEPOL or Eurojust (EJTN) training courses on JITs to include presentations/information about asset recovery.

Additionally, CEPOL cybercrime training should be enriched with a presentation about the advantages of JITs.

Participants expressed the need for greater interaction with other expert *fora* by gaining access to and using their expert platforms (e.g. CARIN EPE, Cybercrime EPE).

Since the asset recovery expert platform provides detailed information on many practical and legal questions related to asset seizure, both at domestic and international level, participants felt that the added value the platform could bring to practitioners discussing a JIT agreement was important.

Participants acknowledged the increasing importance of secure exchange of personal information throughout all phases of the investigation, irrespective of the exchange partner. Europol can provide considerable support when large-scale information management is required.

To that effect, SIENA was considered to be a reliable and preferred solution for data exchange amongst JIT members, since access to the system can be granted to JIT members on short notice provided their national systems allow for it.

In addition, SIENA is accessible to other expert *fora* (e.g. national asset recovery offices, ECAB, national cybercrime experts, Eurojust, etc.).

Participants also agreed on the importance of clarifying the channel for transmission of data beforehand and possibilities to meet the special needs of sensitive investigations, such as large data files, and the need to agree on the party that assumes the task of coordinating information exchange.

Conclusions and recommendations

- Given the complexity and international dimension in cybercrime investigations in particular, participants feel that the EU legislator may wish to further explore the subject to find solutions to challenges faced with the involvement of third States in JITs;
- Experts, aware of the ongoing work at Eurojust on admissibility of evidence and disclosure issues, encourage Eurojust to make the findings of this working group available to all National Experts via the JITs Network restricted area;
- Experts agreed on the importance of the early involvement of national asset recovery offices and officers from the Europol ECAB team as soon as any discussion on the establishment of a JIT with a focus on asset recovery is taking place to quickly clarify legal issues (legal basis of asset recovery) in the countries concerned. Involving those working level experts during all phases of the JIT should preferably be done by nominating the national asset recovery and/or Europol asset recovery experts as JIT members/participants;
- To further stimulate this development, chapter 7 of the model agreement and the operational action plan (OAP: expand the wording related to “financial investigations” to cover asset recovery) should be amended to further encourage the involvement of asset recovery experts in the work of JITs;
- The JITs Network Secretariat is also asked to look into the possibilities of better interaction between the National Experts and other expert *fora* with a view to accessing and using their expert platforms (e.g. CARIN EPE, Cybercrime EPE); and
- The Europol tool for the secure exchange of personal information (SIENA) was considered to be a reliable and preferred solution for data exchange amongst JIT members, since access to the system can be granted to JIT members on short notice provided their national system allows for it.

Workshop 4: Future Challenges and trends in JITs

The workshop reflected on future challenges and trends throughout the European Union.

Trends identified

A number of trends were discussed, and five were highlighted for further reflection. These are found below.

- *Creation of national JIT manuals*

The creation of national JIT manuals was identified as an increasing trend in a number of Member States. The participants observed that these national JIT manuals add value if they are practical, reflect or interpret national legislation and specificities, and provided they are effectively disseminated nationally (and to potential JIT partners).

Participants cautioned specifically against using national JIT manuals without the above characteristics, and to especially avoid copying and pasting existing material, and to retain vagueness by the issuance of generic instructions, all of which provide no added value to a national JIT manual. In this respect, see also the conclusions below concerning awareness raising.

- *Increasing number of multilateral JITs*

Participants noted the increasing number of multilateral JITs, in contrast to bilateral JITs. Participants concluded that this evolution reflects operational needs and realities as well as the fact that cooperation is needed beyond bordering countries. Further discussion is also found under “Participation of third States” below.

- *(Initial) duration of JITs increased*

Participants reflected on the trend of an increasing number of JITs set up or lasting for a longer period of time. Participants found that:

- Increasing use is made of JITs throughout all parts of or for an entire investigation, rather than just a specific part of it (i.e. from 6 months to 2 years' initial duration)
- JITs are increasingly used for longer investigations.

It should be reflected upon, however, that value could be found in continuous evaluations being required prior to extensions being agreed, if initial period is shorter

- *Innovative JIT usage*

Participants reported on and concluded that while some Member States were still in the very early stages of their experience with and use of JITs, other Member States were actively using and experimenting with the added value of JITs in fields not necessarily expected.

- *Participation of third States*

Participants made the following observations regarding the identified trend of increased participation of third States:

- Clear information of a sufficient quantity is needed.
- The trend establishes an increased usage of EU-near countries
- Considerations by some Member States have been expressed regarding also the conclusion of JITs with more distant third States, e.g. Asian
- JITs do not necessarily require a third State to be a member, but the JIT itself increasingly cooperates with various third States.

– Explorations are ongoing and first experiences have been achieved with a “JIT” based on UN instruments (United Nations Conventions against Transnational organized crime - UNTOC and against corruption- UNCAC).

Future challenges

Participants identified the most important future challenges.

- *Ensuring legal basis across all Member States*

The possibility to set up a JIT in all Member States in line with the Framework Decision or the MLA Convention was stressed as essential. Additionally, the compatibility of Member States’ JITs legislation was seen as a challenge, specifically as regards the varying circumstances in which a JIT can be opened (which is subject to different criteria in different Member States, such as the requirement for an existing national investigation, questions of double criminality, as well as thresholds, for example, regarding the “seriousness” of the offence).

- *Increase(d) international cooperation*

The increased and increasing need for international cooperation will lead to a further increase in the use of JITs. Participants raised concerns about the availability of sufficient resources in the Member States, and the appropriateness of “restrictions” in national law regarding those resources. Further concerns were expressed regarding the available possibilities for the involvement of other competent authorities.

A further aspect is the need for funding possibilities for JITs, and the manner by which a permanent funding possibility is established. Questions arose regarding how to prioritise cases using EMPACT priorities, the resources of the Member State in question, and the availability of equipment.

Participants also emphasized the importance of the possibility to assist third States in becoming members or participants in a JIT.

- *Promotion on national level*

Promotion of JITs on a national level is still lacking, at all levels. Promotion is primarily focused on the international and EU level. Promotion needs to filter down more consistently and to a greater extent, including also the possible involvement of other competent authorities (e.g. Customs, etc.).

- *Consistency in operational capabilities*

The final challenge identified by the participants was the need to ensure consistency in operational capabilities of Member States. This need was expressed specifically regarding emerging areas and technologies. In the absence of attention to such considerations, closer cooperation will be limited to fewer Member States, whereas close cooperation through a JIT should also be able to be complemented on a technological and equipment level.