

The Difficulties of Joint Investigation Teams and the Possible Role of OLAF

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Difficulties in Setting Up Joint Investigation Teams

The concept of joint investigation teams, as introduced by Article 13 of the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000¹ (“the Convention”), was not entirely new.² In essence, it allows information gathered by investigators from different EU Member States to be exchanged without making use of a mutual legal assistance request.³ Nevertheless, nine years later, and after the entering into force of this Convention in most Member States, most practitioners lack practical experience and even knowledge of this tool. The lack of joint investigation teams (“JITs”) being set up in practice could be explained by the lack of awareness of the instrument’s advantages and by the lack of clarity in the rules governing the JITs.⁴ This can make law enforcement officers and judicial authorities reach for traditional cooperation tools such as mutual legal assistance requests (“MLA requests”) and mirror investigations rather than setting up a JIT.

Indeed, the Convention leaves much room for the national legislators to implement the instrument of a JIT in their national criminal justice systems. However, this entails differences in national provisions governing international cooperation. In some cases, even the provisions of the Convention have not at all been implemented on a national level, for example the provisions on the criminal liability of the member of a team on the territory of another Member State have not been implemented by France, Latvia, Hungary, the Netherlands, Portugal, etc. Uncertainty about the applicable rules leads to hesitation and, since complex investigations are usually a battle against time, this leads to the use of already established procedures rather than setting up a new investigation structure.

One of the aspects that has been implemented differently when setting up a JIT on a national level is the authority that is competent for taking the initiative. The position of JITs in between law enforcement and judicial cooperation can be interpreted differently in different criminal justice systems with regard to which authority should be entrusted with the competence of setting up a JIT. Article 13 of the Convention refers to “the competent authorities,” thus leaving it to the national legislator to specify which national authorities are competent. Criminal justice systems endorsing divergent legal traditions will want to grant this competence to divergent authorities; e.g., in the Netherlands, the public prosecutor takes the initiative while, in Sweden, several authorities can do this, including the investigating magistrate, the prosecutor, or the police board. In other countries, such as France, the approval of the Minister of Justice is needed.⁵ In practice, JITs have suffered from slow decision-making when a steering group with a top-down approach was in charge. A better functioning has been experienced in a bottom-up approach where a team of judicial and law enforcement officers saw the evident need for a joint team for the benefit of a joint investigation. This made for a clear motivation to work towards a common goal and a smoother flow of information.⁶

Other aspects remain unclear due to the fact that the Convention did not elaborate on them and national implementation legislation is either lacking provisions or includes provisions that are different from those of other Member States. For example, the question of whether or not the setting up of a JIT needs to be preceded by one or more – mutual – MLA requests between the concerned Member States is not answered by the Convention. It nevertheless states that a JIT should be set up by mutual agreement in accordance with the Convention. Therefore, on a national level, authorities can be expected to rely on a MLA request – based on the same Convention – in order to conclude the required mutual agreement.

The leadership of the team is a matter that has not been dealt with in several Member States’ implementation legislation (Denmark, Germany, Lithuania, Malta, the Netherlands, Portugal, Sweden, and the United Kingdom). Other states have specific provisions only regarding the powers bestowed upon the team leader whereas Spain and Austria have ensured a full implementation.⁷ Thus, the lack of (uniform) legislation can

cause hesitation on the part of national authorities with regard to setting up a JIT as supervision of the team and the investigation would have to be transferred to another state when crossing the border.

In order to avoid the necessity of letters rogatory, the Convention enables team members to request investigative measures directly in their home state. This was meant to be one of the main advantages of setting up a JIT over relying on MLA requests and mirror investigations. However, the majority of Member States has not implemented this provision on a national level or has restricted the investigative measures that can be requested.⁸ If national legislation was clear on this issue, the authorities willing to set up a JIT would have a clear picture of the possibilities and, more importantly, of the advantages of this tool.

Furthermore, as one can expect, the Member States' JIT experts⁹ are confronted with a number of questions on how to finance JITs. The possibilities of Community financing via EUROJUST have been explored and resulted in a first "JIT Funding Project" under the Commission's programme "Prevention of and Fight against Crime"¹⁰ in July 2009.¹¹

Ultimately, the role of the agencies (Europol, Eurojust, and OLAF), as mentioned in the explanatory report to the Convention,¹² in the setting up and the functioning of JITs needs clarification. The Convention provides for the participation of persons other than representatives of the competent authorities of the Member States involved. The required legal basis for such participation can be the model agreement provided by the Council.¹³ Still, the national laws of the Member States should also provide for this participation. Evidently, the rights granted to seconded members (members of the JIT who are operating on the territory of a state that is not their national state) do not automatically apply to the representatives of Europol, Eurojust, and OLAF; however, this can be stipulated in the agreement between the JIT and these additional team participants.¹⁴

The Role of OLAF in Joint Investigation Teams

Only competent national authorities can be parties to a JIT agreement.¹⁵ Moreover, criminal investigations are subject to this agreement.¹⁶ Therefore, only officials of judicial and police authorities can be members of a JIT. As a Community administrative body, OLAF cannot be party and OLAF officials cannot be formal members of a JIT in the same manner as officials from competent national authorities. However, Article 13.12 of the Convention provides for the possibility of letting other persons take part in the activities of the team and mentions as an example officials of bodies set up pursuant to the treaty, "to the extent that the laws of the Member States concerned or the provisions of any legal instrument applicable between them permit". As already mentioned, the explanatory report¹⁷ cites OLAF in this respect, besides Europol and Eurojust.¹⁸ For all three agencies, their role is described as "supportive and advisory."¹⁹ With regard to Europol, attention should be paid to the new Europol decision that will be applicable at the earliest from January 1st 2010 on and will replace the Europol Convention.²⁰ Article 6 of the Europol decision governs the participation of Europol officials in JITs and includes the specification that their officials may assist in all activities and exchanges of information under the leadership of the team leader, without, however, "taking part in the taking of any coercive measures."²¹ As regards Eurojust, the amended Eurojust decision – in effect since June 4th 2009 – covers the topic of participation in JITs in the new Article 9f.²²

OLAF's participation in JITs

OLAF's mission consists in fighting fraud, corruption, and any other illegal activity affecting the European Communities' financial interests.²³ As both the criminalisation by Member States' penal law and their obliga-

tions to assume jurisdiction being imposed by the PIF Convention²⁴ and its 1st Protocol²⁵ concern criminal activities, OLAF's mission also extends to the judicial field. OLAF's activity nowadays covers the following:

- international corruption, both by community officials and national officials, relating to EU funds;
- customs fraud by international trafficking of goods under false import declarations or in violation of anti-dumping measures, trafficking of counterfeit goods; illegal cigarette trafficking;
- VAT fraud;
- organised and large-scale subsidy fraud, both concerning indirect (structural funds and agriculture) and direct expenditure, e.g., development aid;
- procurement fraud, involving a community dimension;
- other offences related to the foregoing, such as money laundering and participation in criminal organisations.

If the JIT concept causes practitioners to hesitate,²⁶ this could also be the case for cooperation with OLAF. The reason is to be found in OLAF's hybrid nature. This hybrid nature results from OLAF's dual functions: conducting (administrative) investigations, on the one hand, and providing assistance to the European Commission, on the other. In its investigative function, OLAF's functional independence is guaranteed by Community Law.²⁷ In its assistance and coordination function, OLAF is a service from the Commission, which it represents vis-à-vis police and judicial authorities. OLAF thus contributes to the gathering of information for administrative purposes and the exchange of information with police and judicial authorities for the purpose of a criminal investigation.²⁸ In spite of OLAF's functional independence, for reasons of purpose limitation – one of the basic principles of data protection – practitioners could be hesitant to cooperate with OLAF officials.

The criminal investigation, for which the competent national authorities create a JIT, might have been initiated as a result of a transmission of information undertaken by OLAF on the basis of Article 10 of Regulation EC N° 1073/1999 (the "OLAF-Regulation"). This is the case when OLAF obtains information liable to judicial procedures during an administrative (internal or external) investigation. In addition, an OLAF investigation might have been opened as a result of a referral under Article 7.3. of the OLAF Regulation based on information or documents, which were obtained through judicial investigations by a Member State. In both scenarios, OLAF is still acting under its operational independence. Community law provides for the necessary legal framework here, since it guarantees the admissibility of the evidence provided; Article 9.2 of the OLAF Regulation states that the reports drawn up by OLAF may constitute admissible evidence in judicial proceedings of the Member State where it shall be treated in the same way and under the same conditions as administrative reports by national administrative inspectors.

Specific attention should be drawn to the situation that arises when administrative and judicial investigations of the same facts are being carried out simultaneously. Indeed, as long as they aim to achieve the purpose they were started for – the existence of serious professional misconduct or financial irregularities in the case of OLAF's administrative investigations as well as the detection, investigation, or prosecution of criminal offences in the case of criminal investigations by police and judicial authorities – nothing prevents both procedures from being carried out simultaneously.²⁹ This implies that gathered information should only be used for the purpose for which it was gathered and not for objectives that are incompatible with the original purpose. The involvement of OLAF investigators in order to support these criminal investigations is an evident matter of efficiency on account of their knowledge of the file transmitted to the judiciary. OLAF investigators, who have often conducted a lengthy, in-depth administrative enquiry, might help to improve the

quality of the file that is produced in criminal investigations as well as the efficiency of the investigation itself.

Based on such an approach, the support of the OLAF investigators can take on a more extended dimension and result in continued cooperation, rather than an ad hoc assistance. This is all the more true since judicial and police authorities can, pursuant to Article 7.2. of the OLAF Regulation and under the limits of their national legislation, upon request or on their own initiative, provide information to OLAF relating to its administrative investigations.

OLAF could support a JIT independently from any own investigation, when acting as the Commission's direct contact and providing assistance to judicial and police authorities of the Member States.³⁰

Due to its aforementioned hybrid nature, OLAF can be of assistance to a JIT in several possible ways:

- Firstly, given its competence for investigating EU fraud and irregularities, the police and judicial authorities involved in joint investigations that cover such acts could be supported with legal advice from OLAF. Should information and documents be needed from the European Commission or its services, OLAF is the best placed service to provide them.
- Secondly, the institutional framework of the EU changes continuously as new agencies are created. In this regard, OLAF, due to its internal missions, can provide quick and precise information regarding Community institutions, bodies, and agencies as well as their staff.
- Thirdly, these days, efficient investigative work is based on data analysis and data processing. For national investigative authorities, access to OLAF databases and, via OLAF, to the databases of the Commission, constitutes a qualitative step forward in the fight against fraud and corruption. In the area of customs fraud, cooperation and assistance are based on mutual administrative assistance between Member States (customs authorities) and the Commission.³¹ This cooperation can result in large-scale control operations monitored by an operational centre in OLAF.
- Fourthly, as already mentioned, investigating Community institutions is not primarily a matter of international judicial cooperation. It requires the waiver of immunities, inviolabilities, and the obligation of confidentiality regarding Community staff, premises, and archives. For this, OLAF functions as the Commission's contact point for police and judicial authorities.
- Finally, based on sectoral and horizontal Community law, OLAF assists in the coordination and exchange of information between Member States in matters of customs and agriculture.

Since the possibilities for OLAF to deliver assistance to JITs are considerable, the idea of evolving towards a dynamic and more continuous cooperation is not too farfetched.

An "old" third pillar instrument – of importance since it recently entered into force (19/05/2009) – tends to sustain this approach: the 2nd Protocol to the PIF Convention^{32,33} deals with cooperation with the Commission of the European Communities in this field (the protocol dates from 1997, before the creation of OLAF).

The PIF Convention clearly puts the principle of cooperation forward as it lays down that the Member States and the Commission shall cooperate with each other in the fight against fraud, active and passive corruption, and money laundering. Furthermore, the legal basis for the Commission's (OLAF) assistance is confirmed. To this end, the Commission shall lend such technical and operational assistance as the competent national authorities may need to facilitate the coordination of their investigations. Finally, the issue of information exchange is included in the 2nd protocol to the PIF Convention The competent authorities in the Member

States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption, and money laundering.

Combining the 2000 Convention on Mutual Assistance in Criminal Matters³⁴ and the 2nd Protocol to the PIF Convention applied to OLAF investigations would enable OLAF to participate in JITs in a more dynamic way.

The explanatory report to the 2nd Protocol³⁵ states that the aim of this assistance is to add value to the investigation “by ensuring that the necessary skills and know how are available”. It further clarifies that this assistance can be technical or operational. Technical assistance relates to access to the Commission databases and knowledge of the legal systems of the Member States. Operational assistance includes all organisational aspects related to contacts with authorities involved and access to the results of OLAF’s investigations.

In its turn, and based on Community law (Article 7 of the OLAF Regulation), information from the judicial investigations that is relevant for the administrative investigations can be communicated to OLAF taking into account restrictions of national law.

Limitations to OLAF’s participation

Due to its specific nature, OLAF cannot participate in a JIT unconditionally and without restriction. The following limitations must be taken into account:

First of all, there are the requirements of investigation secrecy. To this end, a Member State, when supplying information to the Commission, may set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed.

Furthermore, OLAF protects personal data in line with Regulation EC 45/2001.³⁶ Personal data is communicated only as far as necessary, and OLAF is responsible for informing data subjects as quickly as possible.

At the same time, any abuse of procedures should be avoided. Judicial and administrative investigations must adhere to their own objectives: their means of investigation can only be used for these distinct objectives. As far as OLAF’s investigative activity is concerned, this affects investigations of corruption or illegal activities by community agents or investigations of irregularities committed by economic operators in external investigations. OLAF investigators will not investigate directly as members of the joint team.

Whereas information obtained during external investigations can be forwarded to the competent (judicial or police) authorities at any time, OLAF must respect Community law when transmitting information from its internal investigations. When providing, upon request of the team, information or documents obtained by using its investigative internal powers, OLAF should obtain a waiver of inviolability of the archives of the Commission. Before drawing conclusions referring by name to a Community agent (or Member), OLAF should enable the interested party to express his views on all the facts that concern him, excepting agreement of the institution obtained to defer compliance with this obligation.

Community law, as well as staff regulations, privileges, and immunities, also prevent OLAF officials from working under the “direction” of the JIT leader. Instead, OLAF investigators will, with respect to the duty of cooperation derived from Community law, cooperate with the JIT, without carrying out any investigative measure themselves.

The restrictions described above, all of them a consequence of OLAF’s status as Community investigation service, could give rise to uncertainty. Cooperation may indeed seem complex and complicated. The JIT agreement and its appendix provide added value here.³⁷ These instruments will enable parties to and parti-

participants in the JIT to clearly define, along the lines as described above, the nature and the boundaries of OLAF's participation.

Conclusion

Some Member States have mentioned OLAF's possible participation in the activities of a JIT in their implementing legislation on JITs. Others have not. For them, the 2nd Protocol to the PIF Convention constitutes the legal instrument permitting OLAF's participation.

When a JIT is created in the field of EU fraud and corruption, the agreement between the Member States' judicial authorities should include a provision on the participation of OLAF. This participation should be defined in detail in an appendix to the JIT agreement, and this appendix should be signed by the OLAF Director. It should describe the tasks of OLAF in the JIT in as much detail as possible. In addition, any possible OLAF administrative investigations related to the matters dealt with by the JIT are to be identified. The procedure of exchanging information between OLAF and the JIT should be described in detail and with due attention to the purpose limitation principle. This solution is not only more efficient and effective – it offers more legal security to all parties involved compared to the situation in which OLAF's role is limited to assisting each of the Member States' judicial authorities separately.

In cases of complex and transnational crime, the creation of a JIT can be a valuable alternative to traditional mutual legal assistance. When such cases relate to Community fraud and corruption, the operational and technical assistance of OLAF in such JITs should add value to the investigative activities.

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1. [EU Convention](#) of 26 July 1995 on the protection of the financial interests of the European Communities (also known as the 'PIF' Convention) (OJ C 316 of 27.11.95, p. 48).↔
 2. Art. 24 of the Convention on Mutual Assistance and cooperation between customs administrations (the Naples II Convention), signed on 18.12.1997, OJ C 24, 23.1.1998, introduced joint special investigations teams as a channel to be used for particularly extensive, complex investigations.↔
 3. See to this respect: A. BALCAEN, in *JOINT INVESTIGATION TEAMS IN THE EUROPEAN UNION, From theory to practice*, The Hague 2006, p. 85.↔
 4. Europol and Eurojust's Joint Investigation Teams Manual, 13598/09, 23.09.2009, Conclusions of the fourth meeting of National Experts on Joint Investigation Teams (15/16 December 2008, The Hague), 17512/08, 19.12.2008 and the conclusions of the Eurojust Seminar on joint investigation teams, http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-07_2008/PFUE-17.07.2008/une_nouvelle_impulsion_en_faveur_des_equipes_communes_d_enquete_.html.↔
 5. REPORT FROM THE COMMISSION on national measures to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, SEC(2004)1725.↔
 6. Read in this respect: RIEGEL R., *Gemeinsame Ermittlungsgruppen – der neue Königsweg der internationalen Rechtshilfe?*, Die Kriminalpolizei, Nr. 3/2008, 80 and RIJKEN C., *Joint Investigation Teams: principles, practice, and problems*, in *Utrecht Law Review*, Volume 2, Issue 2, 2006.↔
 7. REPORT FROM THE COMMISSION on national measures to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, SEC(2004)1725.↔
 8. REPORT FROM THE COMMISSION on national measures to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, SEC(2004)1725.↔
 9. Member States appointed specific experts for JITs in accordance with the proposal adopted by the Council Article 36 Committee on 8 July 2005 (11037/05 CRIMORG 67 ENFOPOL 88)↔
 10. O.J. L 58, 24.2.2007, p. 7.↔
 11. See Eurojust Press Release, 15 July 2009, www.eurojust.europa.eu. See also www.eurojust.europa.eu/jit_funding.htm↔
 12. O.J. C 379, 29.12.2000, p. 19.↔
 13. Recommendation of the Council of 8 May 2003 on a model agreement on the establishment of a JIT, O.J. C 121, 23.5.2003, p. 1.↔
 14. See C. RIJKEN and G. VERMEULEN in *JOINT INVESTIGATION TEAMS IN THE EUROPEAN UNION, From theory to practice*, The Hague 2006, pp. 19-20.↔
 15. Art 13 1. O.J. C 197, 12.7.2000, p. 9.↔
 16. Art 13 1. O.J. C 197, 12.7.2000, p. 9.↔
 17. Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. C 379, 29.12.2000, p. 7.↔
 18. Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. C 379, 29.12.2000, p. 19.↔
 19. Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. C 379, 29.12.2000, p. 19.↔

20. Council Decision of 6 April 2009 establishing the European Police Office (Europol), O.J. L 121, 15.5.2009, p. 37.↔
21. Council Decision of 6 April 2009 establishing the European Police Office (Europol), O.J. L 121, 15.5.2009, p. 40.↔
22. Council Decision of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, O.J. L 138, 4.6.2009, p. 14.↔
23. Art. 1 Regulation (EC) N° 1073/1999.↔
24. Convention on the protection of the European Communities' financial interests, O.J. C 316, 27.11.1995, p. 49.↔
25. Protocol to the Convention on the protection of the European Communities' financial interests, O.J. C 313, 23.10.1996, p. 2.↔
26. See for example: Europol and Eurojust's Joint Investigation Teams Manual, 13598/09, 23.09.2009; Conclusions of the fourth meeting of National Experts on Joint Investigation Teams (15/16 December 2008, The Hague), 17512/08, 19.12.2008; and the conclusions of the Eurojust Seminar on joint investigation teams, http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-07_2008/PFUE-17.07.2008/une_nouvelle_impulsion_en_faveur_des_equipes_communes_d_enquete.html.↔
27. Article 12.3 Regulation (EC) 1073/1999, O.J. L 136, 31.05.1999, p. 6.↔
28. Article 10.2 Regulation (EC) 1073/1999, O.J. L 136, 31.05.1999, p. 5.↔
29. The proper objective of OLAF's administrative investigation consists in demonstrating (internal) serious misconduct of (external) financial irregularities; the proper objective of judicial investigations consists in demonstrating the existence of criminal offences.↔
30. Article 1.2 Regulation EC Nr 1073/1999, O.J. L 136, 31.05.1999, p. 5; Article. 2.6. Commission Decision 1999/352/EC, O.J. L 136, 31.05.1999, p. 20.↔
31. See Art. 18.4 Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters O.J. L 082, 22.03.1997, p. 1 (to this respect, OLAF's role in a JIT could be complementary to the coordination task fulfilled by Eurojust).↔
32. Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests, O.J. C 221 19.7.1997, p. 11.↔
33. See also: explanatory report to the second Protocol, O.J. C 91, 31.03.1999, p. 8.↔
34. Council Act of 29 May 2000 establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. L 197, 12.7.2000, p. 1.↔
35. O.J. C 91, 31.03.1999, p. 13.↔
36. O.J. L 8, 12.01.2001, p. 1.↔
37. See Council Recommendation of 8 May 2003 on a model agreement for setting up a joint investigation team (JIT).↔

* Author statement

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