

## Joint Investigation Teams: principles, practice, and problems Lessons learnt from the first efforts to establish a JIT

Conny Rijken\*

### 1. Introduction

The instrument of a Joint Investigation Team (JIT) has long been anticipated as the desired instrument to facilitate mutual assistance in criminal matters between the EU Member States. However, the first experiences with the use of the JIT show that it is quite difficult to direct cooperation in criminal matters. These experiences have further once more shown that cooperation in criminal matters is a complex issue in which many factors play a role, the creation of a legal framework being just one of them. In general a legal basis is an absolute prerequisite before closer cooperation can commence, but other factors play an important role as well. The fact that a legal instrument is in place is no guarantee that it is also used in the way envisaged upon its adoption or that the expected added value will be attained. The instrument of the JIT is no exception to this rule.

In this article, first the legal framework concerning JITs will be analyzed. The question will be explored as to whether the instrument of a JIT as such is sufficient to facilitate cooperation and to what extent legislation to implement the JIT instrument in the Member States involved has affected the projects in which the JIT instrument was used. The consequences of the existence of two different legal bases on which a JIT can be established will be outlined. Then the various factors that play a role in the establishment and operation of a JIT will be focused upon. Special attention will be paid to the legal basis for setting up a JIT, the information exchange within a JIT and the operational powers of the JIT members. It will be demonstrated that mutual trust between the players in a JIT is essential for running a JIT and that the Member States have an important role to play in this regard. This article will give an insight into the obstacles encountered and the remedies adopted when resorting to a JIT. It further gives an impression of the complexity of factors that influence cooperation in criminal matters within a JIT. The experiences gained with the efforts during the Dutch EU presidency (second half of 2004) to establish an operational JIT are used as illustrative material for this purpose.<sup>1</sup> The analysis and comparison of these first efforts to use the instrument of a JIT generate valuable information for future JITs. These case studies also illustrate the possible added value of using the JIT instrument.

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\* Lecturer and Researcher at Tilburg University, European and International Law Department, Warandelaan 2, 5000 LE Tilburg, the Netherlands, email: c.r.j.rijken@uvt.nl. I would like to thank Professor Linda Senden for her feedback on earlier drafts of this article.

<sup>1</sup> An international and interdisciplinary Scientific Research Group was allowed to monitor and analyze the entire process of these projects. The author of this article was the leader of this Research Group.

## 2. The legal framework of the JIT instrument

Within the EU, the instrument of the JIT has now been adopted and elaborated in two legally binding documents. As the JIT is a new form of cooperation in criminal matters, a discussion of the instrument as such and an explanation as to how a JIT might be established and how it might function are appropriate.

### 2.1. *The creation of a dual legal basis for JITs*

Before the JIT instrument was formally adopted, reference was made to joint investigation teams in several documents (both binding and non-binding). Article 29 of the Treaty of Amsterdam states that the area of freedom, security, and justice within the EU must be achieved through preventing and combating crime, either organized or otherwise. This Treaty further states in Article 30 that, for the promotion of cooperation through Europol, Europol must be enabled to facilitate and support, among other things, operational actions of joint teams. The idea of joint teams was further elaborated during the European Council in Tampere, Finland, on 15 and 16 October 1999. On that occasion, a first step towards the possibility of the use of the instrument of a JIT was taken. Conclusion no. 43 called for ‘joint investigative teams to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism.’<sup>2</sup> Finally the instrument was elaborated in more detail in a legally binding instrument based on Article 34(2)(d) of the Treaty on European Union (EU Treaty), namely in Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (EU Convention on Mutual Assistance).<sup>2</sup> However, the entry into force of this Convention was delayed, because provisions other than Article 13 caused extensive discussions in several countries, preventing the Convention’s ratification.

Therefore, it was decided to adopt the instrument of a JIT as a framework decision in accordance with Article 34(2)(b) of the EU Treaty. The Member States believed that this instrument could greatly facilitate cooperation in criminal matters and that implementing legislation on JITs would be readily adopted in the Member States.<sup>3</sup> Only a few days after the attacks of 11 September 2001, a proposal for a draft Framework Decision on JITs was presented. During the extraordinary Council Meeting on Justice, Home Affairs, and Civil Protection of 20 September 2001, it was stated that ‘the seriousness of recent events has led the Union to speed up the process of creating an area of freedom, security and justice and to step up cooperation with its partners, especially the United States.’<sup>4</sup> To this end, the Council had to adopt various measures, including the Framework Decision on JITs.<sup>5</sup> In the Preamble to the Framework Decision, it is clearly stated that JITs must be considered a welcome instrument to achieve a high level of safety within an area of freedom, security, and justice by combating crime through closer cooperation. The Framework Decision reproduced Articles 13, 15, and 16 of the EU Convention on Mutual Assistance. As we will see below, Article 13 explains when and how a JIT can be set up and can be operated and Articles 15 and 16 concern the criminal and civil liability, respectively, of officials.

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2 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 Member States of the European Union, *OJC* 197, 12.07.2000, p. 1. The Convention entered into force for the ratifying Member States on 23 August 2005.

3 M. Plachta, ‘Joint Investigation Teams. A New Form of International Cooperation in Criminal Matters’, 2005 *European Journal of Crime, Criminal Law and Criminal Justice*, no. 2, p. 292.

4 Extraordinary Council Meeting, Justice, Home Affairs, and Civil Protection, Brussels, 20 September 2001, 12019/01 (Press 327), p. 4.

5 Framework Decision of 13 June 2002 on Joint Investigation Teams, *OJL* 162, 20.06.2002, p. 1.

This means that, at this moment, JITs can be based on two different legal bases, namely a Convention and a Framework Decision. As framework decisions are binding but lack direct effect, full implementation of their provisions is required for them to have full effect. For the Convention this is different, as the provisions that are clearly and unconditionally formulated can be applied directly, if this is allowed under national law. Thus, although the text of Articles 13, 15 and 16 of the Convention is identical to the text of the Framework Decision, the choice of legal basis for the establishment of a JIT has some important consequences, as will be set out in Section 3.<sup>6</sup>

## **2.2. The establishment of a JIT<sup>7</sup>**

According to Article 13(1) of the Convention, a JIT must be established by mutual agreement between two or more Member States of the EU. The aim of such a team must be the execution of criminal investigations in one or more of the Member States setting up the team. The agreement is an important document because it must set out the specific purpose of the team as well as the expected period during which it will operate and the composition of the team. A model agreement for a JIT was adopted as a Council Recommendation on 8 May 2003.<sup>8</sup> Article 13(1) further implies that the establishment of a JIT will be preceded by a request from one of the Member States. It does not indicate how and by whom such a request must be made, or whether it can be done orally, and it does not directly refer to a request for mutual assistance. However, paragraph 2 of Article 13 refers to Article 14 of the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe,<sup>9</sup> which deals with requests for mutual assistance. Therefore, the term ‘request’ in paragraph 1 must be considered a request for mutual assistance, and the general requirements provided in the European Mutual Assistance Convention of the Council of Europe for making such a request must be met.<sup>10</sup> Furthermore, such a request must contain proposals for the composition of the team. The decision on the location of the team is important, as the team will act in accordance with the law of the country where it operates.<sup>11</sup> It is likely that the team is located in the State where the major part of the investigations will take place.

When information or any other assistance is required from an EU Member State not participating in the JIT or from a third country, the general procedures on mutual assistance must be used. Such a request must be made by the competent authorities of the State of operation. Although Article 13(8) does not indicate that the assistance provided by the requested State will be used in the JIT, it would seem logical that this is explained in the request and also which States participate in the JIT concerned, so as to let the requested State know that the assistance provided may be shared with other States, and with what other States. If the number of participating States in the JIT is increased in the course of its duties, the providing State’s approval must again be requested for sharing the information with these new States. To avoid a procedure where the providing State’s approval must be asked time and again, it would be easier to adopt a general

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6 C. Rijken *et al.*, *Joint Investigation Teams in the European Union, From Theory to Practice*, 2006, pp. 10-13.

7 In this section reference is made to Art. 13 of the EU Convention on Mutual Assistance, but it has to be taken into account that parallel provisions exist in the Framework Decision.

8 Recommendation of the Council of 8 May 2003 on a model agreement on the establishment of a JIT. This recommendation also includes an annex with a model agreement for the involvement of Europol, Eurojust, and/or OLAF, *OJ C* 121, 23.5.2003, p. 1.

9 European Convention on Mutual Assistance in Criminal Matters, Council of Europe, Strasbourg, 20 April 1959, CETS 30.

10 According to these requirements such a request must include: the authority making the request, the object of and reason for the request, the identity and nationality of the person concerned and the name and address of the person to be served as well as the offence and a summary of the facts.

11 Art. 13(3)(b) of the EU Convention on Mutual Assistance.

clause in a request for mutual assistance indicating that the information can be used by the JIT regardless of its composition. This also has to be taken into account when applying Article 13(9) on direct information exchange to the JIT by seconded members, *i.e.* members of the team that originate from other Member States than the State in which the team operates.<sup>12</sup>

Although Article 13(11) indicates that this provision is without prejudice to any other existing provision or arrangement on JITs, it does not exclude the possibility that it is used as guidance in the creation of a JIT in relations between Member States, for instance, in cases in which neither the Convention, nor the Framework Decision on JITs is applicable (yet) in these Member States, and in relations between Member States and third States.

Finally, Article 13(12) concerns the participation of persons other than representatives of the competent authorities of the Member States in the setting up of the joint investigation team. When this participation has a legal basis, such arrangements can be agreed. The legal basis can either be sought in national legislation or other instruments. Such persons may be appropriate persons from other States and representatives of, for instance, Europol, Eurojust, and OLAF (European Anti-Fraud Office). The Council has provided a model agreement for arrangements between a JIT and such persons.<sup>13</sup> It has to be taken into account that the position of these persons differs from that of the members and the seconded members and that the rights conferred upon the seconded members by Article 13 do not apply to these persons, unless the agreement expressly states otherwise.

The text of Article 13 and thus of the Framework Decision is rather minimal, as most important issues, such as the competence of JIT members, can be arranged in an agreement. Depending on the implementation laws, this might leave great discretionary powers for the authorities involved in a JIT.

### **2.3. *The advantages of a JIT***

A JIT is an operational investigation team, set up with the aim of investigating a complex case with angles in different States and composed of authorities from these different States. A JIT is normally, but not necessarily, located in one country. By using the instrument of the JIT several advantages are created for the organization of an operation as compared to regular investigations. The major advantages of a JIT are:

- the fact that the operation is headed by one person;
- the fact that competent authorities in participating Member States can be directly asked by their seconded member in the JIT to undertake investigative measures, without a formal request; consequently the information from these investigative measures in the participating Member States can be directly used by the JIT; and
- the direct exchange of information.

These advantages will be further elaborated below.

The first advantage is the way in which the team is led. The general rule is that the leader of the team must be a representative of the competent authority of the State where the team operates.<sup>14</sup>

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<sup>12</sup> Art. 13(4) of the EU Convention on Mutual Assistance, Art. 1(4) of the Framework Decision on JITs.

<sup>13</sup> Recommendation of the Council of 8 May 2003 on a model agreement on the establishment of a JIT. This recommendation also includes an annex with a model agreement for the involvement of Europol, Eurojust and/or OLAF, *OJC* 121, 23.5.2003, p. 1.

<sup>14</sup> Art. 13(3)(a) of the EU Convention on Mutual Assistance, Art. 1(3)a Framework Decision on JITs.

Because JITs will mainly be initiated in more complex cases in which more countries are involved, it is not clear from the onset from which country the team leader must be chosen. In those cases, it is likely that more team leaders will be appointed 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. In other cases, the coordination will be undertaken by the team leader of the country where the JIT is located. When during the course of the team's operation 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 appoint a team leader from that Member State. This means that a person who is a seconded member for one operation can be a member in another operation, namely when that operation takes place on the territory of his or her home country. In line with these implications, it is important that the instrument is used in a flexible way.

The second advantage is that, instead of executing the investigative measures themselves in their home countries on the basis of a formal request, seconded members may ask their colleagues in the home country to take those measures. According to Article 13(7) of the Convention, '[t]hose measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation'. This provision entails one of the major advantages of a JIT instrument, as a formal request is then not required. This means that a check for grounds for refusal will not take place. The request of a member of the JIT is considered as if it were a request in a national case.

The consequence of this provision is that information from such a measure will be directly available to the JIT and can be used in further investigations by that team, irrespective of the country where the investigation took place. This is a third important advantage. The fact that, in this case, information can be shared without any formalities and without any delay is based on the principle of mutual trust between the members of the JIT. Although it is often considered that this mutual trust is present between the Member States of the European Union, there is a need to strengthen this mutual trust.<sup>15</sup> According to Article 13(1), information obtained by the members and seconded members of the JIT may be used: a) for the purpose for which the team has been set up, b) for detecting, investigating, and prosecuting other criminal offences with the prior consent of the Member State where the information became available, c) for preventing an immediate and serious threat to public security, and d) for other purposes to the extent that this is agreed between the Member States setting up the team. Although this is an important step forward, it is to be regretted that it only concerns information and does not include evidence. Thus, if a Member State in its national legislation has not provided for the possibility to exchange evidence generated in a JIT, the conventional methods of providing evidence have to be used. Article 13(10) may also concern information which became available through a third State by a letter of request. This means that this information may be used for detecting, investigating, and prosecuting other offences with the prior consent of that Member State (Article 13(10)(b) EU Convention on Mutual Assistance). However, this paragraph limits the possibility for the providing State to withhold its consent. Consent by the Member State may be withheld only in cases where such use would endanger criminal investigations in the Member State concerned (the providing State) or in respect of which that Member State could refuse mutual assistance. It remains to be seen whether this provision will be (ab)used by Member States in the future to circumvent the possibility of direct information exchange.

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<sup>15</sup> That mutual trust has to be strengthened especially with regard to further and closer cooperation within the EU follows from the Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust between Member States, Brussels, 19 May 2005, COM(2005) 195 final.

Since Article 13(10)(b) only concerns information given by a Member State, information from a third State can only be used for the purpose for which the JIT has been set up in conformity with Article 13(10)(a). In other cases the principle of speciality remains applicable. According to Article 13(9), other information can also be directly exchanged. It states that members of a JIT may, in accordance with their national law and within the limits of their competence, provide the team with information available in their country. Although this paragraph only refers to members of a JIT, according to the explanatory report, the same is true for seconded members.

In the first discussions on the JIT, the attribution of operational powers to the members of the JIT was considered as another major advantage of JITs. It was thought that all members of the JIT should have the same powers in accordance with the *lex loci*. However, the current legal framework does not provide an obligation to endow seconded members with operational powers, but it does not exclude it either. It is up to the Member States to provide the JIT members with operational powers. With regard to the operational powers of the seconded members, Article 13(7) states that they are entitled to be present when investigative measures are taken in the Member State of operation, unless the team leader decides otherwise.<sup>16</sup> Any decision to exclude a seconded member from being present may not be based on the sole fact that the member is a foreigner. The team leader takes these decisions in accordance with the law of the Member State where the team operates. The team leader may decide that seconded members will be entrusted with certain investigative measures.<sup>17</sup> Such an operation takes place in accordance with the law of the Member State where the team operates and must be approved by both the Member State of operation and the seconding Member State. Preferably, such approval is included in the agreement establishing the team, but it may also be granted at a later stage. It may also apply in general terms or it may be restricted to specific cases or circumstances.<sup>18</sup>

The first impression given by the joint Europol/Eurojust research which made available all implementing legislation on JITs in the Member States is that only very few States have used the possibility to entrust seconded members with full operational powers. Ireland and Sweden seem to have excluded the possibility to grant investigative measures to seconded members and Denmark and UK have granted only limited powers. Most of the Member States have excluded coercive measures from the competences of seconded members. In general, States seem to be very reluctant to allow operational activities by foreign officers on their territory.<sup>19</sup> In order to decide whether an operation is allowed and under what conditions it might be executed, extensive knowledge of the law of the State in which the team operates is required. It is therefore important that seconded members are sufficiently educated in the law of the State of operation as well as in the law of the other States participating in the JIT, as they are potential places of operation.

#### **2.4. Participation of Europol and Eurojust**

It is obvious that Europol can play a central role in JITs, especially in intelligence gathering and analysis. It can furthermore assist a JIT in providing its knowledge of the criminal world, coordinating operations by JITs, and providing advice to JITs on technical matters.<sup>20</sup> Article 30 of the EU Treaty, after the last amendment by the Treaty of Nice, specifically referred to the

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<sup>16</sup> Art. 13(5) of the EU Convention on Mutual Assistance, Art. 1(5) of the Framework Decision on JITs.

<sup>17</sup> Art. 13(6) of the EU Convention on Mutual Assistance, Art. 1(6) of the Framework Decision on JITs.

<sup>18</sup> Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU, *OJ* C 379, 29.12.2000, p. 18.

<sup>19</sup> These are only the preliminary results of this compilation of national legislation. The final results are expected at the end of 2006.

<sup>20</sup> See also Recommendation of 30 November 2000 to Member States in Respect of Europol's Assistance to Joint Investigation Teams set up by the Member States.

involvement of Europol with JITs, but did not include any provisions on the formal participation of Europol officers in a JIT. Article 30(2)(a) states that joint teams can include representatives of Europol in a supporting capacity. Formal participation of official Europol staff is not regulated in the Europol Convention and will only become possible after the entry into force of the Protocol of November 2002, amending the Europol Convention.<sup>21</sup> Fortunately, this state of affairs does not exclude an active role for Europol at this moment. In the first place, Europol can share the outcome of an Analysis Work File (AWF)<sup>22</sup> with a JIT if all participants in the analysis group agree on this. A second possibility is to include officials of the Europol National Units (ENUs) in the JIT or to make members of the JIT part of an ENU.<sup>23</sup> ENUs function as the communication channels between Europol and the Member States and all data must be sent through the ENUs. In all these cases, the involvement concerns officials of the national police forces rather than Europol officials, since that is not possible under the present legal framework.

As regards the involvement of Eurojust officials, a first step has been taken in Article 31 of the EU Treaty which mainly provides for a supportive or facilitating function for Eurojust. However, Eurojust members can act in two capacities: as national members in which case they are bound by their national law, or as Eurojust representatives, representing Eurojust as a College, in which case they are bound by the Eurojust regulations. Consequently, a national member of Eurojust can officially participate in a JIT in his/her capacity of judicial authority under domestic law. In that case, this member does not represent Eurojust, but has the advantage of also being part of the Eurojust network.

### **3. Consequences of the existence of a dual legal basis to establish a JIT**

As stated in Section 2, the JIT instrument has now been adopted in two legally binding instruments, namely the EU Convention on Mutual Assistance and the Framework Decision on JITs. Unlike treaties or conventions, framework decisions in themselves cannot in principle produce any direct effect.<sup>24</sup> Therefore, strictly speaking, the Framework Decision cannot be used as an autonomous international legal basis for the establishment and the operation of JITs. This means that the extent to which JITs can be operated based on the Framework Decision depends entirely on the degree to which countries have created a legal basis for JIT cooperation in their domestic legislation. The situation is different in case the EU Convention on Mutual Assistance is used as the legal basis for a JIT, because some of these provisions can be applied directly as a result of their self-executing character.<sup>25</sup> The EU Convention on Mutual Assistance entered into force on 23 August 2005 and is now in force for nineteen Member States.<sup>26</sup> As the Framework Decision on JITs will terminate once the EU Convention enters into force the significance of the Framework Decision on JITs is now limited, but not void. For the States that have not yet ratified the

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21 Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the Establishment of a European Police Office (Europol Convention) and the Protocol on the Privileges and Immunities of Europol, the Members of its Organs, the Deputy Directors, and the Employees of Europol, *OJ C* 312, 16.12.2002.

22 'Analysis Work File means a file opened for the purpose of analysis as referred to in Article 10(1) of the Europol Convention', Art. 1 of the Act of 3 November 1998 adopting rules applicable to Europol analysis files.

23 Art. 4 of the Europol Convention.

24 Art. 34(2) of the EU Treaty, see this Section below.

25 For instance, Art. 13(5), (7), (10). See also C. Rijken *et al.*, *Joint Investigation Teams in the European Union. From Theory to Practice*, 2006, pp. 10-13.

26 It has entered into force for Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Lithuania, Latvia, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, and the United Kingdom. It will enter into force for Slovakia on 1 October 2006. According to Art. 27(3), the Convention enters into force for the ratifying Member States, after the ratification of the eighth Member State who was a member of the EU at the time the Convention was adopted.

Convention, the establishment of a JIT might be based on the Framework Decision if they have implemented the Framework Decision properly. Although, according to the Framework Decision on JITs, the EU Member States must transpose into national law the obligations imposed on them under the Framework Decision by 1 January 2003, initially, and later by June 2004, many States failed to adopt implementing legislation in time.<sup>27</sup> The legal obligations for States following the adoption of a framework decision in general and the consequences of not implementing a framework decision are set out below.

### **3.1. Direct effect of framework decisions?**

In accordance with Article 34(2)(b) of the EU Treaty, a framework decision is similar to a directive under the first pillar in Article 249 EC, since it is binding on the Member States as regards the result to be achieved. The Member States are free to choose the form and measures for achieving the result. This freedom is identically formulated for directives and framework decisions and therefore it is likely that the interpretation given to this freedom with regard to directives can be equally applied to framework decisions. This freedom means in particular that a Member State has a discretionary competence to decide on the kind of measures to be taken, but not as regards the contents thereof. The European Court of Justice (ECJ) has developed case-law on several requirements that must be fulfilled in order to meet the implementation test. These requirements are: full effect, legal certainty, the binding nature of the measures, specificity, precision, and clarity.<sup>28</sup> There are roughly two implementation techniques, namely, the adoption of national implementation rules and the adoption of provisions which refer to an adopted directive.<sup>29</sup> Neither this case-law, nor Article 249 of the EC Treaty, nor Article 34(2)(b) of the EU Treaty specifies what national authorities have to adopt implementing measures, although it is determined that the implementing rules must be legally binding.<sup>30</sup> It all depends on the constitutional division of powers and this remains the autonomy of the Member State concerned as long as it implements the directive by means of national provisions of a binding nature. Or, to use the words of Prechal, '[t]hus the choice of the measures, like the choice of the competent authority, is made within the framework of national constitutional law'.<sup>31</sup>

The essential difference compared to directives is that Article 34(2)(b) explicitly denies direct effect to framework decisions. This means that individuals cannot directly invoke the provisions of a framework decision before a national court. Yet, very importantly, in the *Pupino* case<sup>32</sup> the ECJ has recently declared the doctrine of consistent interpretation also applicable to framework decisions. The Court developed this doctrine under the first pillar in cases where Member States failed to implement directives correctly or in time and reliance on direct effect was not possible, because of a lack of horizontal direct effect of the directives in question.<sup>33</sup> The doctrine entails that in such cases the national court must interpret a national rule on the matter in conformity

27 For an overview of the extent to which the Member States of the EU have implemented this Framework Decision, see the Report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, Commission of the European Communities, 7 January 2005 COM(2004) 858.

28 S. Prechal, *Directives in EC Law*, 2005, pp 73-91. Th. Vandamme, *The Invalid Directive, The Legal Authority of a Union Act Requiring Domestic Law Making*, 2005, pp. 234-236.

29 F. Capotorti, 'Legal Problems of Directives, Regulations and their Implementation', in: H. Siedentopf *et al.*, *Making European Policies Work, The Implementation of Community Legislation in the Member States*, 1988, pp. 160-163.

30 S. Prechal, *Directives in EC Law*, 2005, pp. 73, 81-85.

31 S. Prechal, *Directives in EC Law*, 2005, p. 74.

32 Case C-105/03, *Pupino*, [2005] ECR I-5285.

33 Case C-14/83, *Von Colson and Kamann*, [1984] ECR 1891. Recently the ECJ has decided that 'during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it', thus extending the direct applicability of directives to the period allowed for transposition. Case C-212/04, *Adeneler a.o.*, not yet reported.

with the directive. This is only possible if the national rule leaves sufficient room for such interpretation and if it does not go against legal certainty (*contra legem*).<sup>34</sup> Furthermore, the provision in the directive must be clear and not liable to multiple interpretations.

The important question here, of course, is whether claims from individuals in criminal procedures for consistent interpretation with the Framework Decision on JITs would be successful. This seems unlikely as, in contrast to for instance the Framework Decisions on the European Arrest Warrant or on the Status of Victims of Crime in Criminal Procedures, the Framework Decision on JITs does not directly provide rights for or impose obligations on individuals. Therefore, a case in which an individual claims direct application of this Framework Decision is not likely to succeed. Furthermore, the Framework Decision leaves a rather broad discretionary power to the Member States for those provisions that may affect individuals, for instance, regarding the operational measures. This makes consistent interpretation even more difficult.

However, with regard to the Framework Decision on JITs the *Pupino* case is important since the ECJ had to make another decision before it decided that consistent interpretation was applicable to the third pillar. The ECJ has based the obligation of consistent interpretation in the first pillar on the binding force of the directive pursuant to Article 249 of the EC Treaty, on the one hand, and on the principle of Community loyalty, on the other (Article 10 EC Treaty).<sup>35</sup> In the *Pupino* case, the Court equally based the duty of framework decision-consistent interpretation on the principle of Community loyalty, thus extending this principle to third pillar issues.<sup>36</sup> It stated that:

‘It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion.’<sup>37</sup>

Although the court did not directly refer to Article 10 EC Treaty in this regard, it explicitly rejected the statement that the Treaty on European Union does not contain a provision similar to Article 10 of the EC Treaty in grounds 39 and 40. Some writers argue that this judgment has opened the door for the general principles in the first pillar to enter the field of the third pillar,<sup>38</sup> while others base loyal cooperation on a commonly accepted principle in international public law, namely, *pacta sunt servanda*.<sup>39</sup> But although Article 10 of the EC Treaty is not directly referred to by the Court in the *Pupino* Case, the words chosen to establish loyal cooperation nevertheless seem to refer to Article 10 of the EC Treaty. This means that, besides the obligation based on Article 34(2)(b) of the EU Treaty to implement a framework decision, a more general obligation to comply with the content of the framework decision can be based on the principle of loyal cooperation, enforceable as such before the national court even in the absence of direct

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34 Joined Cases C-397/01 to C-403/01, *Pfeiffer a.o.*, [2004] ECR I-8835.

35 M. Fletcher, ‘Extending “Indirect Effect” to the Third Pillar: the Significance of *Pupino*?’ , 2005 *European Law Review*, no. 6, p. 864.

36 F. Kristen and J. Simmelink, ‘Europese integratie door de rechter: Kaderbesluitconforme interpretatie’, 2005 *Delikt en Delinkwent*, no. 9, pp. 1072-1073.

37 Ground 42.

38 For instance, A.H. Rarga, in a note to the case of the German Constitutional Court, Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law, 2006 *Common Market Law Review*, no. 43, pp. 583-595. On this matter also M. Fletcher, ‘Extending “Indirect Effect” to the Third Pillar: the Significance of *Pupino*?’ , 2005 *European Law Review*, no. 6, pp. 862-877.

39 1969 Vienna Convention on Treaties, 3331 United Nations Treaty Series, Art. 26. Although a framework decision is not a treaty it is an agreement between States under public international law. Also G. Corstens, ‘Eerste ‘strafarrest’ van het Hof van Justitie EG over een kaderbesluit’, 2006 *Nederlands Tijdschrift voor Europees Recht (Dutch Journal for European Law)*, no. 1/2, p. 28.

effect. It might turn out that this conclusion is even more important for future cooperation in the third pillar than the conclusion that consistent interpretation is applicable in this area.

#### **4. Problems experienced relating to the legal framework of a JIT**

During its EU presidency in the second half of 2004, the Netherlands was involved in two efforts to establish a JIT.<sup>40</sup> Only one reached the operational phase, but for the purpose of identifying the obstacles to the functioning of a JIT, it is worth looking at both efforts. In this Section, the legal framework outlined above is evaluated on the basis of these two instances of practical application. Before entering into the legal merits of the two cases, they will first be briefly introduced.

##### **4.1. The JIT project<sup>41</sup>**

The JIT project grew out of an initiative to combat trafficking in human beings (hereinafter: THB) from and through Bulgaria from the Dutch representative at the EPCTF (European Police Chief Task Force) in cooperation with a UK Chief Constable. Exploratory talks were held with Germany and Belgium which proved enthusiastic about the idea to combat THB by using the possibility of closer cooperation through a JIT. Although Europol was at that time also focusing on THB from and through Bulgaria, the two initiatives were only merged to a limited extent and remained co-existent. A steering group was established in which representatives on police level from the four participating States took part and also a representative from Bulgaria at a later stage. This steering group was chaired by the Dutch representative in the EPCTF who was assisted in this task by a project board. Europol and Eurojust participated as observers in the steering group. Persons from both the strategic as well as the operational level were participating in the steering group meetings. Not all of the steering group members were particularly concerned with THB.

The steering group faced three main challenges. First, it had to clarify whether the setting up of a JIT according to Article 13 of the EU Convention on Mutual Assistance was possible between the countries represented in the steering group. Second, a criminal case on THB ongoing in the respective countries had to be identified. And thirdly, a JIT had to be established and managed. Furthermore, a Joint Intelligence Group (JIG) was set up and an AWF called Maritsa was opened at Europol. Here again, two initiatives were co-existent although their tasks overlapped. The JIG was managed by a team leader who was supervised by the project manager of the JIT project. The strategic meeting of 17 September 2003, at which persons were appointed in the various functions and the structure of the project was agreed upon, can be regarded as the formal start of the JIT project. As said, this JIT project did not reach the operational phase, for reasons that will be explained below.

##### **4.2. The Drugs JIT<sup>42</sup>**

A second initiative to establish an operational JIT came from the Dutch and UK National Crime Squads. The case for which this JIT was established related to an investigation in the UK, in which information had been received about a substantial amount of drugs being held in the

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40 The analysis in this and the following Section is based on the results of the Scientific Research Group.

41 For more details on the JIT project, see: C. Rijken, Scientific Research JIT, Final Report, 20 December 2005, printed at the Dutch National Crime Squad, Driebergen.

42 For more details on the various aspects of the Drugs JIT see: Scientific Research Group under the supervision of Dr. C. Rijken, Scientific Research JIT, Report on the Drugs JIT, (Third Sub-report), 20 December 2005, not published.

Netherlands. It was suggested that a Netherlands-UK JIT be set up. As a next step, the public prosecution services of both countries liaised with the national representatives of Eurojust of both countries. After agreement had been reached that the drugs case investigated by the NCSEW (National Crime Squad of England and Wales) was a suitable case, the UK made an oral request to the Dutch officials for assistance and support in investigating the Dutch side of this case, while the UK part of the investigation was not a subject for the JIT and remained under investigation in the UK.

A first Agreement on the Establishment of a JIT was drafted on 24 November 2004, and this was later superseded by an amended version of 17 January 2005. The key players involved in the preparatory phase were largely identical to those participating in the JIT itself. Before the JIT took up its duties in the middle of January 2005, its members had a week of preparatory training and team-building. Similar to the above JIT project, the two aims of fighting crime and establishing a JIT were also formulated for the Drugs JIT. The difference between the Drugs JIT and the JIT project is that a suitable case to start a JIT had already been identified in the case of the Drugs JIT. Following the establishment of the Drugs JIT, several persons were arrested in the UK and the Netherlands, some of whom were convicted. Some questions concerning this JIT came up in a court case in the Netherlands (see Section 4.3.). Besides, a considerable amount of money was confiscated in the Netherlands. The JIT was operational for approximately three months.

#### ***4.3. The legal basis for establishing a JIT in the case of the JIT project***

Within the first JIT project, the non-compliance of the Member States with the requirements imposed by the European legal framework turned out to be one of the main obstacles to the establishment of an operational JIT. With regard to the implementation on a national level of the Framework Decision on JITs or Article 13 of the EU Convention on Mutual Assistance in the States involved in this JIT project (Belgium, Germany, the Netherlands, United Kingdom, and later also Bulgaria), the following picture emerged. The UK had already adopted some provisions and guidelines in 2002, indicating that JITs may be formed under the Framework Decision of 13 June 2002. The Dutch had legislator implemented Article 13 of the EU Convention on Mutual Assistance by means of an Act of 18 March 2004, which entered into force on 1 July 2004. In Belgium, the implementing legislation entered into force on 3 January 2005, and in Germany, specific regulation on JITs entered into force on 8 August 2005. Given that at the start of the project, the UK already had implementation legislation in place, Belgium and the Netherlands were preparing implementing legislation, and Germany initially believed it would be able to participate in a JIT within the framework of existing legislation, there was no need to exert political influence on the participating countries to adopt the necessary legislation. Later on, however, it turned out that Germany did require additional implementing legislation to formally establish a JIT.<sup>43</sup> As Germany, in this project, was regarded as the country with the most potential to participate in an operational JIT, since it had already dealt with several cases on THB from Bulgaria, this delayed the process. Ironically, Bulgaria, which joined the steering group at a later stage and as a non-EU Member State was not considered as a serious partner for establishing a JIT, had had the necessary legislation in place from September 2004, since it had ratified the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters

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<sup>43</sup> Report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, Commission of the European Communities, 7 January 2005, COM(2004) 858, p. 5.

of the Council of Europe, providing a parallel provision on JITs in Article 20.<sup>44</sup> Although the UK had implementing legislation in place, it was not considered as a candidate for establishing a JIT with, as it had not been identified as having a great problem with THB from and through Bulgaria.

Despite the fact that, at the beginning of the project, the issue of lacking JIT-related legislation was mentioned on several occasions, the fact that Germany needed additional legislation had a significant impact on the process within the steering group. Some of the participants were disappointed and frustrated and it was difficult in this environment to reformulate the goal of the project. The fact that Germany needed additional legislation was communicated within the steering group in September 2004 and, at that time, a suitable case for establishing a JIT had not yet been identified although it was one year after the project had officially started. Therefore, other reasons for the fact that an operational JIT could not be established must be considered as well (see Section 5).

#### ***4.4. The legal basis for establishing a JIT in the case of the Drugs JIT***

At first glance, the legal basis for establishing a JIT between the UK and the Netherlands seemed to be straightforward: both had implementing legislation in place at the moment when the establishment of the Drugs JIT was considered (autumn 2004). However, when taking a more in-depth look at the national legal frameworks, some important issues must be clarified.

The first issue concerns the fact that the Dutch implementation legislation of Article 13 of the EU Convention on Mutual Assistance and more specifically Article 552qa(1) of the Dutch Code of Criminal Procedure (CCP) state that a JIT can only be set up insofar as a *treaty* allows for this possibility. Taking this requirement strictly, it must lead to the conclusion that a JIT between the UK and the Netherlands was not possible at that time, as the implementing legislation in the UK was to implement the Framework Decision on JITs and a framework decision cannot be considered a treaty.<sup>45</sup> However, since the Framework Decision on JITs is an exact copy of Article 13 of the EU Convention on Mutual Assistance, this view seems to be too rigid to support. In this particular case, the Framework Decision on JITs must be regarded as an indirect conventional basis for establishing a JIT. By adopting the teleological interpretation method and by taking the intentions of both the Netherlands and the UK into consideration, it is clear that the parties wished to create the possibility of starting a JIT in accordance with the text of Article 13 and the Framework Decision. Furthermore, the treaty requirement also refers to the EU Treaty and framework decisions based on that.<sup>46</sup> Fortunately, on 11 August 2006 the Rotterdam District Court decided on the legal basis of the Drugs JIT and stated that the Framework Decision was binding upon the Member States and had a supranational character. It considered that, following the *Pupino* judgment, national law has to be interpreted in the light of the wording and aim of the Framework Decision. Consequently, there was sufficient legal basis between the UK and the Netherlands to establish a JIT despite the treaty requirement in Dutch national law.<sup>47</sup> This consideration concerning the *Pupino* case however seems to be based on the principle of loyal

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44 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters CETS no. 182, entered into force on 1 February 2004. For Bulgaria, this Protocol entered into force on 1 September 2004.

45 In the Report from the Commission of the EU on national measures taken to comply with the Council Framework Decision of 13 June 2002 on JITs of 7 January 2005, the Netherlands was criticized because of the inclusion of this treaty requirement in the national legislation. Report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, Commission of the European Communities, 7 January 2005, COM(2004) 858, p. 5.

46 This line of reasoning was also adopted in the Netherlands with regard to the European Arrest Warrant, because the Dutch Constitution requires a treaty as the legal basis for extradition, Dutch parliamentary documents (*Kamerstukken II*) 2001-2002, 23 490, no. 209.

47 Decision of 11 August 2006, Rotterdam District Court, *LJN AY6629*, [www.rechtspraak.nl](http://www.rechtspraak.nl).

cooperation and not so much on the principle of consistent interpretation as the court suggested. A need for consistent interpretation cannot be identified in this case and one may wonder whether consistent interpretation would in fact be possible, now that the national legislation does not leave any room for such interpretation. However, with the entry into force of the EU Convention on Mutual Assistance, this issue will now only play a role in relation to EU Member States that have not (yet) ratified this Convention, in which case the Framework Decision on JITs should serve as the legal basis.

The second issue concerns the implementation legislation in the UK. The UK merely converted the provisions contained in Articles 1(7), 2 and 3 of the Framework Decision into legal instruments and communicated that it did not need to legislate in relation to other matters. UK authorities argued that they did not need a statutory legal basis to set up a JIT and, therefore, further rules on JITs were provided by means of a circular.<sup>48</sup> As stated above in Section 3 each Member State is obliged to implement framework decisions in a manner which satisfies the requirements of clarity and legal certainty and thus to convert the provisions of the framework decisions into national provisions having binding force. According to a report of the Commission, circulars are not legally binding and thus the UK was not in compliance with the Framework Decision.<sup>49</sup> Considering the rather strict interpretation of the European Court of Justice as regards the implementing measures to be used to implement directives in the first pillar, it is most likely that the Court will follow the Commission's reasoning.<sup>50</sup>

A last issue is the fact that the Guidelines of the Dutch Board of Procurators General on International Joint Investigation Teams<sup>51</sup> prescribe that a JIT can only be set up if traditional procedures of transnational cooperation will not suffice to achieve the same goal. It can be questioned whether this was the case for the Drugs JIT. However, in the case before the Rotterdam District Court, the court held that it was understandable and acceptable that a rather easy case was the subject of the first operational JIT.

Furthermore, according to these Guidelines of the Dutch Board of Procurators General, a letter of request was needed to bring a JIT into effect. But according to UK national law, namely Section 7 of the UK Crime (International Cooperation) Act 2003, a letter of request can only be issued as a request for 'evidence'. This issue was solved by not explicitly asking for the establishment of a JIT in the formal letter of request. Indeed, it was not necessary to request this, as it had already been asked by means of an informal oral request.

#### **4.5. Conclusion on the legal framework**

In conclusion, it must be stated that finding the proper legal basis for the establishment of a JIT in both the JIT project as well as the Drugs JIT was problematic and surrounded by uncertainty. It seems that these problems are partly due to the exceptional situation in which two instruments with an identical content co-exist, namely, Article 13 of the EU Convention on Mutual Assistance and the Framework Decision on JITs. These problems have already been resolved to a large extent with the entry into force of the EU Convention on Mutual Assistance. Partly, these

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48 These authorities claim that the power to establish a JIT finds its basis in the Royal Prerogative and that they are allowed, for instance, to set up JITs unless this is prohibited under procedural law. On the Royal Prerogative, see also S. de Smith *et al.*, *Constitutional and Administrative Law*, 1999, pp. 121-164.

49 Report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, Commission of the European Communities, 7 January 2005, COM(2004) 858, p. 4.

50 See for instance Case C-66/03, *Commission v. France*, [2003] ECR I-14439; Case C-212/02 *Commission v. Austria*, unpublished. Also S. Prechal, *Directives in EC Law*, 2005, p. 83.

51 Circular of the Board of Procurators General, 1 June 2004, *Staatscourant (Dutch Government Gazette)*, 2004, 143.

problems are caused by the insufficient or unclear transposition of the Framework Decision and/or the Convention.

Furthermore, it can be concluded that it is remarkable that, regardless of these legal problems, the UK and the Netherlands were able to establish the Drugs JIT at all, while in the JIT project a JIT could not even be established during the period that it was thought that Germany was legally able to do so. Therefore, in both cases it is worth looking at other decisive factors in the process.

## **5. Factors influencing the establishment and operation of a JIT**

### ***5.1. Information exchange***

As stated above in Section 2.3, one of the major advantages of a JIT is the informal information exchange between the States participating in a JIT. The relevant provision was adopted because information exchange currently causes enormous delays in cooperation in criminal matters. These delays are caused, for instance, by the fact that the authority seeking information is not familiar with the organizational structure and proceedings in the requested country, or by the fact that the formal agreement of different authorities is required once the information exchanged is used in a trial. But although the JIT legal framework provides for direct information exchange, the projects under research show that this does not solve all the problems related to this matter.

#### ***5.1.1. Information exchange within the JIT project***

The problematic information exchange between different countries is a well-known problem within the EU. To help resolve this problem, a Joint Intelligence Group (JIG) was set up within the first JIT project, which operated parallel to the AWF, Maritsa, within Europol. From the beginning, the role of the JIG was not clear. On the one hand, it was considered as a group of proactive investigators, who provided the AWF with data, *i.e.*, the JIG operated as a catalyst of the AWF. On the other hand, it was considered a target group within the framework of the AWF at Europol, *i.e.*, playing a role after the AWF had made its analysis, thus as an addition to the AWF. To further complicate the matter, the composition of the two also overlapped to some extent.

A common problem with AWFs is that too little live data is fed into the AWF. This was also the case in this particular AWF on THB from and through Bulgaria. Countries were reluctant to submit live data, to avoid endangering ongoing national investigations. For some countries, for instance the Netherlands, the lack of the provision of up-to-date live information was complicated by the fact that a centralized database on THB cases into which regional data are fed, does not exist. Another difficulty in the information supply to the AWF, Maritsa, is that much information was often pre-analyzed at a national level, creating difficulties for the Europol analysts in cross-checking the information. Besides, in some cases, information was exchanged bilaterally between Member States without feeding it into the AWF at Europol or the other Member States. For the analysis group of the AWF, Maritsa, it was often difficult to analyze the information as it was not translated before it was transmitted. Following this inadequate information flow from the national levels to the AWF, Maritsa, the latter could not identify a suitable case for the project. The JIG team leader could not really change this situation, as he largely depended on the national units in the participating countries to provide relevant data.

The analysis group responsible for analyzing the information in the AWF was able to share the analyzed information from the AWF, until one of the Member States objected to this practice. Europol representatives emphasized that they were bound by Europol regulations that restricted

information sharing from AWFs to non-members of the Analysis Group without the agreement of the latter. This hampered the efficient exchange of information and reduced the role of the JIG team leader even more.

The fact that the JIG and the AWF, Maritsa, were co-existent and that the role of the JIG was not clarified by the steering group caused duplication and confusion in the information flows. In this way, the JIG did not have any clear competence.

### *5.1.2. Information exchange within the Drugs JIT*

Within this first operational JIT between the UK and the Netherlands, the facilitated information exchange within the JIT structure could not be used to its full advantage. The rather strict rules of disclosure within the UK prevented this. Furthermore, the fact that a large part of the case (the mother case) remained in the UK and did not become part of the research within the JIT also complicated the exchange of information.

In general, disclosure describes the extent to which the prosecution and the defence have to disclose to each other, before trial, information pertinent to the case.<sup>52</sup> In the UK, the duty of disclosure is regulated by Part I, Sections 1 to 21 of the Criminal Procedure and Investigations Act 1996 (CPIA),<sup>53</sup> supplemented by a Code of Practice issued under that Act (and that will be regulated by Sections 32 to 39 of the Criminal Justice Act (CJA 2003) once it comes into effect). The Code of Practice makes the investigator responsible for ensuring that any information relevant to the investigation is recorded and retained.<sup>54</sup> As a general rule, the prosecution has the duty to disclose the evidence which is at its disposal to the defence. This duty has two aspects: the obligation to notify the defence of the evidence upon which the prosecution intends to rely and, secondly, the duty to make available to the defence any material of relevance to the case upon which they do not intend to rely – ‘unused material’.<sup>55</sup> Unused material has to be disclosed if it is relevant and assists the defence or if it undermines the prosecution’s case, unless the judge decides that it need not be disclosed in the interest of public interest immunity (PII).<sup>56</sup> This means that unused material need not automatically be given to the defence. Normally, a PII will be awarded for the protection of the source of sensitive information. Thus, material must not be disclosed if a court has concluded that it is not in the public interest to do so (Section 3(6) CPIA). According to Seabrook and Sprack, the public interests that might justify an objection to disclosure in a criminal case include those that fall into three categories: protecting police operations (*e.g.*, informant immunity and analogous cases), protecting national security and the proper functioning of the government and its services, and protecting confidences (*e.g.*, social service reports).<sup>57</sup> Ultimately, it is the responsibility of the court to decide on the extent of disclosure.<sup>58</sup> In the Drugs JIT, most of the important information was considered sensitive information.<sup>59</sup> As the UK investigators had to comply with British law and policy when supplying information to the JIT, they had to safeguard sensitive information from being disclosed.

In the Netherlands the system is different, because any information used as a basis for investigative powers must be disclosed in court and may well become known to the defence. This gave

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52 S. Seabrooke *et al.*, *Criminal Evidence and Procedure*, 1999, p. 226

53 For more information on this Act, see J. Niblett, *Disclosure in Criminal Proceedings*, 1997, pp. 228-247.

54 For an overview of the material to be retained, see J. Sprack, *A Practical Approach to Criminal Procedure*, 2004, pp. 139-140.

55 J. Sprack, *A Practical approach to Criminal Procedure*, 2004, p. 137-138, S. Seabrooke *et al.*, *Criminal Evidence and Procedure*, 1999, pp. 226-238.

56 J. Niblett, *Disclosure in Criminal Proceedings*, 1997, pp. 104-105, 138-153, and 233-235.

57 S. Seabrooke *et al.*, *Criminal Evidence and Procedure*, 1999, p. 191.

58 J. Niblett, *Disclosure in Criminal Proceedings*, 1997, pp. 115-116.

59 On disclosure of sensitive information, see J. Niblett, *Disclosure in Criminal Proceedings*, 1997, pp. 258-260.

rise to some problems which were solved by using the Europol channel for sensitive information, after which it would be sent to the Dutch desk and the International Network Service of the National Crime Squad, who would pass it on to the Drugs JIT. In that way, the source of the sensitive information was protected. Europol thus acted as a firewall. Only non-sensitive information could be brought into the JIT directly.

It can be concluded that, due to the disclosure rules and the fact that persons directly involved in the Drugs JIT did not have relevant sensitive information at their disposal, together with the fear of jeopardizing the mother case, led to the situation that conventional channels of information exchange had to be used and that the benefits of using a JIT model were reduced.

## ***5.2. Organizational structure***

The two projects under consideration differ as to the way in which they were organized and managed. As will be explained below, in the JIT project, a primarily top-down approach was chosen, although certain cases in Germany provided the first operational input in this exercise. As the Drugs JIT grew out of an operational case under consideration in the UK, the approach taken in this case can be labelled as a bottom-up approach.

### *5.2.1. Top-down in the JIT project*

The steering group had a central position in the organization of the JIT project. What made the functioning of the steering group more difficult is that there was a marked lack of continuity as regards the presence of persons involved. Sometimes persons who could not take binding decisions attended the meetings, which was frustrating for other members because decisions could then not be taken and they had the impression that the project was not taken very seriously by those particular States. Furthermore, it raised the question of how the transfer of information from one representative to the next could be ensured. The risk of not being well-informed or of unnecessarily duplicating discussions is present in such cases. These circumstances are not beneficial for the development of mutual trust and confidence, which is regarded as one of the most important prerequisites for intensified cooperation. In this way, the top-down approach became an obstacle rather than a facilitating factor. Besides, the management of the JIT project was problematic. The necessary tasks were executed on the basis of willingness and agreements and not on the basis of a real mandate giving the persons involved formal authoritative power that could be formally exercised. Furthermore, the social climate within the steering group did not always contribute to a constructive approach.

The exaggerated structure of the whole project, including a steering group, a project board, a JIG and a project manager, combined with the lack of clarification concerning the relations between the JIG and the AWF, Maritsa, on the one hand, and the JIT project and the working group at Europol, on the other, are important reasons why further results in the JIT project failed to be realized.

### *5.2.2. Bottom-up in the Drugs JIT*

The Drugs JIT was composed more horizontally as it consisted of four persons from the judicial authorities (two public prosecutors from the Netherlands and two crown prosecutors from the UK) and thirteen persons from the police authorities. The latter comprised the JIT team leader and the investigation team supervisor (responsible for the day-to-day operation of the JIT), seven investigators, and one administrative support person for the National Crime Squad of the Netherlands. There were three seconded British police officers who were accommodated in the Netherlands on the basis of a rotating system. The national members of Eurojust from both States

had a supporting, facilitating, and coordinating role and acted on the basis of their national law. Europol assumed the role of provider of analytical support in this JIT. A Dutch analyst from Europol was on-site with the Drugs JIT two or three days a week. The Europol analyst was to look at information and to feed it into the AWFs at Europol, and to assess, in the case of a cross match with the Dutch investigation, the information that was exchanged with the Drugs JIT. However, the Europol analyst did not directly receive or pass on information related to the Drugs JIT, but this went through the liaison bureau in conformity with the rules set out in the Europol Convention.

Thus the Drugs JIT used a bottom-up approach in which the initiative originated from the operational level. A concrete investigation was already available at the outset and further intelligence gathering was built up around it. A bottom-up approach allows practitioners who will eventually perform the intelligence gathering and investigation to make the necessary decisions, instead of a (probably politically driven) steering group. It seems that practitioners are more motivated to apply a new tool if the need stems from ongoing investigations and pressing common problems.

The starting of the Drugs JIT was preceded by a team-building event which included training sessions on cultural differences, language training, and training on each other's legal systems and provided opportunities for the JIT members to get to know each other.

### ***5.3. Lack of a suitable case in the JIT project***

At the start of the first JIT project, it was expected, on the basis of information available in Germany, that a suitable case to start a JIT could be identified rather easily within a limited period of time. Several reasons can be given for the failure of a suitable case to materialize, such as the fact that THB is an area of crime that – by comparison – is particularly difficult to investigate and that there were doubts about the presence of large criminal organizations operating across borders in this crime area. It seems that there is, in general, more of a lack of awareness and prioritizing in investigations on THB than that it is suggested that such organizations do not exist. What is clear is that the fact that a case could not be identified caused frictions within the steering group. The Member States who were not cooperative in providing information to Europol were blamed. It also gave the steering group the time to discuss issues at length which would not have mattered so much if a case had been identified. The lack of a suitable case also revealed the different expectations of the representatives within the steering group. Some of them saw fighting THB as the main goal of the project, while others regarded the testing of the JIT concept as the main goal. This dual goal would not necessarily have been a problem in the cooperation, as the Drugs case shows, but became a source for some frustration when a suitable case could not be identified. In these circumstances the steering group was not able to reformulate its goal and to reorganize its activities, after it became clear that Germany was legally not able to set up a JIT, and a JIT-worthy case could not be identified. This allowed hidden agendas and particular interests of the respective countries or institutions to come to the fore. The consequence was that the activities of the JIT project terminated three months after new legislation had entered into force in Germany, providing a legal basis to start a JIT. However, by that time the relations within the steering group had deteriorated to such an extent, that the motivation to continue the JIT project had disappeared for most of the participants.

### ***5.4. Operational powers in the Drugs JIT***

In accordance with Article 13(6) of the EU Convention on Mutual Assistance, the law of the State where the team operates is decisive, whether the seconded members in the JIT have

operational powers or not. In the agreement between the UK and the Netherlands, the UK officers participating in the JIT were entrusted with full operational powers equal to Dutch police officers based on Article 552qb CCP.<sup>60</sup> During the course of the Drugs JIT, questions were raised on how to interpret Article 552qb CCP, as this article was formulated vaguely and was liable to multiple interpretations.

One interpretation was that foreign investigators seconded to a JIT operating within the Dutch jurisdiction do not have independent investigative powers, unless provided for by the Dutch Code of Criminal Procedure or conventions between countries. The agreement setting up a JIT cannot change this. This means that the powers of seconded members in a JIT are equal to that of other foreign officers operating on Dutch territory. However, Article 552qb CCP could also be interpreted in such a way that the phrase ‘investigative powers provided for’ refers to the powers of Dutch police officers, in which case the powers of the seconded members are equal to those of the Dutch officers. Another interpretation is that Article 552qb CCP concerns the execution of investigative powers and does not concern the allocation of these powers. In that case, the basis for the allocation of these powers must be found in Article 552qa(3) CCP, stating that the powers of seconded members must be defined in the agreement. As mentioned before, this latter interpretation is followed in the agreement establishing the Drugs JIT and Article 552qb CCP is interpreted as equating seconded members to Dutch officers.<sup>61</sup>

After several discussions and debates in the operational field, this issue was eventually clarified in a letter from the Dutch Ministry of Justice.<sup>62</sup> In this letter, the Ministry declared that the narrow interpretation of Article 552qb CCP must be considered the correct one, which means that seconded members cannot be endowed with more or other operational powers than the powers that are given to foreign officers in the Criminal Code of Procedure. Now that this clarification of Article 552qb CCP has been issued, it seems likely that the courts will follow the Ministry in its narrow interpretation. However, the Rotterdam District Court in the case on the Drugs JIT when invited by the prosecutor and counsel for the defence to give its view on the matter decided that this was not required as the seconded members from the UK did not execute operational powers independently.

### 5.5. Trust

In the Drugs JIT, the members commonly agreed that mutual trust and a willingness to proceed are very important issues in international police cooperation. When people who have to work together, know and appreciate each other, cooperation will often take place more easily as, in that case, a basis of trust is available. At the end of the JIT project, the impression was that the mutual trust that was clearly present at the beginning of the project had eroded. Especially the absence of implementing legislation in Germany, the prohibition of one of the Member States to share information from the AWF, Maritsa, with the steering group, and the lack of submission of data to Europol can be identified as the reasons for this erosion.

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60 Section 9.2 of the Amended Agreement on the Establishment of a Joint Investigation Team: Operation Became of 17 January 2005 states that: ‘[W]hen taking investigative measures in the Netherlands, the seconded members of the JIT are allowed to apply the same investigate measures as the Dutch members, except when the seconded members are limited by their national law in the application of these measures’ (Art. 552qb CCP). It furthermore reiterates, in Section 9.3, that all members of the JIT can apply the above-mentioned special investigative powers. The special investigative powers listed are: systematic observation, entering locked premises, requesting information concerning telecommunications, recording (confidential) telecommunication, systematic information gathering by an investigative officer and by a civilian officer, pseudo-purchase and pseudo-services by a police officer and by a civilian, infiltration by a police officer, and civilian infiltration. Section 9.4 states that ‘seconded members ... will be paired with a Dutch officer’.

61 C. Rijken *et al.*, *Joint Investigation Teams in the EU*, 2006, pp. 38-41.

62 Letter from the Dutch Ministry of Justice, Legislation Directorate, to the Board of Procurators General of 10 February 2006 in reply to the Board’s letter of 11 July 2005 on the powers of JIT members.

### **5.6. Practical aspects of a JIT**

As regards the Drugs JIT, the apportionment of the costs of the JIT had already been agreed upon and laid down in the JIT Agreement.<sup>63</sup> The costs of the deployment of police officers were borne by the respective national police forces as usual. Other costs were divided between the Netherlands and the United Kingdom. Unexpectedly high costs resulted from the use of mobile phones. Practitioners often fear that the costs of JITs are relatively high, which could be an obstacle to the initiation of one. As experience with JITs has so far been very limited, this fear cannot be based on practice, but seems rather to be fed by doubt. Furthermore, it seems important to make arrangements in advance concerning the division of assets confiscated by the JIT in order to avoid discussions on this matter afterwards. In the Drugs JIT a week of team-building was scheduled prior to the official commencement of the JIT. This team-building phase contributed to the open-minded and friendly atmosphere within the JIT. Basic knowledge of each other's legal system with regard to the competence of the different authorities involved and the legislation on investigative methods, as well as the organizational structure of the investigation and prosecution must be considered necessary preconditions to start a JIT.

## **6. Conclusion: It is now up to the Member States**

Although the two projects analyzed in this article are difficult to compare as only one of them reached the operational level, some important conclusions can still be drawn. A first conclusion that follows from the above is that the instrument of the JIT has so far not lived up to the high expectations. After this initial shock wears off, however, it is possible to identify sufficient assets for turning the JIT into a successful instrument for combating complex and serious international crimes. When setting up a JIT, it has to be taken into account that it can be organized in various ways and that the legal framework leaves enough options to use the instrument in a flexible way. An example of this are the joint operations set up between Spain and France, in which the judicial space that is created by the JIT instrument is used for the coordination of police and judicial activities and information exchange. The countries in question have chosen to make use of the advantages of the JIT without locating the joint team in one country. Especially for neighbouring states, such JITs could be a welcome addition to the current forms of cooperation.<sup>64</sup>

Secondly, the lesson learnt from both projects is that a JIT does indeed facilitate cooperation, but that successful cooperation remains dependent on numerous other factors. Of course an adequate legal framework is a first prerequisite. This article has demonstrated that even if States are convinced that they have implemented EU legislation properly, this may not actually be the case. The field of police and judicial cooperation in the EU is currently subject to many major developments with whose full dimensions the Member States are not yet familiar. This may lead to some uncertainties and surprises, also on the operational level. However, even more important is the observation that other factors that are less easy to identify and even less easy to change, are decisive for successful cooperation in criminal matters. The most important factor seems to be a willingness to engage in intensified cooperation on the strategic, the operational, as well as the political level. This willingness seems to be fed by mutual trust, which means that mutual trust is essential for closer cooperation through a JIT. While in the JIT project each and every

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<sup>63</sup> In accordance with paragraph 10.1 each party will pay its own costs, including salaries and flights. Special arrangements were made for accommodation, the use of vehicles and communication facilities.

<sup>64</sup> For problems related to cooperation in border regions see T. Spapens *et al.*, *Criminaliteit en rechtshandhaving in de Euregio Maas-Rijn*, Part I, 2005, especially pp. 245-250.

(possible) hurdle was broadly discussed and considered an obstacle to the establishment of a JIT, the Netherlands and the UK managed to start the Drugs JIT regardless, although that road was not yet paved either.

A third conclusion is that, finally, there appears to be an awareness of the necessity for intensified cooperation at the European level and a possibility to translate this awareness into the creation of a legal framework for police and judicial cooperation. In the recent history of the EU, proposals in policy documents have been repeated again and again, without any effort having been made to turn such proposals into legally binding instruments. This seems to have changed as, for instance, the Tampere conclusions are monitored every six months and proposals are more often transformed into legally binding instruments. However, it seems that States must still go through this development and have difficulties in keeping up with these developments as the implementation of these legally binding EU instruments is either too late, lacking, or only minimal. This reluctance of Member States to give full effect to the EU possibilities for reinforced police and judicial cooperation was also apparent in the presented case studies. Therefore, it is now up to the Member State to realize progress if police and judicial cooperation is to play the role that is envisaged for it at the EU level.