Joint Investigation Teams: Belgium, the Netherlands, the United Kingdom

Can (Or Should) Europol Participate?

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Alexandra De Moor

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Promoter: Prof. dr. Gert Vermeulen
Commissioners: Prof. dr. Brice De Ruyver
Prof. dr. Paul Ponsaers
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INTRODUCTION

Section 1. Research description

1. As a law student I have developed a more than particular interest in criminal law, criminal procedure and international criminal law. However, it was not until my stay at Europol in the summer of 2004 that I became fully aware of the growing internationalisation of crime and criminal justice. A major part of my internship with Europol Legal Affairs was dedicated to the project aimed at producing an overview of the different legal possibilities in the EU Member States to set up Joint Investigation Teams and analysing the Member States’ implementing legislation of the Council Framework Decision of 13 June 2002 on Joint Investigation Teams. The involvement in this project has been most enriching. It has changed me as a lawyer and as a person. I expect the Master Programme “European Criminology and Criminal Justice Systems” to do the same.

2. This is an excerpt from my letter of motivation dated 15 September 2005 to enter the Master Programme “European Criminology and Criminal Justice Systems”. The Master Programme did not fall short of expectations and this dissertation is the icing on the cake. To receive the degree of Master in European Criminology and Criminal Justice Systems, students have to write a dissertation, the topic of which should display a European relevance or a comparative study between at least two European countries.

3. My dissertation is devoted to a topic which has been with me for quite some time: joint investigation teams (JITs). Not only was there the project during my internship with Europol Legal Affairs. I also very briefly touched upon the topic in my Master of Law dissertation on Europol, Illegal Immigration and Trafficking in Human Beings. The dissertation for the Master Programme “European Criminology and Criminal Justice Systems” allows me to further develop this topic. I go both wider and deeper. As the title of this dissertation suggests, I have singled out three countries. Why Belgium, the Netherlands and the United Kingdom? Experience in the Member States of the European Union (EU) with the use of JITs is limited. The three countries featured in the title are among the few that have been putting theory into

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1 In the meantime the joint “Europol – Eurojust Project on JITs”. See infra 59.
practice. My focus on three countries in particular is mostly in function of the subtitle and my main research question: “Can (or should) Europol participate?”. The combination title – subtitle invites to better capture possible tensions between Member State and Union level. Adding a subtitle makes this dissertation more European than comparative in nature. The three countries are therefore mainly to be considered as exemplary. The research question as such is extremely relevant in light of the discussion held during the Austrian EU Presidency (1 January – 30 June 2006) on the Future of Europol. Judging from the relevant legal and policy instruments on the level of the EU, it was envisaged from the outset that Europol would play a role in this area. What this entails exactly, is under investigation in this dissertation.

4. As the topic of my dissertation falls under the umbrella of European police and judicial cooperation, I was pleased to find Prof. dr. Gert Vermeulen willing to act as promoter. During his course “European Institutions of Criminal Policy” JITs were indeed one of the hot topics.

Section 2. Methodology

5. This dissertation is based on three research methods (I): a study of the relevant literature, a critical analysis of the relevant (inter)national legal and policy documents and a series of interviews with key persons. I proceeded in four phases (II): gathering information, processing information, gathering more information and writing the dissertation.

I. Research methods

6. Literature study – A preliminary remark concerns the lack of scientific research into JITs. There is a lot of literature on policing in Europe and European police – and judicial – cooperation in general, yet (Europol’s participation in) JITs remain(s) largely uninvestigated. A notable exception is the 2006 publication by Conny Rijken and Gert Vermeulen Joint Investigation Teams in the European Union: From Theory to Practice, The Hague, TMC Asser Press, 2006, 2-10.

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3 Notably the “THB-JIT Project” undertaken by Belgium, Bulgaria, Germany, the Netherlands and the United Kingdom and “Drugs JIT” between the Netherlands and the United Kingdom, respectively. For the background, see C. RIJKEN and G. VERMEULEN, “The legal and practical implementation of JITs: The bumpy road from EU to Member State level”, in C. RIJKEN and G. VERMEULEN (eds.), Joint Investigation Teams in the European Union: From Theory to Practice, The Hague, TMC Asser Press, 2006, 2-10.

4 A JIT is often considered as a form of police cooperation, while in fact it is a form of judicial cooperation in criminal matters. See infra 45.
Investigation Teams in the European Union: From Theory to Practice\(^5\). Moreover, not all available information has been published. With clearance – this goes without saying - I therefore also used unpublished documents.

7. **Analysis of legal and policy documents** – On different international cooperation levels (United Nations, Council of Europe, EU), as well as on national level, legal and policy documents relevant for the topic of this dissertation have been issued. A critical analysis of these documents – including the very latest – was largely geared towards the EU, Belgium, the Netherlands and the United Kingdom. It should be noted that internal Europol documents are not featured as such. To the extent that I had access to documents which were *not* Europol public information, these were taken into account as guiding information.

8. **Interviews** – I obtained interviews from seven key persons. The respondents represent (Belgian) judicial and police authorities, Europol and the academic world. The interviews with the respondents residing in Belgium were conducted face-to-face in the form of a round table or an open interview. The other interviews were done by telephone. All telephonic interviews were semi-structured. I provided my respondents with a general framework, but which allowed them to address other issues they believed to be important. Prior to the telephonic interview I had forwarded a list with topics to the interviewees for their convenience.

9. I had a round table meeting at the Federal Prosecutor’s Office with Johan Delmulle, Hilde Vandevoorde (both from the Federal Prosecutor’s Office) and Frederic Verspeelt (from the Federal Police). Hilde Vandevoorde and Frederic Verspeelt are also National Experts in the EU Network on JITs\(^6\). The main topic of the meeting was the added-value a JIT can bring. I also obtained information on two JITs that have very recently been established with the


Netherlands (a motor vehicle theft case in the Euregio Meuse-Rhine) and with France (a terrorism case).

10. I also sat down with Willy Bruggeman, Professor for Police Science at the Benelux-University of Eindhoven, former Deputy Director at Europol and prominent proponent of international police cooperation. When discussing policing in Europe and European police cooperation (both directly and through Europol) he is simply incontournable. The main topic of this open interview was the participation of Europol in JITs today, tomorrow and the day after tomorrow.

11. My next respondent was Bart De Buck from Europol’s Legal Service. It is important to be aware of the fact that it is only natural for a Europol official to identify with the organisation. Following topics were dealt with in a telephonic interview: the state of play of the joint “Europol – Eurojust Project on JITs”; the discussion held during the Austrian EU Presidency on the Future of Europol; the official Europol position on participation in JITs; Europol’s internal preparation for participation in JITs.

12. My last two respondents were Roger Van de Sompel and Martin van Gaalen, Europol Liaison Officers (ELOs) and representing respectively Belgium and the Netherlands at Europol. To gain insight into national sensitivities that may not necessarily show from national legislation, I put following question to them: “Europol will have the mandate to participate in joint investigation team, but to what extent is your seconding Member State willing to take Europol aboard?”. I also inquired into Europol’s internal preparation for participation in JITs. Liaising between Europol and the Member States, ELOs are in a good position to make sound statements about these topics. As they remain subject to their national law, they can speak freely (and critically) about Europol. This was in particular the case with the Belgian ELO. The Dutch ELO was more prudent.

13. For the sake of completeness it was also my intention to interview Stuart Barker, the ELO representing the United Kingdom. The initial contact went smoothly and the list with topics was forwarded in anticipation of an interview (9 August 2006). Despite several reminders, I heard nothing until 30 August 2006, the day before submission (an e-mail at 11:40 AM
summarily dealing with the topics)\textsuperscript{7}. By that time I had already closed off the content-part of my dissertation, busy with lay-out to be able to submit on time. This explains the imbalance in the last part of the dissertation.

\textit{II. Phases}

14. \textbf{Gathering information (phase 1)} – Although the collection of information was a constant activity during the second semester, I was particularly active during the months of February (legal and policy instruments) and June (literature). This activity was conducted at the academic library of Ghent University (law library, European documentation centre, lecture room criminology) and at home (online resources).

15. \textbf{Processing information (phase 2)} – The literature and legal and policy documents then had to be processed with the research question in mind. This second phase took place in July 2006 both in the Swiss Alps and at home.

16. \textbf{Gathering (more) information (phase 3)} – The third phase was spread over July and August 2006. To fill in the gaps I had identified during the second phase I returned to the library and the World Wide Web. As knowledge of JITs is largely confined to law enforcement circles, I also conducted a series of interviews to obtain information of a more “inside” character.

17. \textbf{Writing dissertation (phase 4)} – The final phase took place in August 2006. The actual writing of the dissertation was the integration of all previous phases. I could also draw from my involvement in the Europol project on JITs. The aim of this dissertation was not merely to recycle and taking a personal stance was indispensable. In this respect I noticed a shift towards a more critical, minimalist approach, as I went from being a Europol intern who identified with the organisation towards a (soon to be) Master of European Criminology and Criminal Justice Systems.

\textsuperscript{7} See Addendum.
Section 3. Structure

18. Two particular forms of international (police) cooperation occupy a central place in this dissertation: the activities of JITs and the participation of Europol in those activities. In three parts and a conclusion, this dissertation covers both. Part I properly defines the dissertation’s main concept: JITs; Parts II and III cover Europol’s participation in JITs. The research question “Can (or should) Europol participate?” is addressed both from the Europol (Part II) and the Member States’ (Part III) perspective. The Conclusion attempts to answer this question.

PART I. JOINT INVESTIGATION TEAMS (JITs)

Section 1. Introduction

19. Joint investigation teams (JITs)\(^8\), joint investigative teams, joint teams... are popular notions in law enforcement and academic circles. Although mentioned in various legal and policy documents, the term JIT has never been clearly defined. Tautologically, a JIT can be described as a team consisting of representatives of law enforcement and other authorities of different states jointly investigating cases of international or cross-border crime. In this sense it could even be argued that we have had JITs for a long time in the EU, with investigators from different Member States coming together. It is true that law enforcement authorities have long been convinced that they are not able to fight cross-border crime solely on the national level. But then again, even though in practice law enforcement authorities of different Member States already worked together jointly in the sense of coordinating cross-border investigations when required\(^9\), one of the obstacles had been the lack of specific framework within which JITs could be established and operate. To meet this concern the political level decided upon a framework for JITs. This framework was introduced in Article 13 of the 2000

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\(^8\) Also referred to as “MITs” (multinational investigation teams). P.J. VAN ZUNDERD, “Samenwerking vergt cultuuromslag”, *Tijdschrift voor de Politie* 2005 (4), 25.

\(^9\) One example of coordinated investigations are the so-called parallel (or mirror) investigations: states investigating criminal activities at the same time that are linked to each other (for example, the same criminal network). In that context the authorities of both states can cooperate at an informal level, for example, by meeting to discuss tactics to coordinate their actions so as not to hinder or prejudice each other investigations or to discuss possibilities of sharing evidence. Parallel investigations do not imply, however, that members of law enforcement authorities from different states work jointly, i.e. as one team allocated at one place. A. HERZ, “The role of Europol and Eurojust in Joint Investigation Teams”, in C. RIJKEN and G. VERMEULEN (eds.), *Joint Investigation Teams in the European Union: From Theory to Practice*, The Hague, TMC Asser Press, 2006, 167.
EU Convention on Mutual Assistance in Criminal Matters\textsuperscript{10} (EU Convention on Mutual Assistance) and correspondingly in Article 1 of the 2002 Council Framework Decision on Joint Investigation Teams\textsuperscript{11} (Framework Decision on JITs). The EU Convention on Mutual Assistance and the Framework Decision on JITs aim to provide Member States with clear rules on the cases in which the setting up of a team is appropriate, the composition of the team, the leadership of the team, the powers of the team members, the operating rules and the use of information gathered, the officials’ liability…

\textbf{20.} The legal framework of the instrument of a JIT is examined both in form (I) and in content (II) in Section 3. First Section 2 briefly touches upon the international legal instruments providing a legal basis for operating a JIT. Article 13 of the EU Convention on Mutual Assistance may be new, but is by no means unique\textsuperscript{12}.

\textbf{Section 2. International legal instruments providing a legal basis for operating a JIT}

\textbf{21.} Various treaties qualify as a potentially valid legal basis for setting up a JIT, provided they apply between the states willing to set up a joint investigation and have not been excluded by the states concerned as a valid JIT basis: the abovementioned 2000 EU Convention on Mutual Assistance Convention, the 1997 EU Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II Convention)\textsuperscript{13}, the 2000 United Nations Convention against Transnational Organized Crime (UN TOC Convention)\textsuperscript{14} and the 2001 Council of Europe Second Additional Protocol to the European Mutual Assistance Convention (CoE 2\textsuperscript{nd} Additional Protocol to the European Mutual Assistance Convention)\textsuperscript{15}.

22. The so-called Naples II Convention may be used as a vehicle for mutual assistance by traditional judicial authorities conducting a criminal investigation into domestic or European Community customs offences\textsuperscript{16}. Article 24 of the Convention provides an explicit basis for the setting up of JITs – “joint special investigation teams” –, albeit in different, less far-reaching wording than Article 13 of the EU Convention on Mutual Assistance does\textsuperscript{17}. All the same, as long as Italy shows no intention of ratifying, the Naples II Convention is only applicable between Member States that have accepted its anticipated entry into force\textsuperscript{18}.

23. The UN TOC Convention aims at promoting international cooperation to prevent and combat transnational organised crime. Mutual legal assistance (Article 18) and law enforcement cooperation (Article 27) are important cooperation tools provided for by the Convention. Also, Article 19 of the Convention provides for the setting up of JITs – “joint investigative bodies”. Yet, the language of this provision is rather weak\textsuperscript{19}. The Convention has entered into force between ratifying State Parties, among which 18 out of the 25 EU Member States\textsuperscript{20}.

24. The CoE 2\textsuperscript{nd} Additional Protocol to the European Mutual Assistance Convention follows very closely the EU Convention on Mutual Assistance. Article 20 of the former reproduces Article 13 of the latter almost in its entirety. This potentially makes the CoE 2\textsuperscript{nd} Additional Protocol to the European Mutual Assistance Convention an equally maximised treaty basis for the setting up of JITs, applying even to a much wider group of countries (the Council of Europe and beyond)\textsuperscript{21}. However, only a limited number of (EU Member) States have ratified

\textsuperscript{17}C. RIJKEN and G. VERMEULEN, “The legal and practical implementation of JITs: The bumpy road from EU to Member State level”, \textit{l.c.}, 11.
\textsuperscript{21}C. RIJKEN and G. VERMEULEN, “The legal and practical implementation of JITs: The bumpy road from EU to Member State level”, \textit{l.c.}, 11.
the Protocol, which has nevertheless entered into force (only 3 ratifications being required to that effect)\(^ {22}\).

25. International legal instruments providing a legal basis for operating a JIT – with the exception of the CoE 2\(^{nd}\) Additional Protocol to the European Mutual Assistance Convention – are less advantageous than the EU Convention of Mutual Assistance. Not only is their scope restricted to specific matters (customs matters in the case of the Napesl II Convention) or crimes (transnational organised crime in the case of the UN TOC Convention). They also create less added-value compared to traditional mutual assistance in the context of parallel investigations\(^ {23}\). For example, they do not provide for an extension of the team with representatives of third countries and/or international bodies (e.g. Europol).

Section 3. The legal framework of the instrument of a JIT

I. Form

26. The provisions introduced into the Treaty on European Union (TEU) by the Treaty of Amsterdam\(^ {24}\) imply that JITs will provide the organisational framework for joint operations of police, customs and other specialised law enforcement services of the EU Member States\(^ {25}\). Article 30 (2) (a) TEU expressly mentions Europol within the context of “operational actions of joint teams”, albeit “in a support capacity”. At its meeting on 15 and 16 October 1999 in Tampere, the European Council called for “joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism (…)” (Conclusion Nr. 43)\(^ {26}\). Although this conclusion seems clear, in fact it was not. The Dutch delegation rightly understood it as follows. The European Council instructed the Council and the Member States to take all legal preparations, without delay, aimed at enabling JITs to be set up in suitable cases. In other words, the European Council


\(^{23}\) See C. RIJKEN and G. VERMEULEN, “The legal and practical implementation of JITs: The bumpy road from EU to Member State level”, *l.c.*, 12 (Table 1. Self-executing treaty provisions for JIT components adding law enforcement value).


called for the EU Convention on Mutual Assistance to be signed immediately, to be ratified at
the earliest opportunity and, if necessary, to be implemented in national legislation. The EU
Convention on Mutual Assistance was signed on 29 May 2000. The process towards
ratification by the Member States, however, was slow and the Council resorted to a separate
legally binding instrument to bring Article 13 of the EU Convention on Mutual Assistance
into effect ahead of time. The Framework Decision on JITs was adopted on 13 June 2002.

27. While the idea actually predates the signing of the EU Convention on Mutual
Assistance, it was not until the events of 11 September 2001 that the need was felt to
implement Article 13 within a much shorter time-frame. Only a few days after Nine Eleven
Belgium, France, Spain and the United Kingdom presented a proposal for a Framework
Decision on JITs. During the Extraordinary Council Meeting, Justice, Home Affairs and
Civil Protection of 20 September this proposal was welcomed, as it would enable the
investigating and prosecuting authorities to coordinate their fight against terrorism.
In accordance with Tampere Conclusion Nr. 43 the initial proposal only allowed for JITs to be
set up to combat trafficking in drugs and human beings as well as terrorism. Following
discussions in COREPER, it was decided that the scope should correspond to that of Article
13 of the EU Convention on Mutual Assistance and therefore should not be restricted.
An indignant Statewatch editor Tony Bunyan commented: “It is one thing to allow the MLA
provisions on joint teams to come into effect to investigate terrorist offences, it is quite

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27 COUNCIL OF THE EUROPEAN UNION, 5845/00 ADD 1, LIMITE EUROPOL 1, Brussels, 11 February
2000, Comments by delegations to the “First Reflections concerning the Tampere Conclusions as far as they
relate to Europol” as contained in doc. 13370/99 EUROPOL 48.
28 See COUNCIL OF THE EUROPEAN UNION, 5698/00, LIMITE CATS 6, Brussels, 3 February 2000,
Adoption of an instrument in relation to the establishment of joint teams to conduct criminal investigations in
one or more Member States.
29 COUNCIL OF THE EUROPEAN UNION, 11990/01, COPEN 50, Brussels, 19 September 2001,
Communication from the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the United
Kingdom: - Initiative of the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the United
Kingdom for the adoption by the Council of a draft Framework Decision on joint investigation teams.
30 Extraordinary Council Meeting, Justice, Home Affairs and Civil Protection, 12019/01 (Presse 327), Brussels,
31 Comité des représentants permanents (Article 207 TEC). Consolidated version of the Treaty of 25 March 1957
32 COUNCIL OF THE EUROPEAN UNION, 11990/01 ADD 1, COPEN 50, Brussels, 16 November 2001,
Communication from the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the United
Kingdom: - Initiative of the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the United
Kingdom for the adoption by the Council of a draft Framework Decision on joint investigation teams.
another to introduce it without any limitation on the scope of offences. One has to wonder how seriously the EU is taking its national parliaments (…)

28. The Framework Decision on JITs is indeed not uncontroversial. Framework decisions are considered to be established in a largely undemocratic and non-transparent way. Contrary to conventions, that only become binding upon ratification by the national governments after having been approved of by the national parliaments or the citizens via referendum, framework decisions do no longer need to be approved or ratified at the national level, even if they may well need implementation into national law or require amendments of the national law. Moreover, the Framework Decision on JITs is a misuse of this legal instrument, as a strict interpretation of the TEU simply does not allow for approximation in the area of international cooperation in criminal matters.

29. The Framework Decision on JITs also failed to deliver. Little speed was gained, only confusion. The aim was to bring into effect, ahead of time, Article 13 of the EU Convention on Mutual Assistance. Member States were called upon to take the necessary measures to comply with the provisions of the Framework Decision by 1 January 2003, and later by June 2004. Not all Member States have as yet adopted implementing legislation. In the meantime Member States have also kept ratifying the EU Convention on Mutual Assistance. The Framework Decision on JITs will only cease to have effect when the EU Convention on

35 Article 29 TEU, last paragraph, provides that the so-called “area of freedom, security and justice” shall be achieved through closer police cooperation (1st indent), judicial cooperation (2nd indent) and, where necessary, through approximation of rules on criminal matters in the Member States (3rd indent), the latter in accordance with Article 31 (e) TEU. According to Article 31 (e) TEU, approximation shall be achieved by progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. In this context Article 34.2 (b) TEU finally provides that the Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States.
37 Article 4 Framework Decision on JITs.
38 COUNCIL OF THE EUROPEAN UNION, 7906/04, JAI 100 ECOFIN 107 TRANS 145 RELEX 123 ECO 73 PESC 208 COTER 20 COSDP 142, Brussels, 29 March 2004, Declaration on combating terrorism.
39 For the most recent state of play (23 out of the 25 Member States have implemented the Framework Decision on JITs; Greece and Italy have draft legislation pending before Parliament), see COUNCIL OF THE EUROPEAN UNION, 9589/06 ADD 1 LIMITE JAI 269 ECOFIN 176 TRANS 131 RELEX 343 ECO 96 PESC 467 COTER 18 COSDP 384 PROCIV 101 ENER 165 ATO 50 DATAPROTECT 18 TELECOM 47, Brussels, 19 May 2006, Implementation of the Action Plan to Combat Terrorism.
Mutual Assistance has entered into force in all Member States\textsuperscript{40}. The Convention entered into force on 23 August 2005 and is now in force for 19 Member States\textsuperscript{41}. It should be noted though, that unlike the Convention, the Framework Decision in itself cannot produce any direct effect\textsuperscript{42}. Therefore, strictly speaking, it cannot be used as an autonomous international legal basis for the establishment of JITs. It should also be noted that opting for ratification of the EU Convention on Mutual Assistance, rather than for a proper implementation of the Framework Decision on JITs, has resulted in minimal, partial or limited national legislation. Member States simply took for granted the self-executing character of Article 13 of the EU Convention on Mutual Assistance, while for crucial provisions (e.g. concerning the extension of the team with representatives of third countries and international bodies) this clearly is not the case\textsuperscript{43}.

\textbf{II. Content}

30. Because the Framework Decision on JITs reproduces entirely Articles 13, 15 and 16 of the EU Convention on Mutual Assistance, comments on the latter equally hold true for the former. Corresponding provisions in the Framework Decision are therefore placed between brackets.

31. Paragraph 1 of Article 13 (Article 1 paragraph 1 Framework Decision) contains the basic rules for the establishment of a JIT. A JIT may, in particular\textsuperscript{44}, be set up where a Member States’ investigations into criminal offences\textsuperscript{45} require difficult and demanding investigations that have links with other Member States; or if a number of Member States are conducting investigations into criminal offences and the necessity for coordinated and concerted action

\textsuperscript{40} Article 5 Framework Decision on JITs.
\textsuperscript{42} Article 34 TEU.
\textsuperscript{43} G. VERMEULEN, “De morning after … Over de deelname van Europol aan gemeenschappelijke onderzoeksteams”, \textit{Orde van de dag} 2005 (30), 33.
\textsuperscript{44} These are only examples of situations in which the setting up of a JIT is considered appropriate.
\textsuperscript{45} Also the Council apparently did not want to reserve JITs for cases of serious crime alone. This to take account of the fact that certain cross-border crime phenomena, even if they do not relate to serious crime strictly speaking, might usually benefit from such teams. COUNCIL OF THE EUROPEAN UNION, 10064/00, COPEN 49, COMIX 528, Brussels, 5 July 2000, Draft explanatory report on the Convention on mutual assistance in criminal matters between the Member States of the European Union. The recent Belgo-Dutch JIT on a motorcycle theft case in the Euregio Meuse-Rhine is an excellent example. Round table with H. VANDEVOORDE, Federal Prosecutor’s Office (B), 3 July 2006, Brussels.
exists in the Member States involved. A request for the setting up of a JIT is followed by an agreement between the competent authorities of the Member States concerned. A model agreement for a JIT was adopted as a Council Recommendation on 8 May 2003. The agreement is an important document because it must specify the JIT’s particular purpose, its limited period of operation and its composition.

32. According to paragraph 3 of Article 13 (Article 1 paragraph 3 Framework Decision) a JIT shall carry out its operations in accordance with the law of the Member States in which it operates and under the leadership of “a representative of the competent authority participating in criminal investigations” of the Member State of operation. The decision on the location of the team is therefore of crucial importance. It is about “finding the best place for investigation”, not yet about Finding the Best Place for Prosecution. Ideally, however, the two coincide. Should the JIT move its operational basis, the law of this Member State shall then apply. Also, the leadership of the team shall change, if investigations are carried out by the team in more than one Member State. In this way sovereignty is guaranteed. The participation in a JIT may be as a member (representatives of the Member State of operation) or as a seconded member (representatives of other Member States). Both members and seconded members carry out their tasks under the leadership of the leader of the team.

46 For the contents of this request, see Article 13 paragraph 2 (Article 1 paragraph 2 Framework Decision).
47 COUNCIL RECOMMENDATION of 8 May 2003 on a model agreement for setting up a joint investigation team (JIT), OJ C 121, 23.5.2003, p. 1. In particular the model agreement deals with 1) the parties to the agreement, 2) the purpose of the JIT, 3) the period covered by the agreement, 4) the Member State(s) in which the JIT will operate, 5) the JIT leader(s), 6) the members of the JIT, 7) the participation by officials from Eurojust/Eurojust/the Commission (OLAF), 8) the general conditions of the agreement as well as 9) specific arrangements, including 10) the organisational arrangements.
48 A particular purpose means that it is not possible to set up a team without indicating the criminal investigation it is intended to work on. C. GUALTIERI, Introductory speech “Joint Investigation Teams: the fight against serious cross-border crime and terrorism”, Conference Joint Investigation Teams: The Fight Against Serious Cross-Border Organised Crime and Terrorism, 17-19 May 2006, ERA – Academy of European Law, Trier, 3.
49 A limited – though extensible – period of operation means that it is not possible to set up a permanently operational team. Ibid.
50 While most of the persons making up a JIT are likely to be law enforcement officers, they will in many cases include prosecutors and judges, as well as other persons. EXPLANATORY REPORT on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (Text approved by the Council on 30 November 2000), OJ C 379, 29.12.2000, p. 18.
54 Article 13 paragraph 4 (Article 1 paragraph 4 Framework Decision). It is important to note that Europol officials are not seconded members in this sense. See infra.
33. Paragraphs 5 and 6 of Article 13 (Article 1 paragraphs 5 and 6 Framework Decision) regulate the powers of the seconded members. The minimum standard is set out in paragraph 5. Seconded members are entitled to be present when investigative measures are taken in the Member State of operation. However, the leader of the team may, for particular reasons, in accordance with the law of the Member State of operation, decide otherwise. Paragraph 6 is more innovative and provides that seconded members may be entrusted by the leader of the team with the task of actually taking certain investigative measures. The wording of paragraph 6 does leave a wide margin of appreciation for the Member States. The authority to engage in investigative activities in the territory of another Member State is strongly linked to national sovereignty. Therefore, to see whether there has indeed been a departure from the classic rules of territorial jurisdiction, one also has to consider national implementing legislation.

34. A totally new idea is comprised in paragraph 7 of Article 13 (Article 1 paragraph 7 Framework Decision). It enables seconded members to directly request their own competent authorities to take investigative measures. Those measures are to be considered in the seconding Member State under the conditions which would apply if they were requested in a national investigation. In other words, apart from the initial request—which is to be considered as a request for mutual assistance—there is no need for any further requests under the traditional mutual legal assistance regime (commissions rogatoires). This time-consuming procedure is hereby circumvented, which will speed things up considerably. Nevertheless, a parallel (or mirror) investigation could be as flexible as a JIT. This is

55 Any decision to exclude a seconded member from being present may not be based on the sole fact that the member is a foreigner. In certain cases operational reasons may form the basis for such decisions. EXPLANATORY REPORT on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (Text approved by the Council on 30 November 2000), OJ C 379, 29.12.2000, p. 18.

56 “Seconded members of the team may, in accordance with the law of the Member State where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the Member State of operation and the seconding Member State” (italics mine).


59 C. RIJKEN and G. VERMEULEN, “The legal and practical implementation of JITs: The bumpy road from EU to Member State level”, I.c., 15.

confirmed by my respondents representing Belgian judicial and police authorities. Operating in a pragmatic manner, the authorities of Member State A can send the authorities of Member State B – who are carrying out a parallel investigation – one “framework request” in which they ask for all assistance they need. This method also avoids the time-consuming sending of successive requests. However, it is questionable whether this practice is consistent with the objective of commissions rogatoires. It would seem that there are indeed limits to stretching requests for assistance. Judicial authorities should realise this.

35. If beyond the abovementioned there should still be a need for traditional requests for assistance from a Member State other than those which have set up the team or from a third State, the procedure is simplified. Paragraph 8 of Article 13 (Article 1 paragraph 8 Framework Decision) designates the competent authorities of the Member State of operation as responsible for making the requests for the JIT.

36. Paragraphs 9 and 10 of Article 13 (Article 1 paragraphs 9 and 10 Framework Decision) regulate respectively the sharing of information within the JIT and the information flow back to the Member States. Paragraph 9 facilitates the work of the JIT by opening the way for a seconded member to share information which is available in his or her Member State and is relevant to the investigations being conducted by the team. However, this will only be possible within the scope of the seconded member’s national law and the limits of his and her competence. In turn, paragraph 10 is concerned with the conditions for the use of information lawfully obtained by a member or seconded member of the team where the information would not otherwise be available to the competent authorities of the Member States concerned.

37. In fact, the participation in a JIT may be as a member, a seconded member or a “non-member”. Paragraph 12 of Article 13 (Article 1 paragraph 12 Framework Decision) paves the way for arrangements allowing “persons other than representatives of the competent authorities of the Member States setting up the team” to take part in the activities of a JIT, to the extent that the laws of the Member States concerned or the provisions of any legal

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61 Round table with J. DELMULLE, H. VANDEVOORDE (Federal Prosecutor’s Office) and F. VERSPEELT (Federal Police), 3 July 2006, Brussels.
62 E. DE BUSSE, l.c., 122.
63 Interview with W. BRUGGEMAN, Benelux University, 29 July 2006, Moerbeke.
64 C. GUALTIERI, l.c., 3.
instrument between them permit. An example of an agreement between a JIT and such persons has been annexed to the abovementioned model agreement adopted as a Council Recommendation. The rights conferred upon the members or seconded members shall not apply to these persons unless the agreement expressly states otherwise. What the drafters of the EU Convention of Mutual Assistance had in mind was that additional assistance and expertise could be provided to a JIT by appropriate persons from third States or international organisations. It goes without saying that these persons are expected to make a valuable contribution to the investigation. It is particularly interesting to get States bordering the EU aboard, as these are often the source countries of serious forms of international crime the EU Member States are seeking to combat. The best example was the wish for a first JIT to be established between Belgium, Bulgaria, Germany, the Netherlands and the United Kingdom to combat trafficking in human beings from and through Bulgaria, an acceding country to the EU.

38. Paragraph 12 makes specific reference to officials or bodies set up pursuant to the TEU. Europol falls under this definition and so do Third Pillar judicial counterpart Eurojust and First Pillar equivalent OLAF, the European Anti-Fraud Office. This would result in a hybrid system in which the horizontal cooperation between sovereign Member States is complemented by a more vertical form of cooperation with international bodies such as Europol. Herein lays the importance of paragraph 12.

39. It can be concluded that Article 13 of the EU Convention on Mutual Assistance and the Framework Decision on JITs foresee the possibility of participation of Europol representatives in a JIT. The dissertation takes it from here to address the “hot potato” of Europol’s participation in the activities of JITs in Parts II and III. The research question “Can

65 The first reference to the possibility for “non-members” to take part in the activities of a JIT can be found in COUNCIL OF THE EUROPEAN UNION, 11158/99, LIMITE COPEN 40, Brussels, 20 October 1999, Draft Convention on mutual assistance in criminal matters between the Member States of the European Union – Joint Investigation Teams (Article 13).
66 See supra 31.
68 See also supra footnote 3.
69 COUNCIL DECISION of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6.3.2000, p. 1.
70 See I. ONSEA, o.c., 436-439.
(or should) Europol participate?” is addressed both from the Europol (Part II) and the Member States’ (Part III) perspective.

PART II. CAN (OR SHOULD) EUROPOL PARTICIPATE? THE EUROPOL PERSPECTIVE

40. In Part II the research question “Can (or should) Europol participate?” is addressed from the Europol perspective. Section 1 gives a brief overview of Europol as an organisation and Section 2 properly links Europol to JITs. Europol’s assistance to and participation in JITs are dealt with in Sections 3 and 4, respectively.

Section 1. Europol

41. Based in The Hague (NL), the European Police Office “Europol” is the EU’s law enforcement organisation that handles criminal intelligence. Its aim is to improve the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating serious international organised crime and terrorism. The mission of Europol is to make a significant contribution to the EU’s law enforcement action against organised crime and terrorism with an emphasis on targeting criminal organisations71.

42. The establishment of Europol was agreed in the Treaty of Maastricht72. Article K. 1 TEU, the core provision of Title VI (Provisions on Cooperation in the Fields of Justice and Home Affairs (JHA), the so-called Third Pillar73) provided that Member States would consider as a matter of common interest: “9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)”. In this provision there is no question of a second stage: the assignment of executive powers to

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71 EUROPOL, Fact Sheet on Europol, January 2006. URL: http://www.europol.eu.int/ataglance/Factsheets/Europol_Factsheet-eng.pdf
73 The Treaty of Maastricht which established the European Union (EU), divided EU policies into three main areas, referred to as pillars. The supranational First Pillar (European Communities) was complemented by the intergovernmental Second (Common Foreign and Security Policy) and Third (Cooperation in the Fields of Justice and Home Affairs (JHA), later renamed Police and Judicial Cooperation in Criminal Matters) Pillars.
Europol\textsuperscript{74}. The same goes for the Europol Convention which was established on 26 July 1995\textsuperscript{75} in accordance with the Treaty of Maastricht. The Europol Convention was ratified by all Member States and entered into force on 1 October 1998. Following a number of legal acts related to the Convention, Europol took up its full activities on 1 July 1999, replacing the Europol Drugs Unit (EDU) which had been set up on a temporary basis in 1995\textsuperscript{76}.

\textbf{43. Europol’s mandate is to support law enforcement action against a whole “shopping list” of crimes}\textsuperscript{77}, where an organised criminal structure is involved and two or more Member States are affected (Article 2 (1) Europol Convention). Europol’s core task is to support the competent authorities in the Member States (mainly police forces, immigration and customs authorities) in their intelligence work\textsuperscript{78}. In addition to the facilitation of exchange of information and the development of criminal intelligence, Europol can assist with advice and training (Article 3 Europol Convention). The backbone of Europol is its “computerized system of collected information” consisting of an information system (IS), analytical work files (AWFs) and an index system (Article 6 Europol Convention). The Europol National Unit (ENU) situated within each Member State is the only liaison body between Europol and the competent national authorities (Article 4 Europol Convention). Europol Liaison Officers (ELOs) are seconded by their ENU to represent the interests of the latter within Europol (Article 5 Europol Convention).

\section*{Section 2. Europol and JITs}

\textbf{44. Judging from the relevant legal and policy instruments on the level of the EU, it was envisaged from the outset that Europol would play a role in JITs}\textsuperscript{79}. The 1997 Action Plan to

\begin{itemize}
\item \textsuperscript{74} W. BRUGGEMAN, “Europol: A Castle or a House of Cards?”, in A. PAULY (ed.), \textit{De Schengen à Maastricht: voie royale et course d’obstacles}, European Institute of Public Administration, Maastricht, 1996, 19.
\item \textsuperscript{75} COUNCIL ACT of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27.11.1995, p. 2.
\item \textsuperscript{77} Europol started in the form of the Europol Drugs Unit (EDU) fighting against drugs. Progressively, other important areas of criminality were added. Since 1 January 2002, Europol deals with all serious forms of international crime listed in Article 2 of the Europol Convention and the Annex to the Europol Convention. See COUNCIL DECISION of 6 December 2001 extending Europol’s mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 362, 18.12.2001, p. 1.
\item \textsuperscript{78} See EUROPOL, \textit{Europol Intelligence Handling}, Luxembourg, Office for Official Publications of the European Communities, 2003, 24 p.
\end{itemize}
combat organised crime\textsuperscript{80} constitutes the first proof of the political desire to extend Europol’s mandate in this sense. The European Council reiterated\textsuperscript{81} its view that Europol should be given operative powers working together with national authorities. To that end, Europol should be enabled to “facilitate and support the preparation, coordination and carrying out of specific investigative actions by the competent authorities of Member States, including \textit{operational actions of joint teams comprising representatives of Europol in a support capacity}”\textsuperscript{82}. In other words, Europol should be released from its operational isolation\textsuperscript{83}. The mandate described here was expressly set forth in the Treaty of Amsterdam. Within a period of five years after the entry into force of the Treaty, Europol was to be enabled “to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity” (Article 30 (2) (a) TEU)\textsuperscript{84}.

\textbf{45.} A JIT is often considered as a form of police cooperation\textsuperscript{85}, while in fact it is a form of judicial cooperation in criminal matters\textsuperscript{86}. In this respect, it is remarkable that the only reference to JITs in the TEU is in the context of police cooperation through Europol under Article 30 TEU and not in the context of judicial cooperation, of which the description can be found in Article 31 TEU. In any case, there is again no question of the assignment of executive powers to Europol. Europol’s embryonic operational powers should not be


\textsuperscript{81} A little reported sentence in the DUBLIN EUROPEAN COUNCIL Presidency Conclusions of 13-14 December 1996 already stated that “Europol should have operative powers working in conjunction with the national authorities to this end. The Council adopts measures enlarging the functions of Europol allowing it to facilitate and assist in the preparation and carrying out of specific cooperative actions by the judicial, police and custom authorities of the Member States including operational actions of joint teams”. Statewatch, “EU: Europol to become EU police force”, \textit{Statewatch bulletin}, November-December 1996. URL: http://database.statewatch.org/protected/article.asp?aid=2003.

\textsuperscript{82} Italics mine. See Political guideline Nr. 10 of the political guidelines and Recommendation Nr. 25 of the detailed action plan. Furthermore, Europol should be enabled to ask the competent of the Member States to conduct investigations in specific cases and develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime.


\textsuperscript{84} Also, Europol is to be allowed to “to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime” (Article 30 (2) (b) TEU).

\textsuperscript{85} Even in literature. See e.g. A.M.M. ORIE and J.M. SJÖCRONA, \textit{o.c.}, 261 (JITS are catalogued under “politiêle rechtshulp”).

\textsuperscript{86} E. DE BUSSER, \textit{i.e.}, 140-141. The existence of this popular misconception was also confirmed by all my respondents.
interpreted in the executive sense. Nevertheless, the question has been raised whether in fact the seeds of a “European FBI” – a German fetish – have not been sown here.

46. The 1998 Action Plan on how best to implement the provisions of the Treaty of Amsterdam on the area of freedom, security and justice announced as one of the measures to be taken within two years after the entry into force of the Treaty the extension of Europol’s powers inter alia to act – in a support capacity – within the framework of operational actions of joint teams (Paragraph 43). As mentioned earlier, the Tampere European Council called for joint investigative teams to be set up without delay. The rules to be established in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity (Conclusion Nr. 43). Europol should even be authorised to ask Member States to create joint investigative teams (Conclusion Nr. 45).

47. In view of this urgency, most Member States – with the notable exception of the Netherlands – initially did not see a need to amend the Europol Convention to enable Europol officials to participate in JITs. The Netherlands found that the participation of Europol in JITs in the Member States essentially contained such new elements that this participation could not be seen as one of the tasks stated in Article 3 Europol Convention. This was even the case when Europol’s contribution would be supportive and its representatives were not granted executive powers. The United Kingdom, on the contrary, shared the view that JITs should be implemented without undue delay and that the re-opening of the Europol Convention – a lengthy process – was not necessary to achieve this. Eventually, agreement was reached on a “phased approach” to implement Article 30 (2) (a) TEU and Tampere Conclusion Nr. 43.

91 See supra 26.
92 COUNCIL OF THE EUROPEAN UNION, 5845/00 ADD 1, LIMITE EUROPOL 1, Brussels, 11 February 2000, Comments by delegations to the “First Reflections concerning the Tampere Conclusions as far as they relate to Europol” as contained in doc. 13370/99 EUROPOL 48.
93 Ibid., 7.
94 Ibid., 40.
48. It was still considered important for Europol representatives to be able to participate as soon as possible. Therefore, in a first phase such participation would take place within the limits of the provisions of the existing Europol Convention, while respecting the rules laid down in the EU Convention on Mutual Assistance. By way of a Council Recommendation Member States were formally invited on 30 November 2000 to make use of this additional possibility to derive maximum benefit from cooperation between Member States’ authorities when investigating cross-border crime. This Council Recommendation merely describes Europol’s support activities under the present Europol Convention. In so far as support activities go beyond the rules and procedures of the Europol Convention, a more solid legal basis was deemed necessary. Consequently, a second phase concentrated on the amendment of the Europol Convention. The debate on allowing Europol officials to participate in JITs proved to be a long and difficult. Ultimately, a Council Act drawing up a Protocol amending the Europol Convention in this sense was adopted on 28 November 2002. The so-called “JIT Protocol” formally adds the participation in JITs in a support capacity to Europol’s principal tasks. Specific rules governing such participation are laid down in detail. Unfortunately, the JIT Protocol is not yet in force.

49. The JIT Protocol is an “old school” instrument amending an even “older school” Europol Convention. In 1995 Europol stood alone as an institutional player in the Third Pillar. Due to its historical position, Europol can look back to the longest experience in EU law enforcement

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95 COUNCIL OF THE EUROPEAN UNION, 7370/00, LIMITE EUROPOL 6, Brussels, 5 April 2000, Europol’s participation in Joint Teams.
96 COUNCIL RECOMMENDATION of 30 November 2000 to Member States in respect of Europol’s assistance to joint investigative teams set up by the Member States, OJ C 357, 13.12.2000, p. 7.
97 See infra 50.
98 The Legal Service of the Council commented on this issue as follows: “A participation of Europol officials in Joint Teams, in the sense of Article 13 of the Convention on Mutual Assistance would imply that such officials would exchange directly with the other members of the Team, including information held by Europol, without the involvement of the national units of the Member States having set up such Teams. Such an exchange of information should have a clear legal basis, which the Europol Convention as presently worked out and structured, does not provide”. See COUNCIL OF THE EUROPEAN UNION, 9632/00, LIMITE JUR 212 EUROPOL 17, Brussels, 20 June 2000, Europol’s participation in Joint Teams (doc. 7370/00 EUROPOL 6).
101 See infra 54.
102 Ratification details (31.8.2006) – Protocol of 28 November 2002 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. URL: http://www.consilium.europa.eu/cms3_Applications/applications/Accords/details.asp?cmsid=297&id=2002094&lang=EN&doclang=EN. The entry into force of the JIT Protocol is depending solely on notification by Ireland, Portugal and Sweden, the only Member States constituting the EU at the time of adoption by the Council that have failed until date to submit the required notification.
cooperation. The drawback is that Europol’s legal basis – a convention – does not reflect the state of the art legislation that is possible under the current TEU\textsuperscript{103}. As a result, changing provisions – of even minor importance – takes several years. Such delays may not be tolerable, but this does not mean that the ratification procedures in the Member States and the consequent delays on themselves are not justified, taking into account the democratic processes in place\textsuperscript{104}. Still, Europol seems to be \textit{Waiting for Godot}, while (European) Councils have been urging the Member States to finalise the ratification of not one, but three Protocols amending the Europol Convention\textsuperscript{105}. A final deadline of 31 December 2006 has now been set in the June 2006 Council Conclusions on the future of Europol\textsuperscript{106}.

\textbf{Section 3. Europol’s assistance to JITs}

\textbf{50.} It is – and always was – Europol’s opinion that Europol can – and does – already participate in JITs under its present legal framework\textsuperscript{107}. It should be noted that this dissertation, makes a clear distinction between assistance to and participation in JITs. The latter is dependent on the entry into force of the JIT Protocol amending the Europol Convention. However, there is nothing that prevents Europol from being involved in a JIT already. The only preconditions for Europol’s involvement are the request from one or more of the Member States setting up the JIT and – self-evidently – the fulfilment of the requirements of Article 2 of the Europol Convention\textsuperscript{108}. Should a third State participate in the JIT, Europol also needs a cooperation agreement\textsuperscript{109} in place with the State concerned before it can become involved\textsuperscript{110}.

\textsuperscript{103} Under Article 34 TEU.

\textsuperscript{104} W. BRUGGEMAN, “Integrating the Europol convention into the European Treaties and its potential transpillarisation”, Briefing paper requested by the European Parliament’s committee on Civil Liberties, Justice and Home Affairs, 30 July 2006 (unpublished).


\textsuperscript{106} COUNCIL OF THE EUROPEAN UNION, 9670/2/06 REV 2, EUROPOL 49, Brussels, 6 June 2006, Council Conclusions on the future of Europol.

\textsuperscript{107} Telephone interview with B. DE BUCK, Europol Legal Service, 2 August 2006.

\textsuperscript{108} See also supra \textbf{43}.

\textsuperscript{109} For Europol’s International relations – Cooperation agreements, see URL: \url{http://www.europol.eu.int/index.asp?page=agreements}.

51. As mentioned earlier, there is a November 2000 Council Recommendation in respect of Europol’s assistance to joint investigative teams set up by the Member States. The internal Europol equivalent is a document entitled “Europol’s present competence to support Joint Teams”. It is dated 24 October 2001 and was submitted to and acknowledged by the Europol Management Board. Both documents merely describe how Europol can assist JITs in accordance with the present Europol Convention and in particular with Articles 3 and 4 thereof. The Recommendation specifies several “advantageous” aspects of involving Europol in a JIT, which include: placing Europol’s knowledge of the criminal world at the disposal of JITs; assisting with coordination of operations by JITs; providing advice to JITs on technical matters; helping with the analysis of offences.

52. What does Europol have in store? Europol situates its assistance to JITs on the level of information exchange, analytical support and logistical support. Europol can facilitate the exchange of information in a JIT by providing a communication platform. Europol can also facilitate the availability of information to a JIT by providing its information system and its index system. When it comes to analytical support, Europol’s influence on JITs could even be considerable. Analytical support involves the gathering and/or analysis of information stemming from a JIT within the formal concept of an AWF. Information gaps can be identified leading to a more focused gathering of new information. Europol can also disseminate analytical reports containing assembled intelligence such as an overall description of criminal organisations, description of criminal roles, responsibilities, modi operandi and activities, links between criminals, identification of threats, identification of new targets and an assessment of evidence gathered. The logistical support that can be provided by Europol concerns language support, advice on best practices (centre of excellence concept), initiating, monitoring and coordinating meetings and offering meeting facilities, involvement of the specialised units of Europol or other law enforcement agencies in the Member States.

111 See supra 48.
112 Telephonic interview with B. DE BUCK, Europol Legal Service, 2 August 2006.
113 See supra 43.
116 Ibid.
117 T. SCHALKEN and M. PRONK, l.c., 75.
53. All of the above is precisely why Europol was conceived in the first place. Assistance to JITs thus provides Europol with a great opportunity to perform its tasks and to convince anyone who has (had) reservations about the very existence of Europol and its legitimacy. The catch – there is always a catch – is that there is no direct liaison between Europol and the JIT. Europol’s assistance to JITs is to be provided exclusively through the ENUs in the Member States and in principle without physical presence in the JIT\(^\text{118}\). Still, several creative solutions have been put forward allowing “sort of” direct liaison\(^\text{119}\). However, from appointing ELOs, ENU representatives or national police experts as JIT members\(^\text{120}\), it is still a long way to participation of actual Europol officials in JITs.

Section 4. Europol’s participation in JITs

54. As was indicated before, Europol’s participation in JITs is dependent on the entry into force of the JIT Protocol, adding the following point to Europol’s principal tasks: “6. to participate in a support capacity in joint investigative teams, according to Article 3a” (Article 1 (1) JIT Protocol)\(^\text{121}\). The newly inserted Article 3a of the Europol Convention provides the legal basis for the actual participation of actual Europol officials in JITs, “including” those set up in accordance with Article 13 of the EU Convention on Mutual Assistance or the Framework Decision on JITs\(^\text{122}\).

55. Within the limits provided for by the law of the Member State where the JIT operates, Europol officials will be allowed to assist in all activities and exchange information with all the members. However, they will not be allowed to take part in the taking of any coercive measures (Article 3a (1) Europol Convention). Where earlier drafts gave “arrest and.

\(^{118}\) G. VERMEULEN, Advisory opinion JIT and pre-JIT cooperation possibilities in the relationship between the Netherlands and other countries involved in the JIT-initiative(s) initiated under the Netherlands EU Presidency 2004, in particular Belgium and Germany, Principal Netherlands EU Presidency 2004 (Police), Ghent, 16 January 2005, 6 (unpublished).

\(^{119}\) Ibid. See also C. RIJKEN and G. VERMEULEN, “The legal and practical implementation of JITs: The bumpy road from EU to Member State level”, i.e., 19-20; A. HERZ, i.e., 171.

\(^{120}\) See also COUNCIL RECOMMENDATION of 8 May 2003 on a model agreement for setting up a joint investigation team (JIT), OJ C 121, 23.5.2003, p. 3, footnote 2.

\(^{121}\) The JIT Protocol adds another point to Europol’s principal tasks: “7. to ask the competent authorities of the Member States to conduct or coordinate investigations in specific cases, according to Article 3b” (Article 1 (1) JIT Protocol). See also supra footnotes 82 and 84.

detention” as examples of coercive measures123, the final text remains silent. Also, it would seem that there is a contradiction between “assist in all activities” and “not take part in the taking of any coercive measures”. This ambiguity makes it unclear which activities Europol officials will be able to assist in and whether or not they may be present during the execution of coercive measures.

56. The European Constitution does not shed light on the matter either, stating that any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member States and stressing that “the application of coercive measures shall be the exclusive responsibility of the competent national authorities” (Article III-276)124. Any room for manoeuvre the wording of this provision would leave, is removed by European Convention Working Group X “Freedom, Security and Justice”, concluding in its final report that “coercive measures would always have to be carried out by competent Member State officials”125. But does this also exclude Europol officials from being present or assisting during the execution of coercive measures (house search, hearing of a suspect)?

57. The key element in this rather semantic discussion could lie in the difference between participation in the formal execution of coercive measures and assistance during the execution of such measures126. According to Europol it is quite clear that Europol officials should not be responsible for the execution of coercive measures. It is not the intention to allocate Europol officials with genuine police competences carrying around fire-arms and arresting criminals all over Europe (sic!) 127. However, Europol presents an argument for allowing its officials to be present and to offer assistance while coercive measures are being carried out by the competent national authorities. Working Europol – after all, the EU criminal intelligence agency – would provide Europol officials with a unique background

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123 COUNCIL OF THE EUROPEAN UNION, 5455/02, EUROPOL 5, Brussels, 28 January 2002, Initiative of the Kingdom of Belgium and the Kingdom of Spain with a view to adopting a Council Act drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention), the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol.


knowledge and expertise about specific criminal phenomena which they can offer to the police officers in the field\textsuperscript{128}. This has been the official Europol position for some time now: “What we want is to be there. We want to be able to work together with the members of the team; we want to be able to give our advice directly to the people concerned. We will not be kicking down doors; we will not be arresting people”\textsuperscript{129}. As part of the discussion held during the Austrian EU Presidency (1 January – 30 June 2006) on the Future of Europol, Europol Director Max-Peter Ratzel reaffirmed: “(…) we want our officials to be able to go to the place of a crime and to advise national authorities what to look for”\textsuperscript{130}. It should nevertheless be pointed out that it may not be about what Europol wants. Isn’t the customer – \textit{in casu} the Member States – always right?

58. What else will the near future bring? To begin with, direct liaison between Europol and the JIT. Europol officials may provide members and seconded members of the team with information from any of the three components of its “computerized system of collected information”. In the case of such direct information exchange Europol must at the same time notify the ENUs of the Member States represented in the JIT, as well as the Member States which provided the information. Conversely, information obtained by a Europol official while part of a JIT may, with consent and under the responsibility of the Member State which provided the information, be included in the Europol computer system (Article 3a (4) Europol Convention). Europol officials – as a rule not taking any orders from outside Europol – are now integrated into the “chain of command” of the JIT (Article 3a (3) Europol Convention). The JIT Protocol also amends the Protocol on the privileges and immunities\textsuperscript{131}, waiving the traditional functional immunity for Europol officials taking part in a JIT (Article 2 JIT Protocol) and properly regulates the liability with regard to Europol’s participation in JITs (Article 1 (3) (c) JIT Protocol).

\textsuperscript{128} \textit{Ibid.}, 13.
\textsuperscript{129} H. FELGENHAUER, Europol Legal Service, 19 May 2004. The United Kingdom Parliament, House of Lords, Select Committee on European Union Minutes of Evidence, Examination of Witnesses (Questions 179-199), 19 May 2004, Mr. Kevin O’Connell, Mr. Harald Felgenhauer and Mr. Christian Jacquier. URL: \url{http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/138/40519p03.htm}.
\textsuperscript{130} M-P. RATZEL, Europol Director, 14 January 2006. BBC, “Europol set to get wider powers” (14.01.2006). URL: \url{http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4613508.stm}.
\textsuperscript{131} COUNCIL ACT of 19 June 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union and Article 41 (3) of the Europol Convention, the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and employees of Europol, OJ C 221, 19.7.1997, p. 2.
59. In the near future, Europol will have the mandate to participate in the activities of JITs. An entirely different matter is whether the organisation is überhaupt ready? Judging from Europol’s Work Programme 2007 – its annual strategic level business plan – a reasonable person would assume this is the case. JIT-support occupies a central place throughout the chapter devoted to “Supporting the EU Member States’ Fight against Organised Crime and Terrorism by Providing Intelligence and Analysis” (Chapter 6). Europol claims it is ready, but can only wave with documents that are still being drafted to sustain this. Europol is in the process of drafting “Management Board Rules governing the arrangements laying down the administrative implementation of the participation of Europol officials in a JIT”, as required by the new Article 3a of the Europol Convention. A first draft of these new Rules will be presented at the Management Board meeting of September 2006. Adoption of these rules is expected by the end of the year. Additionally, Europol plans to draft a comprehensive “JIT User Manual” providing practical guidance for Europol officials participating in the activities of a JIT. The “JIT User Manual” should not be confused though with the joint “Europol – Eurojust Project on JITs”, a guide on Member States’ JIT legislation primarily intended for the European law enforcement community. Both manuals do have in common that they have been announced for quite some time and that there is a shroud of secrecy about them. Europol should nevertheless be given the benefit of the doubt, at least until this dissertation has addressed Europol’s participation in JITs from the Member States’ perspective.

60. Europol’s (future) mandate to participate in the activities of JITs is the result of a political decision to release the organisation from its operational isolation. As was stressed before, Europol’s embryonic operational powers should not be interpreted in the executive sense. Europol has no executive powers: it is the EU intelligence organisation that provides support to the Member States’ law enforcement authorities. In providing support, Europol with its tools – information exchange, analysis, expertise and training – can contribute to the

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133 No less than 11 references to JIT-support. See Ibid., 8, 9, 10, 12, 13, 14, 15, 16, 17, 19 and 20.
135 Ibid.
137 Round table with F. VERSPEELT, Federal Prosecutor’s Office (B), 3 July 2006, Brussels. Even under embargo, it was not possible to obtain a draft version of these manuals.
138 See infra Part III.
executive measures carried out by the competent national authorities. Looking at the more distant future, an executive Europol seems to be far off. No full law enforcement powers for Europol are desired, although it has been suggested that a careful widening of the mandate would be in the interest of all European stakeholder. This widening should enable Europol to become “more operational”, meaning that Europol could, for example, more directly support JITs. The discussion held during the Austrian EU Presidency (1 January – 30 June 2006) on the Future of Europol resulted in an Options Paper. This policy document is said to present the diversity of views expressed by the participating experts, but it is recognised that there is not an agreed consensus on every proposal. To put it bluntly, there are no strings attached! The findings simply seek to inform debate within the Council structures and do not in any way bind Member States.

61. The “option” on JITs is as follows. Europol should be in a position to coordinate – not lead – a JIT, if requested. This would imply the possibility for Europol to suggest that the national members of the JIT perform executive measures in the Member State which they represent, since the execution of coercive measures would remain the sole responsibility of the competent authorities of the concerned Member State. It could also imply the possibility of Europol financing JITs. In Europol circles the latter possibility has – remarkably enough – been disposed of as very unrealistic, if not absurd. As a long term option, the role of Europol in the fight against Euro counterfeiting and possibly EU crimes – to be defined – should be reinforced by granting Europol investigative – but not coercive – powers. The debate on an executive European police force is not new. Using Euro counterfeiting as a test case is not an entirely new idea either. With the Euro replacing the national currencies in just under half of the Member States, the traditional (counter) argument of national

141 COUNCIL OF THE EUROPEAN UNION, 9184/1/06 REV 1, LIMITE EUROPOL 40, Brussels, 19 May 2006, Friends of the Presidency’s report to the Future of Europol.
142 Options Paper reflecting the outcome of the discussion on the future of Europol held during the Austrian Presidency, May 2006, 6.
143 According to a Council decision Europol is to take over the responsibility to act as Central Office for combating Euro counterfeiting in terms of the Geneva Convention of 1929 (COUNCIL DECISION of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro counterfeiting, OJ L 185, 16.7.2005, p. 35).
144 Options Paper reflecting the outcome of the discussion on the future of Europol held during the Austrian Presidency, May 2006, 7.
sovereignty may play to a lesser extent. However, the debate on an executive European police force remains inextricably bound up with the debate on a European Public Prosecutor’s Office, and more precisely with the present absence thereof\textsuperscript{146}.

**PART III. CAN (OR SHOULD) EUROPOL PARTICIPATE? THE MEMBER STATES’ PERSPECTIVE**

62. In Part III the research question “Can (or should) Europol participate?” is addressed from the Member States’ perspective. Three Member States have been singled out for analysis: Belgium, the Netherlands and the United Kingdom. This part is to look into the position of these Member States towards participation of Europol in JITs. It is the position of the Member States \textit{in} the Member States that is aimed at. Still, the fact is acknowledged that EU criminal policy is not one-way traffic and that Member States also labour on EU level to shape the intended policy to their desires\textsuperscript{147}. The Member States’ perspective on whether Europol can (or should) participate in the activities of JITs is made tangible in two sections. Section 1 analyses and comments the relevant national legal and policy documents. Section 2 the comments looks into national sensitivities that cannot be deduced from Section 1.

**Section 1. National legal and policy documents**

63. In the near future Europol will have the mandate to participate \textit{in} JITs. That is all very well, but only within the limits provided for by the law of the Member State where the JIT operates, Europol officials will be allowed to assist in all activities and exchange information with all the members. At this point, one should also recall the provision in Article 13 of the European Convention on Mutual Assistance (Article 1 Framework Decision on JITs) concerning the participation of persons other than representatives of the competent authorities of the Member States setting up the team (paragraph 12). Only when this participation has a legal basis such participation can be agreed upon. The legal basis can either be sought in national legislation or other instruments\textsuperscript{148}. Conclusion: Member States hold the key to Europol’s participation in JITs.

\textsuperscript{146} The European Public Prosecutor’s Office – to be established from Eurojust – obviously goes beyond the scope of this dissertation.

\textsuperscript{147} An example from this dissertation is the position of the Netherlands and the United Kingdom with regards to the implementation of Article 30 (2) (a) TEU and Tampere Conclusion Nr. 43, see \textit{47}.

\textsuperscript{148} See \textit{supra 37}. 
64. Little credit can be gained from recycling the Report from the Commission on national measures to comply with the Framework Decision on JITs\(^{149}\). Overall, it is fair to say that the Commission was not exactly impressed by the Member States\(^{150}\). In fact, only Spain would have complied with the Framework Decision\(^{151}\), the implementation of which has been described as “legislative soup”\(^{152}\). This also goes for Europol’s participation in JITs.

I. Belgium

65. In spite of being one of the initiators of the Framework Decision on JITs, Belgium exceeded the deadline(s) for implementation and did not have JIT legislation in place until the beginning of 2005. The Mutual Assistance Act of 9 December 2004 entered into force on 3 January 2005, after having been published on 24 December 2004\(^{153}\). The Mutual Assistance Act contains implementing legislation for the EU Convention on Mutual Assistance and therefore has a wider scope than the mere implementation of the Framework Decision on JITs. In general, the law contains a truthful implementation of the Framework Decision. As to the extension of a JIT with representatives of Europol the Act provides that in the written agreement that must be concluded prior to the establishment of a JIT, it may be stipulated that representatives of Europol will take part as experts (Article 9 (3) first sentence)\(^{154}\). Europol officials are granted an expert status. They cannot be awarded the same powers seconded members have on Belgian soil. According to explanatory memorandum to the Government’s legislative proposal, it is rather obvious why: Europol officials simply lack the operational powers\(^{155}\). Therefore, it is only with the approval of the leader of the team that Europol

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\(^{153}\) Wet van 9 december 2004 betreffende de wederzijdse internationale rechtshulp in strafzaken en tot wijziging van artikel 90ter van het Wetboek van strafvordering, B.S. 24 december 2004.

\(^{154}\) This equally applies to representatives of non-participating countries and of Eurojust and OLAF.

officials are entitled to be present during the execution of investigative measures (Article 9 (3) second sentence). Moreover, they may not carry out any investigative tasks themselves (Article 9 (3) second sentence in fine). As a “matter of decency”\textsuperscript{156}, the Act also states that the Federal Prosecutor shall inform Europol\textsuperscript{157} of the establishment of any JIT, involving Belgium and at least one other EU Member State (Article 8 (5))\textsuperscript{158}. Arguing, however, that consequently Europol has become \textit{incontournable} is a little exaggerated\textsuperscript{159}.

\textbf{II. The Netherlands}

66. The Netherlands did not implement the Framework Decision on JITs separately, but implemented it under the Law of 18 March concerning the EU Convention on Mutual Assistance\textsuperscript{160}. As a consequence, a new section on “International Joint Investigation Teams” was inserted into the Dutch Code of Criminal Procedure (Articles 552 qa to 552qe). Also, the 1990 Data Protection Police Files Act was amended, creating the possibility to provide data from temporary police files for JIT purposes. This Dutch opting for ratification of the EU Convention on Mutual Assistance, rather than for a proper implementation of the Framework Decision on JITs, has resulted in minimal national legislation. As to the extension of a JIT with representatives of Europol, nothing has been provided for. However, this should not be interpreted as a statement against Europol involvement in JITs, merely as clumsiness on the part of the Dutch legislator. The Dutch Board of Procurators did issue a guideline with further implementing rules on the setting up of JITs, in which the role of Europol is addressed\textsuperscript{161}. Section 5.6 is basically a reproduction of the contents of both “paragraph 12” and the JIT Protocol. Also, the support function of Europol is stressed. The clumsiness on the part of the Dutch legislator could nevertheless have far-reaching consequences. There is confusion as to

\textsuperscript{156} Round table with J. DELMULLE, Federal Prosecutor’s Office (B), 3 July 2006, Brussels.
\textsuperscript{157} This equally applies to Eurojust.
\textsuperscript{158} See also page 23 of Omzendbrief nr. COL 5/2005 van het College van Procureurs-generaal bij de Hoven van Beroep (Gemeenschappelijke omzendbrief van de Minister van Justitie en het College van Procureurs-generaal betreffende de internationale rechtshulp in strafzaken), Brussels, 10 February 2005.
\textsuperscript{160} Wet van 18 maart 2004 tot wijziging van enige bepalingen van het Wetboek van Strafvordering en de Wet politieregisters en aanvulling van het Wetboek van Strafrecht met het oog op de uitvoering van de op 29 mei 2000 te Brussel tot stand gekomen Overeenkomst, door de Raad vastgesteld overeenkomstig artikel 34 van het Verdrag betreffende de Europese Unie, betreffende de wederzijdse rechtshulp in strafzaken tussen de Lid-Staten van de Europese Unie, Stb. 2004, 107.
whether it will be possible for Europol officials to participate in JITs, involving the Netherlands. In the worst-case scenario Europol’s participation in JITs is indeed problematic\textsuperscript{162}.

\textbf{III. The United Kingdom}

\textbf{67.} As a common law country, the United Kingdom takes a special position when it comes to the implementation of EU legislation\textsuperscript{163}. The Framework Decision on JITs has largely been implemented by means of non-binding circulars. Only a handful of provisions – the participation of “persons other than representatives of the competent authorities of the Member States setting up the team” not being one of them – have been turned into legislation\textsuperscript{164}. As to the extension of a JIT with representatives of Europol, the relevant document for the United Kingdom is the Home Office Circular of 1 October 2002 on the EU Framework Decision on Joint Investigation Teams\textsuperscript{165}. The Circular states that the United Kingdom attaches great importance to the participation of Europol in JITs and has supported successive EU Presidencies in endeavours to amend the Europol Convention in this sense. A distinction is then made between assistance to and participation in JITs. For now, it is not possible for Europol officials to be fully associated with JITs. Nonetheless, according to the Home Office, Europol can still play an important and valuable role in advising on organised crime threats common to two or more Member States and can add value to Member States’ own operational information. As a false note, it should be noted again that in the abovementioned worst-case scenario Europol’s future participation could become problematic as well.

\textbf{68.} The analysis of the relevant national legal and policy documents reveals a flaw that can often be detected in relation to EU law in the Third Pillar. Broad and elaborate, and

\textsuperscript{162} G. VERMEULEN, “De morning after … Over de deelname van Europol aan gemeenschappelijke onderzoeksteams”, \textit{l.c.}, 34 (“Sommige lidstaten hebben zelfs überhaupt niets geregeld inzake deelname van Europol aan gemeenschappelijke teams. Vermits geen enkel verdrag ter zake bepalingen lijkt te bevatten die als self-executing kunnen worden beschouwd, mag worden aangenomen dat in teams waarvan de betreffende lidstaten deel uitmaken, helemaal geen rol voor Europol is weggelegd”).

\textsuperscript{163} C. RIJKEN and G. VERMEULEN, “The legal and practical implementation of JITs: The bumpy road from EU to Member State level”, \textit{l.c.}, 44-45.

\textsuperscript{164} See A. HERZ, \textit{l.c.}, 174.

sometimes revolutionary, agreements are made at the political level within the EU. However, the execution of EU instruments is rather limited in national legislation. This most certainly applies to Europol’s (future) mandate to participate in the activities of JITs, which in essence is the result of a political decision to release the organisation from its operational isolation. Only within the limits provided for by the law of the Member State where the JIT operates, Europol officials will be allowed to assist in all activities and exchange information with all the members. In the Netherlands and the United Kingdom, there is no “law of the Member State” whatsoever. In Belgium, Europol officials have only been granted a passive expert status. This puts Europol’s own ambitions into perspective. In the end, it is obviously not about what Europol wants. It is rather about what Member States are willing to grant.

69. Under these circumstances semantic discussions about the difference between participation in the formal execution of coercive measures and assistance during the execution of such measures are pointless. Europol officials (analysts, experts) will most likely be confined to their Raamweg premises in The Hague. What Belgium is willing to grant therefore seems more than reasonable. A parallel can be drawn between this Belgian expert status for Europol officials and what is already common practice in investigations in most Member States, namely allowing “civil” experts (accounting, IT) to be present and to provide advice during house searches. However, Europol’s argument that its officials, because of their background knowledge and expertise, could give indications to police officers during a house search on for example what particular information should be seized is not entirely convincing. Europol’s core task remains to support the competent authorities in the Member States in their intelligence work. Between having Europol officials at the “scene of the crime” and posting an analyst in a JIT, the latter is clearly the preferable option. It is less pedantic and more effective! At least for now, Europol should be satisfied with this role in JITs. Modesty is a virtue, particularly considering the fact that JIT participation almost fell into Europol’s lap. First “street credibility” has to be gained. This is not to say that Member States should not use what Europol has in store. On the contrary, this would be a very unwise decision. Member States can use all the support they can receive in preventing and combating serious international organised crime and terrorism. In sum, let Europol earn its JIT participation, by keeping it involved.

167 See supra 57.
Section 2. National sensitivities

70. To gain insight into national sensitivities that may not necessarily show from national legislation, I put following question to the ELOs representing Belgium, the Netherlands and the United Kingdom at Europol: “Europol will have the mandate to participate in joint investigative teams, but to what extent is your seconding Member State willing to take Europol aboard?”. The way in which this question was answered ranged from critical (Belgian ELO)\textsuperscript{168}, prudent (Dutch ELO)\textsuperscript{169} to not at all (UK ELO)\textsuperscript{170}.

71. The Belgian position on JITS has always been a reluctant one. There is the belief in the tool as such. Yet, this tool is to be kept for multilateral cooperation, involving complex cases. The two JITs recently established with the Netherlands (a motor vehicle theft case in the Euregio Meuse-Rhine) and with France (a terrorism case) are therefore to be considered as exceptions. The Belgian stance towards Europol participation in JITs is characterised by the same reluctance. An \textit{a priori} involvement of Europol is not considered desirable. While the 2003 model agreement for a JIT also states that the participation of officials from Europol is not mandatory but depends on the circumstances of the investigation, Europol seems to have given the impression to be up for a more systematic involvement. Yet, the ELO representing Belgium has the feeling that the initial \textit{Sturm und Drang} at Europol has calmed down over the last two years. This would partly be due to the fact that the first experiences with JITs in practice have not exactly been unqualified successes\textsuperscript{171}.

72. Telling is following “anecdote” on the “Terror JIT” between France and Belgium. Although it was not deemed necessary to take Europol aboard, Europol was informed of the setting up of the team according to the “decency clause” in the Mutual Assistance Act of 9 December 2004\textsuperscript{172}. When the Belgian Liason Bureau passed the message, there was confusion at Europol on how to proceed. In fact, Europol did not have to proceed. Europol was informed, end of story. This example given by the ELO nevertheless casts doubts as to whether Europol will überhaupt be ready to participate in the activities of JITs.

\textsuperscript{168} Telephonic interview with R. VAN DE SOMPEL, Europol Liaison Officer (B), 9 August 2006.
\textsuperscript{169} Telephonic interview with M. VAN GAALLEN, Europol Liaison Officer (NL), 21 August 2006.
\textsuperscript{170} See Addendum.
\textsuperscript{171} As for the “Drugs JIT” between the Netherlands and the United Kingdom, see C. RIJKEN and G. VERMEULEN, “Kreupel paradepaardje”, \textit{Stcrt.} 2006, 127.
\textsuperscript{172} See \textit{supra} 65.
73. As to what Europol has in store for Member States setting up a JIT, the Belgian ELO personally sees a role for Europol in terms of analytical support. With regards to the provision of expert knowledge, the ELO is less convinced of the added-value. Belgium, as do most other “civilised” Member States, would dispose of plenty of expertise itself. After all, Member States put their expertise at the disposal of Europol, which in turn disseminates it to all 25 Member States.

74. A similar attitude is discernible on Dutch side. According to the Dutch ELO, it will be decided on a case-to-case basis whether or not to take Europol aboard. The added-value Europol has to offer is the decisive factor here. On the basis of potential added-value to the case Europol will be “invited” to be involved in a JIT. This involvement is first of all to be expected on the level of analytical support. At a further stage, Europol could also provide expert knowledge. Only in last resort, so the Dutch ELO assumes, participation stricto sensu is envisaged. At least, he thinks that this will not be given priority on Dutch side. (Members of the) Europol (Directorate), on the contrary, would be very keen on participating in the activities of JITs. However, the Dutch ELO was prudent as to whether according to him Europol is überhaupt ready to participate in JITs: “Het lijkt mij het beste dat Europol hier zelf op antwoordt”. As mentioned earlier, Europol claims to be ready for full participation in JITs.

CONCLUSION

75. Two particular forms of international (police) cooperation occupied a central place in this dissertation: the activities of JITs and the participation of Europol in those activities. First the dissertation’s main concept was properly defined. It is a popular misconception that a JIT is a form of police cooperation, while in fact it is a form of judicial cooperation in criminal matters. The most far-reaching concept of a JIT so far has been introduced by Article 13 of the EU Convention on Mutual Assistance (and correspondingly by Article 1 of the Framework Decision on JITs). Article 13 offers EU Member States a framework for setting up a team consisting of representatives of law enforcement and other authorities of different states jointly investigating cases of international or cross-border crime. The added-value – from a law enforcement perspective – compared to traditional mutual assistance in the context of parallel investigations is considerable. Paragraph 12 of Article 13 (and correspondingly Article 1 of the Framework Decision) paves the way for arrangements allowing appropriate
persons from third countries or international organisations (e.g. Europol) to take part in the activities of a JIT. It was concluded that Article 13 of the EU Convention on Mutual Assistance (and correspondingly the Framework Decision on JITs) foresee the possibility of participation of Europol representatives in a JIT. The dissertation took it from here to address the research question “Can (or should) Europol” participate?”. This question was addressed both from the Europol and the Member States’ perspective. Three Member States were to serve as examples: Belgium, the Netherlands and the United Kingdom.

76. The *European Police Office “Europol”* is not an executive European Police force. For now, Europol remains the EU intelligence organisation that provides support – information exchange, analysis, expertise and training – to the Member States’ law enforcement authorities. If the latter are cooperating in the framework of a JIT, Europol can already provide assistance to the activities of the team under the present Europol Convention. However, actual participation in JITs – always in a support capacity – is dependent on the entry into force of the JIT Protocol amending the Europol Convention. Europol is particularly keen on fulfilling its (future) mandate and also claims it is ready to do so. This involves assisting in all activities of a JIT and exchanging information directly with all its members, however without taking part in the taking of any coercive measures. Europol has been feeding semantic discussions about the difference between participation in the formal execution of coercive measures and assistance during the execution of such measures. According to Europol, its officials are not excluded from being present or assisting during a house search for example. They should even be included in the team, because working for Europol would provide them with a unique background knowledge and expertise.

77. That is all very well, but the Member States hold the key to Europol’s participation in JITs. On the part of the Member States (Belgium, the Netherlands and the United Kingdom) there appears to be less enthusiasm, judging from the relevant national legal and policy documents and from sensitivities that do not show from national legislation. Only within the limits provided for by the law of the Member State where the JIT operates, Europol officials will be allowed to assist in all activities and exchange information with all the members. In the Netherlands and the United Kingdom there is no “law of the Member State” whatsoever. Of the three Member States, only Belgium bothered to implement into national legislation the provision in the EU Convention on Mutual Assistance (and correspondingly the Framework Decision on JITs) paving the way for Europol representatives to take part in the activities of a
JIT. Still, Europol officials have *only* been granted a passive expert status by the Belgian legislator. This puts Europol’s own ambitions into perspective. The reluctance on the part of the Member States is not entirely incomprehensible. After all, Europol’s (future) mandate to participate in the activities of JITs is the result of a political decision to release the organisation from its operational isolation. It could even be argued that JIT participation simply fell into Europol’s lap. Moreover, there are doubts as to whether Europol will überhaupt be ready to participate. What Belgium is willing to grant therefore seems more than reasonable and this has nothing to do with chauvinism!
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ADDENDUM
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From: "Barker, S." <BarkerS@Europol.eu.int>
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1) Europol will have the mandate to participate in joint investigation teams (JIT), but not the Member States. How can this be achieved? What is the official UK position on Europol participation in Joint Investigation Teams? What is your personal opinion on this?

The UK is very supportive of JITs and this was reflected in the UK's vote in the 2005, The UK is well represented on both a Law Enforcement and Judicial level in various expert fora. Our permanent seat means that the UK is very keen to be a leader in the JIT field. As Head of the JIT Section in Europol I am an important part of the UK's JIT strategy.

2) What is the official (and/or Europol policy on participation in joint investigation teams? Any understanding by the Europol Director for domestic?
Oral information: semi-structured telephonic interview

Date: (...) August 2006

Respondent: Mr. Stuart BARKER, UK Europol Liaison Officer

Context: Joint Investigation Teams in Belgium, the Netherlands and the United Kingdom. Research Question: "Can (or should) Europol participate?" Point of view of the three Member States (Belgium, the Netherlands, the United Kingdom)/ Europol Liaison Officers (ELOs) are in a good position to make sound statements; they serve as "liaison" between Europol and its "customers" in the Member States: 1) ELOs work at Europol premises 2) yet, ELOs are not Europol staff -> they can speak freely (and critically) about attitude towards Europol in their seconding Member States.

1) Europol will have the mandate to participate in joint investigation teams (able), but are the Member States ready (willing) to take Europol aboard? What is the official UK position on Europol participation in Joint Investigation Teams? What is your personal opinion?

The UK is very supportive of JITs and this was reflected in the UK's role in the 1st JIT The UK are well represented on both a Law Enforcement and Judicial level in various expert groups. On a personal level I feel that the UK are very keep to be a leader within the JIT field As Head of the UK Bureau at Europol I am an important part of the UK's JIT strategy. I attend numerous working groups within Europe concerning JITs to put forward the UK position. My view is that the JIT tool needs to be encouraged and developed to become a more routine law enforcement team.

2) What is the official (external) Europol position on participation in joint investigation teams? Any statements by the Europol Director for example?

Europol are very supportive of JITs. I know this from two types of experience. Firstly, Europol together with Eurojust organise a JIT working group of experts to develop the methodology. Secondly, when I was working on a JIT Europol were very proactive in offering analytical resources. In fact, an analy,st was posted into the JIT
3) (How) Is Europol *internally* preparing itself for JIT-participation? In terms of guidelines, training, budget... Europol will have the mandate as soon as the Protocol of 28 November 2002 enters into force, but is it ready according to you?

*I am aware of a project being undertaken at Europol at the moment to establish what the training needs will be.*

4) Drugs-JIT (UK-NL): this has largely been covered by Annette HERZ (A. HERZ, "The role of Europol and Eurojust in Joint Investigation Teams", in C. RIJKEN and G. VERMEULEN (eds.), *Joint Investigation Teams in the European Union: From Theory to Practice*, The Hague, TMC Asser Press, 2006, 159-199). My promoter edited this publication. I will not bother you by addressing her research questions over again. However, I am interested in your personal experiences in the Drugs-JIT and also in the state of play of the court-case in Rotterdam (Judgement is due in August I believe). What are your expectations for the outcome of the case?

I think the JIT worked very well. Of course it is easy to address only negative points but it must be remembered that this was the 1st time anything like this had been tried before. There were a number of things that were done on an operational basis which we would do differently with hindsight but I feel that we must not lose sight of the fact that during the investigation large quantities of drugs and money were made in Europe. In the UK, the trials were very successful with very long prison terms handed out to the criminals. I do not have an update from the Dutch trial. Whatever the verdict, it is important that we learn lessons from the JIT. We must also remember that one of the aims of the JIT was to test the law relating to JITs. We will have certainly achieved that.