

Business and Human Rights: Enhancing Accountability and Access to Remedy

Project 2: Roles and Responsibilities of Interested States

Project 6: Domestic Prosecution Bodies

Preliminary Research Project #3

International operational-level cooperation with respect to criminal investigation: a short study of the work of Joint Investigation Teams (“JITs”) in the European Union



**UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER**

27 July 2015

1. Introduction

1.1 Background to study

This short study of the role and performance of Joint Investigation Teams (“JITs”) in the European Union (“EU”) was carried out during July 2015 as part of the background work for the OHCHR’s Accountability and Remedy Project.

The OHCHR’s Accountability and Remedy Project comprises six distinct, but interrelated, projects and will run until June 2016.¹ At that point, OHCHR will report the outputs and recommendations from the initiative to the United Nations Human Rights Council, as requested in Human Rights Council resolution A/HRC/RES/26/22.²

The six projects that comprise the OHCHR’s Accountability and Remedy Project have been selected because of their strategic value and potential to improve accountability from a practical, victim-centred perspective.³

Project component 2 of the Accountability and Remedy Project is entitled “Roles and responsibilities of interested States”. This project will explore State practices and attitudes with respect to the appropriate use of extraterritorial jurisdiction and domestic measures with extraterritorial implications. The project will also consider the different ways in which international cooperation (at both diplomatic and operational levels) can improve the ability of victims to access justice in the State where the abuses are alleged to have occurred. It will result in “good practice” guidance for States in relation the management of cross-border cases and explore possible models of international and bilateral cooperation.

Project component 6 of the Accountability and Remedy Project is entitled “Practices and policies of domestic prosecution bodies”. This project aims to investigate the reasons behind the apparently very low levels of activity by domestic criminal law enforcement agencies in relation to alleged business involvement in gross human rights abuses. It will seek to identify challenges faced by domestic prosecutors in such cases, and to develop a set of recommendations for States on ways to begin addressing those challenges.

1.2 Aims of study

The aim of this short preliminary study is to gain a clearer picture of the contribution made by JITs to criminal justice in the EU and, in particular, the way investigators and prosecutors cooperate with each other and overcome differences in legal standards and approaches in complex cross-border cases.

¹ Further information about the OHCHR’s Accountability and Remedy Project can be found at <http://business-humanrights.org/en/ohchr-accountability-and-remedy-project>.

² The text of this resolution is available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/22.

³ More information about the content and aims of these six projects can be found at http://business-humanrights.org/en/ohchr-accountability-and-remedy-project/content-timeline-and-process#prgm_work.

This preparatory research is undertaken with a view to gaining a better understanding of:

- (a) the advantages and disadvantages of the JITs model of cooperation compared to more traditional methods of providing mutual legal assistance between States;
- (b) the extent to which such operational-level cooperation can help improve efficiency and effectiveness of domestic investigation and prosecution bodies, including by addressing problems such as lack of resources, capacity and know-how; and
- (c) the extent to which JITs provide a potential model of cooperation which can usefully be applied to the investigation of cases involving allegations of business involvement in severe human rights abuses.

1.3 How the study findings will be used

The findings of this preliminary study will be used to help inform preparations for, and give practical context to, interactive workshop discussions on the cross-border regulatory and enforcement issues and challenges posed by business involvement in severe human rights abuses. These discussions are scheduled to take place in the latter half of 2015. The aims of these workshops will be as follows:

- to clarify the legal and practical problems that can arise in cross-border cases;
- to understand the ways in which existing views of roles and responsibilities are likely to shape State responses;
- drawing from experience in other regulatory fields, to consider ways that States can work together cooperatively to address the challenges that arise in cross-border cases;
- to test and give participants the opportunity to react to different possible models of international cooperation; and
- to identify the possible elements of a principled basis for appropriate action in relation to jurisdictional matters.⁴

The findings will also be used to inform one-on-one discussions with prosecutors (for the purposes of project component 6), scheduled to take place between July and September 2015.

The insights gained from this preparatory research and the follow up work mentioned above will ultimately be fed into “good practice” guidance and recommendations for States to be developed pursuant to the mandate from the Human Rights Council under HRC resolution 26/22.

⁴ For more information about the planned programme of work for Project 2 (“Roles and responsibilities of interested States”) specifically, see <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyWorkPlans.pdf>.

1.4 Methodology

This study took the form of a desk review of relevant literature and international instruments, including the 2000 EU treaty on mutual legal assistance, and the 2002 Framework Decision on JITs, together with relevant manuals, model agreements, guidance, statistical information and annual reports published by Eurojust. This was followed up by telephone interviews with the heads of two Eurojust network secretariats⁵ to clarify technical issues and to better understand the use of JITs in practice, including patterns of use, structure and modalities, principal challenges and how these can be overcome by practitioners in the design and management of JITs.

2. Discussion

2.1 What are the legal bases of JITs in the EU? What are the key legal instruments that frame the work of JITs?

The possibility of joint criminal investigations is mentioned in several binding and non-binding EU instruments prior to 2000.⁶ A legal basis for the implementation of JITs in the EU was eventually provided in the form of the 2000 EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (the “2000 EU Mutual Assistance Convention”). Article 13 of this Convention provides that:

*“By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement”.*⁷

A further legal basis for JITs is provided by the 2002 Council Framework Decision on Joint Investigation Teams. The EU Council decided to adopt a framework decision shortly after the attacks of 11 September 2001. During an extraordinary Council Meeting on Justice and Home Affairs which took place

⁵ OHCHR would like to thank Matevz Pezdirc (Head of Network Secretariat, network for investigation and prosecution of genocide, crimes against humanity and war crimes) and Vincent Jamin (Head of Secretariat, JIT Network).

⁶ See for instance Articles 29 and 30 of the Treaty on European Union (as amended by the 1997 Treaty of Amsterdam) which refers to the objective of providing citizens with “a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters”. Article 30 states that this “common action” shall include “operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences”. Article 30(2) refers to Europol’s role in facilitating and supporting “... specific investigative actions by competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity”.

⁷ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (“2000 EU Mutual Assistance Convention”), (2000/C 197/01), copy available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF>, Article 13.

on 20 September 2001, concerns were expressed about the slow pace of ratification of the 2000 EU Mutual Assistance Convention. The Council ultimately adopted the 2002 Council Framework Decision, along with several other measures, to “speed up the process of creating an area of freedom and security and justice and to step up cooperation with its partners, especially the United States”.⁸ The provisions of the 2002 Council Framework Decision mirror the provisions of the 2000 EU Mutual Assistance Convention relating to JITs.⁹

2.2 What institutional arrangements have been made to govern and support the work of JITs in the EU?

Eurojust was formally constituted in 2002 pursuant to Council Decision 2002/187/JHA¹⁰ to fulfill a need identified by the Council for:

*“the immediate adoption of structural measures at European Union level to facilitate the optimal coordination of action for investigations and prosecutions covering the territory of more than one Member State with full respect for fundamental rights and freedoms”.*¹¹

Eurojust has several specific roles in relation to JITs. In addition to general objectives to “stimulate and improve coordination” between competent authorities of Member States, and “facilitating the execution of international mutual legal assistance and the implementation of extradition requests”,¹² Eurojust has powers to ask the competent authorities of Member States to consider setting up a JIT, to coordinate between competent authorities of concerned Member States, to provide information and to “give assistance in order to improve cooperation between the competent national authorities”.¹³ Under Article 8, if the competent authorities of a Member State decide not to

⁸ Extraordinary Council Meeting, Justice, Home Affairs and Civil Protection, Brussels, 20 September 2001, 12019/01 (Press 327), p. 4, quoted in Conny Rijken, ‘Joint Investigation Teams: principles, practice and problems: Lessons learnt from the first efforts to establish a JIT’, (2006) 2(2) Utrecht Law Review, p. 99.

⁹ See 2000 EU Mutual Assistance Convention, n. 7 above, Articles 13, 15 and 16, reproduced in Articles 1-3 of the Council Framework Decision of 13 June 2002 on joint investigation teams (2002 Council Framework Decision), (2002/465/JHA), copy available at <http://www.eurojust.europa.eu/doclibrary/JITs/JITs%20framework/Framework%20Decision%202002-465-JHA%20on%20JITs/CFDonJITs-2002-06-13-EN.pdf>.

¹⁰ However, note that the idea of a special unit comprising prosecutors, magistrates and police offices from EU Member States had been discussed at the European Council Meeting in Tampere, Finland, on 15 and 16 October 1999, and that a forerunner to Eurojust (called Pro-Eurojust) had been established by Portugal, France, Sweden and Belgium in 2000. Based in Brussels, Pro-Eurojust was a provisional judicial cooperation unit at which EU Member States would be represented by “national correspondents”. Pro-Eurojust commenced work on 1 March 2001, under the Swedish Presidency.

¹¹ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, (2002/187/JHA), copy available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:063:0001:0013:EN:PDF>, Preamble, para. 2.

¹² Ibid, Article 3.

¹³ Ibid, Articles 6 and 7. The powers referred to in Article 6 are exercised by Eurojust through its national members. The powers referred to in Article 7 are exercised by Eurojust “acting as a college”.

comply with a request by Eurojust under Article 7 to carry out an investigation, or to coordinate with other Member States' competent authorities or to set up a JIT, they are required to inform Eurojust and provide reasons for their decision.¹⁴

It is equally possible for the competent authorities of EU Member States to initiate JITs themselves, without specific recommendations from Eurojust. In such cases, Eurojust can nevertheless be called upon for legal, logistical or practical advice. Eurojust can also provide assistance with respect to information exchange, or with the execution of requests for mutual legal assistance between JIT participants and non-member States.¹⁵

Since its establishment in 2002, Eurojust has grown in size and workload, not least because of EU enlargement in 2004. Cooperation agreements have been completed with a number of EU agencies (including Europol and the EU's anti-fraud agency "OLAF") and some non-EU States (Norway, Iceland, USA, Croatia, Switzerland, and the former Yugoslav Republic of Macedonia).¹⁶ In 2008 the original Council Decision establishing Eurojust¹⁷ was amended with a view to strengthening Eurojust and improving its operational effectiveness, including in relation to JITs.¹⁸ Under the new provisions in Article 9, national members of Eurojust would be entitled to participate in JITs in accordance with Article 13 of the 2000 EU Mutual Assistance Convention.

Pursuant to a 2003 Council Recommendation, a model agreement has been developed to encourage best practices in the design and use of JITs by EU Member States.¹⁹ The model agreement was first published in 2003 and was updated in 2010 to take account of the practical experiences of users. Further advice and guidance is provided by way of a manual on JITs for Member States.²⁰ The JITs manual, which is published jointly by Eurojust and Europol, covers issues such as legal framework, when to set up a JIT and JIT structure, management and reporting.

¹⁴ Ibid, Article 8. Note, however, that reasons do not need to be given for a decision not to comply with certain Eurojust requests where doing so would harm essential national security interests or jeopardise the success of criminal investigations already underway.

¹⁵ Judith Nagy, 'About Joint Investigation Teams in a Nutshell', (2001) 2 *Issues of Business and Law* 104, at p. 112.

¹⁶ The Eurojust website notes that liaison prosecutors from Norway and the US are now permanently based at Eurojust's offices in The Hague.

¹⁷ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, (2002/187/JHA).

¹⁸ Council Decision of 15th July 2009, on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, (2009/426/JHA).

¹⁹ Council Resolution of 26 February 2010 on a Model Agreement for setting up a Joint Investigation Team (JIT), (2010/C 70/01), copy available at <http://www.eurojust.europa.eu/doclibrary/JITs/JITs%20framework/Model%20Agreement%20for%20setting%20up%20a%20Joint%20Investigation%20Team/JITs-C70-01-2010-EN.pdf>.

²⁰ Joint Investigation Teams Manual (JITs manual), copy available at <http://www.eurojust.europa.eu/doclibrary/JITs/JITs%20framework/JITs%20Manual/JITs-manual-2011-11-04-EN.pdf>.

Successive Eurojust annual reports highlight the various ways that the organisation can provide practical and legal assistance to competent authorities in the development and management of JITs. In 2014, this assistance included:

“(i) drafting of JIT agreements or extensions to existing agreements; (ii) advising on the EU and international legal frameworks in setting up a JIT; (iii) providing information on different procedural systems; (iv) identifying suitable cases for JITs; (v) organising coordination meetings to support JITs; and (vi) providing assistance concerning coordinated action.”²¹

Finally, competent authorities in EU Member States can apply to Eurojust for grants to assist with the expenses associated with setting up and managing a JIT. Since 2009, Eurojust has administered a special fund (from grants by the European Commission under the Prevention of and Fight against Crime (ISEC) programme) to cover expenses for items such as accommodation, transport, equipment hire, communications, translation and interpretation.

2.3 How are JITs constituted in practice? What are their terms of reference and how are they managed? Who takes key decisions and how are disagreements resolved?

Both the 2000 EU Mutual Assistance Convention and the 2002 Council Framework Decision recommend the establishment of JITs where:

“(a) a Member State’s investigations into criminal offences require difficult and demanding investigations having links with other Member States; [or]

(b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved.”²²

According to the JITs manual published by Eurojust,²³ the key factor in determining whether to establish a JIT or not is not necessarily the seriousness of the crime or the number of people involved but rather “the crime’s international and cross-border dimension”.²⁴ Noting that “JITs will usually be considered when investigating more serious forms of criminality”, the JITs manual also suggests that “JITs may also prove useful “in the investigation of smaller cross-border cases”.²⁵ The manual goes on:

²¹ See Eurojust Annual Report 2014, copy available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202014/Annual-Report-2014-EN.pdf>, at p. 22.

²² See 2000 EU Mutual Assistance Convention, n. 7 above, Article 13(1); 2002 Council Framework Decision, n. 9 above, Article 1(1).

²³ See n. 20 above.

²⁴ Ibid, p. 6.

²⁵ Ibid, p. 7.

*“This is because a JIT can facilitate co-operation in a specific case and also prepare the groundwork for future JITs by building mutual trust and providing experience in cross-border co-operation.”*²⁶

Requests to set up a JIT may come from a Member State²⁷ but, as noted above, can also be made by Eurojust²⁸ or Europol. Each Member State will have its own internal procedures for receiving and considering requests to establish a JIT which may, as noted in the JITs manual, include some “seriousness” criteria, or some other qualifying criteria.²⁹

The JIT will typically be based in and led from one Member State, which will usually be the State in which the bulk of the investigation is being carried out. While the JIT operates in accordance with the domestic law of the State in which it is based, an agreement must be negotiated to govern the JIT and to allocate responsibilities. The JIT manual recommends that “investigators, prosecutors, magistrates and judges from the Member States considering the creation of a JIT, together with delegates from Eurojust and Europol, meet to discuss the matter *at the earliest opportunity* before a formal proposal and agreement is made”.³⁰ The possibility that domestic implementation of the JITs mechanisms may create additional procedural hurdles (see, for example, the reference to qualifying criteria above) is one of the reasons why early engagement is recommended.

The leaders and membership of the JIT, and their respective roles, are set out in the JIT agreement.³¹ Typically, there will be one leader (representing a competent authority of the Member State in which the JIT is based) although joint leadership (involving representatives of competent authorities of more than one Member State) is a possibility. The JIT manual notes that, while EU legislation does not specify whether the leader should be a member of the judiciary, the prosecution services or the police, “it is recommended that a representative from the judiciary should be the leader in those cases where the investigating magistrates or prosecutors direct operations ... [however] ... In other jurisdictions and dependant on the national framework, it may be appropriate that a law enforcement officer leads the JIT.”³²

Team members carry out their investigative responsibilities under the direction of the team leader (or leaders) and in accordance with the Operational Action Plan (“OAP”). The OAP may be part of the JIT agreement itself, or may be a separate annex, or indeed a separate confidential document.³³ The OAP is a

²⁶ Ibid.

²⁷ See 2000 EU Mutual Assistance Convention, n. 7 above, Article 13(1); 2002 Council Framework Decision, n. 9 above, Article 1(1).

²⁸ See Council Decision 2002/187/JHA, Articles 6(1) and 7(1).

²⁹ See JITs manual, n. 20 above, p. 7

³⁰ Ibid.

³¹ This is true unless there are good operational reasons for protecting the identity of JIT team members (e.g. where covert operations are planned or where there are security concerns), in which case identification numbers are assigned to the relevant team members.

³² Ibid, p. 9.

³³ Domestic legislation and disclosure requirements, as well as operational requirements, will have a bearing on how the agreement is structured. However, according to the notes to the

key part of the team arrangements. The notes to the JIT model agreement stress the need for the OAP to be flexible and practical, although it is silent as to the procedures to be applied should substantial changes be needed (e.g. in light of investigative developments, or in the event of disagreements within the team as to how the JIT objectives or plan should be interpreted). However, Council Decision 2009/426/JHA on the strengthening of Eurojust gives Eurojust a potential mediation role in cases of conflict of jurisdiction which cannot be resolved by mutual agreement between the competent authorities concerned.³⁴

Team members from jurisdictions other than the jurisdiction in which the JIT is based are referred to as “seconded members”. Seconded members are not required to be physically present in the jurisdiction in which the investigations are based. As noted in the JIT manual, “[a] number of scenarios are possible and organisational issues of the JIT have to be decided on a case-by-case basis, taking into account factors such as costs, availability of personnel, length of enquiry, nature of the investigation, judicial authority, etc.”³⁵

Seconded members may (subject to the terms of the JIT agreement and any specific domestic law requirements) be allowed to be present when investigative activities (e.g. searches of premises) are carried out in the other Member States participating in the JIT. The JIT model agreement contains a list of further provisions (“special arrangements”) relevant to the functioning of the team and the role of seconded members, which will normally require elaboration in a JIT. These include the terms under which seconded members can be excluded from investigative activities, conditions under which seconded members can be involved in operational activities within the relevant State, conditions under which they can request assistance from their own national authorities, confidentiality, press briefings, expenses, insurance, data protection and the conditions under which seconded members can carry weapons.³⁶ As noted in the JIT manual, there may be conditions on the involvement of seconded members set by their own competent authorities and these need to be fully taken into account at the time of negotiating the JIT.³⁷

The JIT model agreement has been drafted in a flexible way to cope with a wide range of potential crimes, contexts and operational needs. Case-specific needs and priorities are addressed through an OAP and through the special arrangements specified in the JIT agreement – a checklist for which is provided in the model agreement. However, the different ways in which JITs have been implemented at the domestic level – including different procedures

JIT model agreement “in all cases the competent authorities which sign the agreement shall be aware of the content of the OAP”. See JIT model agreement, n. 19 above, footnote 3.

³⁴ See Council Decision of 15 July 2009 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, (2009/426/JHA), Article 7(2).

³⁵ JIT manual, n. 20 above, p. 9.

³⁶ See JIT model agreement, n. 19 above, clause 13.

³⁷ JIT manual, n.20 above, p. 10.

for gaining political approval,³⁸ the different conditions that may be placed on participation and the extent to which further approvals are needed in respect of operational changes necessary to respond to developments in an investigation – are all complicating factors which need careful examination and consideration at the time of establishment of the JIT. Some of these practical challenges are discussed in more detail in section 2.6 below.

2.4 Which States have made most use of JITs to date? In what fields of criminal investigation have JITs been most used to date? To what extent have JITs been used to investigate allegations of corporate (as well as individual) criminality?

Very few JITs were formalised between 2002 and 2006. Information presented in the Eurojust annual reports for those years suggests that the main State participants in JITs during that time were the UK, Netherlands, Spain and France and that those JITs were set up primarily to investigate drug trafficking (the UK and Netherlands) and terrorism (France and Spain).³⁹ However, in the 2007 Eurojust Annual Report the first indications of a “strong upward trend” were reported, with 12 new cases entered into the Eurojust case management system (2 having been formalised in 2006 and a further 10 in 2007). Since 2007, the number of new JITs initiated in each year has continued to increase.⁴⁰ While most of these have been bilateral (the most frequent pairing being France and Spain),⁴¹ multilateral arrangements (involving three or more States) are now becoming more common. In addition, Eurojust has increasingly been called upon to provide support to JITs involving third States (i.e. non-EU Member States).⁴² The most recent Eurojust annual report (2014) records 45 newly instituted JITs that are supported by Eurojust national members. Statistics on the number and distribution of JITs that have received financial support from Eurojust show that by 2014 competent authorities of virtually all EU Member States had experience participating in a JIT on at least one occasion, and some States (notably Belgium, Denmark, France, Netherlands, Finland and the UK) had participated in JITs on a fairly regular basis.⁴³

³⁸ For instance, the Eurojust Annual Report for 2003 notes that approval by the Ministry of Justice, a judicial authority or the Ministry of the Interior will be required to set up a JIT in some Member States. See <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202003/Annual-Report-2003-EN.pdf>, p. 14.

³⁹ For more information about cooperation between French and Spanish authorities with respect to terrorism offences see Ludo Block ‘Joint Investigation Teams: The Panacea for Fighting Organised Crime?’, copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981641, pp. 21-25.

⁴⁰ Eurojust annual reports record 17 new JITs in 2009 and a further 31 new JITs in 2010.

⁴¹ See Block, n. 39 above, p. 22 for a table showing the distribution of JITs established between 2004 and crimes 2009, and the crimes they were established to investigate.

⁴² See Eurojust Annual Report 2014, n. 21 above, at p. 22. An example given in the Eurojust Annual Report for 2014 is the recently established JIT to investigate the crash of Flight MH17 in the Ukraine, involving Netherlands, Belgium, Australia, Ukraine and Malaysia.

⁴³ See Eurojust Annual Report 2014, n. 21 above, graph at p. 23, which records that the United Kingdom authorities have been participants in 45 JITs that have received financial support by Eurojust, and that the French authorities have participated in 37 such JITs, and Belgian authorities in 30.

The types of crimes most frequently investigated with the use of JITs are drug trafficking, fraud, money laundering, terrorism, trafficking in human beings, counterfeiting and organised robbery.⁴⁴ However, more recently JITs have also been established to investigate other types of crimes including cyber-crime, corruption, vehicle theft and allegations of war crimes.⁴⁵

To date, the focus of JITs has been on *individual* rather than *corporate* criminality. Eurojust annual reports provide no examples of JITs established in response to a corporate crime which have resulted in prosecutions of corporate entities.⁴⁶ Nevertheless, the JIT model used in the EU is deliberately flexible, and there is nothing in the legal framework or in the model agreements that would appear to prevent the use of JITs to investigate allegations of corporate as well as (or instead of) individual criminality.

2.5 How do JITs differ from other mutual legal assistance frameworks? What are the advantages of the JIT model of cooperation?

The most important difference between the JIT model of cooperation and the more traditional ways of obtaining mutual legal assistance is that the JIT model avoids the need for letters rogatory (or “letters of request”) when assistance from foreign judicial or law enforcement authorities is required. A letter rogatory is a formal request for assistance from a court in one jurisdiction to a foreign court. Forms of assistance that may be sought by letters rogatory include service of process, to compel a witness to give testimony, to carry out a search or seizure of property or to obtain certain information. A number of Conventions have been established to streamline the letters rogatory process (enabling judicial authorities to communicate with each other directly, rather than through diplomatic channels).⁴⁷ While these developments helped to facilitate cross-border criminal investigations, problems of inefficiency, fragmentation and duplication of effort remained. As legal commentators have explained:

“Until recently, this type of cooperation at the operational law enforcement level lacked the possibility of (full) participation of foreign officers, and common decisions on strategies, working methods and leadership. From a formal point of view, these investigations were separately executed at ‘different sides of the border’ (mirror investigations). International exchange of

⁴⁴ EU Directorate General Internal Policies of the Union, ‘Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level’, January 2009, PE 410.671. See also Eurojust Annual Report 2007, copy available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202007/Annual-Report-2007-EN.pdf>, at pp. 24-25.

⁴⁵ See n. 21 above.

⁴⁶ See for instance the “VAT Fraud Case Example” detailed in the Eurojust Annual Report 2013. While companies were investigated in the course of those enquiries, the outcome was the arrest of three individuals. See Eurojust Annual Report 2013, copy available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202013/Annual-Report-2013-EN.pdf>, pp. 24-25.

⁴⁷ See, for instance, the European Convention on Mutual Assistance in Criminal Matters, 1959. See also Article 18(13) of the UN Convention on Transnational Organised Crime.

intelligence required formal requests for legal assistance between the parties involved. Many hurdles had to be cleared in the process of cooperation, such as the identification of the competent authority and person abroad, the checking of a request by several authorities in both the sending and receiving country and the time consuming procedure for the submission of requests and materials. In terms of efficiency and effectiveness, a strong need was felt to improve the formal structure."⁴⁸

Under the JIT model, investigators have, by comparison, a more simplified and arguably more efficient method of cooperating and exchanging information relating to an investigation. Although there is likely to be some political oversight with respect to the establishment of the JIT,⁴⁹ once the JIT is operational, team members are able to share information relatively freely and directly with each other, subject to the terms of the JIT agreement. In addition (again, subject to the terms of the JIT agreement) seconded members of JITs may be present when key investigative actions are taken (e.g. witness interviews, searches of premises, etc). They may also make requests directly to their own competent authorities to take specific investigative steps in their own jurisdiction in furtherance of the investigation, the outcomes of which can be shared directly with other members of the JIT.⁵⁰

In addition to the potential efficiency improvement and cost savings,⁵¹ the JIT model provides a flexible framework under which the competent authorities from different jurisdictions can explore and develop ways of responding to specific legal and practical challenges in advance. Problems such as differences in definitions of offences, differences in sanctions, differences in rules on collection and admissibility of evidence, differences in disclosure rules and questions relating to the distribution of confiscated assets (discussed further in section 2.6 below) can be anticipated, considered and dealt with in advance by agreement, rather than reactively on an ad hoc basis as the investigation develops.

In this, competent authorities wishing to establish a JIT have additional resources to call upon in the form of Eurojust. As noted above, this assistance can take the form of help with liaison, advice on potential legal issues and problems, assistance with drafting agreements, as well as (limited) financial assistance for cost items such as transport, accommodation, communication and translation.

⁴⁸ Conny Rijken and Gert Vermeulen, 'The Legal and Practical Implementation of JITs: The bumpy road from EU to Member State level' in Conny Rijken and Gert Vermeulen (eds), *Joint Investigation Teams in the European Union: from Theory to Practice*, (2006, TMC Asser Press, The Hague), at p. 50.

⁴⁹ See p. 8 above.

⁵⁰ See further Rijken, n. 8 above, p. 102-104.

⁵¹ Quantitative data on cost savings and efficiency gains provided by JITs does not appear to have been systematically collected to date. Further studies will be needed to ascertain the impacts of JITs *in practice* in terms of cost and resource savings and prosecutorial outcomes.

Box 1: Potential advantages of JITs in cross-border criminal investigations over more traditional forms of mutual legal assistance

- Easier and quicker information exchange between competent authorities, less bureaucracy and delay;
- Closer cooperation, less fragmentation of investigations, resulting in greater operational effectiveness;
- Single, clear leadership and reporting structure;
- Less duplication of effort, resulting in greater efficiency and potential cost savings;
- Provides a framework for allocating roles and responsibilities and addressing potential problems (i.e. inconsistencies in legal standards) *ex ante* (i.e. before the event);
- Provides a framework for discussing and resolving areas of potential jurisdictional conflict;
- Provides a framework for agreeing and recording a suitable regime to deal with issues such as distribution of confiscated assets and sharing of financial penalties;
- Ready access to technical, legal and financial support from Eurojust and Europol;
- Development of trust and good relations between representatives of law enforcement bodies of different jurisdictions;
- Greater familiarity with different legal cultures, fostering greater international understanding.

2.6 How successful are JITs in practice? What challenges have been faced? How are these challenges overcome?

The data available thus far does not permit a definite conclusion to be drawn about the success of JITs relative to other, more traditional forms of cooperation. While Eurojust provides occasional information about successful JIT investigations in its annual report (often in the form of anonymised case studies), this does not provide a complete picture.⁵² On the other hand, statistics on use of JITs do indicate their growing acceptance and popularity as a useful investigative tool,⁵³ suggesting that users have had positive experiences with this method of conducting cross-border investigations.

However, challenges have emerged both in terms of building confidence in JITs as an investigative tool *in principle*, and, at the more practical level, with respect to the development of specific JITs.

⁵² It is possible that Eurojust will be able to provide more detailed data on JIT use and performance in future. The Council Decision on the strengthening of Eurojust passed in 2009 (see n. 18 above) sets out more detailed provisions relating to reporting by competent authorities. Under Article 13, Member States are required to ensure that national members are informed about the setting up of JITs “and of the results of the work of such teams”. The Eurojust Annual Report for 2009 suggests that Eurojust would be seeking, under these reporting provisions, “information about the setting up of a JIT to Eurojust, including the type of crime being investigated, the size of the JIT, and the outcome”. The report continues, “Once the new Eurojust Decision has been fully implemented across the Member States, Eurojust will be in the unique position of being the only contact point within Europe to be able to provide actual figures on the evolution and usage of JITs across the European Union”. See Eurojust Annual Report 2009, copy available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202009/Annual-Report-2009-EN.pdf>, at p. 34.

⁵³ See discussion at section 2.4 above.

Problems contributing to slow take-up of JITs

As noted above, very few JITs were constituted between 2002 and 2006. Eurojust annual reports during this period express surprise and disappointment at the low rates of take-up.⁵⁴ The key problems at that time, in Eurojust's assessment, were slow implementation by Member States (meaning that JITs could not readily be constituted) and the perceived complexity of arrangements. Subsequent Eurojust annual reports identify lack of awareness and expertise, as well as a general lack of familiarity with JITs as further obstacles.⁵⁵ In 2005, an informal group (called the JIT Experts Informal Network) was tasked with carrying out further activities to uncover the reasons why JITs were still not widely used and to raise awareness.

A number of academic commentators expressed reservations during that initial period as to whether the JITs would ever become widely used. Concerns had been expressed that, because of differences in legal standards, organisation of law enforcement bodies and methods of implementation of JITs by Member States, the JIT model may not overcome enough of the existing obstacles to police cooperation to warrant the additional risk, inconvenience, complexity and cost of constituting a JIT (as opposed to, say, a parallel or "mirror" investigation).⁵⁶ Some have contended this may have been because insufficient attention was given to operational needs and the experiences of practitioners at the time the proposals were formulated.⁵⁷ Others have argued that in some cases the complexity and considerable costs involved in setting up JITs might pose serious obstacles.⁵⁸

However, the steady increase in the numbers of newly-initiated JITs since 2007 suggests that lack of awareness and experience with JITs, rather than technical legal problems and costs, were the most significant factors in the slow uptake until that point. It would appear that, with experience, the risks and benefits involved in working within the JIT format are now better understood and can be more accurately assessed. Even so, differences in approach between EU Member States on a range of issues have posed challenges to the establishment and operation of individual JITs.

⁵⁴ See, for instance, Eurojust Annual Report 2004, copy available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202004/Annual-Report-2004-EN.pdf>, p. 15.

⁵⁵ See, for instance, Eurojust Annual Report 2005, copy available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202005/Annual-Report-2005-EN.pdf>, p. 20.

⁵⁶ See Block, n. 39 above. See Rijken, n. 8 above, esp. p. 117. See also Marvin Klother 'Joint Investigation Teams – problems, shortcomings and reservations', (2014), copy available at <http://essay.utwente.nl/65155/>.

⁵⁷ See Block, n. 39 above, who argues that opportunities to improve cooperation were missed because "the introduction of JITs was supported by legal and political arguments while the professional perspective was not considered ... legal and political considerations in policy-making on cooperation in combating organised crime, although indispensable, are, as the practical experiences with JITs clearly show, insufficient for devising a feasible and effective policy", at p. 28.

⁵⁸ Klother, n. 56 above.

Issues faced in specific cases

In practice, difficulties have arisen due to differing rules relating to the collection of evidence among EU Member States, resulting in the inadmissibility in one State of evidence collected in another State according to the laws of that State. A further difficulty concerns differences between States regarding rules on disclosure of information by law enforcement bodies, which can obviously pose problems to ongoing investigations if they are not recognised and addressed. A third group of challenges arises from different rules on data protection – although these have become less problematic following greater harmonisation of standards within the EU.

Depending on the case and the jurisdictions involved, it may be possible to overcome many of these difficulties in the JIT agreement itself. For instance, it may be possible to make it a condition of cooperation through a JIT that evidence be collected in a certain way that meets the domestic legal requirements of all the participating competent authorities. However, where these requirements are not reconcilable, or where to deal with them would create too much complexity, or be too burdensome, or undermine the effectiveness of the team, it may be that some other cooperation mechanism is preferred. Indeed, one of the services provided by Eurojust in relation to JITs has been “offering advice to national authorities as to whether this tool is appropriate in concrete cases”.⁵⁹

Developing a JIT agreement and OAP that takes account of the legal constraints in operation in all of the participating States can be a particular challenge in relation to JITs that involve third States (i.e. non-EU Member States). Addressing the challenges to greater cooperation with third States using the JIT mechanism is identified in the most recent Eurojust Annual Report (2014) as a particular focus of future work. For instance, differences in the definition of a crime (e.g. a definition of what will constitute a “terrorist organisation”) can be problematic, as can differences in the sanctions that may be imposed in the event of a successful prosecution. For instance, as is noted in the 2014 Eurojust Annual Report “the issue of the use of information and evidence needs to be carefully addressed, especially in relation to third States that enforce the death penalty”.⁶⁰ Despite these difficulties, EU Member States have successfully constituted JITs with competent authorities from third States (as noted above), although the numbers are, proportionally speaking, still quite small.

⁵⁹ See Eurojust Annual Report, 2012, copy available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202012/Annual-Report-2012-EN.pdf>, p. 34.

⁶⁰ Eurojust Annual Report 2014, n. 21 above, p. 22.

Box 2: Challenges involved in establishment and operation of JITs

- Lack of awareness and familiarity with JIT concept (perhaps historic);
- Lack of confidence and trust (perhaps historic);
- Concerns about implications of JIT arrangements for national sovereignty (e.g. in connection with the issue of whether there should be active involvement of foreign law enforcement officers in domestic criminal investigation activities);
- Differences between States in structure and organisation of law enforcement bodies;
- Linguistic differences and differences in legal culture;
- Costs and complexity of JITs (in some cases);
- Logistical and communications difficulties(e.g. interfacing different communications and information gathering systems);
- Differences between EU Member States in implementation of JIT arrangements, including differences in levels of political oversight;
- Differences between States in legal standards and tests for criminality;
- Differences between States in standards in the collection of evidence and rules of admissibility;
- Differences between States in rules relating to disclosure by public authorities;
- Difference between States in legal standards with respect to data protection;
- Differences between States in the sanctions that may be imposed with respect to serious crimes.

2.7 What lessons can be learned from experiences with JITs in the EU so far?

A number of useful lessons can be drawn from experiences with JITs in the EU.

JITs have the potential to make cross-border criminal investigations quicker, cheaper and more effective

More research is needed to test the truth of this assertion, and specifically to quantify (a) the extent to which the costs of setting up a JIT can be offset by savings elsewhere and (b) the positive impacts of JITs in terms of prosecutorial outcomes. However, growing popularity of JITs (evidenced by the steady increase in the number of new JITs initiated each year, and the widening range of jurisdictions participating) suggests recognition among EU Member States (and an increasing number of non-EU States) that JITs do offer advantages over more traditional forms of mutual legal assistance. Key among these appears to be efficiency gains from greater pooling of information and the quicker response times to requests for information as a result of direct contact between investigators and prosecutors in different jurisdictions, all of which have obvious operational benefits.

However, the implementation challenges should not be underestimated

The rate of uptake of JITs during the period up to 2007 was, in Eurojust's own assessment, disappointingly slow. One reason given for this was the slow and variable implementation of the JIT framework by EU Member States. This

may have hampered the ability of competent authorities to utilise the JIT mechanism in several ways. Not only may competent authorities have lacked legal authority in some cases and some jurisdictions, but divergences between States are thought to have added to the complexity (and presumably costs) of JIT agreements, which may have acted as a disincentive in some cases. To reduce the risk of implementation delays causing such problems to similar initiatives in the future, it is important that policy is developed with due regard for the needs of, and experiences in, a wide range of States and, to this end, there is proper engagement and consultation from an early stage.

Flexibility is important, so that JITs can be easily tailored to operational needs and to take account of divergent State approaches

The flexibility of the JIT concept means that investigators and prosecutors have been able to utilise this mechanism in relation to a wide range of cross-border criminal investigations. Historically, the JIT has been most frequently utilised in relation to crimes of drug trafficking, terrorism and trafficking in human beings. However, more recently prosecutors have been finding more uses for JITs, for instance in relation to cyber-crime, vehicle theft, fraud and, in the past year, an investigation into allegations of breaches of international humanitarian law. In addition, this flexibility is needed to allow investigators to take account of differences in approach between EU Member States (with respect to issues such as admissibility of evidence, disclosure and data protection), and to develop practical ways of dealing with these differences in JIT agreements and in their operational action plans.

It may take time for JITs to become an accepted and widely used way of investigating cross-border criminal activity

JITs will represent a new way of working for many investigators. Experience with JITs in the EU suggests that a period of “bedding in” may be needed to allow time for investigators to gain confidence in the mechanism and to build trust and good working relationships with foreign colleagues. There may be political resistance to certain aspects of JITs (such as allowing representatives of foreign law enforcement bodies to be present during interviews and searches) which may take time and effort to overcome. Academic research into early experiences with JITs in the EU suggests that one reason for slow uptake may have been that practitioners were not convinced of the benefits of working with JITs, versus more familiar methods (e.g. parallel investigations), meaning that risk-benefit calculations tended not to favour the use of JITs. If JITs are to be used more widely, this experience highlights the importance of effective and timely consultation with practitioners, to ensure that the framework addresses their legitimate concerns and offers real and practical benefits.

Uptake of JITs can be speeded up, and their performance and impacts enhanced, by the presence of a well-organised and proactive supporting body tasked with awareness-raising, training, liaison and legal and technical advice and able to act as a repository of “best practice” expertise

The coordinating and awareness-raising work of Eurojust appears to have had an impact on the steadily growing popularity of JITs in recent years. As noted above, Eurojust supports practitioners in a number of different ways. It advises practitioners on the appropriateness of JITs in specific cases, assists with liaison between different domestic law enforcement bodies, helps with the identification of potential legal and practical challenges and can assist with the drafting of legal documentation. Since 2008, members of Eurojust have been able to act, at the relevant authorities' request, as participants on JITs. Uptake of JITs has possibly been further enhanced by the availability of financial assistance to help with costs of items such as transport, accommodation, communications, equipment hire and translation. For the future, more systematic evaluation of the performance and impacts of JITs would be useful, so that resources can be well-directed, lessons learned and "good practice" captured and recorded.

3. Issues to explore further in the course of the OHCHR Accountability and Remedy Project (and specifically project components 2 and 6)

Box 3: Issues to explore further in the course of the OHCHR Accountability and Remedy Project (and specifically project components 2 and 6)

1. To what extent are JITs used in other regions and countries outside the EU? Do JITs provide a potential model for further operational-level cooperation initiatives, including in the field of business and human rights?

Note: The Joint Investigation Teams are already mentioned in international agreements in the context of the fight against organised crime. See, for example, Article 19 of the UN Convention Against Transnational Organized Crime which provides as follows:

"States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected."

2. Can greater operational level cooperation (e.g. of the type envisaged in Article 19 of the UN Convention, quoted above) improve the likelihood of "local" or "within-territory" remedies? For instance, can this be a way of improving access to investigative resources? Can this be a way of helping to address resource and capacity constraints (especially within less developed countries) and sharing the burdens of investigating allegations of human rights abuses by companies more fairly? If so, what would be needed to make this work? What kinds of support systems and resources would be (a) necessary and (b) useful?

3. Why have JITs not been used much to date (if at all) in relation to corporate crime? Is there potential for greater use of use of JITs in relation to corporate crimes in the future?

4. What is the appropriate level of political involvement in, and oversight of, JITs?

5. What are the pre-conditions (e.g. legal, cultural, procedural, structural, logistical, practical) for a successful JIT?