BEYOND MUTUAL RECOGNITION: THE RULES OF JOINT INVESTIGATION TEAMS

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Abstract

The “Joint Investigation Teams” (JITs) are a new and effective tool for cooperation in criminal matters, based on a “spirit of solidarity” in carrying out cross-borders criminal investigations: synergistic forms of cooperation between both judicial and police authorities of the different Member States (or even non-EU Countries, if there are legal bases), which coordinate their actions and share the results obtained.

JITs constitute an unprecedented form of judicial assistance: “non-rogatorial”, “hybrid”, “operational” and “self-sufficient” from an organizational point of view.

Based on an agreement between competent authorities – both judicial (judges, prosecutors, investigative judges) and law enforcement – of two or more States, JITs are established for a limited duration and for a specific purpose, to carry out criminal investigation in one or more of the involved States.

Despite the many advantages, the critical issues are not few: the balance between fight against international crime and right of defense; the lack of proper measures to approximate EU Member State’s criminal law and the resulting problem of admissibility of evidence collected abroad in the national trial; the interactions with other new cooperation tools, (MAE, EIO, etc.), with respect to which JITs can often act as an initial mechanism for an investigative activity that can be developed more widely.

Keywords: Eurojust, Europol, Joint Investigation Teams, Judicial Cooperation in Criminal Matters, Mutual Recognition, Olaf.

PËRTEJ NJOHJES TË NDËRSJELLTË: RREGULLAT E EKIPEVE TË PËRBASHKËTA TË HETIMIT

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Abstrakt

“Ekipet e Përbashkëta të Hetimit” (EPH) janë një mjet i ri efektiv për bashkëpunim në çështjet penale, bazuar në një “shpirt solidariteti” në kryerjen e hetimeve penale ndërkufitare, formave sinergjike të bashkëpunimit mes autoriteteve gjyqësore dhe policore të vendeve anëtare (apo vendeve jo-anëtare të BE-së, nëse ekzistojnë bazat ligjore), që koordinojnë veprimet e tyre dhe ndajnë rezultatin e arritur.

EPH përbëjnë një formë të paprecedentë të asistencës ligjore: “jo-letërporositëse”, “hibride”, “operacionale” dhe “e vetëmjaftueshme” nga një pikëpamje organizative.

Bazuar në një marrëveshje mes autoriteteve kompetente – si ato gjyqësore (gjykatës, prokurorë, gjykatës hetimor) por edhe ato policore - të dy apo më shumë shteteve, EPH-të janë krijuar për një kohëzgjatje të kufizuar dhe për një qëllim specifik për të kryer hetime penale në një apo më shumë shtete të përfshira.

Pavarësisht avantazheve të shumta, çështjet kritike nuk janë pak: balanca mes luftës kundër krimit ndërkombëtar dhe të drejtës për mbrojtje; mungesa e masave të duhura për përafrimin me të drejtën penale të vendeve anëtare të BE-së dhe problemet që hasen në pranimin e provave të mbledhura në vende të tjera në gjykatat kombëtare; ndërveprimet me mjete të tjera të reja bashkëpunimi, (MAE, EIO, etj.), në lidhje me të cilat EPH-të mund të veprojnë shpesh si një mekanizëm iniciues për një aktivitet hetimor që mund të zhvillohet më gjërë.

Fjalë kyçe: Eurojust, Europol, Ekipte të Përbashkëta Hetimi, bashkëpunimi gjyqësor në Çështje Penale, njohje e ndërsjelltë, Olaf.

1. Introduction

The phasing-out of border controls within the European Union (EU) resulted in unprecedented openness in trade, finance, travel and communication, and has given rise to great opportunities for criminals to make their business thrive, as well (1).

The sharp increase in so-called cross-border crimes – terrorism, trafficking in human beings, money laundering, migrant smuggling, drug trafficking, cybercrimes, etc. - has affected judicial cooperation in criminal matters, promoting a process of deep and irreversible transformation, ended up with the introduction of new international cooperation tools.

Among these, the “Join Investigation Teams” (JITs), new tools based on the “spirit of solidarity” in carrying out cross-borders criminal investigations: synergistic forms of

cooperation between both judicial and police authorities of different Member States (or even non-EU Countries, if there are legal bases), which coordinate their actions and share the results obtained.

JITs are a form of cooperation in criminal matters that does not implement mutual recognition: on the basis of an agreement between the competent authorities – both judicial (judges, prosecutors, investigative judges) and law enforcement – of two or more States, JITs are set up for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the States involved.

The possibility of setting up JITs between Member States is provided for in article 13 of the *2000 Mutual Legal Assistance Convention*. Due to the slow progress towards its ratification, on 13 June 2002 the Council adopted *Framework Decision 2002/465/JHA on Joint investigation teams*, which Member States were to implement by 1 January 2003 (2). With a delay of almost fourteen years, Italy finally implemented it with Legislative Decree No. 34/2016 (3).

In contrast, the European investigation order (EIO) cannot be used to request the setting up of a JIT (4).

The possibility of setting up JITs with and between no-Member States is provided for in other international texts, such as article 27 of the *Police cooperation Convention for Southeast Europe (PC SEE)*, applicable between several Member States (Austria, Bulgaria, Hungary, Romania, Slovenia) and Countries of the Balkans (Albania, Bosnia and Herzegovina, FYROM, Moldova, Montenegro, Serbia); article 20 of the *2nd Additional Protocol to 1959 Convention*; article 5 of the *Agreement on Mutual Legal Assistance between the European Union and the United States of America*; article 9 of the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*; article 19 of the *United Nations Convention against Transnational Organised Crime (UNTOC)*; article 49 of the *United Nations Convention against Corruption (UNCAC)*; the *Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union* and the 2001 Protocol thereto; Bilateral agreements between the States involved (5).

2. JITs Hallmarks

JITs are an effective cooperation tool that facilitates the coordination of investigations and prosecution conducted in parallel in several States or in cases with a cross-border dimension.

It is a new form of international assistance: “non-rogatorial”, “hybrid”, “operational” and “self-sufficient” from the organizational point of view.

In fact, the tool has been conceived as an alternative channel to the Rogatory Letters, too slow, complex, involving the political authority (with possible negative effects on the success of judicial cooperation) and therefore, unsuitable to meet the needs of contemporary cooperation in criminal matters.

Unlike the Rogatory Letters - but also unlike the new judicial cooperation tools implementing mutual recognition – the JITs are based on a completely different philosophy, which leaves the classic bilateral perspective - based on “coordinated” but still “separate” actions of the competent national authorities - to embrace quite the

opposite a “solidarity perspective” in the fight against cross-border crimes: two or more States (EU members or no-members) join forces, creating a single investigative team, composed of their respective national representatives, who act synergistically under a unified direction, coordinating their actions and directly sharing the results collected. Given this hallmark, you can deduce the “operational” trait of this cooperation, which is “a real time cooperation”: the team members can act directly in “a common investigative space”, which results from the sum of the territories of the States that make up the team. Thus, it’s possible to overcome one of the main disadvantages encountered in international cooperation by law enforcement agencies: the territorial division that limited them within their national borders, while crime took advantage of phasing-out of border controls within the EU, becoming able to move freely.

The above characteristics explain the “hybrid structure” of JITs.

They are made up of representatives of both judicial and police authorities of the States interested in investigating cross-border crimes, and are also open to the participation of representatives of non-state bodies (such as, members of Eurojust, Europol, OLAF), working together under a single direction.

Finally, the constitution and the way of work of the new tool are characterized by a certain level of self-sufficiency: purpose, duration, object, territory of action and composition are established directly by the authorities creating the team, which sign a specific agreement, drawn up on the example of the standard model.

The result is a flexible and ductile assistance tool, based on direct contacts between the competent national authorities and on a debasement of political authority role, having no real power to control of the procedure.

3. JITs Setting Up

According to *2000 MLA Convention* and *Framework Decision 2002/465/JHA*, a JIT may be set up for the purpose of investigating a specific complex criminal offence with a clear international dimension.

More exactly, a joint investigation team may be set up where: (a) a Member State’s investigations into criminal offences require difficult and demanding investigations having links with other Member States; (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 (6).

Basically, under the same conditions JITs can also be set up with and between Countries outside the European Union, provided that there is a legal basis for the creation of such teams.

In any case, the criminal offence that is to be investigated must be well defined and suspects must be identifiable and their role in criminal offence determinable (7).

With regard to JITs setting up, the request can be “voluntary” or “prompted”: in the first case, the competent national authorities decide to do so after establishing contacts with the authorities of the other potential members of the team to exchange information about the case and explore the possibilities of establishing a JIT in the specific case; in the second case, Eurojust prompts them to set up a JIT, either through its national members or as college itself (8).

Since a JIT is a “contract” between at least two or more States, with a specific purpose, for a limited period of time, set up to conduct joint investigation, a formal agreement for

a JIT must be signed, which has all the necessary elements listed in the JIT Model Agreement (9): the purpose of a JIT, legal possibilities and/or limitations, the leader of the JIT, the members and participants, the location in which the team will operate, financing and possible support from Europol and Eurojust.

Eurojust and Europol can play a key role in considering and drafting an agreement, by scheduling a coordination meeting of national authorities for the purpose of getting a more complete international picture of the case, discussing the advisability and modalities of opening parallel investigations, with a view to setting up a JIT, and clarifying national requirements regarding the submission of a formal request to set-up a JIT (10).

The initial agreement may be amended, by mutual agreement between the partners, at any time when it is necessary to adapt its content to the investigative needs, based on changed circumstances (change in the crimes under investigation, involvement of a new Country, change in the composition of the team, purpose, extension of duration, etc.).

The Operational Action Plan (OAP) is attached to the agreement: it is a document in which it is set out how the work will be carried out in a JIT. It defines the practical and operational aspects of the agreement (description of the purpose of the team; identifications of locations; description of the role of members and participants; list of special operations/ investigative techniques that will be used; description of the way of communication and information exchange; decision on information collection, analysis and tasking; decision about financial investigation and prosecution; care for the victims; specification of the evidence gathering; preparing and training on how JIT members will introduce evidence at the court; decision about operational and strategic meeting; provisions on administration and logistics, etc.). When writing OAP, not only the current state-of-play, but also the future should be considered; however, OAP can also be amended according to the changed circumstances (11).

4. Composition and Activities

As mentioned above, being a “hybrid” form of cooperation, the JIT may be composed of both judicial and law enforcement authorities.

The team is set up in one of the Member States where the investigation is likely to take place. In practice, the Country in which most of the operations are expected to take place is chosen as the geographical base, without prejudice to the possibility of carrying out other activities in different areas.

For this reason, the members of the team are divided into “national members” and “seconded members”: the former are members belonging to the Country on whose territory the team is investigating; the latter are members coming from a Country other than the one in which the JIT operates (12).

The JIT leader is chosen among national members: he “shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates” and who “shall act within the limits of his or her competence under national law” (13).

He supervises the activities of the JIT and gives instructions to the other members of the team, who are accountable to him for their work.

The outlined discipline results in an important consequence: if the geographic area of JIT operations changes, so does the leader (14).

This is a phenomenon that could be termed “flowing leadership”, and may result in the identification of more than one leader of the JIT.

This, if consistent with the provisions of the Model Agreement (15) and if it can be justified because of the protection of State sovereignty, nevertheless generates many perplexities.

First of all, because of the criticality it creates from the point of view of investigative coordination (16): there is the risk of a fragmentation in the direction of the investigations, with negative consequences on the coordinated action of the team (17).

This risk, moreover, is aggravated by those practices – sometimes found in some Countries where both an investigating judge and a public prosecutor were involved in the same investigation – of designating several JIT leaders for the same State (18).

Instead, different from the team members are the “participants”: “persons not representing the competent authorities of Member States take part in the activities of the team”, which could be “representatives of, for example, Europol, the Commission (OLAF) or representatives of authorities of non-Member States, and in particular representatives of law enforcement authorities of the United States” (19).

It is a purely optional participation, which aims at involving competent subjects who can offer assistance, specialist knowledge, logistic-organizational support, as well as – in the case of Eurojust – financial support.

As a rule, therefore, participants play a supporting or advisory role and are not allowed to perform the functions conferred on full members, nor may they use the information made available by the seconded members, unless the agreement states otherwise.

From the operational point of view, the JIT operate in compliance with the *lex loci*: in carrying out investigative acts, therefore, the law of the State of intervention is observed. This is a solution that reconciles the needs of international cooperation with the protection of the sovereignty of the country on whose territory the investigations are carried out.

However, there are some risks: the compromise of the future usability of the acts carried out and the “forum shopping”. On the one hand, in fact, the acts carried out abroad could have to be used in proceedings governed by domestic rules that do not allow their use; on the other hand, this could consequently induce the JIT members to make strategic choices about the jurisdiction in which to institute proceedings (20), favoring the most permissive procedural system in terms of transit of the material collected abroad in national proceedings (21). And this in defiance of those needs protected under national law by the constitutional principle of naturalness and pre-establishment of the judge (22).

In order to avoid such risks, the Council Resolution of 26 February 2010 on a model agreement (2010/C 70/01) urged Member States to make the leader of the team or one of the members of the team a “contact person” for the collection of evidence, who could provide guidance and explanations to the other members of the team on the procedural rules in force in a given Country.

In addition, the Operational Action Plan agreed upon by the team members may include, in relation to the jurisdictions under consideration, the appropriate information relating to current legislation regarding the acquisition of evidence, thus ensuring the future usability of the documents collected.

5. A New Spirit of Solidarity

JITs are a new tool of cooperation in criminal matters that goes beyond the logic of mutual recognition, creating a “synergistic action” of States interested in investigating and repressing transnational crimes.

It is a cooperation that brings out the collaborative and supportive spirit among States, giving rise to joint action and direct sharing of the results achieved (23).

In fact, once a JIT is set up, partners can directly exchange information and evidence, can cooperate in real time and can carry out joint operations. In addition, JITs allow operators to be present during investigative measures on the other State’s territory, and thus to share their technical expertise and human resources more efficiently. Direct contacts and communication allow JIT members to build personal and trusting relationship, leading to faster and more efficient cooperation.

The special nature of JITs is made apparent by two significant rules.

According to the first one, “[w]here the joint investigation team needs investigative measures to be taken in one of the Member States setting up the team, members seconded to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation” (24); under the second “[a] member of the joint investigation team may, in accordance with his or her national law and within the limits of his or her competence, provide the team with information available in the Member State which has seconded him or her for the purpose of the criminal investigations conducted by the team” (25).

The rules set out above are both consistent with the tool’s nature: the activity carried out by team members is attributable to the team as a whole, and therefore, to all the States that make up the team. Consequently, it is not necessary to set up a mutual legal assistance procedure, either traditional (Rogatory Letters) or new, based on mutual recognition (EIO) (26). This is the most tangible sign of the removal of borders between jurisdictions achieved by the new cooperation tool.

Finally, the discipline is completed by the limited usability regime set out for information legitimately obtained by members of the team and not otherwise available. In this regard, three competing criteria are relevant: “consistency of purpose”, “consensual data” and “social protection”.

More specifically, “information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the Member States concerned may be used for the following purposes: (a) for the purposes for which the team has been set up; (b) subject to the prior consent of the Member State where the information became available, for detecting, investigating and prosecuting other criminal offences. Such consent may be withheld only in cases where such use would endanger criminal investigations in the Member State concerned or in respect of which that Member State could refuse mutual assistance; (c) for preventing an immediate and serious threat to public security, and without prejudice to subparagraph (b) if subsequently a criminal investigation is opened; (d) for other purposes to the extent that this is agreed between Member States setting up the team” (27).

This is a rather flexible and not very reassuring legislation: indeed, there is a certain “looseness” in the circulation of such information, which can be released both from its source and from the purposes for which it has been made available to the team.

Moreover, this legislation has no countermeasures in terms of guarantees: there is no judicial control over the transit of such data, the defendant has no defensive rights and suffers the effects of an agreement reserved to the national authorities representing the Countries that have set up the team.

In any case, a reasonable interpretation of the legislation advises to recognize the nature of simple “police data” to such information, as such usable only for the purpose of maintaining ongoing investigation, or initiating new ones if the details of a crime report emerge (28).

6. Final Conclusions

JITs constitute an effective cooperation tool that facilitates the coordination of investigations and prosecutions conducted in parallel in different states or in cases with a cross-border dimension.

The use of JITs to investigate a complex cross-border crime has several advantages over traditional investigations.

As said before, the operation is directed by a leader, the JIT members have the possibility to share information without the need to activate formal procedures, they can request investigative measures without the need to establish a Rogatory Letter, they can be involved in operational activities in all the jurisdictions involved in the team, there is the possibility to benefit from funding by EU agencies, to use the contribution of experts, and, in general, there is a greater facilitation in the collection of evidence. As a result, there is greater ease in establishing contacts with foreign partners, greater speed in the circulation of information and intelligence data, and greater trust between team members. However, there are many critical issues: the difficult balance between the fight against international crime and the protection of the right of defense; the lack of adequate measures to harmonize criminal and procedural law of EU Member States and the consequent problem of admissibility and usability of evidence collected abroad in national proceedings; the interactions - not adequately regulated by current legislation - with other new cooperation tools inspired by the principle of mutual recognition of judicial decisions (such as the European Arrest Warrant and the European Investigation Order, etc.), with respect to which JITs can often be used as an initial mechanism for an investigative activity that can be developed more extensively later on.

With regard to Italian implementing legislation, the problems are even more serious.

With a delay of almost fourteen years, Italy, with Legislative Decree No. 34/2016, has finally implemented Framework Decision 2002/465/JHA on Joint investigation teams. Although this discipline is substantially faithful to the spirit and purpose of the European legislation, there are significant inconsistencies and, in general, a lack of guarantees that implies some doubt about the future working of the new cooperation tool.

First of all, there is no provision for representatives of Eurojust, Europol and Olaf to be admitted as participants in the JITs, which seems highly questionable.

Indeed, due to their experience, these international agencies can play an important role in supporting, advising and assisting a joint investigation team.

Moreover, the creation of a JIT entails not insignificant economic costs, which could be partially covered by Eurojust, provided, however, that its representatives are invited to be part of the investigation team (29).

This leads us to the hope that the Italian legislator will review this choice and allow in the future that the teams in which Italy participates may include at least Eurojust representatives.

This would also avoid the problems that would inevitably arise in practice at the time of drafting an agreement aimed at creating a team with countries which, on the other hand, admit the participation as members of representatives of this European agency.

Secondly, it is surprising that two provisions of the Framework Decision that are significant in the new spirit of “international solidarity” inspired by the instrument in question have not been transposed into Italian law.

We are referring, on the one hand, to the provision according to which if the team needs to carry out investigative measures in one of the Member States that set up the team, the seconded members of that Country may make a request directly to their competent authorities which will carry out the relevant examination under the same conditions that would apply if such measures were requested as part of an investigation conducted at the national level (30).

On the other hand, we are talking about the provision that provides that, for the purposes of the investigation carried out by the team, members of the team may, in accordance with their national legislation and within the limits of their respective competences, provide to the team the information available in the Member State that has posted them (31).

Both rules reflect the most important feature of JITs, namely the recognized possibility for their members to move freely within the common territorial context identified by the “sum” of the territories of the States participating in the team, without the need to activate a Rogatory Letter or a European investigation order to seek and obtain evidence and being able to share the information in their possession.

This, of course, does not apply “externally”. In fact, there may be a need to carry out certain functional activities for the purposes of the JIT in Countries no-Member of the team, whether belonging to the European Union or not. In this case, recourse to the other existing instruments of judicial cooperation is permitted by express provision of the Framework Decision 2002/465/JHA, article 1, paragraph 8 of which states that “where the joint investigation team needs assistance from a Member State other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operations to the competent authorities of the other State concerned in accordance with the relevant instruments or arrangements”.

Both shortcomings reveal a lack of understanding on the part of the Italian legislator of the dynamics of the new cooperation tool, which it is hoped can be remedied in the future. In general, moreover, there remains the fundamental problem of the lack of harmonization of the rules on the admissibility of evidence between EU Countries, with the consequent risk that the activities carried out by the team, in compliance with the law in force in the State of action (*lex loci*), are unusable in the proceedings carried out in another Country, where different evidentiary rules apply. This problem leads to the danger of the so-called shopping forum, i.e., of making questionable decisions regarding the jurisdiction in which to set up the proceedings, motivated by the validity, in a given Country, of more permissive rules regarding the use of the acts carried out by the team.

All this has a significant impact on the practical “success” of the new cooperation tool, the use of which - given its significant potential - could be more massive and widespread. According to the data of the Eurojust 2020 Report, in fact, in this year Eurojust provided legal, financial and/or operational support to 262 JITs. During 2020, 74 JITs were

established and 188 were ongoing from previous years (32). Quite low figures, which will hopefully increase in the years to come.

References

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- (2) All Member States have implemented one or both of these legal bases to date. See G. IUZZOLINO, *Le squadre investigative comuni*, in *Squadre investigative e arresto europeo. Gli strumenti per la consegna 'non estradizionale'*, in *Diritto & giustizia*, No. 15, Special Insert, 2003, p. X ff.; F. SPIEZIA, *Le linee evolutive della cooperazione giudiziaria penale in ambito europeo*, in E. APRILE, F. SPIEZIA (eds.), *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Milan, 2009, p. 199 ff.; J. KAPPLINGHAUS, *Joint Investigation Teams: Basic Ideas, Relevant Legal Instruments and First Experiences in Europe*, report to the 134th International Training Course, Visiting expert's papers, 14 April 2012.; M. PLACHTA, *Joint Investigation Teams. A New Form of International Cooperation in Criminal Matters*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13, No. 2, 2005, p. 284 ff.; M.C. REBECCHI, *Joint Investigation Teams: A Reachable Solution to Catch Unreachable Criminals*, in *Queen Mary Law Journal*, No. 8, 2016, pp. 95-108; C. RIJKEN, *Joint Investigation Teams: Principles, Practice, and Problems. Lessons Learnt from the First Efforts to Establish a JIT*, in *Utrecht Law Review*, Vol. 2, No. 2, 2006, p. 117; L. SALAZAR, *La nuova Convenzione europea sull'assistenza giudiziaria in materia penale*, in *Diritto penale e processo*, Vol. 6, No. 11, 2000, pp. 1535 ff. and 1664 ff.; T. SCHALKEN, M. PRONK, *On Joint Investigation Teams, Europol and Supervision of Their Joint Actions*, in *European Journal of Crime, Criminal Law and Criminal Justice*, No. 10, 2002, p. 70 ff.; T. SPAPENS, *Joint Investigation Teams in the European Union: Article 13 JITS and the Alternatives*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, No. 3, 2011, p. 239 ff.
- (3) Legislative Decree of 15 February 2016, No. 34, containing implementing rules for Council Framework Decision 2002/465/JHA of 13 June 2002 on Joint investigation teams, in OJ of the Italian Republic No.58, of 10 March 2016. See R. BELFIORE, *Le squadre investigative comuni nel decreto legislativo n. 34/2016*, in *Cassazione penale*, No. 10, 2016, p. 3886 ff.; L. CAMALDO, *Le squadre investigative comuni: la normativa di attuazione dopo una lunga attesa (d.lgs. 15 febbraio 2016, n. 34)*, in F. RUGGIERI (ed.), *Processo penale e regole europee: atti, diritti, soggetti e decisioni*, Turin, 2017, p. 17 ff.; A. CISTERNA, *Squadre investigative comuni contro terrorismo e crimine operative da oggi*, in *Il Sole 24 Ore*, 25 March 2016; R.M. GERACI, *Le squadre investigative comuni. Uno studio introduttivo*, Turin, 2017, p. 73 ff.
- (4) Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, regarding the *European Investigation Order in criminal matters*, in OJ L 130 of 1 May 2014, where recital 8: "[t]he EIO should have a horizontal scope and therefore should apply to all investigative measures aimed at gathering evidence. However, the setting up of a joint investigation team and the gathering of evidence within such a team require specific rules which are better dealt with separately. Without prejudice to the application of this Directive, existing instruments should therefore continue to apply to this type of investigative measure". According to Eurojust, *Joint Note of Eurojust and the European Judicial Network on The practical application of the European Investigation Order*, June 2019, p. 16, "[g]enerally speaking, EIOs and JITs are different tools and assessment should be made on a case-by-case basis concerning which instrument is best used in which circumstance (e.g. countries involved, complexity of the case, type and number of investigative measures needed, expected costs, etc.). Sometimes, both tools can be combined and the evidence obtained by one JIT country with an outgoing EIO to a country outside the JIT can be shared within the JIT (with an explicit clause in the EIO that enables the sharing of evidence). In countries in which enforcement authorities play an important role, JITs may be the preferred option, rather than a 'judicialised' EIO regime".
- (5) In this case it is necessary to determine the legal basis on which the JIT agreement will be based: an international legal instrument, a bilateral agreement, a multilateral agreement, national legislation.

(6) Convention of 29 May 2000 (Brussels Convention) *on Mutual Assistance in Criminal Matters between the Member States of the European Union*, art. 13, para. 1; Council Framework Decision 2002/584/JHA of 13 June 2002 *on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision*, in OJ L 190 of 18 July 2002, pp. 1-20, art. 1, para. 1. In the vast majority of cases for which JITs are established, parallel investigations are ongoing in the concerned States. However, investigations may not always have been opened in all concerned States when a JIT is considered (but only in one or several of them). In such situations, the first step is often to trigger the opening of domestic investigations in the other concerned States.

(7) JIT The WB, *Guidelines on the Use of Joint Investigation Teams*, p. 6, available at www.rm.coe.int/16806f720a.

(8) Council Decision 2002/187/JHA of 28 February 2002 *setting up Eurojust with a view to reinforcing the fight against serious crime*, in OJ L 63 of 6 March 2002, pp. 1-13.

(9) See the updated JIT Model Agreement set out in Council Resolution 2017/C 18/01 *on a Model Agreement for setting up a Joint Investigation Team (JIT)*, in OJ C 18 of 19 January 2017, pp. 1-9, as well as the previous models set out in Council Resolution of 26 February 2010 (2010/C 70/01), and in Council Recommendation of 8 May 2003 (2003/C 121/01). The JIT Model agreement is a common non-binding baseline that practitioners can tailor to the specific needs of a case. It is available and can be downloaded, in all official languages and in editable format, on the websites of Eurojust and Europol.

(10) M. PETROV, D. KRASTEV, *Concept of Joint Investigation Teams*, in *International E-journal of Advances in Social Sciences*, Vol. 4, No. 11, August 2018, p. 426.

(11) *Guidelines on the use of Joint Investigation Teams*, cit., pp. 9-10.

(12) JITs members must be indicated by name in the Agreement, also specifying the degree, function and possibly the authority that detaches them (Council Recommendation of 8 May 2003, cit., para. 6); this provision can be waived in the event that the team has to carry out infiltration operations or is investigating terrorist episodes that require the maximum security and it is therefore necessary to protect the identity of one or more of its members: in this case, compatibly with the national law of State party to the agreement, it is possible to assign identification numbers to these components, which are noted in a confidential document (Council Resolution of 26 February 2010, cit., para. 7).

(13) Brussels Convention, art. 13, para. 3, let. a); Council Framework Decision 2002/465/JHA of 13 June 2002 *on joint investigation teams*, in OJ L 162 of 20 June 2002, pp. 1-3, art. 1, para. 3, let. a). National legislations usually specify which authority is competent to establish a JIT (where applicable, following an authorization mechanism) and which authority is competent to act as a JIT leader.

(14) *Joint Investigation Team Manual*, in europol.europa.eu, p. 10.

(15) See Council Resolution 2017/C 18/01, cit., para. 5; Council Resolution 2010/C 70/01, cit., para. 6; Council Recommendation 2003/C 121/01, cit., para. 5.

(16) See, L. SALAZAR, *La nuova Convenzione europea*, cit., p. 1665; A. MANGIARACINA, *Verso nuove forme di cooperazione giudiziaria: le squadre investigative comuni*, in *Cassazione penale*, Vol. 44, No. 6, 2004, p. 2196.

(17) See G. DE AMICIS, *Il d.lgs. 15 febbraio 2016, n. 34: l'attuazione delle squadre investigative comuni nell'ordinamento italiano*, in T. BENE, A. MARANDOLA (eds.), *Cooperazione giudiziaria internazionale. I decreti legislativi di attuazione*, Milan, 2016, p. 54; R. BELFIORE, *La prova penale raccolta all'estero*, Roma, 2014, p. 168.

(18) See General Secretariat of the Council, *Joint Investigation Teams Practical Guide*, 14 February 2017, p. 15, available at www.eurojust.europa.eu/sites/default/files/Partners/JITs/JIT-GUIDE-2017-EN.pdf.

(19) Framework Decision 2002/465/JHA, cit. recital 9 points out that "in such cases the agreement setting up the team should specify issues relating to possible liability for such representatives".

(20) See G. DE AMICIS, *Il d.lgs. 15 febbraio 2016, n. 34: l'attuazione delle squadre investigative comuni nell'ordinamento italiano*, cit., p. 53.

(21) See R. BELFIORE, *La prova penale raccolta all'estero*, cit., p. 170.

(22) See A. SCILLA, *Verso le squadre investigative comuni: lo scenario italiano*, cit., p. 145.

(23) See R.M. GERACI, *Il mutuo riconoscimento nella cooperazione processuale: genesi, sviluppi, morfologie*, Bari, p. 237.

(24) Framework Decision 2002/465/JHA, cit., art. 1, para. 7; Brussels Convention, cit., art. 13, para. 7.

(25) Framework Decision 2002/465/JHA, cit., art. 1, para. 9; Brussels Convention, cit., art. 13, para. 9.

(26) *The Joint Investigation Teams Manual*, cit., p. 11, expressly states that the purpose of this provision is to avoid the need for Rogatory Letters even when investigative measures require the exercise of coercive

power, such as the execution of an arrest warrant. This is one of the main advantages of the JITs. One example is the possibility that a Dutch police officer, seconded to a team operating in Germany, asks his colleagues in the police in the Netherlands to execute a search warrant, issued in accordance with Dutch law, in the Netherlands on behalf of the JIT. Instead, a Rogatory Letter will be activated where there is need for assistance from a Member State or a third country that does not participated in the constitution of the team: in this case, the competent authorities of the State of intervention (not the members of the JIT) will make a specific request to the competent authorities of the other State, in accordance with the relevant instruments or provisions (Brussels Convention, cit., art. 13, para. 8; Framework Decision 2002/465/JHA, cit., art. 8; see also C. RIJKEN, *Joint Investigation Teams: Principles, Practice, and Problems*, cit., p. 101).

(27) Framework Decision 2002/465/JHA, cit., art. 1, para. 10.

(28) R. BELFIORE, *Le squadre investigative comuni nel decreto legislativo n.34/2016*, cit., p. 3896.

(29) See Council Decision 2009/426/JHA of 16 December 2008 *on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime*, in OJ L 138 of 4 June 2009, pp. 14-32, art. 9-septies; and *Joint Investigation Teams Practical Guide*, cit., p. 14 (“[f]or the JIT to be eligible for Eurojust funding, Eurojust National Members of the Member State(s) concerned must be invited to participate in its activities. The fulfilment of this requirement is certified by ticking the corresponding box in the application form. Ideally, this invitation should be included in specific documentation (e.g. the annex to the JIT agreement related to the role of participants, a clause in the agreement itself or a mention included in the information supplied to Eurojust in accordance with Article 13.5 of the Eurojust Decision, etc.)”).

(30) Framework Decision 2002/465/JHA, cit., art. 1, para. 7.

(31) Framework Decision 2002/465/JHA, cit., art. 1, para. 9.

(32) See Eurojust, *Eurojust Annual Report 2020*, The Hague, 2021, p. 9, available at [www.eurojust.europa.eu/sites/default/files/Documents/pdf/2021_04_14_eurojust_annual_report_2020_fin al.pdf](http://www.eurojust.europa.eu/sites/default/files/Documents/pdf/2021_04_14_eurojust_annual_report_2020_final.pdf), which pointed out that “several measures were taken to make sure the assistance to JITs, including funding, could remain fully available after the onset of the COVID-19 pandemic. The support covers the entire life cycle of a cross-border investigation, from the planning, setting up of the JIT, and legal and practical aid during the operational phase and the evaluation. The JITs active in 2020 focused on a wide range of crime types, predominantly swindling and fraud, drug trafficking and money laundering”.