Joint investigation teams

International legal and overall theoretical framework

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Police Master - Comparative Criminal Justice Systems
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Structure

› concept
› potential added value
› comparison international legal bases
› JIT components adding LE value
› information/evidence-related reflection
› recommendations
› beyond
› bottom-line
› questions & discussion
Concept (1)

- teams composed of judicial, police and/or customs officers or even of officials of international organisations & bodies (e.g. Europol, Eurojust, OLAF?, ...)
- may be set up for a specific purpose and for a limited period in case of
  - difficult and demanding international investigations
  - coordinated, concerted action between MS necessary
- headed and led by official state where team operates
- seconded team members operating in another state shall be bound by the law of that state
- seconded team members may be entrusted by teamleader with task of certain investigative measures
Concept (2)

- Team members may request own authorities to take the necessary investigative measures in their own state as if they would be taken in a domestic investigation.
- Information lawfully obtained by seconded team members may be used in their own state.
- Eurojust must be informed of setting up.
- Philosophy:
  - Europol intelligence (AWF’s)
  - Europol request MS to start/coordinate investigations.
  - MS set up team, with support Europol analyst.
  - MS inform Eurojust.
  - Eurojust coordinates prosecution.
- Also in other conventions/legal instruments (different rules).
Potential added value (1)

1. depending on availability/applicability int’l legal basis
   - EU 2000 MLA Convention (13)
     - = most complete convention basis
   - EU FD 2002 JITs: identical + BUTs
   - 2001 CoE 2nd Additional Protocol MLA (20)
     - copy of Article 13 EU 2000 MLA Convention
   - Naples II (24)
   - 2000 UN TOC Convention (19)
   - EU-US 2003 MLA Convention (5)
     - (2nd Europol Protocol)

applicable convention provisions
   - vague/detailed? non/self-executing (NSE/SE)?
Potential added value (2)

2. depending on extent/quality of adoption proper implementing JIT legislation
   - convention-basis required or not?
   - which (how many) conventions qualify as valid JIT basis?
   - implementation of NSE convention provisions?
   - implementation even of SE convention provisions?
     - especially relevant if no convention basis is required or where limited/less elaborated convention is relied on
   - provisions beyond Article 13-covered issues?, such as e.g.
     - capacity national/foreign members to draw up official reports
     - use of evidence

3. depending on compatibility of national combinations relating to above items
Comparison int’l legal bases (3)

> common characteristics all conventions
  > difficult & demanding investigations requiring coordination
  > for specific purpose & limited time
  > leadership with country of operation
  > locus regit actum

  > much more potential
  > potential full use EU concepts
    > Europol intelligence (AWF’s)
    > Europol request MS to start/coordinate investigations
    > MS set up team, with support Europol analyst
    > OLAF participation?
    > MS inform Eurojust
    > Eurojust coordinates prosecution
Example 2004 (B,BG,D,NL,UK)

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<tr>
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<th>CoE 2001</th>
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## JIT components adding LE value: NSE/SE (1)

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Information/evidence-related reflection

› approach: JITS “in context”, i.e. compared/confronted with
  › regular mutual legal assistance (MLA)
  › (future) “mutual recognition (MR)” -based MLA
  › police cooperation/Europol
  › Principle of Availability (PoA)
  › draft FD data protection 3rd pillar
  › forum choice (involving Eurojust)

› structure
  › relevant provisions
  › scenarios of info/evidence gathering/use + subslides
Relevant provisions (Article 13 EU MLA 2000)

- para 3b: locus regit actum (SE) + possible additional conditions seconding states (NSE)
- para 5: right for seconded members or for representatives of third countries or international bodies to be present during taking of investigative measures (NSE)
- para 6: right for seconded members or for representatives of third countries or international bodies to carry out investigative tasks (NSE)
- para 7: right for seconded members to directly request investigative measures in home country (could be SE)
- para 9: right to provide the JIT information available in home country (NSE)
- para 10: right to use lawfully JIT-obtained information in home country + specialty rule (SE)
Scenarios of info/evidence gathering/use

- where gathered
  - in another MS, in a 3rd state, internally?
- by whom (foreign/own authorities?)
- context of gathering
  - primarily internal purposes, following MLA request, in JIT context?
- status (existing, new, real-time?)
- type of measures required?
  - coercive/intrusive/privacy-invading?
- type of source (administrative, military, criminal justice?)
- type of purpose of use? (similar as for source)
- use (information/pre-evidence, evidence)
- in context of police (LE) or judicial cooperation?
Where/By whom/Context

- relevant scenario combinations
  - abroad (in another MS - in a 3rd state)
    - by local authorities for primarily internal purposes
    - by local authorities following regular MLA request
    - by local/foreign authorities in JIT context (JIT operating abroad)
  - by local authorities in JIT context (JIT operating elsewhere), following request by local JIT-member
  - by own authorities in JIT context (JIT operating abroad)
  - internally
  - by foreign authorities in JIT context
Abroad (1)

> information
  > internally collected – later transferred
    > acceptable, often even where not in accordance with own legal system
  > if collected following request for investigative measures which would not be acceptable in own system
    > exclusion?
  > lawfully collected by JIT member
    > may be used in all JIT-involved states (para 10)
Abroad (2)

> evidence
  > internally collected – later transferred
    > acceptable, except usually where (manifestly) not in accordance with own legal system
  > in accordance with fundamental principles of domestic legal system and with own legislation (forum regit actum following MLA request)
  > in JIT context (i.e. locus regit actum): no guaranteed evidential use
    > by local authorities, either when JIT operating abroad or following request local JIT member when team operates elsewhere
    > by own authorities, where bestowed with investigative powers (locus regit actum) and within national mandate
      > strict dual locus check
      > additional questions: mandated to draw up official domestic reports? having evidential value back home?
  > by foreign authorities, where bestowed with investigative powers and within national mandate
    > worst case scenario = strict triple locus check
Internally

> i.e. by foreign authorities in JIT context
  > where bestowed with investigative powers
  > and within their national mandate

> distinction
  > information
    > no problem
  > evidence
    > mandated to draw up reports having domestic evidential value in MS of evidence gathering?
Assessment

› JIT-collected information
  › may be used as information
  › depending on JIT treaty basis
    › which treaty – applicability
  › in the absence of applicable SE convention provision
    › fully depending on domestic legislation
    › of all states involved (compatibility issue)
  › no guaranteed use as evidence whatsoever
    › due to locus regit actum rule
    › for evidential purpose therefore
      › inferior to information collected through forum regit actum-based MLA request
Status (1)

＞ scenarios
   ＞ existing
   ＞ new
      ＞ requires investigative measure/execution of request
   ＞ real-time
      ＞ telecom interception & bank account monitoring
Status (2)

> relevance
> - regular MLA: irrespective of status
> - JIT-cooperation
>   - possible advantages: request home, right to presence, active investigative position
>   - as for existing information/evidence: inferior to
>     - PoA: obligation to provide LE-relevant information
>     - proposed Evidence Warrant
> - as for new/real-time information
>   - inferior to announced full replacement MLA with binding MR-based orders/warrants issued by forum state, rendering (almost) automatically information evidence-worthy
Type of measures required

- Y/N coercive/intrusive/privacy-invading?
- relevance for police cooperation
  - Schengen (Article 39): “for police use only” info exchange only where no coercive/… measures are required
  - JIT cooperation: no improvement
  - as opposed to: Prüm Treaty, PoA (for existing information)
- relevance for judicial cooperation
  - regular MLA: dual criminality + compatibility law requested state
  - JIT cooperation: no changes
  - as opposed to
    - for existing evidence: proposed Evidence Warrant
      - no dual criminality requirement for 38 offences
    - for new/real-time evidence: announced MLA-replacement with MR
      - similar irrelevance dual criminality
      - relevance of compatibility with law executing state low
Type of source

- traditionally
  - criminal intelligence operation or criminal investigation/proceedings
- trend
  - administrative/military (OLAF, terrorism, Echelon ...)
  - violating upon purpose limitation principle and upon separation of powers
- JIT cooperation
  - traditional cooperation in criminal matters
  - luckily! also for practitioners?
Type of purpose of use (specialty rule)

- traditional police cooperation
  - Schengen/Europol
    - prevention and detection criminal/administrative offences
    - preventing immediate/serious threat to public security
- traditional judicial cooperation
  - regular MLA
    - criminal proceedings (including administrative offences)
    - related judicial + administrative proceedings
    - preventing immediate and serious threat to public security
    - other use on request
- proposed FD data protection police & judicial cooperation
  - similar
- as opposed to JIT cooperation
  - limited in 1st instance to only investigated offences
Recommendations

- ratify various conventions & specify all as potential JIT basis
- provide detailed implementation legislation
  - preferably not requiring convention basis
  - or also usable in case of bilateral conventions
  - at least implementing NSE provisions + also transposing SE provisions
- regulating also additional issues
  - mutual ability to draft official reports
  - mutual evidential acceptability of official reports?
    - mirroring e.g. 1969 Benelux Convention
  - specify evidential value of JIT-collected information
  - even better: draft general evidence admissibility rules
    - e.g. Belgian implementing legislation
- pre-prosecutorial evidence-related reflection required
  - Eurojust?
Beyond

- full MR in “pre-evidence” cooperation?
  - instead of MR mitigated by equivalent access principle
    - as foreseen in draft FD PoA
  - genuine “pre-evidence” warrant for use in criminal intelligence operation or criminal investigation/proceedings
  - to be issued by police, customs + even: judicial authorities
- mutual recognition evidence
  - as contemplated by EC: if gathered lawfully in locus state: per se acceptable?
    - bypassing judicial review/scrutiny in MS?
- better option?
  - minimum harmonization of criminal procedural law standards
  - combined with MR of evidence gathered accordingly
    - e.g. IRCP draft FDs on witness collaboration/protection
  - see: EU constitution
Bottom-line

> JITs don’t make police work easier
> on the contrary (quite a burden, unless worth it)
> = sophisticated concept
> the primary added value is most likely for judicial cooperation in criminal matters
> police JIT relevance is in
  > tackling crime more effectively
  > because
    > jointly, i.e. on a broader than just national scale
    > making full use of intelligence at EU/international level (including through Europol)
  > more openness to foreign police/LE/judicial/legal culture
Questions & discussion