


Policy Department C
Citizens' Rights and Constitutional Affairs



**IMPLEMENTATION OF THE
EUROPEAN ARREST WARRANT
AND JOINT INVESTIGATION TEAMS
AT EU AND NATIONAL LEVEL**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS



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Directorate General Internal Policies
Policy Department C
Citizens' Rights and Constitutional Affairs

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STUDY

Abstract:

The European Arrest Warrant and Joint Investigation Teams are two instruments of cooperation in the field of EU Freedom, Security and Justice. They are both currently used by Member States, but to different extents.

The 2002 Council Framework Decision adopting the European Arrest Warrant has been challenged by national courts up to the constitutional level. Member States have also regularly implemented the European Arrest Warrant in contradiction with the text of the Framework Decision. Nevertheless, the European Arrest Warrant is the “success story” of EU judicial cooperation in criminal matters.

Joint Investigation Teams, on the other hand, have been used much less by Member States. Additionally, the main EU legal basis has not yet been implemented in all Member States. Nonetheless, Joint Investigation Teams have demonstrated their usefulness in investigating the most serious forms of criminality.

Both instruments could be used more efficiently, in particular through a stronger involvement of both Europol and Eurojust.

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SUMMARY

- The European Arrest Warrant and Joint Investigation Teams are two fundamental instruments of cooperation in the field of EU Freedom, Security and Justice. They are both currently used by Member States, but to different extents.
- The **European Arrest Warrant (EAW)** is the first instrument in the Freedom, Security and Justice Area to be adopted following the principle of mutual recognition, which is designated by the Tampere European Council as the “cornerstone of judicial cooperation in both civil and criminal matters”.
- The EAW revolutionises the classical extradition system by adopting innovative rules: limited grounds for refusal of execution, decision making shifted from political to judicial authorities, possibility to surrender nationals of the executing State and clear time limits for the execution of each EAW.
- Implementation at national level:
 - The EAW is, according to the 2007 evaluation report issued by the Commission, implemented by all Member States and has been widely used: in 2005, nearly 6900 EAWs were issued by 23 Member States resulting in the arrest and surrender of 1770 persons. The Information Note issued in June 2008 by the General Secretariat of the Council compiling responses received from 18 Member States, confirms this trend for 2007.
 - Despite this success, it should be noted that the 2002 Council Framework Decision adopting the European Arrest Warrant, has been challenged by national courts up to constitutional level. Germany, Cyprus and Poland had to amend their constitutional rules and/or implementation acts after decisions taken by their Constitutional Court.
 - Other important implementation difficulties can be identified: Member States regularly refuse to execute the EAW on the basis of grounds that have not been listed in the Framework Decision, in particular with the view of protecting fundamental rights.
 - Some Member States have nevertheless accepted to implement the EAW according to the text of the Framework Decision. Additionally, the Nordic Arrest Warrant initiative is demonstrating that Member States could cooperate further in this field.
- Implementation at European level:
 - The European Court of Justice has decided upon interesting cases involving questions of implementation of the EAW.
 - Eurojust is mentioned as an important stakeholder in the Framework Decision. Its role could be further developed and Member States have been invited by the Commission to make the appropriate efforts to comply with the Framework Decision.

- The European Judicial Network is complementary to Eurojust in that it plays a practical assistance role in the field of mutual legal assistance requests. Nevertheless, it has seldom been used by Member States to channel their EAW requests.
- Europol is also contributing to the implementation of EAW.
- **Joint Investigation Teams (JITs)**, on the other hand, have been used much less by Member States than the EAW instrument.
- Implementation at national level:
 - The main EU legal basis has not yet been implemented in all Member States. Those legal instruments are: the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, and the Convention of 18 December 1997 on Mutual Assistance and Cooperation between Customs Administrations (Naples II Convention).
 - Joint Investigation Teams have demonstrated their usefulness in investigating the most serious forms of criminality such as terrorism, and drug trafficking.
 - As of May 2007, 18 JITs had been set up. This figure has already increased significantly in 2008, since, by the end of that year, France alone had participated in 20 JITs.
 - Implementation difficulties include admissibility of evidence in court, high costs for running the teams and drafting comprehensive agreements to set up the JITs.
 - The Toulouse Conference of July 2008 has stressed the usefulness of JITs as well as the important role that should systematically be played by Europol and Eurojust.
- Implementation at European level:
 - Europol has a strong role to play by providing analytical and logistical support to the competent national authorities. Its officials are allowed to participate in JITs.
 - National Members of Eurojust can participate in JITs. Eurojust, as such, is able to provide assistance (logistical – even in terms of funding – and legal). The future strengthening of Eurojust should increase this role.
 - Europol and Eurojust have initiated a “JIT project” including the publishing of a Joint Investigation Team Manual targeting practitioners, as well as a dedicated web page.
 - National JIT Experts are meeting regularly to exchange relevant information on the practical issues related to the use of JITs and to issue recommendations to practitioners.
- The **implementation of EAWs and JITs** has proved to be successful. If some difficulties still need to be addressed, EAWs and JITs can be considered as valuable tools in the development of an EU criminal justice area.

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STUDY

IMPLEMENTATION OF THE EUROPEAN ARREST WARRANT AND JOINT INVESTIGATION TEAMS AT EU AND NATIONAL LEVEL

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1. INTRODUCTION

The European Arrest Warrant (EAW) and Joint Investigation Teams (JIT) are two fundamental instruments of the Freedom, Security and Justice area. The EAW and the JITs enhance judicial cooperation in criminal matters and also – as far as JITs are concerned – law enforcement cooperation in the European Union. Their purposes are different and their implementation at national and European levels has sometimes been difficult. They are, nevertheless – although to different extents – both implemented and used.

European Arrest Warrant

According to Article 34 of the European Arrest Warrant Framework Decision¹ (hereafter the “Framework Decision”), Member States should have taken the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003.

The Commission issued one report in 2005 based on Article 34 of the Council Framework Decision². At that time, only half of all Member States³ had implemented this instrument within the timeframe allowed by Article 34. Italy was the last of all 25 Member States to implement it in April 2005⁴.

¹ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA).

² Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States COM(2005)63 final, 23.02.2005.

³ BE, DK, ES, IE, CY, LT, HU, PL, PT, SI, FI, SE and UK.

⁴ Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (revised version) COM(2006)8 final, 24.01.2006. This revision only concerns the Italian legislation.

A second report was issued by the Commission on 11 July 2007 (hereafter the “Implementation Report”). Romania and Bulgaria had, at that time, implemented the Framework Decision.

In addition, the General Secretariat of the Council issued an **Information Note on 11 June 2008** compiling replies received from Member States with regards to a questionnaire in 2007 on the practical implementation of the EAW⁵ (the “Information Note”).

Finally, a mutual **evaluation exercise (peer review)** concerning the application of the European Arrest Warrant is also being held in the Member States. Many of those evaluation reports are now public documents⁶.

Joint Investigation Teams

According to Article 4 of the 2002 Council Framework Decision on Joint Investigation Teams⁷ (the “JIT Framework Decision”), Member States should have taken the necessary measures to comply with the provisions of the Framework Decision by 1 January 2003.

The **2002 Framework Decision will cease to have effect when the 2000 Convention on Mutual Assistance in Criminal Matters has entered into force in all the Member States**⁸. This is not yet the case today. Therefore, both instruments can still be used as legal basis for creating JITs.

Other instruments such as the **1997 Naples II Convention**⁹ can also, under certain conditions, be used to create JITs.

Apart from the **Report from the Commission on national measures taken to comply with the Council Framework Decision of 7 January 2005**¹⁰, no comprehensive report has been issued by any European Institution on the use and implementation of JITs by EU Member States¹¹. Therefore, it is through different sources of information (Toulouse Conference, information provided by annual reports, information received from magistrates etc.) that this research will give an overview of the implementation status of Joint Investigation Teams.

⁵ Information Note 10330/08 dated 11 June 2008 on ‘Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant’ – Year 2007.

⁶ http://www.consilium.europa.eu/cms3_Applications/applications/Pol/Ju/details.asp?lang=EN&cmsid=720&id=202

⁷ Council Framework Decision of 13 June 2002 on Joint Investigation Teams (2002/465/JHA).

⁸ Council Act of 29 May 2000 establishing the Convention by the Council in accordance with Article 34 of the Treaty on the European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union. Official Journal 197, 12.07.2000 P. 0003 – 0023.

⁹ Council Act of 18 December 1997 drawing up, on the basis of Article K.3 of the Treaty on the European Union, the Convention on Mutual Assistance and Cooperation between Customs Administrations (98/C 24/01).

¹⁰ COM (2004) 858 final.

¹¹ However, Europol and Eurojust have issued a Joint Investigation Team Manual (2008) and a Guide to EU Member States’ legislation on Joint Investigation Teams (2006).

The EAW and the JIT will be studied from similar perspectives. A few indications on their historical background will first be given and their main features will then be presented. Finally, the paper will propose a detailed overview of their implementation at national and European level.

2. IMPLEMENTATION OF THE EUROPEAN ARREST WARRANT AT NATIONAL AND EUROPEAN LEVEL

“The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”¹².

2.1 Historical background and mutual recognition principle

The European Arrest Warrant is based on the implementation by the Member States of the principle of mutual recognition. This principle was recognised by the Tampere European Council as the “cornerstone of judicial cooperation in both civil and criminal matters”. It entails quasi-automatic recognition and execution of judicial decisions among Member States, as if the executing judicial authority was implementing a national judicial order. In January 2001, the Commission adopted a Programme of measures to implement the principle of mutual recognition of decisions in criminal matters¹³. At the time, the Commission foresaw the “creation of a single European legal area for extradition”¹⁴ and wanted Member States to find ways of “establishing the handing-over of arrangements based on recognition and immediate enforcement of arrest warrants”¹⁵.

The European Arrest Warrant was the first instrument in the area of judicial cooperation in criminal matters to be adopted following the principle of mutual recognition.

The principle of mutual recognition was initially applied in the first pillar to promote integration in the single market. It is based on the necessary “high level of confidence between Member States”¹⁶. Nevertheless such a (ideal) situation, in the very sensitive field of judicial cooperation in criminal matters is not obvious. The Tampere programme did not condition the implementation to this principle. Additionally, the European Court of Justice has indicated in *Advocaten voor de Wereld* (case C-303/05, 3 May 2007) that it is not the objective of the Framework Decision to harmonise the substantive law of the Member States”. Therefore, harmonisation is not a pre-condition to the application of the principle of mutual recognition.

¹² Framework Decision , Article 1.

¹³ 2001/C12/02.

¹⁴ Ibid. para. 2.2.1.

¹⁵ Ibid. Point 8 of A: Table of priority.

¹⁶ Recital (10) of the Framework Decision.

We are, however, of the view that prerequisites to confidence exist and that some elements are strong incentives for implementation of the mutual recognition principle. A few examples are listed below:

- knowledge of other national legal systems and of the EAW provisions through training, exchange of experience;
- willingness to cooperate;
- personal contacts with judicial authorities from other Member States;
- adoption of common refusal grounds for execution of the EAW, in particular based on fundamental rights (see 2.3.3 below). This point is all the more important as the principle of mutual recognition does not expand the rights of individuals against the State, but rather expands the possibilities that State decisions are recognised more easily by other States.

The Commission has recognised that implementation difficulties of the mutual recognition principle could be particularly limited if mutually recognised judgements meet high standards in terms of securing personal rights¹⁷.

2.2 Main features of the EAW

The European Arrest Warrant aims to replace the classical extradition process between Member States of the European Union, which was, until 2003, mainly covered by bilateral agreements or multilateral agreements such as the Council of Europe European Convention on Extradition of 13 December 1957 and its two additional protocols of 1975 and 1978. Extradition can be seen as a “slow, cumbersome and out-of-date” procedure¹⁸. On average, a classical extradition process can last months or years. This procedure is also very much based on political decisions rather than on judicial ones.

The EAW has many advantages compared to traditional extradition processes. The EAW aims to improve efficiency in the surrendering process by limiting grounds for refusal of execution, organising a judicial process, agreeing on the possibility for national Member States to surrender their own nationals and setting time limits for the execution of the EAW.

2.2.1. Limited grounds for refusal of execution

The Framework Decision lists two types of grounds for refusal: **3 mandatory grounds** (Article 3) and **8 non-mandatory grounds** (Article 4, Article 4.7 being divided into two different types of grounds).

¹⁷ Communication from the Commission to the Council and the European Parliament Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, 19.05.2005. Com (2005) 195 final.

¹⁸ Recital C. of the European Parliament recommendation to the Council on the evaluation of the European Arrest Warrant (2005/2175(INI)).

Double-criminality should not be verified for a list of 32 serious offences¹⁹, when those offences are punished in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. Since each of those offences have not been defined in the Framework Decision and since the wording adopted for them can be considered quite vague (e.g. “computer-related crime”), Member States may have adopted different definitions in their legal systems.

It is interesting to note that terrorism is included in this list of 32 offences. The EAW again shows a clear difference to the traditional extradition system, which usually prohibits extraditions for political offences.

2.2.2. Decision making shifted from political to judicial authorities

Authorities involved

In view of speeding up the transmission and execution processes and streamlining the EAW orders, the traditional management of extradition requests is modified. Government approval is no longer required, “**The European Arrest Warrant is a judicial decision**” (Article 1(1) of the Framework Decision). Furthermore, different Articles throughout the Instrument refer to the “mutual agreement between the issuing and the executing judicial authorities”. When questions need to be discussed, judicial authorities should contact their counterpart directly.

Central authorities can assist competent judicial authorities on “practical and administrative” questions (recital (9) of the Framework Decision). However, this role is not always purely administrative, according to the Commission²⁰. Estonia, Ireland and Cyprus have given an executive role to their central authority. This is clearly contrary to the text of the Framework Decision. In the Danish peer review of January 2007, the review team noticed that the government has been asked to approve a judicial decision in three files, “raising the spectre that political pressure may potentially impact upon what should be a purely judicial decision”²¹.

Transmission channels

Article 10(4) of the Framework Decision states that “**The issuing judicial authority may forward the European Arrest Warrant by any secure means** capable of producing written records under conditions allowing the executing Member State to establish its authenticity”. The Framework Decision gives three examples of a “secure channel”, namely the **European Judicial Network telecommunication system** (Article 10(2)), the **Schengen Information System** (SIS, and, soon, SIS II) and **Interpol** (Article 10(3)).

¹⁹ Framework Decision, Article 2.

²⁰ Implementation Report, p.8

²¹ Council of the European Union Implementation Report on the fourth round of mutual evaluation “The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States” – report on Denmark. 12 January 2007 13801/2/06 REV 2 (13801/106 Restreint UE).

It is however important to note that the Interpol alert (with no accompanying EAW) is not a valid reason for arrests in some Member States²².

The Commission indicates in the Implementation Report that in 2005, 58% of the warrants were transmitted by Interpol and/or the SIS²³. In most of the remaining cases, the EAWs were sent directly to the Member State concerned.

According to the Information Note of the Council, around two thirds of EAWs were transmitted in 2007 through Interpol and/or the SIS system, the remainder being sent directly to the executing judicial authority or using the EJN²⁴.

2.2.3. Surrender of nationals of Member States

In a classical extradition system, the extradition of nationals is usually impossible. However, one exception did exist before 2002: Nordic countries' extradition legislation (1960) allowed the extradition of nationals to take place under certain conditions when the request was made by another Nordic country.

The Framework Decision only refers to the "requested person" without distinguishing his/her nationality. **Surrendering nationals is part of the efficiency scheme of the EAW.** This principle has been broadly accepted in the different Member States. The Commission noted that **in 2005 over a fifth of those surrendered were nationals (or residents) of the executing Member State**²⁵.

"Nationality" has nevertheless been granted a specific treatment under the Framework Decision:

- Article 4(6) gives the possibility to the executing Member State to refuse execution of the EAW if "the requested person is staying in, or is a *national* or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law"²⁶.

- Article 5(3) permits Member States to condition the execution of an EAW to the fact that the person surrendered – being a *national* or a resident of the executing Member State – "is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."

Even though these "guarantees" are quite important compromises made by Member States, **some countries still have difficulties in complying with the principle of surrendering its own nationals.** For instance, the Czech Republic still does not accept surrendering its citizens for offences committed by them before 1 November 2004. The same happens in Cyprus, where nationals cannot be surrendered for an offence committed before 1 May 2004²⁷. Nonetheless, it should be noted that the Czech Republic

²² The Netherlands, Sweden, Cyprus and Ireland.

²³ Implementation Report, p.3.

²⁴ According to the 2007 figures, only PT used the EJN for 25 of its requests, *see* 3.3 below.

²⁵ Implementation Report, p. 4.

²⁶ For the definition of "staying in" and "resident" see recent case law from the ECJ in 3.1 below.

²⁷ Implementation Report, p.3.

Constitutional Court decided on 3 May 2006 that Czech citizens had to assume the rights as well as the obligations conferred to them by their European citizenship. Therefore, the temporary surrender of a Czech citizen for sentencing or punishment under an EAW is not unconstitutional.

2.2.4. Clear time limits for the execution of the EAW

Where a classical extradition would take a few months or years, the Framework Decision imposes clear time limits for the executing authority to take a decision on the EAW request.

Article 17 of the Framework Decision states that:

- if the person arrested has given consent to being surrendered, the final decision should be taken within 10 days after the consent has been given;
- if the person does not consent to her/his surrender, the final decision on the execution of the European Arrest Warrant should be taken within 60 days after the arrest of the requested person. This time limit may be extended by a further 30 days in the case that this first time limit cannot be enforced.

Article 23(2) gives the executing authorities 10 days to actually surrender the person sought by the issuing State after the final decision on the execution of the EAW.

Therefore, **when the executing Member State agrees to execute the EAW, the surrender should actually take place within a maximum of 100 days after the person has been arrested.**

According to the Commission, **in 2005, the procedure established by the EAW took on average 43 days, and even 11 days when the person consented to her/his surrender.** The Commission had nevertheless noted that some countries such as the Republic of Ireland and the UK often exceeded the time limit set out by the text of the Framework Decision.

The Information Note displays 17 answers to the question of the length of the surrender procedure in the case of consent and only 15 answers in the case of no consent²⁸. **In the case of no consent, the procedure within 15 Member States in 2007 took an average of 36 to 44 days. In the case of consent of the person sought, this time frame dropped to between 12 and 19 days²⁹.** Despite the different number of Member States providing information to the Commission and to the Council, by comparing the figures for 2005 and the 2007, the conclusion could be drawn that:

²⁸ Malta did not provide any information to question “7.1 How long does a surrender procedure take on average where the person agreed to the surrender (time between the arrest and the decision on the surrender of the person sought)?”. Ireland, Malta and the UK did not provide any response to question “7.2 How long does a surrender procedure take on average where the person did not consent to the surrender (time between the arrest and the decision on the surrender of the person sought)?”.

²⁹ This wide range is partially due to the fact that Poland has answered both questions very broadly: Poland answers between 3 (in the case of consent) or 7 days (in the case of no consent) to 90 days (in the case of consent) or “over 90 days” (in the case of no consent).

- there is no major change in the average length of procedure noted by the Commission;
- it is, however, interesting to note that large differences exist between Member States: for instance, in 2007 in the case of consent, the length might vary from 7 days in Estonia to 26 to 35 days in Finland, and in the case of no consent, from 5 to 10 days in Latvia to 2 months in Lithuania.

The Commission noted that **in 2005, around 80 cases (5% of surrenders) were reported as having been decided upon within a time frame that exceeded the 90 days time limit set out by Article 17(4) of the Framework Decision**³⁰. Additionally, the Commission mentioned that some countries such as France and Italy have not adopted any time limits for their higher court decisions. Therefore, France and Italy are likely to exceed – at some point – the maximum 90 days limit.

The Council, on the other hand, received only 16 responses to this question³¹. Ireland and Germany reported most of the cases where the time limit had been exceeded³².

Another “time” issue should be stressed: many Member States indicate in their Implementing Act that the EAW procedure is only valid for offences committed after a certain date (after the implementation date or the Accession date for a particular Member State for example). In the Implementation Report, the Commission points out that the Czech Republic accepts and issues arrest warrants for offences committed before 1 November 2004, except in the case of its own nationals. Italy states that the provisions of Article 32 of the Framework Decision apply only for EAWs received after the entry into force of its Implementing Act (14 May 2005). Cyprus allows the surrendering of its nationals only for acts committed after the date of accession of Cyprus to the Union, i.e. 1 May 2004.

2.3 Implementation of the EAW at national level

The implementation of the Framework Decision has proved to be challenging at the national level even though it is, paradoxically, already an instrument that is very much – if not commonly – used by judicial national authorities.

2.3.1. General considerations

The EAW has first of all been a success due to the number of requests exchanged between Member States. **During the whole of 2005, nearly 6900 EAWs were issued by 23 Member States**³³.

The Information Note confirms this upward trend. **A total of 9413 EAWs were issued by 18 Member States in 2007**³⁴. According to these figures, Germany, France and

³⁰ Implementation Report, p. 4.

³¹ Only 16 Member States (DE, EE, ES, FR, IE, CY, LV, LT, LU, HU, PL, PT, RO, SK, FI, and SE) answered the question “8.1. In how many cases were the judicial authorities of your Member State not able to respect the 90 days time limit for the decision on the execution of the EAW according to Article 17(4) of the Framework Decision?”.

³² 27 cases for Germany and 31 for Ireland out of a total of 76 cases reported by the 16 Member States.

³³ BE and DE were unable to send figures to the Commission for 2005.

Poland are the countries to have issued most EAWs in 2007 – respectively 1785, 1028 and 3473.

According to the Commission, during 2005 and in over 1770 cases, the person sought was traced and arrested, while 1532 were surrendered; approximately amounting to 22.2% of the total number of EAWs issued. According to the Information Note, a total of 3368 persons were arrested in 2007 under a European Arrest Warrant on a Member State's territory³⁵. Compared with the actual surrender of 2067 persons³⁶, it is possible to deduce the following figures: in 2007, 21.9% of EAWs that were reported led to the surrender of the person sought and around 61.4% of the persons arrested were actually surrendered³⁷.

Compared to the 2005 figures for which the Commission explained that over 86% of the persons arrested were actually surrendered to the issuing authority, the decrease is significant (even though only 18 Member States have provided the Council with figures, while the Commission received figures from 23 Member States).

According to the Information Note, the higher percentage of persons surrendered to the countries that had issued an EAW was obtained by the UK and Finland³⁸, whereas Spain and Poland only obtained the surrender of around one tenth of the persons they sought³⁹.

The Commission indicated that half of the persons that surrendered in 2005 had given their consent⁴⁰.

The Information Note gives a slightly higher figure for 2007; around 56.6% of the persons that surrendered in 17 Member States⁴¹ gave their consent.

According to all of these figures, it is obvious that the EAW has been implemented throughout Europe. Nevertheless, it is important, in order to understand the current situation and to have a general overview of the changes brought about by the EAW, to

³⁴ A total of 18 Member States (DE, EE, ES, FR, IE, CY, LV, LT, LU, HU, MT, PL, PT, RO, SK, FI, SE and UK) replied to the question “How many EAWs have been issued in 2007?”. Nevertheless, from 208 EAWs issued by SK, 19 were cancelled.

³⁵ The 18 Member States replied to the following question: “5.1 How many persons have been arrested under a European Arrest Warrant in your country?”. It is possible though that some of those persons were arrested under EAWs issued earlier than 2007.

³⁶ Question 3 of the Council questionnaire was “How many of these arrest warrants resulted in the effective surrender of the person sought?”. It is worthwhile mentioning though, that among the 99 persons surrendered in 2007 according to the UK, some arrests may have been subject of an EAW from previous years.

³⁷ This figure (61.4%) might prove lower than the actual 2007 figures since question 5.1 was drafted in such a way that it is not certain if the persons were arrested following a EAW issued in 2007 (5.1 How many persons have been arrested under a European Arrest Warrant in your country?).

³⁸ UK: 99 persons surrendered from 185 issued EAWs (approximately 53.5%). Finland: 43 persons surrendered from 84 issued EAWs (approximately 51.2%).

³⁹ Spain: 59 persons surrendered from 588 issued EAWs (approximately 10%). Poland: 434 persons surrendered from 3473 issued EAWs (approximately 12.5%).

⁴⁰ Framework Decision, p. 4.

⁴¹ The UK did not provide a reply to the question “5.3 Of those surrendered how many consented to the surrender?”

look into the implementation difficulties which have occurred – and those that sometimes still do occur in the Member States.

Member States could be categorised into three different types of groups. Some Member States experienced constitutional difficulties and sometimes even had to modify their Constitutional rules in order to be able to implement the EAW. Other Member States did implement the European Arrest Warrant, but modified the content of this instrument to fit their legal system. Finally, a third group implemented the European Arrest Warrant without giving grounds for the Commission to raise any specific negative comments.

2.3.2. Constitutional and legislative amendments: the cases of Germany, Poland and Cyprus

Some countries such as Portugal and Slovenia, have undertaken constitutional amendments to accommodate the obligation to surrender their nationals under the EAW. Nevertheless, these countries did not experience major constitutional complaints.

Complaints on the subject were, on the other hand, introduced in Greece and in the Czech Republic, but were consequently rejected.

In Germany, Cyprus and Poland, complaints linked to the surrendering of nationals of those countries reached the stage of a negative decision of a Constitutional Court against the national implementing act.

Germany

The Judgment of the Second Senate of the Federal Constitutional Court of 18 July 2005 (German Constitutional Court) is an important national development in the implementation of the EAW.

This judgement followed the German Implementation Act (the “Act”) of the European Arrest Warrant adopted on 21 July 2004 and discussed the compatibility of the Act with the German Basic Law.

A European Arrest Warrant was issued by Spain in September 2004 against a German and Syrian citizen, who was prosecuted in Spain for having participated in terrorist activities. Spain had already issued an international (classical) extradition request in September 2003, but Germany had refused to extradite the person because of his German citizenship. The Higher Regional Court declared the complainant’s extradition to Spain admissible by order of 23 November 2004. The extradition was nevertheless granted on the condition that “after the imposition of a final and unappealable prison sentence or other sanction, the complainant would be offered to be returned to Germany for the execution of the sentence”⁴². The Federal Constitutional Court suspended the extradition for a total period of a maximum 9 months, until the decision on the constitutional complaint was taken.

⁴² Federal Constitutional Court, Judgment of the Second Senate of 18 July 2005, paragraph 17. It is interesting to note that the Court uses the word “extradition” rather than the word “surrender”, therefore, we will also use exceptionally, in these specific paragraphs, the word “extradition”.

The complainant argued that his extradition would be contrary to the Basic German Law on various grounds, notably the waiver of the verification of double criminality, the non-protection of German citizens, and the unappealability of the decision on the application for a grant of extradition.

The Federal Constitutional Court ruled definitely that “the European Arrest Warrant Act infringes fundamental rights and is unconstitutional and that the Act is void”⁴³. This decision was based on **the German citizenship of the wanted person, the protection of the principle of legality and the protection of the principle of recourse to the courts against the grant of extradition – both principles being issued from the Basic law**. The Constitutional Court explains that “all citizens are supposed to be protected from the insecurities connected with being sentenced in a legal system that is unknown to them”⁴⁴. Even though the Basic law permits, since an amendment of November 2000, the extradition of German citizens under certain conditions of a Member State of the European Union or to an international court of Justice, “the legislature had failed to take sufficient account of the especially protected interests of German citizens”⁴⁵ (principle of legality⁴⁶, Article 16.2 of the Basic Law).

Additionally, the possibility of recourse to the courts against the grant of extradition is fundamental⁴⁷. Its non-observance is contrary to Article 19.4 of the Basic Law.

Finally, the fact that the extradited German citizen could be returning to Germany for execution after the imposition of an appealable custodial sentence or other sanction did not compensate enough for the deficiencies of the legal regulations⁴⁸. For these reasons, the Act was declared void⁴⁹ and the German citizen could not be extradited as long as a new Act was not implemented. The order of the Higher Regional Court was overturned⁵⁰. It is interesting to note that in a dissenting opinion, Judge Lübke-Wolff indicated that he believed the decision of the Federal Constitutional Courts should also have been extended to non-Germans having lived in or being raised in Germany.⁵¹ As such, this constitutional issue is therefore certainly at least as much an issue of fundamental rights as that of citizenship.

Germany adopted a new Implementation Act on 20 July 2006, which entered into force on 2 August 2006.

According to the Commission’s Implementation Report the fallout of the German Federal Constitutional Court’s decision extended beyond the German borders. Spain and Hungary immediately invoked the well-known public international law principle of reciprocity and refused to recognise the EAW that Germany continued to issue between 18 July 2005 and 2 August 2006⁵².

⁴³ Federal Constitutional Court, Judgment of the Second Senate of 18 July 2005, para. 62.

⁴⁴ Ibid. para 66.

⁴⁵ Ibid. para. 91.

⁴⁶ Ibid. para. 64 to 101.

⁴⁷ Ibid. para. 102 to 116.

⁴⁸ Ibid. para. 100.

⁴⁹ Ibid. para. 117.

⁵⁰ Ibid. para. 125.

⁵¹ Ibid. para. 158.

⁵² Implementation Report, p. 5.

Poland

The implementation of the EAW was made in Poland through the amendment of the Criminal Procedure Code of 1997 by a 2004 Act amending several criminal statutes.

The proceedings before the Constitutional Tribunal⁵³ were initiated by the Regional Court of Gdańsk, in a case where a Polish citizen was to be surrendered on the basis of Article 607t § 1 of the Polish Criminal Procedure Code for the purpose of conducting a criminal prosecution against her in The Netherlands.

The Constitutional Tribunal declared that this article does not conform to Article 55(1) of **the Polish Constitution**, which **stated that the extradition of a Polish citizen was forbidden**. The Polish legislator had not initially proposed to amend the Constitution, but tried to circumvent the ban of Article 55 by distinguishing between the notion of extradition and that of surrender. The Constitutional Tribunal stated that the “surrendering of a person (...) must be viewed as a form of extradition within the meaning of Article 55(1) of the Constitution⁵⁴” and therefore forbade the surrendering of a Polish citizen.

The Constitutional Tribunal in its ruling asked for an amendment to the Polish law to make it constitutionally compatible, or for an amendment of Article 55(1) of the Constitution. In the meantime, the Tribunal ruled that the loss of binding force of the challenged provision was delayed for 18 months.

According to the Implementation Report, during that time, Poland continued to surrender its nationals. The Polish Code of Criminal Procedure was amended following the revision of the Constitution on 7 November 2006. Although the amendments did not enter into force until 26 December 2006⁵⁵, the **new Article 55 of the Constitution** was made directly applicable to Polish law from 7 November 2006 by decision of the Constitutional Tribunal.

Cyprus

Law 133(I)/2004 reproduced the content of the Framework Decision.

The first application of this Implementation Act concerned the surrender to the UK of a person holding dual British and Cypriot citizenship. This person was prosecuted in the UK on charges of fraud.

In a decision dated 7 November 2005⁵⁶, **the Supreme Court of the Republic of Cyprus “could not find an appropriate legal basis in the Constitution justifying the arrest of a Cypriot national for the purpose of surrendering him/her to the competent judicial authorities of another Member State on the basis of a European Arrest Warrant”⁵⁷**. Article 11 of the Cypriot Constitution lists the situations in which a person can be arrested or detained. Since the EAW was adopted after this article, the EAW was

⁵³ An unofficial translation in English of the decision of the Constitutional Tribunal is available at <http://www.trybunal.gov.pl/eng>.

⁵⁴ Paragraph 3 of the Ruling.

⁵⁵ Articles 607p, 607t, 607w of the Polish Code of Criminal Procedure.

⁵⁶ English summary of the Supreme Court Decision of 07.11.2005 available in Council Document No 14285/05 of 11.11.2005.

⁵⁷ Council Document No. 14281/05, p. 2.

obviously not mentioned in Article 11 as a reason for arrest or detention. In addition, the Supreme Court stated that this article precluded for the extradition of Cypriot nationals. Secondly, the Supreme Court mentioned that, since framework decisions adopted under the third pillar do not have any direct effect, the value of a framework decision cannot be superior to that of the Constitution. In doing so, the Supreme Court makes an explicit reference to the *Pupino* case of the European Court of Justice (ECJ)⁵⁸. In the *Pupino* case, the ECJ transferred its jurisprudence on the “indirect effect” of directives to Framework Decisions in the field of police and judicial cooperation in criminal matters. The Supreme Court of Cyprus indicated that “there is no suitable interpretation of the [implementation Law] so that its provisions prevail and are put into effect in relation to a citizen of the Republic [of Cyprus]”.

Following this decision, the **Government of Cyprus proposed an amendment to the Constitution and a new Article 11 was adopted** which came into force on 28 July 2006⁵⁹.

Between 7 November 2005 and 28 July 2006, no EAWs issued against Cypriot nationals could be executed by Cyprus.

These decisions by Constitutional/Supreme courts in three Member States have in common the defence of the fundamental rights of the citizens of those countries. Those major implementation difficulties were nevertheless all lifted after relevant amendments were introduced.

2.3.3. Implementation modifying the substance of the Framework Decision

A second group of Member States could be identified as the ones in which, according to the Implementation Report, “more still needs to be done”.

Protection of fundamental rights

Since all Member States have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms⁶⁰, they should, at least to a certain extent, have mutual trust in their different legal systems on the subject of the protection of Human Rights and the protection of fundamental rights. **Nonetheless, many countries have criticised** the absence of stronger references to human rights in the European Arrest Warrant instrument, **in particular the absence of mandatory grounds for refusal⁶¹ based on human rights.**

The EAW does, however, make a few references to fundamental rights in other Articles of the Council Framework Decision. Recitals (12) and (13) refer respectively to the Charter of Fundamental Rights of the European Union and to the impossibility of

⁵⁸ Case C-105/03, *Criminal proceedings against Maria Pupino*, [2005] ECR I-5285.

⁵⁹ Law 127(I)/2006.

⁶⁰ Council of Europe, 4 November 1950, CETS n°005.

⁶¹ Framework Decision, Article 3.

surrendering a person when they are at serious risk of being subjected to the “death penalty, torture or other inhuman or degrading treatment or punishment”. Additionally, some Procedural rights are also mentioned in the Framework Decision. The person arrested has, for instance, the right to be informed of the content of the EAW (Article 11) as well as the right to be heard by a judicial body in case he or she opposes surrender (Article 14). Also, the surrender may be “temporarily postponed for serious humanitarian reasons” (Article 23.4).

The Italian implementation legislation recognises the European Arrest Warrant as far as the supreme principles of the Italian constitutional order with regard to fundamental rights being respected.⁶² There is a certain similarity here with the 2005 German Constitutional Court decision: community acts that violate fundamental rights should not be applicable in the domestic legal order⁶³. Contrary to other Member States, Italy did not engage in a constitutional revision to implement the EAW. The Commission has noted that Italy has introduced grounds for refusal going beyond the Framework Decision⁶⁴.

Another example of the importance taken by the protection of fundamental rights in various EAW national implementation Acts is the UK Extradition Act 2003. This text allows refusal when the extradition would be unjust or oppressive in the light of the person’s physical or mental condition⁶⁵, or when the person’s rights under the UK Human Rights Act of 1998 would not be compatible⁶⁶.

In different peer reviews, protection of fundamental rights has been denounced as having become in various implementation legislations mandatory grounds for refusal of execution of a EAW. The Greek legislation has, for instance, converted recital (12) of the Framework Decision into a mandatory ground for non-execution⁶⁷; Finland has done the same⁶⁸.

Other implementation difficulties

Refusal grounds

Due to the varying national implementation Acts throughout Europe, the grounds for refusal of execution listed in the Framework Decision are often treated differently from one country to the next.

⁶² Article 1(1) of Act 22 April 2005, No. 69.

⁶³ *Corte di Cassazione* Case No. 1654, 15 May 2006.

⁶⁴ Commission, 2007 Implementation Report, p. 8.

⁶⁵ Section 25 of UK 2003 Extradition Act.

⁶⁶ Section 21 of UK 2003 Extradition Act.

⁶⁷ Council of the European Union Evaluation Report on the fourth round of mutual evaluation “The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States” – report on Greece. 3 December 2008 13416/2/08 REV2 (13416/1/08 REV1 Restreint UE 20 October 2008), p. 38.

⁶⁸ Council of the European Union Evaluation Report on the fourth round of mutual evaluation “The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States” – report on Finland. 16 November 2007 11787/2/07 REV2 (11787/1/07 REV1 Restreint UE 28 September 2007), p.36.

This is illustrated for instance by the surrender figures collected in the Information Note for 2007. Latvia and Lithuania have one of the highest rates of persons surrendered from their territory to the issuing authority compared to the number of persons arrested on their territory (100%). Ireland and Luxembourg have, on the other hand, one of the lowest rates of persons surrendered (respectively around 50.5% for Ireland and 52.9% for Luxembourg). It is clear that Ireland and Luxembourg have refused to surrender those persons that were sought and arrested more often than Latvia and Lithuania has done.

The Member States have informed the Council of some of their causes for refusal. This information is given in Annex II of the Information Note. For instance, many Member States have not been able to execute incomplete EAWs or have experienced problems with the identity of the person sought.

In addition to those practical difficulties, grounds for mandatory non-execution have often been modified and their number increased; thus going far beyond the Framework Decision⁶⁹.

Double criminality

Abandoning the double criminality check for certain types of offences is one of the main advantages of the EAW and one of the practical cases of implementing the mutual recognition principle – a principle based on trust. Nevertheless, many Member States have minimised the scope of this principle.

Article 80 of the new German Implementing Act of 2006 states that in cases where there “is no clear national or foreign reference, a double criminality check should be carried out.”

The Italian Implementation Act maintains the double criminality check as a principle⁷⁰. Additionally, the Italian position goes against the case law of the European Court of Justice, which confirms that only the criminal qualification of the issuing State should be taken into account, and not the qualification of the executing State⁷¹.

Similarly, double criminality is always checked in Poland when the EAW has been issued against a Polish national. Double criminality is also partially checked in Belgium, Slovenia and the UK, where part of the offence is committed on its national territory⁷². Similarly, in Estonia, the peer review conducted in February 2007 demonstrated that “if a person were to be requested in respect of acts which were not an offence in Estonia, surrender would be refused”⁷³.

⁶⁹ EL, IE, IT, CY, PL. Implementation Report, p. 8.

⁷⁰ Implementation Report, p.8.

⁷¹ ECJ 3 May 2007, Case C-303/05, *Advocaten voor de Wereld*, para. 49-50, 52-54.

⁷² Implementation Report, p. 8.

⁷³ Implementation Report on the fourth round of mutual evaluation “The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States” – report on Estonia. 19 March 2007 5301/2/07 REV2 (ST 5301/1/07 Restreint UE 20 February 2007), p. 38.

The misuse of the EAW

It seems that the EAW is not always used to surrender a person wanted “for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order” (Article 1), but also, for instance, to provide a testimony. This situation is in clear contradiction of the Framework Decision. The Italian Cassation Court quashed a surrender decision for that reason in April 2007⁷⁴.

2.3.4. Correct implementation of the EAW

According to the Commission, only a few Member States do not currently have any specific issues relating to implementation of the EAW. This conclusion can be drawn by deducting from the 27 EU Member States, all those States that were specifically identified by the Commission in its Implementation Report, as having implementation problems .

The result is that **Spain, Sweden, Finland, Hungary, Romania and Bulgaria have not been identified as experiencing “problematic” legal situations as far as implementation of the EAW is concerned**⁷⁵ .

An extremely interesting development has recently been taking place between Nordic countries. It is important to mention that Finland, Sweden, Denmark, Norway and Iceland are part of a broad Nordic cooperation that goes a long way back in history. Not only did the Nordic States have “extradition laws with identical wording”⁷⁶ before the adoption of the EAW, but Nordic countries have also recently adopted a **Nordic Arrest Warrant (NAW)** that goes a lot further towards judicial cooperation in criminal matters. The NAW is based on the principle and structure of the EAW and is fully compatible with the obligations of the Nordic EU Member States under the EAW.

The NAW has a broader scope, fewer optional grounds and shorter time limits than the EAW⁷⁷:

- **broader scope**: the NAW is applicable whatever the length of the custodial sentence or detention order.

- **fewer optional grounds**: the NAW abolishes totally dual criminality checks, therefore States cannot refuse to surrender a person on the grounds that the offence in question is not punishable under domestic law. Furthermore, the NAW takes up fewer optional grounds for non-execution of the EAW.

⁷⁴ *Corte di Cassazione*, Section VI, Judgment of 17-19.4.2007, No. 15970, Piras e Stori.

⁷⁵ One should probably wonder if the Commission has been fully able to evaluate the situation prevailing in Romania and Bulgaria. These two countries joined the EU on 1 January 2007 and the Commission updated this evaluation up to 1 June 2007.

⁷⁶ Framework Decision, Recital (3).

⁷⁷ Information provided by Denmark, Finland, Iceland, Sweden and Norway to the General Secretariat of the Council, 24 January 2006, No 5573/06.

- **shorter time limits:** when a person consents to his surrender, the decision on the execution of the NAW should be taken within a limit of three days (compared to 10 days limit under the EAW). When the person does not consent, the time limit is 30 days (60 days under the EAW). Finally, under the NAW, the person should be surrendered no later than five days after the final decision is taken (10 days under the EAW).

The evolution of the NAW compared to the EAW is positive in the sense that it moves judicial cooperation in criminal matters and mutual recognition to an even higher level of cooperation than provided for by the EAW. The NAW also meets some of the recommendations adopted by the European Parliament in 2006 pursuant to a proposal made by Adeline Hazan⁷⁸. In fact, not only has double criminality not been *reintroduced*⁷⁹ between these Nordic countries, but it has even been abolished.

The EU could indeed usefully “take inspiration from the Nordic Arrest Warrant to improve the effectiveness of the European Arrest Warrant.”⁸⁰

2.4 Implementation of the EAW at European level

Implementation of the EAW at European level will be discussed from the angle of the different European stakeholders participating in this process: the European Court of Justice (ECJ), Eurojust, the European Judicial Network (EJN) and Europol.

2.4.1. Decisions of the European Court of Justice

Even though the jurisdiction of the ECJ on preliminary rulings in the field of police and judicial cooperation in criminal matters has still not been accepted by all Member States, the ECJ has decided upon interesting cases involving, in particular, questions relating to the European Arrest Warrant.

The European Court of Justice confirmed the validity of the Framework Decision on the European Arrest Warrant in a judgement delivered on 3 May 2007⁸¹. Asked by the Belgian Court of Arbitration – on the basis of Article 35 EU – if the removal of verification of double criminality, for certain offences mentioned in the Framework Decision, is contrary to the principle of legality in criminal matters, the ECJ responded that those offences and penalties continue to be determined by the law of the issuing Member State which must respect fundamental rights, including the principle of legality of criminal offences (*nullum crimen, nulla poena sine lege*)⁸².

⁷⁸ European Parliament recommendation to the Council on the evaluation of the European Arrest Warrant (2005/2175(INI)).

⁷⁹ Ibid. Recommendation (b).

⁸⁰ Ibid. Recital P.

⁸¹ Case C-303/05.

⁸² See Recitals 52-53 of the judgement.

With respect to the fact that the lack of precision in the definition of the 32 categories of offences listed in the Framework Decision risks giving rise to inconsistent implementation of the Framework Decision within the various national legal orders, the Court simply pointed out that it is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States⁸³.

The European Court of Justice has also defined the terms “resident” and “staying”: core terms of the optional ground for refusal of execution of Article 4(6) of the Framework Decision⁸⁴. Asked by the Oberlandesgericht Stuttgart (Germany) – on the basis of Article 35 EU – if some specific acts/situations were precluding the assumption that a person was “resident” in Germany or was “staying” in Germany, the ECJ stated that the definition of both terms should be uniform throughout Europe and that it cannot be left to the sole assessment of each Member State.

The abolition of pillars envisaged by the Lisbon Treaty⁸⁵ will communitarise decisions taken in the field of judicial cooperation in criminal matters and will enhance the judicial control of the European Court of Justice on the implementation of instruments such as the EAW.

In its recommendation to the Council⁸⁶, the European Parliament had already suggested the “communitarisation” of the European Arrest Warrant by applying the procedure of Article 42 of the EU Treaty; the so-called “passerelle” provision⁸⁷.

2.4.2. Coordination role of Eurojust

The Framework Decision gives a very specific role to Eurojust in Articles 17.7⁸⁸ and 16.2⁸⁹.

In 2007 only nine Member States reported breaches of time limits to Eurojust⁹⁰ as requested by Article 17.7 of the EAW Framework Decision⁹¹. As Eurojust rightly pointed out in its Annual Report, it is doubtful that it was only those nine countries that encountered difficulties leading to non-respect of the time frame envisaged in the Council Framework decision. Therefore, it seems obvious that the majority of Member States still have not complied with this obligation. It would be useful for Eurojust to receive more information from Member States in order to analyse the reasons for delays in the

⁸³ See Recital 59 of the judgment.

⁸⁴ Case C-66/08, 17 July 2008.

⁸⁵ OJC115 9.5.2008.

⁸⁶ (2005/2175(INI)).

⁸⁷ Recommendation (m).

⁸⁸ Article 17.7 of the 2002 Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States: *Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay.*”

⁸⁹ Article 16.2 of the Framework Decision. In case multiple European Arrest Warrants are issued for the same person, *The executing judicial authority may seek the advice of Eurojust when making the choice referred to in paragraph 1 (the choice relating to which EAW to execute).*

⁹⁰ Eurojust Annual Report 2007.

⁹¹ The Czech Republic, Ireland, Hungary, Portugal, Sweden, Romania, Belgium, Spain and France.

execution of the EAWs. The Commission has indeed “urged all Member States to make the appropriate efforts” to comply with the obligation to report the delays to Eurojust⁹².

Article 16.2 allows the executing judicial authority to seek the advice of Eurojust when deciding which European Arrest Warrant should be executed – in case more than one EAW has been issued on the same person at the same time. Eurojust has indicated in Annex II of its 2004 Annual Report⁹³ that it would be willing to give this advice to *all parties concerned*. Nevertheless, Eurojust is hardly ever mentioned in national Implementation Acts⁹⁴.

Eurojust has published guidelines suggesting criteria to be taken into consideration in multi-jurisdictional cases⁹⁵ and has applied these guidelines to the implementation of EAWs in Annex II of its 2004 Annual Report

In fact, the role of Eurojust in implementing and developing the use of European Arrest Warrants already goes way beyond the text of the Framework Decision. Eurojust assists judicial authorities in coordinating their actions. Eurojust has a major coordination role in complex investigations involving many Member States. Those investigations regularly lead to the issuance of European Arrest Warrants. A few examples are provided by Eurojust in its recent Annual Reports.

- In 2005 Eurojust successfully resolved a conflict of jurisdiction between Spain and Portugal involving a drug trafficking case, where an EAW had been issued by Spain but rejected by Portugal who argued for Portuguese jurisdiction. Judicial authorities from the two countries were carrying out investigations on the same evidence and against the same persons. Eurojust’s advice to allow Spain to have jurisdiction over the case was accepted by Portugal, who then surrendered the sought persons to Spain⁹⁶.
- In February 2007, Eurojust assisted a number of Member States in dismantling a credit card fraud network in Romania. In this case, the identities of two of the main suspects were disclosed and European Arrest Warrants were issued.
- In an investigation into counterfeit medicines originally carried out in France in 2007 and involving Sweden, UK, Denmark and the Netherlands with a coordinating role for Eurojust, two persons were arrested in Sweden on the basis of European Arrest Warrants.
- In June 2007, Eurojust and Europol coordinated and supported an originally Belgian investigation against an Albanian criminal network operating in various Member States (Belgium, France, Germany, the Netherlands, Italy and the UK). This organisation was involved in different serious crime offences such as drug trafficking or trafficking of human beings. A simultaneous action carried out in

⁹² Implementation Report, p. 4.

⁹³ Eurojust 2004 Annual Report, Annex II “The legal and practical implementation of the Framework Decision on the European Arrest Warrant (EAW)”.

⁹⁴ See Legislation Applicable,

www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=720&id=71

⁹⁵ Eurojust 2003 Annual Report.

⁹⁶ Eurojust 2005 Annual Report.

seven Member States on the basis of European Arrest Warrants led to several arrests and the seizure of large amounts of drugs, weapons and other stolen objects.

Finally, it is worth mentioning that Eurojust has established a system of thirteen teams that help National Members “to make the best use of their time, skills and resources, to expedite decision making and to better suit the changing shape and size of the organisation”. One of those teams is dedicated to the EAW and to the European Evidence Warrant⁹⁷.

Under the initiative to adopt a Council Decision on the strengthening of Eurojust⁹⁸ (the “Initiative”):

- “national representatives within Eurojust will have the possibility to issue and complete requests for judicial cooperation regarding instruments (...) giving effect to the principle of mutual recognition”⁹⁹; and

- Member States will ensure “that their national member is informed of all requests for judicial cooperation regarding instruments (...) giving effect to the principle of mutual recognition”¹⁰⁰.

On the basis of this important text, Eurojust should, in the future, be able to monitor EAW more efficiently, and provide useful assistance to Member States.

2.4.3. Assistance provided by the European Judicial Network

The Council adopted, on 29 June 1998, a Joint Action on the creation of a European Judicial Network¹⁰¹ (EJN). This Network was officially inaugurated on 25 September 1998 by the Austrian Presidency of the Council of the European Union.

The EJN is a network of contact points set up between authorities of the different Member States playing an important role in practice in the area of judicial cooperation in criminal matters. The aim of the network is to **ensure the proper execution of mutual legal assistance requests**. In order to enhance judicial cooperation in the EU, the EJN has very recently been strengthened and its relations with Eurojust clarified¹⁰².

⁹⁷ Eurojust 2007 Annual Report.

⁹⁸ Initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden with a view to adopting a Council Decision of... on the strengthening of Eurojust and amending Decision 2002/187/JHA.

⁹⁹ Ibid. point 8)2 (a).

¹⁰⁰ Ibid point 11)b)8.a) 11.

¹⁰¹ 98/428/JHA Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, on the creation of a European Judicial Network OJ L 191 of 07 July 1998, p.4.

¹⁰² Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network. OJ L 348 24/12/2008, P. 0130-0134.

Article 10 of the EAW Framework Decision designates the **European Judicial Network contact points as sources of information for EAW issuing judicial authorities or executing judicial authorities.**

On its **website**¹⁰³ an entire section is dedicated to the European Arrest Warrant. The EJN provides practitioners with two important implementation tools for EAWs:

- **Atlas**: detailed information on identity of authorities in charge at national and regional level.
- **Wizard**: provides for the drafting of a EAW;

The Framework Decision gives the possibility to issuing Member States to transmit their European Arrest Warrant through the secure telecommunications system of the EJN. It is worth mentioning though that this channel of transmission is hardly ever used by Member States according to the Information Note. Among 15 Member States replying to this specific question, only Poland had transmitted 25 EAW through the EJN¹⁰⁴.

2.4.4. Role of Europol

Although Europol does not have any judicial powers or authority, **the support that it provides to national investigations – often in coordination with Eurojust – has recently led to the issuance and execution of European Arrest Warrants.** A few examples provided by Europol in its 2006 and 2007 Annual Reports are mentioned below.

- In 2006 the Lithuanian Liaison Bureau in Europol coordinated the arrests of significant drug-related suspects on the basis of European Arrest Warrants.
- In February 2007, a coordinated operation (“Operation Baltico”) against armed robberies was carried out by Europol and the Italian Arma dei Carabinieri. As a result, 35 European Arrest Warrants were executed simultaneously throughout Europe (Italy, Estonia, Lithuania, Finland, Spain, France and Germany) with the assistance of Eurojust and Europol.

Finally, it should be mentioned that the future Council Decision on Europol replacing the Europol Convention modifies the forms of serious crime for which Europol is competent, in order to mirror the list of offences provided by Article 2 of the EAW Framework Decision¹⁰⁵.

¹⁰³ www.ejn-crimjust-europa.eu.

¹⁰⁴ Information Note, Question “2.3 How many of these European Arrest Warrants were transmitted via the VPN of the EJN?” All other countries (DE, EE, ES, FR, IE, CY, LV, LT, LU, HU, PT, SK, FI, UK) replied “none”.

¹⁰⁵ Proposal for a Council Decision establishing the European Police Office (EUROPOL) 20.12.2006 COM (2006) 817 final, Annex I.

3. IMPLEMENTATION OF JOINT INVESTIGATION TEAMS AT NATIONAL AND EUROPEAN LEVEL

3.1 Historical background and legal basis

A JIT is an investigation team set up by mutual agreement by competent authorities of two or more Member States for a specific purpose and a limited period of time, in order to carry out criminal investigations¹⁰⁶.

The Treaty of Amsterdam (1997) provides an initial legal basis for the participation of police, customs and other specialised services in Joint Investigation Teams¹⁰⁷.

The Hague Programme¹⁰⁸ defining the Freedom, Security and Justice area for 2005 to 2010, stresses on a number of occasions the importance of Joint Investigation Teams and the fact that Member States should be encouraged to use this instrument for combating cross-border organised and other serious crimes and terrorism with the support provided by Eurojust and Europol¹⁰⁹.

3.1.1. 2000 Convention on Mutual Assistance in Criminal Matters and 2002 Council Framework Decision on Joint Investigation Teams

In May 2000 the Convention on Mutual Assistance in Criminal Matters (the “MLA Convention”) was adopted to enhance judicial cooperation within the European Union and with Norway and Iceland. Article 13 of the MLA Convention refers to Joint Investigation Teams.

In the aftermath of 11 September 2001 and considering the slow progress in the ratification of the MLA Convention, a Council Framework Decision (the “JIT Framework Decision”) was adopted on 13 June 2002. Member States were to implement the JIT Framework Decision by 1 January 2003. **Member States were convinced that the fight against cross-border organised crime could be improved by creating teams of investigators and judicial authorities from different Member States.**

The JIT Framework Decision will cease to have effect when all Member States have ratified the MLA Convention. Today, Greece is the only Member State not to have yet transposed the MLA Convention into its legislation. In addition, Italy and Greece have not implemented the JIT Framework Decision.

3.1.2. 1997 Naples II Convention

¹⁰⁶ Council Framework Decision of 13 June 2002 on Joint Investigation Teams (2002/465/JHA).

¹⁰⁷ Article 30 Treaty on the European Union

¹⁰⁸ The Hague Programme: strengthening Freedom, Security and Justice in the European Union OJ C 053, 03/03/2005 P.0001-0014...

¹⁰⁹ Ibid.

The possibility for Customs officers to participate in Joint Investigation Teams has been regulated by Article 24 of the Naples II Convention¹¹⁰ in 1997, before the same possibility was given by the MLA Convention to police authorities.

This article is much shorter than Article 13 of the MLA Convention or than the Council Framework Decision of 2002¹¹¹.

Joint Investigation Teams under the Naples II Convention can only be set up for the criminal activities listed in Article 19.2 of the Naples II Convention. This list is broad: from trafficking in prohibited goods (e.g. drugs, nuclear material, chemical weapons), to illegal cross-border commercial trade in taxable goods or trafficking in precursor substances.

The Naples II Convention will enter into force once the last Member State has ratified this Convention. Nevertheless, according to Article 32 of the Convention, it can still be applied between Member States who have expressed their wish to do so and who have already ratified the Convention¹¹². Nevertheless, even though all Member States have signed the Convention, a number of them have not ratified it or adopted the relevant internal texts to apply it¹¹³.

According to Article 3 of the Naples II Convention, judicial authorities are able to carry out investigations for the purposes of carrying out a criminal investigation using the Naples II Convention or the MLA Convention. **The Naples II Convention should, in the years to come, become used more and more by judicial authorities.**

3.1.3. Other legal bases

There are other non-EU legal bases which can be used to create JITs. Apart from bilateral agreements, the following instruments should be mentioned:

- Council of Europe Second Additional Protocol to the European Convention on mutual assistance in criminal matters¹¹⁴ (Article 20)
- UN Convention against Transnational Crime¹¹⁵ (Article 19)
- UN Convention against Corruption¹¹⁶ (Article 49)

¹¹⁰ Council Act of 18 December 1997 drawing up, on the basis of Article K3 of the Treaty on European Union the Convention on mutual assistance and cooperation between customs administrations (98/C 24/01) JO C 24, 23.01.1998.

¹¹¹ The Naples II Convention mainly sets out the objectives of the team, defines the law applicable to the team's activities, the time frame of its activities and mentions the head of the team and the fact that the Member State where the team is located shall make the necessary arrangements for the team to operate.

¹¹² See also the Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Mutual Assistance and Cooperation between Customs Administrations (98/C 189/01).

¹¹³ France, for instance, has ratified the Naples II Convention (legal act of 16 June 2000), but Custom officials cannot yet participate in JITs.

¹¹⁴ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 08.11.2001.

¹¹⁵ United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25 of 15 November 2000.

- EU-US Agreement¹¹⁷ (Article 5)

The significant number of legal bases covering JITs could lead to confusions amongst practitioners. Unification of JIT and legal framework structures would eventually be advisable.

3.2 Main features

3.2.1. Purpose of the JITs

JITs can, *in particular*, be set up when:

- (α) “a Member State’s investigations into criminal offences require difficult and demanding investigations having links with other Member States; or when
- (β) 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”¹¹⁸.

3.2.2. Members and participants of JITs and powers granted to them

Judges, prosecutors, police officers and customs officers can potentially be *members* or *seconded members* of the JIT¹¹⁹. There is however no obligation for a participating Member State to second a member to the team. Officials involved can be members working from their home country without actually working physically on the field with the rest of the team.

People who are attached to EU institutions¹²⁰ (e.g. Europol officials) and people originating from non-EU countries or who belong to other international organisations (such as Interpol) can *participate* in Joint Investigation Teams¹²¹.

The team leader is one of the team members originating from the Member State where the team is located¹²². If the team is active in more than one country, the team leader might change from one country to the other. Nevertheless, all EU States have not defined exactly the conditions under which a leader of the JIT would operate¹²³. Additionally, the question of whether the team leader should be a magistrate or a law-enforcement officer

¹¹⁶ United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003.

¹¹⁷ Agreement on mutual assistance between the European Union and the United States of America, OJ J 181, 19/07/2003 P. 0034-0042.

¹¹⁸ Article 13 1 (a) and (b) of the MLA Convention.

¹¹⁹ Article 13.4 of the MLA Convention.

¹²⁰ Article 13(12) of the MLA Convention states that “(...) arrangements may be agreed for persons other than representatives of the competent authorities of the Member States setting up the Joint Investigation Team to take part in the activities of the team. Such persons may, for example, include officials of bodies set up pursuant to the Treaty.(...)”

¹²¹ Article 13.12 of the MLA Convention.

¹²² Article 13.3 (a) of the MLA Convention.

¹²³ Report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams. COM (2004) 0858 final.

could also become an issue. When investigating magistrates or prosecutors are heading investigations, they usually head the JIT naturally.

Members of the team will, within the limits of her or his competence, provide the team with information available in their own country¹²⁴.

One of the most important points in the MLA Convention and in the JIT Framework Decision is the powers given to seconded members of the team. Seconded members act within the powers which have been granted to them by their State of origin and within the limits of the applicable law to the JIT. They are permitted to be present when investigative measures are taken in the Member States¹²⁵. Nevertheless, in certain circumstances, the team leader may exclude them (e.g. in cases involving sexual crimes against children). **Seconded members may request their own competent authority to take the investigative measures needed by the JIT. “Those measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation”¹²⁶. Information can be exchanged without the use of rogatory letters, which clearly speeds up the information gathering process.**

Seconded members can also be charged by the leader of the team to conduct investigative activities¹²⁷. According to Anne Kostomaroff, Deputy Prosecutor, Head of Counter Terrorist Unit within the Prosecution Division in Paris France would not confer them coercive power. As such, they would be able to take witness statements or assist in search warrants but they would not be able to arrest someone¹²⁸. The Eurojust and Europol Joint Investigation Team Manual, as well as guidance provided by JIT Experts, insist on the **importance of defining the powers available to seconded members from the outset.**

3.2.3. Law applicable to the activities of the team

The law applicable is the law of the country where the team is located¹²⁹.

3.2.4. Agreement for setting up a JIT

The Agreement referred to in the JIT Framework Decision and in the MLA Convention is the one for which a model was issued by the Council in 2003¹³⁰. This agreement should describe:

- the parties to the Agreement;

¹²⁴ Article 13.9 of the MLA Convention.

¹²⁵ Article 13.5 of the MLA Convention.

¹²⁶ Article 13.7 of the MLA Convention.

¹²⁷ Article 13.6 of the MLA Convention.

¹²⁸ Interview displayed on the French Ministry of Justice website. Retrieved from <http://www.justice.gouv.fr/index.php?rubrique=10030&article=14446>.

¹²⁹ Article 13.3b) of the MLA Convention.

¹³⁰ Council Recommendation of 8 May 2003 on a model agreement for setting up a Joint Investigation Team (JIT) (2003/C 121/01).

- the purpose of the JIT
- the period covered by the Agreement
- the Member State(s) in which the JIT will operate
- the JIT leader(s)
- the Members and possibly the officials from third countries or EU bodies (Eurojust, Europol or OLAF) participating in the JIT
- certain general and specific conditions to the Agreement (e.g. powers granted to seconded members, specific data protection rules)
- certain provisions relating to organisation arrangements such as the cost for the JIT during its operation or the language to be used for communications
- any other detail which could be important for the functioning of the JIT.

The agreement may be amended at any time, in particular to extend the period of time during which the JIT will operate¹³¹.

In some Member States, the principle agreement by the Minister of Justice is necessary before competent magistrates can agree on the operational issues of the JIT. In France for instance, a “JIT Framework agreement” is first signed at governmental level before any JIT can be set up. France has already signed seven Framework agreements with: Spain (2003), Germany (2006), Slovenia (2007), Romania (2007), the Netherlands (2008), Belgium (2008) and Bulgaria (2008).

3.2.5 Grounds for refusal

The Naples II Convention, the MLA Convention and the JIT Framework Decision do not display any grounds for refusal of participation or exchange of information once the JIT is created.

The only element that could legitimately lead a Member State to refuse to exchange information with the members of the team would be if another investigation was taking place simultaneously and the sharing of information could endanger its results.

If in practice, Member States refused to participate in JITs, the national legislations can sometimes contain refusal grounds for the creation of a JIT. For instance, the legislation of Luxembourg implementing the European texts indicates that the General State Prosecutor can refuse the mutual assistance request to create a JIT when, in particular, “essential interests”¹³² of Luxembourg could be jeopardised.

3.3 Implementation of Joint Investigation Teams at national level

3.3.1. General considerations

¹³¹ Article 13.1 of the MLA Convention.

¹³² 21 March 2006 Law relating to Joint Investigation Teams, Article 2.2 (in French “les intérêts essentiels”).

In January 2005, the European Commission issued a Report on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams¹³³ (the “2005 Report”).

The Commission noted that only Denmark, Latvia and Finland had adopted the transposing legislation by the official implementation date¹³⁴; 1 January 2003.

According to a Communication of the Commission to the Council and European Parliament in 2007¹³⁵, as of 15 May 2007, only 18 JITs had been set up. The teams had been set up by Spain, France, Belgium, the Netherlands, the United Kingdom and Sweden.

The 2005 Report indicates that the JIT Framework Decision was implemented in Spain and Portugal with more or less the same content as the Framework Decision. Other countries – such as Denmark, France, Latvia or Finland – had modified the content. The Commission was at that time of the opinion that only Spain had adopted transposing measures that were fully compliant with the Framework Decision.

Since then, the remaining Member States have been quite slow to adopt a legislation allowing for the creation of Joint Investigation Teams. In 2008, Italy had not implemented the JIT Framework Decision and Greece had neither transposed the MLA Convention nor the JIT Framework Decision¹³⁶.

3.3.2. JITs used mainly for certain types of crimes

Currently, JITs are mainly used to investigate the most serious forms of crime such as drug trafficking, terrorism, trafficking in human beings or counterfeiting of the Euro. This situation mirrors recommendations drawn nearly ten years ago in the European Council in Tampere on 15 and 16 October 1999. At that time, Conclusion 43 called for “joint investigative teams to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism”.

- *Drug trafficking*: in its Communication to the Council and the European Parliament on an EU Drug Action Plan 2009-2012, the Commission stresses the importance of using JITs and Joint Customs Operations to a greater extent in cooperation with Europol¹³⁷. Important drug trafficking cases are particularly relevant to this type of cooperation since the residence of the drug trafficker is often located in a different country than where the drug is finally sold.

- *Terrorism*

¹³³ COM (2004) 1725.

¹³⁴ Article 4 of the JIT Framework Decision.

¹³⁵ Communication from the Commission to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union, COM(2007) 644 final, 23.10.2007.

¹³⁶ Eurojust and Europol 2008 Joint Investigation Team Manual.

¹³⁷ Communication from the Commission to the European Parliament and the Council on an EU Drugs Action Plan 2009-2012, COM(2008) 0567 final., 18.09.2008.

Similarly to drug cases, terrorism investigations are particularly appropriate for the setting up of JITs since relevant information is often spread throughout many different countries. In 2007, for instance, Portugal and Spain decided to set up a JIT to investigate the Spanish separatist group ETA's activities in Portugal¹³⁸.

The long list of offences of the Naples II Convention, for instance, or of the Europol Convention, should however encourage judicial authorities in the future to set up JITs in more varied criminal investigations.

It is important to recognise that JITs might not be suitable for all types of criminal investigations with ties in different countries. **Other forms of cooperation do also exist, such as *coordination* in case of parallel investigations in different Member States. The Future Group has also lately been suggesting other forms of cooperation in order to simplify European law enforcement cooperation:**

- allow police officers, after simplified formalities, to perform non-coercive acts on the territory of another Member State (e.g. taking witness testimony);
- put in place a system of written requests for information by public entities or individuals from one country to another¹³⁹.

3.3.3. Countries involved and examples of JITs

France is one of the Member States that regularly uses the possibility given by the European legislation to create Joint Investigation Teams. The first JIT that France became a member of was in 2004 with Spain. By the end of 2008, France had participated in 20 JITs. Eleven of these were related to "organised crime" and nine to "terrorism" activities. Most of the JITs have been concluded with Spain (12 out of 20) and with Belgium (4 out of 20). Two have been carried out with Germany, one with the Netherlands and one with Romania¹⁴⁰.

Belgium (operation Nougaro) and France (operation Artigat) were the first to set up a Joint Investigation Team to counter Islamist terrorism¹⁴¹.

Mr Bernard Simier, Examining Magistrate¹⁴² in Rennes, France, has coordinated two Joint Investigation Teams. The first was related to drug trafficking between South America and Spain, organised by French nationals. Operation SPES NOSTRA lasted one year and led to the seizure of 3.3 tons of cocaine. Additionally, movable properties and real estate were also seized. Mr Simier considers that a JIT is a more efficient tool than traditional international *commission rogatoires*, allowing information to be transferred more easily and rapidly between authorities of different Member States. The JIT is a clear

¹³⁸ Europol, TE-SAT 2008 EU Terrorism Situation and Trend Report, p. 32.

¹³⁹ Freedom, Security, Privacy – European Home Affairs in an open world – Report of the Informal High-Level Advisory Group on the Future of European Home Affairs Policy ("The Future Group") 9 July 2008 11657/08, p. 32.

¹⁴⁰ Information obtained from the French Ministry of Justice, January 2009.

¹⁴¹ Europol Annual Report, 2007, p. 55.

¹⁴² "Juge d'Instruction".

symbol of the European Justice area where the different Member States involved – whichever is responsible for judicial proceedings¹⁴³ – are fighting together to dismantle criminal networks.

Mr Simier nevertheless indicates that some difficulties had to be overcome in order for the JITs he participated in to be fully efficient. One of the main issues was the travelling and accommodation costs for law enforcement officers seconded to the team. After Eurojust's proposal to finance some of those costs (see below), magistrates expect easier handling of JITs.

3.3.4. Implementation difficulties

Admissibility of evidence in court

A practical example will illustrate this question.

A JIT has been formed and is composed of judicial and law enforcement members from Member State A, Member State B and Member State C. The JIT has been operating on the territory of the three Member States. The evidence gathered has been done so under the law of each of those Member States. From the start, the three Member States had agreed that judicial proceedings would be carried out in Member State C.

The question of admissibility of evidence in trial is governed by the national law of the Member State where the court proceedings take place. Therefore, depending on C's national legislation, evidence gathered in Member States A and B – according to A and B's national laws – might not be admissible in the Court of Member State C.

Therefore, the Joint Investigation Team Manual and the Network of JIT Experts¹⁴⁴ have insisted on the **importance of having a close examination of this question at the stage of the agreement, before any operational activities are undertaken by the JIT.**

Financial costs and possible funding

Joint Investigation Teams are usually expensive to carry out¹⁴⁵.

Currently the parties to the agreement setting up the JIT have to agree from the beginning on “who should bear what?”

Recently, other funding possibilities have also been proposed. In its 2007 call for proposals, the **Commission proposed to Framework Partners to request grants to fund:**

- the **setting up and conducting of a JIT;**

¹⁴³ In this particular instance, France and Spain agreed that Spain would judge the case.

¹⁴⁴ Conclusions of the Second Meeting of the National Experts on Joint Investigation Teams, Council Document 15023/06, 21 November 2006.

¹⁴⁵ Different types of costs have to be covered: accommodation, travel, telecommunication costs etc.

- activities aiming at **sharing JIT expertise** between the Member States, third partners, Europol and Eurojust;
- **training on JITs**, and in particular JITs under the Naples II Convention.

Eurojust, for instance, has received a grant from the Commission entitled “Financial, administrative and logistical support to Joint Investigation Teams with establishment of a centre of expertise with a central contact point”¹⁴⁶.

The only drawback with EU funding is that monies should be spent exactly as set out in the application form. Given the flexible nature of JITs, which should evolve according to the findings of the investigation, this might prove difficult.

A final interesting option, detailed in **the future “Eurojust Decision”** (see 3.4.2 below), would be that the Eurojust College “on a request from the competent national authorities concerned and in cooperation with them, (to) decide(s) that the relevant expenditure of a Joint Investigation Team (...) shall be regarded as operational expenditure of Eurojust (...)”¹⁴⁷. **Eurojust will consequently be able to finance structurally operating JITs.** Although not mentioned by the Eurojust Decision, it goes without saying that this funding could be conditioned to a more active participation of Eurojust to JITs.

Other difficulties

- The possibility to create JITs is not yet known and mastered within the EU judicial authorities and within the law enforcement authorities¹⁴⁸. Therefore, **training at national level should be organised.** In 2007, the Work Plan on the strategy for customs cooperation (training needs of customs administrations) stressed the fact that those officials generally need training on the European Arrest Warrant and on Joint Investigation Teams¹⁴⁹.

- A JIT is first and foremost a team of persons – from different cultural and professional backgrounds – working together to achieve some specific goals. During the entire investigation, the human dimension of the team should never be underestimated. Therefore, **communication in various forms is essential from the start of the operation:** meetings, discussions before and after the agreement is signed, consideration over the counterparts’ sensitivity and professional differences.

- **The choice of the jurisdiction responsible for judicial proceedings is a crucial element.** This choice should be made from the start, possibly in the agreement. It has consequences over the admissibility of evidence. Nevertheless, it is not always easy to

¹⁴⁶ See on <http://www.eurojust.europa.eu/recruitment/vacancies/2008/08-EJ-CA-42.htm>

¹⁴⁷ Article 1.5 paragraph 4 (2008/C 54/02).

¹⁴⁸ See recommendations of the Toulouse Conference in 3.2.4 below.

¹⁴⁹ Work Plan for the strategy for customs cooperation Project Group – Action 5.1 (Evaluate the training needs of customs administrations in relation to their 3rd pillar role) and action 5.3 (Explore options for funding of customs training) – Final report 5 February 2007 16883/2/06 REV 2.

determine from the outset the competent jurisdiction. For instance, if the parties (UK and Germany) agree that German Courts should be in charge of the judicial proceedings since most of the JIT's investigative acts will be carried out in Germany and that the offender suddenly commits the same type of act in the UK, then the UK officials might be keen to have that specific act – even though linked to the other committed by that same person – examined by a court in the UK under British law.

- The evaluation of JITs proves to be tremendously useful for helping practitioners to improve their skills in that field. Since the 2005 Report, Europol and Eurojust have gathered information on the legislative implementation of JITs in the Member States. Nevertheless, unlike the EAW, a global operational efficiency evaluation covering the EU (number of persons arrested, operational difficulties encountered...) has not been carried out. **Member States would certainly benefit from agreeing on standard evaluation criteria to be applied to each JIT carried out.**

3.3.5. A new momentum: the Toulouse Seminar, July 2008¹⁵⁰

Mrs Rachida Dati, French Minister of Justice, opening the Seminar on 17 July 2008, insisted on the fact that **JITs are very efficient cooperation tools because “JITs are flexible, responsive and because information is exchanged on the spot”¹⁵¹**. According to Mrs Dati, 35 JITs have been created between 2002 and July 2007. Nevertheless, she also stresses that **this instrument is still not used enough**.

Discussions during the Seminar focused on the necessary conditions for the development of JITs and identified the best practices that can contribute to the successful and wider use of JITs in the best possible conditions¹⁵².

The JIT was identified during the Seminar as a **resource-sharing tool**, whereby Member States, Europol and Eurojust are maximising efficiency by joining efforts to fight against criminal activities. **JITs are improving mutual trust between Member States and enhancing cooperation between judicial and law enforcement authorities. It therefore reflects a multi-agency approach to criminal justice cooperation in the EU.**

Important conclusions/recommendations were drawn at the Toulouse Seminar, giving new inspiration to practitioners:

1. It is of foremost importance that Europol and Eurojust are systematically informed and that their services are used by Member States participating in JITs. Europol and Eurojust's analytical, logistical and financial (Eurojust) support should be fully activated.

¹⁵⁰ “Eurojust, Joint Investigation Teams: sharing means and information” seminar, 17 and 18 July 2008.

¹⁵¹ Free translation from French of Mrs Dati's speech “C'est un formidable instrument de coopération. Il est d'une grande efficacité, parce qu'il est souple, parce qu'il est réactif, parce que les informations circulent en temps réel.”

¹⁵² Press release from the French EU Presidency.

2. **Training of judicial authorities and law enforcement authorities should be enhanced** to promote JITs and increase their use.
3. **The 2003 JIT Model should be adapted** following feedback from practical experiences in operating JITs (admissibility of evidence, projected agenda of meetings of the team members, list the objectives of the JIT, insertion of more operational data).
4. **The practical use of JITs should be extended to different types of criminal activities and not only to terrorism and drug trafficking.**
5. **JITs' results should be evaluated from a European perspective** (e.g. sharing of confiscated assets between Member States) **and from a national point of view** (e.g. efficiency of the different participating authorities).

3.4 Implementation of the Joint Investigation Teams at European level

Implementation of the JITs at European level will be discussed from the angle of the different European stakeholders participating in this process: Europol, Eurojust, the Europol and Eurojust JIT project, OLAF and the JIT National Experts.

3.4.1. Participation and support of Europol

During the Tampere European Council (1999), the position of Europol in the joint teams was strongly defended: Europol should not only be able to initiate investigations in the Member States, but also to initiate the setting up of JITs¹⁵³.

Europol currently has a supportive role in the activities of Joint Investigation Teams.

One of the three Protocols of the 1995 Europol Convention, which entered into force in 2007 after a decision by the Management Board of Europol¹⁵⁴, was **the JIT Protocol allowing for the participation – within a support capacity – of Europol officials in Joint Investigation Teams**¹⁵⁵. When Europol participates in JITs, it can provide additional information to the JIT by cross-checking the data gathered by the team with its own databases and by analysing the information gathered. This analysis can be achieved with, for instance, the opening of a sub-project dedicated to the investigation of the JIT in an Analysis Work File.

In 2010, a Council Decision could replace the Europol Convention. According to this decision, Europol's tasks will clearly cover activities relating to JITs. Europol shall coordinate, organise and implement "investigative and operational action carried out jointly with the Member States' competent authorities or in the context of Joint

¹⁵³ Point 45 of the Presidency Conclusions, Tampere European Council, 15 and 16 October 1999.

¹⁵⁴ Decision of the Management Board of 20 March 2007 laying down the rules governing the arrangements regulating the administrative implementation of the participation of Europol officials in Joint Investigation Teams (2007/C 72/16).

¹⁵⁵ Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ.C 312 of 16.12.2002, p.1.

Investigation Teams, where appropriate in liaison with European or third countries bodies”¹⁵⁶.

Europol will be able to participate in Joint Investigation Teams on the basis of the MLA Convention, but also on the basis of the 1997 Naples II Convention¹⁵⁷. Participating Europol officials may also suggest to the national members of the JIT to take specific coercive measures. Finally, another important change is that Europol will have a more important role when a JIT is set up to deal with counterfeiting in Euro currency cases. We share the view that **this Council Decision Proposal is fundamental for the operational strengthening of Europol and in particular for the increased use of JITs throughout the EU.**

A few examples provided by Europol in its 2006 and 2007 Annual Reports are mentioned below:

- In 2006, Europol provided analytical support to the first French-Belgian Joint Investigation Team in the field of terrorism according to the Belgian Liaison Bureau. Also, in August 2006, according to the Slovak Liaison Bureau, Slovak authorities participated in a Joint Investigation Team (Operation Premiere) on the Europol Analysis Work File dealing with Turkish criminal groups.

- According to the 2007 Annual Report, one of Europol’s clear aims is to “facilitate the creation of Joint Investigation Teams” (and) “include Eurojust as far as possible and as agreed by the Member States”¹⁵⁸. In June 2007, the Director of Europol and the President of Eurojust signed a Memorandum of Understanding to establish a secure communication link between Europol and Eurojust. The President of Eurojust explained that this secure channel would “help to develop the project on Joint Investigation Teams”¹⁵⁹.

3.4.2. Support of Eurojust

In its 2007 Communication to the Council and the European Parliament¹⁶⁰, the Commission explained that “most national members in Eurojust can suggest the setting up of a Joint Investigation Team, but very few can negotiate it and even fewer (The Czech Republic, Germany, Malta and Sweden) can order it.”

In May 2007, out of the 18 JITs that had been set up, Eurojust had only “played a role” in three¹⁶¹. Nevertheless, Eurojust decided, at quite an early stage, that one of its main objectives¹⁶² would be to “give legal, technical and other support to JITs”.

¹⁵⁶ Proposal for a Council Decision establishing the European Police Office (EUROPOL) 20.12.2006, COM (2006)817 final, Article 5.

¹⁵⁷ Article 6 of the Proposal for a Council Decision of 20.12.2006. The Naples II Convention is not mentioned in the 1995 Europol Convention.

¹⁵⁸ Europol Annual report 2007, p. 28.

¹⁵⁹ Ibid, p. 37.

¹⁶⁰ Op. cit COM (2007) 644 final.

¹⁶¹ Communication from the Commission to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union, 23.10.2007, COM (2007) 644 final, p. 6

Eurojust has a major coordination role to play in important and complex investigations involving a few Member States and leading regularly to the creation of JITs. A few examples are provided by Eurojust in its 2007 Annual Report.

- In 2007, the creation of a JIT was considered by the National Members in 14 cases.
- Out of 12 cases entered in the Case Management System – where the creation of a JIT was considered by respective National Members – 10 JITs were generated in 2007 (only two in 2006). The crimes covered by those JITs involved amongst others, drug trafficking, money laundering, terrorism, trafficking in human beings, counterfeiting and organised robbery.
- In a section dedicated to the follow-up to Council conclusions¹⁶³, Eurojust explains that “A survey of all National Members shows that very few have formally recommended the setting up of a JIT (...). Approximately half of the National Members have made such a recommendation informally, or have considered doing so. The primary reason for not setting up a JIT or not recommending one is that JITs have not been considered necessary until now, since other forms of cooperation were found (...) by the Member States concerned to have been sufficiently effective. A few National Members have referred to the lack of implementation of the Council Decision on JITs at domestic level.”

A Council Decision has recently been proposed to strengthen Eurojust’s role¹⁶⁴ (the “Initiative”). Different measures to improve Eurojust’s input in the setting up and activity of JITs are proposed:

- Whenever a Joint Investigation Team is to be set up, Eurojust will be informed of the setting up and of the subsequent developments in order to prevent and avoid judicial issues arising at a later stage.
- Eurojust will be able to ask Member States to consider setting up a JIT either acting through a National Member or acting through the Eurojust College.
- All National members will be able to participate in JITs

We share the view that the Initiative is essential to the future use of JITs.

3.4.3. Common Europol and Eurojust JIT project

Europol and Eurojust are promoting the use of Joint Investigation Teams through a common project. A specific web page is dedicated to JITs¹⁶⁵.

Europol and Eurojust have produced a Manual to guide practitioners on how to set up a JIT. This Manual supplements a Guide to EU Member States’ legislation on Joint Investigation Teams.

¹⁶² Eurojust 2005 Annual Report, p. 96

¹⁶³ Eurojust Annual Report, 2007, p.55. EU Document9920/07, 24 May 2007.

¹⁶⁴ Op. cit. footnote n°98..

¹⁶⁵ Same web page respectively on www.europol.europa.eu and www.eurojust.europa.eu.

Part of the JIT project consists of co-organising and hosting the meetings of the National Experts on Joint Investigation Teams. The fourth was held on 15 and 16 December 2008 in The Hague.

Finally, it should also be mentioned that according to the Eurojust and Europol cooperation Agreement, both parties can participate together – at the request of one or more Member States – in the setting up of a JIT¹⁶⁶.

3.4.4. Participation of OLAF

OLAF should be entitled to participate in JITs according to Recital (9) of the JIT Framework Decision and Point 7 of the 2003 Council Recommendation of 8 May 2003 on a model agreement.

To our knowledge, OLAF officials have not yet participated in any Joint Investigation Team. Nonetheless, exchange visits took place in 2006 between Eurojust and the OLAF Magistrates Unit. Those visits were seen at that time as a possible start for involvement in JITs¹⁶⁷.

3.4.5. Role of the National JIT Experts

The Hague Programme proposed the designation by each Member State of a national expert “with a view to encouraging the use of such teams and exchanging experience on best practice”¹⁶⁸. In July 2005, it was agreed that a JITs Experts Informal Network would be established¹⁶⁹.

The JIT experts should provide assistance to competent national authorities:

- (a) to identify the reasons why JITs are not widely used;
- (b) to **exchange relevant information** on practical issues linked to the setting up and functioning of JITs in all Member States;
- (c) to **share best practices**;
- (d) to liaise with other national experts and organisations¹⁷⁰.

One meeting is organised each year by this network with the support of Eurojust, Europol, the General Secretariat of the Council and the Commission. These meetings discuss for example the practical experiences in establishing JITs. The first meeting of the JIT experts was held in November 2005.

¹⁶⁶ Article 6 of the Agreement. This agreement can be found on Europol’s website: www.europol.europa.eu/legal/agreements/Agreements/17374.pdf

¹⁶⁷ Eurojust 2006 Annual Report.

¹⁶⁸ Op. cit footnote 108.

¹⁶⁹ Article 36 Committee, 8 July 2005, Joint Investigation Teams – Proposal for designation of national experts 11037/05.

¹⁷⁰ Eurojust 2005 Annual Report p. 20

The last Expert meeting on Joint Investigation Teams was held on 15 and 16 December 2008 in The Hague, and focused on the exchange of experience in running a JIT, awareness training and evidence gathering¹⁷¹.

4. CONCLUSION

In the future, the EAW instrument will be able to benefit from the use by judicial authorities of the European Evidence Warrant (EEW), adopted by a Council Framework Decision of 18 December 2008¹⁷². Although both are based on the principle of mutual recognition, the EEW recognises the importance of compliance with human rights and fundamental rights provisions more clearly than the text of the EAW. Nevertheless, one can only regret the lack of ambition of the EEW and the fact that it should only be fully applicable by 2011. Indeed, gathering evidence through the use of a JIT, EEW and then requesting persons to be surrendered under a EAW constitute a logical judicial chain.

Another fundamental European aspect should not be forgotten when implementing EAWs and JITs. **Because of the complexity and wide geographical zones used by criminal networks to carry out their illegal activities, it is clear that the implementation of the European Arrest Warrant and the Joint Investigative Teams at the European level should be coordinated more and more by Eurojust, jointly with Europol.** This coordination is all the more essential so that the different national legislations can implement the EAW and the JIT differently.

As far as Joint Investigation Teams are concerned, a contribution from The Netherlands to the Future Group mentioned that Joint Investigation Teams "must be used more often" and that this should go hand in hand with a stronger role for both Europol and Eurojust to work together¹⁷³. **JITs are tools involving the building of mutual trust between Member States.** Even though they could be used more often, members and participants of closed JITs are usually satisfied with the results achieved and consider the instrument to be **of considerable benefit, both for tackling cross-border crime and contributing to a European Criminal Justice Area.** As commented by Mr Jose Luis Lopes da Mota, President of Eurojust, "There is a strong upward trend in the use of JITs since practitioners now recognise JITs as a valuable cooperation tool for cross-border investigations and prosecutions"¹⁷⁴.

¹⁷¹ Joint Europol and Eurojust press release on respective websites, www.europol.europa.eu and www.eurojust.europa.eu

¹⁷² Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. OJ.L 350 of 30.12.2008, p. 72-92

¹⁷³ Report by the Future Group (Justice), 11962/08, Annex II, p. 21.

¹⁷⁴ Expert meeting on Joint Investigation Teams, The Hague, 15 and 16 December 2008.