

Joint Investigation Teams in the Netherlands – What Lessons Can Be Learned From the Dutch Model?

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I. Introduction

Joint Investigation Teams (JITs) are supposed to be powerful, modern tools in the fight against organised transnational crime. Their innovative character lies primarily in the fact that such a team is comprised of investigators from multiple jurisdictions, functioning as a single unit tasked with performing a criminal investigation. There is a single person supervising the investigation, mostly a prosecutor. The integrated nature of such a team is evident from the fact that information can be shared freely within the team, and the transfer of evidence is usually met with less formalities than in classic mutual legal assistance.

While several international and European instruments include provisions on JITs, national law can specify certain issues and set additional rules. It is important to be aware of these when contemplating the setting up of a JIT, since national law can have quite some practical relevance. Moreover, differences in national law can be of academic interest, because they show diverging interpretations of what the concept of a JIT entails and subsequently raise questions as to their design and to (judicial) oversight of these teams. In this article, I discuss Dutch law on JITs, which could offer helpful insights for practical purposes as well as some points for discussion on the law applicable to JITs as such.

Below, I will first explain in paragraph II the applicable law in the Code of Criminal Procedure as well as in prosecutorial guidelines. Next, I will focus on several issues in Dutch law relevant for JITs. Paragraph III tackles issues of choice of forum, both relating to the place of investigation and the place of prosecution. Subsequently, paragraph IV discusses a particular aspect of Dutch law on JITs: the status of foreign law enforcement authorities in Dutch territories, as well as the status of Dutch authorities abroad. Following that, paragraph V explains the law on procedural irregularities committed in a foreign jurisdiction and the difficulties in compensating for these under Dutch law. Last, paragraph VI focuses on the provisional exchange of evidence within a JIT, and a recent change in legislation relevant for that matter.

II. Applicable law

The law applicable to JITs emanates from both international and national legal sources. For most EU countries, the main sources of international law on which a JIT may be based are Art. 13 of the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union¹, and the Council Framework Decision of 13 June

2002². There are of course more treaties and conventions which enable JITs to be established, but I will largely ignore international law sources in the following, and focus on national law instead. International law rules have been described extensively elsewhere.³ What is important to note is that Dutch national law is of a supplementary nature to the rules in international instruments. The provisions in the Code of Criminal Procedure (CCP) and in the applicable international instrument therefore have to be read together.

Art. 5.2.1 CCP provides rules for the establishment of a JIT. Importantly, it requires a basis for a JIT in a treaty or a framework decision. Furthermore, the JIT should be established for a limited period of time, and its purpose should be the execution of criminal investigations in common with the competent authorities of other countries. The public prosecutor is competent to establish a JIT in a written agreement with the competent authorities of the participating countries, on the basis of a request for mutual legal assistance. The agreement should at least contain provisions on the JIT's objective, the period of operation, the place of establishment, the composition of the team and the competences of its members. What also should be included is the duty for the non-Dutch members to appear as a witness in court if and when a case is prosecuted before a Dutch criminal court.

The provision that the public prosecutor is competent to establish a JIT could be slightly misleading. The Public Prosecution Service has issued a guideline on JITs, which restricts the competence to establish a JIT to the College of Procurators-General, the central authority within the Public Prosecution Service. This power has been partly mandated to the National Office of the Public Prosecution Service.⁴ According to the guideline, the public prosecutor in whose territory the JIT will operate should ensure in an early stage that police and prosecutorial capacity are sufficient to enable the JIT to carry out its functions. Moreover, the prosecutor should only seek the establishment of a JIT if a transnational investigation in at least two countries is necessary, if the investigation will be complicated, and if the offences that are investigated have affected at least two countries and a successful investigation is impossible without a JIT.⁵ If the prosecutor deems these conditions to be fulfilled, he should provide the College of Procurators-General or the National Office with the draft

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¹ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ 2000, C 197/1.

² Council Framework Decision of 13 June 2002 on joint investigation teams, OJ 2002, L 162/1.

³ See for instance *Zurkinden*, Joint Investigation Teams, Chancen und Grenzen von gemeinsamen Ermittlungsgruppen in der Schweiz, Europa und den USA, 2013.

⁴ Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45.

⁵ Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 4.1.

agreement and, additionally, with an action plan which is the basis for the JIT's activities.⁶

There is some criticism relating to the emphasis on the need for sufficient capacity as a condition to establish a JIT. This is perceived to be characteristic for Dutch investigative practice, valuing short-term investigative actions obstructing criminal activities over long-term police work aimed at ending a certain pattern of criminal activity or a criminal group. This emphasis on investigative capacity could reduce the use of JITs, as they are designed for longer and more thorough investigations. However, this does not necessarily decrease investigative effectiveness, since it is thought that parallel investigations could in practice be as effective as JITs. Also, the use of mutual legal assistance has been simplified, for instance by the introduction of the European Investigation Order.⁷

III. Choice of forum

Among the first questions to be answered when considering to establish a JIT are questions of forum. These can be distinguished between questions on where to establish the JIT and questions on where to start a prosecution. Regarding the choice for the place where the JIT should be established, and from where the investigation should be supervised, the Public Prosecution Service's guideline gives multiple factors to take into account.⁸ The first factor is where the main focus of the investigation is. This could be indicated by the physical location of the suspects or the location where the offences took place. The second factor is the competence to prosecute the suspects, in order to prevent extradition or surrender proceedings. The third factor is the location of the evidence that must be gathered, also including the execution of investigative measures such as telephone tapping. The fourth and final factor refers to practical issues such as the availability of special expertise or investigative capacity. Despite the carefulness with which the choice for a location for the JIT is made, it may become necessary that its location is changed. The guideline refers to the possibility that the focus of the investigation will shift to another country, and that such a development may incur the need to move the supervision of the JIT to another country as well.

Wherever the JIT is established, it will consist of investigators from multiple countries. The first JITs were organised in such a fashion that all or most participating investigators would share offices and work together in close proximity. However, there is a tendency to organise JITs differently, consisting of investigators which remain based in their respective countries and collaborate from there. This is perceived to lead to a decrease in the learning experience of participating investigators, but an increase in efficiency.⁹

⁶ Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 5.2.

⁷ *Sollie/Kop*, Joint Investigation Teams. Lessons learned, 2012, p. 66–74, 151–152.

⁸ Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 4.2.

⁹ *Sollie/Kop* (Fn. 7), p. 95–96, 103–104.

The CCP and the guideline do not contain any binding provisions on the choice of forum for instigating criminal proceedings after finishing the investigation by a JIT. According to the guideline, the forum for prosecution should ideally be the country in which the JIT was established and where the investigation took place.¹⁰ However, the guideline also states that in most cases it will only become clear during the investigative stage where prosecution could best take place. Because of that, the guideline instructs prosecutors to involve prosecutorial authorities in the participating countries in the work of the JIT already in an early stage of the investigation. This is thought to facilitate the eventual decision on the forum for prosecution.¹¹

Apart from this, in the legislative proceedings it was suggested that an intention for a forum for prosecution may be included in the agreement establishing a JIT.¹² But other methods of striking a more or less binding agreement between the parties involved are also possible. In the case of the JIT investigating the downing of flight MH17, the participating countries have decided to prosecute all criminal cases in the Netherlands, for which purpose a separate treaty has been concluded, allowing a transfer of proceedings from Ukraine to the Netherlands of cases involving non-Dutch victims.¹³

IV. Status of foreign officials

Art. 5.2.2 CCP provides rules on the exercise of competences of the members of a JIT. It requires that the exercise of investigative powers in the Netherlands observes the rules of the CCP and of the treaties applicable between the participating countries. The interpretation of this provision has been the subject of some controversy in the first JITs operating within the Netherlands. The 2005 agreement setting up an experimental JIT between the United Kingdom and the Netherlands, which investigated a case of drug trafficking, contained a provision directly attributing investigative competences in the Netherlands for UK law enforcement authorities. In doing so, it equalled their status to that of Dutch police officers. The Ministry of Justice, which had an observing role in the experiment, sent a letter to the Public Prosecution Service objecting to this aspect of the agreement. In its view, Art. 5.2.2 CCP should not be interpreted as enabling a JIT agreement to define investigative powers, which supplement the powers that are defined in the CCP.¹⁴ Since that moment, this interpretation is viewed as correct,¹⁵ and, consequently,

¹⁰ Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 7.1.

¹¹ Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 5.1.

¹² Explanatory memorandum, Parliamentary documents II 2001/02, 28351, 3, p. 8.

¹³ Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014, Staatsblad 2017, nr. 102.

¹⁴ *Rijken*, Utrecht Law Review 2006, 99 (115 ff.).

¹⁵ See also Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 6.1.

foreign law enforcement officials have limited investigative competences in the Netherlands.

However, there are some possibilities for foreign law enforcement officers to execute investigative powers in the Netherlands on the basis of existing rules, whether in treaties or in the CCP. A straightforward example of the first kind is the power of cross-border pursuit, which is included in multiple treaty provisions.¹⁶ An exception of the second kind is the power to systematically observe a suspect, if a foreign law enforcement officer is specifically authorised for that purpose by the prosecutor.¹⁷ There are some additional rules in that regard, laid down in a ministerial decision, such as the obligation to report and the obligation to appear as a witness in court if needed.¹⁸

These exceptions are generic exceptions and not specifically designed for members of a JIT. While they can of course be employed in the context of a JIT, most of the investigative powers that are to be executed on Dutch territory must necessarily be executed by Dutch investigators. Foreign officers can participate in the investigation, but they have to be escorted by Dutch authorities, who at least formally execute any investigative powers.¹⁹

One of the most important of these rules, and a rule included in the CCP, is that foreign officers must be willing to appear in court as a witness. This rule can have the consequence that participating countries make a certain selection of the available law enforcement officers to second to the JIT. *Spapens* suggests that foreign authorities could pick only those members of a large investigation team as members of a JIT who have enough information in order to be able to operate within the JIT, but not those members who have certain information that the participating country is not willing to disclose in court in foreign criminal proceedings.²⁰

Conversely, Dutch authorities in foreign JITs may only act within the competences Dutch law attributes to them. This does not restrict their actions within a foreign JIT very much, since Dutch law enables the extraterritorial exercise of investigative powers. However, this must remain within the scope made possible by international law.²¹ This means that, if there is a treaty basis for extraterritorial exercise of competences and the specific type of investigative act is allowed under Dutch provisions, Dutch officers may exercise these competences as members of a JIT. Of course, the national law of the

country where the investigative acts are carried out may very well pose additional restrictions.²²

V. Procedural irregularities

Since investigations in the framework of a JIT are carried out by officers of multiple countries, questions are raised not only with regard to the laws applicable to their actions, but also to the rules for compensation or correction of procedural irregularities. The main rule in Dutch criminal procedure is that irregularities committed in an investigation abroad do not have any consequences in Dutch criminal proceedings. The reason for this is that irregularities can only have consequences for the outcome of a case when they are committed in “the investigation leading to the case”. Because the principle of trust governs international relations, the Supreme Court is of the opinion that investigative acts executed by foreign law enforcement authorities are not executed “in the investigation leading to the case”.²³ However, there are two exceptions to this rule. The first is that the irregularity was committed on the instigation of the Dutch Public Prosecution Service. The second is that the irregularity violated essential defence rights.²⁴ When one of these exceptions is present, the irregularities committed abroad may be compensated in Dutch criminal procedure according to normal rules governing these decisions. They may lead to a decision to declare the prosecution inadmissible, to exclude evidence, to mitigate the sentence, or to merely note the irregularity.²⁵

There is some discussion on how to apply this line of reasoning in the context of JITs. The courts seem to apply the Supreme Court’s case law in a strict sense. The District Court of Rotterdam held in a case based on the first, experimental JIT investigation, that “the actions of the English judicial authorities are not to be reviewed by the court”.²⁶ This interpretation in effect splits the investigation in two for purposes of judicial review. Procedural irregularities committed by foreign officials are not committed “in the investigation leading to the case” and could not lead to any compensatory measures in a Dutch trial, unless they were instigated by Dutch prosecutors or violated essential defence rights. This position is reflected in the JIT Guideline, where the Public Prosecution Service instructs prosecutors leading a Dutch JIT to ensure that evidence obtained abroad does not enter the case file if it is gathered in such a way that “it fundamentally violates Dutch criminal procedure”.²⁷ An example of this is

¹⁶ For example in Art. 41 of the Convention Implementing the Schengen Agreement and in Art. 21 of the new Treaty between the Kingdom of the Netherlands, Kingdom of Belgium and the Grand Duchy of Luxembourg on police cooperation, Brussels, 23 July 2018. See also Art. 54 par. 5 CCP for the corresponding power under national law.

¹⁷ Art. 126g par. 9 CCP.

¹⁸ Samenwerkingsbesluit bijzondere opsporingsbevoegdheden, Staatsblad 1999, nr. 549.

¹⁹ *Spapens*, European Journal of Crime, Criminal Law and Criminal Justice 2011, 239 (252–253).

²⁰ *Spapens*, European Journal of Crime, Criminal Law and Criminal Justice 2011, 239 (252).

²¹ Art. 539a CCP.

²² Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 6.3.

²³ Supreme Court of the Netherlands 14 November 2006, Nederlandse Jurisprudentie 2007/179.

²⁴ Supreme Court of the Netherlands, Judgment of 5 October 2010 – Nederlandse Jurisprudentie 2011/169.

²⁵ Supreme Court of the Netherlands, Judgment of 30 March 2004 – Nederlandse Jurisprudentie 2004/376.

²⁶ Rotterdam District Court, Judgment of 11 August 2006 – ECLI:NL:RBROT:2006:AY6630, to be found on www.rechtspraak.nl (18.10.2018).

²⁷ Aanwijzing internationale gemeenschappelijke onderzoeksteams, Staatscourant 2008, nr. 45, paragraph 7.3.

the use of infiltration by civilians, which is not allowed by the Code of Criminal Procedure²⁸ and is thought to seriously endanger the integrity of investigations. In requiring prosecutors to evaluate the lawfulness of investigations, the Guide-line offers some protection against irregularities. Judicial review remains limited.

However, a different position is also possible. After all, a JIT entails an integrated investigation of a combined team, led by a single prosecutor. Consequently, all irregularities could be viewed to have been committed in the investigation leading to the case, which would render all normal rules on procedural irregularities applicable. This would enable the courts to give more protection than the current legal framework does. There is of course, then, the question as to the standard to apply in order to evaluate the lawfulness of investigative action. The way in which JITs are designed implies that the territoriality principle governs investigative actions, which would necessitate the courts to evaluate the actions of JIT members abroad against the laws of that foreign jurisdiction. That is possible, perhaps with the assistance of legal experts, but difficult. It could be viewed as a logical consequence of the integrated nature of investigations carried out by a JIT.

VI. Provisional exchange of evidence

The Dutch Code of Criminal Procedure simplifies the gathering and exchange of evidence in the context of JITs. For instance, Art. 5.2.5 CCP enables the direct transmission of telecommunications intercepted in the Netherlands to a JIT that is based abroad. It includes safeguards for the protection of confidential information exchange between, for instance, a lawyer and his client. Also, it restricts the use of the transmitted information to the investigation by the JIT and requires additional permission if the information is to be used for other purposes.

On the basis of Art. 5.2.3 CCP, evidence gathered as a result of investigative acts carried out abroad by the foreign members of a JIT have equal evidentiary value in Dutch criminal procedure as evidence relating to comparable investigative acts that are carried out by Dutch investigative officers in the Netherlands. However, this evidence can never have a higher evidentiary value than it does have according to the investigator's national law. Consequently, police reports of foreign JIT members are under Dutch law regarded as regular police reports, for which there is no minimum rule: they may serve as a single piece of evidence on the basis of which a defendant may be convicted.²⁹

Another specific rule relating to the exchange of evidence within a JIT is Art. 5.2.4 CCP, which enables the provisional exchange of documents, of objects, and of data. The materials exchanged provisionally may be used in the investigation.

²⁸ Art. 126h CCP restricts infiltration to investigative officers, which can also be foreign officials, as long as their appointment conforms to the rules laid down in the Samenwerkingsbesluit bijzondere opsporingsbevoegdheden, Staatsblad 1999, nr. 549.

²⁹ Art. 344 par. 2 CCP.

However, they cannot be used in evidence, unless they are permanently exchanged by regular procedures of mutual legal assistance. The Code has been recently amended by a bill that expanded the categories that can be exchanged to also include "data". Previously, it was only possible to exchange objects, documents and physical data carriers such as CD-ROMs.³⁰

Final exchange of documents or pieces of evidence always required prior court leave. As a result of the same law amending the Code of Criminal Procedure, the law no longer requires court leave for all cases in which evidence is exchanged by way of mutual legal assistance. This for instance applies when a search has taken place and items have been seized in the presence of the defendant. Court leave in these cases is replaced by a complaint mechanism. This is a change that is not specific for JITs, but it is a general change applying to all exchange of evidence based on requests.³¹

It is a bit remarkable that Dutch law requires court leave in some cases, and that it does not differentiate, apart from the rules on provisional exchange of evidence, between the exchange of evidence in JITs and the exchange of evidence in all other cases. After all, the requirement of court leave enables the court to check whether the conditions for mutual legal assistance, including possible grounds of refusal, as they are laid down in the relevant and applicable treaties, have been complied with. In the case of JITs, such conditions are largely absent since there is a free flow of information and requests within the JIT. When, as is the case with JIT investigations, the gathering of evidence does not take place in the execution of a request for mutual legal assistance, the interference of the court in the exchange of evidence seems superfluous.³² Perhaps the only reason to retain the procedure to obtain court leave is that, in doing so, the lawfulness of the gathering of evidence is placed under judicial review. Since a foreign court most likely will not review the lawfulness of investigative activities by which the evidence was gathered, there is at least some court dedicated to do that.³³ If, however, courts would review the lawfulness of investigative activities carried out abroad, it would no longer be necessary to conduct a review prior to exchanging the evidence.

VII. Conclusion

Dutch law raises some important issues for Joint Investigation Teams which are established in the Netherlands, or

³⁰ Law of 7 June 2017 amending the Code of Criminal Procedure and other laws in order to modernise the rules on international cooperation in criminal matters, Staatsblad 2017, nr. 246, entering into force on 1 July 2018.

³¹ Art. 5.1.10 CCP.

³² The courts regard the agreement establishing a JIT to be the legal basis underlying the exchange of evidence: Amsterdam District Court, Judgment of 30 May 2014 – ECLI:NL:RBAMS:2014:3457, to be found at www.rechtspraak.nl (18.10.2018).

³³ The Amsterdam District Court (Judgment of 30 May 2014 – ECLI:NL:RBAMS:2014:3457) considered that granting the request for exchange of evidence did not run counter "fundamental principles of Dutch criminal procedure".

which include Dutch investigators. Establishing a JIT in the Netherlands is subjected to a specific procedure within the Public Prosecution Service. In this procedure, as well as during the operation of a JIT, there are important choices to be made on the questions of where to establish a JIT and where to instigate criminal proceedings when investigations have been concluded. A relevant issue that can be of influence on these decisions is the status of foreign JIT members under Dutch law, which grants them few investigative powers.

There are very limited possibilities to compensate any procedural irregularities, committed by foreign JIT members, in the criminal procedure following a JIT investigation. This restrictive approach shows the strong reliance on the principle of trust in international relations, excluding judicial review of the lawfulness of foreign investigative activities. It goes hand in hand retaining the need for court leave before an exchange of evidence, also when the evidence was gathered, as is the case with JITs, without a request for mutual legal assistance.

This legal framework is evident of a reserved attitude towards JITs: there is little enthusiasm to perceive the work of a JIT as a single investigation and to provide it with a legal framework that reflects the integrated nature of investigations. Such a legal framework would include a strong assimilation of foreign JIT members with national ones, as well as rules on the exchange of evidence and the review of investigative activities that appraise the integrated character of the work within a JIT. The lack of such a legal framework is perhaps a sign of puzzlement towards the concept of a JIT. Probably the revolutionary idea that criminal investigations could be a shared endeavour needs a more robust basis in the law of criminal procedure. Only when there is a clear legal framework that fully acknowledges the integrated nature of a JIT, while at the same time respecting fundamental principles, a JIT can truly function as a single unit investigating criminal offences.