

**COUNCIL OF
THE EUROPEAN UNION****Brussels, 5 April 2000****7316/00****LIMITE****EUROPOL 4****NOTE**

From : Europol**To :** Europol Working Party**No. prev. doc. :** 5845/00 EUROPOL 1 + ADD 1 + ADD 2 + ADD 3

Subject : Article 30 paragraph 2 TEU, Tampere conclusions¹

1. Rec. 43: Joint Team co-operation with the involvement of Europol officials

1.1. Introduction

The establishment of a common framework for Joint Team investigations has been discussed for more than one year now. Already before the entering into force of the Treaty of Amsterdam, the European Council stated in the Vienna Action Plan¹ that measures to implement Article 30 paragraph 2 of the Treaty of the European Union (TEU) shall be taken within two years after the entry into force of the Treaty.

¹ 13844/98 JAI 41

Subsequently, the German Presidency commenced in the first six month of 1999 a detailed discussion on how to implement Article 30 TEU¹. The Finish Presidency delineated the Tampere Conclusions as far as they related to Europol². The latest paper, so far, was produced in the beginning of February of this year, comprising comments from the delegations at the Working Group Europol on the implementation of the Tampere Conclusions³.

With a view to these documents, and especially after the discussions held at the last meeting of the WG Europol, it seems to be possible to find a common approach on how to implement Article 30 paragraph 2 sub a. of the TEU and Rec. 43 of the Tampere Conclusions. In this note it shall be tried to combine the opinions stated by the delegations to the WG to find a way to implement the provisions mentioned above.

1.2. Phased approach

The European Council was very clear at Tampere in saying that joint investigative teams as foreseen in the Treaty and rules which allow representatives of Europol to participate should be set up without delay. In addition, it was widely acknowledged in the WG Europol that at present the discussion should concentrate on what is feasible under the current legal framework. From the discussions in the WG Europol it was understood that most of the Member States, without pre-empting future discussions on other scenarios, did not see a need to change the Europol Convention to enable Europol officials to participate in Joint Teams. On the other hand, the opinion was expressed that there is a need for improving the conditions for an even closer co-operation between national law enforcement authorities and Europol that goes beyond what it possible under the present legal framework. Also, it was stated that the Tampere Conclusions, looked at in their entirety, show that the European Council envisaged a new quality of law enforcement co-operation under a new European and national legal framework.

¹ 6245/99 EUROPOL 7

² 13370/99 EUROPOL 48

³ 5845/00 EUROPOL 1, ADD 1

It can be concluded that, at this moment, it should be aimed to describe Joint Teams which can be set up immediately to derive maximum benefit from co-operation between Member States without delay. Some preconditions for a model to outline the roles and powers of all participants of a Joint Team are discussed below. Special attention should be given to the fact that such a model is possible under the present legislation and can therefore be implemented without delay.

In addition to this first step, further instruments should be envisaged to accomplish an even more effective co-operation in joint investigations. Especially the need for new legislative action in national law, but also in the Europol Convention, as well as possible implications on the set up of EUROJUST could be the focal point of debate. Such discussions should be based on an evaluation of the practical experiences and results achieved.

1.3. Issues discussed on Joint Team co-operation

The following issues as raised in the WG Europol need to be agreed upon in order to come to a common understanding of a Joint Team investigation. All issues mentioned below are based on the existing legal framework of Europol and the Member States. They are also in line with Article 13 of the draft Convention on Mutual Legal Assistance, initiating joint investigation teams. As a general point, the common legal framework of police co-operation will apply.

1.3.1. Preconditions for the initiation of a Joint Team

To start with, Joint Team investigations can be set up for all kinds of investigations where Member States see a need for co-ordination and harmonisation of efforts at the European level. Preconditions for the involvement of Europol are, in accordance with Article 2 of the Europol Convention, that the Joint Team is dealing with criminal offences that are within the mandate of Europol, that there are factual indications of an organised criminal structure and that two or more Member States are involved.

The operational decision making process is a shared responsibility of all participants of the Joint Team. Executive measures have always to take place under the responsibility of an official of the Member State where the executive measure is undertaken.

There is no minimum number of Member States necessary for the initiation of a Joint Team. The modalities of informing the Member States that are not participating in the Joint Team as well as the involvement of new members will be decided in consultation with the participants of the Joint Team.

1.3.2. Europol to ask Member States to start investigations

Under the provisions of the Europol Convention, Europol is able to make requests to the competent authorities of the Member States via the Europol National Units to initiate, conduct or co-ordinate investigations. This right to ask Member States does not imply a legally binding obligation for the Member States to act on such a request.

1.3.3. Location of the Joint Team

The question was raised whether it would be possible for this Joint Teams to be operating at the Europol headquarters in The Hague. Taken that Europol could act in a co-ordinating role and Europol officials would always act within the framework of the Europol Convention, there is no reason to assume that the Joint Team should not chose Europol as location for their work. Generally, the participants will agree on the most appropriate location of their work according to their needs.

1.3.4. Roles and powers of the participants of a Joint Team

Officials of the Member States have in their state executive powers in accordance with their national law. In other states than their home state they act in a support role, and only where the national law of the state where the investigation takes place allows for further involvement of officials of other states, and if this is in accordance with their own national legislation, additional powers can be granted.

As regards the role of Europol officials, the European Council at Tampere called for the set up of Joint Teams as foreseen in the Treaty. There it was mentioned that the Council shall enable Europol to facilitate and support the preparation, and to encourage the co-ordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity. The activities of Europol officials are based on the Europol Convention, in particular on Article 3. Unlike Member States' participants in the Joint Team, Europol officials can not be granted executive powers during the investigation.

1.3.5. Participation of public prosecutors in the Joint Team

In general, public prosecutors can participate in a Joint Team in accordance with their national law. As regards individual investigative measures, public prosecutors of the state where the individual investigative measures is performed will be involved in accordance with the relevant national law. Evidence is exchanged under the existing legal framework of mutual legal assistance.

1.3.6. Legal protection and liability

Taken that all executive measures will be based on the individual national law of the State where the measure is taken, the provisions on legal protection of that State will apply accordingly.

The liability clauses of the Europol Convention¹ would be directly applicable for any damage caused by Europol officials in the course of an Joint Team investigation.

1.4. Conclusion

It is proposed that the Council declares that Article 30 paragraph 2 sub a TEU and Rec. 43 of the Tampere Conclusions will be implemented using a phased approach. Firstly, the Council is invited to take note of this document. Furthermore, the Council is invited, in order to follow the European Council's request to act without delay, to declare that, as a first step, Joint Teams with the participation of Europol officials shall be set up within the existing legal framework. The Member States should be invited to make use of this additional possibility to derive maximum benefit from co-operation between Member States' authorities when investigating cross-border crime.

¹ Articles 38 and 39

Finally, the Council declares that following this first step further discussions shall be held in order to prepare new steps to an even more effective co-operation in Joint Team investigations. Especially the need for new legislative action in national law, but also concerning the Europol Convention, as well as possible implications on the set up of EUROJUST shall be in the centre of discussion. For that purpose the Member States are invited to present reports to the Council on the results achieved in this matter. These reports shall be presented every six months, starting with the end of 2000.

2. Rec. 45: Europol to ask Member States to initiate, conduct or co-ordinate investigations

Following the last meeting of the Working Group Europol the question was left open what the consequence of requests from Europol to the Member States to start investigations would be. There was consensus among delegates that under the provisions of the Europol Convention Europol is already able to request the initiation, conduct or co-ordination of investigations. With reference to Article 2 (4) of the Europol Convention it can be taken that Europol may address all public bodies existing in the Member States which are responsible under national law for preventing and combating criminal offences. According to Article 4 (2) of the Europol Convention all requests of Europol will be transmitted via the Europol National Units. It is also clear that these provisions do not imply any legal obligation to respond on such requests.

There is no need seen at the moment to strive for a change in Member States legislation and in the Europol Convention to change this situation. It was felt, however, that a policy on how to react to such requests from Europol would be beneficial for the co-operation between Europol and the Member States.

Conclusion

The Council should therefore declare that the Member States are invited to react in the spirit of international co-operation to requests originating from Europol to initiate, conduct or co-ordinate investigations. Member States' competent authorities are invited to give due consideration to a request from Europol and to respond to all requests from Europol. In the case that the request cannot be fulfilled, Member States competent authorities are asked to inform Europol on the reasons for denial in order to allow Europol to be better prepared for amended or future requests. Within one year Member States shall review the experience gained in order to consider new instruments regarding Member States' reaction to requests from Europol.

⁰ The Presidency invites delegations to provide written observations in respect to this document before the meeting of the Europol Working Party taking place on 26 April 2000. Possible observations should be transmitted to the Presidency and the General Secretariat of the Council.