

## Articles

## Cross-border Use of Police Powers within the EU – A Finnish, Norwegian and Swedish Perspective<sup>\*</sup>

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### Abstract

*Cross-border use of police powers today represents a vital part of the European police cooperation that aims at preventing criminality within the European area, maintaining law and order and facilitating proceedings against criminal offenders. This cooperation can, on a general level, be divided into either information exchange or operational cooperation (which may include the use of police powers on foreign territory). The focus of this article is to consider European police cooperation in light of the Nordic police cooperation between Finland, Norway and Sweden concerning the use of police powers on foreign states' territory. In order to do this, the different forms of police cooperation involving the use of police powers on foreign territory facilitated by the EU-instruments are presented. The implementation in Finnish, Norwegian and Swedish law of these EU-instruments is then analysed and compared with Nordic equivalents. Finally, and on the basis of the former analysis, a discussion on European police cooperation in general, differences in implementation in Finland, Norway and Sweden and the role of Nordic police cooperation in view of the EU-instruments is endeavoured.*

### I. Introduction

The use of police powers within the borders of a nation state has traditionally been considered an important part of the state monopoly of power and state jurisdiction.<sup>2</sup> Thus, foreign police officers are not normally permitted to enter the territory of another state in an official capacity. However, due to a significantly increased risk of intensified transnational criminality in Europe following the abolishment of borders, such as trafficking in narcotics, weapons and human beings, money laundry etc., the EU has considered police cooperation an important issue within the European sphere of cooperation.<sup>3</sup> Police cooperation in various forms

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<sup>2</sup> It is often argued that the exercise of police powers on a state's territory by foreign police officers infringes the notion of state sovereignty. It could be argued, however, that the use of police powers on a foreign state's territory is a matter state jurisdiction rather state sovereignty, i.e. that a state in such a situation temporarily confers state jurisdiction to another state rather than abstains from its state sovereignty.

thus constitutes a vital part of European integration, both as *compensating measures* due to a decreased level of national safety as a consequence of the abolished borders, and as *independent supplements* in the fight against international criminality. The ambition of this cooperation is ultimately to prevent criminality within the European area, to maintain law and order and to facilitate proceedings against criminal offenders.<sup>4</sup>

Finland, Sweden (as EU-states) and Norway (as a non-member state) all participate in European legal and police cooperation.<sup>5</sup> However, the Nordic countries (including Denmark and Iceland) have also conventionally upheld close cooperation on their own in many matters, including policing. Characteristic of this cooperation is its informal nature, a relatively high degree of flexibility and a deeply rooted trust towards one another.<sup>6</sup>

Police cooperation today can, on a general level, be divided into either information exchange or operational cooperation, where the latter may or may not include the use of police powers on foreign territory. The focus of this article is European police cooperation of the latter kind. The paper will begin with a survey of the six different forms of police cooperation available within the EU that might involve the use of police powers on foreign territory. *Secondly*, it will look at the implementation in Finnish, Norwegian and Swedish law of the relevant EU-instruments and compare these with possible Nordic equivalents. *Thirdly*, and on the basis of the former analysis, it will close with a discussion on European police cooperation in general, differences in implementation in Finland, Norway and Sweden and the role of Nordic police cooperation in view of the EU instruments.

## II. EU Law and Nordic Instruments on Cross-border Use of Police Powers

### 1. EU instruments

The Schengen Agreement was signed on 14. 6. 1985 by five of the ten member states of the EEC<sup>7</sup> and was supplemented on 19. 6. 1990 by the Convention Implementing the Schengen Agreement (CISA). Together, these treaties created the borderless Schengen area in Europe. The two agreements were signed by most members of the EU, as well as members of the European Economic Area (e.g. Norway). Ireland and the UK did not sign the agreements and have remained

<sup>3</sup> Art. 87 TFEU (ex Article 30 TEU) clearly expresses the need for operational police cooperation between competent law enforcement authorities.

<sup>4</sup> For a general presentation of the development of European legal cooperation, see Ulrich Sieber *et al.*, *Europäisches Strafrecht*, Max-Planck-Institut für ausländisches und internationales Strafrecht (C.H. Beck 2011), p. 504–511.

<sup>5</sup> Danish law is not included in the comparison. Considering that Denmark stands on the outside of the European police cooperation, that the focus of this article is cross-border use of police powers, and that only Finland, Norway and Sweden share land borders with one another, it seems appropriate to limit the comparison to these three states. Iceland is also a Nordic state, but considering *inter alia* its geographical location, its cooperation is also excluded from the scope of this article.

<sup>6</sup> See e.g. Johan Bucht, "De nordiska juristmötena och rättsvetenskapen i Norden", *Defensor Legis* (1999), p. 748.

<sup>7</sup> The States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic.

outside the Schengen cooperation.<sup>8</sup> The Schengen *acquis* was signed in 1996 and the operative cooperation was effectuated in all of five of the Nordic states as from 25.3.2001.<sup>9</sup> CISA includes two forms of European police cooperation relevant in this context: cross-border surveillance and hot pursuit.<sup>10</sup>

The Convention on Mutual Assistance in Criminal Matters (MLA Convention), in accordance with former Art. 34 of the Treaty on European Union (TEU), was established by the Council Act of 29.5.2000.<sup>11</sup> The objective was to encourage and modernise cooperation between judicial, police and customs authorities by supplementing the provisions and facilitating the application of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, its 1978 Protocol, the CISA and the Benelux Treaty of 1962. On 19.12.2003, Iceland and Norway entered into an agreement with the EU on the application of certain provisions of the MLA Convention and the 2001 Protocol, thereto. The convention includes two arrangements relevant in this context: the setting up of joint investigation teams (JITs) and the possibility to perform covert operations on foreign territory.<sup>12</sup>

The Prüm Convention on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (PC) was originally signed by Belgium, Germany, Spain, France, Luxembourg, Netherlands and Austria on 7.7.2005. The core elements of the Prüm Convention were incorporated into the legal framework of the European Union through Council

<sup>8</sup> Following the signing of the Treaty of Amsterdam, the Schengen cooperation was incorporated on 1.5.1999 into the legal and institutional framework of the EU (see Council decisions 1999/435/EC and 1999/436/EC). According to the protocol of the Treaty of Amsterdam, Ireland and the UK can take part in some or all of the Schengen arrangements provided that the Schengen states and the government representative of the country in question vote unanimously in favour within the Council. Later, Ireland and the UK asked to take part in the Schengen-cooperation relating to police and judicial cooperation in criminal matters, the fight against drugs and the SIS (see Council decision 2000/365/EC where the relevant provisions are listed). The Council later approved (2004/926/EC) that the UK could implement this part of the *acquis*.

<sup>9</sup> See Council Decision of 1.12.2000 on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway (2000/777/EC). As a consequence of the Danish legal reservation, Denmark cannot participate in the European police cooperation. See *Ib Henriksen*, International politiet, (København 2010), p. 29–30.

<sup>10</sup> In Art. 41(10) CISA, it is pointed out that the contracting states may extend the scope of paragraph 1 and adopt additional provisions in implementation of this Article through bilateral agreements. Apart from CISA, many bi- and trilateral agreements on hot pursuit, for instance, exist between the European states. Concrete examples are the Benelux Treaty of 2004 as well as the agreements between Germany and Switzerland (Art. 16 Vertrag zwischen der Schweizerischen Eidgenossenschaft und der Bundesrepublik Deutschland über die grenzüberschreitende polizeiliche und justizielle Zusammenarbeit von 1999) and between Switzerland, Austria and Lichtenstein (Art. 16. Vertrag zwischen der Republik Österreich, der Schweizerischen Eidgenossenschaft und dem Fürstentum Lichtenstein über die grenzüberschreitende Zusammenarbeit der Sicherheits- und Zollbehörden von 1999).

<sup>11</sup> The convention was preceded by Council framework decision 2002/465/JHA (13.6.2002) on joint investigations teams.

<sup>12</sup> It should be noted that provisions on cross-border observation (Art. 17), covert investigations (Art. 19) and joint-investigation teams (Art. 20) are also found in the Council of Europe Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters Strasbourg (8.11.2001). However, the Council of Europe treaties form a separate legal regime from the ones discussed in this context and are therefore not *per se* relevant in this context. In relation to states that have ratified both the relevant EU-instruments and Council of Europe, the second additional protocol (2001) questions might still arise as to the relationship between the two with regard to issues of application. Finland and Sweden have not ratified the additional protocol as of 13.2.2012. Norway is, at the time of writing, preparing to implement the provisions of the protocol alongside the MLA Convention, see section 7.2. below.

decision 2008/615/JHA of 23.6. 2008, under the so-called Prüm Decision (PD).<sup>13</sup> The police cooperation facilitated by the Prüm-framework is far reaching and was adopted in order to enable the signatories to exchange data regarding DNA, fingerprint and vehicle registration data of persons concerned as well as to co-operate in the fight against terrorism.<sup>14</sup> It also contains provisions for the deployment of armed sky marshals on flights between signatory states, joint police patrols, as well as cooperation in the case of mass events or disasters. Norway is included in the Prüm-framework applies to Norway.<sup>15</sup> The treaty includes two arrangements relevant in this context: joint operations and cross-border interventions.

Europol (European Police Office) also represents a relevant party in European police cooperation. Europol was originally founded by the Maastricht treaty (Treaty on the European Union) Art. K.1(9). Today, provisions on Europol are found in the Treaty on the Functioning of the European Union (TFEU) Art. 88 (ex Article 30 TEU). A Council decision establishing the Europol was adopted on 9.4. 2009 (2009/371/JHA), thus replacing the Europol convention of 1995.<sup>16</sup> In this context, Art. 7 of the Decision that concerns the participation of Europol staff in joint investigation teams is of particular interest (see section 6.1 below). Europol in itself does, however, fall outside the scope of this article.

## 2. Nordic instruments

Formalised Nordic police cooperation began in the 1970s and is generally considered to be both useful and function well.<sup>17</sup> The present Agreement on Nordic Police Cooperation (ANPC) was signed on 22.8. 2012 and entered into force on 1. 10. 2012. This agreement replaced the old agreement of 2002 as well as its supplementary section of 2004.<sup>18</sup>

The ambition of the present arrangement is to promote cooperation and to simplify the procedures involved in accordance with the requirements set by international law, EU law and national legislation. The ANPC supplements international and bilateral agreements as well as agreements and conventions that include clauses on police cooperation (e.g. the Schengen rules).<sup>19</sup> It covers different areas of police

<sup>13</sup> The *Prüm* decision was implemented through Council decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

<sup>14</sup> On the *Prüm*-treaties, see *Sieber et al.* 2011, p. 659–663.

<sup>15</sup> On 30.11. 2009 agreements were signed between the European Union and Iceland and Norway on the application of certain provisions of council decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. See also Council decision 2010/482/EU on the conclusion of these agreements.

<sup>16</sup> On the history and legal basis of Europol, see e.g. *Alexandra de Moor/Gert Vermeulen*, "The Europol Council Decision: Transforming Europol into an Agency of the European Union", *Common Market Law Review* (2010), 1089–1097. See also *Alexandra de Moor v. Gert Vermeulen*, "Europol Council Decision: A New Legal Basis for Europol", *New Journal of European Criminal Law* (2010), 178–198.

<sup>17</sup> Cooperation is further facilitated by the fact that the Nordic countries hold a similar conception of what the police's tasks in the society are and how they are to be performed. On Nordic police cooperation generally, see *Henricsson* 2010, p. 20–23, *Ragnar Auglend et al.*, *Politirett* (Gyldendal akademisk 2004), p. 1039–1041.

<sup>18</sup> The agreement of 2002 replaced the original agreement of 1972.

cooperation, including requests of interrogation in other Nordic countries (chapt. 3), requests regarding police records etc. (chapt. 4), issuance of arrest warrants orders in another Nordic country (chapter 5), extradition (chapter 6), exchange of information (chapter 7), joint investigation teams (chapter 8), loans of material (chapter 9), transitions (chapter 10), DVI (Disaster Victim Identification) cooperation (chapter 11) and coordination of cooperation in a third country (chapter 12). Only the provisions on the use of police powers on the territory of another Nordic state will be discussed here. The agreement includes one such form of cooperation: joint investigation teams.

A trilateral agreement, which entered into force 1.1. 2003, also exists between Finland, Norway and Sweden on the application of CISA Art. 40–41. The agreement does not provide for additional forms of cooperation.

### III. Cross-border Surveillance

Cross-border surveillance refers to the right for foreign police officers, as part of a criminal investigation, to keep a person under surveillance (observation), visually or by various technical means, on the territory of another state.

#### 1. EU instruments

The provisions on cross-border surveillance are found in Art. 40 CISA.<sup>20</sup> The article distinguishes between pre-planned surveillance (after authorisation of state B) in Art. 40(1) and urgent surveillance (without prior authorisation of state B) in Art. 40(2).

According to Art. 40(1), police officers of one of the contracting states who are keeping a person under surveillance in their country, as part of a criminal investigation into an extraditable criminal offence, may in certain situations continue surveillance on the territory of another contracting state. The article does not seem to include situations where a person has escaped from custody or while serving a sentence involving deprivation of liberty (compare part 5.1 below). Surveillance may be directed against either 1) a person suspected of involvement in such an offence, or 2) some other person (not being a suspect) provided that it is a necessary part of a criminal investigation and there are serious reasons to believe that he can assist in identifying or tracing the suspect.<sup>21</sup> The latter situation concerns, for example, family members or friends of the suspect.

The main rule is that the host state consents to cross-border surveillance in response to a request for assistance made in advance in accordance with Art. 40(1)

<sup>19</sup> See chapt. 1, sect. 1 ANPC.

<sup>20</sup> The original article was amended and broadened by Council Decision 2003/725/JHA (2.10. 2003). Almost identical provisions to the amended Art. 40 CISA are found in the Council of Europe Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (20. 4. 1959), 8.XI.2001, Art. 17. That said, the measure is termed 'cross-border observation'. See also the explanatory report to the protocol.

<sup>21</sup> Art. 40(1) CISA.

CISA. However, this is not without exceptions and provisions on so-called urgent surveillance are found in Art. 40(2) CISA. Police officers are, in certain situations, authorised to continue surveillance without prior consent if that due to particularly urgent reasons cannot be requested. This could be the case, for instance, if the authorities learn of the offence for which cross-border surveillance is required at such a late stage that the request for assistance could not be granted even if it was transmitted to the central authority immediately.<sup>22</sup> These situations only concern the suspect and Art. 41(2) is not applied in relation to family members of the suspect.

A requirement for urgent surveillance is that the subject is assumed to have committed one or more criminal offences listed in Art. 40(7). The offences can be grouped as follows:<sup>23</sup>

a) Crimes against personal integrity: murder, manslaughter, serious offence of a sexual nature, kidnapping and hostage taking, trafficking in human beings

b) Crimes against property: aggravated burglary, robbery, receiving stolen goods

c) Crimes involving public danger: arson,<sup>24</sup> extortion, illicit trafficking in narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, wilful damage through the use of explosives, illicit transportation of toxic and hazardous waste, counterfeiting and forgery of means of payment, serious fraud, smuggling of aliens, money laundering, illicit trafficking in nuclear and radioactive substances, and participation in a criminal organisation as referred to in Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, terrorist offences as referred to in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.<sup>25</sup>

In order for the police to observe an individual on the territory of another state certain additional conditions, which apply to both pre-planned and urgent surveillance, must be fulfilled.<sup>26</sup> These can be divided into *formal* (procedural issues) and *material* (the extent of powers) criteria.

The formal requirements include the following. Only officers from the designated authorities may exercise the power of pursuit. The host-state must be notified immediately after the border has been crossed if its territory is entered upon without prior consent of the competent authorities. A request for assistance, which outlines the grounds for crossing the border without prior authorisation, must be submitted immediately. Surveillance must cease as soon as the host state so requests. If

<sup>22</sup> Manual on cross-border operations 2. 12. 2009 (10505/3/09, rev 3), p. 14.

<sup>23</sup> Compare this with the somewhat narrower list in the Second Additional Protocol, Art. 17: assassination, murder, rape, arson, counterfeiting, armed robbery and receiving of stolen goods, extortion, kidnapping and hostage taking, traffic in human beings, illicit traffic in narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, use of explosives, illicit carriage of toxic and dangerous waste, smuggling of aliens, sexual abuse of children.

<sup>24</sup> Arson may also include a threat against personal integrity.

<sup>25</sup> The last five offences were not originally part of the article, but were included by council decision 2003/725/JHA.

<sup>26</sup> See Art. 40(3a-h) CISA.

authorisation has not been obtained within five hours after the border was crossed and such authorisation has been applied for, the surveillance operation must be abandoned. Officers carrying out cross-border surveillance must comply with the law of the host-state and the provisions of Art. 40 CISA, as well as obey instructions of the competent local authorities. The foreign police officers must also carry documents during the operation that certifies that authorisation of the host state has been granted. The only exception concerns the situations mentioned above where no prior consent has been awarded. Finally, the police officers must at all times be able to prove that they are acting in an official capacity.

As to material requirements, first, entry into private homes and places not accessible to the public is prohibited.<sup>27</sup> Secondly, officers carrying out surveillance may neither challenge nor arrest the subject during the operation. The foreign police officers may carry service weapons during the operation unless specifically decided otherwise by the host state, but the use of firearms is limited to legitimate self-defence.<sup>28</sup> In most European countries the police carry firearms as standard equipment, but in Norway, for instance, the police are unarmed as a general rule. Thus problems of principle connected with the armament of police may arise in some situations.

In order to facilitate quick communication between the relevant authorities, Art. 44 CISA sets out that the contracting states should install, in particular in border areas, telephone, radio, telex lines and other direct links to facilitate police and customs cooperation (account being taken of local circumstances and technical possibilities). In addition to such short-term measures, exchange of equipment, posting of liaison officers provided with appropriate radio equipment, widening of the frequency bands used in border areas, establishment of common links for police and customs services operating in these same areas or coordination of their programs for the procurement of communications equipment with a view to installing standardised and compatible communications systems should according to Art. 44 (2) CISA be considered. However, it is unclear to what extent this has been carried out.<sup>29</sup>

All operations are to be reported to the authorities of the host state. The authorities of the home state must also, when requested by the authorities of the host state, assist in the enquiry subsequent to the operation in which they took part, including possible judicial proceedings. Pursuant to Art. 43, officers operating in the territory of another contracting state shall be regarded as officers of that state with respect to offences committed against them or by them.

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<sup>27</sup> It is not specifically mentioned in Art. 40(3e) CISA whether the provision comprises both physical and technical surveillance. However, it would seem reasonable that it comprises both.

<sup>28</sup> Art. 40(3 d) CISA.

<sup>29</sup> Maarten Daman, "Cross-border Hot Pursuits in the EU", *European Journal of Crime, Criminal Law and Criminal Justice* (2008), 183–184 points out the difficulties that still apparently exist regarding communications between different states in this regard and holds that "direct radio communication with neighbouring countries is still impossible".



Pursuant to Art. 42, officers operating in the territory of another contracting state shall be regarded as officers of that state with respect to offences committed against them or by them.

## 2. Implementation of Art. 40 CISA in Finland, Norway and Sweden

*Finland.* The implementative rules of Art. 40 CISA are found in sect. 30 a of the Finnish Police Act (493/1995).<sup>30</sup> A competent public official (police, customs and coast guard officers) may continue observing a person on Finnish territory with the purpose of investigating a crime, provided that surveillance has begun on the public official's home territory and the person has committed or participated in a criminal offence that can result in extradition.<sup>31</sup> The foreign police officer has the right to make a citizen's arrest on Finnish territory.

A person may, pursuant to the Act on Extradition to Other Member States of the European Union sect. 2, be extradited from Finland if the act he has committed constitutes a criminal offence in both states and may result in at least one year's imprisonment according to the law of the requesting state.<sup>32</sup> Extradition can be done without control of double criminality if the criminal offence results in a minimum of three years' imprisonment and is represented in the list of 32 criminal offences in sect. 3(2) of the Act. To other Nordic countries extradition can be carried out (without control of double criminality) if the offence can result in imprisonment.<sup>33</sup>

The rules on extradition to other Nordic states are similar in Denmark, Finland, Iceland, Norway and Sweden. The present legislation is prepared in close cooperation and the wording and content of the rules are therefore similar. The new rules on extradition between the Nordic states are based on a Convention on Extradition Due to Criminal Offences between the Nordic Countries (Nordic Arrest Warrant; NAW) that the Nordic countries signed 15. 12. 2005.<sup>34</sup> The Convention enters into

<sup>30</sup> As a curiosity the provision refers to art. 41 CISA (which deals with hot pursuit) rather than art. 40. The original preparatory works (RP 20/2001 rd, p. 3) clearly mentions art. 40 CISA, but when the section was later revised the reference to CISA was also erroneously changed to art. 41 CISA (see RP 266/2004 rd, p. 27). See also below footnote 59. In the new Finnish Police Act (872/2011, which enters into force 1.1. 2014, the rules are found in chapt. 5 sect. 27. The material content is identical and the reference to CISA is corrected.

<sup>31</sup> The Act is silent as to whether only the suspect or other persons as well may be put under surveillance (it only refers to the "purpose of investigating a crime"). The reason for this is probably that the statute has not been revised after the revision of art. 40 CISA in 2003. The wording of the statute would indeed allow for an interpretation in conformity with art. 40 CISA in this regard so that other individuals may also be put under surveillance if it is a necessary part of a criminal investigation and serious reasons to believe that he can assist in identifying or tracing such a person exists. However, it is doubtful whether such an extensive interpretation stands in conformity with the principle of legality that prevails in Finnish police law. Consequently the provision in its present form could only be applied to suspects.

<sup>32</sup> Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen (1286/2003). The Act constitutes the implementative legislation for the framework decision on a European Arrest Warrant (2002/584/JHA of 13. 6. 2002), see RP 88/2003 rd, p. 4.

<sup>33</sup> Sect. 2 in the Act on Extradition between Finland and the Other Nordic Countries (Lag om utlämning för brott mellan Finland och de övriga nordiska länderna 1383/2007).

<sup>34</sup> On the Nordic Arrest Warrant, see *Annika Suominen*, The principle of mutual recognition in cooperation in criminal matters: a study of the principle in four framework decisions and in the implementation legislation in the Nordic member states (Cambridge: Intersentia, 2011), p. 81–83 (for a comparison between the cooperation in the



force three months after the ratification of all five of the Nordic countries. Denmark and Finland ratified the Convention in 2007, Norway in 2009 and Sweden in 2011, but Iceland has not yet ratified it. A Nordic Arrest Warrant is defined as a judicial decision issued by a Nordic state that aims at arresting and surrendering a requested person from another Nordic state for the purpose of conducting criminal prosecution or executing a custodial sentence or detention order (NAW art. 1(1)). The NAW also abolishes the requirement of double criminality for all offences.<sup>35</sup>

A prerequisite for cross-border surveillance is that a competent Finnish police, customs or coast guard officer cannot immediately continue the surveillance on Finnish soil. The foreign official may not independently initiate a new surveillance operation by, for instance, installing tracking devices on a suspect's car, and he may only use similar technical equipment to what a Finnish police officer is entitled to, pursuant to the statutes in the Police Act. In Finnish law, surveillance applies to both physical observation and technical observation. The former refers to secret observation of a person in order to gain information, whilst the latter includes the use of technical equipment to perform tapping and recordings of a certain individual (technical tapping), observation and imaging (optical surveillance), as well as tracking of a person's movements (technical tracking).<sup>36</sup>

A foreign official may not, *e contrario* from sect. 30 a of the Police Act, use force on Finnish territory when performing an observation operation. He may carry a firearm, but is only allowed to use it in self-defence.<sup>37</sup> When a foreign official operates on Finnish territory, he is considered equal to a Finnish police officer (Penal Code chapt. 40 sect. 11(4)), which means that he is both bound by the Police Act when exercising police powers, but also protected under the Penal Code.<sup>38</sup>

*Norway.* The rules on cross-border observation are found in sect. 20 a of the Norwegian Police Act.<sup>39</sup> A foreign police officer may on Norwegian territory continue observation of an individual suspected of a crime that can result in extradition. In conformity with CISA Art. 40, the Norwegian rules also allow for a foreign police officer to observe other persons than the suspect when reasonable grounds exist to believe that it will assist in identifying and tracking the suspect. The provision only applies to police officers, not other public officials. This power is only to be exercised until Norwegian police has taken over responsibility for the observation and only within the limits of the Schengen Agreement. The foreign

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EU and between the Nordic countries, see p. 64–66) and *Asbjørn Strandbakken*, "Extradition between the Nordic countries, and the new Nordic Arrest Warrant", in Nico Keijzer –Elies van Sliedregt (ed.), *The European Arrest Warrant in Practice* (The Hague: T. M. C. Asser Press, 2009), 367–375.

<sup>35</sup> See *Suominen* 2011, p. 186.

<sup>36</sup> RP 20/2001 rd, p. 3.

<sup>37</sup> RP 20/2001 rd, p. 4.

<sup>38</sup> See Penal Code chapt. 40 s. 11(4). See also RP 20/2001 rd, p. 2.

<sup>39</sup> A Bill of Law proposes the implementation of the second additional protocol to the 1959 Convention on mutual assistance, including its section on cross-border observation Art. 17. As Norway has already implemented CISA Art. 40, which is somewhat wider in its scope, an amendment was not considered necessary. Implementation of the second protocol was considered most relevant regarding cooperation with Russian police officers. See Prop. 97 LS (2011–2012), p. 53.

official may apprehend the suspect (but not other persons under surveillance) if necessary.

The requirement of an extraditable offence implies, in relation to other Nordic states, that the criminal offence can induce imprisonment.<sup>40</sup> For extradition to other states, it is required that the criminal offence can result in imprisonment for *more than* one year.<sup>41</sup> It is, however, likely that cross-border surveillance will be of most relevance in relation to other Nordic countries.<sup>42</sup>

Foreign police officers may carry their service weapons on Norwegian territory despite Norwegian police being unarmed as a main rule.<sup>43</sup> When foreign police officers operate on Norwegian territory they are bound by Norwegian (police) law and protected by the Penal Code sect. 128.<sup>44</sup> Foreign police officers that operate on Norwegian territory are always bound by Norwegian (police) law and the art. 40 CISA.<sup>45</sup>

*Sweden.* The relevant rules are primarily located in sect. 4 of the International Police Cooperation Act (IPCA),<sup>46</sup> which applies on police cooperation between Sweden and other member states of the EU, as well as Iceland, Norway, Switzerland and Lichtenstein to the extent that Sweden is under an obligation based on international agreements (sect. 1). When an investigation in a contracting Schengen-state is being carried out for a crime which may lead to rendition or extradition, foreign officials (police, customs and coast guard officers) may continue surveillance of a suspect on Swedish territory if a competent Swedish authority consents.<sup>47</sup>

A person may, pursuant to the Swedish Act on Rendition from Sweden on the Basis of the European Arrest Warrant<sup>48</sup> chapt. 2 sect. 2, be extradited for a criminal offence that is criminalized in Swedish law and can result in imprisonment for one

<sup>40</sup> Act on the Extradition of Criminals to Denmark, Finland, Iceland and Sweden (Lov om utlevering av lovbyrtere til Danmark, Finland, Island og Sverige, LOV-1961-03-03-1) sect. 3. As noted above, Norway has not yet implemented the Nordic Arrest Warrant.

<sup>41</sup> Act on Extradition of Criminals (Lov om utlevering av lovbyrtere, LOV-1975-06-13-39) sect. 3(1). Suspicion in this context is interpreted as requiring both 'a reasonable ground for suspicion', i.e. that the suspicion is based on concrete and objective circumstances, and an overbalance of probability. See *Auglend et al.* 2004, p. 568.

<sup>42</sup> When Norway ratified the Schengen agreement it was noted that the wording of sect. 3(2) of the Norwegian Act on Extradition of Criminals differs from that of the European Convention on Extradition of 13.12.1957 (and still differs from the European Arrest Warrant Art. 2), in as far as it requires at least one year's imprisonment in order to allow for extradition. Norway had made a reservation of similar content to the European Extradition Convention Art. 2(1), but declared in the negotiations with the Schengen-countries to be prepared to consider an amendment to this reservation so that *at least* one year's imprisonment would suffice (St.prp. nr. 42 (1996–97), chapt. 5.7.5). Such an amendment was considered not to require the law to be altered and could, pursuant to the Norwegian Act on Extradition of Criminals sect. 3(2), be realised through an agreement with a foreign state. The Schengen Agreement is considered to be such an agreement (*Auglend et al.* 2004, p. 1058). Extradition within the Schengen area (save the Nordic countries) therefore requires a shorter prison term than according to the wording of the statute (imprisonment for at least one year).

<sup>43</sup> Ot.prp. nr. 56 (1998–99), section 8.4.6.

<sup>44</sup> Pursuant to chapt. 12 sect. 128(2) the Norwegian Penal Code, a foreign police officer is considered a public official and thus entitled to the protection established in chapter 12 of the Penal Code. See also *Auglend et al.* 2004, p. 566–567.

<sup>45</sup> Ot.prp. nr. 56 (1998–99), section 8.4.5, *Auglend et al.* 2004, p. 566–567.

<sup>46</sup> Lag (2000:343) om internationellt polisiärt samarbete.

<sup>47</sup> Sect. 4 IPCO.

<sup>48</sup> Lag (2003:1156) om överlämnande från Sverige enligt en europeisk arresteringsorder. See also prop. 2003/04:7, p. 76–78.

year or more according to the requesting state's penal legislation. In relation to the Nordic states, however, there is no control of double criminality and extradition can be effectuated as long as imprisonment is a potential consequence of the offence (i.e. no particular minimum term is prescribed).<sup>49</sup>

Observation may be carried out without preceding consent, but it is required 1) that this is duly reported to a competent Swedish authority as soon as possible when the border has been crossed and 2) that the foreign authority requires assistance regarding the investigation. Surveillance must, according to sect. 4(4) IPCA, cease if a competent Swedish authority so requires and if consent has not been obtained within five hours.<sup>50</sup> In accordance with chap. 11 sect. 1 of the Fire Arms Act (1996:67) foreign police officers may carry fire-arms on Swedish territory. Nothing is said in the Act or the preparatory works about the situations in which foreign police officer could have the right to use fire-arms. In the light of Art. 40(3d) CISA, it is likely that this right only applies to situations of self-defence.

Surveillance is not limited to suspects. However, for persons other than the suspect, i.e. family members, to be put under surveillance, two conditions must be fulfilled: it must be necessary for the on-going investigation in addition to which strong reasons (*starka skäl*) must exist to assume that the measures will assist in identifying or tracing the suspect.

When foreign police officers operate on Swedish territory they are considered equal to Swedish police officers and therefore bound by the Police Act as well as protected by the Swedish Penal Code.<sup>51</sup>

### 3. Nordic instruments on cross-border surveillance

A trilateral agreement between Finland, Norway and Sweden on the conditions for application of Art. 40–41 CISA entered into force on 1. 1. 2003. The agreement contains no additional material conditions and refers primarily to procedural issues.

Requests and contacts relating to urgent cross-border surveillance operations (Art. 40(2) CISA) can, pursuant to Art. 1.3 of the agreement, be directed straight to the local police authorities. The central police (or customs/coast guard) authority must, however, be informed. Officials carrying out operations on the territory of another Nordic state must abide by the national law of that state and by instructions from its competent authorities (Art. 4). The leadership of operations is maintained by the authority that first initiated the operation until the authorities of the host state assume responsibility. The responsibility for necessary supervision by the competent authority of the host state (regarding operations on its territory) begins when a notification referred to in Art. 40(2) CISA is communicated to the authorities of the host state.

<sup>49</sup> Act on Extradition for Crimes to Denmark, Finland, Iceland and Norway (lag (1959:254) om utlämning för brott till Danmark, Finland, Island och Norge). When the NAW (see above) enters into force the Act on rendition from Sweden according to the Nordic Arrest Warrant (Lag (2011:1165) om överlämnande från Sverige enligt en nordisk arresteringsorder) sect. 2, which is identical in substance with the former, will be applied instead.

<sup>50</sup> See prop. 1999/2000:64, p. 80.

<sup>51</sup> Sect. 12 IPCO. See also prop. 1999/2000:64, p. 88.

## IV. Hot Pursuit

Hot pursuit refers to situations in which the police of one state pursue a suspect into the territory of another state in order to facilitate arrest.

### 1. EU instruments

The provisions on hot pursuit are found in Art. 41 CISA. Police officers of one contracting state who are pursuing an individual in their country caught in the act of committing or of participating in a crime are authorised to continue the pursuit on the territory of another contracting state.<sup>52</sup> Hot pursuit may be carried out without prior consent if 1) it is not possible due to the urgency of the situation to notify and advise the competent authorities of the host state prior to entry into its territory, or 2) where the authorities of the host state have been advised but are unable to reach the scene in time to take up the pursuit themselves. Hot pursuit is also permitted when the pursued person has escaped from provisional custody or while he was serving a sentence involving deprivation of liberty. The pursuing officers must consult the authorities of the host state upon crossing the border at the latest and the pursuit must cease as soon as the host state so requests.<sup>53</sup>

Despite the operational importance of land, sea and sky pursuits of criminal suspects, CISA only regulates pursuits over land.<sup>54</sup> Art. 41 CISA is apparently not applicable in relation to individuals other than the suspect.

Art. 41(4) CISA states two options for allowing cross-border hot pursuits: either on the basis of a list of offence categories or of so-called extraditable offences.<sup>55</sup> The list consists of the following offences:<sup>56</sup>

- a) Crimes against the personal integrity: murder, manslaughter, rape, kidnapping and hostage taking, trafficking in human beings
- b) Crimes against property: aggravated burglary, robbery, receiving stolen goods
- c) Crimes involving public danger: arson, extortion, illicit trafficking in narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, wilful damage through the use of explosives, illicit transportation of toxic and hazardous waste, forgery of money, failure to stop and give particulars after an accident which has resulted in death or serious injury.

<sup>52</sup> Art. 41 CISA.

<sup>53</sup> Art. 41(1) CISA.

<sup>54</sup> Art. 41(5 b) CISA. However, as pointed out by Daman 2008, 175, the rules do not necessarily reflect the need of actual police practice, but are an outcome of political negotiations and compromises. It can be noted that such limitations do not apply for cross-border observation (Art. 40 CIS). It may also be noted that the Convention on mutual assistance and cooperation between customs administrations (Naples II) confers a right of hot pursuit to customs officers that is not limited to land borders (Art. 20 Council Act 98/C 24/01 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 (Official Journal C 24 of 23.01. 1998), Art. 19. It may also be pointed out that Norway has not implemented the Naples II-convention). Customs officials, who also fall under CIS, therefore achieve more extensive powers by applying Naples II rather than CISA.

<sup>55</sup> See Daman 2008, p. 181-182, who points out that either choice raises several practical problems.

<sup>56</sup> The list was originally identical to the list regarding cross-border surveillance, save the last point on failure to stop after an accident, which is not included in the former. However, after Council Decision 2003/725/JHA, the latter is now far more comprehensive.

As to the second option, i. e. to relate hot pursuits to extradition, it seems as if the European Arrest Warrant (EAW) is decisive.<sup>57</sup> The EAW is, pursuant to Art. 2, applicable on acts punishable by the law of the issuing state for a maximum of at least 12 months imprisonment (or when a sentence has been passed of at least four months).<sup>58</sup> Verification of double criminality is not necessary for the 32 categories of criminal offences listed under Art. 2(2), including illicit trafficking in human beings, narcotic drugs and psychotropic substances, weapons, sexual exploitation of children and child pornography, terrorism, corruption, computer-related crime, murder, and grievous bodily injury and rape, provided that they are punishable by a custodial sentence or detention order for a maximum period of three years.

The pursuing officers must comply with both the provisions of Art. 41 and the law of the host state, as well as instructions issued by the competent local authorities. Only officers from the designated authorities may carry out hot pursuits.

CISA sets up rather strict criteria as to the actual operations. These may (as in sect. III.1. *supra*) be divided into *formal* and *material* requirements.<sup>59</sup> A formal requirement applies that the pursuing officers must at all times be able to prove that they are acting in an official capacity (they must be easily identifiable). The material prerequisites include prohibition of entry into private homes and places not accessible to the public during the pursuit. The pursuing officers may carry service weapons, but the use of firearms is only allowed in legitimate self-defence. The pursuing officers may subject the apprehended person to a security search and seize objects carried by him. Handcuffs may only be used during transfer.<sup>60</sup> Once the suspect has been apprehended, he is to be handed over to the local authorities of the host state. However, whether the pursuing officers have a right to apprehend the suspect depends on the declaration pursuant to Art. 41(9) CISA made by the host state.<sup>61</sup>

Restrictions on the right to pursue may be applied by each individual state. Some states do, for instance, authorise foreign police officers to stop and question whilst others do not. However, this does not affect the right to make a citizen's arrest in the State on whose territory the pursuit is carried out when an offender is caught in the act.<sup>62</sup> According to Art. 41(2) CISA, hot pursuits can be carried out either in a certain area or during a period as from the crossing of the border. This means that limitations as to distance and time may apply, depending on the declaration of each state. The state may also, however, choose to apply no limitations.<sup>63</sup> The content of the rules are specified in the declaration that each state is to give (Art. 41(9) CISA).

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<sup>57</sup> Daman 2008, p. 181.

<sup>58</sup> On the general principles of EAW, see e. g. Massimo Fichera, *The implementation of the European Arrest Warrant in the European Union: law, policy and practice* (Intersentia 2011), 79–84.

<sup>59</sup> See Art. 41(5a–h) CISA.

<sup>60</sup> Art. 41(5 f) CISA.

<sup>61</sup> See Daman 2008, p. 193–194.

<sup>62</sup> Manual on cross-border operations 2. 12. 2009 (10505/3/09, rev 3), p. 23.

<sup>63</sup> It seems as if Luxembourg as the only state applies a limitation in distance (10 km). This was considered indispensable in the light of its relatively small territory. It seems that no state apply limitations in time. See Daman 2008, p. 186.

Art. 44 CISA also sets out a requirement for the contracting states to facilitate quick communications between the relevant authorities regarding hot pursuits. It is, however, unclear as to what extent this has been carried out (see also above sect. 3.1).

Pursuant to Art. 43, officers operating in the territory of another contracting state shall be regarded as officers of that state with respect to offences committed against them or by them.

## 2. Implementation of Art. 41 CISA in Finland, Norway and Sweden

*Finland.* According to sect. 22 a of the Finnish Police Act, a competent public official (police, customs and frontier guard officers) in a Schengen state is authorised to carry out hot pursuits on Finnish territory if the pursued was caught in the act of committing a crime or attempting escape on the territory of an official's home state.<sup>64</sup> The conditions of the pursuit must be fulfilled either in the state where the suspect is caught or where he attempted an escape.<sup>65</sup> Hot pursuits may only be carried out over land borders. In practise this means that the rules are primarily applicable in relation to Swedish and Norwegian public officials.

The pursued individual may be apprehended and security checked (to the extent prescribed in the Schengen Agreement), but is to be handed over to local authorities without undue delay. The foreign official may also order a vehicle to be stopped if this is necessary for apprehending a suspect. He is only authorised to use force in order to apprehend if the suspect resists apprehension or attempts an escape provided that assistance by a competent Finnish official cannot be given in without undue delay.<sup>66</sup> The force used must not exceed a justifiable level. The foreign official may also resort to self-defence pursuant to the Finnish Penal Code chapt. 4 sect. 4.

In these situations and in conformity with Art. 42 CISA, a foreign public official is considered equal to a Finnish official.<sup>67</sup> Consequently, when a foreign official exercises police powers on Finnish territory, he is bound by the provisions of the Finnish Police Act, but also protected as an official under the provisions in the Penal Code. The foreign official may carry firearms on Finnish territory but may only, in conformity with the Schengen Agreement, use it in self-defence.<sup>68</sup>

<sup>64</sup> The provision is silent as to whether hot pursuit is based on either extraditable offences or the list in Art. 41(4) CISA. It is also silent as to applicability when the pursued person has escaped from provisional custody or while he was serving a sentence involving deprivation of liberty. Curiously enough, the provision refers to Art. 40 CISA (which deals with surveillance) rather than Art. 41. The original preparatory works (RP 20/2001 rd, p. 3) clearly mentioned Art. 41 CISA, but when the section was later revised the reference to CISA was also erroneously changed to Art. 40 CISA (see RP 266/2004 rd, p. 20). In the new Finnish Police Act (872/2011) the rules are found in chap. 2 sect. 22. The content is identical and the reference to CISA is corrected. See also supra footnote 28.

<sup>65</sup> RP 20/2001 rd, p. 2.

<sup>66</sup> "Resistance" refers to a person's physical, active or passive behaviour with the purpose of preventing the performance of a police officer's legal duty. See RP 20/2001 rd, p. 3. Use of force is regulated in sect. 27 of the Police Act (493/1995). In the new Police Act (872/2011) the corresponding provisions are found in 2:17–20.

<sup>67</sup> See Penal Code chapt. 40 s. 11(4). See also RP 20/2001 rd, p. 2.

<sup>68</sup> Sect. 17(11) of the Firearms Act (Skjutvapenlag 1998/1). See RP 20/2001 rd, p. 3.

Finland has given a declaration that Norwegian and Swedish public officials may carry out hot pursuit for suspected crimes and participation in crimes that may lead to extradition and that Finland does not set any limitations as to time or space regarding the pursuit.

*Norway.* A foreign police officer may, according to sect. 20 a of the Norwegian Police Act, carry out hot pursuit on Norwegian territory of a person suspected of a crime that can lead to extradition (see above section 3.2) or when the pursued person has escaped from provisional custody or while he was serving a sentence involving deprivation of liberty.<sup>69</sup> The foreign official may apprehend the suspect if necessary. Due to the fact that hot pursuit can only be carried out over land borders the rules are primarily applicable in relation to Finland and Sweden. Foreign police officers may carry their service weapons on Norwegian territory (albeit the Norwegian police are unarmed as a general rule) but may use them only in self-defence.<sup>70</sup>

The provision also allows for a foreign police officer to pursue persons other than the suspect when reasonable grounds exist to believe that it will assist in identifying and tracking the suspect. To this extent the Norwegian provision is more generous than Art. 41 CISA. The right to hot pursuit can only be exercised until Norwegian police take responsibility for the pursuit and only within the limits of the Schengen Agreement. When foreign police officers operate on Norwegian territory, they are always bound by Norwegian (police) law and protected by the Penal Code sect. 128.<sup>71</sup>

Norway has given a declaration that Finnish and Swedish police officers may carry out hot pursuit of suspected criminals and of those participating in crimes that may lead to extradition and that Norway does not set any limitations as to time or space regarding the pursuit.

*Sweden.* Cross-border hot pursuit by foreign officials (police, customs and coast guard officers) may be carried out on Swedish territory in a situation where a person is caught in the act of committing a crime that can result in rendition or extradition, or if a person who is detained or serving a sentence has escaped.<sup>72</sup> A condition is that a competent Swedish authority consents. Hot pursuit without previous consent may only be carried out if it has not been possible to inform the Swedish authorities in advance or it has not been possible for Swedish officials to take charge of the pursuit. The pursuit must cease if a competent Swedish authority so requires. As cross border hot-pursuit may only be carried out over land borders it can only be practised in relation to Finland, Norway and Denmark.<sup>73</sup>

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<sup>69</sup> Ot.prp. nr. 56 (1998–99), section 8.4.3.

<sup>70</sup> Ot.prp. nr. 56 (1998–99), section 8.4.6 It is pointed out that the foreign police officers, as far as circumstances permit, should carry the fire-arms so that they appear to be unarmed.

<sup>71</sup> Pursuant to chapt. 12 sect. 128(2) the Norwegian Penal Code, a foreign police officer is considered a public official and thus entitled to the protection established in chapter 12 of the Penal Code See also *Auglend et al.* 2004, p. 566–567.

<sup>72</sup> Act on International Police Cooperation sect. 5. On extradition according to Swedish law, see above section 4.2.

<sup>73</sup> Prop. 1999/2000:64, p. 80. It may be pointed out that Sweden applies separate rules regarding the Öresund-connection on the basis of a bilateral agreement with Denmark. Pursuant to sect. 9 of the Swedish Act on International Police Cooperation, Danish police officers have on Swedish territory on the Öresund-connection the



Swedish law allows the pursuing official to apprehend the suspect and, in connection with this, perform a search either for reasons of security or in quest of articles that can either be confiscated pursuant to the Swedish Penal Code or assumed relevant for the investigation of a crime or if it has been taken from another person.<sup>74</sup> Foreign police officers operating on Swedish territory must submit to Swedish law and to instructions given by competent Swedish authorities, but are, pursuant to IPCO sect. 12, considered equal to Swedish police officers and protected by chapt. 17 sect. 1, 2, 4 the Swedish Penal Code.<sup>75</sup> The limitations in Art. 41(3 e) CISA apply.<sup>76</sup> Firearms may be carried on Swedish territory, but only used in self-defence. Handcuffs may be used.

Sweden has given a declaration that Norwegian and Swedish public officials may carry out hot pursuit for suspected crimes and participation in crimes that may lead to extradition and that Sweden does not set any limitations as to time or space regarding the pursuit.

### 3. Nordic instruments

A trilateral agreement between Finland, Norway and Sweden on the conditions for application of Art. 40–41 CISA entered into force on 1. 1. 2003. The agreement contains no additional material conditions and refers primarily to procedural issues. Requests for assistance relating to hot pursuits shall, pursuant to Art. 2.2 of the agreement, be directed to the established point of contact on a district level.

Officials carrying out operations on the territory of another Nordic state must abide with the national law of that state and with instructions from its competent authorities (Art. 4). The leadership of operations referred to in Art. 41(1) CISA is, until the authorities of the host state take on responsibility, maintained by the authority that first initiated the operation. The responsibility for necessary supervision by the competent authority of the host state (regarding operations on its territory) begins from the point when assistance is requested pursuant to Art. 41(1) CISA.

## V. Cross-border Intervention

Cross-border intervention refers to intervention by a police officer on the territory of a neighbouring state with the purpose of averting imminent danger to the physical integrity of individuals.<sup>77</sup>

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same powers as Swedish police officers to intervene against threats to the public order and security. The local Swedish police authority must be notified immediately. The intervention may carry on until a Swedish authority takes over or requires it to be terminated.

<sup>74</sup> *Ibid.*, p. 81, 89.

<sup>75</sup> *Ibid.*, p. 88.

<sup>76</sup> Act on International Police Cooperation sect. 11.

<sup>77</sup> These situations should be distinguished from joint-operations (see below section 8).

## 1. EU instruments

According to Art. 25 Prüm Convention (PC), officers from one contracting state can in urgent situations, without the other state's prior consent, cross the border of another state in order to take the provisional measures necessary to avert imminent danger to the physical integrity of individuals within an area of the other state's territory close to the border. Such urgent actions, which are to be carried out in compliance with the host state's national law and instructions, can arise, for instance, if there is a risk that the danger could materialise in the event of waiting for officials of the host state to take charge of the situation. A police officer crossing the border must notify the host state without delay. The host state must then without delay take the necessary measures to avert the danger and take charge of the operation. The police officers crossing the border can operate in the host state until it takes the necessary protective measures.

It should be noted that the material content of Art. 25 PC was not passed down to the Prüm decision (PD) in its entirety (see part II.1).

## 2. Implementation of Art. 25 PC in Finland, Norway and Sweden

*Finland.* In Finland, the PC is implemented through a separate Act,<sup>78</sup> which entered into force on 17.6. 2007. The rules of the convention are, according to sect. 1, directly enforceable in the way that Finland is committed by them. Pursuant to sect. 4 of the Act, foreign police officers that act in accordance with Art. 25 PC on Finnish territory in order to prevent an imminently dangerous situation possess the same police powers as Finnish police officers do.<sup>79</sup> It is a condition that a pressing need exists to prevent a danger that threatens life or health and that a Finnish police officer cannot take action without due delay.

*Norway.* Norway has not yet implemented the sections of the Prüm treaties relevant here. However, the proposed revision of sect. 20a of the Police Act mentioned above confers a right to a foreign police officer to, *inter alia*, 'carry out public duties' on Norwegian territory to the extent that follows from an agreement with a foreign state. It is possible that this provision will include cross-border interventions.

*Sweden.* Sweden has implemented the PD, not the PC. Therefore Swedish law does not confer the right to cross-border interventions on foreign police officers.

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<sup>78</sup> Lag om sättande i kraft av de bestämmelser som hör till området för lagstiftningen i fördraget mellan Konungariket Belgien, Förbundsrepubliken Tyskland, Konungariket Spanien, Republiken Frankrike, Storhertigdömet Luxemburg, Konungariket Nederländerna och Republiken Österrike om ett fördjupat gränsöverskridande samarbete, särskilt för bekämpning av terrorism, gränsöverskridande brottslighet och olaglig migration samt om tillämpning av detta fördrag (277/2007).

<sup>79</sup> Police powers are regulated in chapt. 2 of both the present Police Act 493/1995 and the new Police Act (872/2011).

### 3. Nordic instruments

There are no Nordic instruments regulating the right for a foreign police officer to intervene in order to avert an imminent danger to physical integrity on the territory of another Nordic state.

## VI. Joint investigation teams (JITs)

Joint investigation teams refer to a team set up by two or more representatives of two or more states either to carry out criminal investigations or other police investigations.

### 1. EU instruments

The setting up of a JIT at EU level is regulated in Art. 13 of the MLA Convention.<sup>80</sup> The competent authorities of two or more member states may, by mutual agreement, set up a JIT for a specific purpose and during a limited period of time to carry out criminal investigations in one or more of the member states setting up the team.<sup>81</sup> The JIT is supposed to facilitate the coordination of two or more criminal investigations in one or more member states and in relation to the investigation of a specific crime.<sup>82</sup> Most of the members are likely to be law enforcement officers, but a JIT can also include prosecutors and judges as well as other persons.

A JIT may be set up for a specific task and for a limited period of time.<sup>83</sup> Art. 13 particularly mentions two such situations: a) when a member state's investigations into criminal offences require difficult and demanding investigations having links with other member states, or b) when 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.<sup>84</sup>

<sup>80</sup> Similar provisions are found in the Council of Europe Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (20.4.1959), 8.XI.2001, Art. 20. See also the explanatory report to the protocol. JITs are often characterised as police cooperation, but can also be viewed as a form of judicial cooperation in criminal matters (see *Els de Busser*, "Judicial Cooperation in Criminal Matters: Mutual Legal Assistance", in *Conny Rijken/Gert Vermeulen*, Joint investigation teams in the European Union. From Theory to Practice, The Hague 2006, 140–141). This probably also applies for covert operations (see below section 8).

<sup>81</sup> Art. 13 MLA Convention. On JITs from various perspectives, see *Conny Rijken/Gert Vermeulen*, Joint investigation teams in the European Union. From Theory to Practice (The Hague 2006). On the specificity of the purpose, see *Ralf Riegel*, "Gemeinsame Ermittlungsgruppen. Herausforderungen und Lösungen", *Eucrim* (3/2009), 101.

<sup>82</sup> See *Anna Jonsson*, "Gemensamma utredningsgrupper i gränsöverskridande brottsutredningar", *Europarättslig tidskrift* (2010), 313. On some of the difficulties connected with the setting up of JITs, see *Stefan de Moor*, "The Difficulties of Joint Investigation Teams and the Possible Role of OLAF", *Eucrim* (3/2009), p. 94–95.

<sup>83</sup> Art. 13(1) MLA Convention. See also generally the Joint Investigation Teams Manual 23.8.2009 (13598/09). For presentation of two JIT initiatives, see *Conny Rijken/Gert Vermeulen*, "The legal and practical implementation of JITs: The bumpy road from EU to Member State level", in *Conny Rijken/Gert Vermeulen* (ed.), Joint investigations Teams in the European Union. From Theory to Practice (TMC Asser Press 2006), 2–10.

<sup>84</sup> *Mayer* points out that a JIT may be set up in three ways. First, a case can be selected after a particular type of crime that requires a transnational investigation has been identified (top-down). Secondly, an on-going national investigation requires support from abroad (bottom up) and, thirdly, a state can be asked by two or more other states that already constitute a JIT to join the team (outside-in). See *Markus Mayer*, "Sociological Aspects Regarding the Set

The first case concerns cases where the criminal investigation is primarily carried out in one state, but cross-border links makes investigations necessary in (a) neighbouring state(s), e.g. due to trafficking in narcotics and human beings, terrorism etc. In the second case the criminal investigation is carried out simultaneously by several member states. A JIT could, for instance, be necessary in a situation where criminal offences committed in several member states can be attributed to a particular criminal alignment that operates transnationally. A possible third situation could be that a member state needs assistance from another state during the investigation, e.g. when a participant of a crime lives in another state than where the main perpetrator is resident.

Art. 13 of the MLA Convention contains detailed operative conditions for JITs. The team leader shall be a representative of the competent authority participating in criminal investigations from the host state.<sup>85</sup> This means, in particular, that the leadership of the JIT will change, for the specific purposes concerned, if investigations are carried out by the team in more than one member state.

The JIT is to carry out its operations in accordance with the law of the host state, i.e. the state in which it operates.<sup>86</sup> It is up to that state to confer powers on the seconded officer through its implementative legislation. One possible implementation of this is that the host state confers the same powers to the seconding officers as those held by the domestic police officers, as long as these do not exceed the powers that the seconded officer has in his home country.<sup>87</sup> It is also possible, however, that the host state restricts the seconding officer's powers. The team members must also take into account the conditions set by their own authorities in the agreement on setting up the JIT. Consequently, certain members of the JIT might have more restricted powers than others.

Seconded members of the JIT have, pursuant to the convention, a right to "be present when investigative measures are taken in the member state of operation".<sup>88</sup> The leader of the JIT may also, depending on the powers of a seconded officer, entrust him with the task of taking certain investigative measures.<sup>89</sup> The right to be present when investigative measures are taken could be seen as a kind of minimum right for the seconding officer (beyond which powers may not be restricted by the host state). The extent, however, of the expression 'investigative measures' is not entirely unequivocal.<sup>90</sup>

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Up and Management of a Joint Investigation Team", in Conny Rijken/Gert Vermeulen, *Joint investigation teams in the European Union. From Theory to Practice* (The Hague 2006), 204–208.

<sup>85</sup> A clear benefit of this is that the leader is well-familiarised with the law of the state (see Riegel 2009, 101). However, various arrangements can be agreed between the participating states. In the French-Spanish JITs on Basque terrorism for instance, France had signed an agreement with Spain that assumed a team leader on both sides of the border. See *Ludo Block*, "Combating Organized Crime in Europe: Practicalities of Police Cooperation", *Policing* (2008), 80.

<sup>86</sup> Art. 13(3 b) MLA Convention.

<sup>87</sup> See *Mayer* 2006, 211–212.

<sup>88</sup> Art. 13(5) MLA Convention.

<sup>89</sup> Art. 13(6) MLA Convention.

<sup>90</sup> It probably includes participation in various surveillance operations, such as the pursuit of suspects, reconnaissance etc., as well as the right to be present on the crime scene when, *inter alia*, securing technical evidence.

The leader of the team may for particular reasons, and in accordance with the law of the host state, decide that the seconding officer may not be present when investigative measures are taken. The expression 'particular reasons' is not defined, but has been considered to include, *inter alia*, situations where evidence is being taken in cases involving sexual crimes, especially where the victims are children.<sup>91</sup> In certain cases, operational reasons may form the basis for such decisions. A decision to exclude a seconded member from being present may not be based on the sole fact that the member is a foreigner.<sup>92</sup>

Europol staff may, according to Art. 6 in the Council decision (6.4. 2009) on Europol, participate in a supporting capacity in JITs that are set up under either the framework decision of 2002, Art. 13 MLA Convention or NAPLES II-Convention Art. 24 and, within the limits provided for by the law of the host state, assist in all activities of the JIT.<sup>93</sup> Even though Europol officers thus may take part in semi-operational activities on the territory of member states, this does not mean that executive police powers have been conferred upon them. It is clearly pointed out in Art. 6(6) of the decision, that Europol staff shall not take part in the taking of any coercive measures. Apart from participating in JITs, it is probable that Europol can also exercise influence at operational level, e. g. by giving directions for joint actions based on the coordination of knowledge, information, methodology and technology from various countries.<sup>94</sup>

## 2. Implementation of Art. 13 MLA Convention in Finland, Norway and Sweden

*Finland.* The Finnish rules are found in the Act on Joint Investigation Teams.<sup>95</sup> Pursuant to sect. 1 of the Act, a competent body in Finland may enter into an agreement with another state on setting up a JIT. A JIT that works in Finland must act in conformity with Finnish law and under the guidance of Finnish authorities (sect. 3), which means that the leader of the JIT is appointed according to sect. 14 of the Finnish Criminal Investigations Act (449/1987).<sup>96</sup> The leadership is thus in the

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Reasonably, it also includes participation of other investigative actions, such as presence during interrogation of suspects and witnesses as well as the familiarisation of evidence. The wording of the provision, however, clearly indicates that it does not confer any independent authority for the seconded member to undertake investigative measures. *Claudia Gräter*, "Joint Investigation Teams", ERA Forum (2007), 235 points out that "seconded or visiting members are considered as *interested observers* without any investigative powers. Their principal task is to liaise with their domestic authorities on investigative measures required in their home countries as a result of the work of the JITs." A seconding officer may therefore probably not, for example, pose independent questions to a suspect, witness etc. during an interrogation directly on the basis of the convention. The article is therefore likely to be construed so that the right to pose questions to a suspect, witness etc. mentioned above requires specific authority by the leader of the group. The conference of such authority must be in accordance with the law of the host state and approved by the competent authorities of both the host state and the seconding state.

<sup>91</sup> Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29.12.200 (2000/C 379/02), p. 18.

<sup>92</sup> *Ibid.* p. 18.

<sup>93</sup> See e. g. *de Moor – Vermeulen* 2010, 1109–1111.

<sup>94</sup> See *Tom Schalken/Maarten Pronk*, "On Joint Investigation Teams, Europol and Supervision of Their joint Actions", *European Journal of Crime, Criminal Law and Criminal Justice* (2002), 75.

<sup>95</sup> Lag om gemensamma utredningsgrupper (1313/2002).

hands of Finnish officials. A member of the team may be present when investigative measures are carried out. He also has a right to participate in the handling of the matter, e. g. by taking part in the documentation and propose measures to be taken, and, if allowed by a competent Finnish authority, present questions to persons interrogated (sect. 4). The provision sets up the outer limits of foreign police officers' powers on Finnish territory. It is, however, possible that these powers are further limited in the specific agreement with the foreign state(s).<sup>97</sup>

A member of the team may, pursuant to sect. 4(2) of the Act, assist in house searches and, in accordance with the directives of the head of the investigation, investigate closed private documents. A foreign official who is a member of the team may with the permission of the leader of the investigation, perform interrogations under his guidance and supervision. A prerequisite is that seconded state consents. The interrogation must be performed in accordance with Finnish law.

*Norway.* The MLA Convention has not yet been implemented in Norwegian law. At the time of writing, a Bill of Law on the ratification of the agreement between the EU and Norway and Iceland on the MLA Convention (19.12. 2003) has recently been approved by the Norwegian Parliament. The existing sect. 20 a of the Police Act has therefore been amended to allow for foreign police officers to participate in JITs on Norwegian territory to the extent that follows from an agreement with a foreign state.<sup>98</sup> The foreign police officer may in this capacity be awarded police powers during the operation.<sup>99</sup> He would be considered a public official in the meaning of the Norwegian Penal Code.<sup>100</sup> The provision is silent as regards leadership of the team and consequently the provision in Art. 13 MLA Convention is likely to apply. The amended act has not yet entered into force.

*Sweden.* The MLA Convention Art. 13 is implemented in Swedish law through the Act on Certain Forms of International Cooperation in Criminal Investigations (on the basis of the framework decision 2002/465/JHA of the Council 13. 6. 2002 and the MLA Convention Art. 13).<sup>101</sup> The Act is only applicable on JITs set up under the framework decision on JITs, the MLA Convention and the Agreement of 19 December, 2003, between the EU, Norway and Iceland.

A JIT may be set up for a specific purpose and for a limited period of time (sect. 2). The Act is silent as to provisions on the leadership of the team (see above). The powers of seconded police officers are not regulated separately. The limits set up in

<sup>96</sup> In the new Criminal Investigations Act (805/2011), which enters into force on 1.1. 2014, the corresponding provision is found in chap. 2 sect. 1.

<sup>97</sup> RP 186/2002 rd, p. 14.

<sup>98</sup> See Prop. 97 LS (2011-2012), p. 49-50. The Bill also includes a proposition to implement the Second Additional Protocol from 2001 to the European Convention on Mutual Assistance in Criminal Matters of 1959 that contains similar provisions on JITs.

<sup>99</sup> *Ibid.* p. 50. It is pointed out in the Bill that such situations are probably rare, but that a foreign police officer might require police authority when the members of a JIT reside in different locations and seconded officers pursue a suspect that unexpectedly enters another state's territory.

<sup>100</sup> *Ibid.* p. 53-54.

<sup>101</sup> Lag (2003:1174) om vissa former av internationellt samarbete i brottsutredningar. On JITs in Swedish law, see *Iain Cameron/Malin Thunberg Schunk/Karin Pålé-Bartes/Christoffer Wong/Petter Asp: International Criminal Law from a Swedish Perspective* (Intersentia 2011), p. 138-143.

the MLA Convention Art. 13 are likely to be applied. However, it is pointed out in the preparatory works that a seconded officer may not perform any tasks that include so-called exercise of public powers (*myndighetsutövning*), i. e. the execution of measures that are an expression of the supremacy of the state, even though he may take part in house searches and scrutinize evidence.<sup>102</sup>

### 3. Nordic instruments

The police authorities of the Nordic countries may establish joint investigation teams with a view on criminal law investigations.<sup>103</sup> The appointment of a Nordic JIT shall be in conformity with Art. 13 of the MLA Convention. This means that the Nordic agreement corresponds with its EU-counterpart.<sup>104</sup> Consequently, the leadership of the group is in the hands of a police officer from the host state and, if the team operates in several Nordic states, circulates accordingly.

## VII. Joint Operations and Cross-border Assistance

Joint operations refer to police operations where the participants of the operation represent two or more states, and where the operation is carried out on the territory of one or more of the participating states. Cross-border assistance refers to different forms of assistance that the member states can provide one another with in connection with e.g. mass gatherings and similar major events, disasters and serious accidents.

### 1. EU instruments

In maintaining public order and security and preventing criminal offences, the contracting states may arrange joint patrols and other joint operations in which officers from another contracting party will participate within the host state's territory.<sup>105</sup> Joint patrols aim at facilitating access to law enforcement by citizens from the different member states concerned, improving general cooperation be-

<sup>102</sup> See prop. 2003/04:4, p. 32–33, Bet. 2001/02:JU15, p. 3.

<sup>103</sup> Chapt. 8 sect. 21 ANPC.

<sup>104</sup> It may be noted that the provision in chapt. 8 of the old ANPC (2002), was more unclear in this regard as it lacked precise conditions of application. The wording indicated that application of chapt. 8 ANPC was less restricted than Art. 13 of the MLA Convention, for instance in the sense that a JIT could be established not only for criminal investigations, but also, should the requirement occur, to perform other police investigations (e.g. lost persons or causes of death).

<sup>105</sup> Art. 17 PD (Council decision 2008/615/JHA). The Manual on cross-border operations, p. 26 mentions the following examples of possible joint operations: joint patrols, assistance to tourists on the street and at police stations, security of tourist sites, common traffic controls, accompanying supporters, personal and document checks, assistance during short period detentions for identification at specific events, use of dogs and dog handlers for security sweeps, accompanying dangerous (such as nuclear) transports, (mutual) support during major events (G8 summit, world football championship), sending material together with operators (e.g. water cannon), setting up on-site Joint Command and Coordination Centres on an *ad-hoc* basis, joint exercises for the kind of operations covered by Art. 17. A particular form of cross-border operation might be carried out for the protection of public figures and the cross-border cooperation based on the Council Decision setting up a European Network for the Protection of Public Figures (2002/956/JHA), as amended by Council Decision 2009/796/JHA of 4 June, 2009.



tween the authorities and officers involved, providing practical and linguistic assistance to the officers of the host state, facilitating communication with the national authorities of the supporting state etc.<sup>106</sup> Joint patrols can either be set up in border areas or in the framework of specific events or periods. Operations can be carried out on land, water and in the air.

When a contracting state acts as a host state it may, in compliance with its own national law and with the seconding state's consent, confer sovereign powers on the other state's officers (involved in the joint operations) or, insofar as the law of the host state permits, allow officers of the seconding member state to exercise their sovereign powers in accordance with the seconding state's law.<sup>107</sup> However, such powers may only be exercised under the guidance and, as a general rule, in the presence of officers from the host state. Police officers from other member states are subject to the law of the host state and to the instructions given by the host state's competent authority. The host state also assumes responsibility for the actions of seconded officers. Officers may also wear their own national uniforms when performing a seconding mission.

Pursuant to Art. 18 PD, the competent authorities of the member states are to provide one another with cross-border assistance in connection with mass gatherings and similar major events, disasters and serious accidents, by seeking to prevent criminal offences and maintain public order and security.<sup>108</sup> This can be done, first, by notifying another member state as promptly as possible of situations with a cross-border impact and by exchanging relevant information. Secondly, this can be done by taking and coordinating the necessary policing measures within their territory in situations with a cross-border impact. Thirdly, a member state can, as far as possible, dispatch officers, specialists and advisers as well as supply equipment at the request of the member state within whose territory the situation has arisen. These measures are to be undertaken in compliance with national law. In the context of cross-border use of police powers, the third alternative is therefore of primary relevance.

It has been recommended that the host state makes provision to allow (in national legislation and/or complementary bilateral agreement) that the seconding states' officers are competent to carry out autonomous police measures.<sup>109</sup> However, in accordance with Art. 17(2) PD "such executive powers may be exercised only under the guidance and, as a rule, in the presence of officers from the host Member State".

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<sup>106</sup> Manual on cross-border operations, p. 29.

<sup>107</sup> Art. 17(2) PD.

<sup>108</sup> A special form of assistance is mentioned in Council decision of 23 June, 2008, on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations (2008/617/JHA). According to Art. 3, a member state may, through a request via the competent authorities, ask to be assisted by a special intervention unit of another member state with a view to dealing with a crisis situation. Subject to agreement between the member states concerned, assistance may consist of providing the requesting member states with equipment and/or expertise and/or carrying out actions on the territory of that member state, using weapons if so required. Seconding officers are to operate under the responsibility, authority and direction of the host state and in accordance with the law of that state, as well as within the limits of their powers under their national law.

<sup>109</sup> The Manual on cross-border operations, p. 26.

Officers from a seconding member state involved in a joint operation within another member state's territory (pursuant to Art. 17 or 18) may carry arms, ammunition and equipment to the extent allowed for under the seconding state's national law.<sup>110</sup> Yet, the host state may prohibit the carrying of particular arms, ammunition or equipment by a seconding state's officers. As a point of departure firearms may be used only in self-defence, but the host state's officer in actual charge of the operation may in individual cases give permission for arms, ammunition and equipment to be used for purposes going beyond such situations.<sup>111</sup> It should probably be required that such actions must be in compliance with the national law of the seconded state. The use of arms, ammunition and equipment are governed by the law of the host state.<sup>112</sup>

## 2. Implementation of Art. 17–19 PD in Finland, Norway and Sweden

*Finland.* In Finland, the Prüm convention was implemented through a separate Act,<sup>113</sup> which entered into force 17.6. 2007. The rules of the convention are, according to sect. 1, directly enforceable in the way that Finland is committed by them. A foreign police officer participating in a joint operation on Finnish territory may, pursuant to Art. 24 PC, exercise police powers to the extent that a Finnish police officer assigns him such powers (sect. 3). He is also authorised to exercise force to the extent that a Finnish police officer assigns him such powers and under the supervision of a Finnish police officer. A foreign police officer may in this situation be permitted to carry firearms or other equipment of force on Finnish territory. A decision as to this is made by a commanding Finnish police officer. Such equipment may only be used in either self-defence or when a Finnish police officer in a specific situation confers power to use that equipment to the seconded police officer.

*Norway.* Norwegian participation in the Prüm-cooperation was agreed with the EU in November, 2009. The framework was considered useful as a tool in the struggle against organised crime and it was an express ambition of Norway to become part of it.<sup>114</sup> The possibility of getting assistance from abroad in connection with bigger arrangements, catastrophes and serious accidents was also considered valuable.<sup>115</sup> The parallel agreement was affirmed by the EU on 26.7. 2011. This

<sup>110</sup> Art. 19(1) PD. For certain implementing statutes regarding joint-operations, see Council decision 2008/616/JHA of 23 June, 2008 (implementing Decision 2008/615/JHA), Art. 17.

<sup>111</sup> Art. 19(2) PD. The member states must submit declarations in which they list the arms, ammunition and equipment that may be used only in legitimate self-defence or in the defence of others.

<sup>112</sup> If police officers from a member state make use of vehicles in action in operations under the PD within another member state's territory they are subject to the same road traffic regulations, e.g. regarding right of way and any special privileges, as officers of the host State.

<sup>113</sup> Lag om sättande i kraft av de bestämmelser som hör till området för lagstiftningen i fördraget mellan Konungariket Belgien, Förbundsrepubliken Tyskland, Konungariket Spanien, Republiken Frankrike, Storhertigdömet Luxemburg, Konungariket Nederländerna och Republiken Österrike om ett fördjupat gränsöverskridande samarbete, särskilt för bekämpning av terrorism, gränsöverskridande brottslighet och olaglig migration samt om tillämpning av detta fördrag (277/2007).

<sup>114</sup> See NOU 2012: 2, p. 710.

<sup>115</sup> Meld. St. 7 (2010–2011), p. 22–23

agreement has so far not been dealt with by the Norwegian parliament (Stortinget) and the Prüm-cooperation is therefore not operative as of yet.<sup>116</sup>

*Sweden.* The relevant parts of the Prüm decision are implemented in sect. 3 in the Decree on International Police Cooperation.<sup>117</sup> Pursuant to this provision, Swedish police, customs and coast guard authorities shall assist a requesting state in maintaining public order and security by, *inter alia*, providing personnel and equipment. The request must (sect. 4) be made by the state on whose territory the situation has arisen. Assistance is only to be given if it lies within the authority's area of responsibility and if it has the necessary resources to do so. The extent to which the assistance is given may not exceed the material limits that are set up by Swedish legislation. Swedish police officers may not be given tasks that include use of public powers when they serve in another state. The Decree is silent as to the powers of foreign police officers possibly operating on Swedish territory.

### 3. Nordic instruments

In April, 2008, a committee was appointed by the Nordic Committee of Senior Officials for Legislative Issues to investigate and survey the need for and possibilities to participate in joint operations with the Nordic police forces.<sup>118</sup> A 'joint operation' means that police officers from two or more Nordic states on the territory of another Nordic state maintain public order and security or uncover or prevent crimes or criminal activities. The committee concluded that several advantages with Nordic joint police operations exist and found it particularly important for the states sharing a geographical border (i.e. Finland, Norway and Sweden).<sup>119</sup> Such joint operations could be used at major sporting events, concerts and fairs.

The committee identified four potential difficulties that might require special consideration: the use of firearms (as well as the right to use force and coercion), aspects of labour law, education and language differences.<sup>120</sup>

At the time of writing, this proposition has not yet been acted upon. It is also uncertain, particularly in the light of similar European developments, whether joint Nordic operations will be put into action at all.<sup>121</sup>

<sup>116</sup> As pointed out above, an amendment to sect. 20 § of the Police Act that allows a foreign police officer to participate in a joint operation on Norwegian territory to the extent that follows from an agreement with a foreign state has been approved by the Norwegian Parliament, but not yet entered into force. The foreign police officer may be awarded police powers and he will be considered a public official in the meaning of the Norwegian Penal Code. Even though the amendment only covers the implementation of the MLA Convention and the second additional protocol to the 1959-convention, it is formulated with regard to the Prüm-framework. The new sect. 20a of the Police Act will therefore possibly also cover joint operations by foreign police officials. See Prop. 97 LK (2011-2012), p. 49-50.

<sup>117</sup> Förordning (2010/705) om internationellt polisiärt samarbete. The statute is silent regarding the powers of a foreign police officer operating on Swedish territory in a situation such as this.

<sup>118</sup> Samtjänstgöring mellan nordisk polispersonal. Rapport från den nordiska arbetsgruppen tillsatt av Nordiska ämbetsmannakommittén för lagstiftningsamarbete. Publikationsserie för polisens högsta ledning 4/2009, p. 4.

<sup>119</sup> *Ibid.* p. 8.

<sup>120</sup> *Ibid.* p. 16-18.

<sup>121</sup> Joint operations are not mentioned in the new Agreement on Nordic police cooperation.

## VIII. Covert Operations

Covert operations refer to the assistance by one state to enable an undercover agent to operate in the requested member state or, alternatively, for the requested member state to be able to send an agent to the requesting member state.

### 1. EU instruments

The provisions on covert operations are found in Art. 14 MLA Convention.<sup>122</sup> The member states may agree to assist one another when conducting criminal investigations by officers acting under covert or false identity (undercover agents).<sup>123</sup> No definition of what is meant by a covert operation is included. It probably involves at least infiltration, i.e. the use of false documents or a false identity in order to acquire the trust needed for obtaining information or preventing the operation from being disclosed. Whether provocation of evidence (i.e. the purchase of an object, substance, property or service by the police in order to prevent crimes with the purpose of gaining possession of such an item that is connected with the crime to be prevented), and provocation of crime (the participation of the police in criminal activity) is allowed must be determined according to the legislation of the host state.<sup>124</sup> It could seem reasonable to also include provocation of evidence in Art. 14 of the MLA Convention. Provocation of crime and, on the other hand, hardly be approved of.

Assistance can be requested to enable an undercover agent to operate in the requested member state or, alternatively, for the member state to be able to send an agent to the requesting member state. No mention is made as to the specific situations when covert operations are utilised. However, they are probably used primarily in relation more serious crimes such as serious organised crime regarding narcotics, abductions, serious types of forgery and weapons theft.

Covert operations are to be carried out in accordance with the law and procedures of the host states. When agreeing upon a covert operation the number of member states, the duration of the covert investigation, the detailed conditions as well as the legal status of the officers concerned must be specified with due regard to national law.

Any member state may declare, when giving notice regarding the constitutional procedures for the adoption of the convention, that it is not bound by the provisions

<sup>122</sup> Almost identical provisions are found in the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (20. 4. 1959), 8.XI.2001, Art. 19 (Council of Europe). See also the explanatory report to the protocol. Finland, Norway and Sweden have not ratified the additional protocol as of 13. 2. 2012.

<sup>123</sup> Art. 14(1) MLA Convention. Covert investigations into a criminal offence may take different forms, so it needs to be pointed out that this article is only concerned with investigations by officers acting under covert or false identity.

<sup>124</sup> Provocation of crime is problematic in relation to the requirement of a fair trial in Art. 6(1) of the European Convention on Human Rights. In *Teixeira de Castro v. Portugal*, appl. 44/1997/828/1034, 9. 6. 1998 the police officers had provoked and instigated the criminal offence and there was “nothing to suggest that without their intervention it would have been committed”. Thus the police officers’ actions went beyond those of undercover agents, whereby the applicant was deprived of a fair trial.

on covert operations. To this extent, Art. 14 MLA Convention diverges from Art. 13. Such a declaration may be withdrawn at any time.

## 2. Implementation of Art. 14 of the MLA Convention in Finland, Norway and Sweden

*Finland.* In Finnish law, Art. 14 is implemented in the Act on the Implementation of the Provisions in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.<sup>125</sup> A competent official from another contracting state can be given the right to perform covert operations on Finnish territory in order to investigate crime. Such covert operations include both infiltration and provocation of evidence (sect. 4).<sup>126</sup> Infiltration refers in this context to the use of false documents or a false identity in order to acquire trust needed for obtaining information or to prevent an operation from being disclosed. Provocation, on the other hand, refers to the purchase of an object, substance, property or service by the police in order to prevent crimes with the purpose of gaining possession of such items connected with the crime to be prevented. Provocation of crime is not allowed according to Finnish law. The foreign official may, when operating on Finnish territory, be given the right to carry firearms if this is necessary due to the character of the operation (sect. 4(2)). This is decided by a commanding Finnish police officer. Firearms may only be used in self-defence.

*Norway.* The MLA Convention has not yet been implemented in Norwegian law. As noted above, Norway has concluded an agreement with the EU on applying the Convention.<sup>127</sup> The revised sect. 20a of the Norwegian Police Act allows for foreign police officers to participate in covert operations on Norwegian territory to the extent that follows from an agreement with a foreign state.<sup>128</sup> Covert operations refer to reconnaissance and infiltration.<sup>129</sup> The foreign police officer may be awarded police powers and he will be considered a public official in the meaning of the Norwegian Penal Code.<sup>130</sup> Such assistance shall only be possible if separately agreed with the foreign state and will be carried out in accordance with national legislation.

<sup>125</sup> Lag om sättande i kraft av de bestämmelser som hör till området för lagstiftningen i konventionen om "ömsesidig" rättslig hjälp i brottmål mellan Europeiska unionens medlemsstater och tillämpning av konventionen (148/2004).

<sup>126</sup> RP 31/2003, p. 55. Infiltration and provocation of evidence are regulated in Tvångsmedelslagen 6:7 (450/1987) and Polislagen sect. 28, 31a(1) 31b(1) and 32 a (493/1995).

<sup>127</sup> Council Decision of 17 December, 2003, on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May, 2000, on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto (2004/79/EC). Norway also intends to implement the Second Additional Protocol from 2001 to the European Convention on Mutual Assistance in Criminal Matters of 1959 that contains similar provisions on covert operations. See Prop. 97 LS (2011–2012), p. 51.

<sup>128</sup> Covert operations are covered by the proposed amendment "otherwise perform duties in Norway to an extent that follows of an agreement with a foreign state".

<sup>129</sup> *Ibid.* p. 51.

<sup>130</sup> *Ibid.* p. 53–54.

*Sweden.* The implementative legislation relating to Art. 14 MLA Convention is found in sect. 15 in the Act on Certain Forms of International Cooperation in Criminal Investigations.<sup>131</sup> Pursuant to this provision, assistance may be given in a covert operation if a criminal investigation is being carried out in Sweden regarding the type of criminality that the covert operation concerns. Swedish police officers may also participate in foreign operations.<sup>132</sup> The actions taken in Sweden or in a Swedish investigation must be in conformity with Swedish law. Authority to enter into an agreement with another state is limited to prosecutors and the police.<sup>133</sup>

No definition of covert operations is included in the provision. However, its formulation clearly refers to the use of a false identity (*användning av skyddsidentitet*), i.e. infiltration. In the preparatory works it is indicated that both infiltration and provocation of evidence are included.<sup>134</sup> Such actions (performed during a criminal investigation) are considered to stand in conformity with Swedish law as long as it is used for the purpose of obtaining information and not provoking crimes.<sup>135</sup> Provocation of crime, on the other hand, is normally unlawful in Swedish law (albeit it might sometimes be difficult to draw a line against, for instance, lawful provocation of evidence).<sup>136</sup>

### 3. Nordic instruments

There are no Nordic legal instruments concerning the use of undercover agents on the territory of another Nordic state.

## IX. Concluding Observations

### 1. A few remarks as to the ambitions on cross-border use of police powers within the EU

It is clear that the present arrangements regarding European police cooperation provide many (operative) benefits with regard to transnational criminality in Europe. The cooperative possibilities will be valuable as a measure to prevent criminality, to maintain law and order and to facilitate proceedings against criminal offenders within the European area.

They will, on the other hand, also give rise to challenges. One important general issue concerns legitimacy. The use of police powers and particularly use of force

<sup>131</sup> Lag (2003:1174) om vissa former av internationellt samarbete i brottsutredningar. On covert operations in Swedish law, see also *Cameron/Thunberg Schunke/Påle-Bartes/Wong/Asp* 2011, p. 145–146.

<sup>132</sup> Prop. 2004/05:144, p. 148.

<sup>133</sup> Prop. 2004/05:144, p. 151.

<sup>134</sup> Prop. 2004/05:144, p. 82–83.

<sup>135</sup> *Peter Fitger*, Rättegångsbalken, section 23:4, internet edition 02/2012. Regarding false identities for the Swedish police, see lag (2006:939) om kvalificerade skyddsidentiteter.

<sup>136</sup> It might be pointed out that even though provocation of crimes is unlawful according to the public law rules of the Police Act, it might be that the provocateur will be relieved of criminal responsibility due to lack of *mens rea* (intent). See *Petter Asp*, Straffansvar vid brottsprovokation (Norstedts juridik; 2001), p. 294–295. Provocation may also result in limitations of prosecution, particularly where the suspect's right to a fair trial has been undermined. See e.g. NJA 2007 p. 1037. See also *Fitger*, section 23:4.

may normally only be employed by officials of the host state and to allow foreign officials to use force may therefore be a sensitive issue.<sup>137</sup> Other challenges relate to, *inter alia*, regulatory issues, police tactics and communications.

First of all, the legal framework is, as with much EU legislation, of a complex character. The number of provisions in different instruments combined with implementative legislation in the member states (that varies in content) clearly affects the accessibility of the legal framework.<sup>138</sup> The complexity at EU level easily spills over and results in complexity on a national level as well, which in turn can affect applicability.

Secondly, even though the tasks of the police in the EU countries are fundamentally the same, i. e. to uphold public order and security and to investigate crimes, the role of the police force in society has varied historically.<sup>139</sup> Different states nourish different police cultures (particularly with regard to the use of force and coercion) and apply different operational strategies, tactics and educational approaches.<sup>140</sup>

Tensions could arise for instance in a situation where a police officer from state A is to serve in a joint patrol in state B, where the police culture sets up a much higher threshold for using force, and particularly firearms. In some states, e. g. Norway, the police are unarmed.<sup>141</sup> Problems of principle and legitimacy might thus be connected with having foreign armed police officers performing public duties on Norwegian territory. Differences in strategic thinking and tactics may cause similar difficulties, for instance, if the police in state A confess to a strategy of passivity and dialogue in relation to unlawful demonstrations, whilst state B applies a more offensive and repressive strategy in such scenarios.

Thirdly, issues regarding education must be taken seriously in the kind of cooperation discussed here. It is crucial for a well-functioning police cooperation that involves cross-border use of police powers, as well as from the point of view of legitimacy, that the participating police officers possess sufficient knowledge on the laws and practises of the host state before the joint operation begins.<sup>142</sup>

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<sup>137</sup> There are many reasons for this, *inter alia*, democratic considerations as well as cultural and institutional aspects.

<sup>138</sup> The European Council instruments touched upon in footnote 11 *supra*, that to some extent contains similar rules as the EU-instruments, can also be mentioned here. It could, for instance, be asked if the difference between the six measures discussed in this article really is so great that they must be regulated in three different treaties. Could it not, for instance, be viable to gather the provisions in one single instrument?

<sup>139</sup> See Juha T. Kääriäinen, "Trust in the Police in 16 European Countries. A Multilevel Analysis", *European Journal of Criminology* (2007). 410. See also generally Bill Tipman/Alison Tipman, *Policing in Europe. Uniform in Diversity* (Exeter: Intellect Books 1999).

<sup>140</sup> This issue also relates to the question of legitimacy. Generally, good and confidential relationships with the public are of great importance for the efficiency of policing. In countries where the police have a high degree of legitimacy, the threshold for using force etc. might therefore be generally lower compared to countries where the legitimacy is lower.

<sup>141</sup> This issue was also addressed by the Nordic Committee, see Samtjänstgöring mellan nordisk polispersonal 2009, p. 16.

<sup>142</sup> The necessity of educative measures in relation to joint operations was also stressed by the Nordic committee. (See Samtjänstgöring mellan nordisk polispersonal 2009, p. 17). *Rijken/Vermuelen* 2006, 9 mentions a Dutch-English JIT where the participants had a week of preparatory training including information on each other's legal systems and legal cultures. This indicates a serious approach to educational issues. In connection with this, the ambitions of the European Police College (CEPOL) must be mentioned.



Fourthly, language differences can mount difficulties.<sup>143</sup> It is not a given fact that European police officers from all the contracting states can communicate with one another without language related problems. Language issues may also cause communicational difficulties in the relationship between citizens and the foreign police officers.

Fifthly, aspects of labour law can cause uncertainty in a joint operation.<sup>144</sup> One such point relates to the responsibility between the police authority in the home state (as an employer) and the police authority in host state (as the commanding authority). A plausible model in an EU setting could be based on *primary* and *secondary* responsibilities.<sup>145</sup> This would mean that the primary responsibility, i. e. how the operation is carried out, would lie with the authority in the host state. The secondary responsibility, on the other hand, relates to issues of education, provision of equipment and possible disciplinary sanctions, and would be maintained by the employing police authority.

It is not clear to what extent issues of this kind have been considered in the legal process surrounding police cooperation and cross-border use of powers in Europe. However, it seems vital that *inter alia* the issues mentioned here are addressed in a proper manner before cooperative operations on a broader scale are carried out.

## 2. Observations on the Nordic implementation of the EU-instruments

A few words should be said about the implementative legislation in Finnish, Norwegian and Swedish law. On a general level, the implementations are quite similar, but differences exist. Some of these may be mentioned here.

In Finland and Sweden, cross-border surveillance and hot pursuit may be carried out by foreign *public officials*, i. e. police, customs and coast guard officers. In Norway, on the other hand, only foreign *police officers* are authorised to employ hot pursuit and cross-border surveillance. As a consequence, cooperation of this type does not apply to coast guard and customs officers (see sect. 10 below).

In Finnish law, it is particularly mentioned with regards to hot pursuit that foreign officials may stop vehicles in order to apprehend a suspect. This is not mentioned in Norwegian or Swedish legislation and the position is therefore unclear. In the Swedish *travaux préparatoires* (to the implementation of Art. 41 CISA), it is pointed out that hot pursuit can include the use of public powers (*myndighetsutövning*).<sup>146</sup> To order a vehicle to stop clearly represents exercise of such powers. One possibility would therefore be that authority to stop vehicles is included in the general power to apprehend the person.<sup>147</sup> However, considering that the principle of legality in Swedish law requires a clear and precise legal basis for police powers, it is question-

<sup>143</sup> See Mayer 2006, 213–216. This issue also has bearing on the question of legitimacy.

<sup>144</sup> See also Mayer 2006, p. 211, who points out that labour law aspects such as working hours and compensation for overtime must be agreed upon.

<sup>145</sup> On this distinction, see Samtjänstgöring mellan nordisk polispersonal 2009, p. 16–17.

<sup>146</sup> In the Swedish preparatory works to the provisions on JITs it is, on the contrary, pointed out that a seconded officer may not perform tasks that include exercise of public powers. See prop. 2003/04:4, p. 32–33, bet. 2001/02: JUU15, p. 3.

able if a hazardous act such as stopping a moving vehicle can be deduced on such vague grounds.<sup>147</sup> Thus, it is arguable that foreign police officers may not order a vehicle to stop during a hot pursuit on Swedish territory. If so, apprehension can only take place after the pursued individual has come to a stop. Regarding the Norwegian position it could also, in line with the above, be argued that foreign police officers do not have the authority to stop a pursued vehicle on Norwegian territory.<sup>149</sup>

The Finnish implementation of Art. 40 CISA in sect. 30 of the Police Act is silent as to whether it applies to individuals other than the suspect (it only refers to the “purpose of investigating a crime”). Even though it could be possible to interpret the wording of provision in conformity with Art. 40 CISA, it is still doubtful whether an extensive interpretation of this kind would conform to the principle of legality as applied in Finnish law.

Due to the implementation of the PC rather than the PD, cross-border interventions are allowed in Finnish law. This is not the case in Sweden, whilst the Prüm framework has not yet been implemented in Norway. The practical consequence of this authority in Finnish law is somewhat unclear.

The Prüm provisions on joint operations and mutual assistance are implemented in Finland and Sweden but not yet in Norway. A difference in perspective between the Finnish and Swedish implementations is also worth pointing out. Whilst the former is primarily concerned with what powers a foreign official possesses on Finnish territory, the latter is mainly concerned with limitations to the powers of Swedish police officers when serving in a foreign state. Nothing is, noticeably, said about what powers a foreign police official has on Swedish territory. This could be a consequence of an attitude that Sweden will not make use of foreign assistance on Swedish territory under the Prüm decision.

Even though the differences in implementations are minor, they are not necessarily without practical consequences. Why the Nordic countries have not coordinated their implementations to a greater extent is not clear, and is somewhat unfortunate. Good reasons exist for the Nordic countries to coordinate their implementative actions in this field.

## **X. Postlude: The Future of Nordic Police Cooperation in the Light of EU Developments**

Bearing in mind the wide ambit of police cooperation in the EU, a final point of interest, particularly in a Nordic perspective, is how the Nordic instruments stand in relation to EU rules. That is, does Nordic police cooperation in this field play any

<sup>147</sup> This might be the position of the Police cooperation handbook of 12. 12. 2003 (15732/03), p. 64, according to which officers have the right to stop and question on Swedish territory.

<sup>148</sup> On the principle of legality in relation to police powers in Swedish law, see *Johan Boucht*, *Polisiär våldsanvändning. En straff- och offentligrättslig undersökning* (Uppsala:ustus förlag 2011), p. 62–80.

<sup>149</sup> This is also the position of the Police cooperation handbook, p. 71.

independent role in itself or is it in fact consumed by EU ambitions? A few points can be mentioned.

First of all, in chapter 1 section 1 of the ANPC it is said that Nordic police cooperation conforms to international treaties and international commitments, EU law and national legislation. This can be read as saying that the ANPC is supplementary to, *inter alia*, international and bilateral agreements and conventions containing provisions on police cooperation. Consequently the ANPC is secondary in the sense that it is to be applied only as far as support cannot be found in other agreements. Secondly, of the six forms of cooperation addressed above, the ANPC only contains provisions regarding JITs. Thirdly, as mentioned above, it has been proposed by the Nordic committee that joint Nordic police operations for the purpose of maintaining public order and security or uncovering or preventing crimes and criminal activities would be favourable. At the time of writing, these ambitions have not become reality, and if they do, they will clearly overlap with Art. 17 PD (see sect. VII.1 *supra*).

In the light of this, it seems that the independent role of the ANPC and Nordic police cooperation that might involve cross-border use of police powers is limited.<sup>150</sup> This does not, however, necessarily mean that Nordic police cooperation of this type could not fulfil any independent role and that the means for Nordic cooperation in this field are exhausted. Rather, it seems to provide ample space for developing a Nordic cooperation that fulfils a function on its own. This could be achieved by deepening existing cooperation rather than broadening it by including new forms of cooperation. A few suggestions as to possible avenues of progression will therefore be put forward.

First, it could be reasonable to open up cooperation not only for police officers, but also for customs and coast guard officials, for example. This is indeed already the case for Finland and Sweden,<sup>151</sup> but not for Norway, which only allows police officers to enter into its territory.

Secondly, it would be plausible to facilitate the police (as well as customs and the coast guard) with the right to engage in hot pursuits not only over land borders, but over sky- (e.g. by helicopter) and water-borders (by boat) as well. As noted above, the Naples II Convention does include such authorisation, but it is only applicable for customs officers and not police (and coast guard) officers. It is further important to note that Norway has not yet implemented Naples II. Therefore, a Nordic agreement that would include the authority to pursue over land, water and sky into the territory of another state could be a valuable supplement to Art. 41 CISA.

Thirdly, the procedure of notification and communication between states can be problematic, both due to the often rapid character of situations involving, for instance, hot pursuits and the fact that the police in different states operate different

<sup>150</sup> Despite this it is probably valuable regarding other fields of cooperation addressed in the agreement, such as information exchange.

<sup>151</sup> It can indeed be noted that Swedish and Norwegian customs officers have a right, according to the Swedish-Norwegian Customs Cooperation Agreement of 1959, to carry out hot pursuits on one another's territory. See St. prp. nr. 42 (1996-97), p. 17.

communications systems.<sup>152</sup> Considering the informal relation between the Nordic states, and the benefits of a simplified standard of communication, it could be a valuable addition to the Nordic cooperation to either harmonize the communications systems or facilitate the police in neighbouring regions to contact the local police authorities of the neighbouring state directly in relevant situations.

Fourthly, as pointed out above, the trilateral agreement between Finland, Norway and Sweden includes stipulations that contacts on cross-border observation can be established directly with the local police authority, whilst contacts in relation to hot pursuits should be addressed through the corresponding police authority on a district level. Why requests relating to hot pursuits cannot be directed through the local authorities is not clear.<sup>153</sup> It seems plausible that cooperation in this regard would benefit if contacts could be established further down in the hierarchy. A further, reasonable step in facilitating flexible communications might also therefore be to allow direct contact with local police authorities in situations concerning hot pursuit.

Fifthly, in regions where cross-border use of police powers may become practised, it is of the essence that the police officers are well trained for the tasks. It would seem suitable for Nordic police cooperation to facilitate such educative measures. Such measures would also seemingly be in conformity with the spirit of the ANPC (2012), which encourages local police authorities to intensify police cooperation within the framework of the agreement.<sup>154</sup> Tentatively, this could be carried out in two ways. In the first place, it could be done by arranging courses where neighbouring police officers from Finland, Norway and Sweden would meet and learn about the various legal rules etc., that deal with the use of police powers in each state. These courses could be arranged in cooperation with the relevant police authorities. A supplementary educative measure could also be incorporated into police education on a voluntary basis.

As part of their education, each cadet must perform active duty as a practising police officer for one year (*Praktikum*) in a regional police authority. Instead of serving the whole period within the borders of the home state, it could be valuable for police cadets that will be stationed in a region that neighbours another state to include a service period, say a month or two, in that state. Finnish police aspirants that will serve in the northern region that borders to Sweden or Norway could, for example, voluntarily perform a shorter period of this practise period in either Sweden or Norway or both.

Against this background, it seems as if the need for Nordic police cooperation of the kind discussed in this article has indeed not ceased. Instead, if developed, it could function as a supplement to the extensive cooperation already facilitated by European instruments and thus fulfil a valuable function in its own right.

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<sup>152</sup> See Marten 2008, 183–184. See also art. 44 CISA.

<sup>153</sup> On the other hand it should be noted that chapt. 1 sect. 4.1. of the ANPC prescribes that direct contacts between the police authorities in each country may be established when permitted by national legislation or international agreements. The precise meaning of the provision in the regard mentioned here is, however, not entirely clear, but it is possible that it paves the way for direct contacts regarding, for example, hot pursuits.

<sup>154</sup> Chapt. 1 sect. 5 ANPC.