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**AD HOC DRAFTING GROUP ON TRANSNATIONAL ORGANISED CRIME
(PC-GR-COT)**

TOPICS TO BE DEALT WITH

Document prepared by the Secretariat of
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In view of the organisation of the first meeting of the Ad hoc drafting Group on Transnational Organised Crime (PC-GR-COT), and with a view to preparing a White paper on trends and developments in transnational organised crime in Council of Europe (CoE) member states, the members of the PC-GR-COT were requested to identify some current concerns which may be considered as priority areas, focusing on identifying possible gaps in criminal law co-operation. These topics may be discussed during the different meetings of the Group.

This document is a compilation of the comments received by the Criminal Law Division Secretariat. The main concerns identified by the members of the PC-GR-COT are the following.

I. Analysis of organised crime

1. The **main factors** affecting the status of organised crime in a country are: globalisation, the country's economic situation, deficiency in the law, society's attitude towards crime, greediness towards money and power, socio-cultural degeneracy, technological changes, visa free regimes, customs union, the capacity of law enforcement and the judiciary. The current economic crisis and political circumstances (Arab Spring) have had an impact on the transborder criminality in the CoE region.
2. **Every criminal act has a burden on society.** But when it comes to organised crime, which has the capacity to penetrate into the economic and social fabric of society and poses a serious threat to individual rights and freedoms, the rule of law, the reliability of financial system and democracy, its damage is much higher than any other type of crime.
3. **Organised criminal groups have both local and transborder dimensions,** not only with regard to their composite and *modus operandi*, but also with regard to the activities they carry out.
4. **Technological advancements** not only facilitate organised criminal acts but also give way to new types of crime. For example, counter activities against online phishing, banking fraud, and cyber-attacks on information systems, databases and personal computers have become part of the daily work of the law enforcement agencies.
5. Although terrorist groups and organised criminal groups have different aims in the long run, **the continuity of their criminal acts depends on their financial power.** In particular illegal drug trafficking stands out in the category of narco-terrorism due to the high financial gains it yields.
6. **The proceeds of crime** obtained through criminal activities are the essential strength of criminal organisations. Criminal groups penetrate into the legal economy in order to legitimise their proceeds and use legal entities as a shield and facilitator to carry out illegal activities. Nightlife, real estate, jewellery, exchange offices, the financial sector, tourism, casinos, procurement, construction are some of the sectors that are vulnerable to infiltration. By reinvesting illicit profits through legal economic means they undermine legitimate commercial activities in a way that works against the free market and fair competition.
7. **The corruption of the authorities** by means of bribing or purchasing their services: politicians, bureaucrats, members of security and intelligence forces, army officers,

managers in the financial sector, lawyers, solicitors, industrialists, bank employees, journalists and media owners or their family members and close relatives are the best targets for corrupt affairs. Generally this is a process in which each side looks after the other.

II. Some thoughts on Transnational Organised Crime (TOC)

8. Fighting TOC is a process that needs a **broader approach**. This means that the matter has to be prioritised not only by lawmakers and public authorities but also the whole society including NGOs, press and media organs, universities, trade unions and the private sector.
9. In combating TOC, a **preventive approach should be accelerated** to minimise the gaps and opportunities in the administrative, social and economic area, which could give the criminal groups the possibility to exploit the unregulated or grey areas for their illegal aims. This approach also includes the promotion of good governance, transparency, accountability, and professional ethics at all levels of the public service. The media's and public's support against corruption and organised crime is crucial.
10. This perspective should include **measures minimising the effect of organised crime**, preventing its recurrence and protecting its victims. Article 31 and the following articles of the Palermo Convention show methods of prevention.
11. A **decisive response from the criminal justice system** to organised criminality is another essential component of the combat. Here, **specialised agencies and units**, qualified manpower, technical capacity, sufficient budgetary resources and smart tools from criminal law should be underlined.
12. **The definition of participation in an organised criminal group** in criminal legislation is not always consistent with the standards set by the Palermo Convention. This hinders the application of the criminal procedures on a national level and also as far as co-operation with other countries in organised crime cases is concerned.
13. **A comprehensive definition of a criminal group** and the application of special investigative methods such as audio, video recording of events taking place on private premises, wiretapping, undercover operations, storefronts, use of informants, undercover agents and controlled delivery under certain circumstances defined by the law are needed.
14. **Witness protection** is also an important way of accessing invaluable evidence concerning organised crimes. However, the victims of the crimes often hesitate and refuse to give a statement against the criminal groups. Therefore, witness protection units should be equipped with legal and technical tools.
15. **Balance between personal privacy and public interest**. If investigative methods are not used properly, they could cause damage to persons who are not actually involved in the criminal activities. This applies to all the traditional investigation measures including apprehension, arrest, house seizure, etc. that can be applied during the investigation.
16. The response from the criminal justice system should cover:

- i. reactive action from the law enforcement side which generally begins after the crime has been committed
- ii. proactive response which tries to predict the future steps of a criminal group.

This issue should be discussed with a number of questions such as:

- what kind of data or database should be accessible to the police?
- what should be the power and capacities of the law enforcement agency before the involvement of the prosecutor in a case against a suspected criminal group?
- can special investigative methods be used before a criminal case is opened by the prosecutor?
- what is the link between preventive investigative methods and criminal investigative methods?
- what are the limits in gathering, processing, analysing and storing data in the prevention of organised crimes?

17. **Good co-ordination among the national agencies.** Only workable and active co-ordination among the relevant agencies at national level can ensure that the existing resources are used efficiently. This is closely related to building strong mutual trust and a culture of collaboration among the law enforcement agencies and judicial bodies. It leads us to the multidisciplinary approach which puts the different professional knowledge and experience together in investigating and prosecuting a case successfully. Limits for sharing information and the legal basis for co-operation and co-ordination between agencies should be identified. Moreover, if there is more than one law enforcement agency in the country, their duties and responsibilities should be governed by the same law not different laws.
18. **Further co-operation and assistance** is needed between countries in policing the flow of information between police agencies. Also legal assistance between judicial bodies is indispensable.
19. **Exchange of information**, experience, expertise, controlled deliveries, joint operations and joint training programmes for the law enforcement agencies should be strengthened. The legal framework should be implemented (international conventions, bilateral agreements and national laws regulating co-operation methods and procedures between competent authorities).
20. **International co-operation and information sharing among the police agencies:** Interpol, Europol, police liaison officers; direct co-operation channels established through bilateral agreements. Bilateral co-operation agreements should be enhanced.
21. The components that shape the quality of international joint action and information sharing are **data protection regimes**, mutual needs, proximity of criminal procedure law, reciprocity, personal contacts and sometimes language. Some countries need to improve their data protection regime in order to receive personal information from other countries for police purposes.
22. At the beginning of 1990's, a limited number of countries started to send **drug liaison officers** to exchange information with their foreign counterparts in a rapid and secure way and to create a positive atmosphere for joint work on disrupting the drug trafficking networks. Since this mechanism proved to be effective in producing concrete results, its scope was widened both in numbers and content. In other words, drug liaison officers were transformed into police liaison officers dealing with all kinds of transborder crimes.

23. **International judicial and policing co-operation** should further increase. Efforts including harmonisation of criminal law definitions and instruments that facilitate the delivering of more efficient mechanisms for co-operation would be concentrated.
24. Efforts towards **investigating organised crime from a financial perspective** as well as monitoring, confiscating and seizing the proceeds of crime owned by criminal organisations. Confiscation should be governed by the same standard of proof required for the conviction of an individual. The Prosecutor or the judge can issue an order to freeze the suspicious assets which are believed to be derived from organised crime.
25. **The confiscation regime should include ‘reversal of the burden of proof’** for organised crimes, because it is very difficult indeed sometimes impossible for the prosecutor establish a link between the origin of the defendant’s assets and criminal activity.
26. Another important aspect in the combat against the criminal economy is the need to set **international standards and procedures** for asset sharing among states.

III. Topics to be dealt with

A. Working on definitions and pan-European standards

27. **Definition of organised crime:** harmonisation in legislation is needed to develop an integrated approach to combat TOC. For example, some legislation has no reference to organised crime being “profit driven”, although it is a key component of it. Thus, a shared definition as well as reliable data are needed. Over the last few years, we have witnessed the emergence of a new dimension of modern crime: its transnational nature, which is linked to three fundamental factors:
 28. **a) the mobility of trafficked goods:** if in the past, the interests of criminals were oriented towards immovable goods (in the field of agriculture, public contracts and construction), there is now increasing criminal interest in movable goods such as weapons, drugs, waste products, and human beings. The pursuit of these new criminal targets and their transfer from the country in which they are produced to their final destination is a generating factor of this new dimension of modern crime;
 29. **b) institutional and political developments,** particularly the abolition of external borders in some specific areas and regions. A good example of this is the EU where the abolition of its internal boundaries has facilitated the free movement of people, goods and services, including criminals;
 30. **c) Technological developments:** they allow and encourage swift circulation not only of people but also of illicit money gained through crime (the proceeds of crime), for which it is vital finding a secure placement for money laundering. The evolution of modern crime has another decisive element which enormously differentiates it from that of the past: the organisational dimension. Criminals are becoming more affiliated with each other and discovering the added value of working together to carry out illegal activities. On the basis of this scenario we might focus on these two important points:
 - i. the necessity to have a common and shared definition and concept of what is organised crime, and what it consists of;

- ii. the need to have reliable sources of information in order to gather data, to know patterns and trends and to set up adequate counter measures.

31. **The creation and implementation** of pan-European standards for combating TOC;

32. Study and the dissemination of best practices in the fight against TOC;

33. **The level of guarantees:** The balance is also not satisfactory when we pay attention to the other side of the problem: the question of civil rights and guarantees. The protection of rights in criminal investigations in the framework of the fight against cross border ORGANISED crime has been a topic of much discussion since the problem affects all forms of co-operation. Although several initiatives have been launched and develop in order to establish procedural safeguards and minimum rights in criminal proceedings throughout Europe, thus far they have failed. The past decisions of the European Court of Justice (ECJ) and of the European Court of Human Rights (ECtHR) have consistently recognised a clear obligation on the part of the Community to respect fundamental rights as they are guaranteed by the ECHR and as a general principle of Community law derived from the constitutional traditions common to member states. Behind these problems there is one common denominator: the tension between the sovereignty of a state, which is particularly strong when it comes to criminal matters on the one hand, and, the internationalisation of crime on the other.

34. **Control the “balloon effect”** - with increasing pressure on crime and as a consequence of its reduction in one country or region, it is growing elsewhere. Symmetrical measures should be applied in all countries of Europe.

35. With regards to common definitions and creation of Pan-European standards, it would be possible **to build up the essential trust among countries and their authorities.**

36. As far as judicial international co-operation is concerned, trust is a key element of any future and enduring policy. A successful policy depends on trust, however mutual trust cannot be built with a decree. In order to move forwards within Europe, and also beyond Europe, there must be a common foundation of trust. To build and maintain that foundation requires a sustained effort. Trust means being confident in one another's legal systems and law enforcement capabilities, but this condition is not a given. Trust should be continually reciprocated. This trust must also be present at different levels:

- at police and judicial level: all the authorities concerned must trust each other if they are to co-operate across borders and they should be able to count on the same level of commitment in fighting organised crime. The good will of each partner is the only reliable condition for creating and building solid mutual trust;
- at national level: mutual trust first of all requires the correct and prompt implementation of the legal instruments that have already been adopted. While member states have made progress in the implementation and application of EU legislation, one of the persisting problems is the uncertain transposition of the legal instruments. From a legal point of view it is essential that member state comply with their implementing obligations in a correct manner and within the set time limits.
- at a global level, trust must mean that policymakers and parliaments must make

new efforts for effective action, taking into consideration the international implications of any initiative, in a way that is not subordinate to their national interest. But, on a global level, trust should start to mean trust in each other's rule of law. This is to be increased through sharing knowledge and insight and also by simply meeting one another, an element that is also essential in the strengthening of practical co-operation in general. Common trust means continuing to work to create a common culture in which legal uniformity and the transparency of legal judgments are basic conditions for trust in one another's legal system and in the legal order of the international Community as a whole.

B. Increase the co-operation and assistance inside and between states

- 37. The inadequacy of the responses of certain states /answers provided by [national] States:** tension between the principle of state sovereignty, the internationalisation of organised crime and the need for an efficient co-operation model.
- 38.** The challenges posed by modern criminality brought about a reaction from the affected states to compensate for the abolition of their external borders at regional level by fighting crime in its transnational dimension. An isolated reaction from a single state is not enough to face the challenge posed by modern crime. Even if there is no question that a lot of progress has been made as far as judicial co-operation is concerned, a lot of inconsistencies and gaps can still be identified. To limit the analysis to the CoE dimension, the dilemma is the following: can the idea of a criminal law area within Europe be considered as sufficiently implemented? A lot of international conventions have been adopted and ratified, following the input and/or on the initiative of international organisations. But:
- do all these instruments work in practice?
 - is the level of international co-operation acceptable?
 - do the states practice a good standard of co-operation within their mutual relationships?
 - is there a sufficient level of connection and partnership among the EU, the EU member states and other countries?
 - what are the main factors that affect international co-operation on a global level?
- 39.** Many of these questions are not of a theoretical nature, as they have a great impact on the real lives of citizens all over the world. At an international level the situation is problematic because of the persisting difficulties that states are facing in order to become effectively and efficiently affiliated with each other and tackle the growing threat posed by modern crime. Judicial authorities still pay little attention to the external dimension of their national proceedings. As national authorities see limited concrete benefits from international co-operation – for example, being able to get hold of the proceeds of criminal activity – their incentives to engage in it is also limited.
- 40.** The international organisations, despite their efforts, are also far from reaching their objectives. The political compromises they need to reach often jeopardise the level and quality of new international agreements and ultimately, the fight against modern crime.
- 41. Freezing of assets, seizure and confiscation.** An effective recovery of assets and the need to establish central offices of recovery of assets are needed. Particular attention

should be paid to the work implemented by the Camden Assets Recovery Inter-Agency Network (CARIN network)¹, which brings together 53 registered member jurisdictions from all over the world in an attempt to improve co-operation and harmonise approaches in the field of tackling proceeds from crime and asset recovery.

42. Multidisciplinary approach of TOC: not only is this term fashionable/à *la mode* within the EU at the moment, it is also proving to have excellent results in those countries which are already implementing it. **The analytical approach** should be improved (smarter working methods; bring in of law enforcement agents with alternative backgrounds).

43. Improve co-operation in the following fields:

- a. Infiltration of criminal organisations (protection of witnesses/ informants);
- b. Training of investigators, prosecutors and fiscal authorities;
- c. Creation of a legal framework for training in case there is the need for joint investigative teams and simplified procedures for the provision of legal assistance;
- d. Joint investigation teams/exchange of evidence (simple and smart set-up, easy to use on a day to day basis);
- e. Criminal matters: binding international treaties or other instruments should be taken into account:
 - the Council Framework Decision 2008/841/JHA on the fight against organised crime (which replaced the old Joint Action 98/733/JHA);
 - the Palermo Convention of 2000 (UNTOC).

44. **Strengthening mutual legal assistance** between financial and fiscal control authorities;

45. Development of technical assistance between CoE member states.

46. An international co-ordination system for prosecutions: the necessity for new global (or regional) players?

47. There is no doubt that direct contact between the competent judicial authorities and the **support** for their relationship is provided by many 'facilitators'. For the EU we can refer to the experience of the European Judicial Network (EJN) and to the liaison magistrates, who can improve the level of judicial co-operation, by speeding up the execution of requests for judicial assistance and by providing essential legal information on the legal system and the judicial authorities of the states concerned. Nevertheless, experience and practice shows that there is still a judicial necessity for an external authority to provide a special function: the co-ordination of investigations needed in proceedings against transnational crime. Stimulating and improving the co-ordination between the competent authorities of states dealing with investigations and prosecutions is a more innovative and modern development in respect of the traditional legal instruments of co-operation. This function will be more and more crucial in the coming years due to the expansion of transnational criminality as described above.

48. In this regard **the question to be put to the Group** might be: should this function also become essential in a wider international context? Before trying to formulate a response

¹ Informal network of experts-practitioners in the field of asset tracing, freezing and confiscation. www.assetrecovery.org/kc/node/baf520a5-fe6d-11dd-a6ca-f1120cbf9dd3.0.jsessionid=B674FCD446F48DD4B0EB4C26957781EF

it is worth recalling what the co-ordinating function means in practice and the shortcomings and advantages of having a co-ordinated approach to investigations.

C. Create specific criminal law provisions and enforcement body

49. **Lack of a specialised law enforcement body** to tackle TOC. Instead, there are lots of different agencies combatting corruption, money laundering etc. which might be a problem now that all crime money laundering measures include all of those crimes. Such dispersion in many cases is responsible for the lack of unique national, regional or multilateral strategy. When this body does not exist, more investment should be given to the training of personnel, its technical capacity, surveillance systems and equipment, databases, computer networking, official e-mail accounts and criminal analysis tools. Advanced training and sufficient resources would also be necessary.
50. Liability of legal persons.
51. **Depriving criminals of the benefits of organised crime** and ensuring the effectiveness of international co-operation regarding freezing, seizure and confiscation of proceeds and instrumentalities: it is indeed essential to overcome delays in communicating and executing the relevant requests, as well as language and terminology barriers.
52. Possible steps in this direction would involve:
 - i) assessing the implementation status and effectiveness of the Warsaw Convention of 2005 (ETS 198);
 - ii) exploring the possibility of “importing” to some extent the principle of mutual recognition in the field of freezing and confiscation orders, building eventually on the (both positive and negative) experiences of Council FDs 2003/577/JHA and 2006/783/JHA;
 - iii) enhancing the ability of member states to freeze and confiscate assets that can be traced back to organised crime groups, ultimately building on the proposed EU Directive of 2012.

D. Strengthen the protection of all relevant actors

53. **Strengthen the protection system for parties of the criminal proceedings**, especially witnesses, judges, law enforcement and regulatory agency officials, and promote protection programmes and incentives in co-operation in criminal proceedings.
54. **Protection of whistle-blowers**: although this issue mainly concerns the fight against corruption, it has close links to the fight against TOC- of which corruption is often an integral part/ a sub-set. Whistle-blowers can provide a useful source of information on illegal practices, especially since corruption is a tool widely employed by organised crime groups.