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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON CO-OPERATION IN CRIMINAL MATTERS (PC-OC)

Council of Europe Action Plan on Combating Transnational Organised Crime (2016-2020)

Information Document:

Possible Activities to be implemented by the PC-OC

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1. INTRODUCTION

At the 22nd meeting of the restricted Group of experts on international co-operation (hereafter, PC-OC Mod) held in Strasbourg on 27 to 29 September 2016, the Secretariat was instructed to highlight which tasks and activities related to the Action Plan on transnational organised crime (hereafter, TOC) were to be implemented by the PC-OC in order to present these to the plenary.¹

This paper aims at identifying which activities may be implemented by the PC-OC so as to meet the objectives and aims of the Action Plan.

1.1. Background

The White Paper on TOC was prepared by the Ad-hoc Drafting Group on Transnational Organised Crime set up by the Committee of Ministers of the Council of Europe under the aegis of the European Committee on Crime Problems (hereafter CDPC).² It was endorsed by the CDPC in June 2014 and it was presented to the Committee of Ministers on 7 October 2014. As a follow-up of the White Paper, the CDPC subsequently decided to prepare a detailed Action Plan, which was adopted by the Committee of Ministers on 3 March 2016.³

Given that TOC presents sophisticated and multi-faceted threats that cannot be addressed through law enforcement action and criminal justice alone, the White Paper focuses on the criminal justice response to TOC and recognises that the fight against TOC must be done through the efficient application of international co-operation mechanisms.

Thus, the White Paper identified the most significant gaps and problems regarding five key areas and made some recommendations and proposals for future actions.

1.2. Objectives and Implementation

Building upon the findings set out in the White Paper on TOC, the Action Plan concentrates on the five key areas where the Council of Europe could make a specific impact.

¹ List of decisions, 22nd meeting of the restricted Group of experts on international co-operation (PC-OC Mod) enlarged to all PC-OC members, 27-29 September 2016; PC-OC Mod (2016)11. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168 06ab0cd

² Available at: http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680

³ European Committee on Crime Problems (CDPC) - d. Action Plan (2016-2020) on transnational organised crime [1249 meeting] CM(2016)2-add1final / 03 March 2016

The White Paper's Key Areas:

- No 1: Enhancing international co-operation through networks.
- No 2: Special investigative techniques.
- No 3: Witness protection and incentives for co-operation.
- No 4: Administrative synergies and co-operation with the private sector.
- No 5: Recovery of assets.

The primary aim of the Action Plan is to provide a structured set of concrete activities to be

The Objectives of the Action Plan:

- To reinforce the legal framework against TOC and focus on its harmonisation among member States.
- To improve the implementation of the legal instruments for fighting TOC in line with fundamental rights and in full respect of the rule of law.
- To enhance international police and judicial co-operation in the area of TOC at a pan-European level.

implemented in each key area. As such, it has been developed with several objectives in mind.

To achieve these objectives in a coordinated, efficient and effective manner, appropriate roles and responsibilities have been identified by the CDPC depending on each actor's particular characteristics and competences.

The Action Plan identifies three types of actions under each key area:

a. Direct actions to improve practical implementation

The actions defined under this point are those that relate to precise activities that are neither directly related to the legal framework and its implementation nor to capacity building; referring instead mainly to defining policies and taking political actions.

b. Standardisation on legal and practice level

Actions that are considered relevant in order to improve the legal framework and relevant practices. The aim is not just to improve quality, but also to foster a certain degree of standardisation among the relevant domestic legal provisions so as to ensure an effective fight against TOC. Additionally, actions directed at ensuring or promoting the adequate implementation of legal provisions are also considered under this heading.

c. Capacity building

Under this heading, the Action Plan identifies broadly the target group that should be involved in the capacity building activities and the possible topics that should be covered.

1.3. PC-OC role in fight against TOC

Given the involvement of the PC-OC in the drafting of the White Paper on TOC and its Action Plan, some actions were taken on board by the PC-OC as its major priorities in its future work. This fact considerably helped to begin with a rapid implementation of the Action Plan following its delayed adoption by the Committee of Ministers

For most key areas, the PC-OC will be engaged in activities to promote and improve legal and practical standards. Drawing from the committee's extensive expertise and resources, this will include actions such as conducting (coordinating) studies and compiling relevant materials, facilitating expert input and round table discussions and contributing to the drafting of practical items such as guidelines and handbooks.

However, it should be noted that the activities identified for the PC-OC in this document are not fixed and are subject to revision where appropriate. As such, the PC-OC is not precluded from participating in additional activities in the Action Plan should it be deemed worthwhile by both the PC-OC and the sub-group responsible for the overseeing of the Action Plan's progress.

Additionally, it should be noted that the timeframe for many Actions reflected in this document have yet to be determined in order to allow the PC-OC to discuss and decide if and when such actions would be feasible.

2. ACTIVITIES TO BE IMPLEMENTED BY PC-OC ON TOC

2.1. Enhancing International Co-Operation through networks

a) Direct Actions for Implementation

Action A1: Improve and maintain website on MLA and International Co-operation and link it to TOC

During the various meetings with the Ad hoc Drafting Group on the White Paper and the follow-up discussions towards the drafting of the Action Plan, the practitioners specialised in TOC as well as the experts in MLA and international co-operation, agreed that a website, with all the necessary information for requesting and providing MLA and international co-operation, undoubtedly facilitates their work and thus speeds up MLA and international co-operation proceedings.

The ultimate goal should be to create a "one-stop website" to find all information needed for effective use of international instruments on co-operation in criminal matters.

Activities implemented:

In progress.

Timeframe TBD

Action A2: Discuss the setting up and use of secure communications for international co-operation

The aim is to establish a secured communications network, similar to existing networks which already operate within international judicial co-operation, but limited to judicial authorities dealing with TOC.

This would improve the efficiency and the security of the communications related to judicial cooperation among the Council of Europe member States when fighting these crimes.

In order to move away from the slow, cumbersome procedure of traditional methods of communication, a secured electronic communication channel should be established.

Activities to be implemented:

The Council of Europe should organise an event to discuss this proposal and its feasibility/availability within the Council of Europe landscape, and prepare conference concept papers.

Action A3: Build-up the connection of judicial networks

The White Paper considers international co-operation through networks as crucial, but it leaves the question of "what such a network should look like" open.

Whether a new judicial network should play a major role in the pan-European context or the EU judicial network model should be expanded to the Council of Europe landscape or even the existing networks connected, or rather start with the establishment of permanent contact points for TOC in all member States, were questions in need of further exploration.

The idea is to create a "network of networks" to combat TOC.

Activities to be implemented:

This will entail establishing contact points on TOC in each member State, and strengthening links between the existing judicial networks.

This will be accomplished through:

- high-level meetings with persons responsible for the most relevant judicial networks already in place;
- a workshop/event on the present co-operation among existing judicial networks in order to identify means of co-operation;
- based on results of meetings and workshops, consulting experts to analyse the legal framework for implementing the connection of judicial networks.

This will require political action to gain institutional support for the development of the "network of networks".

Timeframe: in progress

Note: the proposed action may not be fully accomplished within the four-year period of this Action Plan, but the first preliminary steps should be taken towards the establishment of a judicial network covering the whole Council of Europe area.

Level of implementation

The PC-OC Mod considered a document prepared by the Secretariat⁴ presenting an overview of judicial networks and asked for some additional networks to be included. It also discussed the possibility of organising a meeting between the Secretariats and/or members of these judicial networks to discuss options to strengthen co-operation. The possibility of appointing an expert to produce a reflexion paper on this issue was also mentioned. The PC-OC Mod decided to instruct the Secretariat to update the document (catalogue) in line of the discussions held and to present it to the plenary for further discussion.

⁴ Examination of the draft overview of existing judicial networks and proposals to promote their interconnection, [Doc PC-OC Mod (2016)06]

Action B7: Establishing a practitioners forum on TOC on a regular basis

Sharing best practices in international co-operation and MLA related to TOC, would help to overcome the problems currently encountered.

Exchange of experiences, the sharing of best practices and discussions on the perceived problems with counterparts of other member States will increase mutual trust.

Timeframe: in progress

Level of implementation:

The PC-OC Mod considered the above question and was of the opinion that its list of single points of contact could constitute a basis for such a network.

The PC-OC Mod decided to:

inform the PC-OC plenary of its proposal to invite experts to consider the persons mentioned in the list of single points of contact and to add, where necessary, a different contact point for issues related to TOC.

b) Improving legal and practical standardisation

Action A4: Establish a mechanism to address judicial co-operation problems

The PC-OC undertakes an important role in the monitoring of the relevant conventions and also the practical problems encountered in their implementation. Practitioners consider that when they face a non-co-operative State, the single judge or prosecutor is not able to trigger any mechanism to remind the requested authority of their obligations in complying with their international commitments. Member States are not always in the position to follow the diplomatic channel to help the problems detected in the international co-operation be overcome, and if they do, the response may also take much time.

Increase judicial co-operation and reduce issues which arise with non-co-operative states.

- 1. Establish a rule whereby judicial authorities send a confirmation of receipt of request.
- 2. Establish the duty to consult between authorities involved in the international judicial cooperation process.

Modifying the relevant conventions accordingly should be considered.

Activities to be implemented:

TBD

Action B1: Review provisions on international co-operation in CoE conventions and relevant reservations/declarations to them/these conventions

This action shall be based upon the data collected by the PC-OC (and other relevant committees such as GRETA and COP198) in its continuous assessment on the implementation of Conventions. The PC-OC has stated that the implementation and reasons for non-ratification by some member States of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182) may merit further assessment. Beyond the non-ratification of conventions, the reservations to conventions ratified, shall also be reviewed.

The aim of this action is to remove the reservations that hinder effective international cooperation in criminal law matters, while underlining the importance of signing and ratifying MLA instruments, eliminating out-dated reservations and promoting signature/ratification of conventions.

Modifying the relevant conventions accordingly should be considered.

Activities to be implemented:

Documenting and identifying all reservations and declarations pertaining to PC-OC-related instruments.

Timeframe : in progress

Level of implementation:

The PC-OC Mod examined:

- a) the catalogue of reservations⁵ made to:
 - the European Convention on Extradition and the Additional Protocols thereto,
 - the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocols thereto,
 - the European Convention on the Transfer of Proceedings in Criminal Matters.
 - the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.
- b) the overview of these reservations prepared by the Secretariat⁶.

The PC-OC Mod agreed that as far as the fight against TOC is concerned not all treaties falling within the remit of the PC-OC are relevant. However, it was felt that the Convention on the Transfer of Sentenced Persons and the Additional Protocol thereto are important in this regard.

As regards the reservations made to the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, the PC-OC Mod agreed that the reservations made to this Convention should be analysed together with those made to the more recent Council of

⁵ Catalogue of reservations to Council of Europe treaties within the remit of the PC-OC and of relevance to the fight against transnational organised crime, PC-OC Mod (2016)05rev.

⁶ Overview of reservations made to Council of Europe treaties within the remit of the PC-OC and of relevance to the fight against transnational organised crime, PC-OC Mod (2016)05Add.

Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

The PC-OC Mod decided to:

- instruct the Secretariat to complete the catalogue of reservations and the overview of these reservations with the reservations made to the Convention on the Transfer of Sentenced Persons and the Additional Protocol thereto:
- instruct the Secretariat to liaise with the Secretariat of the Conference of Parties COP
 198 in order to explore possibilities for co-operation between the PC-OC and COP
 198 so as to issue joint conclusions in this particular field;
- propose that the PC-OC invite Parties to the Conventions listed in the catalogue to check whether the catalogue accurately reflects the reservations made by them.

Action B3: Development/Elaboration and support of model request forms

The PC-OC has already agreed to facilitate the practical implementation of the conventions on co-operation in criminal matters by the development of model request forms and practical guidelines for practitioners in the field of MLA and the transfer of proceedings. The PC-OC could consider to develop a similar model request form and guidelines for the European Convention on Extradition.

Activities to be implemented:

Arranging high-level meetings; developing user-friendly model request forms for MLA.

Once the model forms are approved, the PC-OC should support their dissemination among all member States and follow their use by practitioners.

Timeframe TBD

Action B4: Draft Guidelines on selected topics

The provisions of the relevant conventions related to TOC by definition have to remain general, thus the implementation of such provisions in the domestic legislation may not only differ greatly from country to country, but also be inadequate.

By elaborating guidelines on certain selected topics, the Council of Europe would not only promote useful guidance in the implementation of the conventions, but also encourage member States to remove obstacles to co-operation in national legislation and practice.

The further development of practical guidelines for practitioners by the PC-OC in co-operation with other Council of Europe committees in order to improve the use of the conventions in criminal matters is to be encouraged. Support for and co-ordination of the development of these

practical guidelines is to be done within this action.

Activities to be implemented:

- Topics are to be selected by a round-table of experts;
- Set up a team of experts to develop and discuss these guidelines before submitting them for final approval to the PC-OC and CDPC;
- Disseminate these guidelines among the member States, together with information on best practices.

Timeframe TBD

[This action should take place preferably during the second and/or third year, once the survey on the legal framework related to MLA, international co-operation and TOC is in progress, and the answers to the questionnaires on its practical implementation have been gathered.]

Action B5: Develop factsheets with country information

The PC-OC website contains recently updated country information on national procedures as regards extradition, MLA and transfer of sentenced persons. Their regular update and the development of further similar factsheets for the application of other relevant conventions in member States, and making them accessible to the rest of the member States, would clarify the existence of the legal measure requested and the formal requisites for the requested measure in the executing State.

Activities to be implemented:

Factsheets should be drafted using data obtained from the member States on their legal provisions in the five key areas of the White Paper, including relevant procedures and policies. As this action is quite ambitious, it could start with the development of a limited set of factsheets on selected measures (country information templates (CETS 141).

Timeframe: in progress

Level of implementation:

It must be highlighted that the PC-OC adopted a template for country information on ETS 141 and invited countries to complete them by 1 October 2016. At this time, some delegations did not yet provide their country information.

Moreover, the PC-OC also has country information available on the following topics: extradition, MLA and Transfer of sentenced persons.

Action B8: Continue the development of the repository on benchmark Court of Human Rights judgments on international judicial co-operation and TOC

This action is currently in process. The PC-OC has prepared a document on the "Case law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-operation in Criminal Matters", which contains a full collection of cases, classified by topics and a brief summary of them.

Activities to be implemented:

- Keep the list of cases updated and promote its dissemination among practitioners.
- Translation of the document into different languages relevant for reinforcing the international co-operation at pan-European level could be an added value.
- Additionally, the relevant case law related to TOC should be identified and a repository created following the same structure as adopted in the existing index and summaries of ECtHR case law.

2.2. Special Investigative Techniques

Special investigation techniques (SITs) are specific methods used by law enforcement agencies in the fight against TOC. These are vital tools in helping to penetrate organised criminal groups.

b) Improving Legal and Practical Standardisation

This field of action is to be co-ordinated with the other Committees involved with SITs and especially with the Committee of Experts on Terrorism (CODEXTER), as this Committee has also identified the "Special investigation techniques", as one the four priorities of their Actions for 2015-2016.

Action B1: Assessment on the functioning of the Second Additional Protocol on MLA

This action should not take much time/efforts, as the PC-OC already has most of the information, though information on ratification of the Convention and existing reservations should be checked.

The aim is to consider if an update of the conventional legal framework on MLA is needed and to discuss the possibilities of a further harmonisation of the applicable conventional rules among all Council of Europe member States as a pre-requisite for swift co-operation in providing MLA when the request entails the use of SITs.

Activities to be implemented:

Questionnaire.

(Note: linked to Action B3: Compile a comprehensive study on the legal framework of selected SITs at domestic level and their practical implementation, and Action 4: Assessment of the need for improving legal standardization)

Timeframe: in progress

Level of implementation:

As part of the implementation of the Action Plan, the PC-OC Mod discussed the organisation of the special session. It agreed to organise workshops focusing on the two major innovations introduced by this instrument, namely:

- the scope and methods of exchange of information;
- the new methods related to the gathering of evidence.

The PC-OC Mod decided to:

- adopt the programme of the special session⁷;
- propose, as a follow-up to the special session, that the plenary ask the PC-OC Mod to develop a questionnaire on the application of the Second Additional Protocol taking into account the issues raised in the workshops.

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⁷ Doc PC-OC Mod (2016)09.

Action B2: Promote the Practical Standardisation of the use of SIT's and the conditions for MLA

The Second Additional Protocol to the European Convention on Mutual legal Assistance in Criminal Matters provides specifically for rules regarding international co-operation in executing certain SITs (covert investigations, JITs, controlled deliveries).

The aim is to promote more homogenous practice in the use of SITs and identify the practical relevance of the SIT measures in MLA proceedings, best practices and practical shortcomings.

Activities to be implemented:

A Round Table session should be organised to discuss the practical use and problems faced in the transfer and execution of the requests.

Timeframe: in progress

Level of implementation

A round table on this topic will be organised in the framework of a special session within the forthcoming 71st plenary meeting PC-OC plenary meeting (15-17 November 2016).

2.3. Witness protection⁸

Action B1: Review Recommendation Rec(2005)9 on the protection of witnesses and collaborators

This review should assess efficiency of the drafting and implementation of the protection given to relatives and other people close to the witness. Particular attention should be made to trafficking in human beings, smuggling of migrants and witnesses in cases which involve criminal organisations.

Activities to be implemented:

Three events should be organised to:

- 1. gather information on the present situation.
- 2. present preliminary results,
- 3. Present final results.

Timeframe TBD

⁸ Although this heading does not directly fall within the remit of the PC-OC, it could be envisaged that the PC-OC be represented in the drafting of the recommendation.

Action B3: Develop guidelines on protected witnesses' rights and duties

A group of experts should be appointed, preferably with knowledge of witness procedure, to develop clear guidelines which allow witnesses to know what their rights, guarantees and obligations are. Incentivize the co-operation of witnesses in general.

Activities to be implemented:

Two Meetings (WG or round table)

2.4. Administrative Synergies and Co-operation with the Private Sector

a) b) Promote standardisation on a legal and practical level

Action B4: Study on the transparency of legal persons9

Legal persons play a key role in TOC, be it as the main perpetrator or as "straw persons" in order to disguise the real beneficiary and/or owner of the business and/or criminal assets obtained. This means that the conduct of legal persons is of key value in the area of evidence and asset recovery.

Activities to be implemented:

Draft guidelines outlining good practices on the transparency of legal persons, arrangements and mechanisms to discover the nature of legal persons as "straw persons" and mechanisms to dissolve these legal persons.

Timeframe TBD

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⁹ In relation with this heading, the PC-OC could consider assessing MLA with regard to legal persons.

2.5. Recovery of Assets

a) b) Promote standardisation on a legal and practical level

Action B1: Enhancing the implementation of the existing legal framework on the management and disposal of criminal assets

The PC-OC has produced a questionnaire of 11 questions on the use and efficiency of the Council of Europe instruments as regards the international co-operation in the field of seizure and confiscation of proceeds of crime, including the management of confiscated goods and asset sharing (the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)).

It is clear that the practical implementation of this Convention remains an essential issue for combating TOC and that international co-operation in this field needs to be further developed.

The aim is the implementation of the existing legal framework on the management and disposal of criminal assets. This will be achieved with the creation of an improved legal framework on the management and disposal of criminal assets for all CoE member States.

Activities to be implemented:

- Exchange of best practices as regards the management of frozen assets (COP198);
- Prepare updated guidelines for the national asset management offices (COP198);
- Draft a model agreement for asset sharing between CoE Member States (COP198 + PC-OC);
- Enable existing networks of practitioners dealing with the use of confiscated assets and prepare updated criteria to be taken into account for the decision on asset disposal (COP198):
- Establish or designate national authorities in charge of taking a timely decision ensuring the best use of confiscated assets;
- Conclude agreements and memoranda of understanding with other States as regards asset sharing (non-applicable to CoE).

Timeframe TBD

Action B2: Ensuring systematic and effective financial investigations in all cases potentially generating crime proceeds¹⁰

¹⁰ As in previous headings, the participation of PC-OC in this activity could be a positive added value as PC-OC country information on ETS 141 will be very useful.

The objective is to promote awareness of the importance of having in place effective financial investigations (both powers and capacity).

Activities to be implemented:

- Preparing a handbook indicating in every country and specifying which powers and functions are accorded to financial investigation units and law enforcement authorities;
- Developing model provisions on financial judicial investigations;
- Encourage States to develop a proactive approach e.g. launching financial investigations of profit-driven crime;
- Enhance and streamline the domestic legal framework on multidisciplinary financial investigations, in order to ensure the F61 (Moneyval + COP198).

Other actions to be confirmed.

Timeframe TBD

Action B4: Facilitate financial investigations in new technologies related to criminal assets¹¹

New technologies, as for instance crypto-currencies and digital money, offer new technological ways of diverting the criminal assets. Several of these concepts are not yet clearly legally defined. National case law qualifies them in diverging ways (property, currencies, etc.) with diverging legal consequences. There is a need to agree on the legal definitions of these new phenomena.

The aim is to develop clear legal definitions of new technologies used in relation to criminal assets.

Activities to be implemented:

- Pilot group of practitioners to study whether law enforcement agents have expertise and tools required to chase assets in the digital world;
- New digital investigation techniques should be developed e.g. remote digital searches;
- A group of experts should study the possibilities under the rule of law and applicable human rights standards.

Timeframe TBD

Action B5: Strengthen international co-operation on non-traditional forms of confiscations¹²

¹¹ The association of PC-OC to this work would be an added value.

¹² The association of PC-OC to this work would be an added value.

In certain transnational cases prosecution and sentencing is barred because of jurisdiction issues where the perpetrator(s) have fled the jurisdiction or are hiding under immunity rules. In specific cases the use of non-conviction-based confiscation could be considered.

The objective of this action is to determine member States' attitudes towards enacting legislation covering non-traditional forms of confiscation.

Activities to be implemented:

- Establish a database with the most relevant case law of the European Court of Human Rights in the area of non-traditional forms of confiscation;
- Prepare guidelines concerning different forms of non-conviction based confiscation provided by international instruments and national law;
- A pilot study could be set up to find out to what extent CoE member States are willing to introduce in their legislation: non-conviction based confiscation in organised crime cases; execution of MLA non-conviction based confiscation order requests.

Timeframe TBD

Action B6: Enhance the position of victims in the asset recovery procedures¹³

Compensation of victims as part of asset recovery is a new theme that merits further reflection and maybe also a new treaty frame.

The Council of Europe could organise site visits to member States with expertise in order to identify good practices. A study group of experts should be established by the Council of Europe to develop proposals for future legislation in this area.

Activities to be implemented:

- Review the position of victims in asset recovery procedures with a view to potentially establishing legislation in this area;
- Organise CoE staff missions to member States with expertise in this area in order to identify good practices,
- Establish a group of experts to elaborate proposals for future legislation in this area.

Timeframe TBD

The association of PC-OC to this v

¹³ The association of PC-OC to this work would be an added value.

3. FINAL REMARKS

This document details a set of actions where the PC-OC is invited to take part or where its involvement will be essential to the effective implementation of the Action Plan on TOC.

However, the opportunity for the PC-OC to participate in other Action Plan activities remains open. In coordination with other relevant bodies, groups and institutions, the PC-OC is welcome to offer its expertise and know-how to other activities reflected in the Action Plan.

Given the valuable role the PC-OC played from the beginning in the drafting of both the White Paper and its Action Plan, the PC-OC has been crucial in many aspects of the implementation of the Action Plan and will continue to play a key role in implementing relevant follow-up activities. As the fight against TOC requires serious and continuous engagement with multiple stakeholders, the PC-OC's continued contribution in this regard will be highly appreciated.