

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 2 March 2016
cdpc/docs 2015/cdpc (2015) 17

CDPC (2015) 17 Fin

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COUNCIL OF EUROPE ACTION PLAN
ON COMBATING TRANSNATIONAL ORGANISED CRIME (2016-2020)

This document was approved by the European Committee on Crime Problems (CDPC) at its last plenary meeting on 1-4 December 2015 and finally adopted by the Committee of Ministers of the Council of Europe at its meeting on 2 March 2016

CDPC website: www.coe.int/cdpc
CDPC e-mail: dgi-cdpc@coe.int

ACKNOWLEDGEMENTS

The European Committee on Crime Problems (CDPC) is grateful to Ms Lorena Bachmaier Winter, Professor of Law, Faculty of Law, Procedural Law Department, Complutense University, Madrid, Spain, and to Mr John A.E. Vervaele, Professor, Willem Pompe Institute for Criminal Sciences, Utrecht Centre for Regulation and Enforcement in Europe, The Netherlands, as well as to all the experts who participated in the Ad hoc Drafting Group on Transnational Organised Crime (PC-GR-COT) for their overall contribution and expertise in the drafting of this Action Plan on Transnational Organised Crime.

1. INTRODUCTION

The continuously increasing threats that transnational organised crime (hereafter TOC) poses to the rule of law and to the integrity and principles of democratic societies has led the Committee of Ministers to identify the fight against TOC as one of the priorities of the Council of Europe for the coming years.

An emergence of new and significant transnational markets for criminal practices together with the emergence of new crimes with a marked transnational dimension require reinforced efforts in prevention, investigation and sanctioning.

New forms of TOC together with the severe risks of the “traditional” type of cross-border organised criminality, such as drug trafficking, trafficking in human beings or illicit arms trafficking, require co-ordinated action at international level to give maximum support to the member States who bear the primary responsibility to prevent and combat TOC, but need efficient co-operation by the other States.

The challenges of information society are also part of this new scenario, where new technologies and specialised digital communication are widely used by the perpetrators in their illicit transnational activities. However, new technologies can also provide efficient tools enabling law enforcement agents to trace, detect and investigate the most complex forms of TOC. To this end, the common response to TOC and the necessary international police and judicial co-operation giving a criminal law response to TOC, can also benefit from the speedy and flexible forms of communication of the new information society. The challenge lies in converting the drivers of emerging forms of crime into new responses, so that the formal and informal international co-operation networks are also based on fast forms of communication.

This document aims at presenting an Action Plan based on the findings contained in the White Paper (see below). The Action Plan has taken into account the remit of actions of other international organisations in order to provide added value. As stated in the White Paper, the actions have been selected in the hope they will strengthen the fight against TOC.

1.1. White Paper on Transnational Organised Crime

The White Paper on TOC was prepared by the Ad-hoc Drafting Group on Transnational Organised Crime (PC-GR-COT) set up by the Committee of Ministers of the Council of Europe under the aegis of the European Committee on Crime Problems (CDPC).

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. As already stated in its conclusions, the proposals tried to be as precise as possible, but the working group also stated

that “more empirical data is needed to re-define the precise actions to be developed” and set priorities among the actions so that a clear “roadmap to be approved at a later stage” could allow the adoption of concrete actions.

Following the endorsement of the White Paper by the CDPC in June 2014, the CDPC decided to prepare a detailed Action Plan as a follow-up to the recommendations included in the White Paper. This decision was presented to the Committee of Ministers on 7 October 2014.

This Action Plan is intended to provide concrete proposals for Council of Europe member States to effectively address some of the issues detailed in the five key areas identified within the White Paper.

1.2. Fundamental principles and strategic goals of the Action Plan

1.2.1. Duration of the Action Plan

The Action Plan is designed to be enforced in a timeframe of four years (2016-2020). It is clear that improving the tools and mechanisms for combating certain forms of TOC is a task which cannot be subject to a timeframe, as it is an on-going continuous struggle. The principal reason for establishing this timeframe for the Action Plan is because a shorter timeframe would not allow enough time for the main objectives set out in the White Paper to be addressed. Instead, a timeframe of four years will allow time for both an initial assessment on the results obtained, and for further adjustments for future actions in a mid-term assessment to be undertaken. At the end of this Action Plan a final report should also be drafted.

With regard to the outcome of the actions, some results are to be expected before the four years is over, while other objectives which require continuous and on-going action will only be achieved partially within the timeframe established for the execution of this Action Plan. For example, efforts to ensure that all the member States ratify or that third-party states are invited to accede to the conventions relevant for TOC, will require sustained efforts clearly beyond the timeframe of this Action Plan.

It has been noted that, within the four-year timeframe for the Action Plan, some actions will be shorter, while other actions that are already on the way to implementation or partially implemented will continue to be reinforced and supervised. Furthermore, other actions will only start once the necessary information has been gathered and the relevant decisions have been made, for example, on the need and possibility of drafting a new legal framework.

It was considered more appropriate to propose multiple actions, instead of focusing on one action each year which could lead to less effective results.

1.2.2. Objectives and Implementation of the Action Plan

The Action Plan is built upon the findings set out in the White Paper on TOC.

In presenting its analysis and conclusions on TOC, the White Paper concentrates on key areas where the Council of Europe could make a specific impact and provide real added value. The main

objective of this Action Plan is therefore to provide concrete activities to be implemented in each key area (action line). It follows the same structure, dividing the proposed actions into five points, each of them corresponding to one of the identified key areas.

The five key areas, as explained in the White Paper are the following:

- 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

This Action Plan has three main objectives:

- 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 improve international police and judicial co-operation in the area of TOC at a pan-European level.

To achieve these objectives, the Action Plan identifies three types of actions:

a) The taking of direct actions to improve practical implementation, when applicable

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. However, direct actions may also be connected to or impact on the other types of actions.

b) The promotion of standardisation on legal and practice level

Under this heading, the Action Plan lists the proposed actions that are considered relevant in order to improve the legal framework; not only with the aim of improving its quality, but also to foster a certain degree of standardisation among the domestic legal provisions relevant for enhancing the 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 (as to specific target groups including training)

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. It goes without saying that the identification of a target group or category of professionals does not exclude the involvement of other practitioners or professionals; it merely indicates the primary target group. With regards the topics, the proposals are general and do not aim at providing an exact title or content. This shall be developed together with the authorities involved and it should be co-ordinated with all the monitoring bodies in order to avoid gaps and/or overlaps.

All the actions proposed in this Action Plan have been considered as effective and timely in fighting TOC taking into account two elements: their priority in terms of time and the feasibility of them being implemented in a successful way. Cost-efficiency criteria have also been considered when making proposals on actions and precise activities. However, the application of these criteria has not led to the exclusion of relevant proposals despite their presumably higher costs.

The wide set of actions proposed within this Action Plan need to be programmed throughout the period of four years. In terms of development and execution of proposed actions, the setting of priorities has been excluded from this Action Plan for various reasons:

- the scope of the action has already been limited by identifying only five key areas in the White Paper;
- many of the actions are unavoidably interlinked;
- some actions that might not be considered as a priority from a point of view of immediate impact, are however of utmost importance to gain the necessary knowledge to build up the development of other actions.

While prioritisation among the actions has been intentionally left out of this Action Plan, there are nevertheless some actions that have been identified as essential because of their crucial importance for enhancing the co-operation in fighting TOC. The following list, which is by no means exhaustive, contains actions that have been identified by practitioners as “core actions”: the establishment of a subgroup on TOC within the Council of Europe; the action related to the judicial networks and the functioning of contact points on TOC; and the other actions related to the speeding-up of the execution of international judicial co-operation requests.

From that point of view, “Enhancing international co-operation through networks” could be viewed as a priority, because of its overarching effect upon the objectives that are also sought under the other key areas. Having said this, all of the five key areas are of equal importance and are also supported by general actions in cross-cutting/interrelated areas.

Within key area 1 (Enhancing international co-operation through networks), if a priority is to be identified, it would be as follows: firstly, direct action for implementation; secondly, standardisation on legal and practice level. However, such a priority would not apply to key areas 4 (Administrative synergies and co-operation with the private sector) and 5 (Recovery of assets), where actions under “Direct actions for implementation” and “Improving legal and practical standardisation” are equally important; in these areas the providing of studies is of paramount importance.

Within each of the areas, the order in which the actions are listed could be used as a guideline to identify priorities, bearing in mind that all the actions are already considered to be of relevance.

Capacity building is another general priority, but as it is an on-going action and there is a general need for it to be planned and implemented on a continuous basis.

Table: Priorities of actions identified by key area

| | |
|--|--|
| KEY AREA 1: ENHANCING INTERNATIONAL CO-OPERATION THROUGH NETWORKS | |
| 1. Direct actions for implementation | |
| 2. Improving legal and practical standardisation | |
| KEY AREA 4: ADMINISTRATIVE SYNERGIES AND CO-OPERATION WITH THE PRIVATE SECTOR | |
| Direct actions for implementation | Improving legal and practical standardisation |
| KEY AREA 5: RECOVERY OF ASSETS | |
| Direct actions for implementation | Improving legal and practical standardisation |

1.2. 3. Co-ordination of TOC actions

The implementation of the proposed actions shall be co-ordinated at central level within the Council of Europe Secretariat. As stated in the White Paper, the Council of Europe monitoring bodies and steering and expert committees have a longstanding experience and high specialisation in the different areas that are directly related to TOC and are capable of addressing the many-faceted problems of TOC in a pan-European context. Therefore, in implementing this Action Plan, the Council of Europe should involve its bodies with specialised knowledge in specific areas. Such bodies are the Council of Europe anti-money laundering body (Moneyval), the Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (The Pompidou Group), the Council of Europe Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), the Group of States against Corruption (GRECO), the Committee of Experts on Terrorism (CODEXTER), the Group of Experts on Action against Trafficking in Human Beings (GRETA), the Convention Committee on Cybercrime (T-CY) and the Conference of the Parties to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (COP 198).

There is a vast amount of information related to TOC which is already being gathered and analysed by the different monitoring bodies of the Council of Europe that should be put together in order to deal efficiently with TOC. Given that each body has a concrete mandate, it may not be feasible that these bodies also extend their activities to TOC.

The setting up of a sub-group under the CDPC and responsible for TOC, although not a strict prerequisite for the execution of the Action Plan, should be foreseen. The establishment of such a sub-group to undertake the co-ordination could also help to improve the efficient handling of information, the programming of activities and the implementation of the actions while avoiding their overlapping.

1.2. 4. Assessment of the results

a) *Mid-term assessment*: The results of the implementation of the Action Plan shall be subject to a first preliminary assessment after 24 months. At this stage there should be a review of which actions have already been implemented, what results have been achieved and which other actions were not implemented and for what reason. On the basis of these findings, the planning

for the second half of the Action Plan could be re-adjusted to meet the defined objectives more adequately, without departing essentially from the actions initially foreseen.

b) *Final assessment*: After the end of the four-year period, the implementation of the Action Plan should be assessed and on the basis of this assessment, a follow-up Action Plan be developed or the efforts of the Council of Europe with regard to the fight against TOC redirected.

2. LINES OF ACTION IN THE FIVE KEY AREAS

There are general actions that are applicable to all five key areas. These are:

- Raising awareness on TOC and the need for common, co-ordinated, specialised action;
- Enhancing trust among member States and the stakeholders to improve co-operation in the fight against TOC;
- Exchanging best practices, exchanging information;
- Improving co-ordination.

2.1. Enhancing International co-operation through networks

Improving international co-operation in fighting TOC needs an adequate legal framework and effective implementation and progress towards new models of closer co-operation. Ratification of the relevant conventions and a review of reservations is the first step. The second step lies in more effective and regular replies to requests from other States, which will help to overcome delays and obstacles in legal proceedings. Finally, in order to fight a complex phenomenon like TOC, international networking co-operation at law enforcement and judicial level is crucial.

The Council of Europe can specifically contribute in this area by providing networking activities for its member States in order to overcome difficulties resulting from different legal systems and to enhance mutual trust.

Action proposed

Based on the recommendations and actions of the White Paper regarding International Co-operation and Mutual Legal Assistance (MLA), the action proposed the following:

a) Direct action for implementation

Action 1: Improve and maintain the 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 experience on websites gathered within the Council of Europe and the EU on cross-border co-operation in criminal matters, was assessed very positively. The website should provide information, not only on MLA and international co-operation legal instruments but also the model request forms, practical information regarding how to send international requests and how to fill in the model request forms, fact sheets on investigative measures available in each country and the grounds for refusal applicable in each country, etc. Ideally this website should have part of its content accessible to all, and part of its content only accessible to an intranet network. In the

intranet part, the practitioners would find the contact details of the authorities competent for sending/receiving international requests, and whom to contact in case of questions.

Much of this is already in place on the PC-OC website, however, further development and a regular update is to be ensured. The ultimate goal should be to turn the PC-OC website into a “one-stop website” where the practitioner can find all the information needed for the effective use of international instruments on co-operation in criminal matters, including as regards non Council of Europe instruments. In order to facilitate direct transmission of MLA requests, as foreseen by the Second Additional Protocol to the MLA Convention, the PC-OC could also envisage establishing similar tools and information as is found in the EU ATLAS presented on the website of the European Judicial Network within the EU. However, such a goal is seen as too ambitious at present.

Action 2: Discuss the setting up and use of secure communications for international co-operation

Practice in international co-operation shows that in a high number of cases the process of co-operation is slowed by practical issues, such as not having a secured electronic communication channel. Overcoming the cumbersome and slow procedure of sending letters rogatory by diplomatic post and on paper, is one of the first measures to take in order to speed up the whole procedure in international co-operation and MLA. Such secured communications already operate within international police co-operation, but this is still not adequately developed when it comes to international judicial co-operation. There are several initiatives to promote e-extradition and e-transfer.

In practice many member States already use electronic means to communicate in the process of judicial international co-operation. However, the setting up of a secured communications network among the judicial authorities dealing with TOC would improve the efficiency and the security of the communications related to judicial co-operation among the Council of Europe member States when fighting these crimes.

The Council of Europe should organise a conference to discuss this proposal and its feasibility/availability within the Council of Europe landscape. This action is linked to action 1 under paragraph b) (Review provisions on international co-operation in Council of Europe conventions and relevant reservations/declarations to them/these conventions).

Action 3: 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.

- Establish contact points on TOC in every member State
- Expand TOC network

The fight against TOC requires more coordinated co-operation. Besides the improvement of the functioning of the present system of MLA and judicial co-operation - mainly based upon letters rogatory sent to central authorities of each member State -, the TOC experts consider two actions of outmost importance: 1) the establishment of contact points on TOC in each member State; and 2) the strengthening of the links between the existing judicial networks.

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. As such a network is established, the setting up of contact points on TOC – new contact points, or enhancing the competences of the already existing contact points to deal with TOC –, is to be achieved.

To this end, Council of Europe should organise a high-level meeting with the persons responsible for the most relevant judicial networks already in place in the European, Euroasian and Euro-Atlantic sphere in order to start the discussions on the possibility of linking the judicial networks or strengthening the existing co-operation agreements. Secondly, a workshop on the present co-operation among the existing judicial networks should be held, with the aim of identifying if co-operation in the form of Memorandum of Understanding (MoU), or appointing a contact person to act as a liaison point between the different judicial networks, would be feasible options. Thirdly, upon the results of those activities, an analysis of the legal framework for implementing the connection of the judicial networks should begin.

Moreover, political action would be required to gain the support of the different institutions and their involvement in the development of the “network of networks”.

Action 4: Establish a mechanism to address judicial co-operation problems

In the process of requesting international co-operation from other States, the existence of conventional rules and obligations are often not enough to obtain the co-operation requested. Practitioners claim that sometimes there is not even a response to their requests, or that such responses may be delayed for years. The PC-OC undertakes an important role in the monitoring of the relevant conventions and also the practical problems encountered in their implementation. The 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.

A first step to take is to establish rules, within the legal framework of judicial co-operation, to send the confirmation of receipt of the request received within a short time. Secondly, the duty to consult between the authorities involved in the international judicial co-operation process should be established when there are problems or delays in the execution. Modifying the relevant conventions accordingly should be considered. This action is linked to action 1 under paragraph b) of this key area (Review provisions on international co-operation in Council of Europe conventions and relevant reservations/declarations to them/these conventions).

b) Improving legal and practical standardisation

Action 1: Review provisions on international co-operation in Council of Europe 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 political action towards underlining the importance of signing and ratifying the MLA instruments, as well as eliminating outdated reservations is to be taken by the Council of Europe, in particular by involving its Parliamentary Assembly with the national delegations promoting the support for the signature/ratification of the conventions and the deletion of reservations that hinder effective international co-operation in criminal matters.

In particular, with regard to those member States that still do not admit e-requests in practice, the updating of the Council of Europe instruments to contemplate the transfer of judicial co-operation requests by electronic means is to be promoted. This action is linked to actions 2 (Discuss the setting-up and use of secure communications for international co-operation) and 4 (Establish a mechanism to address judicial co-operation problems) under paragraph a) of this key area.

Action 2: Promote the accession to the Council of Europe Conventions relevant for improving international co-operation with regard to TOC

An efficient fight against TOC not only requires improving MLA and international co-operation at pan-European level, but also international co-operation with third countries in other regions. The Americas are key areas with emerging threats in TOC, especially in drug trafficking, trafficking of human beings and smuggling. The same applies to Southwest Asia or West Africa, which has become a major point of transit for illegal drug transport to Europe, or the Asia-Pacific region in human trafficking.

To this end, the Council of Europe shall continue to convey the message that TOC threatens the security of people, the governance of States and the functioning of the global economy. These threats are not equally manifest to all governments and private players. Therefore, a renewed commitment to multilateral diplomacy is considered important to gain new members/parties to the Council of Europe Conventions on MLA and international co-operation.

Council of Europe should reinforce continued dialogue in multilateral fora with third countries and increase the political dialogue with these countries.

Action 3: 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 be invited

to develop a similar model request form and guidelines for the European Convention on Extradition.

Within the TOC Action Plan the development of these model forms should be followed and further supported. Once the model forms are approved, the action to be taken would be to support their dissemination among all member States and follow their use by practitioners.

Action 4: Draft Guidelines on selected topics

The provisions of the relevant conventions related to TOC by definition have to remain general. While they encourage, for example, the use of Special Investigation Techniques (SITs) or regulating witness protection programmes or applying rules for the recovery of assets, 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. 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.

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.

This action would require the organisation of a round-table of experts to select the topic for the guidelines, and then the setting up of a team of experts to develop and discuss these guidelines before submitting them for final approval to the PC-OC and CDPC. The next step would require the dissemination of these guidelines among the member States, together with information on best practices. Further political action with a view to following the guidelines within the national legislation would also be necessary.

Action 5: Develop Factsheets with country information

The experience gathered in improving international judicial co-operation within the Area of Freedom, Security and Justice of the European Union (hereafter EU), shows the usefulness of the factsheets (known as “fiches belges”) containing relevant information when requesting judicial co-operation from another EU member State. For the requesting authority, it is necessary to know what kind of measures can be requested and what regulations are in force before sending a request. 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.

This action is linked to the survey on the legal framework in the five key areas related to TOC and its implementation in practice. The factsheets should be drafted using data obtained from the

member States on their legal provisions in the five key areas of the White Paper. As this action is quite ambitious, it could start with the development of a limited set of factsheets on selected measures.

Action 6: Draft Council of Europe instruments/recommendations on areas where the standardisation of the legal framework seems to be necessary

Together, and in co-ordination with Council of Europe bodies, the need for new legal instruments on precise topics that may not be covered to date in a satisfactory way in the existing conventions and/or recommendations should be analysed. The areas to consider, due to their importance for the functioning of the MLA and other forms of international co-operation in TOC are, in particular: data retention, securing electronic evidence and remote computer searches and related data protection and human rights issues. With regard to data protection as there is already the Data Protection Convention of 28 January 1981 (ETS No. 108), the action should focus more on its implementation at national level, as well as the need for an update.

Action 7: Establishing a practitioners' forum on TOC on a regular basis for disseminating/sharing best practices examples

Sharing best practices in international co-operation and MLA related to TOC, would help to overcome the problems currently encountered. The organisation of a round-table of at least two days with practitioners active in the area of TOC and/or MLA would allow an exchange of experiences, the sharing of best practices and discussions on the perceived problems. A meeting of practitioners would also contribute to personal contact being established with counterparts of other member States and thus an increase in mutual trust. The meeting should be held preferably once a year.

Action 8: Continue the development of the repository on benchmark Court of Human Rights (ECtHR) 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.

The action now to be taken is to update and keep this list of cases updated and promote its dissemination among practitioners. To this end, the translation of this 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 document on MLA case law (identification and classification of cases, and brief summary of those cases).

Dissemination should be done not only through courses on capacity building and a round-table with the relevant practitioners, but also by posting the relevant lists on the Council of Europe website on transnational organised crime.

c) Capacity building + promoting contacts

1. Target group

Authorities competent for providing/requesting international co-operation and MLA related to TOC; judges, prosecutors, selected law enforcement officers dealing with TOC.

2. Topics

Practical application of the MLA and international co-operation instruments; best practices in international co-operation and MLA; use of model request forms; extradition proceedings; European Court of Human Rights (ECtHR) case law on international co-operation.

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. They also make up for the inadequacy of traditional methods of investigation which are easily countered by organised criminal groups. The White Paper highlights that, whilst detecting and prosecuting TOC through SIT's is indispensable, their use has to be counterbalanced with adequate measures that guarantee the protection of human rights and give the possibility to prevent abuse. It states that although there was wide usage of SIT's in Council of Europe member States, their practice was not adequately regulated, in particular in relation to electronic evidence.

Actions Proposed

Based on the recommendations and actions of the White Paper regarding SITs, the actions proposed are the following:

a) Direct actions

Within this key area no direct actions are initially proposed. This is explained by the fact that more information is needed on the use of SITs and the problems encountered in a transnational setting with regard to TOC. Once the proposed study under b) is carried out, it would be possible to decide on the need to take direct actions.

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 of the four priorities of their Actions for 2015-2016. This Committee has decided to review CM Recommendation Rec(2005)10 and the Cybercrime Convention (T-CY).

Action 1: Assessment on the functioning of the Second Additional Protocol on MLA

First of all, in connection with the Action Line 1, the information on the ratification of the Convention and the existing reservations should be checked. This action should not take much time/efforts, as the PC-OC already has most of the information.

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. This action has already been mentioned under the key area 1) "Enhancing International co-operation through networks". It is reiterated here for systematic reasons.

Action 2: Promote the practical standardisation of the use of SITs and the conditions for the 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).

In order to promote a more homogeneous practice in the use of SITs, identify the practical relevance of the SIT measures in MLA proceedings and identify best practices as well as practical shortcomings, the action proposed is: to organise a round-table to discuss the practical use of these measures and what specific problems are encountered in communication and execution of the requests, precisely in two of the three SITs (JITs and controlled deliveries).

Action 3: Compile a comprehensive study on the legal framework of selected SITs at domestic level and their practical implementation

Gather information on national regulation and practice on SITs, JITs, controlled delivery and remote searches of computers and transnational decryption orders. These SITs are not only of key importance for the gathering of evidence, but also for the recovery of assets (see key area 5). It is considered appropriate to start with the drafting of fact sheets on a limited number of SITs both in order to test the methodology and to be able to provide results within the timeframe established for the Action Plan. However, once the fact sheets on these three selected investigative measures are prepared and analysed and the problems in their implementation detected, the action could address other SITs, such as telecommunications interventions. In addition to the fact sheets, the gathering of information should be completed with interviews and a round-table if it appears necessary to compile accurate information.

On the basis of the information gathered through the fact sheets, the national implementation of conventions on the selected topics could be followed.

As part of this research a model questionnaire would need to be prepared and sent to member States asking for their co-operation in providing the relevant data on the regulation and use of SITs.

Once the fact sheets are reviewed and checked, they should be posted on a page/part of the website of Council of Europe specifically designed to provide MLA support.

Action 4: Assessment of the need for improving legal standardisation

With the information gathered on the use of the SITs in practice, the next step is to assess the need to amend the legal framework to provide for the more efficient use of SITS in both national and transnational settings, as well to improve the legal standardisation in its regulation and therefore overcome problems of admissibility of evidence.

c) Capacity building

1. Target group

Law enforcement agents, judges and prosecutors and central contact points for MLA.

2. Topics

Practice on MLA in SITs, good practices exchange, the regulation of remote computer searches, and the JIT's experience in TOC.

Organisation of at least two two-day workshops a year with officers, judges and prosecutors dealing with MLA and organised crime. Preferably the participants should be able to follow these activities in English and get actively involved, providing for a structure where every participant should present relevant data on the practice in his/her country and examples of good practices as well as gaps or problematic experiences.

2.3. Witness protection

In relation to the implementation of witness protection programmes, it is clear that witnesses play a key role in the fight against TOC. In light of the recent events in Europe regarding the migration crisis, the co-operation/use/development of witness protection in the fight of TOC has taken on a major importance. Criminal organisations are involved at present not only in the trafficking of human beings, but they are also becoming active in the smuggling of migrants. There are already a number of legal provisions designed to ensure that a witness can testify safely both during and after trial, however, the practical implementation requires improvement. The scope of application of witness protection programmes and the rights of the witnesses, who decide to adhere to such programmes, requires further analysis. It is important to understand the reasons for not adequately implementing the existing legal instruments in order to provide solutions at a pan-European level.

Actions proposed

Based on the recommendations and actions of the White Paper regarding witness protection, the actions proposed are the following:

a) Take direct actions to improve the practical implementation, when applicable

Political action should be taken on the co-ordination of international witness protection programmes with the allocation of appropriate budgets so that these programmes can really be implemented.

A high-level conference to raise awareness on the importance of ensuring the safety of certain witnesses should be organised in order to encourage them to co-operate in providing the evidence necessary to convict TOC criminals. What also should be taken into consideration at this conference is the role of civil society specialised in the field. For instance many NGOs are the first point of contact for victims in certain types of TOC (e.g. trafficking in human beings, smuggling of migrants, etc.)

The reaching of agreements on the “exchange” of protected witnesses among the member States should be promoted and co-operation with third countries should also be sought.

b) Improving legal and practical standardisation

Action 1: Review Recommendation Rec(2005)9 on the protection of witnesses and collaborators

This review should allow an assessment to be made concerning the extent to which the protection of relatives and other people close to the witness is adequately drafted and implemented in practice. Particular attention should be made to the trafficking in human beings and the smuggling of migrants and witnesses in cases of threat from criminal organisations.

To this end three workshops should be organised. The first workshop would gather information on the present situation and discuss solutions. Another workshop would present preliminary results and discuss them among experts. The third workshop would be organised in order to present the final results.

Action 2: Update the following Council of Europe books on witness protection

- *Protecting witnesses of serious crime - Training manual for law enforcement and judiciary (2006)*
- *Terrorism: Protection of witnesses and collaborators of justice (2006)*

As both books were published in 2006, all out-of-date information contained within them could be updated to provide an adequate tool for practitioners who need to decide on the protection of witnesses and organise, handle, or finance the programmes of witness protection. Experienced experts could be contacted to perform the task of updating these books. These experts could be the same ones that were involved in writing the original books, but this should not be strictly necessary (depending on the author’s rights agreements).

Action 3: Develop guidelines on protected witnesses’ rights and duties.

In order to overcome the reluctance/fear of the witness to comply with their obligation to testify in criminal proceedings and to give an incentive to the co-operation of co-defendants as crown or state witnesses in the fight against TOC, it is important that they know what their rights and guarantees are when entering into a witness protection programme. On the other side, with regard to co-defendants that decide to co-operate with the criminal justice system as witnesses, it is equally important that they commit to/respect their obligations. The needs of these two types of witnesses are to be addressed separately, even if the reluctance to co-operate in both cases stems from the same cause: the fear for their own security and the security of their relatives.

A group of experts should be appointed, preferably with recognised experience in the legal problems and with practical knowledge or experience in establishing guidelines on agreements with witnesses. Their findings/proposals should be examined by the CDPC.

Action 4: Undertake a research study on the effective use of witness protection programmes

An analysis should be made concerning the legal possibility in both domestic and international law for the reallocation of protected witnesses to foreign countries and the use of pre-trial testimonies as evidence. The use of video-conferences for hearing protected witnesses should also be considered.

The execution of the previous Action 3 (Develop guidelines on protected witnesses' rights and duties) and Action 4 should be co-ordinated, as the output of the research study could be used for developing the guidelines on the rights of protected witnesses, similarly, the information gathered by the experts on protection of witness rights, could be included in the research study.

A group of experts should be set up to carry out the research study based on empirical data on the number of witness reallocated to foreign countries and the problems encountered in the execution of such cross-border witness programmes.

A conference/round-table should be organised to present the results and raise awareness on the need for improvement and more international co-operation in this area.

c) Capacity building

1. Target group

Judges, public prosecutors and law enforcement agents, witness protection units.

2. Topics

- Efficient implementation of witness protection programmes. The special needs of protected witness/victims and protected witness/collaborators and their relatives.
- Second Additional Protocol to the Convention MLA and the use of Article 23.

2.4. Administrative synergies and co-operation with the private sector

Actions Proposed

Based on the recommendations and actions of the White Paper regarding synergies with administrative agencies and the private sector, the actions proposed are the following:

a) Direct actions to improve practical implementation

The area of administrative synergies and co-operation with the private sector for law enforcement purposes is a new field of interest and to a large extent underdeveloped and invisible, even for the stakeholders themselves. It is also important that both administrative

authorities and private parties perceive their own advantages in the co-operation frames. For that reason, a high-level conference should be organised on public-private partnerships to raise awareness, build trust and increase expertise. Judicial authorities, administrative supervisors and selected private parties should be invited. Substantive areas of law enforcement should be flagged as having priority.

In some substantive areas of law enforcement liaison persons could be appointed between the private partners, administrative supervisors and judicial authorities with the aim of enhancing the information flow and sharing good practices.

Political action should be taken in order to elaborate programmes of technical assistance and training to specific target groups in the selected substantive fields of interest.

b) Promote standardisation on a legal and practice level

Action 1: Draft a legal instrument (recommendation or convention) on data retention obligations

Data sources have completely changed over the last few decades. Service providers of all types (electronic communications, credit cards, financial institutions, transport, etc.) have at their disposal mega-data sets that give insight into personal attitudes and conduct. The digital traffic data and context data can be used as an important enforcement tool to get a full image of the person (digital identity and digital personality). These data can be useful as a reactive enforcement tool, to discover the judicial truth, as a real time enforcement tool, to monitor conduct, and in some cases even as an anticipative, prospective ante-delictum enforcement tool. Through data-mining it is possible to make concrete risk-profiles.

These data can only be accessed for enforcement purposes if they are stored and retained by corporate bodies for a period of time. As data retention and access to these data interfere with data protection and privacy, there are clear rule of law and human rights limits. The limits concern time-limits of retention, accessing authorities, purpose, use, etc. Under debate is also if and to which extent data access to retained data by corporate bodies are coercive measures which would need a priori approval by a judicial authority.

Data retention obligations for service providers have been developed by the European Union, but the data retention Directive 2006/24/EC was annulled by the EU Court of Justice because of the disproportionality of the obligations (joined cases C-293/12 & C-594/12). Since then, there has been a real panoply of obligations in EU member States and Council of Europe member States. Some States have set very limited or no obligations, while others have gone far beyond the obligations of the EU directive and kept them in place after the annulment.

As it stands there is no common playing field on the topic, neither in the EU, nor in Council of Europe member States. Some member States have no data retention obligations at all. Others have data retention obligations that go beyond the period of time annulled by the EU Court of Justice.

A study group of experts should review the state of play (de lege lata) in Council of Europe member States and analyse de lege ferenda what would be essential for a common playing field concerning retention, access and use, taking into account privacy rights and purpose limitations:

- The type of data that should be retained;
- The circle of service providers to which it should apply;
- The time-limits of the data retention;
- The type of authorities that can access the data;
- The conditions under which these authorities can access the data;
- The purposes for which they can access the data;
- The need for judicial authorisation for access and use of the data.

Action 2: Research study on the use of new technologies for prevention and law enforcement purposes in the area of TOC with the aim of developing/elaborating private-public partnership agreements

The mix between globalisation and digitalisation and the rapid expansion of new technologies (as for instance BITCOIN and new forms of crypto-currencies and digital money, Darkweb, etc.) that steer the supply chain and processing makes it interesting for private and public parties to set up a private-public enforcement agreement. Examples of agreements, that create a chain of responsibility, are for instance the UNODC-World Customs Organization Container Control Programme, the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and other related offences and the Anti-Contraband and Anti-Counterfeit Agreement between tobacco manufactures and the Anti-Fraud Unit of the EU (OLAF).

In these agreements important obligations are laid down related to the compliance regime, the certification of products and services, tracking and tracing and seizure. As TOC is investing in new markets and new technologies it is very important to identify trustworthy private partners that are interested and willing to co-operate in private-public agreements to reduce TOC. It should also be made very clear that private partners can profit from these agreements, both in terms of economic advantage and in terms of governance, legitimacy and brand outreach. Experts from the study group could carry out site visits to verify the existing agreements in order to identify good practices.

Action 3: Promote inter-agency co-operation between law enforcement authorities

Law enforcement authorities (LEA), Financial intelligence units (FIUs) and Asset recovery offices (AROs) all have co-operation agreements with their sister organisations transnationally for example the EGMONT group, the CARIN network etc. This inter-agency co-operation is however clustered around each specialised enforcement field. There is a lack of inter-agency co-operation along the enforcement chain. In many European States the inter-agency co-operation between judicial authorities and FIUs and AROs is weak. The inter-agency co-operation should not only be limited to the exchange of data and information, but should also include the exchange of expertise, common training, participation in joint investigation teams, etc.

Experts should identify good practices in this sense through site visits. In a round-table with experts the relevant elements of the promotion campaign and eventual guidelines could be developed.

Action 4: Study on the transparency of legal persons

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.

The Council of Europe could 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. The OECD practice in the field of anti-corruption policies should be taken on board. Other studies on the transparency of legal persons are currently underway and this Action Plan should take them into consideration and avoid any overlaps when implementing this action.

c) Capacity building and promoting contacts

1. Target group

- AP's and competent authorities (not States); Service providers ISP/telecommunications/banking/credit cards;
- Specialised administrative agencies (dealing for instance with conflict of interests, financing of political parties and asset declarations);
- Police, administrative investigative bodies, judicial authorities;
- Tax authorities;
- FIU central authorities;
- ARO'S (Asset recovery);
- Specific private partners.

2. Topics

- Private-public co-operation with the aim of prevention and repression of TOC;
- Data retention obligations for service providers;
- Due diligence and recordkeeping obligations for designated private parties;
- Use of new technologies in enforcement chain;
- Inter-agency co-operation between LEA's, FIUs and ARO's;
- Responsibility of legal persons.

2.5. Recovery of assets

Actions Proposed

Based on the recommendations and actions of the White Paper regarding recovery of assets, the actions proposed are the following:

a) Take direct actions to improve practical implementation

In this field, there are several direct actions that can contribute to the better implementation and functioning of the existing instruments. Firstly, all the country information on recovery of assets, as developed by EJM and Eurojust in relation to EU countries should be extended to all Council of Europe member States and made available in a digital environment. Secondly, it would be of great

utility if competent authorities could feed and have access to a restricted inter-active data-base in which they can share information about transnational cases of asset recovery and this on a real-time basis. Today too often national authorities of different member States are working on assets recovery of the same case or related cases without being aware of it. Thirdly, asset recovery is a highly technical and specialised area. There is a substantial need for technical assistance and training in this area. The launch of training programmes, the facilitation of the exchange of best practices as regards civil asset forfeiture, extended confiscation and third party confiscation would all be of great usefulness for the practitioners in the field.

b) Promote standardisation on a legal and practical level

Action 1: 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)). The final outcome of the questionnaire has not yet been published. It is clear however 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.

Following this assessment, the Council of Europe could take action on some of the gaps in implementation:

- Ensuring the exchange of best practices as regards the management of frozen assets. The management of frozen or seized assets is a difficult matter, because of interest of third parties, the type of the assets and the unpredictable time-setting in the await of final confiscation. Best practices should be identified and exchanged;
- Preparing updated guidelines for the national asset management offices, taking into account the reported outcome of the UNODC expert group meeting on the management, use and disposal of frozen, seized and confiscated assets (Reggio Calabria, Italy, 2014);
- Reviewing and considering a model agreement for asset sharing to be used between Council of Europe member States;
- Enabling existing networks of practitioners dealing with the use of confiscated assets for social purposes and/or compensation of victims, and prepare update criteria to be taken into account for the decision on asset disposal;
- Establishing or designating national authorities in charge of taking a timely decision ensuring the best use of confiscated assets, according to the criteria identified by the Council of Europe;
- Encouraging agreements and memoranda of understanding among States as regards asset sharing, going beyond / using a case-by-case approach.

In order to assess if new legal instruments are needed at Council of Europe level, a study group should be established with the aim of deciding if new investigative techniques for freezing and seizing assets, new forms of confiscation (non-conviction based) and new technologies would

require a new convention. It should also examine the feasibility of a Council of Europe agreement of asset sharing.

Action 2: Ensuring systematic and effective financial investigations in all cases potentially generating crime proceeds

Judicial financial investigations remain in many Council of Europe member States an underdeveloped track, both concerning competence and capacity. These financial investigations are of utmost importance in a pro-active setting to prevent the commission of transnational crimes and in a re-active setting to gather evidence and to trace the existence and whereabouts of the criminal assets in order to be able to freeze and seize them in due time.

This field is of great importance, but also of great complexity because of the multiplicity of authorities and purposes.

Member States of the Council of Europe should be made aware of the importance of having in place effective financial investigations (powers and capacity). They include, but are not limited to, the FIUs, as they go beyond money laundering issues. The raising of awareness can be done through a set of actions such as:

- Preparing a handbook indicating which authorities are involved in investigations 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 (including proactive approach to proceeds of crime);
- Encouraging States to develop a proactive approach, launching financial investigations as regards every profit-driven crime, even before the initiation of a criminal investigation;
- Enhancing and streamlining the domestic legal framework on multidisciplinary financial investigations, in order to ensure the exchange of information between judicial and administrative authorities.

Action 3: Review legislation on access to databases

In several Council of Europe member States competent authorities have limited access to relevant databases. In some of them some databases are lacking and/or underdeveloped. The lack of central bank registers and public company registers can of course hamper and delay co-operation. The Council of Europe should set up an expert group to verify if and to what extent FIUs, ARO's, administrative supervisory authorities, law enforcement authorities and judicial authorities have access to all relevant databases, including the ones for forensic accounting, registers of companies, etc. These databases include private ones with a public duty and public ones that might have restricted use because of purpose limitations. In any case, specialised law enforcement authorities dealing with TOC should have access to financial intelligence and to relevant databases (land registers, property registers, motor registrations, tax registries, bank registers, financial information, etc.) to be able to investigate promptly and efficiently.

Action 4: Facilitate financial investigations in new technologies related to criminal assets

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. An example can be taken here from the FATF/Moneyval “Guidance for a risk-based approach to virtual currencies”. It is also vital that the law enforcement community has the expertise and tools to trace and track the assets in a digital world. New digital investigation techniques such as remote digital searches and transnational decryption orders should be developed. These techniques have also been included in key area 2, related to the gathering of evidence by SITs. A pilot group of practitioners could be set up to share the knowledge. A group of legal experts should study the possibilities under the rule of law and applicable human rights standards.

Action 5: Strengthen international co-operation on non-traditional forms of confiscations

Traditionally MLA has been limited to traditional forms of confiscations, thus linked to criminal convictions. However, 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. Some Council of Europe member States have extended practice in this field. The Council of Europe could undertake the following actions in this field:

- Setting up of a database with the most relevant case law of the European Court of Human Rights in this field;
- Preparing guidelines concerning different forms of non-conviction-based confiscation provided by international instruments and national laws.

Raising awareness in this field is however not enough as many legal regimes of member States do not provide for these new tools of confiscation. A pilot study could be set up to find out to what extent Council of Europe member States are willing to introduce in their legislation:

- Some forms of non-conviction based confiscation to be applied at least to organised crime cases;
- The execution of MLA non-conviction-based confiscation order requests, provided that they are in conformity with the case law of the European Court of Human Rights, even if they do not exist in the domestic law of the requested State.

Action 6: Enhance the position of victims in the asset recovery procedures

Traditionally the procedure of freezing, seizure and confiscation of assets is a topic for interstate co-operation. In the last decade several Council of Europe member States have strengthened the position of victims in the procedure. They can contribute by participating in the tracing and freezing of the money. They have also the right to be reimbursed for their damages out of the recovered assets. A social-ethical debate is also going on concerning societal damage and reimbursement to organisations that are active in rebuilding societal values and goods in areas that have suffered strongly from organised crime. 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. As study group of experts should be established by the Council of Europe to develop proposals for future legislation in this area.

c) Capacity building

1. Target group

- Specialised administrative agencies;
- Police, judicial authorities;
- Tax authorities;
- FIU central authorities;
- ARO'S (Asset recovery).

2. Topics

- Enhancing implementation of legislation and improving management of assets;
- Strengthening of specialised financial investigation;
- Improving access to databases for all competent authorities;
- Assessment of new investigative techniques related to new technologies;
- Strengthening of the position of victim in asset recovery procedures.