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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

WHITE PAPER ON TRANSNATIONAL ORGANISED CRIME

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Executive Summary

Transnational organised crime (hereinafter TOC) is one of the major threats to global security, and can cause significant social and economic damage. Prevention efforts need to be increased in order to contain this phenomenon and avoid its expansion. TOC benefits from certain legal loopholes and law enforcement agencies have difficulty in reacting quickly to these criminal businesses which use very sophisticated methods to conceal their activities and the proceeds of their crimes, and take advantage of globalisation and the use of information and communication technologies (hereinafter ICTs).

The threat of TOC is becoming an increasingly important issue in many Council of Europe (hereinafter CoE) member states, and thus for the European Committee on Crime Problems (hereinafter CDPC[1]). The setting up of an Ad hoc Drafting Group on Transnational Organised Crime (hereinafter PC-GR-COT) was approved in 2012 and the terms of reference of the group included the drafting of a White Paper on TOC covering possible actions to be undertaken by the CoE in this field.

In this White Paper special attention has been given to identifying in which areas the CoE could contribute to fighting TOC, what actions could be carried out better or more efficiently by the CoE and what problems have not been addressed specifically by other international or supranational organisations or should be co-ordinated with actions of the CoE. Simply stating that the CoE should undertake initiatives in the field of preventing and combating TOC will neither help to address the problem nor find the needed synergies.

To this end, rather than discussing the conceptual issues that are well known with regard to organised crime and its transnational implications, the Group focused on the priorities with regard to efficiency in combating TOC through a criminal response. The White Paper does not aim to set out priorities from an operational point of view nor to undertake a threat or risk assessment of TOC; it aims to identify specific areas where action should be taken to improve the criminal response against TOC. In defining these possible areas of actions, the reports prepared by UNODC[2], EUROPOL[3], and the European Parliament of September 2013[4] and national expertise were considered. The main outcomes are:

[1] Set up in 1958, the European Committee on Crime Problems (CDPC) was entrusted by the Committee of Ministers with the responsibility for overseeing and coordinating the Council of Europe's activities in the field of crime prevention and crime control.

[2] UNODC The Globalization of Crime. A Transnational Organized Crime Threat Assessment" of 2010, available at http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf (accessed 27 December 2013).

[3] Europol SOCTA 2013. EU Serious and Organised Crime Threat Assessment, available at https://www.europol.europa.eu/content/eu-serious-and-organised-crime-threat-assessment-socta (accessed June 2013).

[4] European Parliament Special Committee's Report on organised crime, corruption and money laundering: recommendations on actions and initiatives to be taken, presented by Salvatore Iacolino.

1) There are enough legal structures in place. The main problem does not appear to be a lack of legal instruments, but rather their implementation in practice.

2) The identification of new trends in TOC helps to set priorities with regard to certain types of crime and to define operational policies. However, when enhancing the efficiency of the criminal response to TOC, there are common deficiencies in the systems of co-operation or the criminal justice systems that should be addressed at a legal as well as a practical level.

3) There is a need to identify why there is no adequate application of the existing instruments, in particular, international co-operation at police and judicial level. There are different monitoring bodies that analyse the implementation of the convention in question. A common approach, bringing together all the expertise gathered by CoE monitoring bodies, would help to identify the problems therefore allowing common action to be taken to overcome them.

4) As the Group was aware of the impossibility to carry out an analysis of all the existing problems in fighting TOC, it decided to focus on those that are generally highlighted as essential for an adequate criminal response to TOC. The members of the Group confirmed the assessment of broader studies and brought their own very valuable practical experience to the table.

5) In selecting the most relevant areas where the CoE could really play an essential role on a pan-European landscape, this White Paper concentrates on the criminal response. This does not mean that prevention was not considered as a key factor, but in view of the information gathered, the Group decided to focus on improving the criminal response in a transnational setting (detection, investigation, prosecution, evidence and recovery of assets).

6) Although the Group identified numerous subjects in the field of TOC that could have been covered in its work, only five topics have been developed in this White Paper in order to be able to make precise recommendations for a future action plan: a) problems related to police and judicial international co-operation; b) the use of special investigative techniques; c) the implementation of the witness protection programmes and collaboration of state witness; d) the need for increasing co-operation with administrative agencies as well as with the private sector; e) the essential need to target the proceeds of crime in order to discourage this type of criminality and to really improve the effectiveness of the fight against criminal organisations that operate in a transnational setting.

7) The White Paper includes a list of recommendations based on the analysis made of the existing problems within the five key areas for improving the criminal response to TOC. It is not within the competence of this White Paper to define the precise actions that the CoE should carry out and which area should be addressed as a priority. All in all, the White Paper does not aim to provide a concrete plan with specific activities to be carried out by the CoE but rather to propose certain actions.

The involvement of the CoE in developing a general strategy in the fight against TOC, as well as undertaking political and practical action in precise areas, would definitely contribute to an increased effectiveness of the fight against TOC on the CoE landscape. Carrying out political action to raise awareness on the need for a collective fight against TOC, ensuring the updating and implementation of the existing conventions and working in specialised networks to share intelligence, are tasks that the CoE is in the best position to undertake. Furthermore, if there is no doubt that the criminal response is one of the most important tools in the fight against TOC, the lack of comprehensive practical information hampers the improvement of the response of the criminal justice systems. Important information on where the criminal response is failing to deal adequately with the TOC phenomenon is missing. To face this challenge, we have to know beforehand where the problems lie: how are special investigative techniques being used? How is remote computer access used? What is the reality of cross-border witness reallocation? How much do data protection laws hinder information sharing? Is the lack of mutual trust a real problem among CoE member states? These are some of the topics that need to be analysed at a practical level, in order to define which measures should be applied to improve the efficiency of fighting TOC.

CoE monitoring bodies with their long-standing experience and high specialisation in the different areas related to TOC are capable of addressing the many-facetted issues related to the fight against TOC in a pan-European context, but a common approach is advisable with efforts being joined in the fight against TOC. A specialised approach is needed, but there is the risk that the fragmented results may not be used for a common assessment and action to fight TOC.

What follows is built on the solid foundation of the CoE *acquis.*

1. Introduction

1.1 The Council of Europe and Transnational Organised Crime

Transnational Organised Crime (TOC) poses a direct threat to the internal security of all CoE member states and contributes significantly to undermining the rule of law and compromising the integrity of democratic institutions. The Committee of Ministers has identified thus criminal issue as one of the top priorities in the work programme of the CoE for the years to come. Co-ordination of all actors is essential to efficiently fight TOC.

The first problem when addressing the issue of TOC is to agree on what is meant by organised crime and transnational organised crime[5]. For the purpose of the present document ("White Paper") we have adopted the definition of an "organised crime group" contained in CoE Recommendation Rec(2001)11 concerning guiding principles on the fight against organised crime, which is the same as the one contained in the UN Convention against Transnational Organised Crime (UNTOC).[6] As for the notion of "transnational", we use the definition of the UNTOC.[7]

TOC poses a direct threat to the internal security of all Council of Europe (CoE) member states. By its very nature, this kind of crime, mostly transnational in character, typically cannot be efficiently suppressed by each state on its own. Instead it requires a targeted and comprehensive approach, including the swift application of international co-operation mechanisms.

In response to the threat of TOC, European states have co-operated within the framework of various international and supranational fora. Many of these frameworks, e.g. the UNODC, Interpol and the European Union (EU) institutions, have already proven their worth. However, despite the many instruments adopted in relation to TOC, a truly pan-European

[5] There are numerous definitions of "transnational organised crime" going from those that identify it with only mafia-type criminal organisations, to those that consider it appropriate in relation to any kind of criminal structure where more than three persons act in a co-ordinated way. The same occurs with the meaning of transnational.

[6] "Organised crime group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes, in order to obtain, directly or indirectly, a financial or material benefit".

[7] "(a) It is committed in more than one State;
(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
(c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
(d) It is committed in one State but has substantial effects in another State".

framework and a common strategic approach by all member states tackling transnational and organised crime is arguably still lacking.

TOC contributes significantly to undermining the rule of law and compromising the integrity of democratic institutions. Taking into consideration the sophisticated tools and the violence used by the criminal organisations to achieve their goals, TOC poses a serious threat to human beings as well as to the rule of law, and consequently to the values protected by the European Convention on Human Rights and Fundamental Freedoms and, in general, by the Council of Europe. The negative impact on national economies cannot be overstated. Significant amounts of money are lost through tax evasion, money laundering and illegal economic markets, not to mention the indirect economic harm caused by organised crime as a criminal activity which can undermine the credibility and competitiveness of a state's financial and commercial sectors.

At the same time, criminal organisations and individual criminals, from both within and outside Europe, have been making a steady progression demonstrating their ability to forge alliances and operate across borders in all parts of Europe, thus further complicating the detection work and subsequent criminal prosecution in individual member states.

Since 1958 the CoE Committee dealing with Crime Problems (CDPC) has contributed to the development of international criminal law, drafting a number of important legal instruments in the fight against transnational and organised crime. Moreover, criminal law issues have recently been identified by the Committee of Ministers as one of the top priorities in the work programme of the CoE for the years to come.[8]

Given the fact that some other international and supranational fora are already engaged in combating TOC, it could be argued that there is no need for the CoE to engage specifically in this problem. However, this argument is unfounded: the fight against TOC is so complex that it needs to summon all possible efforts in combating it from all possible perspectives and call upon those actors that are the best placed with regard to the needs identified. The CoE, and in particular the CDPC, is uniquely placed and well-established in the field of criminal law co-operation and can lead actions which contribute and complement the activities of the aforementioned fora, acting as a bridge-builder, creating synergies with strategic partners and promoting co-operation across Europe. The CoE activities should be compatible and co-ordinated with those already developed and approved by the United Nations and the European Union, to cite only two of the most important organisations which are very actively involved in the fight against TOC.

In this field, as in many others, the co-ordination and the distribution of tasks is essential in order to avoid overlapping components and activities that would render the end result inefficient. The lack of a comprehensive common strategy to prevent and combat TOC is manifested in the use of different approaches in determining the threats and risks of TOC and in the identification of the possible "enemies" and the assessment of their capacities which diminishes the effectiveness in fighting them. TOC is moving much faster than the

[8] The programme line on **anti-money laundering and the financing of terrorism measures (MONEYVAL)**, Terrorism, Cybercrime, Trafficking in Human Beings (GRETA), counterfeiting of Medical Products (MEDICRIME) develops an integrated approach and response to major threats to the rule of law building on the significant set of standards and follow-up mechanisms that it has developed over the years. In these areas, the CoE will pursue its active partnerships with other international organisations including UN, UNODC, OECD, FATF, EU, OSCE and OAS (…).

states are able to react. This calls for a very efficient approach to be taken to combating TOC with the setting of priorities which require the adoption of common standards and shared methods and practices to identify and fight TOC[9].

CoE monitoring bodies with their long-standing experience and high specialisation in the different areas related to TOC are capable of addressing the many-facetted issues related to the fight against TOC in a pan-European context. These monitoring bodies not only contribute actively to the effective use and implementation of the CoE Conventions related to the different type of TOC crimes they cover, but they also prepare interesting reports that identify the flaws in practice and the need for future amendments to legal instruments and organise numerous events to collect information and raise awareness of the importance of compliance with the convention in question. However, it appears that all the expertise of these specialised committees could be further co-ordinated to define a common approach to TOC.

1.2 The White Paper process

BOX 2:

The Committee of Ministers approved on 21 November 2012 the setting up of an Ad hoc Drafting Group on Transnational Organised Crime (PC-GR-COT) to identify trends, problems, and possible actions on TOC. This should result in the preparation of a White Paper.

The threat of TOC is becoming an increasingly important issue in many CoE member states, and thus for the CDPC, with concerns on a number of different levels.

A Roadmap setting out the work of the CDPC in the field of transnational organised crime was submitted to the CDPC in December 2011 where the decision was taken to prepare draft terms of reference for a restricted drafting group of experts on transnational organised crime for approval by the CDPC and subsequently submission to the Committee of Ministers.

In March 2012, the Bureau of the CDPC approved the above-mentioned draft terms of reference and instructed the Secretariat both to send them to all CDPC delegations for approval by written procedure and to submit them to the Committee of Ministers for adoption.

After lengthy negotiations, the terms of reference of the Ad hoc Drafting Group on Transnational Organised Crime (PC-GR-COT) were finally adopted by the Committee of Ministers on 21 November 2012.

[9] See for example, Europol's strategic report Serious and Organised Crime Threat Assessment (SOCTA) for 2013:

1. - identify criminal trends and activities related to serious organised crime,
2. - identify criminal organisations or groups which are active in this area and their members too,
3. - establish priorities in relation to activities aimed to prevent and combat TOC,
4. - better dispose of the resources designated for this purpose,
5. -raise the public interest for this problem by using the all types of media and educational programs.

a) Terms of Reference

Following the terms of reference, the principal aims of the Ad hoc Drafting Group were:

- the identification of relevant and emerging transnational organised crime issues which require a criminal law response;
- the development, in close co-ordination with strategic partners, of pan-European strategies, and where possible, common policies on preventing and combating transnational organised crime;
- the collection, assessment and exchange of best practices in the prevention of, and fight against, transnational organised crime from all Council of Europe member States; and
- the preparation of a White Paper for consideration by the Committee of Ministers, after validation by the European Committee on Crime Problems (CDPC), on selected trends and developments in transnational organised crime in the Council of Europe member States which may be considered as priority areas, focusing on developing an integrated strategic approach to combating transnational organised crime and identifying common responses to major threats to the rule of law and security of citizens.

In carrying out its tasks, the PC-GR-COT would consider the previous and current work carried out in this field by the relevant international and supranational organisations, notably the European Union and the previous work of the Council of Europe in this area.

Once trends and developments in transnational organised crime in the CoE member states were identified, the expected result was the preparation of a White Paper on selected key areas which may be considered as priority areas, focusing on identifying possible gaps in criminal law co-operation and providing recommendations as to possible action by the CoE in this regard. The terms of reference required the PC-GR-COT to have completed its work by December 2013.

b) Composition of the Committee

The Ad hoc Drafting Group was composed of 12 representatives of member states of the highest possible rank in the field of transnational organised crime, criminal law and criminology, nominated by the CDPC, and one scientific expert, Mr Michael Levi (United Kingdom), with recognised expertise in the same field, appointed by the Secretary General. The Group was chaired by Ms Lorena Bachmaier Winter (Spain) who was elected chairperson at the first meeting.

The Group consisted of representatives from Azerbaijan, Bosnia and Herzegovina, Croatia, Czech Republic, Denmark, Germany, Greece, Italy, Russian Federation, Serbia, Spain and Turkey. All of them proved to have wide experience in the field of transnational organised crime, at an operational level (as public prosecutors, members of specialised law enforcement units), at academic level or at policy-making level.

Representatives from the following CoE monitoring bodies (Committee of Experts on the Evaluation of Anti-Money Laundering and the Financing of Terrorism (MONEYVAL)[10],

[10] **MONEYVAL** is an intergovernmental committee made of a group of experts with the aim of ensuring that the CoE member states have in place effective systems to counter money laundering and terrorist financing and comply with the relevant international standards in these fields. Available at: www.coe.int/moneyval

Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC)[11], Committee of Experts on Terrorism (CODEXTER)[12], Convention Committee on Cybercrime (T-CY)[13], Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (Pompidou Group)[14], Group of Experts on Action against Trafficking in Human Beings (GRETA)[15], Group of States against Corruption (GRECO)[16]) as well as participants from Mexico, the European Union and I.C.P.O. INTERPOL took part in the meetings at their own expense.

The participation of, for the most part, the chairpersons of the CoE monitoring bodies as well as of the main international actors in the field of transnational organised crime revealed a confidence that the CoE, because of its normative foundation and its wealth of experience, was well placed to take on this timely initiative. Moreover it generated a vast repertoire of suggestions on the content of the White Paper itself.

c) Working methods

The first meeting of the Ad hoc Drafting Group was held in June 2013 and began with a *tour de table* of the main topics in each representative's country that should be dealt with by the Ad hoc Drafting Group and which the representatives of the Group had already submitted in written to the Secretariat beforehand. The representatives of the different monitoring bodies of the CoE presented the main activities carried out in their monitoring work focusing on the transnational perspective of organised crime. Their input into the Group's work was very much appreciated and considered essential in the identification of possible areas to be covered in the White Paper. They also welcomed the added value of meeting together and working in such multidisciplinary manner.

The Ad hoc Drafting Group considered some good examples of judicial co-operation in criminal matters such as the European Judicial Network (hereinafter EJN) as well as the Ibero-American Network for International Legal Cooperation (hereinafter Iber-RED), which is a co-operation tool, for both civil and criminal matters, at the disposal of judicial operators

[11] The **PC-OC** monitors all CoE instruments in the field of international co-operation in criminal matters. The committee develops (negotiates) new binding and non-binding instruments. The monitoring further encompasses the development of practical tools based upon problems related to the application of the instruments or their interpretation. Available at: www.coe.int/tcj

[12] **CODEXTER** is an intergovernmental committee that coordinates the implementation of activities in priority areas within the action against terrorism and makes a follow up of the implementation of the CoE instruments against terrorism. Available at: www.coe.int/terrorism

[13] The **T-CY** represents the State Parties to the Budapest Convention that monitors the effective implementation of the Convention and seeks to exchange information on significant legal, policy or technological developments pertaining to cybercrime and the collection of evidence in electronic form. Available at: www.coe.int/tcy

[14] The **Pompidou Group's** mission is to contribute to the development of multidisciplinary, effective and evidence-based drug policies in the member states, linking practice, science and policy focusing on the implementation of drug programmes. Available at: www.coe.int/pompidou

[15] **GRETA** is responsible for monitoring implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties. Available at: www.coe.int/trafficking

[16] **GRECO** is entrusted with the monitoring of compliance with the CoE instruments and standards against Corruption. Available at: www.coe.int/greco

from 22 Ibero-American countries (including Andorra, Portugal and Spain) and the Supreme Court of Puerto Rico.

In the light of the discussions, the PC-GR-COT identified and agreed upon the different areas to be further developed in the White Paper, in particular mutual legal assistance and international co-operation in criminal matters; issues regarding the confiscation of proceeds of TOC, as well as shortcomings in witness protection programmes; [the improvement of] special investigative measures as well as the synergies between the administrative authorities and law enforcement agencies.

The Ad hoc Drafting Group held its 2nd meeting in December 2013, where the preliminary draft White Paper was presented. Each topic was examined and commented upon by the representatives of member states, taking into consideration the comments received by the CDPC during its 65th Plenary meeting held from 2-5 December 2013, before transmission of the White Paper to the Committee of Ministers for adoption.

1.3 Legislative and policy activities related to organised crime as a transnational phenomenon

BOX 3:

The drafting of new conventions or legal instruments on TOC should no longer be seen as a priority. Actions should focus on ratification, implementation and effectiveness of the existing legal instruments.

The most severe forms of organised crime have a transnational dimension, either because they involve acts committed in different countries or perpetrators enjoying foreign connections and support, or because they involve foreign countries in the money laundering process, through investments in foreign companies or real estate or through the use of fiscal havens to hide the proceeds of the crime. In order to address the problem of organised crime, [and crimes related to it,] and therefore the problems arising from its essentially transnational dimension, many instruments at international and European level have already been adopted including, *inter alia*, the UN, CoE and EU documents mentioned in Annex II[17].

Looking at the legal instruments at international level, it is plain to see that this constitutes a constantly evolving arena of policy and action, but that policy alone may not always lead to changes in action 'on the ground'. It appears that the CoE should no longer see the drafting of new conventions or legal instruments on the phenomenon of TOC as a priority. Despite the impressive number of legal instruments related to TOC, there are still problematic issues to be addressed as regards to ratification, implementation, and effectiveness of the legal instruments. The PC-GR-COT Group has highlighted several areas for this White Paper to address, which we will treat in the following chapters not in order of importance but in order

[17] The full list of international instruments pertaining to the fight against transnational organised crime can be found in Annex I of this paper.

of their role in the criminal process, from the identification and detection of crime to recovery of the proceeds of crime.

2. Features, Trends and Developments in Transnational Organised Crime (TOC)

BOX 4:

Three fundamental factors have influenced in the expansion of TOC: the mobility of trafficked goods and persons, institutional and political developments and first and foremost technological developments. Reliable figures and criminal statistics are needed to deal with the problem efficiently. Identifying new trends is interesting, and it may determine the need for action. Traditional key areas such as international drug trafficking, trafficking in exploitation of person and financial crime remain the principal causes for concern.

2.1 Difficulties in identifying trends in TOC

The notion of a trend in organised crime contains two elements which are separable in principle but are often mixed up in practice. The first is the evolution of how criminals organise themselves and relate to each other – the 'organised' bit. The second is the evolution of what sorts of crimes are being committed, to what extent, and with what social effects – the 'crime' and 'harm' bits.

When describing apparent shifts in activities or forms of criminal association as *changes* or trends in organised crime, the difficult task is to allow for changes in our focus, in technology and in human sources when recognising, tracking and evaluating what is altering. Sometimes things may seem worse only because we know more about what was happening in the past, rather than because they have actually become worse. Our awareness of trends is only as good as the underpinning data, derived usually from policing intelligence but also sometimes from academic and civil society research. Therefore variations in intelligence efforts between CoE member states *and* in the penetrability of their targets are a constraint that we should take into account.

Organised crime in Europe, is normally understood as involving both predatory crimes (e.g. art and antiquities theft, trafficking in Human Beings, extortion, fraud, robbery and other violence) and consensual or transit crimes (e.g. some forms of corruption, migrants, drugs and money laundering).

Data is poor about most of these offences, which have large 'dark figures' of unreported and undetected crimes. Despite the absence of precise figures covering the number, impact and costs of organised crime within the pan-European area, there is general recognition that, especially for illicit trade offences and other offences which are consensual or where the actual victim is not easy to determine, recorded crime or prosecution rates are more an index of police activity than a measure of the 'objective' scope and scale of any crime problem. To identify trends relating to TOC we must try to combine using official sources, academic sources and investigative journalism/other civil society sources.

The Group considers the gathering of reliable and homogeneous data on TOC crimes at national level as a priority: only on the basis of reliable figures and criminal statistics can

such a complex phenomenon be efficiently addressed at political, judicial and law enforcement level.

2.2 New trends identified in TOC

Over the last few years we have witnessed the emergence of the following features [and dimensions] of modern crime: the transnational nature of criminal activities and their organisational dimension.

The former is due to three fundamental factors:

- the mobility of trafficked goods and persons: If in the past, the interests of criminals were oriented towards immovable goods (in the field of agriculture, public contracts and construction), now there is increasing criminal interest in movable goods such as weapons, drugs, hazardous wastes, metals, various counterfeit goods and persons through trafficking in human beings or smuggling of migrants. The pursuit of these new criminal targets and their transfer from the country of origin or production to their final destination is a generating factor of this new dimension;
- institutional and political developments, particularly the abolition of external borders of some specific areas and regions. A good example of this is the EU where the abolition of its internal boundaries has facilitated the free movement of people, goods, capital and services, as well as criminals, illegal merchandise and services and illicit money;
- technological developments that allow and encourage swift communications, transactions and circulation, but also rapid transfer of illicit money gained through crime (the proceeds of crime), for which it is vital to find a secure placement for money laundering.

As to the latter, it is common experience to find out that criminals are becoming more affiliated with each other, discovering the added value of working together to carry out illegal activities. Of course, when we speak about the organisational dimension we are referring not to the simple situation in which more people carry out a crime, playing a different role in order to reach the final illicit aim, but to a situation in which the group is not randomly set up but has a stable dimension, with a structure, sometimes sophisticated, sometimes quite essential, in order to pursue a programme which goes beyond a single crime, and where it is instrumental to gain profit for the members of the group.

The described new patterns of modern criminality can easily be found not only in practical experience, but also in the reports of law enforcement and judicial authorities, in data collected at national and international level, and from analysis available at EU level. Europol's strategic report, the 2013 Serious and Organised Crime Threat Assessment (SOCTA 2013), is worth mentioning as it provides information to Europe's law enforcement community and decision-makers about the threat of serious and organised crime to the EU that could also be applied/relevant at Coe level[18]. According to this source of analysis

[18] The SOCTA is the cornerstone of the multi-annual policy cycle established by the EU in 2010, as a tool which ensures effective co-operation between national law enforcement agencies, EU institutions, EU agencies and other relevant partners in the fight against serious and organised crime. In identifying the new trends on TOC we have mainly used this EUROPOL SOCTA assessment, as it is the most recent one and is covers a considerable part of the geographical area of the CoE.

"serious and organised crime is an increasingly dynamic and complex phenomenon, and remains a significant threat to the safety and prosperity of the EU and of Third Countries". The key findings of this report show that traditional crime areas such as international drug trafficking remain a principal cause for concern. But they also highlight that the effects of globalisation in society and business have facilitated the emergence of significant new variations in criminal activity, in which criminal networks exploit legislative loopholes, the Internet and conditions associated with the economic crisis to generate illicit profits at low risk.

Informed by its analysis of the prevailing threat, SOCTA 2013 identifies a number of key priorities: facilitated illegal immigration, trafficking in human beings, synthetic drugs and poly-drug trafficking, Missing Trader Intra-Community (MTIC) fraud, the production and distribution of counterfeited goods, cybercrime and money laundering are the particular crime areas listed in this category[19].

Furthermore, SOCTA 2013 highlights the continuing evolution of an allegedly new breed of 'network-style' organised crime groups, defined much less by their ethnicity or nationality than has been the case hitherto, and much more by their capacity to operate on an international basis, with multiple partners and in multiple crime areas and countries. The pyramidal structures have evolved to networks of cells with continuously changing partners and even locations. Europol states that this calls for a shift in the strategic response in the EU, away from one centred on individual ethnic types, or even individual crime areas, towards a more flexible, heterogeneous model of targeting these dynamic organised crime networks, through a more effective use of cross-border mechanisms to exchange information and co-ordinate operational activity. These could also be proposed for the CoE and should be politically unproblematic for those member states that have ratified the Palermo Convention.[20]

The analysis done by the EU institutions, although not totally applicable to the pan-European area, is useful to demonstrate the prevailing trends: at the end of the day, the phenomenon of TOC in the EU has clear and direct connections to the criminal organisations operating in the neighbouring states. And the criminal organisations operating, for example, in drug trafficking in the EU are also active in many of the CoE member states.

Thus it can be said that there are special features or different levels of impact of certain crimes in the EU, due especially to the elimination of interior borders within the Schengen area, but not different trends or a different type of emerging offence relevant when analysing TOC within the CoE landscape.

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[19] Following the SOCTA assessment the Council of the EU has set up the priorities for the fight against organised crime for 2014-2017. See the Draft Council Conclusions of 28 may 2013, (JAI 407, CRIMORG 151).

[20] An interesting approach is mentioned in the Transnational Organised Crime Threat Assessment, elaborated by the United Nations Office on Drugs and Crime in 2010. The document advises law enforcement authorities to direct more focus towards disrupting illegal markets (i.e. the sum of illegal activities carried out by various organised criminal groups, including trade in illegal merchandise and laundering illicit money), rather than solely targeting organised criminal groups.

[6] The PC-GR-COT Scientific Expert prepared that report on economic crimes in Europe, and also worked on the earlier ones. The reports, 1996-2005, are available at http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/.

There has been no forum or mechanism for gathering data about organised crime trends in all CoE member states since 2005, when the last of the CoE annual organised crime situation reports was published.[21] Therefore in the absence of a comprehensive study of the phenomenon in the CoE region, the findings, research and analysis done within the EU might be used in the development of this White Paper.

On the other hand, it has been suggested that a future CoE Action plan on TOC should not be too preoccupied with only focusing on emerging or new threats. Many of the threats are long-standing but are not being dealt with satisfactorily, and this is a sufficient basis for the launching of new initiatives. The lack of exact figures should not impede the identification of what is needed to fight TOC in a more efficient way, of the challenges ahead and of the type of action plan needed to overcome the present problems.

2.3 Main features and needs of TOC

The main factors affecting the status of organised crime in a country are: globalisation, the country's economic situation, deficiencies in national law, society's attitude towards crime, socio-cultural degeneracies, technological changes, visa-free regimes, the customs union, and the capacities of law enforcement and judicial authorities. The current economic crisis and political circumstances (Arab Spring) have had an impact on cross-border criminality in the CoE region.

1. Every criminal act places a burden on society. But when it comes to TOC, which has the capacity to penetrate the economic and social fabric of society and poses a serious threat to individual rights and freedoms, the rule of law, the reliability of the financial system and democracy, the damage caused is much higher than that caused by any other type of crime.

2. Organised criminal groups have both local and cross-border dimensions, not only with regard to their composition and *modus operandi*, but also with regard to the activities they carry out and their consequences. Furthermore, these groups show a high capacity to adapt their criminal schemes and *modus operandi* quickly due to their flexibility.

3. Technological advancements not only facilitate transnational organised criminal acts but also give way to new types of crime. For example, counter activities against online phishing, banking fraud, and cyber-attacks on information systems, databases and personal computers have become part of the daily work of the law enforcement agencies.

4. Although terrorist groups and transnational organised criminal groups have different aims in the long run, the continuity of their criminal acts depends on their financial power. In particular, illegal drug trafficking stands out in the category of narco-terrorism due to the high financial gains it yields.

5. Groups of organised crime tend to specialise in providing particular services, even if they

work in networks. For example, drug importation, drug concealment, drug distribution, fraudulent documentation or racketeering[22].

6. Some groups of organised crime resemble criminal enterprises with a high degree of expertise, sophisticated structures and manpower while others are very flexible and simple in their structure.

7. From the point of view of the criminals, the type of goods they deal with is not so relevant. What motivates them is the capacity to undertake activities at the lowest risk of detection whilst generating the highest possible profits.

8. The proceeds of crime obtained through criminal activities are the essential strength of criminal organisations. Criminal groups penetrate into the legal economy in order to legitimise their proceeds and use legal entities as a shield and facilitator to carry out illegal activities. Nightlife, real estate, jewellery, exchange offices, the financial sector, tourism, casinos, procurement and construction are some of the sectors that are vulnerable to infiltration by organised crime groups. By reinvesting illicit profits through legal economic means, these groups undermine legitimate commercial activities in a way that works against the free market and fair competition.

9. Criminal groups are supported by a wide range of professionals, working alongside the criminal activity: lawyers, accountants, financial advisers, corrupt officials, judges and politicians, chemists, etc. Without them TOC would not succeed.

10. Corruption of the authorities by means of bribing or purchasing the services of public officials is a common feature of organised crime activities in order to gain impunity or to infiltrate the legal economy and public institutions to make common illegal business: politicians, bureaucrats, members of security and intelligence forces, army officers, managers in the financial sector, lawyers, solicitors, industrialists, bank employees, journalists and media owners or their family members and close relatives are the best targets for such practices. Generally this is a process in which each side looks after the other.

11. Fighting TOC is a process that needs a broader approach than fighting ordinary crime. This means that the matter has to be prioritised not only by lawmakers and public authorities but also the whole society including NGOs, press and media organs, universities, trade unions and the private sector.

12. In combating TOC, a preventive approach should be prioritised to minimise the gaps and opportunities in the administrative, social and economic area, which could give the criminal groups the possibility to exploit unregulated or grey areas for their illegal aims. This approach also includes the promotion of good governance, transparency, accountability, and professional ethics at all levels of the public service. The media's and public's support against corruption and organised crime is crucial.

[22] W. Kegö & C. Özkan, Countering Transnational Organized Crime. Challenges and Countermeasures, Institute for Security and Development Policy, Stockholm, 2010, p. 7, http://www.isdp.eu/publications/index.php?option=com_jombib&task=showbib&id=5816, (accessed 13.1.2014).

13. This perspective should include measures minimising the effect of organised crime, preventing its recurrence and protecting its victims. Article 31 and the following articles of the UNTOC show methods of prevention.

14. A decisive response from the criminal justice system to organised criminality is another essential component needed to effectively tackle this problem. Here, specialised agencies and units, qualified manpower, technical capacity, sufficient budgetary resources and smart tools from criminal law should be underlined.

15. The definition of participation in an organised criminal group in criminal legislation is not always consistent with the standards set by the UNTOC. This hinders the application of criminal measures at a national level and also as far as co-operation with other countries in organised crime cases is concerned.

3. Identified key areas

BOX 5:

Concentrating on precise problems to better define the CoE's strategy and action plan on TOC seems necessary to foster efficiency and minimise risks of overlapping. The five areas selected (Enhancing International co-operation, Special investigative techniques, Witness protection and incentives for co-operation, Administrative synergies and co-operation with the private sector, Recovery of assets) have been identified as crucial for an effective investigation and prosecution of TOC.

Taking into account the different studies and assessments on TOC and the information provided by the members of the Group – as already mentioned, the vast majority having wide expertise of fighting TOC at an operative level – it can be concluded that there is need for adequate implementation of the [existing] legal instruments and more efficiency in the investigation and the co-ordination at a transnational level. Instead of making general statements on the need to fight TOC effectively and in order to be more efficient it was considered necessary to concentrate the efforts on those areas which are essential for improving the efficiency in combating TOC through criminal law. The Group identified five areas to be addressed with priority. All five areas are interconnected: if co-operation instruments do not work correctly, the fight at a transnational level is inefficient. This is why this point is considered crucial and has been addressed at length. For the recovery of assets and the detention of the suspects, effective transnational investigation is needed, through the use of Special Investigative Techniques (SITs), not only at a national level, but also via international co-operation. Only with swift international co-operation and investigation, targeting the seizing the assets, the core element of these criminal business organisations, can TOC be kept within limits – complete eradication is only an ideal utopia. Finally, for the sanctioning and incarceration of the perpetrators of these types of crime and the dismantling of criminal organisations, insider co-operation and their witness testimony is essential. In certain types of TOC, such as Trafficking in Human Beings, the victim's testimony will only be obtained, if the victims are sure of their future protection. This is why SITs together with the protection of witnesses are dealt in this White Paper.

Of course, there are many other areas that should be covered when dealing with the fight against TOC: prevention, awareness, good governance, and in general the implementation of the rule of law, are also crucial to combat TOC. Choosing only five key areas does not mean that the others are less important or should be neglected. But, in order to make sensible and feasible proposals for a future CoE strategy on TOC, the Group decided to concentrate on the criminal investigation and prosecution, and on concrete topics, to be able to draft precise recommendations.

3.1 Enhancing International Co-operation. Establishing and widening of networks

BOX 6:

Improving international co-operation in fighting TOC needs an adequate legal framework, its effective implementation and progress towards new models of closer co-operation. Ratification of conventions and legal instruments, as well as a review of reservations is the first step. The second step, which lies in the execution of requests, and mechanisms and incentives, should be put in place to overcome delays and obstacles. Finally, for fighting complex phenomena like TOC, international networking co-operation at law enforcement and judicial level is crucial.

The investigation, the prosecution and the execution of sanctions regarding organised crime requires efficient international co-operation[23]. Despite the availability of numerous wide-ranging instruments at various intergovernmental or (sub)regional levels, international co-operation remains often slow and laborious. However, international co-operation can be efficient and effective.

Generally three basic conditions must be fulfilled to co-operate efficiently at international level. The first condition is related to the international instruments, while the second deals with the domestic legal framework. The third condition regards the availability and use of networks.

With regard to the latter, it is clear that enhancing efficiency in the investigation of complex forms of TOC involves the setting up of judicial and police networks, to foster swift co-operation, the understanding of the transnational dimension, the co-ordination of the intervention, the execution of requests and to overcome the legal diversity among the different member states involved in a TOC investigation.

In sub-regional and inter-regional European, Eurasian and Euro-Atlantic specialised organisations/ there are several police and judicial networks, following diverse patterns[24].

[23] The term 'international co-operation' is used since the white paper wants to grasp all types and forms of international co-operation. By this we mean international police co-operation, international judicial co-operation and international administrative co-operation, the latter covers for instance the co-operation between financial information units, tax authorities, social security and labour inspection authorities, immigration authorities and other administrative bodies.

[24] See for example, European Judicial Network, Genocide Network, the European Police Office (Europol), Police Cooperation Convention for Southeast Europe, the Ibero-American Network for International Legal Cooperation (Iber-RED), the Office for the Coordination of the Fight Against Organised Crime and Other Dangerous Types of Crime on the Territory of CIS Participant States (BKBOP), GUAM (Organisation for Democracy and Economic Development), Virtual Law-Enforcement Centre (VLEC), the Central Asian Regional Information and Coordination Centre for Combating the Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Their Precursors (CARICC).

The level of co-operation in these organisations varies depending on the degree of integration at political, economic and humanitarian level. Being integrated in a broader institutional association, such as, in particular, the European Union, the Commonwealth of Independent States or the Ibero-American General Secretariat, obviously fosters a great level of law enforcement and judicial co-operation.

Within the European Union, which aims at creating a single space of freedom, security and justice – and therefore has very particular features not easily to be transferred to other countries – Eurojust, EJN and Europol exemplify a step forward in dealing with transnational criminality.[25] The experience of the EJN, Europol, Eurojust, and OLAF, show that many issues and obstacles concerning the judicial co-operation process can be resolved at an early stage of investigation, through co-ordinating mechanisms, because, for instance, procedural standards and evidential requirements can be explained to all the parties involved and the proper letters rogatory prepared in advance.

At law enforcement level the networking co-operation is also crucial. Interpol plays an essential role in this field and its global system of national central bureaux (NCB), which exist in over than 190 countries all over the world, is an example of outstanding networking co-operation[26]. INTERPOL's system of notices and diffusions is a well-known mechanism to assist national law enforcement agencies with concrete aspects of specific investigations.[27] The well-recognised activity of the United Nations Office on Drugs and Crime (UNODC) also covers the network-type of set up. The International Money Laundering Information Network (IMoLIN), an Internet-based network assisting governments, organisations and individuals in the fight against money laundering has recently been established[28].

Another example of a network by UNODC is the CARICC (the Central Asian Regional Information and Coordination Centre for Combating the Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Their Precursors). The CARICC serves to facilitate co-operation between all law enforcement agencies involved in countering illicit trafficking including the police, drug control agencies, customs, border guards and special services, it

[25] The goal of co-operation is clearly stated in the Action Plan Implementing the Stockholm Programme: "EU agencies and bodies such as FRONTEX, Europol and Eurojust, as well as OLAF, have a crucial role to play. They must cooperate better and be given the powers and resources necessary to achieve their goals within clearly defined roles", O.J. 115/1, of 4.5.2010, available at

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF, p.6.

[26] UNODC, Digest Of Organised Crime Cases. A compilation of cases with commentaries and lessons learned, Vienna 2012, pp. 70-71, 103-104.

[27] The General Secretariat published approximately 26 500 notices and diffusions in 2011.There were 40 836 notices and 48 310 diffusions in circulation at the end of 2011, and 7 958 people were arrested on the basis of a notice or diffusion during 2011 (International Notice System – Interpol). The databases and networking in the field of firearms is also a good example of networking in a special area: it is channelled through ICPO,IFRT (Illicit Arms Records and tracing Management System), iARMS and the Ballistic Information Network (IBIN).

[28] IMoLIN has been developed with the co-operation of the world's leading anti-money laundering organisations. Included herein is a database on legislation and regulation throughout the world (AMLID), an electronic library, and a calendar of events in the anti-money laundering field

introduces secure information exchange channels and it agrees on multilateral international operations, including controlled deliveries.

Attempts to transfer progressive experience and best practices from one international jurisdiction to another are already known. In particular, the situation regarding the establishment of relations between Europol and the so-called third countries (non-EU states), including countries both within Europe (Bosnia and Herzegovina, Russia, Turkey, etc.) and outside Europe (Canada, Colombia, USA, etc.) could be highlighted. Eurojust carries out a similar practice..

Without a proper legal framework, international co-operation is hampered or even impossible from the onset. The more states become party to these instruments, the more the network of legally binding connections expands and increases the possibilities for co-operation. Becoming a party to treaties and conventions is a first step. States can then do more and promote multilateral instruments to other states that are not yet a party. States can also look over the fence and join multilateral instruments of other geographical entities or organisations and invite their counterparts to accede to CoE instruments. All of the conventions in the field of international co-operation in criminal matters are open to accession; some of them were set up as open instruments from the onset. Over the past years an increasing number of non-European states have in fact 'joined' the Council of Europe family by acceding to one or more convention in the field of international co-operation in criminal matters. For instance Chile and Korea have acceded to the mutual legal assistance Convention and its Protocols. Brazil is set to joint this instrument as well.

As an example of a CoE initiative to set up a network-type system in CoE member states and even further afield is the Convention on Cybercrime[29], signed in Budapest 23.11.2001. This convention, which is not only applicable to cybercrime, but also to any international co-operation request which implies the use of ICTs, provides in its Article 35 a 24/7 Network to hasten the process of providing assistance when this is needed quickly for example for the preservation of computer data[30]. Following this provision almost all participating states have

[29] The main legal instruments on judicial co-operation elaborated within CoE are listed under Annex I.
[30] Article 35:

1. Each Party shall designate a point of contact available on a twenty-four hour, seven-day-a-week basis, in order to ensure the provision of immediate assistance for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence. Such assistance shall include facilitating, or, if permitted by its domestic law and practice, directly carrying out the following measures:
   a) the provision of technical advice;
   b) the preservation of data pursuant to Articles 29 and 30;
   c) the collection of evidence, the provision of legal information, and locating of suspects.
2. a. A Party's point of contact shall have the capacity to carry out communications with the point of contact of another Party on an expedited basis
   b. If the point of contact designated by a Party is not part of that Party's authority or authorities responsible for international mutual assistance or extradition, the point of contact shall ensure that it is able to co-ordinate with such authority or authorities on an expedited basis.
3. Each Party shall ensure that trained and equipped personnel are available, in order to facilitate the operation of the network.

established contact points either within the national police service or the prosecutor's office or a hybrid of both. In this context, attention should also be paid to the *Network of Single Points of Contact* within the Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters (PC-OC). There are good reasons to explore and to recommend in the White Paper that this network could be further developed, and inspiration could also be drawn from the EJN and Iber-RED.

3.1.1 Gaps and problems identified

a) In the legal field

According to the information received from the monitoring body on International Conventions (PC-OC), there are several of the CoE conventions that are signed, but not ratified. Another important problem is that many states at the moment of ratifying the Conventions introduced certain reservations that might have been justified at that moment, but over the years have become outdated. Declarations and reservations require regular 'maintenance' in order to keep the other parties properly informed about the (im)possibilities of co-operation

However, as TOC is a global problem, there is also the need to co-operate with third countries. The entering of bilateral agreements with each of the countries not only increases the complexity of the legal framework – as every bilateral agreement might be quite different – but it is also a cumbersome and slow process. A fast way to increase the network of conventional relations with other states is to accede to multilateral instruments that were negotiated by other inter-governmental organisations, as these instruments are open to accession by third states. For instance accession to the mutual legal assistance convention of the Organisation of American States[31] allows legally binding procedures to be established with dozens of American states without having to negotiate bilateral instruments with all these states individually. A simple accession saves time and money.

Finally, there is a last layer of laws: the domestic implementation of international instruments. A law on international co-operation in criminal matters is the *hyphen* between the (ratified) international instruments and the domestic criminal (procedure) law. The law is the place where the parties will meet when they cooperate. The problem identified in practice is that, despite the efforts of harmonisation through international instruments, each state later implements the convention in question in a different way. This variety of laws with different terms and conditions makes international co-operation clearly more complex, and thus less attractive and slower. Domestic legislation in this field should include consultations with other states and the inclusion of comparative law with a view to achieving the highest harmonisation possible.

b) In the execution of requests

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[31] InterAmerican Convention on mutual legal assistance, Nassau, 1992; Optional Protocol, Managua, 1993. Available at: www.oas.org.

If providing an adequate legal framework is a pre-requisite for efficient international co-operation in criminal matters, it is only the first step. Practice shows that problems are found in the transfer and execution of requests: delays, mistrust, overloaded criminal justice systems, lack of adequate knowledge of the procedure and/or language, are some of the problems most invoked by practitioners[32]. The practitioners participating in the Group confirmed this assessment unanimously.

Delays in the execution of requests is one of the problems most often invoked by practitioners, together with the refusal to extradite nationals. Both of these problems do not lie in the lack of legal provisions, or a lack of ratifying the relevant conventions, but have to do with their legal and practical implementation.

With regard to delays, the requested authority often does not consider the compliance of the letter rogatory as a priority: in fact, the requested authority does not know much about the case at the origin of the request. Moreover, the performance indicators usually do not prioritise the execution of mutual legal assistance requests, therefore such acts are only dealt with once national cases allow the authority to take care of the foreign cases. Lack of awareness of the importance of co-operating in a swift manner is also to be seen in practice: requests for mutual legal assistance are still viewed as something that concerns the requesting state, and not a whole region. For example, some authorities still view the mafia criminality as an Italian problem, tending to underestimate the capacity to act in a transnational setting. It should be made clear that in combatting TOC every state profits, because TOC is an expansive phenomenon, and in the end, affects every country in one way or another.

According to the discussion paper "*The functioning of 24/7 points of contact for cybercrime*",[33] the main problem is the duration of the mutual legal assistance process. The reasons for delays expressed in this study confirm the assessment made here, although with the particularities applied to the system of 24/7 contact points provided in the Convention of Cybercrime.

If delays in the execution of judicial requests are a generalised problem, the refusal to extradite own nationals also requires attention. These grounds for refusal are based on the traditional role of the sovereign state to undertake the duty to protect its own nationals. However, in a context of enhanced co-operation, each state should facilitate the extradition of alleged criminals to be brought to justice in the forum state. The reasons why these grounds for refusal are so often put forward, is manifold, but probably the lack of trust among the member states in their respective judicial and penitentiary systems plays an important role.

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[32] See the study: "Euroneeds: Evaluating the need for and the needs of a European Criminal Justice System" carried out by the Max Planck Institute for Foreign and International Criminal Law. Available at http://www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/strafrecht/forschungsprogramm/fp_kurzbeschreibung.htm.

[33] *"The functioning of 24/7 points of contact for cybercrime"*, Project on Cybercrime of the Council of Europe, Discussion paper, document prepared by the Economic Crime Division, Directorate General of Human Rights and Legal Affairs (DC-HL), version 2 April 2009, Council of Europe. It can be downloaded at:www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/documents/567_24_7report4public_april09a.pdf

In addition to this, the role played by requests when investigating corporate criminal liability and whether requests for measures and evidence regarding to an incriminated legal person, are accepted and executed in all CoE states should be analysed.

Against this backdrop, even if the aim does not go so far as to establish a single area of justice as in the EU, the need for mutual trust in order to improve mutual legal assistance is manifestly one of the areas in which the CoE is working and has to continue working: a certain legal uniformity, guarantees in the protection of human rights and an equivalent level of procedural rights and penitentiary conditions are pre-requisites for building mutual trust. The lack of political will and the lack of mutual trust plays an important role in this context. It is clear that in areas where two or more states have a real willingness to co-operate, the co-operation works more efficiently. Improving the political will to improve co-operation in dealing with transnational organised crime should be one of the tasks of the CoE.

c) Expanding, connecting, setting up networks

A major shortcoming characterising the current state of international co-operation in law enforcement is its geographical fragmentation: the fight against TOC requires a more co-ordinated and multi-state approach, because co-operation funnelled through single letters rogatory is not enough. On the basis of the experience of practitioners[34] it can be said that stimulating and improving the co-ordination between the competent authorities of states dealing with investigations and prosecutions will be more and more crucial in the coming years in light of the developments in transnational criminality described above.

The complexity of the type of crimes and the transnational character requires the different authorities to be involved together from an early stage in the investigation and continue such co-ordinated work at the time of the prosecution. In this context the setting up of a pan-European network of legal assistance in criminal matters (from Lisbon to Vladivostok), where all 47member states of the CoE could co-operate, should be further studied. Of course the creation of such networks should be coherent with the existing frameworks, taking into account the bodies and the agencies already set up at a regional level, avoiding duplication of efforts and sparing resources and developing strategic and structural synergies with existing networks.

In sum: Combating complex criminal organisations requires new models of networking co-operation.

If co-operation through networks is considered crucial, the next question should be what kind of model should be followed or adopted? Should a new judicial network play a major role in the pan-European context? Could the EU judicial network model be expanded to the CoE-landscape, or would connecting the existing networks be a solution to be explored?

One of the possibilities would be to set up a central point within the CoE landscape and institutionalised as a reference point, whose action could be co-ordinated with the actions of other bodies like Eurojust and the EJN. This central point could also promote the stipulation of a *Memorandum of Understanding* among the competent authorities and might trigger the

[34] Members of Committee Euroneeds study

use of Joint Investigation Teams (hereinafter JITs) in certain areas of criminality, being able to have a more proactive investigative approach in investigations concerning TOC[35].

The experience of the contact points' network pursuant to the 2001 Budapest Convention on Cybercrime is a real example of this kind of co-operation under the auspices of the Council of Europe. The possibility of establishing a similar network (networks) for co-operation between national law enforcement agencies to deal with other criminal offences related to transnational organised crime or expanding the existing cybercrime network to deal also with TOC should be studied.[36] The setting up of joint investigation teams in cross-border complex TOC investigations could also be part of the networking structures.

The other approach that should be studied is the possibility of connecting existing networks. The development of network co-operation could be based on agreements between currently existing networks. Building such a bridge is already in place in Europe. Europol, in this sense, has a certain experience: it entered into strategic agreements with the UNODC and with the World Customs Organisation, and it has an operating agreement with INTERPOL. Other regional organisations, for instance BKBOP, in accordance with Article 1.3 of the Regulations of the Bureau, may also establish and maintain working relationships with international police organisations.

It seems that one of the problems of expanding and connecting different regional law enforcement and judicial networks is the reluctance of many countries to share data and information due to a lack of trust in the personal data protection legislation of the requesting state.

3.1.2 Possible action to be taken

a) Legal level

- take political action to encourage any member state party to CoE conventions to make efforts to review and update declarations and if possible to eliminate reservations to the international conventions on co-operation in criminal matters and fighting against TOC;
- promote the accession to CoE conventions of third countries, in particular those who are more affected by TOC and promote the entering into agreements with relevant third countries;
- study the transposition of the conventions into the domestic legal framework, undertake action to reduce the number of grounds of refusal for execution of international judicial requests and consider the possibility of introducing legal deadlines for executing international co-operation requests;

[35] Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS No.: 182. Available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/182.htm

[36] Competent authorities and points of contact for international co-operation. It can be downloaded at: www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/Documents/Internationalcooperation/Res_internatcoop_authorities_en.asp

- within the ambit of UNODC there are several handbooks on the Internet with regard to the legal framework of international judicial co-operation. An analysis could be made on whether a coordinated approach to the elaboration of such handbooks would be useful, and if the updating and translating of such materials should be also done by the CoE for its member-states.

b) Operational level

If the two main problems detected are the protracted process of executing the requests for co-operation and the refusal to extradite nationals, the following actions could be considered in this regard:

- actions to raise awareness not only on the problems of TOC, which are quite well known, but on the precise aspects of the need to co-operate. TOC is never a problem of a state, it is like a very infectious disease: if common action is not taken in a co-ordinated way, the illness will spread and end up infecting everyone. This metaphor applied to TOC should lead to co-operation being considered as a priority in every state;
- gather together the reports of the monitoring bodies, and publish the results on the practical implementation of co-operation on TOC. On the basis of these results, propose legal changes and publish detailed reports specifically on the fight against TOC;
- analyse the grounds for the delayed execution of requests: if it is lack of knowledge, lack of political will, or lack of time and resources. Depending on the reasons identified, different solutions to provide incentives for the swift and efficient response to the requesting authority, should be studied: more training, political action, incentives for the judges, prioritisation of resource allocation;
- analyse the practical incidence and scope of co-operation with regard to legal persons incriminated for TOC activities;
- study the possibility of establishing fixed deadlines for the execution of requests, if not in conventions then through agreements or in domestic law;
- examine if a solution to overcome the refusals to extradite based on the nationality of the alleged perpetrator could be found, for example by the entering into agreements on preventive custody and the transfer of the sentence being served to the state of the national, as conditions for extradition;
- building up trust. The scope of activities is so broad, that we will not make any concrete proposals, but only underline the importance of raising awareness on the need to co-operate and continue working in the area of protecting human rights. The action of the CoE could perhaps start with projects of enhanced co-operation with regard to a certain type of offence, where all the member states share a high interest in co-operating and there are no political obstacles in promoting such co-operation;
- training of law enforcement authorities, judges and prosecutors in fighting TOC, and providing mutual legal assistance. The use of ICTs in all types of crime, not only cybercrime, has increased significantly, especially in the field of TOC, for communication and for money-laundering. The training has to be focused on SIT, on the use of ICTs, on

preventive measures, on international co-operation instruments and on financial and business structures;

- specialised language courses for those involved in TOC should be organised. The mastering of a common language is to be seen as essential in fostering a swift co-operation.

c) Networks

Based on the practical experience and on successful cases, the Committee considers that a good level of judicial co-operation in fighting TOC, cannot be reached only resorting to traditional schemes of international co-operation based on the execution of letters rogatory.

- The CoE should take political action to raise awareness of the fact that in the fight against TOC a new model of co-operation is needed: a more stable co-operation unit could be envisaged, with more frequent contacts among the specialised units dealing with the same type of crime;
- The CoE Recommendation Rec (2001)11 concerning guiding principles on the fight against organised crime, as to the appointment of contact points at a national level, should be fully transposed and institutionalised. Such contact points could play a key role at CoE level in improving international co-operation. A judicial network at CoE level is strongly recommended (CoEJN), e.g. to establish an institutionalised connection between Eurojust and the network of judicial co-operation in the rest of the CoE member states.
- The CoE should explore the possibilities for encouraging the setting up of joint investigation teams in transnational criminal investigations in the pan-European landscape.
- CoE should promote the expanding or setting up of contact points with relevant experience in fighting TOC, for assisting in the transfer and execution of requests and co-ordinating and sharing operational and investigative information with the rest of the members of the TOC network, with the aim of taking a proactive approach to TOC.

3.2 Special investigative techniques (SITs)

BOX 7:

While it is clear that to detect and prosecute TOC these SITs are indispensable, their use has to be counterbalanced with adequate measures that guarantee the protection of human rights, and give the possibility to prevent abuse. Practice shows that CoE member states make wide use of SITs in investigating TOC, but SITs are not always adequately regulated, in particular with regard to electronic evidence. The lack of precise rules and legal harmonisation poses difficulties to the cross-border transfer of evidence.

Organised criminal groups take many counter measures while carrying out or preparing their criminal activities in order not to attract the attention of the law enforcement agencies. Therefore traditional methods of investigation are often inadequate because of the special structures and professionalism of organised criminal groups. That's why special investigative measures are applied to penetrate such criminal groups.

To gather intelligence and information about the activities of a criminal group, it is necessary to resort to some of the special investigative methods that are based on operational needs. There is a variety of 'special investigative techniques' against organised crime. These include controlled deliveries; covert investigations; interception of communications (wire-tapping); bugging of premises; covert surveillance; covert storefront operations which appear to offer crime opportunities; undercover agents and informants.

At international level, Article 20 of the Palermo Convention encourages the use of special investigation techniques, mentioning expressly controlled delivery, the use of electronic surveillance measures and undercover operations. But this list is merely an example as this provision refers also to other special investigative techniques. Article 7 of the Money Laundering Convention of 2005 also encourages the use of SITs. The Council of Europe Convention on Cybercrime envisages strong and fast co-operation to investigate cybercrime among state parties as cybercrime (Articles 29-34)[37]. Furthermore, the Group of Experts of the Action against Trafficking in Human Beings (hereinafter GRETA) regularly stressed on the importance to use special investigative techniques in order to comply with the obligation to conduct effective investigations on Trafficking in Human Beings mentioned in Article 1. 1b) of the CoE Anti-Trafficking Convention. Best practices in the use of SITs are also defined in numerous international documents.

Although the conventions underline the relevance of using SITs to combat TOC, precise rules regarding the use of SITs in criminal investigations are to be found in the domestic law

[37] Some states have expressed that the Budapest Convention is outdated and it contains certain contradictions. According to the UNODC draft Comprehensive Study on Cybercrime (not yet adopted) some states recommended to develop a new international legal instrument on fighting against the use of ICTs for criminal purposes.

and each country regulates them according to their own assessment of the risks for security, and their own appreciation of the proportionality principle.

Despite the significant contributions of the ECtHR, we have to point out that in the field of criminal investigative measures and the protection of fundamental rights (mainly the right to privacy) we are still very far from reaching a common standard or a uniform understanding on the limits of these measures: proportionality is still a notion to be defined. The ECtHR has focused primarily and almost exclusively on the legality requirement, skipping the issue of the limits of intrusive investigative measures. There are no specific guidelines to define the right balance between the interests of a criminal investigation and the protection of the rights of citizens, at least not until now, and therefore there is no common understanding of what is the principle of proportionality.

This might be the most sensible policy for the Court, not only because we lack universally accepted standards to measure the necessity of limitations on human rights and especially on privacy, but also in order not to place too much stress on its own existence. But the logical consequence is a lack of legal harmonisation among the CoE member states, and great disparities in the level of intrusiveness that is acceptable when resorting to SITs within a criminal investigation in each country. This represents an obstacle in the transfer and circulation of evidence, as well as in its admissibility before the court of the forum state.

3.2.1 Gaps and problems identified

The practice in the CoE member states shows that they make wide use of SITs in investigating crime. But many have not an adequate legal framework regulating special investigation techniques, especially those regarding the use of ICTs. Searches of computers are often made under the general rules of search and seizure, something that is not always adequate, as for example happens with remote access to computer networks. Remote access to computer hard drives using Trojan or other hacking software programmes is highly controversial, as it may be used beyond borders, raising problematic issues regarding jurisdiction and sovereignty.

A second relevant problem is found with regard to data mining, as many legal systems consider that it amounts to street surveillance, if the data are open-source, while other countries consider that it infringes privacy and some judicial control should be required.

The obligations of service provider companies with regard to the storing of data and the access to those data by law enforcement authorities also lack consistent regulations under much domestic law within the CoE landscape. Whilst some countries allow access to the IP of a user without a judicial warrant, others allow access to all the envelope data or meta data, and others require a judicial order to authorise the service provider to transfer the data of their clients to the law enforcement authorities.

This lack of comprehensive regulation and/or the differences existing in the domestic law of CoE member states obviously increases the difficulties in transnational co-operation and the transfer of evidence and the differences in the regulation of certain investigative techniques may hamper their use in a cross-border setting.

For example conducting covert investigations and controlled deliveries in the territory of another state is challenging because of differences in laws, law enforcement systems and

institutional priorities. It is frequent that undercover agents who take part in TOC investigations need to move to another country where the targeted criminal group has links, but legal barriers and the absence of a clear regulation on joint investigation teams or operations, renders such transnational investigative measures unfeasible or difficult to carry out.

However, the fight against TOC needs to take a proactive investigative approach. TOCs are hardly ever reported to the police, because in the majority of cases – with the exception of human trafficking – there is no clear victim to be individualised. All the persons involved in the criminal activity are interested in concealing information and in keeping the crime undetected. This is why, the traditional approach, waiting for a crime to be reported or finding evidence of an already committed crime, to initiate the criminal investigation, does not work when fighting organised crime. A pro-active approach, gathering information, analysing information, matching data, is usually required not only to discover the criminal activity, but also to understand the whole criminal market where it operates.

To this end, most countries have set up intelligence units to deal with information on complex serious organised criminality. These intelligence units, as law enforcement units with the task of building up information positions, have to be differentiated from the traditional secret intelligence services dealing with state security issues. However, this distinction is not often clear in all legal systems.

Finally, while there is general agreement that the fight against TOC needs a proactive approach, the laws usually do not provide for the legal framework, defining what kind of coercive measures a law enforcement unit can use within that preventive or intelligence gathering stage. This may, on one hand, hinder the effective prevention and investigation of TOC, and on the other hand, pose risks to the fundamental rights of individuals, as recently seen in the media, with regard to the activities of certain national security agencies.

3.2.2 Possible action to be taken

There are two parallel set of actions that could be taken with regard to the fight against TOC and the use of SITs: 1) enhancing the regulation and efficient use of such techniques along with acquiring comprehensive knowledge of the existing legislation in CoE member states; and 2) strengthening human rights protection when resorting to these intrusive investigative measures. While it is clear that to detect and prosecute TOC these SITs are indispensable, their use has to be counterbalanced with adequate measures that guarantee the protection of human rights, and the possibility of preventing abuse.

With regard to the first perspective, and in line with the UNTOC, the CoE could undertake following actions:

- ensure that there are sufficient training programmes provided to enhance the professional skills of law enforcement agencies, prosecutors and judges in applying SITs and ICTs. Ensuring that in every member state there is a unit with adequate training in dealing with SITs with regard to TOC, could be a first step;
- scientific and comparative research within the CoE landscape should be carried out to collect all existing rules at national level and create a handbook of the measures available

and their legal regime. Such information should be posted in an updated and adequately disseminated webpage;

- ensure that ICT use in criminal investigations is adequately regulated, in particular with regard to remote access to computer networks, where the application of the general rules on search and seizure are clearly not adequate;
- ensure that legal systems provide a distinction between actions carried out to build up information positions (preventive intelligence) and to gather evidence for prosecutorial aims;
- there is the need to evaluate the efficiency of these measures and the level of legal harmonisation among member states. The study could start with one single measure, for example on-line searches. The study should pay special attention to the conditions for granting special investigative methods and whether the rules governing the gathering, processing, analysing and storing of relevant data are clearly defined by law and also applied in practice, and also if measures for the protection of human rights in a transnational investigations exist, in particular with regard to data protection and privacy.
- undertake a study on the problems encountered in the use of SITs at a transnational level, and if such problems could be better overcome with joint investigation teams, single agreements, or by setting general guidelines.
- undertake a study on the problems regarding the admissibility of evidence in the forum state, and the protection of the defendant's rights against investigative acts carried out in a foreign country under different rules. SITs are relevant in order to combat any kind of serious crime, with regard to transnational proceedings and investigations.
- in the view of this Group, the CoE shall play a key role in defining "Principles of transnational criminal proceedings" to strengthen the defendant's rights in such proceedings, while promoting the efficiency of the investigation. The role of the ECtHR has been decisive in establishing common standards on HR, but there is still the need to set clear rules on the rights of defendants in transnational inquiries.

3.3 Witness protection and incentives for co-operation

3.3.1 Witness/State witness protection programmes

BOX 8:

Legal instruments and mechanisms providing protection to witnesses in fighting TOC are in place. There is a need to find out why the witness programmes do not work as efficiently as they should in the realm of TOC. The CoE should take action in analysing the real impact of witness evidence in combating TOC, the number and quality of witness protection programmes, and the shortcomings detected in their implementation.

Witnesses may play a crucial role in the investigation, prosecution and adjudication of TOC. A range of procedural and non-procedural protection measures is considered necessary to ensure that witnesses can testify freely and without intimidation, and that their life and that of their relatives and other persons close to them is protected before, during and after the trial.

Being protected by law and the relevant institutions during criminal proceedings is a basic human right. Indeed, a testimony being given by a person in the capacity of witness before a court is obligatory. Bearing in mind this obligation, states are obliged to provide witnesses with the protection of all human rights that is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Furthermore, Article 24 of the UNTOC obliges all states parties to *"take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them".* Article 26 of the Convention also urges states parties to *"take appropriate measures to encourage persons who participate or who have participated in organised criminal groups"* to supply information useful to competent authorities for investigative and evidentiary purposes.

The question of the protection for witnesses and persons collaborating with the judicial authorities has already been dealt with by the CoE in *Recommendation No. R(97)13 of the Committee of Ministers to member States concerning intimidation of witnesses and the rights of the defence*, adopted on 10 September 1997. The recommendation establishes a set of principles as guidance for national law on witness protection whether in the code of criminal procedure or with out-of-court protection measures.

The recommendation offers member states a list of measures which could effectively help protect the interests both of witnesses and of the criminal justice system, while guaranteeing the defence appropriate opportunities for the exercise of rights during the criminal proceedings.

The Committee of Ministers of the CoE adopted its Recommendation Rec(2001)11 concerning guiding principles on the fight against organised crime on 19 September 2001 at the 765th meeting of the Ministers' Deputies. According to this recommendation, member

states are urged to *provide effective, physical and other, protection for witnesses and collaborators of justice who require such protection because they have given or agreed to provide information or give testimony or other evidence in relation to organised crime*. *Similarly, such protection measures should be available for those who participate in or agreed to participate in the investigation or the prosecution of organised crime as well as for the relatives and associates of the individuals who require protection.*

Furthermore Article 28 of the Council of Europe Convention on Action against Trafficking in Human Beings stipulates that countries *"shall adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators".* According to the Explanatory Report of the Convention the expression "effective and appropriate protection", refers to the need to adapt the level of protection to the threat to the victims, the collaborators with the judicial authorities, the witnesses, the informers and, when necessary, the members of such persons' families. The measures required will depend on the assessment of the risks such persons run. In some cases, for example, it is sufficient to install preventive technical equipment, agree upon an alert procedure, record incoming and outgoing telephone calls or provide a confidential telephone number, a protected car registration number or a mobile phone for emergency calls. Other cases will require bodyguards or, in extreme circumstances, further-reaching witness-protection measures such as a change of identity, employment and place of residence.

The Criminal Law Convention on Corruption of the CoE (Article 22) requires states parties of the Convention to adopt such measures as may be necessary to provide effective and appropriate protection for those who report corruption or give testimony about it before the court.

The Committee of Ministers of the CoE adopted Recommendation Rec (2005)9 on the protection of witnesses and collaborators of justice at the 924th meeting of the Ministers' Deputies held on 20 April 2005. This recommendation includes definitions of the relevant concepts that should aid in harmonising the national laws[38].

a) Gaps and problems identified

From the perspective of the practitioners, there are enough International legal instruments dealing with witness protection and highlighting their importance in fighting TOC. The

[38] Rec(2005)9 defines the terms '**witness'** to mean "*any person, irrespective of his/her status under national procedural law, who possesses information relevant to criminal proceedings, including experts and interpreters.*" A '**witness at risk'** or 'endangered witness' is a witness who is likely to endanger himself or herself by co-operating with the authorities, or a witness who has reasons to fear for his or her life or safety or has already been threatened or intimidated. The CoE defines the term '**intimidation'** for the purpose of witness protection: "*any direct or indirect threat carried out or likely to be carried out to a witness or collaborator of justice, which may lead to interference with his/her willingness to give testimony free from undue interference, or which is a consequence of his/her testimony*". This includes intimidation resulting from the "*mere existence of a criminal organisation having a strong reputation for violence and reprisal or from the mere fact that the witness belongs to a closed social group and is a position of weakness therein*".

drawbacks are rather to be found on the practical implementation of the witness protections programmes. This is why in spite of the existence of exchange programmes, platforms and the CoE recommendation of 2005, it is important to evaluate whether these tools are properly implemented. However, there are no updated published studies that enable us to do this in a pan-European context and exact figures on the number of convictions gained on the basis of statements made by protected witnesses are not available[39].

The possibility of counting on the contributions and evidence of witnesses is of paramount importance for the judicial authorities, because sometimes it represents the only tool available to discover the secrets and the structure of criminal groups. The experience of some member states, such as Italy (evidenced by the statistics), is decisive in the consideration of the successful protection of witness and suspects co-operating as a key factor in the final success of investigations against OCGs. The above-mentioned considerations are sufficient reason to envisage appropriate policy on this matter with strategic relevance at a pan-European level.

In many countries, witness protection is largely seen as a police function, whereas in others, judges and a range of government departments play a key role[40]. The CoE (2004) study of best practices concluded that it is important to separate the staffing and organisation of witness protection agencies from investigative and prosecutorial units. This is necessary in order to ensure the objectivity of witness protection measures and to protect the rights of witnesses. A later review of existing programmes in Europe identified three main necessary characteristics of agencies charged with implementing witness protection:

1. they must co-operate very closely with law enforcement agencies, using well-defined protocols;
2. those responsible for witness protection should operate independently of the other elements of the organisation to protect the confidentiality of the measures taken to protect a witness;
3. the staff dealing with the implementation of the protective measures should not be involved in the investigation or in the preparation of the case for which the witness is to give evidence.

Assessments should therefore be conducted periodically and their results should be shared with the witnesses so that they have a realistic understanding of the dangers they potentially face, without invalidating their feelings of fear and anxiety. The UN asserts that enabling legislation should make it a criminal offence to divulge protected information related to the programme or the witnesses.

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[39] A decade ago, the *programme effectiveness* of European programmes was high, in the sense that not a single participant or relative of a protected witness had been victim of an attack by the source of the threat; "The effectiveness is underlined by the fact that there have been attacks, some of them fatal, on relatives not participating in a protection programme and on witnesses who chose to leave the programme at a moment when the responsible protection agency did not consider the situation safe" (CoE 2004: 40).

[40] See also Karen Kramer Senior Expert, Division for Treaty Affairs, United Nations Office on Drugs and Crime, Witness Protection as a Key tool in addressing serious and organized crime

http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf (accessed June 2013).

All individuals involved must voluntarily agree to enter a programme, because protected witnesses must play an active role in ensuring their own safety and preventing harm to themselves and persons close to them. Once an individual is accepted, a 'protection plan' is developed to put in place a number of measures commensurate with the level of threat and the various people involved (witnesses and people close to them). However within the CoE context, no legal rights arise from protection contracts nor do those on the programme even receive a copy of the contract for security reasons[41].

Procedural measures - e.g. recognising pre-trial statements – should be used to reduce the risk faced by witnesses. In many European countries, pre-trial statements given by witnesses and collaborators of justice are recognised as valid evidence in court, provided that the parties have the opportunity to participate in their cross-examination. In a system where pre-trial statements of witnesses or testimonies of anonymous witnesses are generally regarded as valid evidence during proceedings, these procedures reduce the risk to witnesses except from revenge attacks. International co-operation in this area "is highly important, since many member states are too small to guarantee safety for witnesses at risk who are relocated within their borders".

The European Parliament's report on organised crime of September 2013, already cited, shows great divergences in the regulation and the implementation of witness protection programmes among the EU member states, as well as the use that each of the criminal justice systems makes of them, as the statistics show. It also recommends introducing "standard pan-European rules on the protection of witnesses, informers and those who cooperate with the courts"[42].

b) Possible action to be taken

It is obvious that member states take differing approaches to witness protection programmes. The question is whether these different approaches generate problems at an international level when it comes to co-operation on witness protection. We consider that the CoE should analyse this issue and try to find out why the witness programmes do not work as efficiently as they should in the realm of TOC. Until now it appears that the mechanisms exist, but there might be problems as to providing resources for locating a witness under protection abroad. Therefore, the CoE should take action in analysing the real impact of witness evidence in combating TOC, the number and quality of witness protection programmes and the shortcomings detected in their implementation. The study should include the following issues:

[41] On average, the minimum length of the witness participation in a protection programme is two years and the average duration was between three and five years in the best practices study. The general principle is that a protected witness should be enabled to live a normal life as much and as soon as possible. After that, the agency will let participants leave the programme and take care of themselves again, as soon as this can be done safely. The UN review asserts that experience has shown that even after the end of the formal protection programme, some form of care must still be provided, because the threat against the person rarely disappears completely.

[42] See, paragraph 125, xviii.

- evaluation of the implementation of the Council of Europe Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice;
- necessity to create a separate legal regime, with different features, for the protection of witnesses and the protection of state witnesses (persons already members of criminal group who decide to co-operate with justice);
- rights of witnesses in witness protection programmes in the country in question and abroad (in case of relocation);
- protection of personal data and the possibility of using new or false identities;
- institutional capacities to protect witnesses/Special Witness Protection Units (operational independence, financial independence, human resources specialisation);
- types of protection measures;
- use of ICT in witness cross-examination and evidentiary value of such recorded witness statements, as well as anonymous witness' statements;
- legal possibility of relocation of witnesses abroad;
- existence of formal programmes in each member state and whether any of them operate cross-border;
- data about success rates both at the time of giving evidence and afterwards, and cross-border learning about problems and their resolution.

3.3.2 Incentives for the co-operation of co-defendants in the criminal investigation and in providing witness evidence

BOX 9:

The co-operation of insiders is crucial in investigating and combating TOC. The establishment of incentives for the co-operation of those co-offenders is a controversial issue, although a number of international legal instruments require the states to take measures to encourage such co-operation. A study and assessment of those measures – plea agreements, mitigated punishment, etc. – within CoE member states is necessary.

Co-defendants are very often important witnesses in proceedings related to TOC. The previous paragraph has addressed the need to analyse witness protection in general, including therefore that of the co-defendants. However, for the co-defendants, mostly members of the organised criminal group, to take the step and collaborate with the authorities in investigating, prosecuting and sanctioning this type of crime, the offering of protection is not incentive enough. Criminal groups have to be combated with the help from insiders, and to this end, the possibility of getting a mitigated sentence, entering into an agreement or even being granted immunity, might be exceptionally considered. The importance of this highly controversial approach, justifies that these incentives for witnesses are analysed under this paragraph separately.

One of the issues that are central to the goals of investigating and combating transnational organised crime, as well as foiling planned criminal operations, is providing adequate incentives for the co-operation of persons who are themselves, directly or indirectly, participants in criminal acts and thus subject (potentially) to prosecution (so-called "collaborators of justice").[43] Such insiders sometimes possess invaluable knowledge about the structure, method of operation and activities of the criminal organisations to which they are affiliated, as well as their links with other local or foreign groups.

A number of international instruments require that states parties take measures, in accordance with their fundamental legal principles, to encourage the co-operation of this special category of witnesses with law enforcement authorities. These instruments include the UNTOC (Article 26) and the UN Convention against Corruption (Article 37), which have an impact on all CoE member states, as well as the more restrictive EU Council Resolution of 20 December 1996 on individuals who co-operate with the judicial process in the fight against international organised crime, and EU Council Framework decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (Article 4).

States parties to the above instruments are obliged (or at least urged in the case of the EU Framework decision) not only to ensure that collaborating offenders enjoy *mutatis mutandis* the protection from retaliation and intimidation granted to other witnesses – as foreseen also in Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice of 20 April 2005 –[44] but also to provide *concrete motives and inducements* to offenders to attain their co-operation in supplying information useful for investigatory and evidentiary purposes (e.g. the identity, nature, composition, structure, location or activities of organised criminal groups, international links with other groups, offences committed or about to be committed etc.), for depriving organised criminal groups of their resources and proceeds of crime and for recovering such proceeds.

a) Gaps and problems identified

Up until now, the nature of such motives and the possible steps to be taken for their introduction has been left to the discretion of the countries involved. Among the conceivable measures capable of furthering the goals of combating transnational organised crime, states parties are encouraged in particular to provide for the possibility of mitigating the punishment or of granting immunity from prosecution to persons providing substantial co-operation in the investigation or prosecution of a related offence, not only in a domestic, but also in a transnational context.

Indeed, some states have sought to promote the co-operation of offenders through the granting of immunity from prosecution or comparative lenience, under certain conditions,

[43] See also UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organised crime*, New York, 2008, p. 19.

[44] See also Recommendation R(97)13 of the Committee of Ministers concerning intimidation of witnesses and the rights of the defence of 10 September 1997, and Article 22(a) of the CoE Criminal Law Convention on Corruption of 1999. It is worth mentioning that the rule among Council of Europe States appears to be that national systems do not foresee or keep record of protection measures applied separately for collaborators of justice.

which vary from state to state. In several CoE member states, however, there are no explicit policies or adequate legal provisions in place. More specifically, the following can be noted:

With regard to *mitigated punishments*, most states parties have measures of a generic nature in place (usually to be found in their Criminal Codes), permitting collaboration to be considered as a circumstance mitigating criminal liability and taken into account by the court during sentencing, i.e. at the stage of determining the perpetrator's individual punishment: no assurances are provided to the co-operating defendant in advance. Acts of collaboration which may lead to a mitigated treatment normally include active co-operation towards the detection of a criminal group, pleading guilty, exposing other accomplices, and also rendering assistance in the investigation and the recovery of criminal proceeds. The extent to which a lighter sentence is imposed depends, usually, on the degree of co-operation of the particular defendant and the effect he/she has in reducing the harm caused by the offence, and is left to the discretion of the court. Naturally, the possibility of mitigating a sentence may be linked not only to the degree of co-operation, but also to the seriousness of the crime and the guilt of the accused person. Therefore, mitigation of punishment may be excluded in the case of a major organised crime offence and the substantially wrongful behaviour of the co-operating person.

Since this is a general principle of sentencing, there are normally no guidelines or uniform criteria in this regard – every case is dealt with on its own merit.

Such generic provisions cannot always be considered sufficient for the purposes of combating transnational organised crime. Therefore, it may be useful to consider ways to expand the scope of domestic legislation, streamline the applicable procedures and adopt specific provisions aimed at subverting the loyalty of offenders to organised criminal groups. Such provisions may include various forms of plea bargaining, pre-judicial co-operation agreements and summary prosecutions, as already used or being developed by a number of CoE member states (e.g. Azerbaijan, Estonia, Switzerland, the UK).

With regard to granting *immunity from prosecution* (or to refraining from imposing punishment) to accused collaborators, several CoE member states appear not to have established such a possibility for organised crime offences (e.g. Bulgaria, Finland, Switzerland), despite the fact that the international instruments mentioned above, advocate that this possibility should be considered. Such measures, if advisable in a certain legal context, should take precautions to curb possible abuse, such as providing for some form of judicial review to ratify the terms of immunity arrangements and issuing precise guidelines setting out in detail the principles of exercising the available discretion and protecting the rights of the accused, e.g. by ensuring that a conviction for belonging to a criminal organisation or for crimes committed by such are not based solely on the statements of a collaborating co-defendant[45], etc.

Finally, it is important that the measures described above can also function in a transnational context, given the widely transnational character of organised criminal activity. Significantly, both Article 26 paragraph 5 of UNTOC and Article 37 paragraph 5 of UNCAC urge states parties to consider entering into agreements concerning the potential provision of preferential treatment by the competent authorities of one state to a co-operating person located in another. For instance, if a member state, within its jurisdiction and national regulations, has

[45] See ECtHR *Verhoek v The Netherlands*, of 27.1.2004, Appl. No. 54445/00.

granted special treatment to a criminal organisation member or to the perpetrator of a crime committed in an organised form, then an assessment should be made as to whether the same treatment could also be made valid in courts of other member states.[46] Nevertheless, CoE member states – with few exceptions (e.g. a treaty is reported to be in place between the Baltic States) – appear not to have entered into arrangements of this kind

b) Possible action to be taken

Based on the above findings, it appears necessary to undertake a more thorough study of the status of implementation of the above-mentioned provisions among CoE member states, as well as an assessment of the various measures which could promote the co-operation of organised crime offenders with law enforcement authorities, with a focus on:

- the various forms of plea bargaining, if they exist, and evaluating their compatibility with national policies on fighting organised crime and pre-judicial co-operation agreements that may result in a mitigated punishment or in the dismissal of the case against the collaborator; and
- the establishment of agreements or other arrangements among member states for the transnational application of such measures.

As a further step, a recommendation or even binding provisions may be envisaged, that would stress the importance and urge for the adoption of effective, harmonised measures among member states in this field.

[46] See also EU Council Resolution of 20 December 1996 of individuals who co-operate with the judicial process in the fight against international organised crime, par. D.

3.4 Administrative synergies and co-operation with the private sector

BOX 10:

With the advances in information and communication technologies, administrative synergies emerge as a necessary and cost-efficient extension of the powers to counter TOC: active co-operation and exchange of information between administrative bodies and private entities and law enforcement authorities has to be promoted, including at a transnational level, within an adequate legal framework that respects data protection and privacy rights.

By administrative synergies we understand the various forms of co-operation between law enforcement authorities on the one hand, and administrative authorities and private entities on the other. This is a key issue with regard to efficient (preventive) co-ordinated action against transnational organised crime, as administrative authorities can play an important role in identifying, but also in deterring, organised criminal groups that infiltrate state and private legal activities for the purpose of committing crimes, laundering money and organising frameworks for concealed the financing of crime.

Although the practice of including administrative authorities and private entities in fighting organised crime has been around for several decades (e.g. in the United States of America), in Europe it is a relatively new phenomenon, dating back no more than five years. Despite this fact, administrative synergies are, in some form or another, present in most CoE member states, where law enforcement authorities are able to pool information from a variety of administrative authorities and private entities.

With the advances in information and communication technologies, and as organised criminals become ever defter in their methods, and law enforcement authorities ever more in need of additional resources, administrative synergies emerge as the natural and cost-efficient extension of the powers that counter organised crime.

Co-operation between law enforcement authorities and other bodies is generally encouraged in all documents pertaining to organised crime. The UNTOC stresses the importance of co-operation between law enforcement authorities and other bodies in several instances (most notably in Article 1, Article 7 (4) and Article 31 (2a)). **The CoE Money Laundering Convention of 2005 [47] (the Warsaw Convention) provides** for the setting up of financial intelligence units and the co-operation between them at an international level. This Convention encourages the co-operation between different authorities, albeit without explicitly stating the need for co-operation between law enforcement authorities and other actors. It does so in the Convention on Mutual Administrative Assistance in Tax Matters, which was developed in concert with the OECD and which lays down the ground rules for co-operation and exchange of information in the field of taxes. It should also be recalled that the CoE Convention on Action against Trafficking in Human Beings provides a legal basis for

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

co-operation and sinergies between state bodies and private entities[48]. However, the legal provisions governing the possibility of law enforcement authorities to mine administrative authorities and private entities for information differ from country to country. Even though the formulation of universal guidelines in this area would not be advisable at the present time (due to differing national legal systems), it is commendable that several international bodies have taken note of the importance of administrative synergies and continue to encourage their development. This role could also be envisaged for the CoE.

In most CoE member states, the general norm is that law enforcement authorities have the possibility, while investigating a crime, to ask relevant actors (be they administrative authorities or private entities) for information. These actors, in turn, are obliged to render the required information within a certain time. Furthermore, most CoE member states require that a suspicion that a crime is being committed be reported, which also includes administrative authorities and private entities. Some CoE member states, such as Italy or the Netherlands, have taken a further step in granting administrative authorities additional powers, thus widening the scope of actors actively engaged in the fight against organised crime. This practice is most often referred to as the 'administrative' or 'multidisciplinary' approach (see below).The most ardent proponent of administrative synergies to date has been the European Union. The importance of deploying a set of complementary measures and actions to prevent and combat organised crime has been pointed out in a number of EU strategic documents[49]. Several EU Council Conclusions have dealt with the issue of the administrative or multidisciplinary approach, most notably those on the fight against crimes committed by mobile (itinerant) criminal groups, which called on EU member states to develop an administrative approach as a complement to existing prevention, police and judicial work. These conclusions resulted in the setting up of the informal network of contact points on the administrative approach, whose purpose it is to strengthen co-operation and spread awareness across the EU[50].

As has been stated above, in many CoE member states some form of administrative synergies is already in place, often without being referred to as such. In Italy and the Netherlands, for example, the issue of a business licence is subject to certification that the applicant has no ties to organised crime.[51] A huge experience has been accumulated as well by Italy in the field of public procurements and public works, requiring the absence of a link with OCGs in the tender procedures. In the Czech Republic, to cite another example, private energy companies co-operate with the police in order to help detect clandestine grow houses. Similar examples abound across Europe, where law enforcement authorities face up to the double challenge of cutting costs and tackling state of the art criminal modi operandi by enhancing co-operation with other actors.

[48] See for example both Article 5 and Article 35 of the CoE Convention on Action against Trafficking in Human Beings. Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm .

[49] These include the Stockholm Programme, the Internal Security Strategy, and the European Commission's Communication on the EU Internal Security Strategy in Action.

[50] See also the Special Committee's Report of the European Parliament, paras. 90 and 107.

[51] As per the Anti-Mafia (IT) and BIBOB (NL) legislations.

3.4.1. Problems and Gaps Identified

Putting administrative synergies into practice on an international level is a daunting task. It requires flexibility and motivation, especially in an environment where many CoE member states are in the process of reviewing and optimising their own national systems of co-operation between law enforcement authorities and other relevant bodies.

Starting at national level, administrative synergies may be hindered by any one or a combination of the following factors:

- legal restrictions (e.g. where a law enforcement authority does not have the authority to request information from another body);
- data protection laws;
- lack of motivation (e.g. where a law enforcement authority has no means of obliging a relevant body to provide it with information);
- lack of awareness of a problem (e.g. where an administrative authority or private entity possess information that could be useful to law enforcement authorities, yet is unaware of this fact and the information is thus neither volunteered, nor requested);
- lack of efficient communication channels (e.g. where, either as a result of lengthy bureaucratic procedures or an unwillingness to share information, communication becomes lengthy to the extent that the information provided becomes futile).

When putting administrative synergies into practice at international level, further challenges present themselves:

- language barriers (e.g. in written correspondence as well in personal communication);
- delays incurred by transnational communication (e.g. where official requests are necessary, the processing of one request may easily take several months);
- varying legal requirements (e.g. where certain procedures are necessary in one state, but not in another state, or where certain procedures are possible in one state, but have no legislative ground in another);
- lack of insider information (e.g. when the information required is not specific, it can be difficult to know which exact authority to turn to, or even what information could be required of what authority, without the assistance of liaison officers or contact points).

The majority of countries, when fighting organised crime, co-operate most closely with their immediate geographical neighbours. Ideally, the law enforcement authorities of neighbouring states will have long-standing traditions of co-operation and will have at their disposal a number of bilateral and/or regional instruments aimed at facilitating the exchange of information, joint investigations, and other actions pertaining to criminal proceedings.

Considering co-operation outside the field of law enforcement, it is imaginable that, where the motivation is high, there are possibilities of involving administrative authorities and private entities based in different countries in a joint transnational investigation.

3.4.2. Possible action to be taken

The challenges outlined above should provide a guide to further action to be taken at both national and international levels. Speaking in general terms, it would be advisable that the CoE takes action on the following areas:

- the systematic promotion of administrative synergies among member states, i.e. the co-operation of law enforcement and administrative authorities and private entities, through their inclusion in bilateral agreements and international conventions, including mutual legal assistance treaties;
- the encouragement of the building, maintenance, and use of efficient communication channels, including liaison officers and contact points, this especially applies to the sharing of information through existing and new databases;
- transnational co-operation through informing liaison officers of the importance of administrative synergies should be promoted and exchange of information relevant for national contact points should be encouraged;
- the encouragement of the exchange of good practices in preventing the infiltration of criminal organisations into the private and public sectors;
- a review of the systems and practical implementation of data protection rules with the aim of achieving a higher degree of harmonisation within the CoE member states' legislation and the monitoring of its practical implementation to increase the level of mutual trust;
- the increase in awareness of administrative authorities and private entities of their role in preventing and fighting organised crime, including providing training so as to give them specific tools with which to identify and report possible organised criminal activity.

One of the most efficient means of tackling organised crime is to focus on money laundering. Incidentally, it is also in this field that international co-operation could be most potent, due to the well-oiled machine of banking networks already in place across the world.

It is advisable that the CoE devotes further attention to administrative synergies within its own committees, with regards to specific forms of organised crime (e.g. CDPC, MONEYVAL, GRECO, T-CY).

3.5 Recovery of Assets

BOX 11:

> The target in fighting TOC is not only prosecuting the offenders, but depriving them of the proceeds of crime. To this end, timely tracing of assets in different jurisdictions, effective co-ordination at a transnational level and direct contact among asset recovery bodies is crucial. The seizure and freezing of assets in a transnational setting is lacking in efficiency, and mechanisms to speed up co-operation at this level need to be further explored and implemented.

Criminal assets are a growing concern for many countries. They not only feed corruption and organised crime but also constitute a reliable source for the financing of terrorism. The proceeds of crime in substantial amounts provide not only economic power but also prestige and political influence to criminal organisations thereby increasing the severity of the threat imposed on society by such organisations.

The prevalence of the proceeds of crime in the economy brings about unfair competition between economic actors, undermines public finance and negatively affects the rule of law, democratic values and human rights due to the power and influence gained by criminal organisations, while also corrupting and spoiling society.

Law enforcement experience shows that arresting criminals is not enough to eradicate criminal organisations unless you recover the assets derived from their criminal activities. And unless you develop a comprehensive plan to take the proceeds of crimes from corrupt officials, smugglers and organised criminal groups, it will not be possible to disrupt the criminal activities which are hampering the good governance and transparency of the public sector and decreasing public confidence in the government.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the financing on Terrorism (CETS No. 198), the UNTOC and the United Nations Convention Against Corruption (UNCAC) are some of the binding instruments that provide a unique opportunity to mount a global and regional response to this problem.

3.5.1 Gaps and problems identified

There are promising initiatives to fill the gap in the area of information sharing and co-operation among states. Europol's Camden Asset Recovery Inter-Agency Network (CARIN) and the Stolen Asset Recovery Initiative (StAR Initiative) are examples of regional and international mechanisms that encourage co-operation between prosecutors and investigators.

But mutual legal assistance is still at a low level due to the lack of dual criminality despite the best efforts of international conventions and initiatives. Even if a requesting state fully complies with the demands of the requested state, there can be other problems including a

lack of expertise, lack of will or inadequately funded central authorities to assist in the asset recovery investigations being conducted. These problems are not restricted to one geographical area of the world.

There are two main approaches in terms of dealing with the proceeds of crime. One of them is to link the confiscation with the criminal conviction. In this case, even if it is probable that the assets of a suspect are derived from a criminal offence and the owner or possessor is not able to provide evidence that the gain was acquired legally, confiscation is not allowed. In this legal system confiscation is governed by the same standard of proof required for the conviction of an individual.

The other has been introduced as a model of civil law asset forfeiture which allows the confiscation of assets without a criminal conviction, providing that the assets in question result from criminal activities or are used to carry out criminal activities, upon the decision of a court.

On the basis of Italian practice in investigations of TOC, whenever a defendant is convicted for organised crime, for playing a major role within a criminal organisation or for having performed criminal activities regularly, the judge shall order the confiscation of the money, commodities or any other assets the defendant has at his/her disposal and whose illegitimate origins he/she has not suitably justified in order to disprove the circumstantial evidence collected by the prosecution, provided that the value of the goods and properties mentioned above are disproportionate to the statement of income or the business activity performed. It is also worth mentioning that the Italian experience of the preventive measures, including the confiscation of assets disproportionate to legitimate incomes, is based on the model of confiscation in rem, which can be issued by judges in cases where there are not sufficient grounds to get a conviction for the crime of participation in a criminal organisation, but there are more than sufficient suspicions on the person involved about his/her contiguity with criminal groups.

Money, commodities or other assets can be confiscated when acquired by a legal person following an organised crime committed by an organ, a representative or by any natural person who, on the basis of factual circumstances, is to be considered to have acted to the advantage of or in the interests of such a body. The legal person shall be dissolved if it operated exclusively or primarily for the realisation of criminal activities. The assets remaining from the liquidation shall be confiscated as well.

But the complex nature of financial investigations and the detailed requirements for the identification of banking information in many jurisdictions makes it hard to identify and confiscate the criminal proceeds. In many cases assets of organised criminal groups are held in the name of other persons, especially relatives or friends. Businesses are run by front individuals who have no criminal record.

Due to the increasing tools and choices in the financial sector, it is not difficult for the criminals to hide the source of the proceeds with the help of professional advice coming from economists, accountants and legal experts. Being financially motivated, these specialists use their expertise to launder money and place it in the legal economy.

Criminals are now taking advantage of the globalisation of the world’s economy by transferring funds quickly by on-line banking, virtual casinos, auctions, smart-cards. They utilise legal shields as a way to reinvest illicit profits.

So, timely tracing of assets in different jurisdictions, effective co-ordination and direct contact among asset recovery bodies is crucial. If this co-ordination isn't established well, it will be impossible to successfully start formal mutual legal assistance procedures to confiscate the criminal assets.

The organised criminal groups benefit from the insufficient co-ordination and slow exchange of information among law enforcement and judicial agencies on an international level. Although the level of ratification of international and European instruments dealing with trans-border organised crime is on the rise, there is still a lack of harmonisation related to criminal definitions, liability of legal entities and criminal procedural instruments.

Bank secrecy, the use of offshore companies, different priorities of the judicial and law enforcement authorities and lack of trust among them makes it harder to co-operate effectively. In some countries there isn't even enough political will to actively pursue suspicious financial transactions. At times of economic crisis, some companies and banks tend to ignore transparency and the available preventive measures against money-laundering

Statistics available on asset recovery support the idea that the relevant mechanisms in place have not proved effective in addressing this issue from both a regional and an international point of view.

The management and disposal of confiscated assets, which are important aspects of the overall process of confiscation, seem problematic for a number of countries. For instance the sale of confiscated real estate, running a confiscated firm until its sale, selling food products before they are ruined are some of the problems that the asset recovery offices have to face on a day to day basis.

3.5.2 Possible action to be taken

- Resume efforts to ensure that the member states of the CoE ratify and fully implement the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[52] as well as the provisions on confiscation of assets included in other CoE Conventions[53].
- The CoE might also take political action to ensure that the freezing and confiscation of the proceeds of crime owned by criminal organisations is placed at the top of agenda on the counter activities against organised crime.
- The actual results achieved in confiscating and seizing the proceeds of crime from criminal organisations should be reviewed by preparing an annual report in this regard.

[52] It should be noted that while the COE Convention on action against trafficking in human beings also adopted in 2005 has been ratified by 1st December 2013, 41 Parties as of 1.12.2013, only 6 Member States have ratified the Money Laundering Convention of 2005.

[53] See, for example, the Council of Europe Convention on Action against Trafficking in Human Beings, whose Article 23.3 makes an obligation to confiscate the criminal assets from trafficking: "*Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with Articles 18 and 20, paragraph a, of this Convention, or property the value of which corresponds to such proceeds.*"

- The CoE could explore the possibilities of creating a central register or database of bank accounts and a register of beneficial ownership of the legal persons at national level.
- Review legislation to allow specialised law enforcement authorities to access the financial intelligence and relevant databases (land register, property register, motor registration, tax registry, bank registers, financial information, etc.) to investigate promptly the preliminary indications of money laundering.
- Analyse how far the legislation of CoE member states regulates fast seizure and freezing mechanisms and how these mechanisms are implemented in practice in a transnational setting.
- An effective system should be established to manage the confiscated assets to make sure that they do not lose their value.
- Effective confiscation regimes should be established. Such regimes could include 'reversal of the burden of proof' for organised crime cases or similar legal constructions aiming to simplify the confiscation of criminal assets from major criminals.
- For the purpose of confiscation, the goods that are fictitiously registered in the name of third parties or which are possessed by intermediary natural or legal persons acting as straw persons should be considered as being at the disposal of the offender.
- Investigations against organised crimes should be supported by a financial perspective to give the law enforcement agencies and prosecutors extra information to lead the investigation in the right direction which also facilitates the detection of illicit financial flows and criminal proceeds.
- It is crucial to ensure active participation and maximise the level of co-ordination and co-operation among the competent units in prosecution, administrative and law enforcement bodies. This strengthened co-ordination should include the setting up of joint prosecutor-investigator task forces. In this regard the opening of parallel investigations for money laundering in the country where illegal assets are allocated and hidden should be recommended as example of good practise to follow.
- International standards and procedures for asset sharing among states should be set up in order to combat criminal economy using a holistic cost-effective approach. States should be encouraged to provide mutual legal assistance on this basis. To this end, ad hoc arrangements, memorandums of understanding or bilateral co-operation agreements should be signed.
- Criminal assets recovered should be used for the benefit of the community such as for the purpose of compensating the victims and financing the social work. There should also be an analysis of whether the assets recovered could also be used as an incentive for the Law Enforcement Agencies as already exists in some jurisdictions e.g. France.
- Special training should be organised in order to increase the awareness of those who are in charge of combating these crimes such as law enforcement authorities and prosecutors. This concept should go beyond national borders and contribute to the upgrading of the operational skills of law enforcement officers and also to building an informal network among them.

4. Recommendations and proposals for future action

4.1 General recommendations

1. A more co-ordinated action against TOC should be promoted. The combat against TOC requires co-ordinating efforts: the actions and initiatives of the UN, the CoE, the EU, OSCE, OCDE and other organisations with an active role in TOC should be co-ordinated. In particular initiatives taken in the EU need to be co-ordinated with the actions of the CoE, as the TOC that affects the EU has its origins in third countries and many of the criminal organisations that operate in the EU are originally from, linked to or based in CoE member states.

2. The UN activities related to Palermo Convention should be co-ordinated with the CoE initiatives in the CoE landscape and take into account the findings of the CoE monitoring bodies. Overlapping and non-efficient resource allocation in facing this global challenge should be avoided.

3. The priority in defining actions should be focused on identifying to what extent national legal systems have implemented the CoE Conventions and Recommendations and the UN conventions. The CoE has provided numerous recommendations and conventions to deal with TOC. These instruments combined with the Palermo Convention, which has been ratified by all CoE member states, show that at this moment the priority does not seem to be the drafting of new legal instruments at international level. However, the CoE should consider it, if need be

4. The reasons for non-implementation or lack of adequate implementation of the existing legal instruments on combating TOC should be further analysed. Identifying these reasons is a first step towards designing comprehensive strategies and programmes.

5. For a better assessment of TOC reality, the setting up of a unit on TOC, putting together all the input and data gathered by the different monitoring bodies, should be considered. If such a “co-ordinating body on TOC” is not considered appropriate, then it would be expected that all the CoE monitoring bodies that deal with serious crimes falling within the category of TOC or are directly linked to TOC should be able to cover the whole phenomenon of TOC in order to provide a comprehensive approach to enhance the efficiency of fighting TOC by defining common strategies and joining efforts.

6. Further attention within the CoE monitoring bodies should be given to the threats posed by TOC. There is a need for raising awareness on the global character of the threats posed by TOC: transnational problems need to be dealt at a transnational level and with transnational tools. Unless there is co-ordinated action, the spill-over effect will end up having a negative effect on those countries where the efforts are less.

7. The CoE should encourage its member states to make civil society organisations participate in dealing with the risks of TOC by raising awareness and protecting victims. Capacity-building activities for law enforcement authorities, judges and prosecutors to fight TOC efficiently (e.g. international co-operation, implementation of witness protection programmes, the use of SITs and the recovery of assets) should be continued. Dissemination and exchange of good practices in the criminal response to TOC should be expanded.

8. The need for a mutual pan-European strategy covering both prevention and suppression of all phenomena of serious and organised crime should be further examined.

4.2 Enhancing judicial and police co-operation

1. The CoE should design an action plan to enhance mutual trust among the CoE Member States, as this undoubtedly fosters the co-operation. There should be further analysis on whether some of the measures adopted within the EU area, should or could be extended to the CoE landscape.

2. The CoE should take political action towards the ratification of the relevant conventions. States Parties should review the need for keeping some reservations and declarations.

3. The CoE should promote the accession to its conventions by third countries as well as the establishment of co-operation agreements and projects with relevant non-CoE states.

4. The CoE should analyse to what extent the national legal framework on TOC is harmonised in the CoE area and if the existing divergences represent a significant obstacle in co-ordinating efforts and providing efficient co-operation. If such divergences exist, the CoE should analyse if there are certain areas where harmonisation or compatibility of legal provisions could be sought.

5. Further practical measures to overcome the existing delays in providing international co-operation, to avoid ungrounded refusals and to establish mechanisms to prioritise the co-operation in the fight of TOC, should be taken. The MLA conventions intended in a broad sense, including all relevant Conventions, such as Extradition, Transfer of Prisoners, etc., provide an adequate legal framework to enable efficient co-operation, however their application is still not sufficient. The delays are unacceptable for an efficient criminal justice response, and in a technologized society these delays will render the prosecutions and the recovery of assets impossible.

6. The evolution of the international co-operation model from traditional requests for MLA towards close co-operation and co-ordinated on-going parallel investigations should be fostered by the CoE. To this end the ratification of the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters – which gives a framework for the JITS – should be encouraged.

7. The CoE should promote the connection of existing judicial and police networks and their expansion within a pan-European landscape. A unit representing non-EU and CoE member states in Eurojust, for co-operation in certain areas of TOC, could be studied further. Promotion of co-operation agreements and memoranda of understanding should be supported if the guarantees for the protection of human rights, and specifically for data protection and privacy rights, are to be safeguarded.

8. Further development of the existing network[s] of Contact Points in all CoE member states should be studied. The setting up of institutionalised network of contact points at CoE level (CoEJN) is recommended.

9. Programmes to ensure that the central units, contact points and judges involved in MLA have adequate training, language skills and are subject to special performance indicators, should be supported.

4.3 The use of SITs

1. Scientific and comparative research should be carried out to collect relevant information on the existing legal frameworks under which SITs operate in CoE member states and the possibilities of their harmonisation.

2. The CoE should analyse how the SITs are used in practice and evaluate if they are adequately applied/utilised. In particular, the CoE should examine if SITs are used in a proactive setting and to what extent the preventive and reactive actions to provide a criminal response against TOC are regulated. Practical measures to guarantee the right to data protection and privacy also need to be looked into. There is the need to analyse any problems regarding the admissibility of evidence gathered in a cross-border investigation within CoE member states. In this regard, the CoE should play a key role in defining principles of transnational criminal proceedings.

4.4 Witnesses, state witnesses and collaborators

1. The CoE should carry out studies to analyse why the protection programmes are not functioning adequately or how they could be improved. With regard to the fight against TOC, the relocation of protected witness should be further studied and evaluated to see if the shortcomings are due to lack of resources, distrust of the witnesses in their national programmes, etc.

2. Incentives to encourage the co-operation of collaborators should be further analysed. In this regard, various forms of plea-bargaining and pre-judicial co-operation agreements that may result in a mitigated punishment should be studied. Both risks and expected advantages of such activities should be covered.

4.5 Synergies and co-operation with other entities

1. Administrative synergies should be systematically promoted, i.e. the co-operation between law enforcement and administrative authorities (e.g. financial supervisory units) and private entities (e.g. banks, transportation companies).

2. Transnational co-operation through informing liaison officers of the importance of administrative synergies should be promoted and the exchange of information relevant for national contact points should be encouraged.

4.6 Recovery of Assets

1. The actual results achieved in seizure, management and confiscation of the proceeds of crime from criminal organisations should be reviewed by preparing an annual report. Swift execution of requests for freezing assets should be a priority.

2. The existence of central offices for the recovery and management of assets in CoE member states and their efficiency should be analysed, to make an assessment of the model to be followed in the setting up of a specialised unit for the recovery of assets.

3. The CoE could further explore the effectiveness of a centralised national register of bank accounts.

5. Conclusions of the Committee

Despite multiple initiatives undertaken by other international and supranational organisations, there are certain areas where the CoE could and should play an important role in the fight against TOC, especially by operating on the pan-European territory.

The CoE should play a key role in the creation of a new pan-European network on international legal assistance in criminal matters, and also in the development of links between the various existing networks to provide mutual legal assistance in criminal matters. The CoE is a unique position for the fostering of co-operation agreements in specific areas where the CoE member states need to co-operate more efficiently.

If there is a lack of political will to implement co-operation mechanisms among the CoE member states, the CoE should study the reasons for this and define the political approach to be followed to help overcome such obstacles in the fight against TOC.

The proposals made in this White Paper have tried to be as precise as possible, but more empirical data is needed to re-define the precise actions to be developed. Among the actions proposed, priorities should be set and a step by step programme or roadmap should be approved at a further stage in order to adopt more concrete measures and actions.

Appendix 1 – Selected texts

United Nations

- United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, and the Protocols thereto; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition
- United Nations Convention against Corruption, adopted by General Assembly resolution 58/4 of 31 October 2003
- UNODC draft Comprehensive Study on Cybercrime (not yet adopted).

Council of Europe

- European Convention on Mutual Assistance in Criminal Matters (CETS N°030) and its Additional Protocol (CETS N°099) and Second Additional Protocol (CETS N°182)
- European Convention on the International Validity of Judgments (CETS N°070)
- European Convention on the Transfer of Proceedings in Criminal Matters (CETS N°073)
- European Convention on the Compensation of Victims of Violent Crimes (CETS N°116)
- Convention on Insider Trading (CETS N°130) and its Protocol (CETS N°133)
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS N°141)
- Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances (CETS N°156)
- Criminal Law Convention on Corruption (CETS N°173) and its Additional Protocol (CETS N°191)
- Civil Law Convention on Corruption (CETS N°174)
- Convention on Cybercrime (CETS N°182)
- Council of Europe Convention on Action against Trafficking in Human Beings (CETS N°197)
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS N°198)
- Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS N°211)

European Union

- Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering
- Joint Action concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union, 96/277/JHA, 27 April 1996.
- Joint Action on making it a criminal offence to participate in a criminal organisation in the European Union', 98/733/JHA of 21 December 1998
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States and subsequent amending act
- Council Framework Decision 2002/465/GAI of 13 June 2002 on joint investigation teams (and report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams (COM(2004)0858)
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
- Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property
- Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
- EC Third Directive and the Council of Europe Convention N198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism
- EU Drugs Strategy (2005-2012) and the EU Action Plan on Drugs (2009-2012)
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
- Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union
- Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, 27 November 2008
- Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network
- Council resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan
- Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law
- Council resolution of 23 October 2009 on a reinforced strategy for customs co-operation
- Council Decision 2009/371/JHA establishing the European Police Office (Europol)

- Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
- Council Conclusions on combating the criminal misuse and anonymous use of electronic communications, 2908th JHA Council meeting, Brussels, 26 and 27 February 2008
- Council Conclusions on supporting the Council of Europe's legislative work in the area of criminal, justice, 2927th JHA Council meeting, Brussels, 26 and 27 February 2009
- Stockholm Programme on freedom, security and justice and the Action Plan on Implementing the Stockholm Programme' (COM(2010)0171)
- Draft Council Conclusions of 20 May 2010 on the Prevention and Combating of the Illegal Trafficking of Waste, particularly international trafficking
- Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims
- Council conclusions on the new EU Strategy towards the Eradication of Trafficking in Human Beings 2012 – 2016, 3195th JHA Council meeting, Luxembourg, 25 October 2012
- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

Appendix 2 – List of abbreviations

BKBOP	The Office for the Coordination of the Fight Against Organised Crime and Other Dangerous Types of Crime on the Territory of CIS Participant States
CARICC	The Central Asian Regional Information and Coordination Centre for Combating the Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Their Precursors
CARIN	Camden Asset Recovery Inter-Agency Network
CDPC	European Committee on Crime Problems
CODEXTER	Committee of Experts on Terrorism
CoE	Council of Europe
EJN	European Judicial Network
EU	European Union
EUROPOL	The European Police Office
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
GR-PC-COT	Ad-hoc Drafting Group on Transnational Organised Crime
GUAM	Organisation for Democracy and Economic Development
Iber-RED	The Ibero-American Network for International Legal Cooperation
ICTs	Information and communication Technologies
IMoLIN	International Money Laundering Information Network
INTERPOL	International Criminal Police Organisation
JITs	Joint Investigations Teams
MEDICRIME	Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering and the Financing of Terrorism
MTIC	Missing Trader Intra-Community fraud
NCB	National Central Bureaux
OLAF	European Anti-Fraud Office
PCC SEE	Police Co-operation Convention for Southeast Europe
PC-OC	Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters
Pompidou Group	Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs

SITs	Special Investigative Techniques
SOCTA	EU Serious and Organised Crime Threat Assessment
StAR	Stolen Asset Recovery Initiative
T-CY	Convention Committee on Cybercrime
TOC	Transnational Organised Crime
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	UN Convention against Transnational Organised Crime
VLEC	Virtual Law-Enforcement Centre