



Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime

Final report, February 2015

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**Study on paving the way for
future policy initiatives in the
field of fight against organised
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specific criminal law measures
targeting organised crime**

Final report

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Preface

This document sets out findings from a study led by RAND Europe and Professor Michael Levi, and conducted in partnership with the Centre for the Study of Democracy and the eCrime group at the University of Trento.

RAND Europe is an independent not-for-profit research institution whose mission is to improve policy and decisionmaking through research and analysis. RAND Europe's clients include European governments, institutions, non-government organisations and firms with a need for rigorous, independent, multidisciplinary analysis.

Professor Michael Levi has been Professor of Criminology at the School of Social Sciences, Cardiff University since 1991. He has been conducting international research on the control of white-collar and organised crime, corruption and money laundering/financing of terrorism since 1972, and has published widely on these subjects as well as editing major journals. He has served as Scientific Expert on Organised Crime to the Council of Europe.

The Center for the Study of Democracy is a Bulgarian multidisciplinary think tank combining a broad range of capacities: legal and regulatory analysis, policy monitoring and advocacy, European integration, institution building, security sector reform, and anti-crime and anti-corruption strategies and practices.

eCrime is the research group on eCriminology of the Faculty of Law of the University of Trento UNITN. eCrime is involved in international research projects on transnational organised crime, corruption and the evaluation of policies against organised and non-organised crime.

The study was directed and coordinated by Andrea Di Nicola (eCrime, University of Trento), Philip Gounev (Center for the Study of Democracy), Michael Levi (Cardiff University), Jennifer Rubin (RAND Europe) and Barbara Vettori (Catholic University of Milan).

William Hughes, QPM CBE (Director of Probimus Marylebone Associates Cambridge), Filippo Spiezia (Deputy National Anti-Mafia Prosecutor at the Italian Anti-Mafia Directorate in Rome) and Barbara Vettori (Assistant Professor in Sociology of Deviance, Faculty of Political and Social Sciences – Catholic University of Milan) acted as Advisory Board to the study.

This report is divided into six parts and 11 Chapters. Authorship of this report is as follows:

- Part one (RAND Europe and Professor Levi): An introduction and background to the study and the methodological approach.

- Part two (eCrime, University of Trento): Mapping of the national legislation on organised crime, based on the contents of Framework Decision 2008/841/JHA; assessment of the transposition of Framework Decision 2008/841/JHA into MS national legislation; analysis of further/alternative criminal law tools to fight organised crime; implementation of laws relating to participation in a criminal organisation.
- Part three (Center for the Study of Democracy): Analysis of the investigatory tools used in the fight against organised crime (legislation and practices).
- Part four (RAND Europe and Professor Levi): Examples of specialist national agencies involved in the fight against organised crime.
- Part five: Italian case study (eCrime, University of Trento) and UK case study (RAND Europe and Professor Levi).
- Part six (all partners): Summary and conclusions.

Parts one and four and the UK case study only have been subject to RAND Europe Quality Assurance review processes.

Executive summary

Organised crime poses a threat to the security and freedom of European citizens and impacts the lives of people worldwide. Recognising the severity of the problem and the need for coordinated action, the EU has initiated a number of measures to encourage closer cooperation between Member States and the adoption of common legal, judicial and investigative frameworks to address organised crime.

Study objectives

This study is an evaluation of the practical application of legal and investigative tools stemming from Framework Decision 2008/841/JHA on the fight against organised crime, other EU and international regulations and national legislation. The aim of this study is twofold:

- To assess the impact of Framework Decision 2008/841/JHA and other relevant EU and national legislation on the fight against organised crime through comparative legal analysis.
- To provide a comparative analysis of investigative tools and other measures used at the national and EU level for the purpose of fighting organised crime, with a focus on the operational results of these tools.

Elements of the study

This study, conducted for the European Commission DG Home, involved the following elements:

- Reviewing the law in 28 Member States:
 - Mapping Member States' legislation and assessing the transposition of Framework Decision 2008/841/JHA.
 - Identifying other national criminal law tools (other than those transposing the Framework Decision) used in the fight against organised crime.
- Examining how the identified legislation, relevant to the fight against organised crime, was used in practice in each Member State.
- Reviewing eight special legal and investigative tools and techniques used in the fight against organised crime: surveillance; interception of communications; covert investigations; controlled deliveries; informants; hot pursuit of suspects; witness protection; and joint investigation teams.
 - The study looked at if and how these legal and investigative tools were permitted, by law, in Member States.

- The study looked at how these legal and investigative tools and techniques were used in practice.
- Providing an overview of selected national specialist law enforcement and prosecution agencies involved in the fight against organised crime.

Cutting across these three main elements of the study was the objective of identifying potential good practice – in relation to law, investigatory tools and specialist agencies – which could be potentially helpful and transferrable to other Member States who are looking to improve national practices.

Study methodology

This study involved four main research activities/data collection methods:

- Data collection by 28 Member State experts: experts in criminal law in each Member State completed a detailed questionnaire to provide the research team with information relevant to each of the elements of the study, outlined above. In completing the questionnaire experts drew on their own knowledge, as well as interviews with individuals within the Member State (including prosecutors and judges, police officers from specialised units fighting organised crime, academics and policymakers). Members of the research team liaised extensively with the Member State experts to ensure the information provided was as comprehensive and accurate as possible.
- Assessment of compliance and transposition: this looked at the compliance of national legislation in all 28 MS with the Framework Decision 2008/841/JHA. The research team assessed compliance with Articles 1–8 of the Framework Decision.
- Desk research of national legislation, law and other information, to supplement information provided by Member State experts.
- Case studies on aspects of the fight against organised crime in Italy and the United Kingdom.

Study limitations

- An approach based on the use of information provided by national experts was selected as the only practical way of collecting data across the 28 Member States within the time and resources available for this study. National experts were predominantly academic lawyers, knowledgeable in their field and also about the control of organised crime. The research team supplemented the information provided by national experts with information from desk research, but largely this study is based on information provided by national experts.
- Given the scale of the task, experts were not required or expected to be comprehensive. National experts were asked to describe the *main* specialist national agencies. In the time available, some experts were unable to access all the information requested in the questionnaire. Therefore, as anticipated in the planned methodology for this study, the report provides an overview, to the extent feasible, of investigative tools and national

agencies, highlighting the main issues, agencies, etc.

- The study aimed to collect objective data regarding the use and impacts of national law, investigative techniques and national specialist agencies used in the fight against organised crime. The research team primarily relied on national experts' perceptions of effectiveness (and the perceptions of the stakeholders they interviewed). For this reason the term 'promising practices' is used to describe elements perceived to be working well within a country, which other Member States might be interested in learning about but which require more detailed assessments regarding impacts.
- Availability of national statistics: Recognising the importance of policy being informed by the best-available comparative data and statistics (and in the hope of validating the views reported by Member State experts), the research team attempted to collect statistics compiled at national level regarding the use of legal and investigatory tools in order to assess the effects of policies via objective indicators. As expected, data were very limited and this means that the study had to rely primarily on more subjective views reported by experts.

Key findings regarding transposition of the Framework Decision 2008/841/JHA on the fight against organised crime

Chapter 4 of this report presents the detailed mapping and transposition assessment of Framework Decision 2008/841/JHA, article by article.

With the exception of Denmark and Sweden, all Member States have transposed the key elements of the Framework Decision and introduced a self-standing offence of participation in a criminal organisation and/or conspiracy to commit offences. The majority of Member States only have the offence of participation in a criminal organisation. A minority (two Member States) only have the offence of conspiracy, and four Member States have both offences.

Denmark and Sweden do not have a self-standing offence in relation to Article 2 of the Framework Decision. All other provisions (apart from potentially Article 3.2) of the Framework Decision are based on Article 2, which means that it is not possible for Denmark and Sweden to transpose any of the other Articles. These countries do, however, have other alternative legal instruments to tackle criminal organisations and have national specialist agencies for the fight against organised crime.

Findings from the mapping of national legislation and assessment of compliance lead the research team to make a number of observations and conclusions regarding the added-value of the Framework Decision, as follows:

The Framework Decision differs considerably from the original proposal by the Commission and the most important provisions are optional.

During the process of approving the Framework Decision, Member States made the main obligations optional (e.g. offences in relation to participation in a criminal organisation – Article 2), relatively vague (e.g. definitions – Article 1) or of modest impact (e.g. penalties – Article 3). For this reason, the content of

the Framework Decision adds little value in relation to the international UNTOC standards and the previous EU Joint Action.

Motivations for creating organised crime legislation are primarily national, rather than stemming from a need or desire to comply with the Framework Decision.

Comments from national experts suggest that Member States tend to develop legislation on organised crime issues for their own domestic reasons, taking account of the threat they believe organised crime poses nationally.

Most Member States were compliant with the minimum standards before the Framework Decision was issued.

Twenty Member States were fully or partially compliant with the terms of Article 2 before the Framework Decision was introduced, and eight changed their national legislation following the introduction of Framework Decision.

The Framework Decision should be seen in the context of the range of other measures in the fight against organised crime.

Within Member States, there are a range of measures and processes used in the fight against organised crime, which are independent of the Framework Decision (for example evidential law and asset recovery powers), as well as preventative measures against organised crime implemented by businesses, citizens and the public authorities. These can have a large impact on crime threats and public security.

Member State law often goes beyond the minimum standards set out in the Framework Decision.

For example, in relation to Article 3 (penalties), most Member States impose penalties that are higher than the required minimum. Others extend the scope of predicate offences (Article 1(1)) to all criminal offences.

Transposition of the Framework Decision may, in some instances, be too broad.

Some national experts were concerned that legislation aimed at serious organised crime could be used to target activities that were not sufficiently serious or not of a cross-border nature. This raised concerns about over-criminalisation.

Legal reasons and non-legal reasons were identified to explain why national legislation relating to participation in a criminal organisation may not be used in practice.

Legal reasons included difficulties in meeting the standard of proof and proving all the elements of the offence. The non-legal reasons included practitioners' preferences for conspiracy over participation and a preference for predicate offences and using participation in a criminal organisation as an aggravating factor. Factors which were said to facilitate the use of participation offences were related to procedures such as exchange of information and coordinating agencies, rather than to legislation as such.

Compliance with the Framework Decision through case law or jurisprudence may increase uncertainty.

Some Member States comply through jurisprudence or case law, and while this is permitted, this could create a problem because the status of these types of law may vary between Member States.

It is not clear that future, additional legislation would address the limitations of the Framework Decision.

This study has indicated that that the legal implementation of a Framework Decision or other instrument is no guarantee that Member States will use it to the extent intended. The shape of any possible future revised legal instrument would largely depend on the willingness of Member States to enhance the current legislation.¹

Key findings regarding further and alternative criminal law tools

Chapter 5 of this report describes whether Member States have further criminal law tools to tackle organised crime (in addition to offences under the Framework Decision). Key findings are as follows:

Eleven Member States had further offences.

In several cases these further tools aimed to tackle the most serious or large organised crime groups, or set out laws on specific topics, such as organised crime groups involved in drug trafficking. In five Member States the further laws included offences which were broader (less specific) than required in the Framework Decision.

Denmark and Sweden have alternative criminal law tools to fight organised crime.

In Denmark there are provisions related to complicity, aggravating circumstances based on organised crime and criminalisation of organisations that use violence to achieve their ends. In Sweden national legislation states that it is an aggravating circumstance when an offence is committed as part of organised criminal activity. Sweden also criminalises offences that involve several persons or involve organisation.

Key findings regarding the use in practice of offences related to participation in a criminal organisation and perceived usefulness.

Chapter 6 of this report describes practices in the use of criminal law offences relating to participation in a criminal organisation, based on interviews with national stakeholders conducted by the Member State experts, as well as the views of the Member State experts themselves.

There was variation between Member States in reported frequency of use of these offences. Overall these offences were considered to be useful, and were reported to be

¹ This is so despite the fact that under the Lisbon Treaty, the approximation of criminal legislation is dealt with under co-decision involving both the Council and the European Parliament as equal partners.

used most in relation to organisations involved in drug trafficking, human trafficking and people smuggling.

Inhibitors to the use of participation offences were reported. These included:

- The wording of national legislation.
- Standards of proof.
- Staffing and resources.
- Low penalties for participation in a criminal organisation (especially compared with those for predicate offences in that jurisdiction).
- Conflicts over the use of the self-standing offence of participation in a criminal organisation and using participation in a criminal organisation as an aggravating circumstance.
- How the legislation tends to be used in MS, due to the knowledge and experience of practitioners and for cultural reasons.

Key findings regarding special legal and investigative tools used in the fight against organised crime.

Chapter 7 of this report reviews the use of eight investigative techniques:

- Surveillance
- Interception of communication
- Covert investigations
- Controlled deliveries
- Informants
- Hot pursuit
- Witness protection
- Joint investigation teams.

Any discussion of the use of special investigatory techniques must clearly recognise that they have the potential to infringe individual rights and privacy. Most jurisdictions have installed a system of legal procedural constraints on the use of these tools.

For each tool, Chapter 7 outlines barriers to its use within Member States and in cross-border investigations. Readers are directed to the summary tables at the start and end of Sections 7.6–7.14 for details of each tool.

Special investigative tools were reported to be rarely used on their own, and were more usually used as part of a multifaceted approach to gathering evidence.

This is primarily due to the complex nature of organised crime cases, which require the use of several tools to gather necessary evidence and intelligence. This makes it difficult to assess their utility in isolation.

The regulation of cross-border use of investigative techniques is highly complex.

The regulatory landscape includes Member States' legal frameworks, plus a large number of regional and national bilateral agreements and arrangements. The advantage of having these many different options when conducting cross-border

investigations is that law enforcement officers can select an approach and regulatory framework which best suits the needs of the case. On the other hand, variability in the approach could hinder effective collaboration, since it means each case is different and approaches are not standardised.

Interception of communications, surveillance and informants were reported by Member State experts to be most useful techniques and were reported to be used most often.

The techniques reported to be least used were hot pursuit, joint investigative teams and witness protection.

Common barriers to the use of special legal and investigative tools, as highlighted by Member State experts, included the following:

- Differences in Member States' legislation regarding when the use of investigative techniques is permitted.
- Differences in processes for authorisation.
- Differences in the admissibility of evidence.
- Administrative and bureaucratic requirements.
- Different criminal justice processes and rules, for example, regarding admissibility of evidence and disclosure of material pre-trial.
- Limited resources, when the use of these tools could be very costly.
- Skills, recruitment and training of law enforcement professionals.

There were a range of recommendations and suggestions to overcome these barriers. Some were suggested by Member State experts and others were suggested by the research team based on their evidence.

EU-wide harmonisation is extremely limited in this area (Article 72 of the Treaty of Lisbon). However, not all the recommendations suggest EU-level legislation. Many look to Member States themselves to act to harmonise their approaches, and/or suggest measures such as training and relationship-building between law enforcement officers from different Member States:

- Some of the recommendations included calls for Member States to take steps to harmonise their legislation, to ensure greater similarities in what legal and investigative tools are permitted, when they can be authorised, restrictions on their use, and so on.
- Ensuring all Member States have access to technology and equipment could enhance investigations into organised crime. Some Member State experts suggested that EU-level funding might be made available to purchase equipment.
- Training staff, and facilitating contact between law enforcement professionals in different Member States was recommended to enhance technical skills and knowledge and to build and expand personal contacts and trust between law enforcement officers.
- Exchange best practice and good ideas between Member States.
- The adoption of common models and approaches by Member States (for example the Dedicated Informant Management model) could constitute a

first step to enhanced cooperation.

Key findings regarding national specialist agencies

Chapter 8 of this report it describes the main agencies and aims to highlight those that were considered by national experts and the stakeholders they interviewed to be examples of promising practices.

The majority of Member States were reported to have more than one specialist agency tasked with fighting organised crime in their country.

There is a great deal of variability in the structure, remit and approach taken by national specialist agencies, as well as how they are controlled and held accountable. Exceptions were Belgium and to some extent Austria and Sweden, where work against organised crime groups was integrated within their enforcement agencies.

Key findings regarding national specialist agencies are as follows:

- Reforms to specialist national agencies were reported in many Member States, which could be disruptive.
- National specialist agencies were said to face challenges in recruiting and retaining staff with appropriate skills.
- Cooperation between different law enforcement agencies within Member States remains a challenging issue for several Member States.
- Lack of access by law enforcement officials to information systems (such as those of other law enforcement agencies, as well as tax authorities and land registers) can hinder the work of specialist agencies.
- A minority of Member States reported having units dedicated to international cooperation. In most cases specialist agencies have international cooperation as part of their mandate, and some have units or divisions specialising in international matters and mutual legal assistance.
- The study highlights several potentially promising practices. These are highlighted throughout Chapter 8, and in Box 11.2.

Innovative practices highlighted by the Italian case study

As well as reviewing the legal tools in the fight against organised crime in Italy, the Italian case study looked in detail at the work of the Italian National Anti-Mafia Directorate (DNA).

The DNA coordinates and supports the 26 Anti-Mafia District Directorates (DDAs) and the law enforcement bodies dedicated to the investigation of serious organised crime, and is managed by the Anti-Mafia National Prosecutor.

Features of the DNA which are potentially promising practices, transferable to other Member States, include:

- The DNA is an organisation whose role is to coordinate prosecution and investigations all over the country carried out by the 26 DDAs. The DNA has no direct investigative or prosecution tasks, which means it can focus entirely on coordinating other actors and gathering and sharing information.

- The DNA can take a strategic view of organised crime across the country, set medium- and long-term targets and identify future trends.
- The DNA specialises in serious forms of organised crime and organised criminal activities, and recruits specialist staff.
- The DNA has special databases – SIDNA (Anti-Mafia Directorate Information System) and SIDDA (District Level Anti-Mafia Directorates Information System) – where all data on investigations and prosecutions and criminal organisations are stored. All public prosecutors put information into the system.
- The DNA is the contact point for cross-border cooperation, in charge of developing and expanding relationships with political/judicial/prosecutorial institutions engaged in the fight against organised crime in other states, as well as of information and data exchange in relation to transnational organised crime.

Key findings from the UK case study

The UK case study looked at the UK approach to fighting serious and organised crime in order to highlight approaches and practices which could potentially be transferrable to other Member States.

The agency that coordinates the fight against organised crime in the UK is the National Crime Agency (NCA). This was introduced in 2013 and replaced the previous national agency, the Serious Organised Crime Agency. The creation of the NCA was intended to harmonise and strengthen cooperation in against serious and organised crime.

While it is too early to say whether the NCA approach can be recommended as a model to be adopted elsewhere in the EU, based on interviews with practitioners working in the NCA, the following were identified as areas of potentially promising practice:

- The NCA has single system for tasking and coordination with all UK police forces. The tasking system was seen by interviewees from NCA as an essential element in improved collaboration and better prioritisation of threats.
- Although the NCA has the power to direct Chief Constables in local police forces, it prefers to work with police forces by consent, and senior staff at the NCA were said to spend much time relationship-building.
- The NCA uses a 'lifetime offender management' approach. This creates a structure through which all serious offenders of interest are individually monitored, and measures are put in place to disrupt their criminal activities in prison and prevent criminal activity upon release. Lifetime offender management also ensures that details of all offenders released from prison are shared with probation services and police forces.
- The NCA can issue *Serious Crime Prevention Orders* (SCPOs) to support lifetime offender management. These place restrictions on individuals after their release from custody. Enforcement of SCPOs can be a challenge, however, since good collaboration between law enforcement and other agencies is required in order to successfully monitor the orders. They are

also resource intensive.

- The NCA employs innovative behavioural approaches to crime disruption and prevention.
- The NCA approach to cybercrime involves cooperation with the private sector, NGOs, academics and individual experts. The NCA operates a 'NCA Special Constables' programme for experts with technical skills who volunteer to support the NCA part-time.

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PART 1: INTRODUCTION AND BACKGROUND²

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1. Introduction to the study

This study is an evaluation of the practical application of legal and investigative tools stemming from Framework Decision 2008/841/JHA on the fight against organised crime, other EU and international regulations and national legislation. The aim of this study is twofold:

- To assess the impact of Framework Decision 2008/841/JHA and other relevant EU and national legislation on the fight against organised crime through comparative legal analysis.
- To provide a comparative analysis of investigative tools and other measures used at the national and EU level for the purpose of fighting organised crime and with a focus on operational results.

The study focuses on the following specific objectives, with reference to the EU and national levels for the 28 Member States (MS):

- Identify and compare the main substantive criminal law tools and procedural criminal law tools (including special investigative techniques) used in the fight against organised crime, stemming both from Framework Decision 2008/841/JHA, other regulations and national legislation.
- Assess the compliance of MS' national legislation in the fight against organised crime with Framework Decision 2008/841/JHA, through evaluation of the transposition of the Framework Decision and the practical application of substantive and procedural criminal law tools.
- Conduct an assessment of (a) the practical application of and (b) the impact of substantive criminal law tools and procedural criminal law tools, including special investigative techniques in the fight against organised crime, stemming from Framework Decision 2008/841/JHA, other regulations and national legislation.
- Identify good practices in EU/national legal and investigative tools for the fight against organised crime, as well as limits on their application.
- Identify good practices in the role/added value of national specialised law enforcement agencies and international law enforcement agencies (such as Europol) in implementing criminal law and investigative tools.

The following chapter provides the policy background to the study.

2. Background to the study – European and international legal frameworks in the fight against organised crime

In recent decades a number of European and international legal instruments have sought to contribute to the fight against organised crime. Both the European Union (EU) and the United Nations (UN) have been active in developing the legal framework in this area. The Council of Europe and the Financial Action Task Force/MoneyVal³ have also made contributions.

2.1. EU Action Plan to Combat Organised Crime – 1997

The 1997 EU Action Plan to Combat Organised Crime⁴ requested the Council of the European Union, in its recommendation n. 17, to:

rapidly adopt a joint action aiming at making it an offence under the laws of each Member State for a person, present in its territory, to participate in a criminal organization, irrespective of the location in the Union where the organization is concentrated or is carrying out its criminal activity [...].

Aware of the different legal traditions, the same recommendation added that it would have been regarded as acceptable 'for a limited period of time, that not all MS will be able to sign up immediately to the agreed definition'.

2.2. Joint Action – 1998

Following from the above recommendation, the first international legal instrument aiming to harmonise national legislation was the EU Joint Action on making it a criminal offence to participate in a criminal organisation in the MS of the European Union, adopted on 21 December 1998.⁵ The Joint Action provided an EU-wide definition of 'criminal organisation':

[Any] structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of

³ The Financial Action Task Force is 'an inter-governmental body established in 1989 by the Ministers of its Member jurisdiction' (FATF 2015). The MoneyVal or Committee of Experts on the Evaluation of Anti-Money Laundering Measures was created by the Council of Europe in 1997 (MoneyVal 2015).

⁴ Council of the European Union (1997).

⁵ Council of the European Union (1998).

liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities. (Article 1, Joint Action)

The Joint Action invited MS to envisage criminal penalties to punish various forms of offences in relation to participation in a criminal organisation (Article 2),⁶ committed either by individuals or legal persons. The intention of the Joint Action was to provide a fairly low threshold to meet the definition of a criminal organisation, so as to empower cross-border cooperation without undue burdens.

2.3. The United Nations Convention – 2000

The Joint Action was followed by the United Nations Convention Against Transnational Organised Crime (UNTOC), signed in Palermo in December 2000 (the Palermo Convention). The European Community participated in the negotiations of the Convention, signed it and is a Party to the Convention.⁷ The Palermo Convention introduced a global legal definition of an organised criminal group⁸ and has worldwide reach. It remains today one of the key international legal references in relation to organised crime.

2.4. Commission proposals for a Framework Decision – 2005

On 19 January 2005, the European Commission put forward a proposal for a Framework Decision on the fight against organised crime.⁹ The aim was to build on the

⁶ Article 2 of the 1998 Joint Action reads as follows:

1. To assist the fight against criminal organisations, each Member State shall undertake, in accordance with the procedure laid down in Article 6, to ensure that one or both of the types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties:

(a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in:

- the organisation's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed;

- the organisation's other activities in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities falling within Article 1;

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity.

2. Irrespective of whether they have elected to make the type of conduct referred to in paragraph 1(a) or (b) a criminal offence, Member States will afford one another the most comprehensive assistance possible in respect of the offences covered by this Article, as well as those offences covered by Article 3(4) of the Convention relating to extradition between the Member States of the European Union, drawn up by the Council on 27 September 1996' (Council of the European Union 1998).

⁷ Council of the European Union (2004).

⁸ The Palermo Convention defines organised criminal group as follows: '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 or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit' (United Nations Office on Drugs and Crime 2004).

⁹ European Commission (2005a).

Joint Action as well as UNTOC. In 2004,¹⁰ the Commission stated that the Joint Action should be revised in order to:

actually harmonise the definition of offences and penalties as regards individuals and bodies corporate;

provide for a specific offence of 'directing a criminal organisation';

determine specific aggravating circumstances (commission of an offence in conjunction with a criminal organisation) and mitigating circumstances (reduced penalties for those who assist the police with their inquiries);

include provisions to facilitate cooperation between judicial authorities and coordinate their action.¹¹

The Commission proposal for a Framework Decision also referenced the objective of the Hague Programme,¹² which highlights the importance of approximation of substantive criminal law to facilitate mutual recognition of judgments and police and judicial cooperation in cross-border criminal cases.¹³

2.5. Council Framework Decision – 2008

The Council Framework Decision (2008/841/JHA) was subsequently introduced (with the repeal of the 1998 EU Joint Action).

The outcome of the negotiations over the Framework Decision resulted in an instrument that was not as ambitious as the initial proposal from the Commission: MS are given an option whether to either criminalise participation in a criminal organisation or conspiracy in organised crime (i.e., 'agreement with one or more persons that an activity should be pursued'). It was because the Framework Decision maintains this 'dual approach' that the Commission issued (with support of FR and IT) a declaration questioning the added value of the instrument from the point of view of achieving necessary minimum approximation of national legislation.¹⁴

¹⁰ European Commission (2004).

¹¹ European Commission (2004), para 3(17).

¹² Council of the European Union (2005).

¹³ Council of the European Union (2005), para 3.3.2.

¹⁴ The Commission considers that the Framework Decision on the fight against organised crime fails to achieve the objective sought by the Commission in relation to Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, and in relation to the United Nations Convention Against Transnational Organised Crime, adopted on 15 November 2000, to which the Community has been a party since 29 April 2004. The Framework Decision does not achieve the minimum degree of approximation of acts of directing or participating in a criminal organisation on the basis of a single concept of such an organisation, as proposed by the Commission and as already adopted in Framework Decision 2002/475/JHA on the fight against terrorism. Furthermore, the Framework Decision enables Member States not to introduce the concept of criminal organisation but to continue to apply existing national criminal law by having recourse to general rules on participation in and preparation of specific offences.

2.6. Issues related to the current regime

While the rationale behind the Framework Decision was to provide higher standards in the EU regarding offences linked to a criminal organisation, the provisions of all three instruments (the 1998 EU Joint Action, the Palermo Convention and the Framework Decision) are very similar.¹⁵

A 2011 report prepared for the European Parliament noted that the Framework Decision could be further improved in terms of its legal certainty, its scope and the level of harmonisation it has achieved.¹⁶ This report also pointed out that the definition of a criminal organisation in the Framework Decision may lead to over-criminalisation, as 'the elements of a criminal organisation are defined very broadly and with flexible, ambiguous criteria'.¹⁷ As a result, there may be substantial differences across MS, which could jeopardise an effective approximation of national legislation, and reduce the domestic and international cooperation added-value of the Framework Decision. Similar criticism has been made in relation to the definition of an organised criminal group in the Palermo Convention, which has been described both as 'overly broad' and 'under-inclusive' because it includes valid elements while not specifying others such as violence and corruption, which are seen as important features of organised criminal groups' activities by some authors.¹⁸

While these are important considerations, there is a need for further research into the implementation of these elements in national organised crime legislation and to understand the extent to which this 'functional equivalence' is a problem in practice, and whether the criticisms of the Framework Decision are justified in practice as well as on more conceptual grounds. This gap in understanding formed part of the impetus behind the European Commission commissioning the present study.

2.7. How is organised crime defined in the literature?

The definition of organised crime has been the subject of much discussion by scholars in this field,¹⁹ and there is ongoing disagreement between sociologists, criminologists and lawyers about what its proper definition should be. While some highlight the structure of the criminal organisation, others have focused on the set of criminal activities developed by that criminal organisation and/or 'actor networks'.

2.7.1. Organised crime as a set of actors

The set of actors involved in organised crime may include a wide range of individuals and social networks that may not themselves be straightforwardly defined as criminals. Thus, academics have conceptualised 'organised crime' in terms of groups, networks, and 'enterprise crime'.²⁰ The picture is also complicated by adaptability; the

¹⁵ Please see comparisons between the three instruments under each relevant section (i.e., Sections 2.2-2.5).

¹⁶ Mitsilegas (2001).

¹⁷ Mitsilegas (2001), 6); Joutsen (2002), 423.

¹⁸ Orlova & Moore (2005); Calderoni, F. (2010).

¹⁹ For example, see Von Lampe (2015).

²⁰ Levi (1998).

organisation, structure and activities encompassed within organised crime have changed over the years in response to developments in the wider context in which organised crime occurs.²¹ For example, counter-measures against organised crime may have affected its structure and organisation (although there is very little robust evaluation of the effectiveness of counter-measures).²²

2.7.2. Organised crime as a set of criminal activities

The term 'organised crime' does not just define a set of actors and how they are organised, but also a set of criminal activities.²³ These activities include, but may not be limited to: drug-trafficking; trafficking in people; extortion; kidnapping for profit; illegal toxic waste dumping (environmental crime); identity frauds (including sophisticated credit and debit card fraud and social security/tax credit frauds); frauds against the European Union; smuggling to evade excise tax on alcohol and tobacco; intellectual property theft (video and audio piracy and product counterfeiting); Value-Added Tax (VAT) frauds; and corruption of public officials to facilitate these offences and/or evade sanctions.²⁴ The lack of clear criteria defining organised crime allows the scope of the term to be broadened by adding new criminal activities.

2.7.3. Organised crime as profit-driven crime

Other scholars have suggested replacing and/or complementing the concept of organised crime with different concepts such as criminal enterprise and profit-driven crime. For example, van Duyne²⁵ suggests that in order to overcome the conceptually unclear construct of organised crime, the 'criminal enterprise' notion should instead be employed, whereby the activities of organised crime are considered from an economic point of view. Finckenaer argues that there is a 'danger, generally, in the promiscuous use of the label organised crime with reference to perpetrators of "crimes that are organised", and also with criminal networks that lack what we regard as the essential defining elements of being criminal organisations'.²⁶ Naylor offers a typology of 'profit-driven crimes' and suggests a refocus of scientific analysis on criminal activities ('what' and 'how') rather than on offenders ('who').²⁷

2.8. The need for further research into organised crime legislation and the approximation of national legislation

Some comparative research with a focus on organised crime legislation in the EU already exists. The UN Centre for International Crime Prevention collected legislation in 1999 relating to participation in a criminal organisation from 38 countries, including 15 EU countries.²⁸ However, given the speed of change and the growth of money

²¹ Rubin, Pardal, McGee & Culley (2013).

²² Levi & Maguire (2012).

²³ Levi & Maguire (2012); Cohen (1977).

²⁴ Levi & Maguire (2012), 600–601.

²⁵ Van Duyne, Jager, Von Lampe & Newell (2004).

²⁶ Finckenaer (2005).

²⁷ Naylor (2002, 2003); Savona, Calderoni & Remmerswaal (2011).

²⁸ Centre for International Crime Prevention (1999).

laundering and proceeds of crime legislation in the intervening period, this is of limited use today.

There are also academic and other studies that provide an in-depth comparative analysis of national legislation.²⁹ Further studies have compared national systems in relation to international cooperation.³⁰

Academic research into the level of approximation of legislation on organised crime and related offences among MS is scant. A review of the literature reveals that current applications of the legal approximation methodology are still limited.³¹ Hence, further research into how legal provisions are applied in the 28 MS, especially after the introduction of the Framework Decision, will be important in improving policies, law and practice.

²⁹ Levi & Smith (2002); Cornils & Greve (2004); Council of Europe (2004a); Centre for the Study of Democracy (2012). Levi & Smith (2002) studied aspects of the Racketeer Influenced and Corrupt Organisations (RICO) legislation in the US and European legislation at that time dealing with incrimination and proof of organised crime activity and their applicability to England and Wales. The Centre for the Study of Democracy (2012) studied the national legislation on organised crime in Bulgaria including the criminal procedure law and related laws, and the problems posed by their implementation. This study provides sufficient detail and can be used in comparative analysis of organised crime legislations in the EU Member States.

³⁰ Den Boer (2002); Bartone (2003); Fijnaut & Paoli (2004); Hauck & Peterke (2010); Joutsen (2002); Brady (2007).

³¹ Calderoni (2010). One of the main goals of Calderoni (2010, 48) is to assess the level of approximation of national organised crime pieces of law to the EU standards set by the Framework Decision 2008/841/JHA, i.e. 'the EU Member States' rate of compliance (positive assessments) with the indicators of approximation EU requirements as set by Framework Decision (2008/841/JHA) for each'. The author created 17 indicators of approximation in order to evaluate whether domestic legal measures against organised crime comply or not with the standards of the above-mentioned Framework Decision.

3. Methodology

To achieve the research objectives set out in Section 1.1 the research team carried out a number of activities, explained below.

3.1. Data collection in MS by country experts

In this study a pivotal aspect of the approach to collecting information about each MS was a network of 28 national experts (one in each MS), all of whom have substantial experience in criminal law and organised crime. A questionnaire was prepared by the research team, and completed by national experts.

In order to complete the questionnaire national experts were asked to:

- Draw on their own judgement and expertise.
- Gather further information through interviews with at least eight national stakeholders in their country from the following groups: prosecutors and judges, police officers from specialised units fighting organised crime, academics, policymakers and NGOs.

The questionnaire was divided into five sections, as follows:

Section 1: National criminal law tools used in the fight against organised crime

This section aimed to gather information about the criminal law tools used in the fight against organised crime in each country, including national legislation transposing Framework Decision 2008/841/JHA and other relevant national laws. It aimed to acquire information about perceived barriers and facilitators to the implementation of criminal law tools, and solicited experts' and interviewees' views about the frequency of the use of national legislative provisions, their use in practice, and their impact.

Section 2: National specialist judicial and law enforcement agencies involved in the fight against organised crime

Given the large number of agencies, units and organisations possibly playing a role in the fight against organised crime, it was beyond the scope of this study to conduct a comprehensive review of each agency in every MS (it is not the objective of this study to compare specialist national agencies – either within or between countries). Instead, this section of the questionnaire asked MS experts to identify specific examples of good practice and ways in which specialist agencies added value (as perceived by the

MS expert or national interviewees). It also aimed to capture some of the variation in the way in which specialised national agencies operate.

Section 3: National specialist legal and investigative tools

This section aimed to acquire information about the implementation of legal and investigative tools used in the fight against organised crime. The same questions were asked about each of the following legal and investigative tools:

- Interception of communications
- Controlled delivery
- Covert investigation (undercover officers)
- Informants
- Surveillance (including cross-border surveillance)
- Hot pursuit
- Joint Investigation Teams
- Witness protection.

Additionally, experts were asked to name other legal and investigative tools, procedures or techniques used in the fight against organised crime in their country, different to those listed above. For each of the legal and investigative tools, experts were invited to share their views as to ease of use, clarity, financial resources made available, groups against which tools are most useful, as well as the issues and challenges that may undermine their impact. There were also questions about possible ways to improve each tool in order to achieve greater impact.

Section 4: Statistics on the use of legal and investigative tools

This section aimed to gather information about the actual use of legal and investigative tools in each country.

Experts were asked to complete this section based on available national statistics from official sources in each country. However, it was recognised in advance that such official data may be limited or not be available at all. National experts were therefore asked to request additional data from interviewees, including regarding investigations or prosecutions in which interviewees had been involved (if appropriate). While these data would not be representative or generalisable, they might provide useful illustrations or examples. National experts were asked to comment on data unavailability and data quality where appropriate.

Section 5: Indicators of the use of national criminal law measures

This section aimed to acquire data about the use of criminal law measures in the fight against organised crime, such as:

- The number of reported/arrested/convicted natural/legal persons under the specific anti-organised crime legislation.
- Estimates of the number of organised crime groups.

National experts were instructed that this section should be primarily based on the collection of available statistics from official sources. However, as with Section 4,

national experts also asked interviewees whether they could provide information that they had collected as individual practitioners or which had been collected by institutions in which they have worked.

3.3. Assessment of transposition and practical application

A central part of this study was to assess the compliance of national legislation in all 28 MS with Framework Decision 2008/841/JHA. The aim was to understand whether the introduction of the Framework Decision in 2008 had a real influence on the adoption of the legal definitions of, and standards in, the field of the fight against organised crime in MS. The research team assessed compliance with Articles 1 to 8 of the Framework Decision, which relate to:

- Definition
- Offences with regard to Article 2 of the Framework Decision
- Penalties
- Special circumstances
- Liability of legal persons
- Penalties for legal persons
- Jurisdiction and coordination of prosecution
- Absence of requirement of a report or accusation by victims.

Country experts were asked to provide 'detailed descriptions' of how Articles 1 to 8 were transposed in national legislation. In relation to some Articles,³² national experts were asked to provide 'official or unofficial translation in English', however few official translations were available. The assessment of transposition relied to a great extent, therefore, on the descriptions of national legislation provided by MS experts. The research team took steps to ensure that the information provided by national experts, on which the mapping and assessment was based, was as accurate as possible. MS experts were lawyers or otherwise knowledgeable in their field and national law. Where information provided was not complete, members of the research team requested more information and asked for clarifications; the research team also undertook some supplemental desk-based research. Findings from the assessment were fed back to national experts for validation.

3.4. Case studies

Two case studies were conducted to provide an in-depth analysis of aspects of the fight against organised crime in Italy and the UK. Each case study had a different focus:

- The Italian case study explored the role of the Italian Anti-Mafia Directorate in the fight against organised crime and the offence of mafia-type association (Article 416 bis). It focused on investigative techniques of interception of communications in the context of cross-border cooperation

³² The questionnaire completed by MS experts asked for official or unofficial translations in English for: offences relating to participation in a criminal organisation; aggravating factors; absence of requirement of a report or accusation by victims; and liability of legal persons.

and the special prison regime for people convicted of organised crimes.

- The UK case study looked at the role of the National Crime Agency in the UK, and in particular, multi-agency cooperation in the fight against organised crime (including cooperation with the private sector and cooperation between different enforcement agencies).

Focusing on these two countries with different legal systems and traditions provided an opportunity to explore how the existing tools to fight organised crime actually operate in different contexts. The case studies focused on the use of selected tools, agencies and practices in these countries in order to understand:

- Why they are effective and under what conditions.
- If they are exportable to other MS and under what conditions.
- How the selected tools agencies and practices are used nationally and in cross-border cooperation.

The case studies were based on desk research as well as some primary data collection:

- In Italy: Focus group with five Deputy National Anti-Mafia Prosecutors at the National Anti-Mafia Directorate.
- In the UK: Interviews with 20 individuals working in various roles primarily in law enforcement and the judiciary (12 of them at the National Crime Agency).

3.5. Limitations of the study

This study has an ambitious scope and objectives, looking at law and practice across all MS. The study design has a number of limitations, which are explained below.

Reliance on information provided by MS experts

In order to gather the necessary information within the time and resources available for the study, the research team relied mainly on MS experts to provide (through the questionnaire) the information on which this report is based. MS experts were instructed to complete the questionnaires using their own expertise as well as information from interviewees and stakeholders. The questionnaires had to be completed to a sufficient level of detail within a constrained time period and within resources available.

The mapping and assessment of compliance (see Chapter 4 of this report) is mainly based upon information provided by MS experts about how the articles of the Framework Decision have been transposed (or not) into national law. It is also based on desk-research that was conducted in parallel to check information provided and ensure consistency.

The research team took care to check the responses of MS experts and to ensure information gaps were filled. Few official translations of the many pieces of national legislation (of interest regarding the Framework Decision) were available. Where official translations were not available, the research team relied on MS experts'

unofficial translations of national legislative text, or parts of texts, as well as on available literature. The same applies to the information presented in this report regarding the use of investigatory techniques.

Experts encountered different challenges in completing the questionnaire, both practical (for example, in securing interviews with members of the judiciary or law enforcement community) and more fundamental (related to the particularities of each legal system and criminal justice procedure). As a result, the completed questionnaires varied somewhat in the amount of information and the level of detail provided. The research team attempted to fill gaps by returning to national experts for further information, and by conducting desk research, but it is inevitable in a study of this nature that the level of detail varies between MS.

It is for this reason that the information provided in this report in Chapters 5, 7 and 8 should not be viewed as comprehensive. These chapters aim to cover the main alternative legal tools, investigative tools and specialist agencies, as highlighted by national experts and the desk research undertaken by the research team.

Promising practices in relation to national specialist agencies

As mentioned above, it is not the objective of this study to conduct a comprehensive review of national agencies involved in the fight against organised crime. Instead we asked national experts (and the people they interviewed) to highlight agencies and practices perceived as demonstrating good practices.

It was not possible for the research team to validate these perceptions of good practices, and for this reason the term 'promising practice' is used in this report, indicating that further research would be needed to evaluate effectiveness.

Limited availability of national statistics

In Sections 4 and 5 of the questionnaire, national experts were asked what statistics were currently compiled at national level and about the availability of data from official and administrative sources. These questions covered a range of possible indicators of the use and effectiveness of measures against organised. These data were of interest to the study because it is important to ensure that policy initiatives are grounded in solid evidence and, as far as possible, reliable and comparable statistics.

Overall, and as expected, there were many indicators for which data were either not publicly available, or for which data were not collected. For example:

- In some MS, there are data only on prosecutions for organised crime offences but not on convictions (for example BE).
- In other MS statistics are not available at all or are only partially available (CY, DK, EE, FR, DE, LV, LU, MT etc.).
- In many MS statistical data on the use of investigative tools are not publicly available, are available only for a single year, or the use of tools is recorded but no differentiation can be made between organised crime and other crime categories.
- The latter also applies to information about prosecutions and sentencing, where it is usually not possible to distinguish organised crime cases.

- The majority of MS did not hold good statistical data in relation to cross-border investigations of organised crime cases.

Comprehensiveness of and evidence base for the case studies

The case studies in the UK and Italy are not intended as comprehensive accounts of the fight against organised crime in these countries. They cover selected tools, agencies and approaches which are specific to each country. The aim is to explore the practical operation of these tools and approaches, and to highlight selected potentially promising practices, barriers and facilitators. The case studies are based on interviews (UK) and focus groups (IT) with national experts working in the fight against organised crime, supplemented by desk research conducted by the research team. However, it was not the intention of the research team to validate experts' views on the effectiveness of and challenges related to different tools and approaches.

PART 2: NATIONAL CRIMINAL LAW TOOLS USED IN THE FIGHT AGAINST ORGANISED CRIME³³

³³ This part, under the supervision of Andrea Di Nicola (scientific coordinator of eCrime, University of Trento) and Barbara Vettori (Catholic University of Milan, member of the Advisory Board), was written by them with Andrea Cauduro (Senior researcher at eCrime) and Gabriele Baratto (Junior researcher at eCrime). Authorship is attributed below, under each Chapter. Francesca Pesce (Junior researcher at eCrime and research fellow at the Faculty of Law of the University of Trento) acted as research assistant.

4. Mapping and transposition assessment of MS legislation with reference to Framework Decision 2008/841/JHA³⁴

This chapter addresses objective 2 of the study, since it:

- Maps the national legislation on organised crime, based on the contents of Framework Decision 2008/841/JHA.
- Assesses the transposition of Framework Decision 2008/841/JHA into MS national legislation.

It is organised as follows: Section 4.1 provides some background to the Framework Decision; Section 4.2 discusses how it is to be transposed into national law; Section 4.3 provides working definitions to explain the terms used in the section; Section 4.4 sets out the method of assessment; and Sections 4.5–4.11 set out the results from the extensive mapping and transposition assessment.

4.1. Transposition of the Framework Decision

Under Article 10 of Framework Decision 2008/841/JHA:

Member States shall take the necessary measures to comply with the provisions of this Framework Decision before 11 May 2010 [...and] transmit to [...] the Council and to the Commission, before 11 May 2010, the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

Before proceeding further, some preliminary remarks on the term ‘transposition’ are necessary. Transposition is the process by which the provisions of EU laws are incorporated into MS domestic law. As far as Framework Decisions are concerned, their provisions should not be slavishly copied by a MS. Rather they have to be ‘embodied’ in the national legal system in order to effectively enforce them and reach (at least) the legal minimum standards required by the Framework Decisions’ text, thus guaranteeing approximation of the various EU MS laws and regulations (as stated in Article 34(2)(b) TEU).

³⁴ With a joint research effort under the supervision of Andrea Di Nicola (scientific coordinator of eCrime, University of Trento) and Barbara Vettori (Catholic University of Milan, member of the Advisory Board), authorship is as follows: Andrea Di Nicola 4.4, 4.11; Barbara Vettori Introduction, 4.1, 4.2, 4.3, 4.7.2 (only Findings), 4.7.3, 4.8.1, 4.8.2 (*Presence in the national legal system of criminal and non-criminal fines*), 4.9, 4.10; Andrea Cauduro 4.5, 4.6; Gabriele Baratto 4.7.1, 4.7.2 (except Findings), 4.8.2 (*Presence in the national legal system of other penalties*).

In this regard, and considering the different legal cultures and traditions (e.g. civil and common law), the Court of Justice has set some rules on the way this shall take place:

- The Court stressed that transposition shall be achieved via 'legally binding instruments'.³⁵ This conclusion flows from Article 34 TEU, which refers to approximation of 'laws and regulation' as the final goal of Framework Decision, as well as longstanding jurisprudence of the Court of Justice in respect of Directives, which is applicable *mutatis mutandis* in this regard.
- Also for Framework Decisions, as it is for Directives, the requirement of 'legal certainty' is essential according to the Court of Justice. In its decisions, the Court of Justice maintains that 'each Member State must implement Directives in a manner which fully meets the requirement of legal certainty and must consequently transpose their terms into national law as binding provisions'.³⁶ Several authorities point out that legally binding instruments are needed to guarantee a uniform and stable implementation of the provisions of Framework Decisions into a given MS. This means that jurisprudence and 'soft law' such as guidelines or other tools (e.g. administrative provisions) that do not possess these features are excluded.³⁷

4.2. Terminology

The terminology used in this section is herein clarified.

4.2.1. Criminal organisation

The term 'criminal organisation' refers to a structured association³⁸ of more than two persons who act in concert and for a period of time with the aim of obtaining directly or indirectly a financial or other material benefit. Such a concept is stated in Article 1(1) of the Framework Decision, which draws its formulation (with slight changes) from Article 2(a)³⁹ of the Palermo Convention under the name of 'organised criminal group'. So 'criminal organisation' and 'organised criminal group' can be used as synonyms.

This concept is referred to in some MS legislation with a different terminology, such as 'criminal association' (e.g. Croatia, Italy), 'organised criminal group' (e.g. Bulgaria), or 'organised criminal association' (e.g. Czech Republic).

Within this report the authors will always use, in line with the Framework Decision, the term '**criminal organisation**' with an exception when direct reference is made to the legislative text of those MS where the concept is expressed with a different terminology.

Some MS also envisage under criminal law criminal structures other than the ones necessary for Framework Decision transposition, often influenced by the specific situation of the MS. This is the case for instance in Italian criminal law, which adopts a

³⁵ CJEC case 239/85, *Commission v. Belgium*, ECR 1986, 3645; Note from the Article 36 Committee to Coreper/Council on the Draft Report on the implementation of the Framework Decision of 15 March 2001, 15 December 2004, number 14830/2/04, 4–5.

³⁶ CJEC case 239/85, *Commission v. Belgium*, ECR 1986, 3645.

³⁷ See Calderoni (2010); Borgers (2007); Kurcz & Lazowski (2006).

³⁸ As specified at Article 1(2) of the Framework Decision: "'structured association" means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure'.

³⁹ 'Organised criminal 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 or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

particular definition of 'mafia-type association' as a criminal structure.⁴⁰ Other MS also present alternative definitions of criminal structures that, compared to the one of the Framework Decision, narrow the scope of application to specific crimes.⁴¹

In this report the term '**criminal group**' will be used to refer to these alternative criminal structures, as opposed to 'criminal organisations' in the sense adopted by the Framework Decision. They will be examined in more detail in Chapter 5.

4.2.2. Offences relating to participation in a criminal organisation

The phrase 'offences relating to participation in a criminal organisation', according to the Framework Decision, refers to:

- Participation in a criminal organisation and/or
- Conspiracy to commit offences punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty.⁴²

In this regard, the Framework Decision imposes the obligation to introduce a self-standing offence in relation to Article 2. Although one may argue that this request can also be met by introducing different and alternative provisions that, cumulatively, may contribute to fight the criminal phenomena described in the Framework Decision, the fact that the Framework Decision clearly asks for a self-standing offence makes that the only possible option, taking into consideration the following reasons:

- *Historical reasons.* Previous international normative tools clearly show the need for a self-standing offence. Such is the case in particular for the Joint Action 98/733/JHA in which the EU envisaged the commitment 'on making it a criminal offence to participate in a criminal organisation in the European Union'. Calderoni⁴³ in this sense reminds us that 'Article 2 [...] requires Member States to ensure the criminalization of the participation in a criminal organization through the introduction of a "criminal organization offence" (COO)'. Such an approach is also followed by other international tools such as the United Nations Convention against Transnational Organized Crime that, in

⁴⁰ This type of organisation is characterised by a particular *modus operandi* based on intimidation and 'omertà' (code of silence). Compared to that of the Framework Decision, this definition introduces stricter elements tailored to the Italian situation. In particular, Article 416 bis of the Italian criminal code states that the members of the 'mafia-type' association shall 'take advantage of the intimidating power of the association and of the resulting conditions of submission and silence to commit criminal offences, to manage or in any way control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for other persons on the occasion of an election'. See Chapter 5 for more details.

⁴¹ This is the case, for example of the Italian legal framework (Article 74 Decree of the President of the Republic 309/1990) that introduces a specific definition of criminal association aimed at the commission of drug related crimes: 'When three or more persons join together with the aim of committing crimes under Article 73 [...]'. Similarly in Portugal, Article 28 of Decree-Law n. 15/93, of 22 January 1993 envisages a specific definition of criminal association devoted to drug related crimes: '[...] a group, an organization or an association comprising two or more persons for the purpose of concertedly committing any of the offenses described in Articles 21 or 22 [...]'. See Chapter 5 for more details.

⁴² This does not exclude that: MS having such offences might not have further criminal tools to fight the organised crime phenomenon; MS not having such offences (such as Denmark and Sweden that do not possess either a definition of criminal organisation - and therefore do not have the related crime of 'participation in a criminal organisation' - or an offence of 'conspiracy to commit serious offences') might not have alternative criminal tools to fight the organised crime phenomenon. These further/alternative criminal tools will not be dealt in this section, for the analysis of alternative criminal law tools and practices please see Chapters 5 and 6 of this report.

⁴³ Calderoni (2010), 29.

Article 5, clearly states:

- Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally
 - (a) *Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:*
 - (i) *Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;*
 - (ii) *Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:*
 - a. *Criminal activities of the organized criminal group;*
 - b. *Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;*
 - (b) *Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.'*
- Textual reasons. This historical background is reflected also in the text of the Framework Decision that indicates how MS shall introduce a self-standing offence choosing between the crime of participation in a criminal organisation and/or conspiracy, as remarked also, for example, by Mitsilegas: '[t]he Framework Decision attempts to [...] introduce a specific offence of participation in a criminal organisation, which is distinct from other association/membership offences in domestic criminal justice systems'.⁴⁴ Similarly, Calderoni states '[t]he Framework Decision (2008/841/JHA) maintains the double model offence approach. [...] Consequently, the two possible model offences are once again a continental/civil law model and an Anglo-Saxon/common law model respectively'.⁴⁵
- Policy context reasons. Policy context underlines how the absence of a self-standing offence in EU MS would create severe difficulties in transnational investigative and judicial cooperation and coordination in fighting organised crime. Not having the same self-standing offence for punishing the same phenomenon would result in the hampering of cooperation in the field.
- Structural reasons within the Framework Decision. From the structure of the Framework Decision, it is clear how it would be troublesome, if not impossible, for MS to transpose the remaining Articles – e.g. the aggravation of penalties

⁴⁴ Mitsilegas (2011), 5.

⁴⁵ Calderoni (2010), 37–38. In this regard, one can notice how the Council rejected the proposal of the EU Commission that aimed at introducing only the 'participation in a criminal organisation' offence, preferring the dual approach (participation in a criminal organisation and/or conspiracy). Nonetheless, this choice does not change the clear intent of introducing a self-standing offence (see also Mitsilegas (2011), 11–13).

committed in the framework of a criminal organisation (Art. 3), the mitigation/exemption of such penalties (Art. 4), or the punishment of legal persons involved in the commission of crimes in the framework of a criminal organisation (Art. 5) – without a self-standing offence.

Participation in a criminal organisation

The term 'participation in a criminal organisation' refers to the offence committed by whoever takes active part in the activities of a criminal organisation, knowing that such participation will contribute to the achievement of the criminal organisation itself. Such a concept is stated in Article 2(a) of the Framework Decision,⁴⁶ that requires that the offender 'actively takes part in the organisation's criminal activities' [...] 'knowing that such participation will contribute to the association's criminal activities'. Such an 'active participation' can consist of a wide range of activities, such as giving financial support, aiding and abetting members of the organisation or playing any role in the possible structure of the organisation.

The idea is to link the conduct of participation in a criminal organisation with certain criminal activities of the group that will be, at least potentially, committed. **Therefore, it is crucial for the prosecution of the offence to prove the link with the criminal activity that would be carried out in practice.** This concept is referred to in some MS legislation using a different terminology (e.g. 'criminal association' in Italy and France).⁴⁷

'Participation in a criminal organisation' is an offence typically used in civil law countries and was introduced in the Framework Decision as a self-standing offence to facilitate harmonisation of key concepts transposition in MS belonging to this legal tradition, lacking it or having it in such a manner that needed revisions.

Within this report the authors will always use, in line with the Framework Decision, the term '**participation in a criminal organisation**' with an exception when direct reference is made to legislative text of those MS where the concept is expressed with a different terminology.⁴⁸

⁴⁶ 'Conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities.'

⁴⁷ For more details, see Chapter 5 on alternative criminalisation of criminal organisations.

⁴⁸ This section does not cover other forms of associative offences. Some MS, besides the general offence of participation in a criminal organisation, also have more specific associative crimes (criminal association finalised to the commission of peculiar offences and/or using a peculiar *modus operandi*): e.g. Finland for drug trafficking (Chapter 50, section 2 c.c.), Italy both for the mafia-type association (section 416 bis c.c.) and for specific offences related to human trafficking (sections 600 to 602 c.c.) or drug trafficking (section 74 Decree of the President of the Republic 309/1990), Portugal for drug trafficking (section 28 Law decree 15/1993) or tax crimes (section 89 Law 15/2001). For more details, please see Chapter 5 of this report.

Conspiracy to commit criminal offences⁴⁹

The term conspiracy refers to an offence which punishes the mere agreement between two or more persons to commit a crime even if no actual execution of the criminal activity has taken place. **The idea is to punish not the fact of active participation but mere belonging to an organisation, no matter what the role or contribution of the person in question.**

For the purpose of prosecution, 'belonging' to the organisation does not have to be linked to any additional criminal activity. The conviction takes place for 'being' a part of a criminal organisation and not for committing (or being evidentially connectable to) any specific criminal activity.

Article 2(b) of the Framework Decision⁵⁰ aims to punish specifically the agreement to commit offences punishable by deprivation of liberty or a detention order of at least four years.

Conspiracy is a widely used offence in common law countries and was introduced as an option in the Framework Decision, with specific reference to offences punishable by deprivation of liberty or a detention order of at least four years, as a self-standing offence to facilitate the transposition in MS belonging to this legal tradition. According to this very broad offence, it suffices that two or more persons merely agree to commit any crime at some time in the future independently from the actual execution of such an activity.

4.3. Mapping and assessment method

Based upon the above-mentioned terminology and building upon relevant literature,⁵¹ the following sections (4.4–4.10) map MS legislation on organised crime (based on the contents of Framework Decision 2008/841/JHA) and assess the transposition of Framework Decision 2008/841/JHA by MS.

The mapping and the transposition assessment of the MS criminal law on organised crime is based on the seven 'legal minimum standards' stated in the Articles of the Framework Decision:

- Offences relating to participation in a criminal organisation (Article 2 based on definitions from Article 1).
- Penalties (Article 3).
- Special circumstances (Article 4).
- Liability of legal persons (Article 5).
- Penalties for legal persons (Article 6).

⁴⁹ The expression 'conspiracy to commit criminal offences' shall have preference over 'conspiracy in organised crime/s' and was used throughout the text. Legal literature, also by the European Parliament (<http://www.europarl.europa.eu/document/activities/cont/201206/20120627ATT47779/20120627ATT47779EN.pdf>) for instance, in this case uses only the word 'conspiracy', without any further specification, as an alternative to 'participation in a criminal organisation'. Conspiracy, in fact, under Article 2b, is 'an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1'. The offences under Article 1 are not 'organised crimes' per se. They are just offences punished with a maximum over a certain threshold (4 years).

⁵⁰ 'Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.'

⁵¹ Bressan (2012); Calderoni (2010).

- Jurisdiction and coordination of prosecution (Article 7).
- Absence of requirement of a report or accusation by victims (Article 8).

Each standard is broken up into simpler 'elements' within each section. This makes it possible to understand, MS by MS, if and how a country transposes these legal minimum standards. The following seven sections (4.5–4.11) deal with each of the seven selected legal minimum standards (one per section). Each is divided into three parts:

- A description of the legal minimum standard and elements.
- The mapping of MS legislation.
- The transposition assessment.

The second part on mapping gives a detailed overview of MS criminal legislation with reference to the contents of the Framework Decision, standard by standard, element by element. The third and last part of each section assesses if such MS criminal legislation transposes (fully or partially) the contents of the Framework Decision or not.

Note regarding Denmark and Sweden

Denmark and Sweden do not have a self-standing offence in relation to Article 2 of the Framework Decision (neither participation in a criminal organisation nor conspiracy to commit criminal offences); therefore these MS have not as yet transposed this Framework Decision provision.⁵² As all other provisions (apart from potentially Article 3.2) are based on Article 2, those provisions also have not been transposed in these two countries.

For this reason, Denmark and Sweden have been excluded from the presentation of results, including all tables of findings, for ease of reading. Nonetheless, both MS have alternative legal instruments to tackle criminal organisations, even though they do not match the Framework Decision standards. These will be discussed in Chapter 5.⁵³

Note regarding the UK

Due to the fact that there are significant differences in the criminal legislation between England, Wales, and Northern Ireland on the one side and Scotland on the other, the mapping and assessment of Framework Decision transposition will be carried out separately for:

- England (*Eng*), Wales (*Wal*) and Northern Ireland (*NI*).
- Scotland (*Sco*).

The UK Parliament is also currently discussing the 'Serious Crime Bill' (introduced in the House of Lords on 5 June 2014), which aims to introduce (in England and Wales) the new offence of participation in an organised crime group, thus transposing the content of Article 2a of the Framework Decision.⁵⁴

⁵² See above, para. 4.2.2.

⁵³ See Chapter 5, Section 5.2

⁵⁴ For further details, see UK Home Office (2014a).

4.4. Definitions of criminal organisation and offences relating to participation in a criminal organisation (Article 2, based on definitions from Article 1)

4.4.1. Standard and elements – ‘Criminal organisation’: definition and offences

The first standard corresponds to Article 2 of the Framework Decision, based on definitions from Article 1.

Article 2 of the Framework Decision reads as follows:

‘Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:

- a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation’s criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation’s criminal activities;
- b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.’

Article 2 shall be read in conjunction with Article 1 of the Framework Decision, which reads as follows:

‘For the purposes of this Framework Decision:

1. “criminal organisation” means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;
2. “structured association” means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.’

It should be stressed that both provisions are substantially in line with previous legislation, namely UNTOC⁵⁵ and the Joint Action.⁵⁶

⁵⁵ Article 5 of the United Nations Convention Against Transnational Organized Crime (UNTOC):
1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

Article 2 therefore requires MS to introduce in their legal system a specific offence, in the form either of participation in a criminal organisation or conspiracy to commit criminal offences (or both). This provision is therefore met only when a MS has introduced such a self-standing offence in its criminal law system (see Section 4.2.2 above). The rationale behind this provision is to go beyond the punishment of individual, predicate, offences committed by members of a criminal organisation and to grasp the organisational element behind them. This is done by envisaging two conducts, one of which should at least be regarded as an offence by MS, i.e. a) active participation in the illicit activities of a criminal organisation, knowing the aim of the organisation or its intention to commit crimes; and b) an agreement of at least two persons to perpetrate crimes without necessarily taking part in their commission.

In order to map MS criminal law with reference to the legal minimum standard set in Article 2a of the Framework Decision and to assess transposition of this standard, one has to consider how this provision relates back to the definition of criminal organisation under Article 1. The following elements are thus to be taken into account:

- **Structure of the criminal organisation** (i.e. an association that is not randomly formed for the immediate commission of an offence; and that does

(a) *Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:*

(i) *Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;*

(ii) *Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:*

a. *Criminal activities of the organized criminal group;*

b. *Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;*

(b) *Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.*

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

⁵⁶ Article 2 of the Joint Action 98/733/JHA, OJ L351, 29 December 1998:

1. To assist the fight against criminal organisations, each Member State shall undertake, in accordance with the procedure laid down in Article 6, to ensure that one or both of the types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties:

(a) *conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in:*

- *the organisation's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed,*

- *the organisation's other activities in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities falling within Article 1;*

(b) *conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity.*

2. Irrespective of whether they have elected to make the type of conduct referred to in paragraph 1(a) or (b) a criminal offence, Member States will afford one another the most comprehensive assistance possible in respect of the offences covered by this Article, as well as those offences covered by Article 3(4) of the Convention relating to extradition between the Member States of the European Union, drawn up by the Council on 27 September 1996.

not need to have formally defined roles for its members, continuity of its membership or a developed structure).

- **Continuity of the criminal organisation** (i.e. a criminal organisation shall be established over a period of time).
- **Number of members** of the criminal organisation (i.e. at least 3 persons).
- **Intent** (i.e. the specific intent to commit an offence, which refers to the person's state of mind and willingness to break the law).
- **Scope of predicate offences** (i.e. offences punishable by the deprivation of liberty or detention order of at least four years or more serious penalties).
- **Benefit** (i.e. to obtain, directly or indirectly, a financial or other material benefit).
- **Material contribution**, namely an active participation in an organisation's criminal activities through concrete actions that add a necessary or useful contribution in order to commit a crime (participation in a criminal organisation).

In order to map MS criminal law with reference to the legal minimum standard set in Article 2b of the Framework Decision and to assess transposition of this standard, the following element has to be taken into account:

- **Punishment of the mere agreement**, namely an agreement between two or more persons to commit offences punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty at some time in the future, without the need for committing the planned crime and proving any potential criminal activity.

In the text of Article 2b the Framework Decision does not make any reference to the definition of criminal organisation given under Article 1: it only makes reference to the *offences* under Article 1 (i.e. MS have to punish conspiracy that 'would amount to the commission of offences referred to in Article 1'). The only offences mentioned under Article 1 are those 'punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty'. In other words, from the text of the Framework Decision, it is clear that the criminal conduct of 'conspiracy', differently from the criminal conduct 'participation in a criminal organisation', does not bring as a necessary part of its constituent elements the features of a 'criminal organisation' (structure, continuity, number of members, intent, scope of predicate offences, benefit or material contribution).

This is also evident, for instance, from the fact that, according to the Framework Decision, conspiracy, in line with common law tradition, needs the involvement of at least two persons (agreement with one or more persons), while for the offence of participation in a criminal organisation such an organisation has to be made up of at least three persons.

Furthermore, one can conspire for only a specific crime and asking for continuity of the conspiracy offence, for instance, would conflict with the legal tradition of this common law offence (as explained, this offence was included in the Framework Decision exactly to take into account the common law legacy).

What is asked by the Framework Decision is that conspiracy should be punished if committed 'within the framework of a criminal organisation'. But this is superfluous since the offence of conspiracy is so broad that it well encompasses all the conspiring acts

carried out by members of a criminal organisation with the characteristics described in the Framework Decision.

Nonetheless, the UK's rationale for introducing the new provisions of the Serious Crime Bill 2014 is to get to parts of organised crime activity that conspiracy cannot reach, as well as to make cross-border cooperation easier.

4.4.2. Mapping of MS legislation: 'criminal organisation' – definition and offences

Definitions of criminal organisation






Structure of the criminal organisation

The Framework Decision, in Article 1 par. 2, defines a criminal organisation as a 'structured association', i.e. 'an association that is not randomly formed for the immediate commission of an offence; and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure'. The idea is to ensure that the scope of the offence from Article 2 covers only organisations that are sufficiently structured. At the same time the Framework Decision does not give any specific guidance on this matter apart from indicating what should not be regarded as a structured association.

Table 4.1 shows how MS deal with the 'structure of the criminal organisation' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.

Table 4.1: Structure of the criminal organisation

Member State	Definition of criminal organisation in national legislation: structure
 Austria	No mention of the notion of 'structured organisation' in the legislation <i>source: section 278 c.c.</i>
 Belgium	Only a mention that the association is to be structured (not further elaborated) <i>source: section 324 bis c.c.</i>
 Bulgaria	Only a mention that the association is to be structured (not further elaborated) <i>source: section 321 c.c.</i>
 Croatia	The concept is further elaborated (shall not include an association randomly formed for the immediate commission of one criminal offence) <i>source: section 328 c.c.</i>
 Cyprus	Only a mention that the association is to be structured (not further elaborated) <i>source: section 63b c.c.</i>
 Czech Republic	The concept is further elaborated (internal organisational structure, a division of functions and division of activities) <i>source: section 129 c.c.</i>
 Estonia	The concept is further elaborated (persons who share a distribution of tasks) <i>source: section 255 c.c.</i>
 Finland	Only a mention that the association is to be structured (not further elaborated) <i>source: chapter 17, section 1(a) c.c.</i>
 France	No mention of the notion of 'structured organisation' in the legislation <i>source: section 450-1 c.c.</i>
 Germany	No mention of the notion of 'structured organisation' in the legislation <i>source: section 129 c.c.</i>
 Greece	Only a mention that the association is to be structured (not further elaborated) <i>source: section 187 c.c.</i>
 Hungary	No mention of the notion of the 'structured organisation' in the legislation <i>source: section 459 c.c.</i>
 Ireland	Only a mention that the association is to be structured (not further elaborated) <i>source: Criminal Justice Act of 2006 as amended by section 3(l)(a) of Criminal Justice Act of 2009, section 70</i>
 Italy	No mention of the notion of 'structured organisation' in the legislation <i>source: section 416 c.c.</i>
 Latvia	The concept is further elaborated (<i>the participants of which in accordance with previous agreement have divided responsibilities</i>) <i>source: section 21 c.c.</i>
 Lithuania	The concept is further elaborated (<i>persons linked by permanent mutual relations and division of roles or tasks</i>) <i>source: section 25 c.c.</i>
 Luxembourg	Only a mention that the association is to be structured (not further elaborated) <i>source: section 324 bis c.c.</i>
 Malta	No mention of the notion of 'structured organisation' in the legislation <i>source: section 83A c.c.</i>
 Netherlands	No mention of the notion of 'structured organisation' in the legislation <i>source: section 140 c.c.</i>
 Poland	No mention of the notion of 'structured organisation' in the legislation <i>source: section 258 c.c.</i>
 Portugal	No mention of the notion of 'structured organisation' in the legislation <i>source: section 299 c.c.</i>

 Romania	Only a mention that the association is to be structured (not further elaborated) <i>source: section 367 c.c.</i>	
 Slovakia	Only a mention that the association is to be structured (not further elaborated) <i>source: section 129 c.c.</i>	
 Slovenia	No mention of the notion of 'structured organisation' in the legislation <i>source: section 294 c.c.</i>	
 Spain	The concept is further elaborated (persons... who act in concert to coordinate various tasks or functions) <i>source: section 570 bis c.c.</i>	
 United Kingdom	England, Wales, Northern Ireland	No definition of criminal organisation <i>source: n.a.</i>
	Scotland	No mention of the notion of 'structured organisation' in the legislation <i>source: Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</i>

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Based on Table 4.1, it is possible to conclude that only the United Kingdom (England, Wales and Northern Ireland) and Sweden and Denmark (who have failed to transpose any of the Framework Decision – see Section 4.4), currently do not provide a definition of criminal organisation in their national legislation.

Within the remaining 25 MS, the following approaches exist in reference to the 'structure of the criminal organisation' element:

- The 'only a mention' approach, in which it is just mentioned that the association is to be structured, with no further elaboration. This is adopted by: Belgium, Bulgaria, Cyprus, Finland, Greece, Ireland, Luxembourg, Romania and Slovakia. This approach copies the wording of the Framework Decision.
- The 'further elaborated concept' approach, in which details are given regarding the concept of structure. This is adopted by: Croatia, the Czech Republic, Estonia, Latvia, Lithuania and Spain. Such an approach gives further guidance to the national judge in the way this notion should be interpreted.
- The 'no mention approach', which does not make any explicit reference to the structure of the criminal organisation. It is followed by: Austria, France, Germany, Hungary, Italy, Malta, the Netherlands, Poland, Portugal, Slovenia and Scotland. Such an approach means that this notion does not have to be proven before the court, and therefore opens the field of application of this provision in a potentially 'less structured' manner. In practice the lack of need to prove structure means that the case may be easier to prove before the court.

Continuity of the criminal organisation over time

The Framework Decision, in Article 1 par. 1, indicates that a criminal organisation is one that is 'established over a period of time'.

The goal of identifying this criterion in the Framework Decision is distinguishing criminal organisations from less serious criminal activities which are usually also characterised by shorter-lasting criminal links. This element makes it possible to distinguish the existence












of a criminal organisation from a situation where more than one offence is committed by a group of offenders.⁵⁷

Table 4.2 shows how MS deal with the 'continuity of the criminal organisation over time' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.

Table 4.2: Continuity of the criminal organisation

Member State	Definition of criminal organisation in national legislation: continuity
 Austria	Mention of duration in the legislation (set up for the longer term) <i>source: section 278 c.c.</i>
 Belgium	Mention of duration in the legislation (established over a period of time) <i>source: section 324 bis c.c.</i>
 Bulgaria	Mention of duration in the legislation (stable) <i>source: section 93 c.c.</i>
 Croatia	No mention of duration in the legislation <i>source: section 328 c.c.</i>
 Cyprus	No mention of duration in the legislation <i>source: section 63b c.c.</i>
 Czech Republic	No mention of duration in the legislation <i>source: section 129 c.c.</i>
 Estonia	Mention of a 'permanent' duration <i>source: section 255 c.c.</i>
 Finland	Mention of duration in the legislation (established over a period of time) <i>source: chapter 17, section 1(a) c.c.</i>
 France	No mention of duration in the legislation <i>source: section 450-1 c.c.</i>
 Germany	No mention of duration in the legislation <i>source: section 129 c.c.</i>
 Greece	Mention of duration in the legislation (for a period of time) <i>source: section 187 c.c.</i>
 Hungary	Mention of duration in the legislation (in the long term) <i>source: section 459 c.c.</i>
 Ireland	No mention of duration in the legislation <i>source: Criminal Justice Act of 2006 as amended by section 3(l)(a) of Criminal Justice Act of 2009, section 70</i>
 Italy	No mention of duration in the legislation <i>source: section 416 c.c.</i>
 Latvia	No mention of duration in the legislation <i>source: section 21 c.c.</i>

⁵⁷ This element concerns the continuity through time of the criminal organisation, as requested by the Framework Decision. Scientific research stresses the importance of the continuity requirement in defining organised crime: we do not have organised crime without 'continuity'. The goal is distinguishing criminal organisations from less serious criminal activities. This element makes it possible to distinguish criminal organisations from the commission of more than one offence by a group of offenders. Calderoni (2010).

 Lithuania	Mention of a 'permanent' duration	
	<i>source: section 25 c.c.</i>	
 Luxembourg	Mention of duration in the legislation (established over a period of time)	
	<i>source: section 324 bis c.c.</i>	
 Malta	No mention of duration in the legislation	
	<i>source: section 83A c.c. and 48A c.c.</i>	
 Netherlands	No mention of duration in the legislation	
	<i>source: section 140 c.c.</i>	
 Poland	No mention of duration in the legislation	
	<i>source: section 258 c.c.</i>	
 Portugal	No mention of duration in the legislation	
	<i>source: section 299 c.c.</i>	
 Romania	Mention of duration in the legislation (for a period of time)	
	<i>source: section 367 c.c.</i>	
 Slovakia	Mention of duration in the legislation (for a certain period of time)	
	<i>source: section 129 c.c.</i>	
 Slovenia	No mention of duration in the legislation	
	<i>source: section 294 c.c.</i>	
 Spain	Mention of duration in the legislation (a stable basis; for an indefinite period of time)	
	<i>source: section 570 bis c.c</i>	
 United Kingdom	England, Wales, Northern Ireland	No definition of criminal organisation
	<i>source: n.a.</i>	
	Scotland	No mention of duration in the legislation
<i>source: Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</i>		

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Based on Table 4.2, one may conclude that, within the national legal systems of the 25 MS (plus Scotland) that offer a definition of criminal organisation, the following approaches exist in reference to the 'continuity of the criminal organisation' element:







- The 'mention' approach, which makes mention of continuous duration in the legislation. This is adopted by: Austria, Belgium, Bulgaria, Finland, Greece, Hungary, Luxembourg, Romania, Slovakia and Spain. Such an approach copies the Framework Decision wording.
- The 'no mention' approach, used by: Croatia, Cyprus, the Czech Republic, France, Germany, Ireland, Italy, Latvia, Malta, the Netherlands, Poland, Portugal, Slovenia and Scotland. The absence of specific continuity and time requirements mean that the offence, other things being equal, should be easier to prove.
- The 'permanent basis' approach, which refers to criminal organisations operating permanently. This is adopted by Estonia and Lithuania. Such an approach means that while some indication of time is given, this concept may be difficult to prove in practice, as the 'permanence' criterion is difficult to prove operationally. It also potentially excludes any 'non-permanent' criminal organisations which nevertheless exist over some period of time. It can create an important obstacle to the application of the offence of organised crime in practice. This is especially so for more fluid criminal networks, which the Europol SOCTAs and academic research show are the dominant mode.

Number of members of the criminal organisation

The Framework Decision, in Article 1 par. 1, indicates that a criminal organisation is one that is composed 'of more than two persons acting in concert'.

Table 4.3 shows how MS deal with the 'number of members of the criminal organisation' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.

Table 4.3: Number of members of the criminal organisation

Member State	Definition of criminal organisation in national legislation: number of members
 Austria	Three members or more (more than two persons) <i>source: section 278 c.c.</i>
 Belgium	Three members or more (plus de deux personnes) <i>source: section 324 bis c.c.</i>
 Bulgaria	Three members or more (three or more persons) <i>source: section 93 c.c.</i>
 Croatia	Three members or more (three or more persons) <i>source: section 328 c.c.</i>
 Cyprus	Three members or more (three or more persons) <i>source: section 63b c.c.</i>
 Czech Republic	Two members or more (two or more persons) <i>source: section 129 c.c.</i>

 Estonia	Three members or more (three or more persons) <i>source: section 255 c.c.</i>	
 Finland	Three members or more (at least three persons) <i>source: chapter 17, section 1(a) c.c.</i>	
 France	No mention of the minimum number of members in the legislation <i>source: section 450-1 c.c.</i>	
 Germany	No mention of the minimum number of members in the legislation <i>source: section 129 c.c.</i>	
 Greece	Three members or more (three or more persons) <i>source: section 187 c.c.</i>	
 Hungary	Three members or more (three or more persons) <i>source: section 459 c.c.</i>	
 Ireland	Three members or more (three or more persons) <i>source: Criminal Justice Act of 2006 as amended by section 3(l)(a) of Criminal Justice Act of 2009, section 70</i>	
 Italy	Three members or more (three or more persons) <i>source: section 416 c.c.</i>	
 Latvia	Three members or more (more than two persons) <i>source: section 21 c.c.</i>	
 Lithuania	Three members or more (three or more persons) <i>source: section 25 c.c.</i>	
 Luxembourg	Three members or more (plus de deux personnes) <i>source: section 324 bis c.c.</i>	
 Malta	Two members or more (two or more persons) <i>source: section 83A c.c.</i>	
 Netherlands	No mention of the minimum number of members in the legislation <i>source: section 140 c.c.</i>	
 Poland	No mention of the minimum number of members in the legislation <i>source: section 258 c.c.</i>	
 Portugal	No mention of the minimum number of members in the legislation <i>source: section 299 c.c.</i>	
 Romania	Three members or more (three or more people) <i>source: section 367 c.c.</i>	
 Slovakia	Three members or more (at least three persons) <i>source: section 129 c.c.</i>	
 Slovenia	No mention of the minimum number of members in the legislation <i>source: section 294 c.c.</i>	
 Spain	Three members or more (more than two persons) <i>source: section 570 bis c.c.</i>	
 United Kingdom	England, Wales, Northern Ireland	No definition of criminal organisation <i>source: n.a.</i>
	Scotland	Two members or more (a person who agrees with at least one other person) <i>source: Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</i>

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Based on Table 4.3, it is possible to conclude that, within the national legal systems of the 25 MS (plus Scotland) providing for a definition of criminal organisation, the following approaches exist in reference to the 'number of members of the criminal organisation' element:







- The 'three members or more' approach is adopted by the majority of EU MS and requires at least three members for a criminal organisation. It is followed by: Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Romania, Slovakia and Spain. Such an approach is a direct transposition of the terms of the Framework Decision.
- The 'two members or more' approach, which is followed by: Malta, the Czech Republic and Scotland. Lowering the minimum number to two opens the application of the provision to smaller organisations but plainly complies with the Framework Decision requirement.
- The 'no mention' approach, which does not explicitly require a minimum number of members for a criminal organisation. It is followed by: France, Germany, Poland, Portugal, Slovenia and the Netherlands. Except where jurisprudence and/or accepted scholarly commentary holds otherwise, this implies two or more persons and complies with the Framework Decision threshold.

















Intent to commit an offence

The Framework Decision, in Article 1 par. 1, indicates that a criminal organisation is one that is established 'with a view to committing offences'. The specific intent of criminal associates to commit an offence is essential and refers to the person's state of mind and willingness to break the law.

Table 4.4 shows how MS deal with the 'intent' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.

Table 4.4: Intent

Member State	Definition of criminal organisation in national legislation: intent
 Austria	for the purpose of <i>source: section 278 c.c.</i>
 Belgium	en vue de commettre <i>source: section 324 bis c.c.</i>
 Bulgaria	for the purpose of <i>source: section 93 c.c.</i>
 Croatia	with the aim of <i>source: section 328 c.c.</i>
 Cyprus	for the purpose of committing <i>source: section 63b c.c.</i>
 Czech Republic	Intentional <i>source: section 129 c.c.</i>

 Estonia	for the purpose of <i>source: section 255 c.c.</i>	
 Finland	acting in concert to commit <i>source: chapter 17, section 1(a) c.c.</i>	
 France	with the view to <i>source: section 450-1 c.c.</i>	
 Germany	the objectives or activity of which are directed towards the <i>source: section 129 c.c.</i>	
 Greece	with the aim of committing <i>source: section 187 c.c.</i>	
 Hungary	to deliberately engage <i>source: section 459 c.c.</i>	
 Ireland	with a view to <i>source: Criminal Justice Act of 2006 as amended by section 3(1)(a) of Criminal Justice Act of 2009, section 70</i>	
 Italy	with a view to <i>source: section 416 c.c.</i>	
 Latvia	for purpose of <i>source: section 21 c.c.</i>	
 Lithuania	for the commission <i>source: section 25 c.c.</i>	
 Luxembourg	en vue de commettre <i>source: section 324 bis c.c.</i>	
 Malta	with a view to <i>source: section 83A c.c.</i>	
 Netherlands	which has as its purpose <i>source: section 140 c.c.</i>	
 Poland	aimed at committing <i>source: section 258 c.c.</i>	
 Portugal	whose purpose or activity is directed to <i>source: section 299 c.c.</i>	
 Romania	in order to <i>source: section 367 c.c.</i>	
 Slovakia	with a view to <i>source: section 129 c.c.</i>	
 Slovenia	which has the purpose of <i>source: section 294 c.c.</i>	
 Spain	for the purpose of <i>source: section 570 bis c.c.</i>	
 United Kingdom	England, Wales, Northern Ireland	No definition of criminal organisation <i>source: n.a.</i>
	Scotland	for the principal purpose of committing or conspiring to commit <i>source: Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</i>

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Based on Table 4.4 it is possible to conclude that, within the national legal systems of all the 25 MS (plus Scotland) providing for a definition of criminal organisation, the element of 'intent' is transposed similarly. All MS cover only intentional offences.



Scope of predicate offences



The Framework Decision, in Article 1 par. 1, indicates that a criminal organisation is one that is established 'with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty'.







The idea is to ensure that the scope of the offence from Article 2 covers criminal organisations that commit in practice serious offences (as judged by sentence maxima), though they may also commit offences that carry a less than four-year prison sentence.

Table 4.5 shows how MS deal with the 'scope of predicate offences' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.

Table 4.5: Scope of predicate offences committed by a criminal organisation

Member State	Definition of criminal organisation in national legislation: scope of predicate offences
 Austria	Offences punishable with 3 years of imprisonment or a more serious penalty ('criminal organisation' is an association, set up for the longer term, of more than two persons for the purpose of one or more members of the organisation committing one or more crimes. 'Crimes are intentional acts that are punishable by lifelong or with more than three years imprisonment'.) <i>source: sections 278 and 17 c.c.</i>
 Belgium	Offences punishable with at least 3 years of imprisonment or a more serious penalty (des crimes et délits punissables d'un emprisonnement de trois ans ou d'une peine plus grave) <i>source: section 324 ter c.c.</i>
 Bulgaria	Offences punishable with at least 3 years of imprisonment or a more serious penalty (criminal offences punishable by more than three years' imprisonment) <i>source: section 93 c.c.</i>
 Croatia	Offences punishable with at least 3 years of imprisonment or a more serious penalty (criminal offences that are punishable with imprisonment for a term longer than three years) <i>source: section 328 c.c.</i>
 Cyprus	Offences punishable with at least 3 years of imprisonment or a more serious penalty (criminal offences punishable by a maximum sentence of at least three years) <i>source: section 63b c.c.</i>
 Czech Republic	No restriction of the scope of the predicate offences in the legislation <i>source: section 129 c.c.</i>
 Estonia	Offences punishable with at least 3 years of imprisonment or a more serious penalty (criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree, is punishable by 3 to 12 years' imprisonment) <i>source: section 255 and 256 c.c.</i>
 Finland	Offences punishable with at least 4 years of imprisonment in the maximum or a more serious penalty (offences for which the maximum statutory sentence is imprisonment for at least four years) <i>source: chapter 17, section 1(a) c.c.</i>

 France	Offences punishable with at least 5 years of imprisonment or a more serious penalty (felonies, or [...] misdemeanours punished by at least five years' imprisonment) <i>source: section 450-1 c.c.</i>
 Germany	No restriction of the scope of the predicate offences in the legislation <i>source: section 129 c.c.</i>
 Greece	<p>A list of offences to be regarded as predicate offences is provided for in the legislation (crimes provided for in Articles 207 (counterfeiting), 208 (circulation of counterfeit money), 216 (forgery), 218 (forgery and use of forged stamps), 242 (false declaration, falsification), 264 (arson), 265 (arson in forests), 268 (flood), 270 (explosion), 272 (offences involving the use of explosives), 277 (deliberate shipwreck), 279 (poisoning water sources and food), 291 (undermining the safety of railways, ships and aircraft), 299 (murder), 310 (grievous bodily harm), 322 (kidnapping), 323 (slave-trading), 323A (human trafficking), 324 (abduction of minors), 327 (forced abduction), 336 (rape), 338 (sexual abuse of incompetents), 339 (corruption of minors), 348A (child pornography), 351 (pimping), 351A (sexual abuse of minors for payment), 374 (certain types of theft), 375 (embezzlement), 380 (robbery), 385 (blackmail), 366 (fraud), 386A (computer fraud), or 404 (usury), or in Article 87(5), last sentence, or Article 88 of Law 3386/2005 (Government Gazette 212A) where such crimes (facilitating the illegal entry or exit or smuggling of third country nationals) are committed for gain, or one or more offences provided for under legislation on narcotics, firearms, explosives and protection from materials that emit harmful radiation, or one or more offences provided for and punished under legislation for the protection of antiquities and the cultural heritage in general)</p> <i>source: section 187 c.c.</i>
 Hungary	Offences punishable with at least 5 years of imprisonment or a more serious penalty (criminal acts, which are punishable with five years of imprisonment or more) <i>source: section 459 c.c.</i>
 Ireland	Offences punishable with at least 4 years of imprisonment or a more serious penalty (offence for which a person may be punished by imprisonment for a term of 4 years or more) <i>source: Criminal Justice Act of 2006 as amended by section 3(l)(a) of Criminal Justice Act of 2009, section 70</i>
 Italy	No restriction of the scope of the predicate offences in the legislation <i>source: section 416 c.c.</i>
 Latvia	No restriction of the scope of the predicate offences in the legislation <i>source: section 21 c.c.</i>
 Lithuania	Offences punishable with at least 3 years of imprisonment or a more serious penalty (crime punishable, under the criminal law, by a custodial sentence of the duration in excess of three years, but not exceeding ten years of imprisonment and crime punishable, under the criminal law, by a custodial sentence of the maximum duration in excess of ten years) <i>source: section 25 c.c.</i>
 Luxembourg	Offences punishable with at least 4 years of imprisonment or a more serious penalty (crimes et délits punissables d'un emprisonnement d'un maximum d'au moins quatre ans ou d'une peine plus grave) <i>source: section 324 bis c.c.</i>
 Malta	Offences punishable with at least 4 years of imprisonment or a more serious penalty (offences liable to the punishment of imprisonment for a term of four years or more) <i>source: section 83A c.c.</i>
 Netherlands	No restriction of the scope of the predicate offences in the legislation <i>source: section 140 c.c.</i>
 Poland	No restriction of the scope of the predicate offences in the legislation <i>source: section 258 c.c.</i>

 Portugal	No restriction of the scope of the predicate offences in the legislation <i>source: section 299 c.c.</i>	
 Romania	No restriction of the scope of the predicate offences in the legislation <i>source: section 367 c.c.</i>	
 Slovakia	Offences punishable with at least 5 years of imprisonment in the maximum or a more serious penalty (intentional offence in respect of which the special part of this Act specifies a penalty of imprisonment with a maximum length exceeding five years) <i>source: section 11 c.c.</i>	
 Slovenia	Offences punishable with at least 3 years of imprisonment or a more serious penalty (offences for which a punishment by imprisonment of more than three years, or a life sentence may be imposed). <i>source: section 294 c.c.</i>	
 Spain	No restriction of the scope of the predicate offences in the legislation <i>source: section 570 bis c.c</i>	
 United Kingdom	England, Wales, Northern Ireland	No definition of criminal organisation <i>source: n.a.</i>
	Scotland	No restriction of the scope of the predicate offences in the legislation <i>source: Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</i>

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Based on Table 4.5, it is possible to conclude that, within the national legal systems of the 25 MS (plus Scotland) providing for a definition of criminal organisation, the following approaches exist in reference to the 'scope of predicate offences' element:

- The 'offences punishable with at least 3 years of imprisonment or a more serious penalty' approach. This is the position taken by: Belgium, Bulgaria, Croatia, Cyprus, Estonia, Lithuania and Slovenia. Such an approach goes beyond the minimum scope set by the Framework Decision.
- The 'offences punishable with at least 4 years of imprisonment or a more serious penalty' approach. It is followed by: Finland, Ireland, Luxembourg and Malta. Such an approach is a direct transposition from the Framework Decision.
- The 'offences punishable with at least 5 years imprisonment' approach. This is the approach taken by France, Hungary and Slovakia. Such an approach restricts the application of the provision to only some serious offences, creating a gap between the 4 years required by the Framework Decision and the requirement applied by those MS.
- The 'no restriction to the scope' approach which covers any possible criminal offence, irrespective of punishment. The MS following this approach are: the Czech Republic, Germany, Italy, Latvia, Portugal, the Netherlands, Poland, Romania, Spain and Scotland. Such an approach goes beyond the minimum scope set by the Framework Decision by opening the scope of application of the provision to all criminal offences (not only serious ones).
- The 'selection of offences approach', where the legislation provides a list of predicate offences which do not include all the offences punishable by deprivation of liberty or a detention order of a maximum of at least four years. The MS following this approach is Greece. Such an approach covers most of the serious criminal offences typically committed by a criminal organisation, but the list is not fully in line with the Framework Decision requirement as it does not cover all required offences.





Benefit

The Framework Decision, in Article 1 par. 1, indicates that a criminal organisation is one that is established with the aim 'to obtain, directly or indirectly, a financial or other material benefit'.

Table 4.6 shows how MS deal with the 'benefit' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.

Table 4.6: Benefit

Member State	Definition of criminal organisation in national legislation: benefit
 Austria	No mention of benefit in the legislation <i>source: section 278 c.c.</i>
 Belgium	Mention of benefit in the legislation (pour obtenir, directement ou indirectement, des avantages patrimoniaux) <i>source: section 324 bis c.c.</i>
 Bulgaria	No mention of benefit in the legislation <i>source: section 93 c.c.</i>
 Croatia	No mention of benefit in the legislation <i>source: section 328 c.c.</i>
 Cyprus	No mention of benefit in the legislation <i>source: section 63b c.c.</i>
 Czech Republic	No mention of benefit in the legislation <i>source: section 129 c.c.</i>
 Estonia	Mention of benefit in the legislation (created for the purpose of proprietary gain) <i>source: section 255 c.c.</i>
 Finland	No mention of benefit in the legislation <i>source: chapter 17, section 1(a) c.c.</i>
 France	No mention of benefit in the legislation <i>source: section 450-1 c.c.</i>
 Germany	No mention of benefit in the legislation <i>source: section 129 c.c.</i>
 Greece	Mention of benefit in the legislation (for the purpose of achieving financial or other material gain or of attacking a person's life, physical integrity or reproductive freedom) <i>source: section 187 c.c.</i>
 Hungary	No mention of benefit in the legislation <i>source: section 459 c.c.</i>
 Ireland	No mention of benefit in the legislation <i>source: Criminal Justice Act of 2006 as amended by section 3(1)(a) of Criminal Justice Act of 2009, section 70</i>
 Italy	No mention of benefit in the legislation <i>source: section 416 c.c.</i>
 Latvia	No mention of benefit in the legislation <i>source: section 21 c.c.</i>
 Lithuania	No mention of benefit in the legislation <i>source: section 25 c.c.</i>
 Luxembourg	Mention of benefit in the legislation (pour obtenir, directement ou indirectement, des avantages patrimoniaux) <i>source: section 324 bis c.c.</i>
 Malta	No mention of benefit in the legislation <i>source: section 83A c.c.</i>
 Netherlands	No mention of benefit in the legislation <i>source: section 140 c.c.</i>
 Poland	No mention of benefit in the legislation <i>source: section 258 c.c.</i>
 Portugal	No mention of benefit in the legislation <i>source: section 299 c.c.</i>

 Romania	No mention of benefit in the legislation <i>source: section 367 c.c.</i>	
	Mention of benefit in the legislation (with a view to direct or indirect financial gain or other benefits) <i>source: section 129 c.c.</i>	
 Slovakia	No mention of benefit in the legislation <i>source: section 294 c.c.</i>	
	No mention of benefit in the legislation <i>source: section 570 bis c.c</i>	
 Spain	No definition of criminal organisation <i>source: n.a.</i>	
	England, Wales, Northern Ireland	Mention of benefit in the legislation (obtaining a material benefit) <i>Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</i>
 United Kingdom	Scotland	Mention of benefit in the legislation (obtaining a material benefit) <i>Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</i>

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Based on Table 4.6, it is possible to conclude that, within the national legal systems of the 25 MS (plus Scotland) providing for a definition of criminal organisation, there are the following approaches with reference to the 'benefit' element:

- The 'mention' approach, which explicitly requires the final goal of achieving benefit. It is followed by: Belgium, Estonia, Greece, Ireland, Italy, Luxembourg, Slovakia and Scotland. Such an approach is in line with the aim of the Framework Decision linking profit to the nature of the criminal organisation.
- The 'no mention' approach, adopted by: Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia and Spain. Such an approach goes beyond the minimum standards and extends the definition to situations where the obtaining of benefit does not have to be proven.

Offences relating to participation in a criminal organisation

Regarding the offences relating to participation in a criminal organisation (as shown in Table 4.7), according to Articles 1 and 2 of the Framework Decision MS should criminalise:

- a) Participation in a criminal organisation,
- b) Conspiracy to commit offences punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, OR
- c) Both.

Table 4.7: Offences relating to participation in a criminal organisation and MS

Offences relating to participation in a criminal organisation	Member States
Participation in a criminal organisation	Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain
Conspiracy to commit criminal offences	United Kingdom (England, Wales, Northern Ireland)
Both	Bulgaria, Croatia, Greece, Ireland, Malta and Scotland
None	Denmark, Sweden

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.




Table 4.7 shows that 19 MS make it a criminal offence to participate in a criminal organisation, while only the UK (England, Wales, Northern Ireland) opts for conspiracy to commit criminal offences. Some 6 MS (plus Scotland) envisage both offences, while 2 have none of them.



Type of criminalised conducts for offences relating to participation in a criminal organisation



Table 4.8 lists the type of criminalised conducts for offences related to a criminal organisation, with details of the source for each MS.



Table 4.8: Offences related to a criminal organisation – punishable conducts



Member State	Punishable conducts
 Austria	Founding
	Participation <i>Who founds a criminal organisation or participates in it as a member, shall be punished with imprisonment up to three years.</i> <i>source: section 278 c.c.</i>
 Belgium	Participation to a criminal organisation if this one uses intimidation, threat, violence, fraud, corruption, or commercial structures or Participation to the legal activities of a criminal organisation
	Decisionmaking
	Leadership
	<p><i>(1). Lorsque l'organisation criminelle utilise l'intimidation, la menace, la violence, des manœuvres frauduleuses ou la corruption ou recourt à des structures commerciales ou autres pour dissimuler ou faciliter la réalisation des infractions, toute personne qui, sciemment et volontairement, en fait partie, est punie d'un emprisonnement d'un an à trois ans et d'une amende de cent euros à cinq mille euros ou d'une de ces peines seulement, même si elle n'a pas l'intention de commettre une infraction dans le cadre de cette organisation ni de s'y associer d'une des manières prévues par les articles 66 à 69.</i></p> <p><i>§ (2). Toute personne qui participe à la préparation ou à la réalisation de toute activité licite de cette organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article 324bis, est punie d'un emprisonnement de un an à trois ans et d'une amende de cent [euros] à cinq mille [euros] ou d'une de ces peines seulement.</i></p> <p><i>§ (3). Toute personne qui participe à toute prise de décision dans le cadre des activités de l'organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article 324bis, est punie de la réclusion de cinq ans à dix ans et d'une amende de cinq cent euros à cent mille euros ou d'une de ces peines seulement.</i></p> <p><i>(4). Tout dirigeant de l'organisation criminelle est puni de la réclusion de dix ans à quinze ans et d'une amende de mille euros à deux cent mille euros ou d'une de ces peines seulement.</i> <i>source: section 324 ter c.c.</i></p>
 Bulgaria	Founding/leadership
	Participation
	Conspiring (i.e. conspire to commit crimes punishable with more than 3 years' imprisonment for gain and/or to influence state/local bodies) <i>(1) Forming or leading an organised criminal group shall be punishable by three to ten years' imprisonment.</i> <i>Taking part in such groups shall be punishable by one to six years' imprisonment.</i> [...] <i>(6) Conspiring with one or more persons to commit, in Bulgaria or abroad, offences punishable by more than three years' imprisonment in pursuit of material gain or for the purpose of gaining illicit influence over bodies of state or local government shall be punishable by up to six years' imprisonment.</i> <i>source: section 321 c.c.</i>

 Croatia	<p>Participation in a criminal organisation framework without committing any crime or Support (i.e. financial, other kind) or Commission of legal acts to further the goals of a criminal organisation</p> <p>Leadership (organisation/direction)</p> <p>Conspiring to commit offences</p> <p><i>(1) Whoever organises or directs a criminal association shall be punished by imprisonment from six months to five years.</i></p> <p><i>(2) Whoever participates in the association referred to in paragraph 1 of this Article but has not as yet committed any criminal offence for this association, or whoever carries out an act which in itself does not constitute a criminal offence but which he/she knows furthers the goal of a criminal association, or whoever financially or otherwise supports a criminal association shall be punished by imprisonment not exceeding three years.</i></p> <p>[...] source: section 328 c.c.</p> <p><i>(1) Whoever conspires with another to commit a criminal offence for which a punishment of imprisonment exceeding three years may be imposed under the law shall be punished by imprisonment not exceeding three years.</i></p> <p>[...] source: section 327 c.c.</p>
 Cyprus	<p>Participation in a criminal organisation</p> <p>Participation in any action of the criminal organisation</p> <p><i>(1) Whoever, having knowledge of the unlawful purpose or activities of a criminal organisation:</i></p> <p><i>(a) participates in any operation involved in any illegal act or criminal organisation;</i></p> <p><i>(b) engages in any act of a criminal organisation, of which it should reasonably have been known that it is in any way connected with the commission of a criminal offence</i></p> <p><i>shall be guilty of a felony punishable by imprisonment for up to ten years or a fine of up to fifty thousand pounds, or to both such penalties.</i></p> <p>source: section 63b c.c.</p>
 Czech Republic	<p>Founding</p> <p>Participation</p> <p>Support</p> <p><i>(1) Any person who establishes an organised criminal association, who participates in the activities of an organised criminal association, or who supports an organised criminal association shall be punished by the deprivation of liberty for two to ten years or with the forfeiture of property.</i></p> <p><i>(2) The perpetrator shall be punished by the deprivation of liberty for three to twelve years or the forfeiture of property if he commits the act specified in paragraph 1 in relation to an organised criminal association designed for or focused on the commission of treason (Sec. 309), terrorist attack (Sec. 311) or terror (Sec. 312).</i></p> <p><i>(3) The perpetrator shall be punished by the deprivation of liberty for five to fifteen years or the forfeiture of property if he is a leader or representative of an organised criminal association designed for or focused on the commission of treason (Sec. 309), terrorist attack (Sec. 311) or terror (Sec. 312).</i></p> <p><i>(4) The provisions of Sec. 107 and 108 shall not apply with respect to a perpetrator referred to in paragraphs 1 to 3.</i></p> <p>source: section 361 c.c.</p>



 Estonia	Founding/leadership/recruitment
	Participation
	<p><i>(1) Membership in a permanent organisation consisting of three or more persons who share a distribution of tasks, created for the purpose of proprietary gain and whose activities are directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree, is punishable by 3 to 12 years' imprisonment.</i></p> <p style="text-align: center;">[...]</p> <p style="text-align: center;"><i>source: section 255 c.c.</i></p> <p><i>(1) Forming or leading of or recruiting members to a criminal organisation is punishable by 5 to 15 years' imprisonment.</i></p> <p style="text-align: center;">[...]</p> <p style="text-align: center;"><i>source: section 256 c.c.</i></p>
 Finland	Founding/organising
	Participation/support (recruiting/attempting to recruit; equipping/attempting to equip; arranging/attempting to arrange/providing training; obtaining/attempting to obtain/providing premises, other facilities, means of transport, other equipment; financing; managing financial affairs; giving financial or legal advice; otherwise actively promoting accomplishment of the aim of the organisation)
	<p style="text-align: center;"><i>(1) A person who</i></p> <p><i>by establishing or organising a criminal organisation or by recruiting or attempting to recruit persons for it,</i></p> <p><i>by equipping or attempting to equip a criminal organisation with explosives, weapons, ammunition or with materials or equipment intended for their production or with other dangerous supplies or materials,</i></p> <p><i>by arranging, attempting to arrange or providing a criminal organisation training for criminal activity,</i></p> <p><i>by obtaining, attempting to obtain or providing a criminal organisation premises or other facilities needed by it or means of transport or other equipment that is particularly important for the organisation,</i></p> <p><i>by directly or indirectly giving or collecting funds to finance the criminal activity of a criminal organisation,</i></p> <p><i>by managing financial affairs that are important for the criminal organisation or by giving financial or legal advice that is particularly important for the organisation or</i></p> <p><i>by actively promoting the accomplishment of the aims of a criminal organisation in another substantial manner</i></p> <p><i>participates in the activities of a criminal organisation with the aim of committing one or more offences for which the maximum statutory sentence is imprisonment for at least four years or one or more of the offences referred to in chapter 11, section 10 or chapter 15, section 9, and if such an offence or its punishable attempt is committed, shall be sentenced for participating in the activity of a criminal organisation to a fine or imprisonment for at most two years.</i></p> <p style="text-align: center;"><i>source: chapter 17, section 1(a) c.c.</i></p>




 France	Participation in a criminal organisation to perpetrate one or more felonies/misdemeanours punished by 10 years imprisonment
	Participation in a criminal organisation to perpetrate one or more misdemeanours punished by at least 5 years imprisonment
	<p><i>A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.</i></p> <p><i>Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of €150,000.</i></p> <p><i>Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of €75,000.</i></p> <p><i>source: section 450-1 c.c.</i></p>
 Germany	Founding
	Participation
	Recruitment
	Support
	<p><i>(1) Whoever forms an organisation, the objectives or activity of which are directed towards the commission of crimes, or whoever participates in such an organisation as members, recruits for it or supports it, shall be punished with imprisonment for not more than five years or a fine.</i></p> <p><i>source: section 129 c.c.</i></p>





 Greece	Founding/participation/support (with material information, means)
	Leadership
	Conspiring
	<p>(1) Anyone who forms or joins a structured group of three or more persons, operating for a period of time (organisation), with the aim of committing one or more crimes provided for in Articles 207 (counterfeiting), 208 (circulation of counterfeit money), 216 (forgery), 218 (forgery and use of forged stamps), 242 (false declaration, falsification), 264 (arson), 265 (arson in forests), 268 (flood), 270 (explosion), 272 (offences involving the use of explosives), 277 (deliberate shipwreck), 279 (poisoning water sources and food), 291 (undermining the safety of railways, ships and aircraft), 299 (murder), 310 (grievous bodily harm), 322 (kidnapping), 323 (slave-trading), 323A (human trafficking), 324 (abduction of minors), 327 (forced abduction), 336 (rape), 338 (sexual abuse of incompetents), 339 (corruption of minors), 348A (child pornography), 351 (pimping), 351A (sexual abuse of minors for payment), 374 (certain types of theft), 375 (embezzlement), 380 (robbery), 385 (blackmail), 366 (fraud), 386A (computer fraud), or 404 (usury), or in Article 87(5), last sentence, or Article 88 of Law 3386/2005 (Government Gazette 212A) where such crimes (facilitating the illegal entry or exit or smuggling of third country nationals) are committed for gain, or one or more offences provided for under legislation on narcotics, firearms, explosives and protection from materials that emit harmful radiation, or one or more offences provided for and punished under legislation for the protection of antiquities and the cultural heritage in general, shall be punished by incarceration for up to ten years.</p> <p>(2) Anyone who provides material information or means with a view to facilitating or assisting an organisation referred to in the previous paragraph to commit the offences referred to therein shall be punished by incarceration for up to ten years.</p> <p>(3) Anyone who leads an organisation referred to in the first paragraph shall be punished by incarceration for at least ten years.</p> <p>[...]</p> <p>(5) Anyone who conspires with another person in order to commit a crime outside the scope of paragraph 1 shall be punished by imprisonment for at least six months. Offenders shall be punished by imprisonment for at least three months if the conspiracy referred to in the previous sentence was entered into in order to commit a misdemeanour punishable by at least one year's imprisonment for the purpose of achieving financial or other material gain or of attacking a person's life, physical integrity or reproductive freedom.</p> <p>[...]</p> <p>source: section 187 c.c.</p>
 Hungary	Instigation/suggestion/offer to engage in criminal activities
	Joining/collaboration
	Support (means, etc.)
	<p>(1) Any person who instigates, suggests or offers, or joins or collaborates to engage in criminal activities in the framework of a criminal organisation, or who provides the means intended to be used for such activities, or supports the activities of the criminal organisation in any other manner is guilty of felony punishable by imprisonment between one to five years.</p> <p>[...]</p> <p>source: section 321 c.c.</p>


 Ireland	Participation/contributing to any (legal or illegal) activity
	Leadership
	Conspiring
	<p>(1) A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not)</p> <p>(a) intending either to</p> <p>(i) enhance the ability of a criminal organisation or any of its members to commit, or</p> <p>(ii) facilitate the commission by a criminal organisation or any of its members of,</p> <p style="padding-left: 40px;">a serious offence, or</p> <p>(b) being reckless as to whether such participation or contribution could either</p> <p>(i) enhance the ability of a criminal organisation or any of its members to commit, or</p> <p>(ii) facilitate the commission by a criminal organisation or any of its members of,</p> <p style="padding-left: 40px;">a serious offence.</p> <p>(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.</p> <p style="text-align: center;">source: Criminal Justice Act of 2006 (as amended by section 3(1)(a) of Criminal Justice Act of 2009, section 72)</p>
 Italy	Founding/Leadership
	Participation
	<p>When three or more persons conspire with a view to committing offences, those who initiate or form or organise the association will be punishable, on that account alone, by imprisonment for a term of three to seven years. Those who participate in the association will be punishable, on that account alone, by imprisonment for a term of one to five years.</p> <p>The leaders will be liable to the same penalty as that established for the promoters.</p> <p>Where the members bear weapons in the countryside or on the public highway, they will be liable to imprisonment for a term of five to fifteen years.</p> <p>The penalty will be increased if the members number ten or more.</p> <p>If the association is for the purpose of committing any of the offences referred to in articles 600, 601 and 602, or in article 12.3-bis, of the consolidated text of the provisions on the regulation of immigration and the rules on the status of foreign nationals laid down in Legislative Decree 286, 25 July 1998, a term of five to fifteen years' imprisonment will be applied in those cases referred to in the first paragraph and from four to nine years in the cases referred to in the second paragraph.</p> <p style="text-align: center;">source: section 416 c.c.</p>

 Latvia	Founding/Leadership
	Participation
	<p>(1) <i>An organised group is an association formed by more than two persons, which has been created for purpose of jointly committing one or several criminal offences and the participants of which in accordance with previous agreement have divided responsibilities.</i></p> <p>(2) <i>Liability of a person for the commission of an offence within an organised group shall apply in the cases set forth in this Law for formation and leadership of a group, and for participation in preparation for a serious or especially serious crime or in commission of a crime, irrespective of the role of the person in the jointly committed offence.</i> <i>source: section 21 c.c.</i></p> <p>(1) <i>For a person who commits the establishment of such a criminal organisation (association), in the composition of which are at least five persons, for the purpose of committing especially serious crimes against humanity or peace, war crimes, to commit genocide or to commit especially serious crimes against the State, as well as for involvement in such an organisation or in an organised group included within such organisation or other criminal formation, the applicable punishment is deprivation of liberty for a term of not less than eight and not exceeding seventeen years, with or without confiscation of property and with or without probationary supervision for a term not exceeding three years.</i></p> <p>(2) <i>For a person who commits the leading of a criminal organisation or participates in the committing of the crimes provided for in Paragraph one of this Section by such an organisation, the applicable punishment is life imprisonment or deprivation of liberty for a term of not less than ten and not exceeding twenty years, with or without confiscation of property and with probationary supervision for a term not exceeding three years.</i> <i>source: section 89.1 c.c.</i></p>
 Lithuania	Participation
	Leadership
	<p>(1) <i>A person who participates in the activities of a criminal association shall be punished by imprisonment for a term of three up to fifteen years.</i></p> <p>(2) <i>A person who participates in the activities of a criminal association armed with firearms, explosives or explosive materials shall be punished by imprisonment for a term of six up to twenty years or by life imprisonment.</i></p> <p>(3) <i>A person who organises the criminal associations provided for in paragraph 1 or 2 of this Article or is the leader thereof shall be punished by imprisonment for a period of ten up to twenty years or by life imprisonment.</i> [...] <i>source: section 249 c.c.</i></p>

 Luxembourg	Participation
	Participation to the legal activities of a criminal organisation
	Decisionmaking
	Leadership
	<p>(1) Toute personne, qui volontairement et sciemment, fait activement partie de l'organisation criminelle visée à l'article précédent, est punie d'un emprisonnement de deux ans à cinq ans et d'une amende de 2.500 euros à 12.500 euros, ou d'une de ces peines seulement, même si elle n'a pas l'intention de commettre une infraction dans le cadre de cette organisation ni de s'y associer comme auteur ou complice.</p> <p>(2) Toute personne, qui participe à la préparation ou à la réalisation de toute activité licite de cette organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article précédent, est punie d'un emprisonnement d'un à trois ans et d'une amende de 2.500 euros à 12.500 euros, ou d'une de ces peines seulement.</p> <p>(3) Toute personne qui participe à toute prise de décision dans le cadre des activités de l'organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article précédent, est punie de la réclusion de cinq à dix ans et d'une amende de 12.500 euros à 25.000 euros ou d'une de ces peines seulement.</p> <p>(4) Tout dirigeant de l'organisation criminelle est puni de la réclusion de dix à quinze ans et d'une amende de 25.000 euros à 50.000 euros ou d'une de ces peines seulement.</p> <p>(5) Les comportements visés aux points 1 à 4 du présent article qui se sont produits sur le territoire national sont poursuivis selon le droit luxembourgeois quel que soit le lieu où l'organisation criminelle est basée ou exerce ses activités.</p> <p>source: section 324 ter c.c.</p>
 Malta	Promoting/Founding/Organisation/Financing
	Participation
	Conspiracy
	<p>(1) Any person who promotes, constitutes, organises or finances an organisation of two or more persons with a view to commit criminal offences liable to the punishment of imprisonment for a term of four years or more shall be liable to the punishment of imprisonment for a term from three to seven years.</p> <p>(2) Any person who belongs to an organisation referred to in subarticle (1) shall for that mere fact be liable to the punishment of imprisonment for a term from one to five years.</p> <p>(3) Where the number of persons in the organisation is ten or more the punishment in the preceding subarticles shall be increased form one to two degrees.</p> <p>[...]</p> <p>source: section 83A c.c.</p>
	<p>(1) Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence.</p> <p>(2) The conspiracy referred to in subarticle (1) shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between such persons.</p> <p>(3) Any person found guilty of conspiracy under this article shall be liable to the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees.</p> <p>(4) For the purposes of subarticle (3), in the determination of the punishment for the completed offence object of the conspiracy account shall be had of any circumstances aggravating that offence.</p> <p>source: section 48A c.c.</p>

 Netherlands	Participation/support
	Founding/Leadership/Managing
	<p>(1) Participation in an organisation which has as its purpose the commission of serious offences, shall be punishable by a term of imprisonment not exceeding six years or a fine of the fifth category.</p> <p>(2) Participation in the continuation of the activities of an organisation that has been declared prohibited by final judicial decision or is prohibited by operation of law or against which an irrevocable declaratory judgment has been pronounced as referred to in Section 10:122(1) of the Civil Code, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.</p> <p>(3) The terms of imprisonment for founders, directors or managers may be increased by one third.</p> <p>(4) Participation, as defined in subsection (1), shall also include the provision of financial or other material support as well as the raising of funds or the recruitment of persons on behalf of the organisation defined in said subsection.</p> <p>source: section 140 c.c.</p>
 Poland	Founding/ directing
	Participation
	<p>(1) Whoever takes part in an organised group or association aimed at committing a criminal offence or a tax offence, is punishable by imprisonment from 3 months to 5 years.</p> <p>(2) If a group or association referred to in (1) are armed or intended to commit a terrorist offence, the perpetrator is punishable by imprisonment from 6 months to 8 years.</p> <p>(3) Who sets up a group or association referred to in (1), including of an armed character or such a group or association directs, is punishable by imprisonment from one to 10 years.</p> <p>(4) Who sets up group or association aimed at committing a terrorist offence or such a group or compound directs, is punishable by imprisonment for not less than 3 years.</p> <p>source: section 258 c.c.</p>
 Portugal	Founding
	Participation/support
	Leadership
	<p>(1) Who promotes or establishes a group, organisation or association whose purpose or activity is directed to the crimes shall be punished with imprisonment from 1 to 5 years.</p> <p>(2) The same penalty applies to anyone who is part of such groups, organisations or associations or those who support them, including providing weapons, ammunition, instruments of crime, custody or places for meetings, or for any aid that recruit new members.</p> <p>(3) Who heads or leads groups, organisations or associations referred to in the preceding paragraphs shall be punished with imprisonment for 2-8 years.</p> <p>source: section 299 c.c.</p>

 Romania	Founding/participation/support
	Founding/participation/support to an organisation aimed at committing crimes punishable with imprisonment for life or exceeding 10 years
	<p>(1) <i>The initiation or constitution of an organised criminal group, joining or supporting in any form such a group shall be punished with imprisonment of one to five years and prohibited from exercising certain rights.</i></p> <p>(2) <i>If the offence which is the purpose of the organised criminal group is sanctioned by law with imprisonment for life or imprisonment exceeding 10 years punishment is imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights.</i></p> <p>(3) <i>If the deeds stipulated in paragraph (1) and (2) were followed for an offence, punishment is calculated according to the rules for concurrent offences.</i> [...]</p> <p>(6) <i>Organised criminal group shall mean a structured group, consisting of three or more people, constituted for a period of time in order to act in a coordinated manner towards committing one or more crimes.</i> source: section 367 c.c.</p> <p>[Until 2013 Romania also criminalised conspiracy (sections 167 and 323 c.c.). This offence was repealed by the new Criminal Code (2014)]</p>
 Slovakia	Founding
	Participation
	Support
	<p><i>Whoever establishes or plots a criminal group, is a member thereof, or acts for or supports a criminal group, shall be punished with a period of imprisonment of between five years and ten years.</i> source: section 296 c.c.</p>
 Slovenia	Founding/leadership
	Participation
	<p>(1) <i>Whoever participates in a criminal association which has the purpose of committing criminal offences for which a punishment by imprisonment of more than three years, or a life sentence may be imposed, shall be punished by imprisonment of three months up to five years.</i></p> <p>(2) <i>Whoever establishes or leads an association as referred to in the preceding paragraph, shall be punished by imprisonment of six months up to eight years.</i> [...] source: section 294 c.c.</p>
 Spain	Participation/support in a criminal organisation aimed at committing serious crimes
	Participation/support in a criminal organisation aimed at committing minor crimes
	Leadership/founding of a criminal organisation aimed at committing serious crimes
	Leadership/founding of a criminal organisation aimed at committing minor crimes
	<p>(1) <i>Anyone promoting, organising, coordinating or directing a criminal organisation shall be liable to a penalty of four to eight years' imprisonment if the organisation's aim or purpose is to commit serious crimes, and a penalty of three to six years' imprisonment in all other cases; and anyone taking active part in the organisation, belonging to it or cooperating with it financially or in any other way, shall be liable to penalties of two to five years' imprisonment if the purpose is to commit serious crimes, and one to three years' imprisonment in all other cases.</i></p> <p><i>For the purposes of this Code, a criminal organisation means a group of more than two persons organised on a stable basis or for an indefinite period of time who act in concert to coordinate various tasks or functions for the purpose of committing offences and of repeated perpetration of misdemeanours.</i> source: section 570a c.c.</p>

 United Kingdom	England, Wales, Northern Ireland	Conspiracy
	<p> <i>(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either</i> <i>(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or</i> <i>(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,</i> <i>he is guilty of conspiracy to commit the offence or offences in question.</i> <i>source: section 1(1) of the Criminal Law Act 1977 (England and Wales)</i> </p> <p> <i>(1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either</i> <i>(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or</i> <i>(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,</i> <i>he is guilty of conspiracy to commit the offence or offences in question.</i> <i>source: Part IV of the Criminal Attempts and Conspiracy Order 1983 (Northern Ireland)</i> </p>	



United Kingdom

Scotland	Conspiracy
	Participation in serious organised crime
	Directing serious organised crime
<p>(1) A person who agrees with at least one other person to become involved in serious organised crime commits an offence.</p> <p>(2) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person</p> <p>(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and</p> <p>(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.</p> <p>(3) For the purposes of this section and sections 29 to 31 'serious organised crime' means crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences,</p> <p>'serious offence' means an indictable offence</p> <p>(a) committed with the intention of obtaining a material benefit for any person, or</p> <p>(b) which is an act of violence committed or a threat made with the intention of obtaining such a benefit in the future, and</p> <p>'material benefit' means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.</p> <p>(4) A person guilty of an offence under subsection (1) is liable</p> <p>(a) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or to both,</p> <p>(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.</p> <p>source: section 28 of the Criminal Justice and Licensing (Scotland) Act 2010</p> <p>1) A person commits an offence by directing another person</p> <p>(a) to commit a serious offence,</p> <p>(b) to commit an offence aggravated by a connection with serious organised crime under section 29.</p> <p>(2) A person commits an offence by directing another person to direct a further person to commit an offence mentioned in subsection (1).</p> <p>(3) For the purposes of subsections (1) and (2), a person directs another person to commit an offence if the person</p> <p>(a) does something, or a series of things, to direct the person to commit the offence,</p> <p>(b) intends that the thing or things done will persuade the person to commit the offence, and</p> <p>(c) intends that the thing or things done will</p> <p>(i) result in a person committing serious organised crime, or</p> <p>(ii) enable a person to commit serious organised crime.</p> <p>(4) The person directing the other person commits an offence under subsection (1) whether or not the other person in fact commits</p> <p>(a) a serious offence, or</p> <p>(b) an offence aggravated by a connection with serious organised crime under section 29.</p> <p>(5) In this section 'directing' a person to commit an offence includes inciting the person to commit the offence.</p> <p>(6) A person guilty of an offence under subsection (1) or (2) is liable</p> <p>(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years or to a fine or to both,</p> <p>(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.</p> <p>source: section 30 of the Criminal Justice and Licensing (Scotland) Act 2010</p>	

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

4.4.3. Transposition assessment of Articles 1 and 2 of the Framework Decision










In order to assess the transposition of the first of the seven 'legal minimum standards',⁵⁸ as outlined in Articles 2 and 1 of the Framework Decision, one must first take into account that MS can either transpose 2a or 2b, or both.

Transposition of the legal minimum standard set in Article 2a can then be assessed according to the seven elements outlined above in Section 4.5.1 (structure of the criminal organisation, continuity, number of members, intent to commit an offence, scope of predicate offences, benefit from the commission of offences, type of criminalised conduct).










With regards to the transposition of the legal minimum standard set in Article 2b, the sole element to be taken into account is that of the punishment of the mere agreement, as mentioned in Section 4.5.1.

Based on information presented in the previous sub-sections, Table 4.9 graphically illustrates MS transposition of Article 2 of Framework Decision, in a yes/no format.

Table 4.9: MS transposition of the standard set in Article 2 of Framework Decision 2008/841/JHA

Member State	Elements 2a							Element 2b Conspiracy to commit criminal offences
	7. Offence	Definition						
		1. Structure of the criminal organisation	2. Continuity of the criminal organisation	3. Number of members of the criminal organisation	4. Intent	5. Scope of predicate offences	6. Benefit	
 Austria	YES	YES	YES	YES	YES	YES	YES	NO
 Belgium	YES	YES	YES	YES	YES	YES	YES	NO
 Bulgaria	YES	YES	YES	YES	YES	YES	YES	YES
 Croatia	YES	YES	YES	YES	YES	YES	YES	YES
 Cyprus	YES	YES	YES	YES	YES	YES	YES	NO
 Czech Republic	YES	YES	YES	YES	YES	YES	YES	NO
 Estonia	YES	YES	NO	YES	YES	YES	YES	NO
 Finland	YES	YES	YES	YES	YES	YES	YES	NO
 France	YES	YES	YES	YES	YES	NO	YES	NO

⁵⁸ See Section 4.4 for a complete list of these seven standards.

 Germany	YES	YES	YES	YES	YES	YES	YES	NO	
 Greece	YES	YES	YES	YES	YES	NO	YES	YES	
 Hungary	YES	YES	YES	YES	YES	NO	YES	NO	
 Ireland	YES	YES	YES	YES	YES	YES	YES	YES	
 Italy	YES	YES	YES	YES	YES	YES	YES	NO	
 Latvia	YES	YES	YES	YES	YES	YES	YES	NO	
 Lithuania	YES	YES	NO	YES	YES	YES	YES	NO	
 Luxembourg	YES	YES	YES	YES	YES	YES	YES	NO	
 Malta	YES	YES	YES	YES	YES	YES	YES	YES	
 Netherlands	YES	YES	YES	YES	YES	YES	YES	NO	
 Poland	YES	YES	YES	YES	YES	YES	YES	NO	
 Portugal	YES	YES	YES	YES	YES	YES	YES	NO	
 Romania	YES	YES	YES	YES	YES	YES	YES	NO	
 Slovakia	YES	YES	YES	YES	YES	NO	YES	NO	
 Slovenia	YES	YES	YES	YES	YES	YES	YES	NO	
 Spain	YES	YES	YES	YES	YES	YES	YES	NO	
 UK	<i>E&W</i>	NO	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	YES
	<i>Scot</i>	YES	YES	YES	YES	YES	YES	YES	YES

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Timing of MS legislation and Articles 1 and 2 of the Framework Decision.

Table 4.10 summarises the timing of the enactment of MS legislation on the topics addressed by Articles 1 and 2 of the Framework Decision. It is noteworthy that the majority of MS possessed norms in line with the Framework Decision even before its entry into force. In some other cases, MS intervened after the entry into force of the Framework Decision with significant modifications to their criminal norms regarding the offences related to the participation in a criminal organisation (this is the case, for example, in Bulgaria, Spain and Scotland). Finally, in some other cases, MS made only non-relevant changes to their criminal provisions after the entry into force of the Framework Decision; thus one can consider such states already in line with the norms of

the Framework Decision before its entry into force (this is the case, for example, in Hungary and Lithuania).

Table 4.10: Timing of MS legislation with reference to Articles 1 and 2 of Framework Decision

In line or partially in line already before the entry into force of the Framework Decision	In line after the entry into force of the Framework Decision
Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland (conspiracy), Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovakia, Slovenia, United Kingdom (conspiracy, all jurisdictions)	Bulgaria, Croatia, Czech Republic, Ireland (participation), Poland, Romania, Spain, United Kingdom (participation, in Scotland)

Findings

From the above Tables the following conclusions may be drawn:

- 21 out of 28 MS (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, the United Kingdom) have fully transposed the standard set in Article 2 of the Framework Decision. Among these MS one can distinguish:
 - MS whose legislation includes the legal minimum standard set in Article 2a of the Framework Decision, i.e. it foresees only the offence of participation in a criminal organisation, embracing all the elements listed by Article 1 of the Framework Decision. They are: Austria, Belgium, Cyprus, the Czech Republic, Finland, Germany, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Scotland.
 - MS whose legislation includes the legal minimum standard set in Article 2b of the Framework Decision, i.e. it foresees the offence of conspiracy to serious commit offences. This is the case in Greece (that also partially transposed Article 2a)⁵⁹ and the United Kingdom (England, Wales and Northern Ireland).
 - MS whose legislation includes both the legal minimum standard set in Article 2a of the Framework Decision and the legal minimum standard set in Article 2b of the Framework Decision. They are: Bulgaria, Croatia, Ireland and Malta.
- 5 out of 28 MS (Estonia, France, Hungary, Lithuania and Slovakia) have partially transposed the standard set in Article 2 of the Framework Decision, since their legislation includes only some of the 7 elements foreseen under the legal minimum standard set in Article 2a of the Framework Decision.⁶⁰
- 20 MS were fully or partially aligned to the contents of Articles 1 and 2 of the

⁵⁹ In Greece, Article 187, paragraphs 1-3, c.c. lists a series of predicate offences for the application of the offence of participation in a criminal organisation, thus partially transposing Article 2a of the Framework Decision. In combination, Article 187, paragraph 5, c.c. states that 'anyone who conspires with another person in order to commit a crime outside the scope of paragraph 1, shall be punished by imprisonment for at least 6 months'.

⁶⁰ In greater detail, Estonia and Lithuania envisage a stricter criterion (i.e. the permanent duration of the criminal organisation) compared to the minimum standard set by the Framework Decision concerning the duration of the criminal organisation (i.e. 'a criminal organisation shall be established over a period of time'). France, Hungary and Slovakia envisage a stricter criterion (i.e. offences punishable by the deprivation of liberty or detention order of at least 5 years or more serious penalties) compared to the minimum standard set by the Framework Decision concerning the scope of the predicate offences (i.e. 'offences punishable by the deprivation of liberty or detention order of at least 4 years or more serious penalties').

Framework Decision already before its entry into force (Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland (for conspiracy), Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovakia, Slovenia, United Kingdom (for conspiracy in all jurisdictions)), while 8 modified their legislation afterwards (Bulgaria, Croatia, Czech Republic, Ireland (for participation), Poland, Romania, Spain, Scotland (for participation)). In some cases, MS decided to modify their legislation after the entry into force of the Framework Decision to be closer to its provisions, even though they already possessed norms in line with the requests of Articles 1 and 2 of the Framework Decision (e.g. Romania). All the MS that modified their legislation after the entry into force of the Framework Decision are 'fully' in line with it.

4.5. Penalties for offences relating to participation in a criminal organisation (Article 3)

4.5.1. Standard and elements – penalties and aggravating circumstances

The second 'legal minimum standard' stated in the Framework Decision is outlined in Article 3, which reads as follows:

'1. Each Member State shall take the necessary measures to ensure that:

- (a) the offence referred to in Article 2(a) is punishable by a maximum term of imprisonment of at least between two and five years; or
- (b) the offence referred to in Article 2(b) is punishable by the same maximum term of imprisonment as the offence at which the agreement is aimed, or by a maximum term of imprisonment of at least between two and five years.

2. Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance.'

The penalty requirement set by the Framework Decision under Article 3 paragraph 1 – 'maximum term of imprisonment of at least between two and five years' – has to be read as 'maximum term of imprisonment of at least two years'. The 'between two and five years' expression is misleading since it would unreasonably exclude offences whose maximum term of imprisonment is above five years, and therefore we may deduce that it was mistakenly inserted in the Framework Decision text.⁶¹

⁶¹ The 'between two and five years' expression stems from Council of the European Union (2002a), which establishes a system of penalty levels: '*where there is a need for providing the minimum level for the maximum penalty which must be provided by each Member State under its national law in respect of a specific offence, the minimum level is set at one of the levels*'. One of these levels (level 2) refers to 'penalties of a maximum of at least between 2 and 5 years of imprisonment'. The ranges set by the Council conclusions should be logically translated, while drafting a concrete legal instrument, into one single maximum penalty

It should also be stressed that the 'offences referred to in Article 2' (Article 3 paragraph 2) are not those of 'participation in a criminal organisation' (Article 2a) and 'conspiracy to commit criminal offences' (Article 2 b). Even though the text is not very clear this reference should be interpreted as concerning predicate offences, namely the offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years imprisonment or a more serious penalty. The aim of the provision is to foresee a possible aggravation due to the commission of a predicate offence in the framework of a criminal organisation.

In order to map MS criminal law with reference to the legal minimum standard set in Article 3 of the Framework Decision and assess transposition of this standard, the following elements will be taken into account:

1. Penalties (i.e. threshold of at least two years imprisonment for the maximum penalty level for offences under Article 2a; the same maximum term of imprisonment as the offence at which the agreement is aimed, or at least two years imprisonment in the maximum for offences under Article 2b);
2. Aggravating circumstances: applying to offences punishable by deprivation of liberty or detention order of at least four years, which may be aggravated if committed in the framework of a criminal organisation.







4.5.2. Mapping of MS legislation – penalties and aggravating circumstances







Penalties






Table 4.11 summarises how MS legislation deals with the 'penalties' element. It provides information on penalties for each of the punishable conducts previously examined. This provision relates back to Article 2 of the Framework Decision and is aimed at approximating MS legislation regarding punishment for offences relating to participation in a criminal organisation, by setting minimum thresholds. For each MS, excerpts from relevant legislative texts are given, with details of the source.








indication, falling within the range. In the case of the Framework Decision the indication is copied and pasted directly from the document and, therefore, misleading. This is way it should be interpreted as a 'maximum term of imprisonment of at least two years'.

Table 4.11: Penalties



Member State	Punishable conducts	Penalty
 Austria	Founding	up to 3 years imprisonment
	Participation	up to 3 years imprisonment
	<i>source: section 278 c.c.</i>	
 Belgium	Participation to a criminal organisation if this one uses intimidation, threat, violence, fraud, corruption, or commercial structures or Participation to the legal activities of a criminal organisation	From 1 to 3 years imprisonment and/or a fine from €100 to €5,000
	Decisionmaking	From 5 to 10 years imprisonment and/or a fine from €500 to €100,000
	Leadership	From 10 to 15 years imprisonment and/or a fine from €1,000 to €200,000
	<i>source: section 324 ter c.c.</i>	
 Bulgaria	Founding/leadership	From 3 to 10 years imprisonment
	Participation	From 1 to 6 years imprisonment
	Conspiring (i.e. conspire to commit crimes punishable with more than 3 years' imprisonment for gain and/or to influence state/local bodies)	up to 6 years imprisonment
	<i>source: section 321 c.c.</i>	
 Croatia	Participation in a criminal organisation framework without committing any crime or Support (i.e. financial, other kind) or Commission of legal acts to further the goals of a criminal organisation	up to 3 years imprisonment
	Leadership (organisation/direction)	From 6 months to 5 years imprisonment
	Conspiring to commit offences punishable with imprisonment exceeding three years	up to 3 years
	<i>source: sections 327, 328 c.c.</i>	
 Cyprus	Participation in a criminal organisation	up to 3 years imprisonment
	Participation in any action of a criminal organisation	up to 10 years imprisonment and/or a fine up to €85,430.07
	<i>source: section 63a and 63b c.c.</i>	
 Czech Republic	Founding	From 2 to 10 years imprisonment or forfeiture of property
	Participation	From 2 to 10 years imprisonment or forfeiture of property
	Support	From 2 to 10 years imprisonment or forfeiture of property
	<i>source: section 361 c.c.</i>	

 Estonia	Founding/leadership/recruitment	From 5 to 15 years imprisonment
	Participation	From 3 to 12 years imprisonment
	<i>source: section 255 and 256 c.c.</i>	
 Finland	Founding/organising	up to 2 years imprisonment
	Participation/support (recruiting/attempting to recruit; equipping/attempting to equip; arranging/attempting to arrange/providing training; obtaining/attempting to obtain/providing premises, other facilities, means of transport, other equipment; financing; managing financial affairs; giving financial or legal advice; otherwise actively promoting accomplishment of the aim of the organisation)	up to 2 years imprisonment
	<i>source: chapter 17, section 1(a) c.c.</i>	
 France	Participation in a criminal organisation to perpetrate one or more felonies/misdemeanours punished by 10 years imprisonment	up to 10 years imprisonment and a fine of €150,000
	Participation in a criminal organisation to perpetrate one or more misdemeanours punished by at least 5 years imprisonment	up to 5 years imprisonment and a fine of €75,000
	<i>source: section 450-1 c.c.</i>	
 Germany	Founding	up to 5 years imprisonment or a fine
	Participation	up to 5 years imprisonment or a fine
	Recruitment	up to 5 years imprisonment or a fine
	Support	up to 5 years imprisonment or a fine
	Conspiring	dependant on the crime object of the conspiracy
	<i>source: section 30 and 129 c.c.</i>	
 Greece	Founding/participation/support (with material information, means)	up to 10 years imprisonment
	Leadership	at least 10 years imprisonment
	Conspiring	at least 3 months imprisonment if the conspired crime is punishable up to 1 year imprisonment, otherwise at least 6 months imprisonment
	<i>source: section 187 c.c.</i>	
 Hungary	Instigation/suggestion/offer to engage in criminal activities	From 1 to 5 years imprisonment
	Joining/collaboration	From 1 to 5 years imprisonment
	Support (means, etc.)	From 1 to 5 years imprisonment
	<i>source: section 321 c.c.</i>	

 Ireland	Participation/contributing to any (legal or illegal) activity	up to 15 years imprisonment, a fine or both
	Leadership	up to imprisonment for life
	Conspiracy	dependant on the crime object of the conspiracy
	<i>source: Criminal Justice Act of 2006 as amended by section 3(l)(a) of Criminal Justice Act of 2009, section 72</i>	
 Italy	Founding/Leadership	From 3 to 7 years imprisonment
	Participation	From 1 to 5 years imprisonment
	<i>source: section 416 c.c.</i>	
 Latvia	Founding/Leadership	From 8 to 17 years imprisonment and/or confiscation of property and with or without probationary supervision for a term not exceeding 3 years
	Participation	From 8 to 17 years imprisonment and/or confiscation of property and with or without probationary supervision for a term not exceeding 3 years
	<i>source: section 21 c.c. and 89.1 c.c.</i>	
 Lithuania	Participation	From 3 to 15 years imprisonment
	Leadership	From 10 to 20 years imprisonment or imprisonment for life
	<i>source: section 249 c.c.</i>	
 Luxembourg	Participation	From 2 to 5 years imprisonment and/or a fine from €2,500 to €12,500
	Participation to the legal activities of a criminal organisation	From 1 to 3 years imprisonment and/or a fine from €2,500 to €12,500
	Decisionmaking	From 5 to 10 years imprisonment and/or a fine from €12,500 to €50,000
	Leadership	From 10 to 15 years imprisonment and/or a fine from €25,000 to €50,000
	<i>source: section 324 ter c.c.</i>	

 Malta	Promoting/Founding/Organisation/Financing	From 3 to 7 years imprisonment
	Participation	From 1 to 5 years imprisonment
	Conspiracy	punishment for the completed offence object of the conspiracy with a decrease of two or three degrees ⁶²
	<i>source: section 83A c.c. and 48A c.c.</i>	
 Netherlands	Participation/support	up to 6 years imprisonment or a fine
	Founding/Leadership/Managing	Participation terms may be increased by one third
	<i>source: section 140 c.c.</i>	
 Poland	Founding /directing (including an armed organisation)	From 1 to 10 years imprisonment
	Participation	From 3 months to 5 years imprisonment
	Founding/directing a terrorist organisation	No less than 3 years imprisonment
	Participation in an armed or terrorist organisation	6 months to 8 years imprisonment
	<i>source: section 258 c.c.</i>	
 Portugal	Founding	From 1 to 5 years imprisonment
	Participation/support	From 1 to 5 years imprisonment
	Leadership	From 2 to 8 years imprisonment
	<i>source: section 299 c.c.</i>	
 Romania	Founding/participation/support	From 1 to 5 years imprisonment
	Founding/participation/support to an organisation aimed at committing crimes punishable with imprisonment for life or exceeding 10 years	From 3 to 10 years imprisonment
	<i>source: section 367 c.c.</i>	
 Slovakia	Founding	From 5 to 10 years imprisonment
	Participation	From 5 to 10 years imprisonment
	Support	From 5 to 10 years imprisonment
	<i>source: section 296 c.c.</i>	
 Slovenia	Founding/leadership	From 6 months to 8 years imprisonment
	Participation	From 3 months to 5 years imprisonment
	<i>source: section 294 c.c.</i>	

⁶² For further information about the determination of penalty degrees, please see Article 31 of the Malta Criminal Code.

 Spain	Participation/support in a criminal organisation aimed at committing serious crimes	From 2 to 5 years imprisonment
	Participation/support in a criminal organisation aimed at committing minor crimes	From 1 to 3 years imprisonment
	Leadership/founding of a criminal organisation aimed at committing serious crimes	From 4 to 8 years imprisonment
	Leadership/founding of a criminal organisation aimed at committing minor crimes	From 3 to 6 years imprisonment
	<i>source: section 570 bis c.c.</i>	
 United Kingdom	Conspiracy	<p>Dependant on the crime object of the conspiracy (England, Wales, Northern Ireland), i.e.:</p> <ul style="list-style-type: none"> - imprisonment for life for: (a) murder, or any other offence the sentence for which is fixed by law; (b) an offence for which a sentence extending to imprisonment for life is provided; or (c) an indictable offence punishable with imprisonment for which no maximum term of imprisonment is provided; - imprisonment for a term not exceeding the maximum term provided for the offence to which the conspiracy relates, for the remaining offences punishable with imprisonment; - a fine, in any other case. <p>For Scotland:</p> <ul style="list-style-type: none"> - up to 10 years imprisonment and/or a fine for conviction on indictment; - up to 12 months and/or a fine for a summary conviction.
	<p><i>Source:</i></p> <ul style="list-style-type: none"> - <i>Criminal Law Act 1977, Section 3 (England and Wales)</i> - <i>Criminal Attempts and Conspiracy Order 1983, Section 11 (Northern Ireland)</i> - <i>Criminal Justice and Licensing Act 2010, Section 28 (Scotland)</i> 	

	Involvement (only in Scotland)	- up to 10 years imprisonment and/or a fine for conviction on indictment; - up to 12 months and/or a fine for a summary conviction.
	Directing (only in Scotland)	- up to 14 years imprisonment and/or a fine for conviction on indictment; - up to 12 months and/or a fine for a summary conviction.
	<i>Source:</i> <i>- Criminal Justice and Licensing Act 2010, Section 30</i>	

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Table 4.11 indicates that all MS provided at least 2 years of imprisonment for the upper threshold of imprisonment.

The table also highlights that the national legislation of MS shows a considerable imbalance both in terms of conduct differentiation and in the level of the penalties foreseen.

Focusing on penalties related to the conduct of 'participation', MS may be grouped into the following categories:

1. MS with low penalties, corresponding to a minimum level of the maximum from 2 to 5 years of imprisonment (Austria, Belgium, Croatia, Cyprus, Finland, Germany, Hungary, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Spain).
2. MS with medium penalties, corresponding to a maximum from 5 to 10 years of imprisonment (Bulgaria, the Czech Republic, France, Greece, Italy, the Netherlands, Slovakia and Scotland).
3. MS with high penalties, corresponding to a maximum penalty over 10 years of imprisonment (Estonia, Ireland, Latvia, Lithuania).










Organised crime as an aggravating circumstance for predicate offences

Table 4.12 summarises how MS legislation deals with the 'aggravating circumstances' element. For each MS, excerpts from relevant legislative texts are given, with details of the source. This provision relates back to Article 2 (and therefore to Article 1) of the Framework Decision and is aimed at aggravating the penalties for predicate offences punished by deprivation of liberty of a maximum term of at least four years when committed in the framework of a criminal organisation.





It does not indicate clearly what is meant by aggravation, which gives a certain freedom for the national legislator in determining the specific conditions of the aggravation. For this reason MS are obliged to ensure that judges are able to apply in a concrete case some kind of aggravation referred to generally (e.g. the penalty should be aggravated) or specifically (i.e. increasing the imprisonment penalty up to a certain threshold or imposing any other additional penalty). The MS must therefore ensure that judges have discretion in considering whether to apply the aggravating circumstance stemming from the commission of the offence in the framework of a criminal organisation.

The obligation imposed by Article 3.2 is not exclusively in connection to the offences related to participation in a criminal organisation, since the latter could also be aggravated due to other factors, such as a high number of persons, using weapons, using intimidation, etc. Such a solution is not covered at all by the Framework Decision, though it is used by a number of MS (see Chapter 5 below).

Table 4.12: Presence of aggravating circumstances for crimes committed in the framework of a criminal organisation

Member State	Presence of aggravating circumstances for crimes committed in the framework of a criminal organisation
 Austria	Yes for a list of crimes (e.g. human trafficking, theft, robbery, child pornography), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum <i>source: section 104a, 130, 143, 207a, c.c.</i>
 Belgium	Yes for a list of crimes (human trafficking), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum <i>sources: section 433 octies and 433 duodecies c.c.</i>
 Bulgaria	Yes, for a list of crimes (e.g. abduction, arson, drug dealing), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum <i>source: Articles 156, 235, 253, 256, 330, 354a, 354 c.c.</i>
 Croatia	Yes, for all crimes <i>source: section 329 c.c.</i>
 Cyprus	Yes, for a list of crimes (human trafficking and drug dealing), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum <i>source: law 87(I)/2007; law 29/1977</i>
 Czech Republic	Yes, for all crimes <i>source: sections 108 c.c.</i>
 Estonia	Yes, for all crimes (general aggravating circumstance) Yes, for a list of crimes (e.g. incitement of hatred, drug dealing, larceny, robbery, fraud, extortion, money laundering) which includes some but not all those punished with imprisonment for a maximum term of at least 4 years (specific aggravating circumstance) <i>source: section 58 c.c.</i> <i>source: sections 151, 184, 199, 200, 209, 214, 349 c.c.</i>
 Finland	Yes, for all crimes <i>source: chapter 6, section 5(2) c.c.</i>
 France	Not in the context of Article 2 offences. (See findings below and Chapter 5 for more details) <i>source: not applicable</i>

 Germany	<p>Yes, for a list of crimes (e.g. counterfeiting of money, child pornography, human trafficking, robbery), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum</p> <p><i>source: section 146, 152a, 152b, 184b, 184c, 232, 233, 233a, 236, 244, 244a, 250, 253, 260, 260a, 261, 263, 263a, 267, 268, 269, 275, 276, 276a, 284, 300, 303b, 335 c.c. and section 30 BtMG</i></p>
 Greece	<p>No</p> <p><i>source: not applicable</i></p>
 Hungary	<p>Yes, for all crimes</p> <p><i>source: section 91 c.c.</i></p>
 Ireland	<p>Yes, for all crimes for which a person may be punished by imprisonment for a maximum term of at least 4 years</p> <p><i>source: Criminal Justice Act of 2006 as amended by section 3(l)(a) of Criminal Justice Act of 2009, section 74A</i></p>
 Italy	<p>Yes, for a list of crimes (e.g. murder, rape, theft, robbery), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum</p> <p><i>source: section 576, 609 ter, 625, 628 ter c.c.</i></p> <p><i>source: section 112(1)</i></p>
 Latvia	<p>Yes, for a list of crimes (e.g. murder, circulation of radioactive and chemical substances, robbery, theft, illegal deprivation of liberty, kidnapping, human trafficking), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum</p> <p><i>sources: section 98, 99, 109, 118, 125, 148, 152, 153, 154, 154.1, 164, 165, 165.1, 166, 175., 176, 177, 177.1, 187, 190, 190.1, 192, 193, 193.1, 195, 195.2, 206, 218, 220.1, 221, 233, 243, 250, 253.1, 255, 256, 296, 285, 314, 320, 323 c.c.</i></p>
 Lithuania	<p>Yes, for all crimes (general aggravating circumstance)</p> <p>Yes, for a list of crimes (e.g. human trafficking, purchase or sale of a child, theft, robbery, extortion, drug dealing), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum</p> <p><i>source: section 60 c.c.</i></p> <p><i>source: sections 147, 157, 178, 180, 181, 263 c.c.</i></p>
 Luxembourg	<p>Not in the context of Article 2 offences. (See findings below and Chapter 5 for more details)</p> <p><i>source: not applicable</i></p>
 Malta	<p>Yes, for a list of crimes (e.g. child prostitution, child pornography, human trafficking), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum</p> <p><i>source: sections 204A, 204B, 248E c.c.</i></p>
 Netherlands	<p>No</p> <p><i>source: not applicable</i></p>
 Poland	<p>Yes, for all crimes</p> <p><i>source: section 65 c.c.</i></p>
 Portugal	<p>Yes, for a list of crimes (larceny, theft, extortion, drug trafficking), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum</p> <p><i>source: 204 (2), 210 (2), 223 (3) c.c.; 24 (j) of the decree law 15/1993</i></p>
 Romania	<p>Yes, for all crimes</p> <p><i>source: sections 77, 78 c.c.</i></p>

 Slovakia	<p>Yes, for all crimes (general aggravating circumstance) Yes, for a list of crimes (e.g. killing, bodily harm, illicit removal of organs and tissues, illicit manufacturing and possession of narcotics or psychotropic substances, poisons or precursors, and trafficking in them, trafficking in human beings, stealing and trading of children, deprivation of personal freedom, restriction of personal freedom, taking a hostage, kidnapping for ransom, abduction to a foreign country, robbery, extortion, gross coercion, duress, forcible entry into dwelling, kidnapping, theft), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum (specific aggravating circumstance)</p>	
	<p><i>source: Article 138 c.c.</i> <i>source: Articles 147, 155, 159, 171, 172, 179, 180, 182, 183, 185, 186, 187, 188, 189, 199, 193, 194, 202, 213 c.c.</i></p>	
 Slovenia	<p>Yes, for all crimes (general aggravating circumstance) Yes, for a list of crimes (e.g. murder), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum (specific aggravating circumstance)</p>	
	<p><i>source: Article 41 c.c.</i> <i>source: Articles 100-103, 108, 109, 113, 116, 175, 176, 186, 205-206, 211, 213, 217, 245, 249, 250, 307, 308, 332, 334, 335, 344 c.c.</i></p>	
 Spain	<p>Yes, for a list of crimes (e.g. human trafficking, sexual offences when the victim is below 13, prostitution and child corruption, coerced/child prostitution, child/disabled people pornography, computer crimes, intellectual property crimes, money laundering, human trafficking, drug trafficking, counterfeiting of means of payment), which includes some but not all offences punishable by deprivation of liberty of at least four years in the maximum</p>	
	<p><i>source: sections 177 bis, 183, 187, 188, 189, 197, 264, 271, 276, 302, 318 bis, 370, 371, 399 bis c.c.</i></p>	
 UK	<p><i>England</i> <i>Wales</i> <i>NI</i></p>	<p><i>No</i> <i>source: n.a.</i></p>
	<p><i>Scotland</i></p>	<p><i>No</i></p>
		<p><i>source: n.a.</i></p>
		<p>Yes, for all crimes⁶³</p>

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Based on Table 4.12, it is possible to conclude that, within the MS national legal systems, the following approaches exist in relation to the 'aggravating circumstances' element:

- The 'aggravating circumstances for a list of crimes' approach, in which the penalty is aggravated for a selected few crimes (e.g. human trafficking, robbery, child pornography, drug dealing) when committed in the framework of a criminal organisation. This list includes some but not all offences

⁶³ The national expert pointed out that: 'In Scotland, section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that an offence may be aggravated by a connection with serious organised crime if the offender was motivated wholly or partially by the aim of committing or conspiring to commit serious organised crime, whether or not he in fact enabled himself or another person to commit such a crime. Where this aggravation is labelled and proved it must be taken into account by the court in determining the appropriate sentence, and the court must state on conviction that the offence was so aggravated and the difference in sentence had there been no such connection. No statutory provision exists for the rest of the UK [...]'.'

punishable by deprivation of liberty of at least four years in the maximum. This approach is followed by: Austria, Belgium, Bulgaria, Cyprus, Germany, Italy, Latvia, Malta, Portugal, Spain. National legislation on predicate offences often makes a reference to a 'group' or 'persons acting in association' and not necessarily to the definition of the criminal organisation as provided in a certain MS. It means that those cases of aggravation relate also to situations beyond the specific concept of a criminal organisation covering all other possible associations. (For further details see the tables with legislation in relation to Article 3.2).

- The 'aggravating circumstances for all crimes' approach, according to which the penalty is aggravated for all crimes committed in the framework of a criminal organisation, regardless of their seriousness and type. This approach is followed by: Croatia, the Czech Republic, Estonia, Finland, Hungary, Lithuania, Poland, Romania, Slovakia, Slovenia and Scotland. Such an approach goes beyond the minimum scope covered by the Framework Decision as it extends the application of this provision to all criminal offences and not only to those regarded as serious (deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty).
- The 'aggravating circumstances for crimes punishable with penalties above a certain threshold' approach, according to which the penalty is aggravated for all crimes punishable with penalties above a certain threshold, when committed in the framework of a criminal organisation. This approach is followed by Ireland (where the threshold is imprisonment for a maximum term of at least 4 years). In this case the national legislation copies *expressis verbis* the text of the Framework Decision.
- Cases where the national legislation does not mention *expressis verbis* the commission of an offence in the framework of the criminal organisation as aggravating circumstance. It is followed by: Greece, France, Luxembourg, the Netherlands, the United Kingdom (excluding Scotland). In the UK, due to its common law legal system, a judge, in determining the penalties and based on his/her discretionary power, can aggravate the main penalty. A similar approach probably stems also from judicial discretion (not written law) in other MS, either those that do not make any reference to such a circumstance in their national legislation or those that do so only partly. For the latter reason it is difficult to exclude that such an aggravation can take place in cases of all MS.

4.5.3. Transposition assessment of Article 3 of the Framework Decision

The assessment of the transposition of the legal minimum standard set in Article 3 of the Framework Decision⁶⁴ can be achieved by taking into account the two elements outlined in the previous section, namely the penalties imposed for offences introduced according to Article 2 of the Framework Decision, and the introduction of aggravating circumstances for crimes committed in the context of a criminal organisation.










In the table below, the transposition is assessed as follows:

⁶⁴ This 'legal minimum standard' is the second of seven standards introduced by the Framework Decision, as outlined above in Section 4.4.

- 'Yes' when a MS envisages a maximum term of imprisonment of at least 2 years for offences under Article 2a.
- 'Yes' when a MS envisages a maximum term of imprisonment of at least 2 years or the same maximum term of imprisonment as the offence at which the agreement is aimed for offences under Article 2b.
- 'Partial' when a MS envisages alternative penalties to the maximum term of imprisonment which is line with the requests of the Framework Decision.⁶⁵
- 'No' when a MS does not provide a maximum term of imprisonment of at least 2 years or provides only alternative sanctions for offences under Article 2a.
- 'No' when a MS does neither provide a maximum term of imprisonment of at least 2 years nor the same maximum term of imprisonment as the offence at which the agreement is aimed for offences under Article 2b.

Table 4.13 graphically illustrates this assessment of the MS transposition of Article 3, in a yes/partial/no format.

Table 4.13: MS transposition of the standard set in Article 3 of Framework Decision 2008/841/JHA

Member State	Penalties		Aggravating circumstances for predicate based on commission in the framework in a criminal organisation
	Penalties for offences under 2a	Penalties for offences under 2b	
 Austria	YES	Not applicable	NO
 Belgium	PARTIAL	Not applicable	NO
 Bulgaria	YES	Not applicable	NO
 Croatia	YES	YES	YES
 Cyprus	PARTIAL	Not applicable	NO
 Czech Republic	PARTIAL	Not applicable	YES
 Estonia	YES	Not applicable	YES
 Finland	YES	Not applicable	YES
 France	YES	Not applicable	NO

⁶⁵ This because the Framework Decision does not explicitly mention the possibility of applying alternative sanctions to imprisonment.

 Germany		PARTIAL	YES	NO
 Greece		YES	NO	NO
 Hungary		YES	Not applicable	YES
 Ireland		PARTIAL	Not applicable	YES
 Italy		YES	Not applicable	NO
 Latvia		PARTIAL	Not applicable	NO
 Lithuania		YES	Not applicable	YES
 Luxembourg		PARTIAL	Not applicable	NO
 Malta		YES	NO	NO
 Netherlands		YES	Not applicable	NO
 Poland		YES	Not applicable	YES
 Portugal		YES	Not applicable	NO
 Romania		YES	Not applicable	YES
 Slovakia		YES	Not applicable	YES
 Slovenia		YES	Not applicable	YES
 Spain		YES	Not applicable	NO
 UK	<i>Eng</i>	Not applicable	PARTIAL	Not applicable
	<i>Wal</i>			
	<i>NI</i>			
	<i>Sco</i>	YES	YES	YES

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

4.6. Special circumstances for exemption/reduction of penalties for offences relating to participation in a criminal organisation (Article 4)

4.6.1. Standard and elements – special circumstances

The third 'legal minimum standard' imposed by the Framework Decision relates to the existence of special circumstances for the reduction or exemption of penalties for offences relating to participation in a criminal organisation. It is outlined in Article 4 of the Framework Decision and reads as follows:

Each Member State may take the necessary measures to ensure that the penalties referred to in Article 3 may be reduced or that the offender may be exempted from penalties if he, for example:

(a) renounces criminal activity; and

(b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:

(i) prevent, end or mitigate the effects of the offence;

(ii) identify or bring to justice the other offenders;

(iii) find evidence;

(iv) deprive the criminal organisation of illicit resources or of the proceeds of its criminal activities; or

(v) prevent further offences referred to in Article 2 from being committed.

It should first be noted that this Article is not binding, since it is stated that MS *may* take the necessary measures. The provision indicates a number of potential circumstances in which the MS may consider the possibility of reducing penalties or exempting the offender from penalties for offences relating to participation in a criminal organisation (Article 2 Framework Decision). The transposition is nevertheless not obligatory.

The transposition of the legal minimum standard set in Article 4 will be assessed by taking into account the recognition of special circumstances reducing penalties or exempting offenders from penalties for crimes committed in the framework of a criminal organisation.

This provision relates back to Article 3, and therefore to Article 2 of the Framework Decision and suggests that MS reduce, or allow for an exemption from, the penalties for offences relating to participation in a criminal organisation if the offender, for example, abandons criminal activities and supports the authorities with hard-to-obtain information.⁶⁶

⁶⁶ In this regard, it shall be noticed how some MS envisage also the exemption from criminal liability (and not only from the application of the penalty). In detail, such an exemption can (optional) or shall (mandatory) be issued for:

a) *renouncing to criminal activity* in Italy (Section 56 c.c., mandatory), Lithuania (Section 391 c.c., optional);

b) *providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain* in Austria (Section 209a c.c.p., optional), Czech Republic (Section 362 c.c., mandatory), Estonia (Section 205 c.c., optional), Greece (Section 187B c.c., mandatory), Latvia (Section 58 c.c., optional), Lithuania (Section 391 c.c., optional), Slovakia (Section 215 c.c., optional), United Kingdom – England, Wales and Northern Ireland (Section 72 Serious Organised Crime and Police Act 2005, optional), United Kingdom – Scotland (Section 328 Criminal Procedure Act 1995, mandatory);

c) *Other reasons* in Germany (Section 31 c.c., mandatory), Latvia (Section 58 c.c., optional), United Kingdom – England, Wales and Northern Ireland (Section 71 Serious Organised Crime and Police Act 2005, optional), United Kingdom – Scotland (Section 97 Criminal Procedure Act 1995, optional).


4.6.2. Mapping of MS legislation – special circumstances



Table 4.14 summarises how MS legislation deals with the 'special circumstances' element. The table highlights, for three types of special circumstances ('renouncing criminal activity', 'providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain', 'others'):


- a) The presence of each type of special circumstance in the national legal system.
- b) If present, the features of each special circumstance (i.e. if it is an exemption or mitigation of the penalty, or both); and if its application is mandatory and/or optional.


For each MS, excerpts from relevant legislative texts are given, with details of the source.


Table 4.14: Special circumstances – mapping


Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Austria 	Presence	YES	YES	
	Features	Exemption/Mitigation, Mandatory	Mitigation, Mandatory/Optional	
	Source	<p>Section 278(4) c.c. No member of a criminal organisation is to be punished if no criminal offences of the kind planned have been carried out and the organisation has voluntarily dissolved itself or it is otherwise clear from its conduct that it has voluntarily abandoned its plans. Anyone who has voluntarily left the organisation before any offence of the kind planned has been committed or attempted is not to be punished for the offence of criminal association. This applies to leading members only if they eliminate the dangers posed by the organisation by a voluntary report or through other means.</p> <p>Section 34 c.c. If the perpetrator (a) voluntarily refrains from doing greater damage although he or she had the opportunity to do it, (...) then this is deemed to be a special mitigating attenuating circumstance for the purposes of sentencing.</p>	<p>Section 34 c.c. If the perpetrator (...) (b) makes a confession showing repentance, or his or her statement makes a substantial contribution to establishing the truth, then this is deemed to be a special mitigating attenuating circumstance for the purposes of sentencing.</p> <p>Section 41a c.c. Cooperation with the law enforcement authorities is to be deemed an extraordinary mitigating circumstance and a sentence may be reduced below the statutory minimum if, after committing the offence punishable under Section 278 StGB or an offence associated with such a conspiracy, association or organisation, the perpetrator discloses to a law enforcement authority facts the knowledge of which significantly contributes to eliminating or substantially reducing the danger caused by the organisation, to solving or helping to solve the crime or to tracking down a person who has played a leading role in such an association or organisation.</p>	



Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Belgium 	Presence		YES	
	Features		Exemption, Mandatory	
	Source		section 326 c.c. Seront exemptés des peines prononcées par le présent chapitre, ceux des coupables qui, avant toute tentative de crimes ou délits faisant l'objet de l'association et avant toutes poursuites commencées auront révélé à l'autorité l'existence de ces bandes et les noms de leurs commandants en chef ou en sous-ordre.	
Bulgaria 	YES		YES	
	Features		Exemption/Mitigation, Mandatory	
	Source		Section 321 c.c. (4) Members of organised criminal groups who surrender voluntarily to the authorities and disclose everything they know about the group before they or the group commit any offence shall be exempted from punishment. (5) Members of organised criminal groups who surrender voluntarily to the authorities, disclose everything they know about the group and thus give substantial assistance in the discovering or proving of offences committed by the group shall be punished in accordance with Article 55.	


Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Croatia 	Presence		YES	
	Feature		Exemption, Optional	
	Source		<p>Section 327 c.c. [...] (2) A perpetrator who uncovers the conspiracy referred to in paragraph 1 of this Article before the agreed upon criminal offence is committed may have his/her punishment remitted.</p> <p>Section 328 c.c. [...] (3) The perpetrator of a criminal offence referred to in paragraph 1 or 2 of this Article who by timely disclosure of a criminal association prevents the commission of any of the criminal offences set forth in paragraph 4 of this Article or a member of a criminal association who discloses a criminal association before committing, as its member or on its behalf, any of the criminal offences set forth in paragraph 4 of this Article may have his/her punishment remitted.</p>	


Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Cyprus 	Presence		YES	
	Feature		Mitigation, Optional	
	Source		<p>Section 16(3) of the Witness Protection Law 95(I)/2001 In the Plan may be included any person holding information which the Attorney General deems substantial for the purposes of criminal proceedings and which may put this person in danger if disclosed.</p> <p>Section 17(2) of the Witness Protection Law 95(I)/2001 The Plan includes: [...] (e) special detention conditions for the collaborators of justice.</p>	



Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Czech Republic 	Presence		YES	YES
	Feature		Mitigation, Mandatory	Mitigation, Mandatory
	Source		Section 33 c.c. When deciding on the extent of a sentence, the court shall consider as an attenuating circumstance in particular the fact that the offender: [...] <ul style="list-style-type: none"> i) himself reported his criminal offence to the authorities; j) assisted the appropriate organs in clearing up criminal acts which he had committed; k) assisted the appropriate organs in clearing up criminal acts committed as a part of a criminal conspiracy. 	Section 33 c.c. When deciding on the extent of a sentence, the court shall consider as an attenuating circumstance in particular the fact that the offender: <ul style="list-style-type: none"> a) committed the criminal offence in a state of severe agitation (excitement); b) committed the criminal offence at an age close to that of juvenile; c) committed the criminal offence while dependent or subordinate; d) committed the criminal offence under threat or duress; e) committed the criminal offence under the influence of a difficult personal or family situation not caused by himself; f) committed the criminal offence while averting an attack or another danger, without the conditions of necessary defence or extreme necessity being fully met; g) had led an orderly life prior to committing the criminal offence; h) endeavoured to remove the harmful consequences of his criminal offence, or voluntarily provided compensation for damage he had caused; i) sincerely regretted his criminal offence;


Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Estonia 	Presence	YES	YES	YES
	Feature	Mitigation, Mandatory	Mitigation, Mandatory	Mitigation, Mandatory
	Source	Section 57 c.c. (1) Mitigating circumstances are: [...] 3) appearance for voluntary confession [...]	Section 57 c.c. (1) Mitigating circumstances are: [...] 3) [...] active assistance in detection of the offence; [...]	Section 57 c.c. (1) Mitigating circumstances are: 1 prevention of harmful consequences of the offence, and provision of assistance to the victim immediately after the commission of the offence; 2) voluntary compensation for damage; 3) [...] sincere remorse [...]; 4) commission of the offence due to a difficult personal situation; 5) commission of the offence under threat or duress, or due to service, financial or family-related dependent relationship; 6) commission of the offence in a highly provoked state caused by unlawful behaviour; [...] (2) Circumstances not specified in subsection (1) of this section may be taken into consideration in imposition of a punishment.

Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Finland 	Presence		YES	
	Feature		Mitigation, Optional	
	Source		<p>Chapter 6, Section 6(3) c.c. The following are grounds for reducing penalties: [...] (...) efforts by the perpetrator to prevent or remedy the effects of the offence or to further the investigation of the offence.</p>	
France 	Presence		YES	
	Feature		Exemption, Mandatory	
	Source		<p>Section 450-2 c.c. Any person who has participated in the group or the conspiracy defined by Article 450-1 is exempted from punishment if, before any prosecution is instituted, he discloses the existence of the group or conspiracy to the competent authorities and enables the other participants to be identified.</p>	


Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Germany 	Presence		YES	YES
	Feature		Exemption/Mitigation, Optional	Exemption, Optional
	Source		<p>Section 129 c.c. [...]</p> <p>(6) The court may in its discretion mitigate the punishment (Section 49 subsection (2)) or dispense with punishment under these provisions if the perpetrator:</p> <ol style="list-style-type: none"> 1. voluntarily and earnestly makes efforts to prevent the continued existence of the organisation or the commission of a crime consistent with its goals; or 2. voluntarily discloses his knowledge to a government agency in time, so that crimes, the planning of which he is aware, may still be prevented; if the perpetrator attains his goal of preventing the continued existence of the organisation or if it is attained without his efforts, then he shall not be punished. 	<p>Section 129 c.c. [...]</p> <p>(5) The court may dispense with punishment under subsections (1) and (3) in the case of participants whose guilt is slight or whose involvement is of minor significance. [...]</p>


Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Greece 	Presence		YES	
	Feature		Exemption/Mitigation, Mandatory/Optional	
	Source		<p>Section 187B c.c.</p> <p>(1) A person guilty of the acts of forming or joining a criminal organisation or conspiracy within the meaning of Article 187(1) and (3) [...] who reports and thus makes it possible to prevent the commission of a planned crime or thus materially helps to dismantle the criminal organisation or conspiracy [...] shall be exempt from punishment for those acts.</p> <p>[...]</p> <p>(2) If, in the cases referred to in the previous paragraph, the offender has committed one of the planned crimes referred to in Article 187(1) and (3) [...], the court shall impose a lighter sentence in accordance with Article 83. In exceptional circumstances, once it has appraised all the circumstances, especially the danger represented by the criminal organisation, conspiracy [...], the degree of involvement of the offender in it and the extent of his assistance in dismantling it, the court may order a suspended sentence of between 3 and 10 years and apply Articles 99 to 104.</p>	

Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Hungary 	Presence		YES	
	Feature		Exemption, Mandatory	
	Source		Section 263/C c.c. [...] (2) Any person who reports the criminal act to the authorities beforehand and reveals the circumstances of its perpetration shall be exonerated from punishment for participation in a criminal organisation.	
Ireland 	Judicial discretion in determination of sentencing includes consideration of mitigating factors			



Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Italy 	Presence			YES
	Feature			Mitigation, Mandatory/Optional
	Source			<p>Section 56 c.c. [...] If he voluntarily prevents the event, he will be liable to the penalty laid down for the attempted offence, reduced by one third to a half.</p> <p>Section 62 c.c. The offence is mitigated by the following circumstances, if they are not constitutive elements of the offence or special mitigation circumstances:</p> <ol style="list-style-type: none"> 1) having committed the offence for reasons with a particularly high moral or social value; 2) having committed the offence driven by anger caused by an unjust act committed by a third; 3) having committed the offence under the influence of a rioting crowd, except if such a muster was forbidden by the law or by Public Authority, and the guilty person is not a usual, professional or by tendency offender; 4) having, in crimes against property, caused a limited damage to the victim or in case of crimes committed for economic gain, having committed the offence to get a limited gain,


				<p>if the dangerous or damaging fact is particular limited per se.</p> <p>5) having contributed to the creation of the event, together with the action or omission of the guilty person, the voluntary or guilty action of the victim.</p> <p>6) having, before the sentence, completely restored the damaged caused through reimbursement and, when possible, through the restitution; or having, before the sentence [...], spontaneously acted to mitigate or eliminate the dangerous or damaging consequences of the offence.</p> <p>Section 62bis c.c.</p> <p>The judge, independently from the circumstances envisaged by Article 62, can take into account other and different circumstances that s/he considers suitable to allow a penalty mitigation. They are taken into account, in order to apply this Article, as a single circumstance that can also be joint to one or more of the circumstances of Article 62.</p> <p>[...]</p>
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Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Latvia 	Presence		YES	YES
	Feature		Mitigation, Mandatory/Optional	Mitigation, Mandatory
	Source		<p>Section 47 c.c.</p> <p>(1) The following circumstances shall be considered as circumstances mitigating the liability: [...]</p> <p>2) the offender has actively furthered the disclosure and investigation of the criminal offence; [...]</p> <p>4) the offender has facilitated the disclosure of a crime of another person; [...]</p> <p>Section 60 c.c.</p> <p>If a convicted person has helped uncover a crime, committed by other persons, which is more serious or more dangerous than the criminal offence committed by the person, the court, by whose judgment such person has been convicted, may reduce the punishment specified in the judgment, but where life imprisonment has been adjudged, a term of deprivation of liberty for twenty years shall be substituted therefore.</p>	<p>Section 47 c.c.</p> <p>(1) The following circumstances shall be considered as circumstances mitigating the liability: 1) the perpetrator of the criminal offence has admitted his or her guilt, has freely confessed and has regretted the offence committed; [...]</p> <p>3) the offender has voluntarily compensated the harm caused by the criminal offence to the victim or has eliminated the harm caused; [...]</p> <p>(2) In determining a punishment, circumstances which are not provided for in this Law and which are related to the criminal offence committed, may be considered as circumstances mitigating the liability.</p> <p>(3) A circumstance, which is provided for in this Law as a constituent element of a criminal offence, may not be considered to be a mitigating circumstance.</p>

Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Lithuania 	Presence	YES	YES	YES
	Feature	Mitigation, Optional	Mitigation, Optional	Mitigation, Optional
	Source	Section 62 c.c. [...] <p>2. Having considered all the circumstances of a case, a court may impose for every criminal act a more lenient penalty than provided for by a law also in the presence of mitigating circumstances, at least partial compensation for or elimination of property damage, if any has been incurred, and where: [...]</p> <p>4) the act was discontinued at the stage of preparation to commit the crime or at the stage of an attempt to commit the criminal act; [...]</p> <p>3. In the presence of the condition indicated [...], a court may:</p> <p>1) impose a more lenient penalty than the minimum penalty provided for in the sanction of an article for a criminal act committed; or</p> <p>2) impose a more lenient penalty than stipulated in paragraph 2 of Article 56 of this Code, or</p> <p>3) impose a more lenient type of penalty than provided for in the sanction of an article for a criminal act committed.</p>	Article 62 c.c. <p>1. Where, a person who has committed a criminal act freely and voluntarily gives himself or reports this act, confesses to commission thereof and sincerely regrets and/or assists pre-trial investigators and a court in detecting the criminal act and has fully or partially compensated for or eliminated the incurred property damage, a court may, having considered all the circumstances of the case, impose for every criminal act a more lenient penalty than provided for by a law. [...]</p> <p>3. In the presence of the condition indicated [...], a court may:</p> <p>1) impose a more lenient penalty than the minimum penalty provided for in the sanction of an article for a criminal act committed; or</p> <p>2) impose a more lenient penalty than stipulated in paragraph 2 of Article 56 of this Code, or</p> <p>3) impose a more lenient type of penalty than provided for in the sanction of an article for a criminal act committed.</p>	Article 62 c.c. [...] <p>2. Having considered all the circumstances of a case, a court may impose for every criminal act a more lenient penalty than provided for by a law also in the presence of mitigating circumstances, at least partial compensation for or elimination of property damage, if any has been incurred, and where:</p> <p>1) the offender maintains the persons suffering from a grave illness or are disabled and no one else can look after them, or</p> <p>2) the offender maintains young children and there would be no one to look after them if the penalty provided for by a law was imposed; or</p> <p>3) the offender as an accomplice had only a secondary role in the commission of the criminal act; or [...]</p> <p>5) the act has been committed by exceeding the limits of self-defence, or</p> <p>6) the act has been committed in violation of conditions of arrest of the person who has committed the criminal act, direct necessity, discharge of professional duty or performance</p>




				<p>of an assignment of law enforcement institutions, conditions of industrial or economic risk or lawfulness of a scientific experiment.</p> <p>3. In the presence of the conditions indicated in paragraphs 1 and 2 of this Article, a court may:</p> <ol style="list-style-type: none"> 1) impose a more lenient penalty than the minimum penalty provided for in the sanction of an article for a criminal act committed; or 2) impose a more lenient penalty than stipulated in paragraph 2 of Article 56 of this Code, or 3) impose a more lenient type of penalty than provided for in the sanction of an article for a criminal act committed. <p>4. A court may also, according to paragraph 3 of this Article, impose a more lenient penalty than provided for by a law upon a person who participated in the commission of a premeditated murder, where he makes a confession regarding all the criminal acts committed by him and actively assists in detecting a premeditated murder committed by members of an organised group or criminal association and where:</p> <ol style="list-style-type: none"> 1) the murder has been committed as a result of a threat or coercion; or 2) the offender as an accomplice had only a secondary role in the commission of the murder, or 3) the act has been discontinued at the stage of preparation for the commission of the murder or at the stage of attempting to commit the murder.
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Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Luxembourg 	Presence		YES	
	Feature		Exemption, Mandatory	
	Source		Section 326 c.c. Seront exemptés des peines prononcées par le présent chapitre, ceux des coupables qui, avant toute tentative de crimes ou délits faisant l'objet de l'association et avant toutes poursuites commencées, auront révélé à l'autorité l'existence de ces bandes et les noms de leurs commandants en chef ou en sous-ordre.	
Malta 	Presence	YES	YES	YES
	Feature	Mitigation, Optional	Mitigation, Optional	Mitigation, Optional
	Source	Section 21 c.c. Saving the provisions of Article 492, the court may, for special and exceptional reasons to be expressly stated in detail in the decision, apply in its discretion any lesser punishment which it deems adequate, notwithstanding that a minimum punishment is prescribed in the article contemplating the particular offence or under the provisions of Article 20, saving the provisions of Article 7.	Section 21 c.c. Saving the provisions of Article 492, the court may, for special and exceptional reasons to be expressly stated in detail in the decision, apply in its discretion any lesser punishment which it deems adequate, notwithstanding that a minimum punishment is prescribed in the article contemplating the particular offence or under the provisions of article 20, saving the provisions of article 7.	Section 21 c.c. Saving the provisions of article 492, the court may, for special and exceptional reasons to be expressly stated in detail in the decision, apply in its discretion any lesser punishment which it deems adequate, notwithstanding that a minimum punishment is prescribed in the article contemplating the particular offence or under the provisions of article 20, saving the provisions of article 7.

Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Netherlands 	Presence		YES	
	Feature		Mitigation, Optional	
	Source		<p>Section 44a c.c.</p> <p>1. On application of the public prosecutor, the court may, on the basis of the agreement made under Section 226h(3) of the Code of Criminal Procedure, reduce the sentence it considered imposing in the manner set out in subsection (2). In the sentence reduction, the court shall take into account the fact that by giving testimony as a witness an important contribution is or can be made to the investigation or prosecution of serious offences.</p> <p>[...]</p> <p>Section 226g c.c.p.</p> <p>1. The public prosecutor shall notify the examining magistrate of the agreement he intends to make with a suspect who is prepared to give a witness statement in the criminal case against another suspect in exchange for the prosecutor's promise to demand a reduced sentence in his own criminal case under application of section 44a of the Penal Code. The agreement shall exclusively relate to a witness statement to be given in the context of a criminal investigation into serious offences, as defined in section 67(1) of the Code of Criminal Procedure, which are committed by an organised group and in view of their nature or the relation to other serious offences committed by the suspect constitute a serious breach of law and order or into serious offences which carry a</p>	


			<p>statutory term of imprisonment of at least eight years. The agreement shall exclusively relate to a sentence reduction as referred to in section 44a(2).</p> <p>(2) The intended agreement shall be put in writing and shall contain the most precise description possible of:</p> <ul style="list-style-type: none"> a. the serious offences about which and where possible, the suspect against whom, the witness, referred to in subsection (1), is prepared to give a witness statement; b. the criminal offences for which the witness in the case in which he is a suspect will be prosecuted and to which that promise relates; c. the conditions which are set for the witness who is also a suspect and with which said witness is prepared to comply; d. the substance of the promise of the public prosecutor. <p>(3) On application of the public prosecutor, the examining magistrate shall review the lawfulness of the agreement referred to in subsection (2). The public prosecutor shall provide the examining magistrate with the information he requires for his review.</p> <p>(4) An official record shall be prepared of agreements which cannot be deemed to be an agreement within the meaning of subsection (1), and which could be relevant to the investigation in the case. The public prosecutor shall add this official record to the case documents as soon as possible.</p> <p style="text-align: center;">Section 226h c.c.p.</p> <p>(1) The witness who consults with the public prosecutor about making an agreement under the terms of section 226g, may have the legal representation of a lawyer. A lawyer shall be assigned to the witness who does not yet have legal representation. The board of the Legal Aid</p>	
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			<p>Council shall arrange the assignment of said lawyer by order of the examining magistrate.</p> <p>(2) The examining magistrate shall hear the witness, referred to in section 226g(1), on the intended agreement.</p> <p>(3) The examining magistrate shall review the lawfulness of the agreement and shall take into account the urgent necessity and the importance of obtaining the statement to be given by the witness. He shall also give an opinion on the credibility of the witness. His opinion shall be given in the form of a decision. If he judges the agreement to be lawful, said agreement shall be concluded.</p> <p>(4) The public prosecutor shall not add the official records and other objects from which data can be derived, which were obtained by making an agreement as referred to in section 226g, to the case documents until the examining magistrate has judged the agreement to be lawful.</p>	
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Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Poland 	Presence		YES	YES
	Feature		Exemption, Mandatory	Exemption, Mandatory
	Source		Section 259 c.c. Whoever voluntarily abandoned the participation in the group or association and disclosed to an authority responsible for prosecuting offences all the essential circumstances of the committed act or [...] shall not be subject to the penalty for the offence specified in Article 258.	Section 259 c.c. Whoever [...] has voluntarily averted the impending danger shall not be subject to the penalty for the offence specified in Article 258.
Portugal 	Presence		YES	YES
	Feature		Exemption/Mitigation, Optional	Exemption/Mitigation, Optional
	Source		Section 299 c.c. [...] (4) The penalties referred to may be especially mitigated or not take place punishment if the agent [...] submit to the authority of its existence in order to be able to avoid this practice crimes.	Section 299 c.c. [...] (4) The penalties referred to may be especially mitigated or not take place punishment if the agent [...] prevent serious efforts to prevent the continuation of groups, organisations or associations [...].
Romania 	Presence	YES	YES	YES
	Feature	Exemption, Mandatory	Mitigation/Exemption, Optional/Mandatory	Mitigation, Optional
	Source	Section 323 c.c. [...] (3) The persons in para. (1) shall not be punished if they denounce the association to the authorities before it is discovered and before the beginning of commission of the offence that is the purpose of the association. Section 22 c.c. (1) A perpetrator who divested him/herself or who prevented the occurrence of the outcome before the act was discovered shall not be punished. (2) If the acts accomplished up to the moment of divestment or prevention of outcome occurrence represent another offence, the penalty for that offence shall be applied.	Section 74 c. c. (1) The following situations can be deemed as mitigating circumstances: [...] c)[...] the facilitation of the discovery or arrest of participants. (2) The situations enumerated in the present Article are examples. Section 9 Law 39/2003 (1) The person who, while committing one of the deeds stipulated in art. 7 paragraph (1) lays information against the organised criminal group, before it has been discovered and before the grave offence that is the purpose of this group is committed, shall not be punished.	Art. 74 c.c. (1) The following situations can be deemed as mitigating circumstances: a) the offender's good conduct before committing the offence; b) the offender's endeavour to remove the result of the offence or to repair the damage caused; c) the offender's attitude after committing the offence, shown by his/her appearance before the authority, the sincere behaviour during the trial[...]. (2) The situations enumerated in the present Article are examples.

Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Slovakia 	Presence		YES	
	Feature		Exemption/Mitigation, Mandatory/Optional	
	Source		<p>Section 36 c.c. A 'mitigating factor' comprises the fact that an offender has [...] o. contributed to the discovery or conviction of an organised group, a criminal group or a terrorist group.</p> <p>Section 39 (2) The court may also reduce the penalty to below the threshold of the criminal tariff specified by this Act when sentencing an offender [...] b. who has made an important contribution to the investigation of an offence committed for the benefit of a criminal group or a terrorist group or has helped prevent the commissioning of an offence planned or attempted by another person for the benefit of a criminal group or terrorist group by reporting such activity to the law enforcement authorities and providing information which they would not otherwise have obtained and thus helping them to prevent or mitigate the consequences of the offence, identify or convict the offenders or secure evidence of an offence which assists in convicting a criminal group or terrorist group, [...] e. who has made a particularly important contribution to the investigation of [...] the offence of establishing, plotting and supporting a criminal group under Section</p>	

			<p>296 [...] or a particularly serious crime committed by an organised group, criminal group or terrorist group, or for identifying or convicting the offender by providing evidence in criminal proceedings concerning such an act where, with regard to the nature and seriousness of the crime he has committed the court concludes that the purposes of punishment may also be achieved by a sentence of shorter duration; reduction of a prison sentence below the lower threshold of the criminal tariff is not permitted in the case of organisers, abettors or commissioners of an offence in respect of which the person in question provides evidence in criminal proceedings.</p> <p>Section 86 An offence shall also cease to be punishable where it involves [...]</p> <p>e. establishing, plotting and supporting a criminal group under Section 296 or establishing, plotting and supporting a terrorist group under Section 297, where the offender has made a voluntary report to a law enforcement authority or the Police Force concerning a criminal group or a terrorist group and its activities at a time when the danger posed by its continuing activities may still be eliminated; [...]</p>	
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Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Slovenia 	Presence	YES	YES	YES
	Feature	Exemption/Mitigation, Optional	Mitigation, Optional	Mitigation, Optional
	Source	Section 36 c.c. (1) If the perpetrator has attempted to commit a criminal offence but voluntarily desisted to go through with it, his sentence may be withdrawn. (2) If the perpetrator voluntarily desists from committing a criminal offence, he shall be punished for those acts, which present some other independent criminal offence. (3) The perpetrator may be granted a remission of his sentence if he has sincerely and appropriately endeavoured to prevent the consequences of his act – even if the consequences did not occur for another reason.	Section 294 c.c. [...] (3) A perpetrator of a criminal offence from the preceding paragraphs who [...] discloses information which has a bearing on the investigation and proving of criminal offences that have already been committed, may have his punishment for these offences mitigated, in accordance with Article 51 of this Penal Code.	Section 294 [...] (3) A perpetrator of a criminal offence from the preceding paragraphs who prevents further commission of these offences [...] may have his punishment for these offences mitigated, in accordance with Article 51 of this Penal Code.

Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
Spain 	Presence	YES	YES	YES
	Feature	Mitigation, Mandatory	Mitigation, Optional	Mitigation, Mandatory/Optional
	Source	Section 21 c.c. [...] <p>4. Is a mitigating circumstance: the convict having proceeded to confess his crime to the authorities before having knowledge of the judicial proceedings brought against him.</p>	Section 570 quater c.c. [...] <p>4. The Judges or Courts of Law, giving the reasons in their judgement, may impose a lower punishment by one or two degrees on the person responsible for any of the felonies foreseen in this Chapter, as long as the subject has voluntarily quit his criminal activities and has actively collaborated with the authorities or their agents either to obtain decisive evidence for the identification or capture of others who are responsible or to prevent the activities or furtherance of the organisations or groups to which they have belonged or to prevent a felony being committed within or through those organisations or groups.</p> <p>Section 294 c.c. [...]</p> <p>(3) A perpetrator of a criminal offence from the preceding paragraphs who [...] discloses information which has a bearing on the investigation and proving of criminal offences that have already been committed, may have his punishment for these offences mitigated, in accordance with Article 51 of this Penal Code.</p>	Section 21 c.c. [...] <p>(7) Any other circumstance of a similar importance to the aforesaid.</p> <p>Section 294 c.c. [...]</p> <p>(3) A perpetrator of a criminal offence from the preceding paragraphs who prevents further commission of these offences [...] may have his punishment for these offences mitigated, in accordance with Article 51 of this Penal Code.</p>

Member State	Presence of special circumstances	Type of special circumstances		
		<i>Renouncing criminal activity</i>	<i>Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain</i>	<i>Others</i>
United Kingdom 	England, Wales, Northern Ireland	Judicial discretion in determination of sentencing includes consideration of mitigating factors		
	Scotland	Judicial discretion in determination of sentencing includes consideration of mitigating factors		

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Table 4.15: Special circumstances – summary table

Type of special circumstance	Exemption		Mitigation	
	Mandatory	Optional	Mandatory	Optional
Renouncing criminal activity	Austria; Romania	Slovenia	Austria; Estonia; Spain	Ireland; Lithuania; Malta; Slovenia; United Kingdom (all jurisdictions)
Providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain	Belgium; Bulgaria; France; Greece; Hungary; Luxembourg; Poland; Romania; Slovakia	Croatia; Germany; Greece; Portugal	Austria; Bulgaria; Czech Republic; Greece; Latvia; Slovakia; Estonia	Austria; Cyprus; Finland; Germany; Ireland; Lithuania; Malta; Netherlands; Portugal; Romania; Slovakia; Slovenia; Spain; United Kingdom (all jurisdictions)
Others⁶⁷	Poland	Germany; Portugal	Estonia; Czech Republic; Italy; Latvia; Spain;	Ireland; Italy; Latvia; Lithuania; Malta; Portugal; Romania; Slovenia; Spain;; United Kingdom (all jurisdictions)

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

4.6.3. Transposition assessment of Article 4 of the Framework Decision




As presented in Section 4.7.1, Article 4 of the Framework Decision is not binding, since it is stated that MS *may* take the necessary measures. Our research and analysis indicates that all MS⁶⁸ foresee in some circumstances reducing penalties or exempting the offender from penalties for crimes committed in the framework of a criminal organisation.

Table 4.16 graphically illustrates MS transposition of Article 4 of the Framework Decision, in a yes/no format. A 'yes' is assigned if MS legislation envisages at least one type of mitigation/exemption circumstance.

⁶⁷ For details see Appendix A, containing all relevant quotations from the national legislation, and Table 4.13.

⁶⁸ This excludes Denmark and Sweden, which have not introduced any self-standing offences which could form the basis for the application of Article 4. See Section 4.4 above and Chapter 5 for more details.

Table 4.16: MS transposition of the standard set in Article 4 of Framework Decision 2008/841/JHA

Member State	Special circumstances	Member State	Special circumstances
Austria 	YES	Italy 	YES
Belgium 	YES	Latvia 	YES
Bulgaria 	YES	Lithuania 	YES
Croatia 	YES	Luxembourg 	YES
Cyprus 	YES	Malta 	YES
Czech Republic 	YES	Netherlands 	YES
Estonia 	YES	Poland 	YES
Finland 	YES	Portugal 	YES
France 	YES	Romania 	YES
Germany 	YES	Slovakia 	YES
Greece 	YES	Slovenia 	YES
Hungary 	YES	Spain 	YES
Ireland 	YES	United Kingdom 	YES (all jurisdictions)

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

4.7. Liability of legal persons for offences relating to participation in a criminal organisation (Article 5)

4.7.1. Standard and elements – liability of legal persons

The fourth 'legal minimum standard' presented in the Framework Decision relates to the liability of legal persons for offences relating to participation in a criminal organisation. It is outlined in Article 5, and reads as follows:

'1. Each Member State shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Article 2 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one of the following:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.

2. Member States shall also take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, by a person under its authority, of any of the offences referred to in Article 2 for the benefit of that legal person.

3. Liability of legal persons under paragraphs 1 and 2 shall be without prejudice to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences referred to in Article 2.

4. For the purpose of this Framework Decision 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.'

In order to map MS criminal law with reference to the legal minimum standard set in Article 5 of the Framework Decision and to assess transposition of this standard, the following elements are to be taken into account:

- 1) Individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation (different categories are identified: e.g. people having a power of representation; people with authority to take decisions; people with authority to exercise control).
- 2) Lack of supervision, i.e. if the legal persons may be held liable where the lack of supervision or control by a person under the previous element has made possible the commission, by a person under its authority, of an offence relating to participation in a criminal organisation.
- 3) No prejudice from proceedings against legal persons to criminal proceedings against natural persons, who are perpetrators of, or accessories to, any of the offences relating to participation in a criminal organisation.
- 4) Scope of application, i.e. the body that can be held liable is any entity having legal personality under the applicable national law, with the exception of State, public bodies, or international organisations.


This provision concerns the liability of legal persons limited to the offences related to a criminal organisation (Article 2). It refers to offences committed by a person having a key role/position within the legal person or as a result of lack of supervision by a person under the authority of the former. All three elements mentioned above are binding on

the MS. At the same time this provision, unlike the previous Framework Decision provisions, does not require the introduction of criminal law measures. The Article refers to 'liability', which is not necessarily of criminal nature. In this way the Framework Decision follows the example set by numerous previously adopted criminal law instruments which are flexible in terms of type of liability foreseen for legal persons in a particular MS. The Framework Decision does not state any preference in this regard, leaving the MS the possibility of making their own choices.

4.7.2. Mapping of MS legislation – liability of legal persons


Table 4.17 summarises how MS legislation deals with all three of the issues relating to 'liability of legal persons' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.


Table 4.17: Liability of legal persons


Member State	Liability of legal persons							
Austria 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Section 3 below</i>	explicit mention <i>source: Section 3 below</i>	YES <i>source: Section 1 below</i>
<p style="text-align: center;">Federal Law on the Criminal Liability of Associations</p> <p style="text-align: center;">Section 1 [...]</p> <p>(2) For the purpose of this law associations shall mean legal persons, registered partnerships and European Economic Interest Groupings. (3) For the purpose of this law the following shall not be associations:</p> <ol style="list-style-type: none"> 1. a (deceased person's) estate; 2. the federal state, provinces and municipalities and other legal persons in so far as they enforce laws; 3. recognised churches, religious societies and religious communities in so far as they are engaged in pastoral care. <p style="text-align: center;">Section 2</p> <p>(1) For the purpose of this law a decision-maker shall mean a person who</p> <ol style="list-style-type: none"> 1. is a managing director, an executive board member or authorised representative, or who is authorised in a comparable manner to represent the association in external dealings either according to statutory or corporate power of representation, 2. is a member of the supervisory board or board of directors or otherwise exercises controlling powers in a leading position, or 3. otherwise exercises significant influence on the management of the association. <p>(2) For the purpose of this law an employee shall mean a person who works for the association</p> <ol style="list-style-type: none"> 1. on the basis of an employment, apprentice or other training relationship, 2. on the basis of a relationship that is subject to the provisions of the 1960 Law on Home Working [Heimarbeitsgesetz], BGBl. No. 105/1961, or that is of an employee-like status, 3. as an employee provided on a temporary basis as defined in § 3(4) of the Temporary Employment Law, BGBl. No 196/1988, or 4. on the basis of a service relationship or other special public-law relationship. 								


Section 3


- (1) Subject to the additional conditions laid down in paragraphs 2 or 3, an association shall be liable for a criminal offence if
1. the offence was committed for its benefit or
 2. as a result of the act, duties incumbent on the association have been infringed.
- (2) The association shall be liable for offences committed by a decision-maker if the decision-maker as such acted unlawfully and culpably.
- (3) The association shall be liable for criminal offences of employees if
1. the facts and circumstances which correspond to the statutory definition of an offence have been realised in an illegal manner; the association shall be liable for an offence that requires wilful action only if an employee has acted with wilful intent, and for a criminal offence for which negligent action is a condition only if an employee has failed to apply the due care required in the respective circumstances; and
 2. committing the offence was made possible or considerably easier due to the fact that decision-makers failed to apply the due and reasonable care required in the respective circumstances, in particular by omitting to take material technical, organisational or staff-related measures to prevent such offences.
- (4) Liability of an association for an offence and criminal liability of decision-makers or employees on grounds of the same offence shall not be mutually exclusive.

Member State	Liability of legal persons							
Belgium 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	YES	NO	explicit mention	YES
		<i>source: Section 5 below</i>	<i>source: Section 5 below</i>	<i>source: Section 5 below</i>	<i>source: Section 5 below</i>	<i>source: not applicable</i>	<i>source: Section 5 below</i>	<i>source: Section 5 below</i>
<p style="text-align: center;">Criminal Code Section 5</p> <p>Toute personne morale est pénalement responsable des infractions qui sont intrinsèquement liées à la réalisation de son objet ou à la défense de ses intérêts, ou de celles dont les faits concrets démontrent qu'elles ont été commises pour son compte.</p> <p>Lorsque la responsabilité de la personne morale est engagée exclusivement en raison de l'intervention d'une personne physique identifiée, seule la personne qui a commis la faute la plus grave peut être condamnée. Si la personne physique identifiée a commis la faute sciemment et volontairement, elle peut être condamnée en même temps que la personne morale responsable.</p> <p>Sont assimilées à des personnes morales :</p> <p>1° les associations momentanées et les associations en participation;</p> <p>2° les sociétés visées à l'Article 2, alinéa 3, des lois coordonnées sur les sociétés commerciales, ainsi que les sociétés commerciales en formation;</p> <p>3° les sociétés civiles qui n'ont pas pris la forme d'une société commerciale.</p> <p>Ne peuvent pas être considérées comme des personnes morales responsables pénalement pour l'application du présent Article : l'Etat fédéral, les régions, les communautés, les provinces, l'agglomération bruxelloise, les communes, les zones pluricommunales, les organes territoriaux intra-communaux, la Commission communautaire française, la Commission communautaire flamande, la Commission communautaire commune et les centres publics d'aide sociale.</p>								

Member State	Liability of legal persons							
Bulgaria 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, non criminal	YES <i>source: Section 83a below</i>	YES <i>source: Section 83a below</i>	YES <i>source: Section 83a below</i>	YES <i>source: Section 83a below</i>	NO <i>source: not applicable</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 83a below</i>
Law on Administrative Violations and Administrative Penalties								
Section 83a								
(1) Legal persons that have or would have enriched themselves as a result of one of the criminal offences described in Articles (...), 320 to 321a, (...) of the Criminal Code, or as a result of any criminal offence committed on instructions from or pursuant to a decision of an organised criminal group, if the perpetrator is: <ol style="list-style-type: none"> 1. a natural person authorised to make decisions on behalf of the legal person; 2. a natural person representing the legal person; 3. a natural person, elected to a supervisory board of the legal person, or 4. an employee to whom the legal person has assigned a certain task, if the offence was committed during or in connection with the performance of this task; shall be subject to a fine of up to BGN 1,000,000 which shall be at least equivalent to the benefit in question if it is material in nature, or, if the benefit is not material in nature or its value cannot be established, the fine shall be BGN 5,000 to 100,000.								
(2) The fine shall also be imposed on the legal person if the persons referred to in Paragraph (1) items 1, 2 and 3 have aided or abetted the commission of the above acts, even if the said acts were stopped at the stage of attempt.								
(3) The fine shall be imposed regardless of the materialisation of the criminal liability of the perpetrator of the offence referred to in Paragraph 1.								
(4) The benefit or its equivalent shall be forfeited to the state, if not subject to return or restitution, or forfeiture under the Criminal Code.								
(5) The state, state authorities and local government authorities, and international organisations shall not be liable to the fines referred to in paragraph 1.								

Member State	Liability of legal persons							
Croatia 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 4 below</i>	YES <i>source: Section 4 below</i>	YES <i>source: Section 4 below</i>	YES <i>source: Section 4 below</i>	NO <i>source: not applicable</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 6 below</i>
<p style="text-align: center;">Act on the Responsibility of Legal Person for the Criminal Offences</p> <p style="text-align: center;">Section 4</p> <p style="text-align: center;">The responsible person within the meaning of this Act is a natural person in charge of the operations of the legal person or entrusted with the tasks from the scope of operation of the legal person.</p> <p style="text-align: center;">Section 5</p> <p style="text-align: center;">Responsibility of legal person is based on the guilt of the responsible person. The legal person shall be punished for the criminal Offence of the responsible person also in cases when the existence of legal or actual obstacles for establishing of responsibility of responsible person is determined.</p> <p style="text-align: center;">Section 6</p> <p style="text-align: center;">The Republic of Croatia as a legal person may not be punished for a criminal offence. Units of local and regional self-government may be punished only for criminal offences that have not been committed in their execution of public authority.</p>								

Member State	Liability of legal persons
Cyprus 	National provision regarding the liability of legal persons in CY do not cover the offence of participation in a criminal organisation.

Member State	Liability of legal persons							
Czech Republic 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 8 below</i>	YES <i>source: Section 8 below</i>	YES <i>source: Section 8 below</i>	YES <i>source: Section 8 below</i>	YES <i>source: Section 8 below</i>	explicit mention <i>source: Section 9 below</i>	YES <i>source: Section 6 below</i>
<p style="text-align: center;">Act No. 418/2011 Coll. on Criminal Liability of Legal Person and Proceedings against Them</p> <p style="text-align: center;">Section 6</p> <p style="text-align: center;">(1) Following legal persons are not criminally liable according to this Act:</p> <p style="text-align: center;">a) Czech Republic;</p> <p style="text-align: center;">b) local self-governing entities while exercising public authority.</p> <p style="text-align: center;">(2) Share of legal persons stipulated in Paragraph 1 in (another) legal person does not preclude criminal liability of such legal person under this Act.</p> <p style="text-align: center;">Section 8</p> <p>(1) Criminal act committed by a legal person is an unlawful act committed in its name or in its interest or within its activity, if committed by</p> <p style="margin-left: 20px;">a) statutory body or member of the statutory body or the person entitled to act on behalf of or for the legal person,</p> <p style="margin-left: 20px;">b) a person performing managerial or controlling activity within the legal person, even if he/she is not a person as mentioned in Letter a),</p> <p style="margin-left: 20px;">c) a person with a decisive authority on management of this legal person, if his/her act was at least one of the conditions leading to a consequence establishing criminal liability of a legal person, or</p> <p style="margin-left: 20px;">d) employee or a person with similar status (thereinafter 'employee') while fulfilling his/her duties/tasks, even if he/she is not a person as mentioned in Letters a) to c),</p> <p style="margin-left: 40px;">given that the act can be attributed to the legal person in accordance with Paragraph 2.</p> <p>(2) Commitment of a criminal act as specified in Section 7 can be attributed to a legal person, if committed by</p> <p style="margin-left: 20px;">a) action of bodies or persons mentioned in Paragraph 1 letters a) to c), or</p> <p style="margin-left: 20px;">b) an employee mentioned in Paragraph 1 Letter d) on the grounds of a decision, approval or guidance of bodies of the legal person or persons mentioned in Paragraph 1 Letters a) to c), or because the bodies of the legal person or persons mentioned in Paragraph 1 Letters a) to c) did not take measures required by other legal regulation or that can be justly required, namely that they did not perform obligatory or</p>								

necessary control (supervision) over the activities of employees or other persons, they are superiors to, or they did not take necessary measures to prevent or stave off the consequences of a committed criminal act.

(3) Criminal liability of a legal person is not obstructed by the fact that a concrete natural person who has acted in a way specified in Paragraphs 1 and 2 cannot be identified.


(4) Provisions of Paragraphs 1 and 2 will apply also if


- a) the activity specified in Paragraphs 1 and 2 took place prior to establishing the legal person,
- b) the legal person has been established but the court decided on nullity of the legal person,
- c) the legal act establishing authorisation for action on the legal persons behalf is invalid or ineffective, or
- d) the acting natural person is not (held) criminally liable for such criminal act.


Section 9


[...]

(3) Criminal liability of legal person does not affect criminal liability of natural persons specified in Section 8 Paragraph 1 and criminal liability of these natural persons does not affect criminal liability of the legal person. If the criminal act has been committed by means of a joint action of more persons, where at least one of them was a legal person, every each one of these persons is liable as if the person committed the act on its own.


Member State	Liability of legal persons							
Estonia 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	NO	NO	explicit mention	YES
		<i>source: Section 14 below</i>	<i>source: Section 14 below</i>	<i>source: Section 14 below</i>	<i>source: not applicable</i>	<i>source: not applicable</i>	<i>source: Section 14 below</i>	<i>source: Section 14 below</i>
<p style="text-align: center;">Criminal code</p> <p style="text-align: center;">Section 14</p> <p>(1) In the cases provided by law, a legal person shall be held responsible for an act which is committed in the interests of the legal person by its body, a member thereof, or by its senior official or competent representative.</p> <p>(2) Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence.</p> <p>(3) The provisions of this Act do not apply to the state, local governments or to legal persons in public law.</p>								

Member State	Liability of legal persons							
Finland 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Sections 2 and 3 below</i>	YES <i>source: Section 2 below</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 1 below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Chapter 9</p> <p style="text-align: center;">Section 1</p> <p>(1) A corporation, foundation or other legal entity in whose operations an offence has been committed may, at the request of the public prosecutor, be sentenced to a corporate fine if this Code provides for such a sanction for the offence (441/2011). (2) The provisions of this Chapter do not apply to offences committed in the exercise of public authority.</p> <p style="text-align: center;">Section 2</p> <p>(1) A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation. (2) A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges.</p> <p style="text-align: center;">Section 3</p> <p>(1) The offence is deemed to have been committed in the operations of a corporation if the perpetrator has acted on the behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation. (2) The corporation does not have the right to compensation from the offender for a corporate fine that it has paid, unless such liability is based on statutes on corporations and foundations.</p>								


Member State	Liability of legal persons							
France 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	NO	NO	explicit mention	YES
		<i>source: Section 121-2 below</i>	<i>source: Section 121-2 below</i>	<i>source: Section 121-2 below</i>	<i>source: not applicable</i>	<i>source: not applicable</i>	<i>source: Section 121-2 below</i>	<i>source: Section 121-2 below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Section 121-2</p> <p>Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in Articles 121-4 and 121-7. However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of Article 121-3.</p>								

Member State	Liability of legal persons							
Germany 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, non criminal	YES <i>source: Section 30 below</i>	YES <i>source: Section 30 below</i>	NO <i>source: not applicable</i>	YES <i>source: Section 30 below</i>	YES <i>source: Section 130 below</i>	no mention <i>source: not applicable</i>	YES <i>source: Sections 30 and 130 below</i>
<p style="text-align: center;">Administrative Offences Act of the Federal Republic of Germany</p> <p style="text-align: center;">Section 30</p> <p style="text-align: center;">(1) If a person</p> <ol style="list-style-type: none"> 1. acting in the capacity of an agency authorised to represent a legal entity, or as a member of such an agency, 2. as the board of an association not having legal capacity, or as a member of such a board, 3. as a partner of a commercial partnership authorised to represent, or 4. as the fully authorised representative or in a leading position as a procura holder, or as general agent of a legal entity or of an association as specified in Nos. 2 or 3 <p>has committed a criminal or administrative offence by means of which duties incumbent upon the legal entity or the association have been violated, or the legal entity or the association has gained or was supposed to gain a profit, a fine may be imposed on the latter.</p> <p style="text-align: center;">[...]</p> <p>(4) If criminal proceedings or administrative fine proceedings in respect of the criminal or administrative offence are not initiated, or if they are discontinued, or if no punishment is deemed appropriate, the fine may be assessed separately. It may be specified by means of a statute that the fine may also be assessed separately in further cases. Separate assessment of a fine on the legal entity or association shall however be ruled out if the criminal or administrative offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.</p> <p style="text-align: center;">Section 130</p> <p>(1) Whoever, as the owner of a firm or an enterprise, wilfully or negligently fails to take the supervisory measures required to prevent contravention of duties in the firm or the enterprise which concern the owner in this capacity, and the violation of which is punishable by a penalty or a fine, shall be deemed to have committed an administrative offence if such a contravention is committed which could have been prevented or made much more difficult by proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.</p>								


	<p>(2) A firm or an enterprise in accordance with subsections 1 and 2 shall include a public enterprise.</p> <p>(3) If the administrative offence is subject to punishment, it may be punished by a fine not exceeding one million Euros. If the violation of duty is punishable by a fine, the maximum amount of the fine for a violation of obligatory supervision shall be dependent on the maximum amount of the fine provided for the violation of duty. The second sentence shall also apply in the event of a breach of duty which at the same time is punishable by a penalty and a fine if the maximum amount of the fine is in excess of the maximum amount in accordance with the first sentence.</p>
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Member State	Liability of legal persons							
Greece 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, non criminal	YES <i>source: Section 41 below</i>	YES <i>source: Section 41 below</i>	YES <i>source: Section 41 below</i>	NO <i>source: not applicable</i>	YES <i>source: Section 41 below</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 41 below</i>
Law 3251/2004 Section 41 (1) If a criminal act referred to in Articles 187 and 187A of the Penal Code was committed via or for the benefit or on behalf of a legal entity by a natural person acting either individually or as a member of an organ of the legal entity with a leading position within it based on powers of representation thereof or the authority to take decisions on its behalf or to exercise control within it, the following penalties shall be imposed on the legal entity, either cumulatively or alternatively, by joint decision of the Minister for Justice, Transparency and Human Rights and the Minister for Citizen Protection: i) an administrative fine of between EUR 50,000 (fifty thousand) and EUR 5,000,000 (five million); ii) permanent or temporary withdrawal for between one month and two years or suspension of the business licence or a ban on business activities; iii) a ban on certain business activities or the establishment of branches or increases in share capital for the same period of time; iv) permanent or temporary exclusion for the same period of time from public procurement, aid, grants, works, service and supply contracts, advertisements and government and broader public-sector competitions. The administrative fine referred to in point (i) shall always be imposed, irrespective of any other penalties. (2) The above penalties shall also be imposed if one of the crimes referred to in Article 187(1) of the Penal Code was committed by a criminal organisation on behalf of a legal entity with the involvement of a natural person referred to in the previous paragraph. (3) Where lack of supervision or control by a natural person referred to in paragraph 1 makes it possible for a hierarchically lower person to commit an offence referred to in paragraphs 1 and 2 via or for the benefit or on behalf of a legal entity, the following penalties shall be imposed, either cumulatively or alternatively, on the legal entity: - an administrative fine of between EUR 10,000 (ten thousand) and EUR 1,000,000 (one million); - The penalties referred to in points (ii), (iii) and (iv) for up to six months. [...] (5) The provisions of the previous paragraphs shall apply irrespective of any civil, disciplinary or criminal liability on the part of the natural								

	<p>persons referred to therein.</p> <p>(6) The prosecution and police authorities shall inform the Ministry for Justice, Transparency and Human Rights of cases in which a legal entity within the meaning of paragraphs 1 to 3 was involved in the commission of the crimes referred to in Articles 187 and 187A of the Penal Code and of any court judgments passed.</p>
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Member state	Liability of legal persons							
Hungary 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 2 below</i>	YES <i>source: Section 2 below</i>	YES <i>source: Section 2 below</i>	YES <i>source: Section 2 below</i>	YES <i>source: Section 2 below</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 1 below</i>
<p style="text-align: center;">Act 104 of 2001 on Measures Applicable to Legal Entities Under Criminal Law</p> <p style="text-align: center;">Section 1</p> <p style="text-align: center;">(1) For the purposes of this Act</p> <p>1. 'Legal entities' shall be understood as any organization or organizational units thereof vested with rights of individual representation, which the governing rules of law recognise as legal entities, as well as organizations that can be subject to conditions of civil law in their own right and possess assets distinct from that of their members, including companies active prior to registration pursuant to the Act on Economic Associations, [...]</p> <p>(2) This act shall not apply to the State of Hungary, foreign states, the institutions listed in the Constitution of the Republic of Hungary, the Office of the National Assembly, the Office of the President of the Republic, the Office of the Ombudsmen, and any bodies which are, according to the law, responsible for tasks of governance, public administration and local government administration, and international organizations established under international agreements.</p> <p style="text-align: center;">Section 2</p> <p>(1) The measures defined in the present act are applicable to legal entities in the event of perpetration of any intentional criminal act defined in Act IV of 1978 on the Criminal Code if the perpetration of such an act was aimed at or has resulted in the legal entity gaining benefit, and the criminal act was committed by</p> <p>(a) the legal entity's executive officer, its member, employee, officer, managing clerk entitled to represent it, its supervisory board member and/or their representatives, within the legal entity's scope of activity,</p> <p>(b) a member or employee of the legal entity within its scope of activity, and could have been prevented by the executive officer, the managing clerk or the supervisory board by fulfilling his/her/its supervisory or control obligations.</p> <p>(2) Other than in the cases defined in paragraph (1), the measures defined in this act shall be applicable also if perpetration of the criminal act resulted in the legal entity gaining benefit and the legal entity's executive officer or member, employee, officer or managing clerk</p>								


	entitled to represent it or its supervisory board member had knowledge of perpetration of the criminal act.
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Member State	Liability of legal persons							
Ireland 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	YES	YES	no mention	YES
	<i>source: Section 76 below</i>	<i>source: Section 76 below</i>	<i>source: Section 76 below</i>	<i>source: Section 76 below</i>	<i>source: Section 76 below</i>	<i>source: not applicable</i>	<i>source: Section 76 below</i>	
Criminal Justice Act 2006								
Section 76								
<p>(1) Where an offence under this Part is committed by a body corporate and is proved to have been committed with the consent, connivance or approval of, or to have been attributable to any wilful neglect on the part of, any person, being a director, manager, secretary or any other officer of the body corporate or a person who was purporting to act in any such capacity, that person, as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.</p> <p>(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.</p>								


Member State	Liability of legal persons							
Italy 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, non criminal	YES <i>source: Section 5 below</i>	YES <i>source: Section 5 below</i>	YES <i>source: Section 5 below</i>	YES <i>source: Section 5 below</i>	YES <i>source: Sections 6 and 7 below</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 1 below</i>
Legislative Decree 231 of 8 June 2001								
<p style="text-align: center;">Section 1</p> <p>(1) This Legislative Decree disciplines the liability of legal bodies for administrative violations dependant from criminal offences (2) The provisions of this Decree are applied to legal persons and to corporates and associations that are not legal persons (3) The provisions of this Decree are not applied to State, local bodies, public bodies without economic nature and public bodies that carry out activities of constitutional relevance</p>								
<p style="text-align: center;">Section 5</p> <p>(1) The legal person will be held liable for offences committed in its interest or to its advantage: a) by persons exercising the functions of representation, administration or management of the legal person or of one of its organisational units having financial and functional autonomy, as well as by persons exercising the formal or de facto management and control thereof; b) by persons under the management or supervision of one of the persons referred to in a). 2. The legal person will not be held liable if the persons indicated in paragraph 1 have acted in their own exclusive interest or in the interest of third parties.</p>								
<p style="text-align: center;">Section 6</p> <p>1. If the crime has been committed by the persons indicated at section 5, par. 1, letter a), the body shall not be considered liable if it proves that: a) the leading organ adopted and efficiently enacted, before the commission of the fact, organisation and management models able to prevent offences of the same kind of the one occurred; b) the task of controlling the functioning and the respect of models and their updating has been given to an organ of the body with autonomous control powers; c) the persons committed the crimes fraudulently eluding the organisation and management models;</p>								


	<p>d) if there has not been insufficient or omitted control by the organ envisaged at letter b) [...]</p> <p style="text-align: center;">Section 7</p> <p>1. In the case envisaged by section 5, par. 1, letter b), the body shall be considered liable if the commission of the offence has been enabled by the non respect of the direction or control duties.</p> <p>2. In any case, the non respect of the direction or control duties shall be excluded if the body, before the commission of the offence, adopted organisation and management models able to prevent offences of the same kind of the one occurred. [...]</p> <p style="text-align: center;">Section 8</p> <p>1. The liability for the body shall be existent also when:</p> <p>a) the author of the offence has not been identified or is not indictable; [...]</p>
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Member State	Liability of legal persons							
Latvia 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 70.1 below</i>	YES <i>source: Section 70.1 below</i>	YES <i>source: Section 70.1 below</i>	NO <i>source: not applicable</i>	YES <i>source: Section 70.1 below</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 70.1 below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Section 70.1</p> <p>For the criminal offences provided for in the Special Part of this Law, a court or in the cases provided for by the Law – a public prosecutor may apply a coercive measure to a legal person governed by private law, including State or local government capital company, as well as partnership, if a natural person has committed the offence in the interests of the legal person, for the sake of the person or as a result of insufficient supervision or control, acting individually or as a member of the collegial authority of the relevant legal person:</p> <ol style="list-style-type: none"> 1) on the basis of the right to represent the legal person or act on the behalf thereof; 2) on the basis of the right to take a decision on behalf of the legal person; 3) in implementing control within the scope of the legal person. 								


Member State	Liability of legal persons							
Lithuania 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	NO	YES	explicit mention	YES
		<i>source: Section 20 below</i>	<i>source: Section 20 below</i>	<i>source: Section 20 below</i>	<i>source: not applicable</i>	<i>source: Section 20 below</i>	<i>source: Section 20 below</i>	<i>source: Section 20 below</i>
Criminal Code Section 20 (1) A legal entity shall be held liable solely for the criminal acts the commission whereof is subject to liability of a legal entity as provided for in the Special Part of this Code. (2) A legal entity shall be held liable for the criminal acts committed by a natural person solely where a criminal act was committed for the benefit or in the interests of the legal entity by a natural person acting independently or on behalf of the legal entity, provided that he, while occupying an executive position in the legal entity, was entitled: 1) to represent the legal entity, or 2) to take decisions on behalf of the legal entity, or 3) to control activities of the legal entity. (3) A legal entity may be held liable for criminal acts also where they have been committed by an employee or authorised representative of the legal entity as a result of insufficient supervision or control by the person indicated in paragraph 2 of this Article. (4) Criminal liability of a legal entity shall not release from criminal liability a natural person who has committed, organised, instigated or assisted in commission of the criminal act. (5) The State, a municipality, a state and municipal institution and agency as well as international public organisation shall not be held liable under this Code.								

Member State	Liability of legal persons							
Luxembourg 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	NO	NO	explicit mention	YES
		<i>source: Section 34 below</i>	<i>source: Section 34 below</i>	<i>source: Section 34 below</i>	<i>source: not applicable</i>	<i>source: not applicable</i>	<i>source: Section 34 below</i>	<i>source: Section 34 below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Section 34</p> <p>Lorsqu'un crime ou un délit est commis au nom et dans l'intérêt d'une personne morale par un de ses organes légaux ou par un ou plusieurs de ses dirigeants de droit ou de fait, la personne morale peut être déclarée pénalement responsable et encourir les peines prévues par les Articles 35 à 38. La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes infractions. Les alinéas précédents ne sont pas applicables à l'Etat et aux communes.</p>								


Member State	Liability of legal persons							
Malta 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 83A below</i>	YES <i>source: Section 83A below</i>	YES <i>source: Section 83A below</i>	NO <i>source: not applicable</i>	NO <i>source: not applicable</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 83A below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Section 83A [...]</p> <p style="text-align: center;">(4) Where the person found guilty of an offence under this title is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the offence of which that person was found guilty was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this title be deemed to be vested with the legal representation of the same body corporate which shall be liable as follows: [...]</p>								

Member State	Liability of legal persons							
Netherlands 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	YES	YES The national expert stated that: 'In the jurisprudence the criminal liability of leading staff of a legal person has evolved into a broad criminal liability principle. Briefly: liable are those who act (first level); make other people/staff to commit crime(s) (second level); or did not prevent people/staff committing	explicit mention	YES


						crime(s) if these acts are within the general assignment of the operations of the legal person (general level), also if the manager was not informed of the actual commitment of those acts.'		
		<i>source: Section 51 below</i>	<i>source: Section 51 below</i>	<i>source: Section 51 below</i>	<i>source: Section 51 below</i>	<i>source: jurisprudence</i>	<i>source: Section 51 below</i>	<i>source: Section 51 below</i>
Criminal Code								
<p>Section 51</p> <p>(1) Criminal offences can be committed by natural persons and legal persons.</p> <p>(2) If a criminal offence is committed by a legal person, criminal proceedings may be instituted and such punishments and measures as prescribed by law, where applicable, may be imposed:</p> <p style="padding-left: 40px;">1°. on the legal person; or</p> <p style="padding-left: 40px;">2°. on those persons who have ordered the commission of the criminal offence, and on those persons who actually directed the unlawful acts; or</p> <p style="padding-left: 40px;">3° on the persons referred to in 1° and 2° jointly.</p> <p>(3) In the application of the preceding subsections, the following shall be considered as equivalent to the legal person: the unincorporated company, the partnership, the shipping company and the special purpose fund.</p>								


Member State	Liability of legal persons							
Poland 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, non criminal	YES <i>source: Section 3 below</i>	YES <i>source: Section 3 below</i>	YES <i>source: Section 3 below</i>	YES <i>source: Section 3 below</i>	YES <i>source: Section 5 below</i>	explicit mention <i>source: Section 6 below</i>	YES <i>source: Section 2 below</i>
<p style="text-align: center;">Act on the Liability of Collective Entities for Acts Prohibited Under Penalty</p> <p style="text-align: center;">Section 2</p> <p>A collective entity, as understood in the Act, denotes a legal person and/or organisational entity without personality at law for which specific legal provisions grant legal capacity, except for the State Treasury, local self-government units and their associations.</p> <p>A collective entity, as understood in the Act, also denotes a commercial company with equity participation of the State Treasury, a local self-government unit or an association thereof, a commercial company in organisation, an entity in liquidation, and an entrepreneur other than a natural person, as well as a foreign organisational entity.</p> <p style="text-align: center;">Section 3</p> <p>The collective entity shall be liable for a prohibited act consisting in conduct of a natural person who:</p> <ol style="list-style-type: none"> 1) acts in the name or on behalf of the collective entity under the authority or duty to represent it, to make decisions in its name, or to exercise internal control, or whenever such person abuses the authority or neglects the duty, 2) is allowed to act as the result of abuse of the authority or neglecting of the duty by the person referred to in point 1 above, 3) acts in the name or on behalf of the collective entity on consent or at the knowledge of the person referred to in point 1, <ol style="list-style-type: none"> 3a) being an entrepreneur, which directly interacts with the collective entity in achieving the legally permissible goal, <ul style="list-style-type: none"> - if such conduct did or could have given the collective entity an advantage, even of non-financial nature <p style="text-align: center;">Section 5</p> <p>The collective entity shall be held liable if the offence has been committed in the effect of:</p> <ol style="list-style-type: none"> 1) at least absence of due diligence in electing the natural person referred to in Section 3. point 2 or 3.point 3, or of at least the absence of due supervision over this person, by an authority or a representative of the collective entity. 2) business organization of a collective entity which has not assured to avoid the offence by the person referred to in Section 3 point 1 or 								


	<p>3a, while it could provide due diligence required under the circumstances, by the authority or the representative of the collective entity.</p> <p style="text-align: center;">Section 6</p> <p>Neither the existence nor non-existence of liability of the collective entity under the principles set forth in this Act shall exclude civil liability for the inflicted damage, administrative liability, or personal legal responsibility of the perpetrator of the prohibited act.</p>
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Member State	Liability of legal persons							
Portugal 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 11 below</i>	YES <i>source: Section 11 below</i>	YES <i>source: Section 11 below</i>	NO <i>source: not applicable</i>	YES <i>source: Section 11 below</i>	explicit mention <i>source: Section 11 below</i>	YES <i>source: Section 11 below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Section 11</p> <p>(1) Unless otherwise stated and with the exception of the following provisions, only individuals are liable to criminal responsibility.</p> <p>(2) Legal persons and equivalent entities, with exception of the State, public legal persons and international public law organisations, are liable for the offences concerned in Articles 152 -A and 152-B, 159 and 160, 163 and 166, if the victim is a minor, and Articles 168, 169, 171 to 176, 217 to 222, 240, 256, 258, 262 to 283, 285, 299, 335, 348, 353, 363, 367, 368-A and 372 to 374, when committed:</p> <p style="margin-left: 40px;">a) In behalf and in the interest of the legal person by someone who is in a leadership position within that legal person; or</p> <p style="margin-left: 40px;">b) By someone acting under the authority of those in a leadership position within that legal person as a result of a violation of their duties of surveillance or control.</p> <p style="margin-left: 40px;">(3) By 'public legal persons' to the extent of criminal law, the expression covers:</p> <p style="margin-left: 80px;">a) Legal persons constituted under public law, including public companies;</p> <p style="margin-left: 80px;">b) Entities who hold a public service concession;</p> <p style="margin-left: 80px;">c) Other legal persons granted prerogatives of public powers.</p> <p>(4) The holders of corporate bodies, representatives of the legal person and those in control of its activity are considered as holders of a leadership position.</p> <p>(5) To criminal liability extent, civil societies and de facto associations are equivalent to a legal person.</p> <p>(6) The liability of a legal person is excluded when the perpetrator has acted against direct orders or instructions of those who are legally responsible.</p> <p>(7) The liability of a legal person does not exclude the individual liability of the agents and it is not determined by their individual liability.</p> <p>(8) Mergers or divisions do not lead to the extinction of criminal liability of a legal person, being liable:</p> <p style="margin-left: 40px;">a) The legal person resulted from the merger; and</p> <p style="margin-left: 40px;">b) All legal persons resulting from the division.</p>								


	<p>(9) Individuals in a leadership position are, in a subsidiary way, liable for fines and civil compensation determined against the legal person, keeping the right of recovery, regarding offences:</p> <ul style="list-style-type: none">a) Committed during the period of their mandate, without their direct opposition;b) Committed before, when they are held responsible for the incapacity of the legal person correspond to the expected
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Member State	Liability of legal persons							
Romania 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	YES	NO	explicit mention	YES
		<i>source: Section 135 below</i>	<i>source: Section 135 below</i>	<i>source: Section 135 below</i>	<i>source: Section 135 below</i>	<i>source: not applicable</i>	<i>source: Section 135 below</i>	<i>source: Section 135 below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Section 135</p> <p>(1) Legal persons, except for state and public authorities are criminally liable for crimes committed in the realization of their main activity or in the interest or in the name of the legal person.</p> <p>(2) Public institutions are not criminally liable for offences committed in the exercise of activities that may not be done in the private sector.</p> <p>(3) The liability of the legal person does not exclude the criminal liability of the natural person that contributed to the commission of the respective crime.</p>								

Member State	Liability of legal persons							
Slovakia 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	YES	NO	YES	no mention	YES
		<i>source: Sections 83a and 83b below</i>	<i>source: Sections 83a and 83b below</i>	<i>source: Sections 83a and 83b below</i>	<i>source: Sections 83a and 83b below</i>	<i>source: Sections 83a and 83b below</i>	<i>source: not applicable</i>	<i>source: Sections 83a and 83b below</i>
<p style="text-align: center;">Criminal Code Section 83a</p> <p style="text-align: center;">(1) Court may impose the confiscation of a specific sum of money on the legal person if the criminal offence, even as a criminal attempt, was committed or in the case of aiding and abetting a criminal offence in connection with:</p> <ul style="list-style-type: none"> a) exercising the right to represent that legal person b) exercising the right to make decisions in the name of that legal person c) exercising the right to carry out the control within that legal person, or d) negligence concerning the supervision or due diligence within that legal person. <p style="text-align: center;">[...]</p> <p style="text-align: center;">Section 83b</p> <p style="text-align: center;">(1) Court shall impose the confiscation of a property on the legal person if the criminal offence, even as a criminal attempt, was committed or in the case of aiding and abetting a criminal offence as described in Article 58 paragraph 2 and if the legal person gained the property or its part by a crime or from proceeds of a crime, in connection with:</p> <ul style="list-style-type: none"> a) exercising the right to represent that legal person b) exercising the right to make decisions in the name of that legal person c) exercising the right to carry out the control within that legal person, or d) negligence concerning the supervision or due diligence within that legal person. <p style="text-align: center;">[...]</p>								

Member State	Liability of legal persons							
Slovenia 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 4 below</i>	YES <i>source: Section 4 below</i>	YES <i>source: Section 4 below</i>	YES <i>source: Section 4 below</i>	YES <i>source: Section 4 below</i>	explicit mention <i>source: Section 5 below</i>	YES <i>source: Section 2 below</i>
<p style="text-align: center;">Liability of Legal Persons for Criminal Offences Act</p> <p style="text-align: center;">Section 2</p> <p>(1) The Republic of Slovenia and local communities of self-government as legal persons shall not be liable for criminal offences.</p> <p>(2) For legal persons not included under the preceding paragraph the statute may stipulate that for a specific criminal offence all or only certain types of legal persons are liable.</p> <p style="text-align: center;">Section 4</p> <p>A legal person shall be liable for a criminal offence committed by the perpetrator in the name of, on behalf of or in favour of the legal person:</p> <ol style="list-style-type: none"> 1. If the committed criminal offence means carrying out an unlawful resolution, order or endorsement of its management or supervisory bodies; 2. If its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence; 3. If it has at his disposal unlawfully obtained property benefit or uses objects obtained through a criminal offence; 4. If its management or supervisory bodies have omitted due supervision of the legality of the actions of employees subordinate to them. <p style="text-align: center;">Section 5</p> <p>(1) Under the conditions under the preceding Article a legal person shall also be liable for a criminal offence if the perpetrator is not criminally liable for the committed criminal offence.</p> <p>(2) The liability of a legal person does not preclude the criminal liability of natural persons or responsible persons for committed criminal offence.</p> <p>(3) A legal person may only be liable for criminal offences committed out of negligence under the conditions from Point 4 of Article 4 of this Act. In this case the legal person may be given a reduced punishment.</p> <p>(4) If a legal person has no other body besides the perpetrator who could lead or supervise the perpetrator, the legal person shall be liable for the committed criminal offence within the limits of the perpetrator's guilt.</p> <p style="text-align: center;">[...]</p>								

Member State	Liability of legal persons							
Spain 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES <i>source: Section 31bis below</i>	YES <i>source: Section 31bis below</i>	YES <i>source: Section 31bis below</i>	NO <i>source: not applicable</i>	YES <i>source: Section 31bis below</i>	no mention <i>source: not applicable</i>	YES <i>source: Section 31bis below</i>
<p style="text-align: center;">Criminal Code</p> <p style="text-align: center;">Section 31bis</p> <p>(1) In the cases foreseen in this Code, legal persons shall be held criminally accountable for the felonies committed in their name or on their behalf, and to their benefit, by their legal representatives and de facto or de jure administrators. In the same cases, legal persons shall also be criminally accountable for the felonies committed when perpetrating the corporate activities and on account and to the advantage thereof, who, these being committed by the natural persons mentioned in the preceding Section, were able to perpetrate the acts as due control was not exercised over them in view of the specific circumstances of the case.</p> <p>(2) The criminal accountability of legal persons shall be applicable whenever there is record of a felony being committed that must have been committed by the person who holds office or perpetrates the duties referred to in the preceding Section, even when the specific natural person responsible has not been individually identified, or it has not been possible to prosecute that person. When fines are handed down to both as a consequence of these acts, the Judges or Courts of Law shall modulate the respective amounts, so the resulting sum is not disproportionate in relation to the seriousness of such acts.</p> <p>(3) Concurrence, in the persons who have materially perpetrated the acts or those who have made these possible due to not having exercised due control, of circumstances that affect the culpability of the accused or aggravate his responsibility, or the fact that those persons have died or have escaped the action of justice, shall not exclude or modify the criminal accountability of legal persons, without prejudice to what is set forth in the following Section. [...]</p> <p>(5) The provisions related to criminal accountability of legal persons shall not be applicable to the State, to the territorial and institutional Public Administrations, to the Regulatory Bodies, the Public Agencies and Corporate Entities, to political parties and Trade Unions¹, to organisations under Public International Law, or to others that exercise public powers of sovereignty, administration, or in the case of State Mercantile Companies that implement public policies or provide services of general economic interest. [...]</p>								

Member State	Liability of legal persons							
United Kingdom⁶⁹ 	existence and type of liability of legal persons	individuals for whose conduct legal persons are held liable for offences relating to participation in a criminal organisation, by position				liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons	scope of application
		<i>individuals with power of representation</i>	<i>individuals with authority to take decisions</i>	<i>individuals with authority to exercise control</i>	<i>other</i>			
	yes, criminal	YES	YES	NO	NO	YES	explicit mention	YES
		<i>source: Crown Prosecution Service, Legal Guidance, Corporate Prosecutions</i>	<i>source: Crown Prosecution Service, Legal Guidance, Corporate Prosecutions</i>	<i>source: not applicable</i>	<i>source: not applicable</i>	<i>source: Crown Prosecution Service, Legal Guidance, Corporate Prosecutions</i>	<i>source: Crown Prosecution Service, Legal Guidance, Corporate Prosecutions</i>	<i>source: Crown Prosecution Service, Legal Guidance, Corporate Prosecutions</i>
<p style="text-align: center;">As highlighted Crown Prosecution Service in issuing legal guidance on corporate prosecutions:</p> <p>'In the absence of legislation which expressly creates criminal liability for companies, corporate liability may be established by:</p> <ul style="list-style-type: none"> - vicarious Liability for the acts of a company's employees/agents. This has some limited application at common law e.g. in relation to public nuisance. Statutes frequently impose liability on companies. This is quite common for offences under the Road Traffic Act 1988. Many statutory/regulatory offences impose liability upon employers (corporate and human) to ensure compliance with the relevant regulatory legislation. - non-vicarious liability arising from the so-called 'identification principle'. The identification principle determines whether the offender was a directing mind and will of the company. It applies to all types of offences, including those which require mens rea (see <i>Tesco Supermarkets v Nattrass</i> [1972] AC 153 and, for Scotland, <i>Transco v HM Advocate</i> [2004] JC 29)' <p>A company can be convicted of a conspiracy (see <i>R. v. I.C.R. Haulage Co. Ltd</i> [1944] KB 551) although the company cannot conspire with a sole person responsible in the company and acting for the company for the offence charged, as they are treated as the same person.</p>								

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

⁶⁹ All jurisdictions (i.e. England, Wales, Northern Ireland and Scotland).

Findings

Based on Table 4.17, it is possible to conclude that, within the MS national legal systems, the following approaches exist in relation reference to the 'liability of legal persons' element:

- Most MS envisage a liability of legal persons for offences relating to participation in a criminal organisation: Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, Spain and the United Kingdom; while a minority of MS have a non-criminal liability of legal persons system (Bulgaria, Germany, Greece, Italy and Poland).
- The only assessed MS which does not have a general provision concerning the liability of legal persons in relation to offences from Article 2 is Cyprus, although some rules on liability of legal persons exist and are applicable to numerous other offences.⁷⁰

Regarding individuals for whose conduct legal persons are held liable for offences in relation to a criminal organisation:

- Most MS recognise the liability of legal persons arising from all the three types of leading positions identified in the Framework Decision (individuals with power of representation; individuals with authority to take decisions; individuals with authority to exercise control). This 'three leading positions' approach is taken by: Estonia, France, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia and Spain; such an approach is broader than the minimum required.
- Some MS recognise the liability of legal persons arising from two out of the three leading positions identified in the Framework Decision. This 'two leading positions' approach is taken by: Germany (individuals with power of representation; individuals with authority to take decisions) and the United Kingdom (individuals with power of representation; individuals with authority to take decisions). Such an approach is broader than the required minimum.
- Some MS extend the scope of liability of legal persons beyond the conduct of the three leading positions to other individuals (e.g. persons who have *de facto* control of a legal person, including employees at a low level). This 'broader' approach is taken by: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Finland, Hungary, Ireland, Italy, the Netherlands, Poland, Romania and Slovenia.⁷¹
- Regarding the liability of legal persons from lack of supervision, some MS envisage this in their legal provisions: Austria, the Czech Republic, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and the United Kingdom. In some of these MS, this particular type of liability does not arise from legislative

⁷⁰ There are sporadic specific provisions relating to some criminal markets typical of organised crime but the provisions do not relate to the offence of participation in a criminal organisation existing in CY (e.g. section 19 of Law 87(I)/2007 on human trafficking, section 5 of law 134(I)/2011 on racism & xenophobia, section 27 of law 29/77 on drugs, section 14 of Law 110(I)/2010 on terrorism).

⁷¹ This can be related to the United Kingdom's long-standing inclusion in its criminal and other liability provisions under Companies Law a reference to the liability of 'shadow directors', i.e. those in accordance with whose instructions the nominal directors are accustomed to act.

texts, but instead stems from case law and jurisprudence (NL, UK). It may also be that some MS interpret broadly their general provisions extending them also to cases of lack of supervision or control, even though such an interpretation cannot be deduced from the legal text at first sight. The question also arises if those measures have the required legal certainty (see comments on transposition of directives and framework decisions at the beginning of this chapter).

- Regarding the existence of no prejudice from proceedings against legal persons to criminal proceedings against natural persons, who are perpetrators of, or accessories to, any of the offences relating to participation in a criminal organisation, some MS explicitly mention it in their national legislation. They are: Austria, Belgium, Czech Republic, Estonia, France, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia and the United Kingdom.
- Some other MS do not explicitly mention the existence of no prejudice. They are: Bulgaria, Croatia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Malta, Slovakia and Spain. For the latter group it can be concluded that as long as there is no contrary provision in the national legislation, compliance with this Article should be assumed.

As for the scope of application, in all assessed MS the bodies that can be held liable are all entities having legal personality under the applicable national law, with the possible exception of States, public bodies and international organisations.

4.7.3. Transposition assessment of Article 5 of the Framework Decision
















The transposition of the legal minimum standard set in Article 5 of the Framework Decision can be assessed by taking into account all three relevant elements regarding the liability of legal persons in relation to criminal organisations, as discussed in previous sections. These relate to the liability of legal persons flowing from a leading position or a lack of supervision, as well as the absence of prejudice and the scope of application.

Based on the information presented in the previous sub-section, Table 4.18 graphically illustrates MS transposition of Article 5 of the Framework Decision, in a yes/no format.

Table 4.18: MS transposition of the standard set in Article 5 of Framework Decision 2008/841/JHA

Member State	liability of legal persons from conducts of individuals in leading positions	liability of legal persons from lack of supervision	no prejudice from proceedings against legal persons to criminal proceedings against natural persons⁷²	scope of application
Austria 	YES	YES	YES	YES
Belgium 	YES	NO	YES	YES
Bulgaria 	YES	NO	YES	YES
Croatia 	YES	NO	YES	YES
Cyprus 	NO	NO	NO	YES
Czech Republic 	YES	YES	YES	YES
Estonia 	YES	NO	YES	YES
Finland 	YES	YES	YES	YES
France 	YES	NO	YES	YES
Germany 	YES	YES	YES	YES
Greece 	YES	YES	YES	YES

⁷² 'YES' to transposition is given both in the case of the explicit mention of such a prejudice or in case of 'no mention' in the national legislation, since also the latter does not hamper the proceeding against a natural person.

Hungary 	YES	YES	YES	YES
Ireland 	YES	YES	YES	YES
Italy 	YES	YES	YES	YES
Latvia 	YES	YES	YES	YES
Lithuania 	YES	YES	YES	YES
Luxembourg 	YES	NO	YES	YES
Malta 	YES	NO	YES	YES
Netherlands 	YES	YES	YES	YES
Poland 	YES	YES	YES	YES
Portugal 	YES	YES	YES	YES
Romania 	YES	NO	YES	YES
Slovakia 	YES	YES	YES	YES
Slovenia 	YES	YES	YES	YES
Spain 	YES	YES	YES	YES
United Kingdom 	YES	YES	YES	YES

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

4.8. Penalties for legal persons for offences relating to participation in a criminal organisation (Article 6)

4.8.1. Standard and elements – penalties for legal persons

The fifth 'legal minimum standard' introduced by the Framework Decision relates to the penalties imposed to legal persons for offences relating to participation in a criminal organisation. It is outlined in Article 6 of the Framework Decision and reads as follows:

'1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, for example:

- (a) exclusion from entitlement to public benefits or aid
- (b) temporary or permanent disqualification from the practice of commercial activities
- (c) placing under judicial supervision
- (d) judicial winding-up
- (e) temporary or permanent closure of establishments which have been used for committing the offence [...]'.

This provision requires MS to introduce penalties in relation to the liability of legal persons for offences relating to participation in a criminal organisation (Article 6 relates back to Article 5, and therefore to offences from Article 2 of the Framework Decision). This provision does not introduce the obligation of setting criminal penalties, giving MS flexibility in this regard. According to this provision MS:

- Must introduce fines (criminal or non-criminal), and
- May also introduce other penalties (some examples of those are indicated in the provision).

Therefore, in the sections below, in order to map MS criminal law with reference to the legal minimum standard set in Article 6 of the Framework Decision and to assess transposition of this standard, the following elements will be taken into account:

- 'Presence in the national legal system of criminal or non-criminal fines' to punish legal persons for offences relating to participation in a criminal organisation, and amount thereof.
- 'Presence in the national legal system of penalties other than fines' (at least one) to punish legal persons for offences relating to participation in a criminal organisation (e.g. exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; judicial winding-up; temporary or permanent closure of establishments which have been used for committing the offence). This element is not prescriptive, since the Framework Decision states that other penalties may be included.


Due to the fact that Cyprus does not render applicable the general rules of liability of legal persons to the offences of Article 2, this MS will not be assessed in relation to penalties for legal persons.






4.8.2. Mapping of MS legislation – penalties for legal persons





Presence in the national legal system of criminal or non-criminal fines




Table 4.19 summarises how MS legislation deals with the 'presence in the national legal system of criminal or non-criminal fines' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.



Table 4.19: Penalties for legal persons – criminal and non-criminal fines


Member State	Fines	
Austria 	Presence	YES (criminal fine)
	Amount	<p>(1) If an association is liable for a criminal offence, it shall be subject to a corporate fine.</p> <p>(2) The corporate fine shall be determined in daily rates. It shall amount to at least one daily rate.</p> <p>(3) The maximum number of daily rates shall be</p> <ul style="list-style-type: none"> - 180: if the offence attracts a penalty of life imprisonment or up to 20 years' imprisonment - 155: if the offence attracts a penalty of up to 15 years' imprisonment, - 130: if the offence attracts a penalty of up to 10 years' imprisonment, - 100: if the offence attracts a penalty of up to 5 years' imprisonment, - 85: if the offence attracts a penalty of up to 3 years' imprisonment, - 70: if the offence attracts a penalty of up to 2 years' imprisonment, - 55: if the offence attracts a penalty of up to 1 year's imprisonment, - 40: in all other cases. <p>(4) The daily rate shall be determined according to the income situation of the association, with due regard for its general economic performance. It shall be set at an amount corresponding to 1/360th of the annual income, or a figure which is no more than one-third above or below that amount, but subject to a minimum of EUR 50 and a maximum of EUR 10,000. If the association is for charitable, humanitarian or religious purposes (§§ 34 to 47 of the Austrian Federal Tax Code [Bundesabgabenordnung], BGBl. No. 194/1961) or is otherwise not-for-profit, the daily rate shall be set at a minimum of EUR 2 and a maximum of EUR 500.</p>
	Source	<i>Section 4, Federal Law on the Criminal Liability of Associations</i>


Belgium 	Presence	YES (criminal fine)
	Amount	<p>1er. Les amendes applicables aux infractions commises par les personnes morales sont :</p> <p>en matière criminelle et correctionnelle :</p> <ul style="list-style-type: none"> - lorsque la loi prévoit pour le fait une peine privative de liberté à perpétuité : une amende de deux cent quarante mille [euros] à sept cent vingt mille euros; - lorsque la loi prévoit pour le fait une peine privative de liberté et une amende, ou l'une de ces peines seulement : une amende minimale de cinq cents euros multipliés par le nombre de mois correspondant au minimum de la peine privative de liberté, et sans pouvoir être inférieure au minimum de l'amende prévue pour le fait; le maximum s'élève à deux mille euros multipliés par le nombre de mois correspondant au maximum de la peine privative de liberté, et sans pouvoir être inférieure au double du maximum de l'amende prévue pour le fait; - lorsque la loi ne prévoit pour le fait qu'une amende : le minimum et le maximum sont ceux prévus par la loi pour le fait; <p>en matière de police :</p> <ul style="list-style-type: none"> - une amende de vingt-cinq euros à deux cent cinquante euros.
	Source	<i>Section 41 bis c.c.</i>
Bulgaria 	Presence	YES (non criminal fine)
	Amount	Legal persons [...] shall be subject to a fine of up to BGN 1,000,000 which shall be at least equivalent to the benefit in question if it is material in nature, or, if the benefit is not material in nature or its value cannot be established, the fine shall be BGN 5,000 to 100,000.
	Source	<i>Section 83A, Administrative Infringements and Penalties Act</i>
Croatia 	Presence	YES (criminal fine)
	Amount	<p>(1) If the criminal offence is punishable by imprisonment for a term of up to one year, the legal person may be punished by a fine of 5,000 to 2,000,000 kuna.</p> <p>(2) If the criminal offence is punishable by imprisonment for a term of up to 5 years, legal person may be punished by a fine of 10.000,00 to 3,000,000 kuna.</p> <p>(3) If the criminal offence is punishable by imprisonment for term of up to 10 years, legal person may be punished by a fine of 15.000,00 to 4,000,000 kuna.</p> <p>(4) If the criminal offence is punishable by imprisonment for a term of up to 15 years or by long-term imprisonment, the legal person may be punished by a fine of 20,000 to 5,000,000 kuna.</p>
	Source	<i>Section 10, Act on the Responsibility of Legal Person for the Criminal Offences</i>
Cyprus 	Cyprus national legislation does not provide a general provision concerning the liability of legal persons for offences relating to participation in a criminal organisation.	
Czech Republic 	Presence	YES (criminal fine)
	Amount	A monetary penalty from CZK 1,000 to CZK 2,000,000 for the term of 20 to 730 days, up to a maximum monetary penalty of CZK 1.46 billion.
	Source	<i>Act No. 418/2011 Coll. on Criminal Liability of Legal Person and Proceedings against Them</i>




Estonia 	Presence	YES (criminal fine)
	Amount	<p>(8) In case of a legal person, the court may impose a pecuniary punishment of 3,200 to 16,000,000 Euros.</p> <p>(9) In the cases provided for in the Special Part of this Code, the court may impose a pecuniary punishment on a legal person, the amount of which is calculated as a percentage of the turnover of the legal person during the financial year immediately preceding the year in which the criminal proceedings were commenced or in case the person has operated for less than a year, during the year of commencing the criminal proceedings. In such case, the upper limit of the pecuniary punishment imposed shall not exceed the upper limit of the pecuniary punishment provided for in subsection (8) of this section.</p>
	Source	<i>Section 44 c.c.</i>
Finland 	Presence	YES (criminal fine)
	Amount	<p>Section 5 A corporate fine is imposed as a lump sum. The corporate fine is a minimum of €850 and a maximum of €850,000.</p> <p>Section 6 (1) The amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation by management, as referred to in Section 2, and the financial standing of the legal person. [...] (3) When evaluating the financial standing of the legal person, account shall be taken of the size and solvency of the legal person, as well as the earnings and the other essential indicators of the financial standing of the legal person.</p>
	Source	<i>Chapter 9, Sections 5 and 6 c.c.</i>
France 	Presence	YES (criminal fine)
	Amount	<p>The maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons by the law sanctioning the offence.</p> <p>Where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is €1,000,000.</p>
	Source	<i>Section 131-38 c.c.</i>
Germany 	Presence	YES (non criminal fine)
	Amount	<p>Section 30 [...] (2) The fine shall be 1. up to one million Euros in cases of a wilfully committed offence; 2. up to five hundred thousand Euros in cases of a negligently committed offence.</p> <p>In cases of an administrative offence the maximum amount of the fine shall be assessed in accordance with the maximum fine provided for the administrative offence in question.</p> <p>Section 130 [...] (3) If the administrative offence is subject to punishment, it may be punished by a fine not exceeding one million Euros. If the violation of duty is punishable by a fine, the maximum amount of the fine for a violation of obligatory supervision shall be dependent on the maximum amount of the fine provided for the violation of duty. The second sentence shall also apply in the event of a breach of duty which at the same time is punishable by a penalty and a fine if the maximum amount of the fine is in excess of the maximum amount in accordance with the first sentence.</p>
	Source	<i>Sections 30 and 130, Administrative Offences Act of the Federal Republic of Germany</i>



Greece 	Presence	YES (non criminal fine)
	Amount	<p>If a criminal act referred to in Articles 187 and 187A of the Penal Code was committed via or for the benefit or on behalf of a legal entity by a natural person acting either individually or as a member of an organ of the legal entity with a leading position within it based on powers of representation thereof or the authority to take decisions on its behalf or to exercise control within it, the following penalties shall be imposed on the legal entity, either cumulatively or alternatively, by joint decision of the Minister for Justice, Transparency and Human Rights and the Minister for Citizen Protection:</p> <p>i) an administrative fine of between EUR 50,000 (fifty thousand) and EUR 5,000,000 (five million) [...]</p> <p>3) Where lack of supervision or control by a natural person referred to in paragraph 1 makes it possible for a hierarchically lower person to commit an offence referred to in paragraphs 1 and 2 via or for the benefit or on behalf of a legal entity, the following penalties shall be imposed, either cumulatively or alternatively, on the legal entity: - an administrative fine of between EUR 10,000 (ten thousand) and EUR 1,000,000 (one million);</p>
	Source	<i>Section 41 Law 3251/2004</i>
Hungary 	Presence	YES (criminal fine)
	Amount	<p>(1) The highest fine that can be imposed on the legal entity shall be three times the financial advantage gained or intended to be gained through the criminal act, but at least HUF 500,000.</p> <p>(2) The Court may estimate the rate of the financial advantage if the financial advantage gained or intended to be gained could only be established at unreasonably high cost or not at all.</p> <p>(3) If the benefit gained or intended to be gained through the criminal act is not financial advantage, the court imposes the fine considering the financial situation of the legal entity, but at least HUF 500,000.</p>
	Source	<i>Section 6 Act 104 of 2001 on Measures Applicable to Legal Entities Under Criminal Law</i>
Ireland 	Presence	YES (criminal fine)
	Amount	Judicial discretion in determination of the amount
	Source	<i>Section 76, Criminal Justice Act 2006</i>





Italy 	Presence	YES (non criminal fine)
	Amount	<p>Section 10</p> <p>(1) For the administrative offence a monetary penalty is always applied.</p> <p>(2) The monetary sanction is applied by shares in a number neither less than one hundred nor above one thousand.</p> <p>(3) The monetary value of a share ranges from minimum 500,000 Lire to 3,000,000 Lire.</p> <p>[...]</p> <p>Section 11</p> <p>(1) In calculating the amount of the penalty, the judge determines the number of shares considering the seriousness of the fact, the level of responsibility of the body and the activity carried out to eliminate or mitigate the consequences of the fact and to prevent the commission of further offences.</p> <p>(2) The amount of the share is set on the basis of the economic and patrimonial conditions of the body in order to ensure the effectiveness of the penalty.</p> <p>[...]</p> <p>Section 24 ter</p> <p>(1) In relation to the commission of any of the crimes referred to in Articles 416, sixth paragraph of Article 416-bis, 416-ter and 630 of the Penal Code, crimes committed under the conditions laid down by that Article 416-bis of or in order to facilitate activities associations provided in that Article , as well as crimes provided for in Article 74 of the single Text of the decree of the President of the Republic October 9, 1990, n. 309 , applies a fine of four hundred to one thousand shares.</p> <p>(2) In relation to the commission of any of the crimes referred to in Article 416 of the Penal Code, with the exception of the sixth paragraph, or referred to in Article 407, paragraph 2, letter a), number 5) of the Code of Criminal Procedure, it shall be imposed a fine of three hundred to eight hundred shares.</p>
	Source	<i>Section 24 ter Law 146 of 16 March 2006, Sections 10 and 11 Legislative Decree 231 of 8 June 2001</i>
Latvia 	Presence	YES (criminal fine)
	Amount	<p>A monetary levy is a sum of money, which is imposed by a court or public prosecutor to be paid for the benefit of the State within 30 days. Monetary levy, in conformity with the seriousness of the criminal offence and the financial circumstances of a legal person, shall be determined in the amount of not less than ten thousand and not exceeding hundred thousand times the minimum monthly wage specified in the Republic of Latvia at the time of the rendering of the adjudication, indicating in the adjudication the amount of the monetary levy in the monetary units of the Republic of Latvia. A public prosecutor may, in an injunction regarding a coercive measure, apply not more than half of the maximum amount of monetary levy provided for in this Section, complying to the amount of the minimum wage specified in the Republic of Latvia at the time of drawing up the referred to injunction and indicating therein the sum of such monetary levy in the monetary units of the Republic of Latvia.</p>
	Source	<i>Sections 70.2 and 70.6 c.c.</i>

Lithuania 	Presence	YES (criminal fine)
	Amount	<p>A fine shall be calculated in the amounts of minimum standard of living (MSL). The minimum amount of a fine shall be one MSL.</p> <p>The amounts of a fine shall be determined as follows:</p> <ol style="list-style-type: none"> 1) for a misdemeanour – up to the amount of 50 MSLs. 2) for a minor crime – up to the amount of 100 MSLs; 3) for a less serious crime – up to the amount of 200 MSLs; 4) for a serious crime – up to the amount of 300 MSLs; 5) for a negligent crime – up to the amount of 75 MSLs. <p>The amount of a fine for a legal entity shall be up to 50 000 MSLs.</p> <p>The sanction of an Article shall not indicate the amount of a fine for a committed criminal act. It shall be specified by a court when imposing the penalty.</p>
	Source	<i>Sections 43 and 47 c.c.</i>

Luxembourg 	Presence	YES (criminal fine)
	Amount	<p style="text-align: center;">Section 36</p> <p>L'amende en matière criminelle et correctionnelle applicable aux personnes morales est de 500 euros au moins. En matière criminelle, le taux maximum de l'amende applicable aux personnes morales est de 750.000 euros. En matière correctionnelle, le taux maximum de l'amende applicable aux personnes morales est égal au double de celui prévu à l'égard des personnes physiques par la loi qui réprime l'infraction. Lorsqu'aucune amende n'est prévue à l'égard des personnes physiques par la loi qui réprime l'infraction, le taux maximum de l'amende applicable aux personnes morales ne peut excéder le double de la somme obtenue par multiplication du maximum de la peine d'emprisonnement prévue, exprimée en jours, par le montant pris en considération en matière de contrainte par corps.</p> <p style="text-align: center;">Section 37</p> <p>Le taux maximum de l'amende encourue selon les dispositions de l'Article 36 est quintuplé lorsque la responsabilité pénale de la personne morale est engagée pour une des infractions suivantes:</p> <ul style="list-style-type: none"> - crimes et délits contre la sûreté de l'Etat - actes de terrorisme et de financement de terrorisme - infractions aux lois relatives aux armes prohibées en relation avec une association de malfaiteurs ou une organisation criminelle <ul style="list-style-type: none"> - traite des êtres humains et proxénétisme - trafic de stupéfiants en relation avec une association de malfaiteurs ou une organisation criminelle <ul style="list-style-type: none"> - blanchiment et recel - concussion, prise illégale d'intérêts, corruption active et passive, corruption privée - aide à l'entrée et au séjour irréguliers en relation avec une association de malfaiteurs ou une organisation criminelle. <p style="text-align: center;">Section 57-2</p> <p>Lorsqu'une personne morale, ayant été condamnée à une peine criminelle au titre de l'Article 36, engage sa responsabilité pénale par un nouveau crime, le taux maximum de l'amende applicable est égal au quadruple de celui fixé à l'Article 36. Lorsqu'une personne morale, ayant été condamnée à une peine criminelle au titre de l'Article 37, engage sa responsabilité pénale par un nouveau crime, le taux maximum de l'amende applicable est égal au quadruple de celui fixé à l'Article 37.</p> <p style="text-align: center;">Section 57-3</p> <p>Lorsqu'une personne morale, ayant été condamnée à une peine criminelle, engage sa responsabilité pénale par un délit, le taux maximum de l'amende applicable est égal au quadruple de celui fixé à l'Article 36. Les peines prévues à l'alinéa précédent pourront être prononcées lorsqu'une personne morale, antérieurement condamnée à une amende correctionnelle d'au moins 36.000 euros, engage sa responsabilité par un nouveau délit avant l'expiration de cinq ans depuis qu'elle a subi ou prescrit sa peine.</p>
	Source	<i>Sections 36, 37, 57-2, 57-3 c.c.</i>

Malta 	Presence	YES (criminal fine)
	Amount	<p>Where the person found guilty of an offence under this title is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the offence of which that person was found guilty was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this title be deemed to be vested with the legal representation of the same body corporate which shall be liable as follows:</p> <p>Where the offence of which the person was found guilty is the offence in Section 83A(1), to the payment of a fine (multa) of not less than thirty-four thousand and nine hundred and forty euro and sixty cents (34,940.60) and not more than one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (116,468.67);</p> <p>Where the offence of which the person was found guilty is the offence in Section 83A(2), to the payment of a fine (multa) of not less than twenty-three thousand and two hundred and ninety-three euro and seventy-three cents (23,293.73) and not more than sixty-nine thousand and eight hundred and eighty-one euro and twenty cents (69,881.20);</p> <p>Where the offence of which the person was found guilty is punishable as provided in Section 83A(3) of this Article:</p> <p>(i) where the offence is that provided in Section 83A(1), to the punishment of a fine (multa) of not less than forty-six thousand and five hundred and eighty-seven euro and forty-seven cents (46,587.47) and not more than one million and one hundred and sixty-four thousand and six hundred and eighty-six euro and seventy cents (1,164,686.70);</p> <p>(ii) where the offence is that provided in Section 83A(1), to the punishment of a fine (multa) of not less than thirty-four thousand and nine hundred and forty euro and sixty cents (34,940.60) and not more than one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (116,468.67).</p>
	Source	<i>Section 83A c.c.</i>
Netherlands 	Presence	YES (criminal fine)
	Amount	<p>(7) In the case of conviction of a legal person, a fine up to the maximum of the next highest category may be imposed if the fine category specified for the offence does not provide for an appropriate punishment.</p> <p>(8) The preceding subsection shall apply mutatis mutandis in the case of conviction of an unincorporated company, a partnership, a shipping company or a special purpose fund.</p>
	Source	<i>Section 23 c.c.</i>
Poland 	Presence	YES (non criminal fine)
	Amount	<p>A fine between 1,000 and 205,000,000 PLN but no more than up to 103% of the revenue generated in the tax year when the offence which is a ground for the collective entity's liability was committed.</p> <p>When adjudicating the fine the court shall consider in particular weight of irregularities in electing or supervising, the size of the advantages obtained or possible to obtain by the collective entity, its financial situation and social consequences of the penalty and an influence of punishment on further functioning of the collective entity.</p>
	Source	<i>Sections 7 and 10 Act on the Liability of Collective Entities for Acts Prohibited Under Penalty</i>

Portugal 	Presence	YES (criminal fine)
	Amount	<p>(1) The minimum and maximum limits of a fine applicable to legal persons and similar entities are determined by reference to the term of imprisonment provided for individuals.</p> <p>(2) One month of imprisonment shall, for legal persons and equivalent, 10 days of fine entities.</p> <p>(3) Whenever the penalty applicable to individuals is determined solely or alternatively a fine, shall apply to legal persons or entities treated the same fine days .</p> <p>(4) The penalty of fine is determined in days, according to the criteria set out in paragraph 1 of Article 71.</p> <p>(5) Each day of fine corresponds to an amount of (euro) 100 and (euro) 10,000, which the court decides according to the economic and financial situation of the convicted and their costs with workers being applicable paragraphs. 3 to 5 of Article 47.</p>
	Source	<i>Section 90B c.c.</i>
Romania 	Presence	YES (criminal fine)
	Amount	<p>(1) The fine consists in the amount of money the convicted legal person has to pay to the state.</p> <p>(2) The amount of the fine is calculated using a calculation system based on the concept of 'days-fine'. The monetary value of one 'day-fine' varies between 100 and 5,000 RON and the total amount of the fine is calculated by multiplying this value with the number of 'days-fine'. The number of 'day-fine' varies between 30 and 600.</p> <p>(3) The court decides on the number of 'days-fine' taking into account the general criteria for individualizing the penalties. The concrete value of one 'day-fine' is established taking into account the turnover of the legal person in question if it is a for-profit entity or the value of the assets of all other legal persons, as well as all the debts of the respective legal person.</p> <p>(4) The special limits of 'days-fine' are set between:</p> <p>a) 60 and 180 'days-fine', for crimes sanctioned uniquely by fines in accordance to the law;</p> <p>b) 120 and 240 'days-fine', for crimes sanctioned by imprisonment of not more than 5 years as unique sanction or as an alternative sanction to a fine;</p> <p>c) 180 and 300 'days-fine', for crimes sanctioned by imprisonment of not more than 10 years;</p> <p>d) 240 and 420 'days-fine', for crimes sanctioned by imprisonment of not more than 20 years;</p> <p>e) 360 and 510 'days-fine', for crimes sanctioned by imprisonment of over 20 years or life imprisonment;</p> <p>(5) When the crime was committed with a view to acquire a pecuniary benefit the special limits of 'days-fine' may be increased by a third provided that the general maximum limit set for fines is not exceeded. In the process of setting the fine the value of the pecuniary benefit obtained or sought is taken into account.</p>
	Source	<i>Section 137 c.c.</i>

Slovakia 	Presence	YES (criminal fine)⁷³
	Amount	[...] (2) The protection measures under paragraph 1 may not be imposed on a legal person whose financial circumstances as a debtor cannot be settled pursuant to the specific regulation governing insolvency proceedings, or where implementation of the protection measure will affect assets of the state or of the European Union, or the authorities of a foreign state or international public law organisations. It shall also not be imposed if this would result in an offence listed in paragraph 1 ceasing to be punishable through the barring of criminal proceedings or on the basis of effective regret. (3) The court may impose the confiscation of a sum of money of between EUR 800 and EUR 1,660,000. When setting the level of the confiscation of a sum of money, the court shall take account of the seriousness of the offence committed, the scope of the act, the benefit obtained, the harm caused, the circumstances under which the offence is committed and the consequences for the legal person. The court shall not impose the confiscation of a sum of money if it imposes a protection measure on the legal person concerning the confiscation of assets under Section 83b. [...]
	Source	<i>Section 83a c.c.</i>
Slovenia 	Presence	YES (criminal fine)
	Amount	(1) The fine which may be prescribed may not be less than 10,000 EUR or more than 1,000,000 EUR. (2) In the case of the legal person's criminal offence having caused damage to another's property, or of the legal person having obtained unlawful property benefit, the highest limit of the fine imposed may be 200 (two hundred) times the amount of such damage or benefit.
	Source	<i>Section 13 Liability of Legal Persons for Criminal Offences Act</i>
Spain 	Presence	YES (criminal fine)
	Amount	[...] (7) Penalties applicable to legal persons, that are all deemed serious, are as follows: a) Fine by quotas or proportional; [...]
	Source	<i>Section 33 c.c.</i>
United Kingdom 	Presence	YES (criminal fine)
	Amount	Determination by judge, based also on recommendations from the Sentencing Council Guidelines ⁷⁴
	Source	Sentencing Council Guidelines; jurisprudence

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Table 4.19 illustrates that all assessed MS have adopted some sort of fine, whether criminal or non-criminal, to sanction legal persons convicted of offences relating to participation in a criminal organisation in line with Article 6. The majority of MS (20) have adopted criminal fines as sanctions (Austria, Belgium, Croatia, the Czech Republic, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom), while other MS have resorted to administrative fines as an alternative (Bulgaria, Germany, Greece, Italy and Poland).




⁷³ Article 83a of the Slovakian criminal code refers to 'confiscation' as a protective measure, nonetheless the rules on the application of this measures recalls rather a fine than confiscation.


⁷⁴ For more details, see Sentencing Guidelines Council (2010).


Presence in the national legal system of other penalties


Table 4.20 summarises how MS legislation deals with the 'presence in the national legal system of other penalties' element. For each MS, excerpts from relevant legislative texts are given, with details of the source.



Table 4.20: Penalties for legal persons – penalties other than fines


Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Austria 	Presence						YES
	Type						Disgorgement of gains
	Source						<i>Section 20 StGB</i>
Belgium 	Presence		YES		YES	YES	YES
	Type		Temporary or permanent interdiction to exercise activities relevant to the scope of legal person		Winding-up	Temporary or permanent closure of establishments	Special confiscation Publication or diffusion of the sentence
	Source		<i>Sections 7bis and 36 c.c.</i>		<i>Sections 7bis and 35 c.c.</i>	<i>Sections 7bis and 37 c.c.</i>	<i>Sections 7bis, 37bis and 42 c.c.</i>
Bulgaria 	Presence						YES
	Type						Forfeiture of the benefit or its equivalent
	Source						<i>Section 83A, Administrative Infringements and Penalties Act</i>

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Croatia 		YES	YES		YES		YES
	Presence Type	Ban on obtaining of licenses, authorisations, concessions or subventions	Ban of performances of certain activities or transaction Ban on obtaining of licenses, authorisations, concessions or subventions Ban on transaction with beneficiaries of the national or local budgets		Termination of the legal person		Suspended sentence instead of the fine Confiscation
	Source	<i>Section 15, Act on the Responsibility of Legal Person for the Criminal Offences</i>	<i>Section 15, Act on the Responsibility of Legal Person for the Criminal Offences</i>		<i>Section 12, Act on the Responsibility of Legal Person for the Criminal Offences</i>		<i>Sections 13 and 15, Act on the Responsibility of Legal Person for the Criminal Offences</i>



Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Cyprus 		N/A					


Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Czech Republic 	Presence	YES	YES		YES		YES
	Type	Prohibition to perform public contracts, debarment from concession procedure or public procurement Prohibition to receive endowments (grants) and subsidies	Prohibition of activity		Dissolution		Confiscation Forfeiture of a thing or other asset value Publication of the judgment
	Source	<i>Section 15, Act No. 418/2011 Coll. on Criminal Liability of Legal Person and Proceedings against Them</i>	<i>Section 15, Act No. 418/2011 Coll. on Criminal Liability of Legal Person and Proceedings against Them</i>		<i>Section 15, Act No. 418/2011 Coll. on Criminal Liability of Legal Person and Proceedings against Them</i>		<i>Section 15, Act No. 418/2011 Coll. on Criminal Liability of Legal Person and Proceedings against Them</i>

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	Other
Estonia 	Presence						YES
	Type						Compulsory dissolution
	Source						<i>Section 46 c.c.</i>
Finland 	No other sanctions foreseen						


Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
France 	Presence	YES	YES	YES	YES	YES	YES
	Type	<p>Temporary (max 5 years) or permanent disqualification from public tenders</p> <p>Temporary (max. 5 years) or permanent prohibition to make a public appeal for funds</p>	<p>Temporary (max.5 years) or permanent prohibition to exercise, directly or indirectly one or more social or professional activity</p>	<p>Temporary (max. 5 years) placement under judicial supervision</p>	<p>Dissolution</p>	<p>Temporary (max. 5 years) or permanent closure of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question</p>	<p>Temporary (max. 5 years) prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards</p> <p>Confiscation of the assets, whatever their nature, movable or immovable which was used or</p>


							intended for the commission of the offence, or of the assets, whatever their nature, movable or immovable which is the product of it
							Confiscation of all or part of assets, whatever their nature, movable or immovable, severally or jointly owned.
	Source	<i>Section 131-39 c.c.</i>	<i>Section 131-39 c.c.</i>	<i>Section 131-39 c.c.</i>	<i>Section 131-39 c.c.</i>	<i>Section 131-39 c.c.</i>	Publication of the decision
							<i>Sections 131-39 and 450-5 c.c.</i>

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Germany 	Presence						YES
	Type						Confiscation
	Source						<i>Section 73 c.c.</i>
Greece 	Presence	YES	YES				
	Type	Temporary (between 1 month and 2 years) or permanent exclusion from public procurement, aid, grants, works, service and supply contracts, advertisements and government and broader public-sector competitions	Temporary (between 1 month and 2 years) or permanent withdrawal or suspension of the business licence or a ban on business activities Ban on certain business activities or the establishment of branches or increases in share capital for the same period of time				
	Source	<i>Section 41, Law 3251/2004</i>	<i>Section 41, Law 3251/2004</i>				


Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Hungary 	Presence Type	YES Temporary (between 1 and 3 years) prohibition of collect deposits based on a public call for tenders, participate in public procurement procedures, enter into concession contracts, receive funding from central or local government budgets, earmarked state funds and or targeted support from foreign states, the European Community or other international organisations Immediate rescission of contract concluded with legal entity under the public procurement procedure, rescission of			YES Winding up		YES Temporary (between 1 and 3 years) prohibition of be classified as a public benefit organization and pursue any other activities that have been prohibited by the court. The procedure involving classification as a public benefit organisation is considered terminated, and the legal entity is considered deleted from the registry of public benefit organisations




		<p>concession contract concluded with legal entity</p> <p>The procedure involving the granting of subsidies is considered terminated, and any subsidy received in conjunction with the criminal act shall be repaid.</p>					
	Source	<p><i>Sections 3 and 5, Act 104 of 2001 on Measures Applicable to Legal Entities Under Criminal Law</i></p>			<p><i>Sections 3 and 4, Act 104 of 2001 on Measures Applicable to Legal Entities Under Criminal Law</i></p>		<p><i>Sections 3 and 5, Act 104 of 2001 on Measures Applicable to Legal Entities Under Criminal Law</i></p>



Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Ireland 		No other sanctions foreseen					

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Italy 	Presence	YES	YES	YES			YES
	Type	Temporary (between 3 months and 2 years) suspension or termination of the authorisations, permits, concessions functional to the commission of the offence; Permanent or temporary (between 3 months and 2 years) prohibition to conclude contracts with the public administration, excluding those to obtain a public service Temporary	Permanent or temporary (between 3 months and 2 years) prohibition to exercise body's activity Temporary (between 3 months and 2 years) prohibition to advertise goods or services	Judicial supervision			Confiscation Publication of the sentence


		(between 3 months and 2 years) exclusion from benefits, funds, contributions and possible termination of those already received					
	Source	<i>Sections 9, 13 and 16, Legislative Decree 231 of 8 June 2001</i>	<i>Sections 9, 13 and 16, Legislative Decree 231 of 8 June 2001</i>	<i>Section 15, Legislative Decree 231 of 8 June 2001</i>			<i>Sections 9, 18 and 19, Legislative Decree 231 of 8 June 2001</i>


Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Latvia 	Presence	YES			YES		YES
	Type	Temporary (between 1 and 10 years) deprivation of specific rights or permits or the determination of such prohibition, which prevents a legal person from receive State support or assistance, participate in a State or local government procurement procedure			Compulsory termination of the activities of a legal person (liquidation)		Confiscation of property Temporary (between 1 and 10 years) deprivation of specific rights or permits or the determination of such prohibition, which prevents a legal person from exercising certain rights, to perform a specific type of activity.
	Source	<i>Sections 70.2 and 70.4 c.c.</i>			<i>Sections 70.2 and 70.3 c.c.</i>		<i>Sections 70.2, 70.4 and 70.5 c.c.</i>



Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Lithuania 	Presence		YES		YES	YES	
	Type		Temporary (between 1 year and 5 years) prohibition from engaging in certain activities		Liquidation	Temporary (between 1 year and 5 years) or permanent order to close a certain or all division of the legal entity	
	Source		<i>Sections 43 and 52 c.c.</i>		<i>Sections 43 and 53 c.c.</i>	<i>Sections 43 and 52 c.c.</i>	
Luxembourg 	No other sanctions foreseen						
Malta 	No other sanctions foreseen						



Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Netherlands 	Presence						YES
	Type						All punishments that are imposed on natural persons, with the exception of a detention
	Source						Section 51 c.c.
Poland 	Presence	YES	YES				YES
	Type	<p>Temporary (between 1 and 5 years) ban on using grants, subsidies, or other forms of financial support originating from public funds</p> <p>Temporary (between 1 and 5 years) prohibition of access to public resources</p> <p>Temporary (between 1 and 5 years) ban on using the aid provided by the international organisations the Republic of Poland</p>	<p>Temporary (between 1 and 5 years) ban on promoting or advertising the business activities it conducts, the products it manufactures or sells, the services it renders, or the benefits it grants</p> <p>Temporary (between 1 and 5 years) ban on pursuing the indicated prime or incidental business</p>				<p>Forfeiture of the objects coming, even indirectly, from the prohibited act, or objects used or designated for use as the tools of perpetrating the prohibited act, the financial gains originating, even indirectly, from the prohibited act, the amount equivalent to the objects or financial benefit coming, even indirectly, from the prohibited act</p>

		holds membership in Temporary (between 1 and 5 years) ban on applying for public procurement contracts	activities repealed				Publication of the sentence
	Source	<i>Section 9.1, Act on the Liability of Collective Entities for Acts Prohibited Under Penalty</i>	<i>Section 9.1, Act on the Liability of Collective Entities for Acts Prohibited Under Penalty</i>				<i>Sections 8.1 and 9.1, Act on the Liability of Collective Entities for Acts Prohibited Under Penalty</i>

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Portugal 	Presence	YES	YES	YES	YES	YES	YES
	Type	Temporary (between 1 and 5 years) ineligibility public to grants, subsidies or incentives	Temporary (between 1 and 5 years) prohibition of certain contracts or enter into contracts with certain entities Temporary (between 3 months and 5 years) or permanent prohibition of certain activities	Order by the court to adopt certain measures, including those illicit activity needed to stop or avoid its consequences Temporary (between 1 and 5 years) judicial supervision instead of a fine	Dissolution	Temporary (between 3 months and 5 years) or permanent closure of establishment	Publication of the sentence Admonition instead of a fine Good behaviour caution instead of a fine
	Source	<i>Sections 90A and 90I c.c.</i>	<i>Sections 90A, 90H and 90J c.c.</i>	<i>Sections 90A, 90E and 90G c.c.</i>	<i>Sections 90A and 90F c.c.</i>	<i>Sections 90A and 90L c.c.</i>	<i>Section 90A, 90C, 90D and 90M c.c.</i>

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Romania 	Presence	YES	YES	YES	YES	YES	YES
	Type	Prohibition to directly or indirectly take part in procedures for the attribution of public procurement contracts	Permanent or temporary (up to 3 months) suspension to perform the activity the realisation of which the crime was committed (not applicable to public institutions, to political parties, to unions, to business associations, to religious organisations or to organisations that belong to national minorities)	Temporary (between 1 and 3 years) judicial supervision (not applicable to public institutions, to political parties, to unions, to business associations, to religious organisations or to organisations that belong to national minorities)	Dissolution (not applicable to public institutions, to political parties, to unions, to business associations, to religious organisations or to organisations that belong to national minorities)	Closure of one or several offices in which the crime was committed (not applicable to legal persons that perform their activities in the media business)	Publication of the sentence
	Source	Section 143 c.c.	Sections 140 and 141 c.c.	Section 144 c.c.	Section 139 and 141 c.c.	Section 142	Section 145 c.c.

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Slovakia 	Presence						YES
	Type						Confiscation of a property
	Source						source: Section 83b c.c.
Slovenia 	Presence		YES		YES		YES
	Type		Prohibition of a specific commercial activity		Winding-up		Confiscation of property Suspended sentence instead of a fine Publication of the judgment
	Source		<i>Section 20, Liability of Legal Persons for Criminal Offences Act</i>		<i>Section 15, Liability of Legal Persons for Criminal Offences Act</i>		<i>Sections 14, 17 and 19 Liability of Legal Persons for Criminal Offences Act</i>

Member State	Presence/type/source	Penalties for legal persons other than fines					
		<i>exclusion from entitlement to public benefits or aid</i>	<i>temporary or permanent disqualification from the practice of commercial activities</i>	<i>placing under judicial supervision</i>	<i>judicial winding-up</i>	<i>temporary or permanent closure of establishments which have been used for committing the offence</i>	<i>Other</i>
Spain 	Presence	YES	YES		YES	YES	YES
	Type	Temporary (up to 15 years) barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives	Temporary (up to 5 years) Suspension of the activities Temporary (up to 15 years) or permanent prohibition to carry out the activities through which it has committed, favoured or concealed the felony in the future		Dissolution	Temporary (up to 5 years) closure of its premises and establishments	Temporary (up to 15 years) judicial intervention to safeguard the rights of the workers or creditors
	Source	<i>Section 33 c.c.</i>	<i>Section 33 c.c</i>		<i>Section 33 c.c</i>	<i>Section 33 c.c</i>	<i>Section 33 c.c</i>
United Kingdom 	No other sanctions						

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

In addition to the existence of fines, many MS have also introduced alternative sanctions for legal persons convicted of offences relating to participation in a criminal organisation, as shown by Table 4.20. All but five of the MS (Finland, Ireland, Luxembourg, Malta and the United Kingdom) have some combination of alternative sanctions in their legal system.

The most widely used sanctions are:

- Exclusion from entitlement to public benefits or aid (Croatia, the Czech Republic, France, Greece, Hungary, Italy, Latvia, Poland, Portugal, Romania and Spain).
- Temporary or permanent disqualification from the practice of commercial activities (Belgium, Croatia, the Czech Republic, France, Greece, Italy, Lithuania, Poland, Portugal, Romania, Slovenia and Spain).
- Judicial winding-up (Belgium, Croatia, the Czech Republic, France, Hungary, Lithuania, Portugal, Romania, Slovenia and Spain).

Other possible sanctions were less taken up by MS, including judicial supervision (France, Italy, Portugal and Romania) and the temporary or permanent closure of establishments which have been used for committing the offence (Belgium, France, Lithuania, Portugal, Romania and Spain). These sanctions are generally only temporary rather than permanent.

Finally, 17 MS have adopted other sanctions not suggested by Article 6 of the Framework Decision, focusing in particular on the use of confiscation, forfeiture and the publication of judgments (Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain).

4.8.3. Transposition assessment of Article 6 of the Framework Decision

The transposition of the legal minimum standard set in Article 6 of the Framework Decision can be assessed by taking into account the presence in MS legal systems of criminal or non-criminal fines against legal persons for offences relating to participation in a criminal organisation, as well as possible penalties other than fines, as outlined above in Sections 4.8.1 and 4.8.2.

Only the first element is obligatory and therefore has to be present in a given MS, while the second one is optional.

Based on the information presented in the previous sub-section, Table 4.21 graphically illustrates MS transposition of Article 6 of the Framework Decision, in a yes/no format.

Table 4.21: MS transposition of the standard set in Article 6 of Framework Decision 2008/841/JHA

Member State	Presence in the national legal system of criminal or non-criminal fines for the offences from Article 2 committed by legal persons	Presence in the national legal system of penalties other than fines for the offences from Article 2 committed by legal persons
Austria 	YES	YES
Belgium 	YES	YES
Bulgaria 	YES	YES
Croatia 	YES	YES
Cyprus 	N/A	N/A
Czech Republic 	YES	YES
Estonia 	YES	YES
Finland 	YES	NO
France 	YES	YES
Germany 	YES	YES
Greece 	YES	YES
Hungary 	YES	YES
Ireland 	YES	NO
Italy 	YES	YES

Latvia 	YES	YES
Lithuania 	YES	YES
Luxembourg 	YES	NO
Malta 	YES	NO
Netherlands 	YES	YES
Poland 	YES	YES
Portugal 	YES	YES
Romania 	YES	YES
Slovakia 	YES	YES
Slovenia 	YES	YES
Spain 	YES	YES
United Kingdom 	YES	NO

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

The transposition of Article 6 of the Framework Decision varies significantly between different MS. All assessed MS have introduced fines (criminal or non-criminal) and/or alternative sanctions in line with Article 6.

Those MS which have introduced administrative rather than criminal fines (Bulgaria, Germany, Greece, Italy and Poland) also rely on additional alternative sanctions against legal persons, some of which were suggested in Article 6, but also others such as confiscation or publication of judgements (Germany, Italy and Bulgaria).

Of the MS that have adopted criminal fines, five do not rely on any other alternative sanctions (Finland, Ireland, Luxembourg, Malta and the United Kingdom), but most use them in combination with a range of other sanctions. France in particular has introduced criminal fines against legal persons in relation to criminal organisations, but also relies on all five possible alternative sanctions listed in Article 6, as well as an extensive list of other possible sanctions.

4.9. Jurisdiction for offences relating to participation in a criminal organisation (Article 7)

4.9.1. Standard and elements – jurisdiction

The sixth 'legal minimum standard' introduced by the Articles of the Framework Decision relates to the jurisdiction for offences relating to participation in a criminal organisation. It is outlined in Article 7 of the Framework Decision and reads as follows:

'1. Each Member State shall ensure that its jurisdiction covers at least the cases in which the offences referred to in Article 2 were committed:

- (a) in whole or in part within its territory, wherever the criminal organisation is based or pursues its criminal activities;
- (b) by one of its nationals; or
- (c) for the benefit of a legal person established in the territory of that Member State.

A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in (b) and (c) where the offences referred to in Article 2 are committed outside its territory.

2. When an offence referred to in Article 2 falls within the jurisdiction of more than one Member State and when any one of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders, with the aim, if possible, of centralising proceedings in a single Member State.

To this end, Member States may have recourse to Eurojust or any other body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Special account shall be taken of

the following factors:

- (a) the Member State in the territory of which the acts were committed;
- (b) the Member State of which the perpetrator is a national or resident;
- (c) the Member State of the origin of the victims;
- (d) the Member State in the territory of which the perpetrator was found.

3. A Member State which, under its law, does not as yet extradite or surrender its own nationals shall take the necessary measures to establish its jurisdiction over and, where appropriate, to prosecute the offence referred to in Article 2, when committed by one of its nationals outside its territory.

4. This Article shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation.'

The provision, which relates back to Article 2 of the Framework Decision in relation to the offences targeted, has a twofold aim:

- To set clear rules regarding MS jurisdiction over offences relating to participation in a criminal organisation (paragraphs 1 and 3).
- To set rules concerning the judicial cooperation in the prosecution of offences related to Article 2 of the Framework Decision in case of transnational cases (paragraph 2).

In addition, paragraph 4 includes a safeguard clause that guarantees in any case the exercise of jurisdiction in criminal matters by MS. Such a paragraph does not require transposition and will not be examined.

a) Rules about MS jurisdiction (paragraphs 1 and 3)

In order to map MS criminal law with reference to paragraph 7.1 of the Framework Decision and assess its transposition, the following section will examine the issue of jurisdiction in relation to offences which were:

- Committed in whole or in part within its territory, wherever the criminal organisation is based or pursues its criminal activities, or
- Committed by one of its nationals, or
- Committed for the benefit of a legal person established in the MS territory.

In addition, to map MS criminal law with reference to paragraph 7.3 of the Framework Decision (that is to be read together with the requirement of Article 7.1b) and assess its transposition, the following section will examine if a MS that does not extradite or surrender its own nationals it:

- Takes the necessary measures to establish its jurisdiction over and, where appropriate, to prosecute the offence referred to in Article 2, when committed by one of its nationals outside its territory.

b) Rules about judicial cooperation and coordination (paragraph 2)

As for judicial cooperation among MS in cases of potential jurisdiction conflicts, it should be pointed out that the Framework Decision imposes a 'behavioural obligation', i.e. they 'shall cooperate in order to decide which of them will prosecute the offenders'. In other words MS do not have to transpose any provision to comply with the Framework Decision, but can use national and/or EU tools to cooperate, thus complying with the Framework Decision. Thus, due to the nature of Article 7.2, its mapping and transposition assessment is not possible from a legislative point of view.

In reaction to the obligation for cooperation and coordination of procedures, all MS participate in EU relevant bodies (especially Eurojust) and envisage cooperation mechanisms that can make it possible to follow this behavioural obligation.

4.9.2. Mapping MS legislation – jurisdiction

Table 4.22 summarises how MS legislation deals with all three elements mentioned in Article 7.1 and 7.3 of the jurisdiction for offences relating to participation in a criminal organisation. For each MS, excerpts from relevant legislative texts are given, with details of the source.

Table 4.22: Jurisdiction over offences relating to participation in a criminal organisation

Member State	Territorial jurisdiction over	Personal jurisdiction over	
	<i>offences committed in whole or in part within its territory</i>	<i>offences committed by one of its nationals</i>	<i>offences committed for the benefit of a legal person established in the MS</i>
Austria 	YES	YES	NO
	<i>Section 62 c.c.</i>	<i>Sections 64.1 and 65 c.c.</i>	<i>n.a.</i>
Belgium 	YES	YES	NO
	<i>Section 3 c.c.</i>	<i>Section 7 Code of Criminal Procedure</i>	<i>n.a.</i>
Bulgaria 	YES	YES	NO
	<i>Section 3 c.c.</i>	<i>Section 4 c.c.</i>	<i>n.a.</i>
Croatia 	YES	YES	NO
	<i>Section 13 c.c.</i>	<i>Section 14 c.c.</i>	<i>n.a.</i>
Cyprus 	YES	YES	NO
	<i>Section 5 c.c.</i>	<i>Section 5 c.c.</i>	<i>n.a.</i>
Czech Republic 	YES	YES	YES
	<i>Section 4 c.c.</i>	<i>Section 6 c.c.</i>	<i>Section 8 c.c.</i>
Estonia 	YES	YES	NO
	<i>Section 6 c.c.</i>	<i>Section 7 c.c.</i>	<i>n.a.</i>
Finland 	YES	YES	NO
	<i>Chapter 1, Section 1 c.c.</i>	<i>Chapter 1, Section 6 c.c.</i>	<i>n.a.</i>
France 	YES	YES	NO
	<i>Section 113-2 c.c.</i>	<i>Section 113-6 c.c.</i>	<i>n.a.</i>
Germany 	YES	YES	NO
	<i>Section 3 c.c.</i>	<i>Section 7 c.c.</i>	<i>n.a.</i>
Greece 	YES	YES	NO
	<i>Section 5 c.c.</i>	<i>Section 6 c.c.</i>	<i>n.a.</i>
Hungary 	YES	YES	NO
	<i>Section 3 c.c.</i>	<i>Section 3 c.c.</i>	<i>n.a.</i>
Ireland 	YES	YES	YES
	<i>Section 71 and 71A Criminal Justice Act 2006, as amended in 2009</i>	<i>Section 74 Criminal Justice Act 2006, as amended in 2009</i>	<i>Section 74 Criminal Justice Act 2006, as amended in 2009</i>
Italy 	YES	YES	YES
	<i>Section 6 c.c.</i>	<i>Section 9 c.c.</i>	<i>Section 4 Legislative Decree 231, 8 June 2001</i>

Latvia 	YES	YES	NO
	<i>Section 2 c.c.</i>	<i>Section 4 c.c.</i>	<i>n.a.</i>
Lithuania 	YES	YES	NO
	<i>Section 4 c.c.</i>	<i>Section 5 c.c.</i>	<i>n.a.</i>
Luxembourg 	YES	YES	NO
	<i>Section 3 c.c.</i>	<i>Section 5 Code of Criminal Procedure</i>	<i>n.a.</i>
Malta 	YES	YES	NO
	<i>Sections 5 and 83A c.c.</i>	<i>Sections 5 and 83A c.c.</i>	<i>n.a.</i>
Netherlands 	YES	YES	YES
	<i>Section 2 c.c.</i>	<i>Sections 5 and 5a c.c.</i>	<i>Sections 5 and 5a c.c.</i>
Poland 	YES	YES	NO
	<i>Section 5 c.c.</i>	<i>Section 109 c.c.</i>	<i>n.a.</i>
Portugal 	YES	YES	NO
	<i>Section 4 c.c.</i>	<i>Section 5 c.c.</i>	<i>n.a.</i>
Romania 	YES	YES	NO
	<i>Section 8 c.c.</i>	<i>Section 10 c.c.</i>	<i>n.a.</i>
Slovakia 	YES	YES	NO
	<i>Section 3 c.c.</i>	<i>Section 4 c.c.</i>	<i>n.a.</i>
Slovenia 	YES	YES	NO
	<i>Section 10 c.c.</i>	<i>Section 12 c.c.</i>	<i>n.a.</i>
Spain 	YES	YES	NO
	<i>Section 23 Ley orgánica del poder judicial</i>	<i>Section 23 Ley orgánica del poder judicial</i>	<i>n.a.</i>
United Kingdom 	YES	YES	NO
	<u>conspiring in the UK to commit a crime abroad:</u> <i>Section 1A of the Criminal Law Act 1997</i> <u>conspiring abroad to commit a crime in the UK: jurisdiction always present (common law principle)</u>	<u>conspiring in the UK to commit a crime abroad:</u> <i>Section 1A of the Criminal Law Act 1997</i>	<i>n.a.</i>

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

As Table 4.22 shows, all MS have adopted jurisdiction over offences committed in whole or in part within their territory, as well as over offences committed by one of their nationals, according to the terms of Article 7 of the Framework Decision. However, in terms of the jurisdiction over offences committed for the benefit of a legal person established in the MS, only four MS have adopted jurisdiction (the Czech Republic, Ireland, Italy and the Netherlands). The latter does not mean lack of transposition of Article 7.1 of the Framework Decision, as the three criteria are to be read as alternatives.







In reaction to the obligation for cooperation and coordination of procedures all MS participate in relevant EU bodies (especially Eurojust) and envisage cooperation mechanisms.




4.9.3. Transposition assessment of Article 7 of the Framework Decision





The transposition of the legal minimum standard set out in Article 7 of the Framework Decision can be assessed by taking into account the rules regarding territorial and personal jurisdiction for offences relating to criminal organisation in each MS, according to the categories outlined in the previous sections. Since all MS prosecute offences of Article 2 in relation to their nationals when committed outside their territory, the requirement of Article 7.3 is also satisfied.

Based on information presented in the previous sub-section, Table 4.23 graphically illustrates MS transposition of Article 7 of the Framework Decision, in a yes/no format.

Table 4.23: MS transposition of the standard set in Article 7 of Framework Decision 2008/841/JHA

Member State	Jurisdiction over offences relating to participation in a criminal organisation committed a) in whole or in part within its territory, wherever the criminal organisation is based or pursues its criminal activities; or b) by one of its nationals; or c) for the benefit of a legal person established in the MS territory
Austria 	YES
Belgium 	YES
Bulgaria 	YES
Croatia 	YES
Cyprus 	YES
Czech Republic 	YES

Estonia 	YES
Finland 	YES
France 	YES
Germany 	YES
Greece 	YES
Hungary 	YES
Ireland 	YES
Italy 	YES
Latvia 	YES
Lithuania 	YES
Luxembourg 	YES
Malta 	YES
Netherlands 	YES
Poland 	YES
Portugal 	YES
Romania 	YES

<p>Slovakia</p> 	YES
<p>Slovenia</p> 	YES
<p>Spain</p> 	YES
<p>United Kingdom</p> 	YES

Source: Elaboration of information drawn from legal texts validated by national experts through their replies to questionnaires and other secondary sources.

Findings

Perhaps by virtue of the conditional nature of Article 7's recommendations, its transposition into MS legislation appears to have been very successful. Although the more far-reaching option of jurisdiction over offences committed for the benefit of a legal person established in the MS territory has only been adopted by four MS (the Czech Republic, Ireland, Italy and the Netherlands), the recognition by all assessed MS of jurisdiction over offences relating to participation in a criminal organisation committed in whole or in part within its territory as well as those committed by one of its nationals shows the ease with which this particular article has been transposed.

4.10. Absence of dependence on a report or accusation by victims (Article 8)

The seventh 'minimum legal standard' introduced by the Articles of the Framework Decision relates to the dependence of prosecutions for offences relating to criminal organisations on reports or accusations made by victims of such offences. It is outlined in Article 8 of the Framework Decision and reads:

Member States shall ensure that investigations into, or prosecution of, offences referred to in Article 2 are not dependent on a report or accusation made by a person subjected to the offence, at least as regards acts committed in the territory of the Member State.

The provision relates back to Article 2 of the Framework Decision and therefore requires MS to ensure that a report/accusation from a victim is not needed to conduct investigations and prosecutions for offences relating to participation in a criminal organisation.

No table can be produced since in this case, since there is an *a contrario* reasoning. As remarked on by national experts, MS legislation envisages that all crimes shall be prosecuted *ex officio* **apart from some exceptions** (e.g. offences against honour such as defamation) and this is not the case with crimes related to Article 2 of the Framework

Decision. As a consequence, offences under Article 2 are prosecuted *ex officio* in all MS, precisely because they are not included in the list of crimes (and the related criminal norms) that can be prosecuted only after the report/accusation is made by the victim(s).

Findings

With reference to this provision, all the national experts maintained that such offences would be prosecuted *ex officio* (i.e. irrespective of the wishes or participation of the victim) in their states.

It either stems directly from the national legislation that such a declaration is not needed for the prosecution purposes or it can be deduced from the absence of a specific condition rendering prosecution dependant from such a declaration.

As a consequence, all 26 assessed MS (out of 28) appear to have successfully transposed this standard: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom.

4.11. Key findings

This section presents the key findings drawn from the mapping and transposition assessment of the Framework Decision 2008/841/JHA, article by article. Article 2 (and Article 1):

- The general **level of transposition of Article 2** is, overall, **very satisfactory**. All MS, with the exception of DK and SE,⁷⁵ have transposed the key elements of the Framework Decision and introduced a self-standing offence relating to at least one of the two types of conduct from Article 2. However, the majority of MS were compliant with the Framework Decision before it entered into force and all MS have some minor discrepancies.
- Due to the fact that DK and SE lack compliance with the basis offence of Article 2, those MS are not further assessed for all provisions that are based on Article 2. For this reason, unless stated otherwise, **'all assessed MS' means all MS apart from DK and SE**.
- Within this good level of transposition, some **minor discrepancies** remain in relation to certain specific elements of the offences. France, Hungary and Slovakia define a criminal organisation according to its commission of predicate offences punishable by 5 years imprisonment or more, despite the fact that Article 1 explicitly states that the threshold should be 4 years. Estonia and Lithuania also alter the definition of criminal organisation by targeting only organisations of permanent duration, contrary to the terms of the Framework Decision.
- In addition, **approximation** of national legislation on offences relating to participation in a criminal organisation between MS legislation is in practice **relatively low**. While remaining within the limits set by the Framework

⁷⁵ As mentioned in Section 4.4, DK and SE have not implemented any of the measures of the Framework Decision in their legal system. As a result, they have been left out of this assessment, although their alternative legal measures to fight organised crime are examined in Chapter 5.

Decision, MS have adopted **disparate definitions of criminal organisations**, from the very broad, as in the case of Germany and the Netherlands,⁷⁶ to the very precise and narrow, as with Croatia and Lithuania.⁷⁷ Although those definitions all match the requirements set out in the Framework Decision, such disparity could lead to practical difficulties in their application (see further conclusions in Chapter 9).

- Approximation between MS legislation is further hindered by the possibility granted by the Framework Decision of choice between the participation in a criminal organisation model (Article 2a of the Framework Decision) and conspiracy to commit criminal offences model (Article 2b of the Framework Decision) (or both).

Article 3, par. 1 (penalties)

- **All 26 assessed MS are compliant with the Framework Decision** in relation to the minimum threshold required (the minimum level of the upper threshold of 2 years of imprisonment).
- At the same time it must be noted that **8 MS (BE, CY, CZ, DE, IE, LV, LU, UK) allow for the alternative possibility of the imposition of a fine**. This means that it is possible that the penalty of imprisonment is not applied in practice. This fact does not mean that the possibility to impose imprisonment is not at disposal of a national judge in line with the Framework Decision. As a consequence, these MS partially transpose the Framework Decision provisions.
- In any case (also when imprisonment is, in principle, the only penalty foreseen) a national judge could, within the bounds of judicial discretion, convert it into any other penalty (e.g. community service or fine) in line with national rules. Also, approximation of national legislation on penalties for offences relating to participation in a criminal organisation seems far from being reached, since imprisonment penalties vary a lot from one MS to another. So, for example, in Finland the maximum penalty is up to 2 years, while in Lithuania it is up to 15 years.
- The latter could be partly due to the fact that some MS distinguish many participation conducts (e.g. founding, leading role, participation, recruitment, participation in the legal activities of a criminal organisation), while others do not. So, for example, Bulgaria, Greece and Lithuania differentiate among conducts and envisage high imprisonment penalties; while Austria and Finland do not differentiate much and envisage low penalties for all conducts.

Article 3, par. 2 (aggravating circumstances)

- Only 11 MS made a specific reference in the national legislation to an aggravation of predicate offences due to the fact that they were committed in

⁷⁶ '[...] an organization, the objectives or activity of which are directed towards the commission of crimes[...]' and '[...] organisation which has as its purpose the commission of serious offences [...]'.

⁷⁷ Croatian criminal law states that 'a criminal association shall be made up of three or more persons acting in concert with the aim of committing one or more criminal offences that are punishable with imprisonment for a term longer than three years and shall not include an association randomly formed for the immediate commission of one criminal offence,' whereas Lithuanian criminal law states that 'a criminal association shall be one in which three or more persons linked by permanent mutual relations and division of roles or tasks join together for the commission of a joint criminal act – one or several serious and grave crimes. An anti-state group or organisation and a terrorist group shall be considered equivalent to a criminal association'.

the framework of a criminal organisation (17 MS did not: AT, BE, BG, CY, FR, DE, DK, EL, IT, LV, LU, MT, NL, PT, ES, SE, UK).⁷⁸

- This may be the consequence of a potential conflict between Articles 2 and 3 of the Framework Decision. Most MS have followed Article 2 in introducing a self-standing offence to criminalise participation to a criminal organisation, which is defined by the commission of certain offences. Yet Article 3 additionally requires MS to aggravate the sentence for offences committed within the framework of a criminal organisation.
- The question arises of how to ensure the application of both provisions. It can happen that both offences (predicate offences and the offence of Article 2) are prosecuted in the course of the same trial – or they could be prosecuted in separate proceedings. In such cases, one must take into account that the obligations stemming from both provisions (Article 2 and 3.2 of the Framework Decision) do not run the risk of infringing the principle of *ne bis in idem*, which guarantees that the same cause of action cannot twice form the basis for legal action. The risk of *bis in idem* is due to the possibility that two separate convictions can take place for different conduct, namely one for the offence in relation to participation in a criminal organisation and the other for a specific predicate offence, e.g. drug trafficking. In the second case the fact that the framework of a criminal organisation is raised constitutes only the context of another offence and not its core element (i.e. there is no *idem*).
- As explained above even though this issue does not constitute the infringement of the *ne bis in idem* principle there may be certain doubts on how those provisions need to be applied in practice (see Chapter 6 in relation to practice).
- It is worth mentioning that MS provide, despite no obligation stemming from the Framework Decision in this regard, certain aggravating circumstances in relation to the offence of organised crime (and not to predicate offences as in Article 3.2). Those MS aggravate the offence of Article 2 in relation to certain organisational features and circumstances such as use of violence or weapons by a criminal organisation.⁷⁹
- In addition, the introduction of aggravating circumstances is unlikely to be transposed in MS which have adopted a conspiracy offence under Article 2b of the Framework Decision, since the system will already be relying on a similar mechanism to criminalise such behaviour, and might not have a working definition of criminal organisation, despite its being in line with the Framework Decision. This is more specifically the case in the UK, where the sole offence introduced is one of conspiracy, and the aggravating circumstances do not stem from written law but can only be applied through judicial discretion.

Article 4 (special circumstances)

- All 26 assessed MS are compliant with the Framework Decision.

⁷⁸ It should be stressed that the obligation stemming from Article 3(2) is not meant for the offence of conspiracy in OC (Article 2(b)) due to the fact that the nature of this offence does not relate to predicate offences but punishes the mere agreement irrespectively of the specific offences that may be committed in practice. For this reason the UK being the only MS that transposed solely Article 2(b) is not assessed against Article 3(2). For other MS providing for the conspiracy offence the assessment in this case is carried out only in relation to the Article 2(a), namely the offence of participation in a criminal organisation.

⁷⁹ These alternative methods of criminalisation are examined in Chapter 5.

- This is due to the fact that the provision is not obligatory (Article 4 states that MS **'may** take the necessary measures to ensure that the penalties referred to in Article 3 may be reduced or that the offender may be exempted').
- It should be noted, however, that despite the optional nature of Article 4, **all MS have adopted some form of special circumstances** for the reduction of penalties for offences relating to participation in a criminal organisation or exempting the offender from those penalties.

Article 5 (liability of legal persons)

- **All assessed MS**, with the exception of Cyprus, **envisage criminal or non-criminal liability for legal persons** involved in offences relating to participation in a criminal organisation.
- The transposition is satisfactory in its scope of application, since in all MS the bodies that can be held liable are all entities having legal personality under the applicable national law, with the (possible) exception of state and public bodies, or international organisations.
- As for leading positions within a legal person, 10 MS (EE, FR, GR, LV, LT, LU, MT, PT, SK, ES) envisage the liability of legal persons arising from all the three types of leading positions identified in the Framework Decision (i.e. individuals with power of representation; individuals with authority to take decisions; individuals with authority to exercise control), 2 MS (DE, UK) envisage the liability of legal persons arising from two out of the three leading positions identified in the Framework Decision, and 13 MS (AT, BE, BG, HR, CZ, FI, HU, IE, IT, NL, PL, RO, SL) extend even the scope of liability of legal persons beyond the conduct of the three leading positions to other individuals (e.g. persons who have *de facto* the control of a legal person, including employees at a low level).
- Less satisfactory is the transposition of the part of the Article requiring MS to take the necessary measures to ensure that such liability also arises for lack of supervision or control by persons having a leading position; in 8 MS (BE, BG, HR, EE, FR, LU, MT, RO) this element was not transposed.
- Of the 25 MS that envisage criminal or non-criminal liability for legal persons (all except CY, DK, SE), the national legislation of 24 of those MS (all apart from DE) expressly mentions that no prejudice arises from proceedings against legal persons to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences relating to participation in a criminal organisation. However the national legislation of 2 MS (PL, HU) indicates that proceedings against legal persons can be launched only following the conviction of the natural person for the same offence. Such an approach may in practice restrict holding legal persons liable for offences.

Article 6 (penalties for legal persons)

- **All assessed MS** (CY is not assessed due to the fact that the liability for legal persons is not applicable in this MS to the offence of Article 2) **envisage criminal or non-criminal penalties for legal persons.**
- In relation to the optional 'other penalties', including the non-exhaustive list enumerated in the provision all MS apart from 5 (FI, IE, LU, MT, UK) also

provide measures other than fines. Those alternative measures principally include forfeiture/confiscation of entity's assets and/or publication of the conviction.

- It should be stressed that in many cases **MS go much beyond the provisions of the Framework Decision** providing numerous additional measures which are not obligatory under the Framework Decision. France in particular has adopted all possible measures, ranging from criminal fines in accordance with Article 6's obligatory provision, to alternative measures contained in the same provision, as well as a wide range of other alternative measures (including confiscation, publication, etc.)

Article 7 (jurisdiction)

- **All 26 assessed MS** envisage the required standards under Article 7 in terms of jurisdiction rules as well as cooperation in cross-border investigations.
- While all assessed MS establish their own jurisdiction in whole or in part within their territory and over offences committed by their nationals, whenever the criminal organisation is based or pursues its criminal activities, only 4 MS (CZ, IE, IT, NL) extend their jurisdiction to offences committed for the benefit of a legal person established in the territory of that MS.
- With regard to restricting the jurisdiction of the latter two situations (Article 7(1)(b) and (c) to specific circumstances applying when the offences are committed outside their territory **no MS decided to have such a recourse.**

Article 8 (absence of requirement of a report or accusation by victims)

- In accordance with the obligation set out in Article 8, **all assessed MS** ensure that relevant investigations do not depend on a report or accusation made by a person subjected to the offence.

5. Further/alternative criminal law tools to fight organised crime⁸⁰

As described in Chapter 4, all MS (with the exception of DK and SE), have offences relating to participation in a criminal organisation, which transpose either Article 2a or 2b (or both) of the Framework Decision in their criminal system.

This does not exclude that:

- MS having such offences might have further criminal law tools to fight the organised crime phenomenon horizontally. This is the case in 11 MS (AT, BE, BG, FI, FR, DE, HU, IT, LU, PT, ES) out of 26 that – besides punishing participation in a criminal organisation and/or conspiracy (or both) in line with the Framework Decision – have further criminal law tools to fight organised crime. Section 5.1 reviews these further criminal law tools.
- For a number of MS the tools are shaped to tackle the most serious or largest organised crime groups, setting higher requirements in areas such as the number of persons involved (this is the case for AT and IT; the latter's approach relates in particular to the country's longstanding problem with mafia-type organisations).
- Some MS (BG, FI, FR, DE, HU, IT, LU, PT) provide specific offences, to be considered as *lex specialis* to the basic offence discussed in the previous chapter, which tackle specific objectives, mostly referring to the criminal market, e.g. organised crime groups committing drug trafficking.
- It should be noted that in 5 of the 11 MS with further criminal law tools (BE, FR, HU, LU, ES) some additional offences are defined more broadly than the basic requirements of the Framework Decision. In cases when both provisions existing in a MS were generally in line with the Framework Decision, the provision discussed in the previous section was the one that is more specific while the additional one is discussed in the current section. The existence of a more generic offence allows MS to punish behaviour that would not be covered by the more specific offence (e.g. in cases of less serious offences or when the organisational structure is not advanced enough to qualify it as a 'criminal organisation' under the Framework Decision provisions or simply when it is difficult to prove in practice one of the elements required by the specific offence). The more generic offence allows punishment of those conducts that fall outside the scope foreseen by the Framework Decision, and remains within

⁸⁰ With a joint research effort under the supervision of Andrea Di Nicola (scientific coordinator of eCrime, University of Trento) and Barbara Vettori (Catholic University of Milan, member of the Advisory Board), authorship is as follows: Andrea Di Nicola Introduction, 5.2; Barbara Vettori 5.1 (Portugal, Spain), 5.3, 5.4; Andrea Cauduro 5.1 (France, Germany, Hungary, Italy, Luxembourg); Gabriele Baratto 5.1 (Austria, Belgium, Bulgaria, Finland).

the discretion of each MS; it does not stem from the EU legislation, which targets only serious criminality (predicate offences with maxima of at least 4 years of imprisonment).

- MS not having such offences (Denmark and Sweden) might have **alternative criminal law tools** to fight the organised crime phenomenon. Section 5.2 provides an overview of these alternative criminal law tools.

These further and alternative tools have been identified from national experts' answers to the questionnaire administered by this study. The list of tools is not exhaustive and it is limited to those linked to participation in a criminal organisation horizontally, and not tools relating to specific criminal markets, if any.

Key findings and recommendations are presented in Sections 5.3 and 5.4.

5.1. Further criminal law tools

Austria

In Austria, alongside participation in a criminal organisation punished by Article 278 c.c., Article 278a c.c. envisages another offence that punishes participation in a different and more structured criminal group made up of a large number of members (at least 10), with a hierarchical structure and shared tasks among members. The predicate offences committed by this criminal group have to be serious, with the aim of gaining a large amount of money (at least 50,000 Euros) and include corruption, intimidation and the attempt to evade criminal investigation using specific means. Participation in such a criminal group is punishable with imprisonment for between 6 months and 5 years.

The definition of such a criminal group differs from that of a 'criminal organisation' in the Framework Decision (Article 1) as follows:

- 1) Structure: Article 278a⁸¹ c.c. requests a defined hierarchy and a division of tasks among members.
- 2) Number of members: Article 278a c.c. requests a larger number (10 or more).
- 3) Benefit: Article 278a c.c. requests the commission of predicate crimes aimed at gaining a large amount of money (more than 50,000 Euros).

Belgium

In Belgium, alongside participation in a criminal organisation punished by Article 324 bis c.c., Articles 322, 323 and 324 c.c.⁸² punish gangs (*bandes*). Such provisions generically

⁸¹ Section 278:

(1) Who founds a criminal organization or participates in it as a member, shall be punished with imprisonment up to three years;

(2) 'criminal organisation' is an association, set up for the longer term, of more than two persons for the purpose of one or more members of the organisation committing one or more crimes, other serious acts of violence against life and limb, not only minor damage to property, theft or fraud, offences under Sections 104a, 165, 177b, 233 to 239, 241a to 241c, 241e, 241f, 304 or 307, other offences specified in Section 278d(1) or offences under Sections 114(1) or 116 of the Immigration Authorities Act;

(3) Is a member participant in a criminal organization, who commits a criminal offense within its criminal orientation or participates in the activities of the organization through the provision of information or assets or otherwise, in the knowledge that he thereby promotes the association or their criminal acts.

⁸² See Appendix A for Article 324.

Art. 322: Toute association formée dans le but d'attenter aux personnes ou aux propriétés est un crime ou un délit, qui existe par le seul fait de l'organisation de la bande.

criminalise the formation of/participation in a gang aimed at **committing crimes against persons or properties**.

Leading/forming such a criminal group is punished with:

- 5 to 10 years imprisonment for serious offences punished with life imprisonment, or serious offences punished from 10 to 15 years imprisonment or a higher term.
- 2 to 5 years imprisonment for other serious offences.
- 6 months to 3 years in case for other offences (Article 323 c.c.).

Participation/support is punished with:

- 6 months to 5 years imprisonment for serious offences punished with life imprisonment, or serious offences punished from 10 to 15 years imprisonment or a higher term.
- 2 months to 3 years imprisonment for other serious offences.
- 1 month to 2 years for other offences (Article 324 c.c.).

The definition provided by Article 322 c.c. is broader than that of criminal organisation contained in Article 324 bis c.c., which fulfils all the legal minimum standards set out in Articles 1 and 2 of the Framework Decision.⁸³ However, as the national expert remarked:

This Article on banditism and the related Art. 323 and 324 are not created for the prosecution of organised crime. These Articles are older. However for a criminal organisation there are more than two people needed. In case of two people the public prosecutor can rely on the article of banditism. The Articles 322, 323 and 324 requires an element of intention. This is not the case for Art. 324 bis and ter: the intention to belong to the criminal organisation is sufficient.

Notwithstanding this, Article 322 c.c. is also in line with the Framework Decision requirements since it is so broad as to incorporate all of them.

Bulgaria

In Bulgaria, alongside participation in a criminal organisation punished by Article 321 c.c., other criminal norms specifically criminalise formation/direction/participation in criminal groups that have specific goals. This is the case of:

- Article 162(3) and (4) c.c.⁸⁴ for criminal groups aimed at committing **offences against national, racial and ethnic equality, and religious and political**

Art. 323: (Si l'association a eu pour but la perpétration de crimes emportant la peine de réclusion à perpétuité ou la réclusion de dix ans à quinze ans ou un terme supérieur, les provocateurs de cette association, les chefs de cette bande et ceux qui y auront exercé un commandement quelconque, seront punis de la réclusion de cinq ans à dix ans.) Ils seront punis d'un emprisonnement de deux ans à cinq ans, si l'association a été formée pour commettre d'autres crimes, et d'un emprisonnement de six mois à trois ans, si l'association a été formée pour commettre des délits.

Art. 324: Tous autres individus faisant partie de l'association et ceux qui auront sciemment et volontairement fourni à la bande ou à ses divisions des armes, munitions, instruments de crime, logements, retraite ou lieu de réunion, seront punis : Dans le premier cas prévu par l'article précédent, d'un emprisonnement de six mois à cinq ans; Dans le second cas, d'un emprisonnement de deux mois à trois ans; Et dans le troisième, d'un emprisonnement d'un mois à deux ans.

⁸³ See Chapter 4, Section 4.5.

⁸⁴ Article 162(3): An individual who forms or leads an organization or a group that has set itself the task of doing activities under para.1 and 2, or systematically tolerates the performance of such activities, is subjected to a penalty of imprisonment for a term from one to six years, a fine from ten to thirty BGN and a public execration. Article 162(4) A person who is a member of such an organisation or group shall be punished by deprivation of liberty for up to three years and by public censure.

tolerance. Leading or forming such a criminal group is punished with 1 to 6 years imprisonment and public censure (Article 162(3) c.c.); participation is punished with up to 3 years imprisonment and public censure (Article 162(4) c.c.).

- Article 109(1) and (2) c.c.⁸⁵ for criminal groups aimed at **committing offences against the Republic.** Leading or forming such a criminal group is punished with up to 12 years imprisonment (Article 109(1) c.c.); participation is punished with up to 10 years imprisonment (Article 109(2) c.c.).
- Article 169d c.c.⁸⁶ for criminal groups aimed at committing **offences against citizens' political rights.** Leading or forming such a criminal group is punished with from 1 to 8 years imprisonment; participation is punished with 1 to 6 years imprisonment.
- Article 321a c.c.⁸⁷ for criminal groups aimed at **concluding transactions or deriving benefits by use of force or intimidation.** Leading or forming such a criminal group is punished with 3 to 8 years imprisonment (Article 321a(1) c.c.); participation is punished with up to 5 years imprisonment (Article 321a(2) c.c.).
- Article 354c c.c.⁸⁸ for criminal groups **aimed at the production or processing of narcotic drugs.** Leading or forming such a criminal group is punished with 10 to 20 years imprisonment and a fine (Article 354c(2) c.c.); participation is punished with 3 to 10 years imprisonment and a fine (Article 354c(3) c.c.).

The definition of such criminal groups differs from that of a 'criminal organisation' in the Framework Decision for the scope of the predicate offences, since all these provisions restrict their application only to some specific crimes, as seen above, and not to all offences punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or a more serious penalty.

Finland

In Finland, Chapter 50 § 2 c.c.,⁸⁹ ratifying the 1988 Vienna Convention on drug trafficking,⁹⁰ envisages a separate offence with harsher penalties for participation in a

⁸⁵ Article 109(1): A person who forms or leads an organisation or group, which has set itself the aim of committing crimes under the present Chapter, shall be punished by deprivation of liberty for up to twelve years, but not more than the punishment provided for the respective crime. 109(2) A person who is a member of such an organisation or group shall be punished by deprivation of liberty for up to ten years, but not more than the punishment provided for the respective crime.

⁸⁶ 169d(1): An individual who forms or lead a group that has set itself the task of doing crimes under this section, is subjected to a penalty of imprisonment for a term from one to eight years. 169d (2) An individual who is a member of such group is subjected to a penalty of imprisonment for a term of up to six years.

⁸⁷ 321a(1): A person who participates in the leadership of an organisation or a group, which concludes transactions or makes benefit by use of force or by inspiring fear, shall be punished by deprivation of liberty for three to eight years. (2) A person who participates in such an organisation or group shall be punished by deprivation of liberty for up to five years.

⁸⁸ 354c(2): A person who organises, leads or finances an organised criminal group for the purposes of cultivating plants under paragraph 1, or of extracting, producing, or processing drugs, shall be punished by deprivation of liberty from ten to twenty years and by a fine from BGN 50,000 to BGN 200,000. (3) A person who participates in an organised criminal group under the preceding paragraph, shall be punished by deprivation of liberty for three to ten years and by a fine from BGN 5,000 to BGN 10,000.

⁸⁹ Chapter 50(2): If in the narcotics offence... (3) the offender acts as a member of a group organised for the extensive commission of such an offence ... and the narcotics offence is aggravated also when assessed as a whole, the offender shall be sentenced for an aggravated narcotics offence to imprisonment for at least one and at most ten years.

⁹⁰ United Nations Office on Drugs and Crime (1988).

criminal group organised for the purpose of committing serious drug-related offences. Participation in such a criminal group is punished with 1 to 10 years imprisonment.

The definition of such a criminal group differs from that of a 'criminal organisation' in the Framework Decision (Article 1) for the scope of the predicate offence, since such provision applies only to serious drug-related offences, and not to all offences punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or a more serious penalty.

France

In France, alongside participation in a criminal organisation punished by Article 450–1 c.c., Article 132–71 c.c.⁹¹ refers to the concept of the gang (*bande organisée*), namely any criminal group formed or any agreement made with the aim of preparing one or more offences (both serious and other offences – *crimes et délits*). The preparation of such offences is characterised by one or more material facts (*faits matériels*) functional to the commission of the offence(s) for which the group was established/the agreement made.

The commission of a crime by a gang as defined under Article 132–71 c.c. is considered an aggravating circumstance for a number of crimes, e.g. fiscal fraud (Article 87, Law 1646/2009) and environmental crimes (Article L415-6, Law 619/2013).

The definition provided by Article 132–71 c.c. is broader than that of criminal organisation contained in Article 450–1 c.c., which fulfils all the legal minimum standards under Articles 1 and 2 of the Framework Decision.⁹² Notwithstanding this, Article 450–1 c.c. is also in line with the Framework Decision requirements since it is so broad that it can incorporate all of them (felonies or misdemeanours punished by at least 5 years' imprisonment).

Germany

In Germany, alongside participation in a criminal organisation punished by Article 129 c.c., Article 244(1) c.c.⁹³ refers to the concept of the gang (*Schwerer Bandendiebstahl*) formed with the aim of continued commission of robbery or theft. Participation in such a criminal group is punished with 1 to 10 years imprisonment or with 6 months to 5 years imprisonment in less serious cases.

The definition of such a criminal group differs from that of a 'criminal organisation' in the Framework Decision (Article 1) for the scope of the predicate offences, since such provision applies only to robberies and thefts, and not to all offences punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or a more serious penalty. Penalties foreseen in this provision are harsher than the basic offence of Article 129 c.c.

⁹¹ ARTICLE 132-71: An organised gang within the meaning of the law is any group formed or association established with a view to the preparation of one or more criminal offences, preparation marked by one or more material actions.

⁹² See Chapter 4, Section 4.5 for more details.

⁹³ 244(1): Whosoever [...] 2. steals as a member of a gang whose purpose is the continued commission of robbery or theft under participation of another member of the gang... shall be liable to imprisonment from six months to ten years.

Hungary

In Hungary, alongside participation in a criminal organisation punished by Article 459(1), Article 459(1)1 c.c.⁹⁴ punishes 'criminal association'; this is a criminal group made up of at least two persons, with some kind of organisation, engaged in the attempt or commission of at least one criminal activity. This form of criminal cooperation is not 'sophisticated' enough to be legally qualified as criminal organisation (Article 459(1)) as it covers serious and minor offences. Broadly speaking it is in line with the Framework Decision requirements since it is so broad as to incorporate all of the features of a criminal organisation.

This provision is used as an aggravating circumstance for some crimes, e.g. illegal use of a human body (Article 175 c.c.), drug trafficking (Article 176 c.c.), and falsification of health care products (Article 186 c.c.). The Hungarian criminal code envisages an aggravation of the penalty for the commission of such crimes when committed in 'criminal association', namely when such offences are committed by two or more persons (Article 459(2) c.c.). Such provisions include also the possibility of aggravating penalties in case of the commission of such crimes by 'criminal organisations' under Article 459(1).

Italy

In Italy, alongside participation in a criminal organisation punished by Article 416(1-5), there are other offences specifically dealing with formation/direction/participation in criminal groups that have specific goals:

- Article 416(6) c.c.⁹⁵ refers to a criminal group made up of at least three members and aimed at the **commission of offences related to human trafficking and/or smuggling of migrants**. Leading or forming such a criminal group is punished with 5 to 15 years imprisonment (Article 416(6) c.c.); participation is punished with 4 to 9 years imprisonment (Article 416(6) c.c.).
- Article 74 of the Decree of the President of Republic n. 309/1990 refers to a criminal group made up of at least three people and aimed at the **commission of drug-related offences**. Leading or forming such a criminal group is punished with up to 20 years imprisonment (Article 74(1) DPR 309/1990); participation is punished with up to 10 years imprisonment (Article 74(2) DPR 309/1990).
- Article 416 bis c.c. defines 'mafia-type association', namely a criminal group made up of at least of three members that aims to commit criminal offences, to directly and indirectly acquire management or in whatever way control of economic activities, licenses, authorisations, public contracts and services, or to obtain unlawful profits or advantages for themselves or any other person, or with a view to preventing or limiting the freedom to vote, or getting votes for themselves or other persons, on the occasion of an election. Such activities

⁹⁴ Art 459(1)2: 'Criminal association' shall mean when two or more persons are engaged in criminal activities in an organized fashion, or they conspire to do so and attempt to commit a criminal act at least once, without, however, creating a criminal organization [...].

⁹⁵ Art 416(6): [...] If the organization is to commit any of the crimes referred to in Articles 600, 601 and 602 and Article 12, paragraph 3-bis of the Consolidated Law provisions governing immigration and the status of foreigners in the legislative decree 25 July 1998, n. 286, punishment is imprisonment of from five to fifteen years in cases provided for by the first paragraph and from four to nine years in cases provided for in the second paragraph.

shall rely on the use of the 'mafia method', that consists of the intimidating power of association ties (*vincolo associativo*) and of the resulting conditions of submission and silence (*omertà*). In other terms, 'a mafia group is an organized criminal group which has a long history of violence and intimidation: this "history" of violence and intimidation – for the reason of being well-known in the territory – has itself a strong threatening effect, so that the criminal group can easily acquire unlawful advantages through the simple unlawful use of other people's fear, mostly even without the need for explicit and specific new threats.'⁹⁶ Leading or forming such a criminal group is punished with 9 to 14 years imprisonment (Article 416 bis(2) c.c.);⁹⁷ participation is punished with 7 to 12 years imprisonment (Article 416 bis(1) c.c.).⁹⁸

The definitions of such criminal groups differ from that of a 'criminal organisation' in the Framework Decision (Article 1) since they envisage a specific *modus operandi* (416 bis c.c.) or restrict the scope of the predicate offences to some crimes only (i.e. human trafficking, smuggling, drug-related offences (Article 416(6-7) c.c., Article 74 DPR 309/1990)) and not to all offences punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or a more serious penalty.

Luxembourg

In Luxembourg, alongside participation in a criminal organisation punished by Article 324 bis, Articles 322, 323 and 324 punish gangs (*associations de mafaiteurs*). Such provisions generically criminalise the formation of or participation in a gang aimed at committing crimes against persons or properties. Leading/forming such a criminal group is punished with:

- 5 to 10 years imprisonment for serious offences punished with at least 10 years imprisonment.
- 2 to 5 years imprisonment for other serious offences.
- 6 months to 3 years for other offences (Article 323 c.c.).

Participation/support is punished with:

- 6 months to 5 years imprisonment for serious offences punished with at least 10 years imprisonment.
- 2 months to 3 years imprisonment for other serious offences.
- 1 month to 2 years for other offences (Article 324 c.c.).

The definition under Article 322 c.c. is broader than that of criminal organisation contained in Article 324 bis c.c., which fulfils all the legal minimum standards under Articles 1 and 2 of the Framework Decision. Notwithstanding this, Article 322 c.c. is also in line with the Framework Decision requirements since it so broad as to incorporate all of them.

⁹⁶ Turone (2007), 51–52.

⁹⁷ Article 416 bis(2): Those who promote, manage or organize the association are punished for that reason alone, with imprisonment from nine to fourteen.

⁹⁸ Article 416 bis(1). Anyone who takes part in a Mafia-type formed by three or more persons, shall be punished with imprisonment from seven to twelve years.

Portugal

In Portugal, alongside participation in a criminal organisation punished by Article 321 c.c., there are other offences specifically dealing with formation/direction/participation in criminal groups that have specific goals. This is the case of:

- Article 28 of Decree-Law n. 15/93,⁹⁹ that punishes anyone who 'promotes, creates or funds an association, group or organisation of two or more persons with the intent of, in a joint manner' **committing a drug trafficking offence**, as well as collaborators, members or supporters of the group. Forming such a criminal group is punished with 10 to 20 years imprisonment (Article 28(1) Decree-Law n. 15/93); participation is punished with 5 to 10 years imprisonment (Article 28(2) Decree-Law n. 15/93); leading is punished with 12 to 20 years imprisonment (Article 28(3) Decree-Law n. 15/93).
- Article 89 of Law n. 15/2001 envisages criminalisation of a criminal group involved in **tax crimes**.
- Article 2 of Law n.52/2003 punishes **a criminal group aimed at terrorism**. This is an offence that punishes participation in such a group as a separate (and more serious) offence compared to the terrorism offence governed by Article 4 of the same law. While Article 2 punishes participation in a criminal group aimed at committing terrorist acts, Article 4 punishes people engaging in such terrorist acts.

The definitions of such criminal groups differ from that of a 'criminal organisation' in the Framework Decision (Article 1) for the scope of the predicate offences, since all these provisions apply to specific crimes only, as seen above, and not to all offences punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or a more serious penalty.

Spain

In Spain, alongside participation in a criminal organisation punished by Article 570 bis c.c., Article 570 ter c.c. deals with participation in criminal groups (*grupos criminales*).¹⁰⁰

⁹⁹ 1. Any person who promotes the creation of, creates or funds a group, an organization or an association comprising two or more persons for the purpose of concertedly committing any of the offenses described in Articles 21 or 22, shall be liable to imprisonment for a term of 10 to 20 years.

2. Any person who cooperates directly or indirectly with, or supports any group, organization or association as mentioned in the preceding paragraph, shall be liable to imprisonment for a term of 5 to 15 years.

3. Any person who acts as head or steers any group, organization or association as mentioned in paragraph 1, shall be liable to imprisonment for a term of 12 to 20 years.

4. Where the aims of the group, organization or association are to convert, transfer, disguise or receive either goods or the proceeds of any of the offenses described in Articles 21 and 22, or where its activities amount to converting, transferring, disguising or receiving either goods or the proceeds of any of the offenses described in Articles 21 and 22, the offender shall be liable to: a. imprisonment for a term of 2 to 10 years, in the cases mentioned in paragraphs 1 and 3; b. imprisonment for a term of 1 to 8 years, in the cases mentioned in paragraph 2.

¹⁰⁰ Article 570 ter:

1. Whoever constitutes, finances or forms a criminal group shall be punished:

a) If the purpose of the group is to commit the felonies mentioned in Section 3 of the preceding Article, with the punishment of two to four years imprisonment for one or more serious felonies and with that of one to three years imprisonment for less serious felonies;

b) With the punishment of six months to two years imprisonment if the purpose of the group is to commit any other serious felony;

c) With the punishment from three months to a year of imprisonment when the aim is to commit one or several less serious felonies not included in Section a) or reiterated commission of misdemeanours, in the latter case the punishment must be imposed in the lower half, except if the purpose of the group is reiterated

These are groups of more than two persons that aim to jointly commit serious offences or repeatedly perpetrate minor offences, but lack one or more features of the '*organización criminal*' (Article 570 bis). So, for example, '*grupos criminales*' do not have to be stable, nor to distribute tasks among members. Participation in or support of such a criminal group is punished with:

- 2 to 4 years imprisonment for serious offences against life, physical integrity, freedom, sexual freedom, human trafficking (Article 570 ter (a) c.c.).
- 6 months to 2 years imprisonment for other serious offences (Article 570 ter (b) c.c.).
- 3 months to 1 year for other offences (Article 570 ter (c) c.c.).

The definition provided by Article 570 ter c.c. is broader than the definition of criminal organisation under Article 570 bis c.c., which fulfils all the legal minimum standards under Articles 1 and 2 of the Framework Decision. Notwithstanding this, Article 570 ter c.c. is also in line with the Framework Decision requirements since it so broad as to incorporate all of them.

5.2. Alternative criminal law tools

Denmark and Sweden, whose criminal legislation does not include as a self-standing offence either participation in a criminal organisation (Article 2a of the Framework Decision) or conspiracy to commit criminal offences (Article 2b of the Framework Decision), have some alternative criminal law tools to fight organised crime, discussed below.

5.2.1. Denmark

Denmark does not have in its criminal law system any of the offences relating to participation in a criminal organisation requested by the Framework Decision.

MS experts reported that a self-standing offence was unnecessary as potentially any criminal conduct can be covered by the existing provisions. Also, it seems that the Danish approach relating to the transposition of the former third-pillar legislation is affected by various exceptions as regards their EU membership.

The alternatives underlined by the experts are the following:

- *Complicity* (Article 23 of the Danish Criminal Code¹⁰¹) that constitutes a form of committing an offence and is present in legal orders of all MS. It is worth noting that this is not a self-standing offence of participation in a criminal organisation nor of conspiracy. As a form of commission of an offence it does not entail any specific penalties but it only acknowledges that an offence can be committed by more than one person and in such cases each person is responsible legally for their own conduct.

perpetration of the misdemeanour defined in Section 1 of Article 623, in which case the full punishment may be handed down. For the purposes of this Code, a criminal group shall be construed as the collusion of more than two persons who, without fulfilling any or a number of the characteristics of a criminal organisation defined in the preceding Section, has the purpose or object of perpetrating felonies in collusion, or coordinated, reiterated commission of misdemeanours.

¹⁰¹ 'The penalty provisions laid down for an offence shall apply to all persons who have aided, abetted, counselled or procured the commission of the offence. The penalty may be reduced in the case of a person who has only intended to lend assistance of minor importance or strengthen a determined intent and in case the crime has not been completed or an intended contribution has failed.'

- *Aggravating circumstance based on organised crime* (Article 81(2) c.c.), which states that punishment shall be aggravated when a crime is carried out by several people acting in association.¹⁰² This issue is included in the assessment of the Framework Decision in relation to Article 3(2) on the aggravating circumstance (see Chapter 4).
- *Criminalisation of organisations that use violence to achieve their ends* (Article 78, subsection 2 of the Danish Constitution¹⁰³), which imposes the dissolution of *any* organisation that employs violence to reach its aims. The provision was originally meant to fight terrorist or subversive political movements that use violence against population, such as the Hipo Corps established during the Nazi occupation of Denmark during Second World War. Such a provision, through an expansive interpretation, can be applied also to (non-terrorist) criminal organisations that use violence to get their goals.

5.2.2. Sweden

Sweden does not have in its criminal law system any of the offences relating to participation in a criminal organisation requested by the Framework Decision.

Swedish experts consider it difficult to prove the existence of and the specific roles of the members of an organisation. As a result, the participation in a criminal organisation concept is too vague and cannot be a sufficient and useful criterion to determine if an individual concretely belongs to it.

In addition, according to the Swedish interpretation, the Framework Decision does not impose an obligation to introduce a self-standing offence, rather to punish those predicate offences that are *typically* committed by organised crime, such as theft, robbery, fraud, drug dealing, counterfeiting, illegal gambling, exploitation of prostitution and/or human trafficking or smuggling of migrants. According to this interpretation, therefore, criminal organisations could be effectively fought through punishing the actual crime committed and the contemporary criminalisation of the *preparation, aiding and abetting* of such crime (and in general of those predicate offences punished with at least 4 years as a maximum penalty) in order to involve in the accusation all those persons at any level involved in the commission of the offence, including those who gave legal contributions to the criminal organisation.

Such an approach is already present in all MS and does not provide added value in the fight against organised crime as aimed at by the Framework Decision, that on the contrary requires the introduction of a self-standing offence (for further details on the need for a self-standing offence, see Section 4.2.2 above).

- Apart from these considerations, as hinted above and according to the national expert and the stakeholders interviewed, Sweden punishes participation in a criminal organisation with alternative criminal law tools through:
 - *Aggravating circumstance based on organised crime*. Chapter 29, Section 2 of the Swedish criminal code envisages general aggravating circumstances based on organised crime if the offence has been committed 'as part of a criminal

¹⁰² 'In sentencing, the following shall ordinarily be considered aggravating circumstances: [...] 2) the fact that the offence was committed by more than one person acting in association; [...]'.

¹⁰³ 'Subsection 2. Associations employing violence, or aiming at the attainment of their object by violence, by instigation to violence, or by similar punishable influence on persons holding other views, shall be dissolved by court judgement.'

activity which is conducted in an organised way or if the offence has been committed in a systematic way or has been planned'. Moreover, some special pieces of legislation deal with specific aggravated offences when criminal activities are perpetrated systematically or on a large scale (e.g. Section 5, Tax Fraud Law), or when the offence has been committed 'as part of a criminal activity which is conducted systematically' (e.g. Section 5, Smuggling Code), or when it is conducted 'in a large scale or professional' manner (e.g. Section 3, Drug Penal Law). This issue is included in the assessment of the Framework Decision in relation to Article 3(2) on the aggravating circumstance.

- Criminalisation of offences that require involvement of several persons and/or organisation, such as smuggling of migrants (e.g. Chapter 20, Section 9, Foreign Law).

5.2.3. Conclusions regarding alternative tools

The Danish and Swedish legislators do not acknowledge the need to provide a self-standing offence relating to the existence of a criminal organisation. It is considered enough to punish offences committed in practice which can, at times, be aggravated due to the fact that they were committed by a group. For further information on the possible usefulness of the measures used in Denmark and Sweden, please see Chapter 6.

This position goes against the reasoning of the Framework Decision, which explicitly requires the introduction of a self-standing offence of organised crime in addition to any prosecution of predicate offences. In fact, as also stated above in Chapter 4, the Framework Decision requires MS to introduce in their legal system a self-standing offence, namely either the participation in a criminal organisation or the conspiracy to commit serious offences (or both).

The rationale of the Framework Decision therefore stems from the threat of criminal organisations as such, not only from their criminal activities (which change over time and are adjusted to specific circumstances). The Framework Decision aims to tackle and dissolve criminal organisations by envisaging two forms of conduct, at least one of which should be regarded as an offence by an MS, i.e. a) active participation in the illicit activities of a criminal organisation, knowing the aim of the organisation or its intention is to commit crimes, and b) an agreement on the perpetration of crimes, without necessarily taking part in their commission. The latter is not acknowledged by DK or SE legislators.¹⁰⁴

5.3. Key findings

Below are the key findings drawn from the above analysis of further and alternative criminal law tools:

- 11 (AT, BE, BG, FI, FR, DE, HU, IT, LU, PT, ES) MS have further criminal law tools to fight organised crime.
- 7 of these 11 MS (AT, BG, FI, DE, HU, IT, PT) punish criminal groups with specific characteristics (e.g. mafia methods) and/or with a narrower scope of predicate offences (e.g. drug-related offences, human trafficking).
- 4 of out these 12 MS (BE, FR, LU, ES) also punish other criminal groups via a

¹⁰⁴ For further information see the assessment of Article 2 in Chapter 4 of this report.

broader/more general definition.

- Denmark and Sweden are the only 2 MS whose legislation does not include as a self-standing offence either the participation in a criminal organisation (Article 2a of the Framework Decision) or conspiracy to commit offences related to a criminal organisation (Article 2b of the Framework Decision). Our research has not identified any convincing alternatives to compensate for the lack of a self-standing offence in those two MS. The tools invoked by the experts indicate measures common for all MS existing in most of the MS in parallel to the self-standing offence of organised crime.

5.4. Recommendations

It is recommended to explore the possibility of MS introducing, in addition to offences under Article 2 of the Framework Decision, further offences to criminalise criminal groups with specific characteristics or modus operandi (e.g. using intimidation) and/or those targeting specific criminal markets (e.g. drug-related offences, human trafficking). These offences could be tailored by each MS to the peculiarities of their organised phenomenon/criminal law system and they would allow application of tailor-made sanctions. Those measures should take account of the specific national and EU context in order to respond adequately to the threat posed to the MS and to fellow MS. Part of the rationale for legislative compatibility is to enable mutual legal assistance within the EU.

6. Implementation of laws relating to participation in a criminal organisation¹⁰⁵

This chapter describes current practices in the implementation of laws relating to participation in a criminal organisation.

The information in this chapter is based on interviews with national stakeholders, conducted by the MS experts, as well as the views of the national experts themselves. Frequency of use of such offences is discussed (Section 6.1), as well as their perceived usefulness (Section 6.2) and clarity (Section 6.3). Barriers to implementation and factors reported by national experts to assist in the implementation of legislation are then examined (Section 6.4). Key findings and recommendations are presented in Section 6.5.

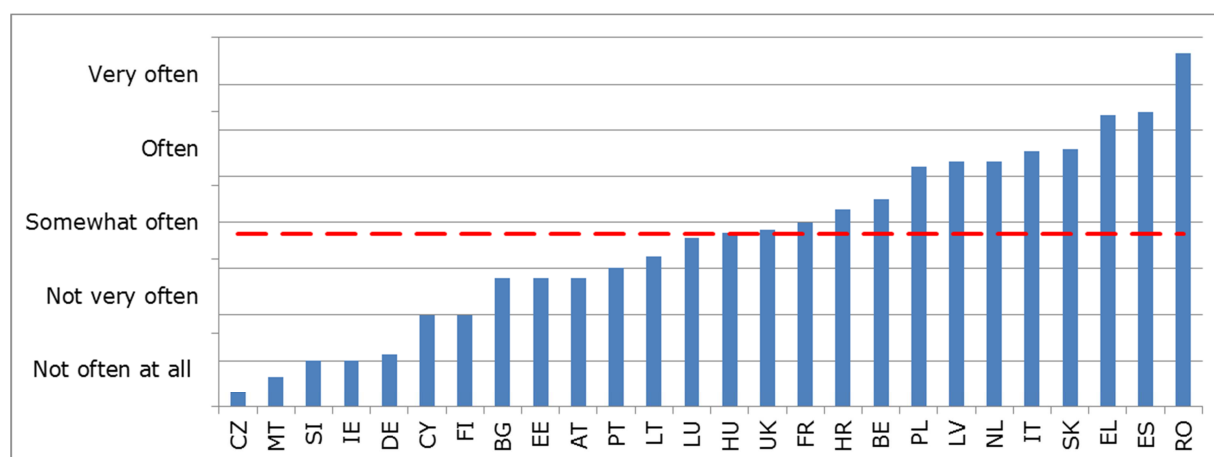
Because Sweden and Denmark do not have a self-standing offence (neither of participation in a criminal organisation nor of conspiracy), those countries are not included in this chapter.

6.1. Reported frequency of use of offences relating to participation in a criminal organisation

Figure 6.1 shows, country by country, answers to the question 'How often are criminal law offences relating to participation in a criminal organisation used in organised crime cases in your country'. National experts were asked to use a scale ranging from 'not often at all' to 'very often'. National experts were not asked to respond separately for offences of participation in a criminal organisation and offences of conspiracy. For the UK the response related to both Scotland and the rest of the UK.

¹⁰⁵ Authorship is as follows: Andrea Di Nicola 6.4, 6.5, 6.7; Barbara Vettori Introduction, 6.1, 6.2, 6.3.

Figure 6.1: Frequency of use of criminal law offences relating to participation in a criminal organisation



Source: information provided by MS experts¹⁰⁶

The EU average (according to respondents) is that offences relating to participation are used 'somewhat often'. Some 13 MSs are below this average (CY, CZ, MT, SI, IE, DE, FI, BG, EE, AT, PT, LT, LU). The frequency of use of these offences is the lowest in CY, CZ, MT, SI, IE, DE and FI.

According to experts, there are many reasons which could explain the differences in frequency of use of participation offences, including:

- Cultural factors and lack of familiarity with organised crime phenomena (CZ, DE)
- Few organised crime cases (MT)
- Difficulty of proving participation (SI, DE)
- Lack of resources (DE)
- Lack of investigative capabilities skills and tools (DE)
- Lack of familiarity with relevant legislation and provisions (IE)
- Preference for predicate offences, rather than for participation offences (FI).

The remaining 13 MSs (HU, UK, FR, HR, BE, PL, LV, NL, SK, ES, IT, EL, RO) have scores equal or above the EU average. The frequency of use of these offences is particularly high in IT, SK, EL, ES and RO). Experts suggest this might be explained by factors such as:

- A long standing judicial practice (IT, RO)
- The existence of a specialised prosecutorial body (IT, RO).

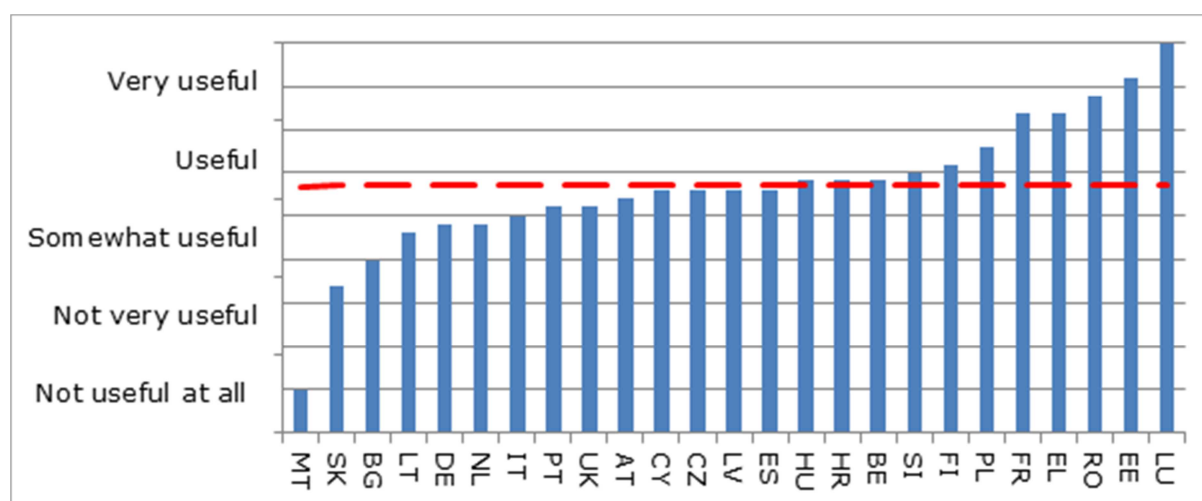
In Greece, the high frequency of use was reported by academics and public prosecutors to partly be due to the overuse of the provisions, especially in cases where there is not strong evidence of participation in a criminal organisation. As a result many such cases lead to conviction for predicate offences and acquittal for participation charges.

¹⁰⁶ As explained in Chapter 3, Member State experts were requested to respond to these questions based on their own judgement, and based on the views of the people they interviewed within their Member State.

6.2. Perceived usefulness of offences relating to participation in a criminal organisation

National experts were asked: 'Against which organised criminal activities would you say criminal law offences relating to participation in a criminal organisation are most useful?'. Respondents were asked about a number of specified offences and to indicate their response on a scale ranging from 'very useful' to 'not at all useful.' Figure 6.2 groups responses, country by country, across all criminal activities.

Figure 6.2: Perceived usefulness of criminal law offences relating to participation in a criminal organisation



Source: information provided by MS experts

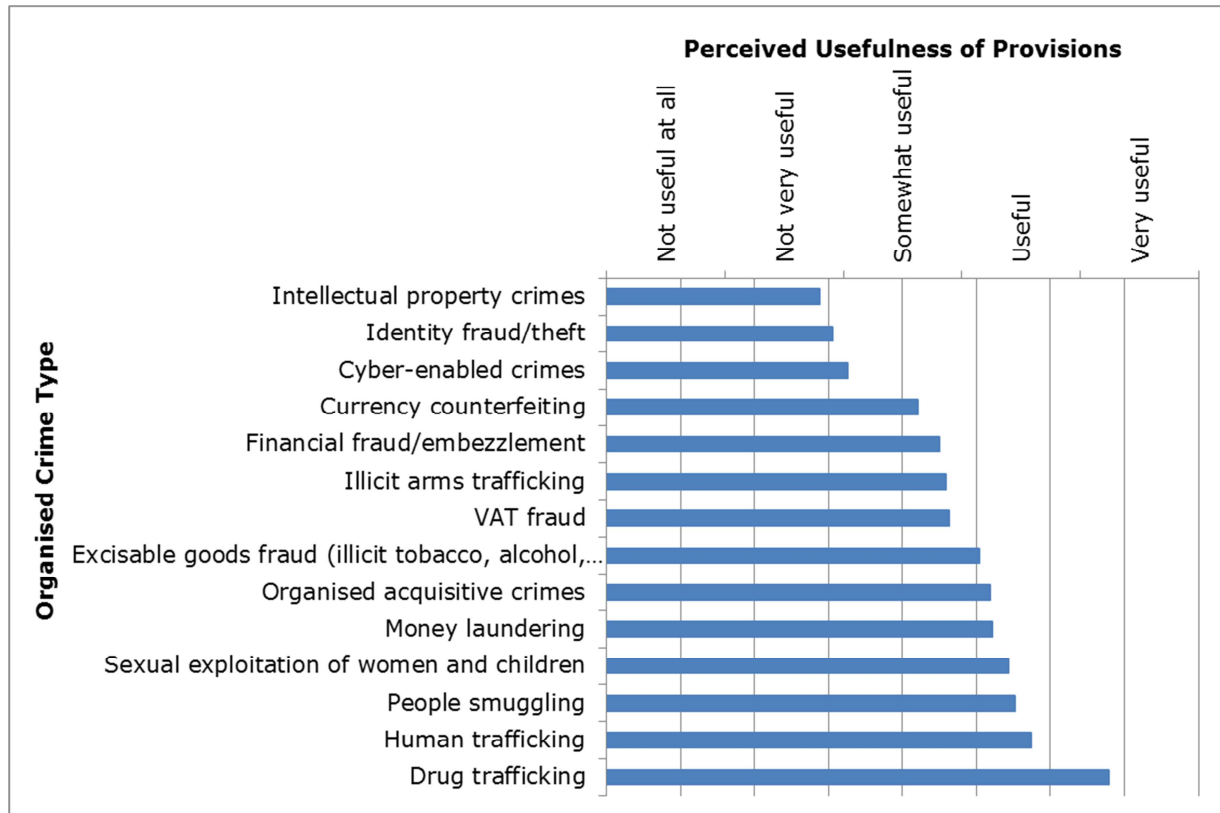
Such offences are, on average, regarded as useful by stakeholders in the vast majority of MS. The reasons why included:

- Making it possible to punish a broad spectrum of individuals that support criminal organisations in a variety of roles, irrespective of their direct involvement in the actual commission of predicate offences (LT, SK, BG), also via legal activities (LU), who would have otherwise escaped investigation/punishment (ES).
- The possibility of using special and effective investigative tools, such as informants and collaborators (AT, BE, DE, FI, FR, IT, LT).
- The possibility of investigating individuals who in the early investigative phases do not seem directly involved in the predicate crimes (ES).
- The possibility of also applying these provisions to legal persons (BE).
- The possibility of imposing increased penalties/other penalties (e.g. confiscation) (BE, EL, HU, LV).
- The possibility of members of criminal organisations who fear harsh penalties collaborating with investigations (SK).
- The possibility of law enforcement agencies bringing together and linking otherwise geographically scattered and apparently unrelated conducts, especially in transnational cases (HU, PL).
- The possibility of punishing preparatory acts, even if the planned crime does not take place – acts that cannot be prosecuted and punished otherwise (EE),

(RO).

Figure 6.3 shows the perceived usefulness of the provisions in relation to criminal organisations dealing with different types of crime, grouping together responses from all MS.

Figure 6.3: Perceived usefulness of the provisions in relation to criminal organisations involved in different types of crime



Source: information provided by MS experts

As shown in Figure 6.3, provisions in relation to participation in organised crime were perceived to be most useful in the case of organisations involved in drug trafficking, human trafficking and people smuggling, while they were reported to be less useful for cyber-enabled crimes, identity fraud/theft and intellectual property crimes.

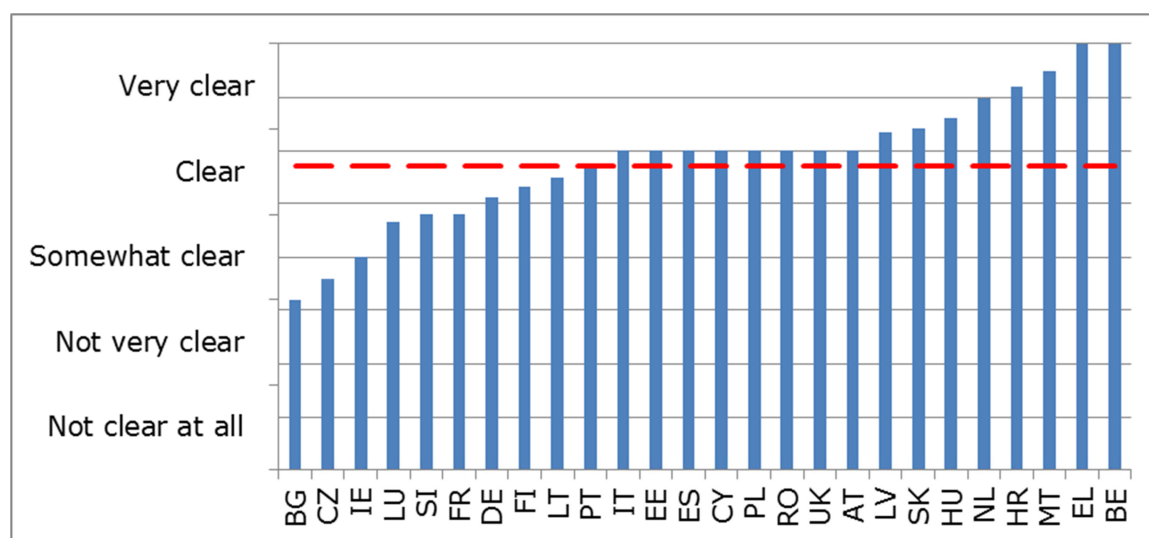
Interviewed stakeholders highlighted that in general the more 'intellectual' the crime was, the more difficult it was to prove participation and therefore such offences became less useful. (It is also possible that such offenders are not monitored actively: many of them are not 'the usual suspects' and they may fall outside policing priorities. In addition they may not be in a position to have sufficient knowledge about the activities of the organisations to which they had links.) Also, respondents stressed that the usefulness was highest for offences whose commission in practice required some sort of criminal organisation behind it. It was argued that low usefulness for Internet-related crimes was likely to be based on the fact that current criminal procedural measures are tailored towards more traditional offences and designed to respond to traditional forms of telecommunication. Therefore the legal instruments as well as the personnel and equipment (including training) of law enforcement agencies are not always adequate.

It was also noted that regulations were most useful in cases where the focus of law enforcement activities was the destruction of the criminal structures rather than the sanctioning and detection of individual offences. Targeting the structures is a priority when groups engaged in weapons and drug trafficking and money laundering are concerned (especially groups working across borders).

6.3. Clarity

Figure 6.4 shows, country by country, responses to the question: 'Do you think the wording of criminal law offences relating to participation in a criminal organisation is sufficiently clear', on a scale from 'not clear at all' to 'very clear'.

Figure 6.4: Perceived clarity of criminal law offences relating to participation in a criminal organisation



Source: information provided by MS experts

The wording of such offences at the EU level was on average, according to national experts and interviewees, regarded as clear. 10 MS are below this average (BG, CZ, IE, LU, SI, FR, DE, FI, LT, PT). Eight are very close to the EU average value (IT, EE, ES, CY, PL, RO, UK, AT), and the remaining 8 are above it, with 2 of them (BE, EL) reaching the highest score. Below is an overview of the key problems arising in terms of clarity of offences relating to participation in a criminal organisation, as reported by national experts.

Too vague/unclear concepts in definitions

Experts from various MS highlighted problems related to use of vague/unclear concepts in the wording of criminal law offences relating to participation in a criminal organisation. Nevertheless, experts regarded this broad scope as 'the price to pay' for having at their disposal a text that allowed a range of situations to be covered.

Some examples of concepts which were said to be unclear are:

- In **Austria**, concepts such as 'longer period of time' and 'serious acts of violence' are quite vague.
- All **Belgian** experts stressed that Art. 324bis is very broad, leaving judges a

strong leeway.

- In **Bulgaria** the wording regarding the requirements of continuity and structure, although taken directly from the UN Convention and the EU Framework Decision, were regarded as unclear. Experts noted that there were no criteria for assessing when a certain association became permanent and structured. Moreover, following the UN Convention and the Framework Decision, the Bulgarian Criminal Code expressly specified that the association was structured even without formally defined functions for participants, continuity of participation or a developed structure. However, it did not include the further specification, contained within the above international instruments, that is, the association was structured where it was not randomly formed for the immediate commission of an offence.
- In **Cyprus** interpretation problems were discussed in relation to the structure element.
- **Czech** respondents commented on the vagueness of the organised crime legal definition in terms of its wording and formulation. In particular, experts noted the lack of precision in the concept of 'aim at systematic commission of criminal activities', which was very difficult to prove.
- In **Estonia**, the wording was perceived as generally clear but there were doubts about how 'permanent' the organisation should be.
- In **Finland** concerns were expressed in relation to the definition of criminal organisation, as well as in relation to defining 'participation' and 'membership'. In Finland there was also said to be confusion regarding the temporal and spatial consequences of a verdict concerning participation/membership: a typical interpretation is that the verdict can only be linked to the concrete case for which it was passed. Thus, 'membership' or 'participation' need to be proven separately in each new case.
- Also, legal practice shows lack of uniformity in terms of whether and to what extent mafia groups are organised crime groups. In **Italy** the key problem was said to be the lack of precision of the concept of association (which is partially overcome by case law).

One consequence of the various problems related to interpretation is that if the aim is to produce national uniformity in order to aid cross-border prosecutions in the EU, the different criteria used across different MS would undermine this effort. A defendant might argue that what he was doing was below the threshold for participation in a criminal organisation in one MS, even if the same conduct might have led to conviction in another.

Differential breadth of definitions

In Bulgaria the definition of criminal organisation is broad and therefore covers a large spectrum of concerted criminal consortia, which may include criminal associations of a relatively low degree of social danger. Also, the Criminal Code considers as predicate offences those punishable by imprisonment for more than 3 years, thus broadening the scope of application of the definition, compared to the Framework Decision.

In Germany the laws in question were perceived as sufficiently clear and precise, but the interpretation of individual elements of these offences is left to jurisprudence and legal reasoning, since the legal wording does not suffice. For example:

- The number of members necessary to form a criminal organisation is left to jurisprudence.
- It is questionable whether hierarchically structured groups are criminal organisations under Article 129 c.c.
- It is not clear or if significant threats to public safety are a necessary element of the crime.
- A further question is whether supporting criminal offences committed by a third party – a classic ‘enabler’ role – is sufficient as a purpose of the organisation and whether a merely passive membership can justify prosecution under Article 129 c.c.

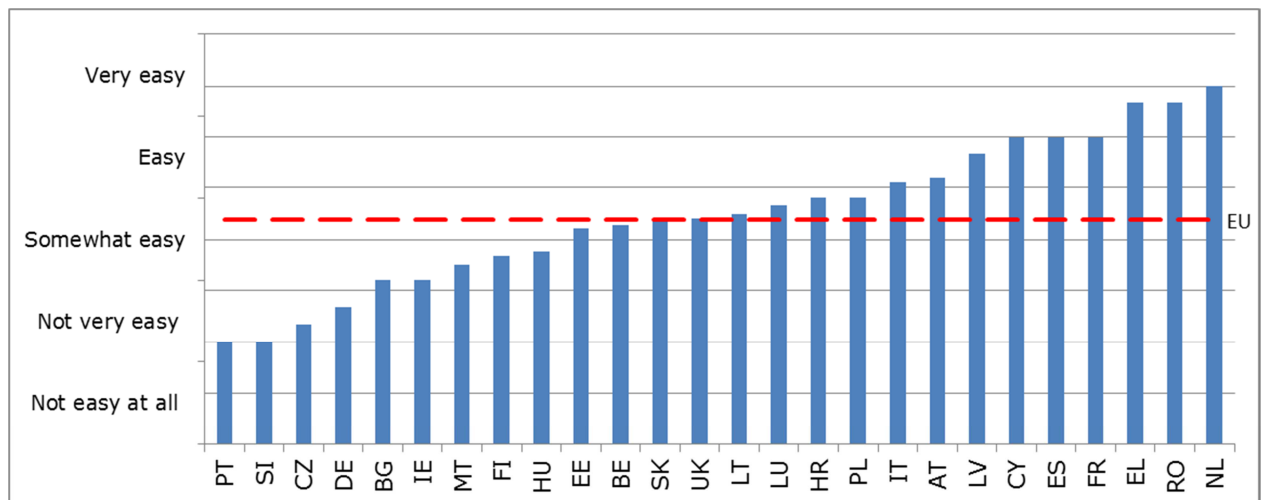
There were several examples provided by national experts of very broad offences:

- In Ireland legislation is broader compared with international standards, therefore giving rise to constitutional issues (especially in relation to legal certainty).
- Similarly, in the Netherlands legislation virtually encompasses all forms of criminal cooperation of more than two persons, unless undertaken for a very short term and on an ad hoc basis. It is commonplace to charge individuals with the basic offence ‘committed jointly’, instead of using the ‘participation’ offence.
- In Spain, provisions on ‘Organización criminal’ (Art. 570 bis) and ‘Grupo criminal’ (Art. 570 ter) cover a large number of crimes (theoretically all crimes) and thus do not differentiate between more serious and less serious crimes.

6.4. Ease of use, barriers and facilitators to implementation

Figure 6.5 shows, country by country and at the aggregate EU level, answers to the question ‘How easy is it to enforce or put into practice offences relating to participation in a criminal organisation in your country?’ (on a scale of ‘not easy at all’ to ‘very easy’).

Figure 6.5: Ease of enforcing offences relating to participation in a criminal organisation



Source: information provided by MS experts

Enforcing such offences in practice is, on average, regarded as somewhat easy at the EU level. 11 MS are below this average (PT, SI, CZ, DE, BG, IE, MT, FI, HU, EE, BE), 2 have a value equal to the EU average (SK, UK), and the remaining MS are above it, with three of them (EL, RO, NL) reaching the highest scores.

National experts were invited to further explain their answers regarding ease of use. The following sub-sections set out what MS experts reported as barriers and facilitators to the use of offences relating to participation in a criminal organisation.

6.4.1. Barriers

The points raised by national experts as possible challenges and facilitators were as follows:

- **Extent (degree and nature) of participation:** in Belgium, the proof of participation is critical. It was reported by national experts that changes made to Article 324bis c.c. in 2005 have improved the situation, but there are still problems in proving the degree of participation.
- **High burden of proof:** the burden of proof was reported to be high in Belgium and Croatia. The nature of organised crime (and especially the degree of secrecy of these organisations and/or their activities) makes it difficult to collect sufficient evidence. In Germany a high standard of evidence was also said to be needed, especially in relation to 'participation' and 'criminal organisation' (jurisprudence requires that the aim of the participants is to form a solid organisation resting on a collective will to commit crimes). It is difficult to prove that a criminal organisation seeks to commit crimes, due to, amongst other things, the use of modern means of telecommunication (with or without encryption) by criminals and constraints in terms of human and material resources on the part of law enforcement agencies. In Estonia, too, evidence is needed in relation to the communications inside the criminal organisation and it depends on the willingness of individuals from the organisation to testify. In Hungary, the problems of application lie in the general high standard of proof in criminal proceedings ('without reasonable doubt'). Therefore, even if there is evidence hinting at the presence of a criminal organisation, this threshold might not be met, as shown by the significantly lower conviction rate for participation in criminal organisation compared to other offences. In Portugal the expert reported that in many cases it has been relatively difficult to succeed in court using the participation in a criminal organisation offence, due to the high standards of proof: interviewees explained that judges tend to be very demanding regarding the evidence.
- **Participation in a criminal organisation vs. conspiracy:** In Cyprus, which is influenced by the common law of England and Wales, interviewees suggested that cases could be prosecuted more easily using the conspiracy offence rather than the participation offence, since the evidential requirements for the former were lower. Also, the preference for conspiracy over participation may reflect the greater familiarity with the use of the former by law enforcement personnel.
- **Unduly broad scope:** in Bulgaria, according to judges, the provisions relating to participation in a criminal organisation were too easily used, and this is a problem rather than an advantage. The unduly broad scope of these provisions

makes it easier to apply them even to cases beyond organised crime (less structured and less lasting associations). This can lead to overuse of the offences in relation to participation in a criminal organisation.

- **Unclear definitions:** in Bulgaria lack of clarity causes problems when collecting evidence on the permanence and structure of the group. Also, due to inconsistencies in the use of terminology in the Criminal Code, the provisions on criminal organisations can often overlap with those regarding other types of criminal groups. This makes the practical implementation of the provisions difficult and may also lead to the imposition of different sanctions for similar criminal acts. In Poland, a problem mentioned by national experts is how to interpret 'taking part in' the criminal organisation, i.e. the role of people involved in committing the crime.
- **Restricted scope of practical application of the offence:** in Lithuania the offence is usually applied to typical traditional criminal organisations, whose number is quite low. These criminal organisations are normally involved in more traditional organised criminal activities, such as drug trafficking and smuggling, trafficking in human beings, extortion and car theft. The provision is not frequently used for criminal organisations involved in white collar crimes, such as financial fraud, VAT fraud and intellectual property crimes. One reason for this is that these crimes are usually committed by relatively smaller criminal organisations created solely for their commission, rather than by generalist criminals. Also in Poland the offence is more easily enforced in relation to more traditional criminal organisations that use violence or threats, while it is more difficult to apply it to organisations involved in economic crimes (also because criminals involved in the latter are well prepared, qualified or specialised).
- **Difficulty of proving criminal conduct (participation in a criminal organisation) going beyond the predicate offences:** in Finland, the participation offence is sometimes useful in the first stages of the investigation (as it provides an offence which can be used to arrest and investigate); however, its criteria are in practice rather difficult to prove, and participation offences tend not to be pursued in prosecution and sentencing. A reason for this reported by the national expert is that after the evidence concerning the substantial serious offence has been obtained, it was often thought to be not very useful to invest resources to prosecute for 'participation' on top of the substantial offences committed. In Germany there is a very high standard of proof regarding criminal organisations, which makes convictions under § 129 and 129b c.c. very rare and prosecutions tend to focus on accompanying offences. In Hungary, during criminal proceedings the initial charge for participation in a criminal organisation was usually said to be replaced by related predicate crimes, because the organised and coordinated commission is hard to prove. A similar issue was reported to arise in Portugal. In Ireland, 'participation' offences in relation to criminal organisations were said to be seldom used and one reason is that, in practice, prosecutors usually prefer to use the predicate offences. In Italy it is unusual/rare that criminal proceedings start for Art. 416 c.c. only, partly because it would be difficult to gather the necessary evidence without investigating the specific crimes committed by the organisation. For this reason, the crimes committed by the criminal

organisation are typically investigated and prosecuted first; then, the evidence gathered during the investigation process is used to prove participation in a criminal organisation under Art. 416 c.c. In Slovenia the law is not applied often, because prosecutors pursue only the criminal acts and not participation in a criminal organisation. In the Netherlands, problems may arise due to the need to prove participation in a criminal organisation by proving the underlying predicate offence. The ease or difficulty of prosecution and conviction depends on this. So, for example, (organised) fraud is always more difficult to prove than drug trafficking/transportation.

- **MS having a conspiracy offence only (England, Wales and Northern Ireland).** The UK government has proposed the creation of a new offence of criminal participation. One reason given for this in official documents is that it was felt that 'enablers' and those on the periphery of organised crime currently evade liability under the conspiracy approach. According to the UK Home Office, the current offence of conspiracy 'makes it difficult to pursue people in the wider criminal group. The participation offence should 'reflect how "modern" organised criminal groups facilitate their criminal enterprises'.¹⁰⁷ Lawmakers expect that the participation offence will increase the risk to a higher proportion of those involved in organised crime. (See the UK case study in Chapter 10 for further details.)
- Conflicts over the use of the self-standing offence of participation in a criminal organisation and of aggravating circumstances: in Lithuania low funding of police and other enforcement agencies is conducive to taking the 'easiest' way, that is, the prosecution pursue the predicate offence aggravated by the 'organised group', rather than the offence of participation in a criminal organisation (or participation in a criminal organisation as an aggravating circumstance). In Romania interviewees suggested that it was often difficult to prove all elements related to criminal organisation (structure, hierarchy, purpose, duration, role of each member) because of their covert nature. Accordingly, in some cases investigators would choose to use the aggravating circumstance rather than the standalone offence. This is the practice also in Slovenia. In Spain offences regarding participation in a criminal organisation entered into force in December 2010 and were put into practice soon after. The transition from the more cumbersome previous system (based on the 'illicit association' crime) and the current legislation was easy, according to respondents, because of the very broad wording of the provisions in Articles 570 bis and 570 ter c.c. All interviewees in Spain also shared the opinion that the weakest point in terms of implementation was the relation of Articles 570 bis and 570 ter c.c. with the aggravating circumstances in relation to participation in a criminal organisation provided for certain offences. Does the application of the aggravating circumstance have precedence over the standalone offence of participation in a criminal organisation or can they concur? The legislator tried to answer this question in Article 570 quater.2: 'whenever a conduct is foreseen in two different provisions and there are no overriding criteria to decide which one to apply, the provision with the most serious punishment must be chosen'.

¹⁰⁷ UK Home Office (2014b), 2.

- **Low penalties for participation in a criminal organisation**, especially if compared to penalties for predicate offences. In Germany there is comparatively little threat of punishment (imprisonment up to 5 years or a fine). In the Netherlands many of the underlying offences have a higher punishment maximum than 'participation in a criminal organisation' itself (6 years). Accordingly, in terms of sentencing, if the predicate offence can be proved against each individual, there is little incentive to prosecute for 'participation'. In Italy imprisonment penalties issued for Art. 416 c.c. are often lenient in practice.
- **Prioritisation:** it is worth noting also that policymaking has an impact on the way offences are given priority in relation to enforcement.
- **Practical obstacles linked to the sophisticated nature of criminal organisations.** In Greece the main perceived obstacle which police officers and the Financial and Economic Crime Unit face is the lack of evidence in organised crime cases. According to interviewees, members of criminal organisations are usually very experienced and they know how to conceal their activities. Law enforcement agencies have to deal with an organisation which acts 'professionally and sometimes scientifically', as reported by one stakeholder. In Poland experts suggested that codes of silence, good insulation between the different levels within the criminal group, and penalties for predicate offences that do not stimulate defendants to cooperate with law enforcement agencies and give evidence make it difficult to prove participation. Similarly in Slovakia difficulties were reported in relation to gathering sufficient evidence to prove membership in a criminal organisation.
- **Limited scope of predicate offences:** In Greece various offences are regarded by Article 187 c.c. as predicate offences committed by a criminal organisation. It is therefore not possible to use this criminal tool to combat criminal groups involved in the commission of other offences which are not listed by the article (e.g. corruption). This was not reported to be a problem in other MS that have adopted similar approach, but it may become so.
- **(Frequent) legislative amendments:** In Bulgaria, according to respondents, the frequent changes in substantive criminal law prevent the development of consistent practice, and have a negative impact on pending cases. In Ireland it was noted that authorities were 'still working through' the new provisions. There is a time-lag before such offences are picked up and used regularly.

6.4.2. Factors that facilitate the implementation of participation offences

The following section discusses the factors that facilitate the implementation of criminal law offences relating to participation in a criminal organisation, as described by national experts and stakeholders.

Specialist agencies

In **France** the Perben laws have enabled a significant level of specialisation and centralisation in investigating and prosecuting organised crime. In particular, there is a consensus about the fact that the setting up of the Juridictions inter-régionales specialisees (JIRS) has considerably changed the working relations between judges and police officers. This has facilitated not only organised crime investigations, but also the

enforcement of offences relating to participation in a criminal organisation, as cases are more robust when being examined. The JIRS work as special judicial panels that gather public prosecutors (Magistrats du Parquet) and investigating judges (Juges d'instruction). These panels are specialised in organised crime and 'complex' cases, such as financial crimes, homicides committed by organised gangs, etc. Currently, there are eight JIRS: in Paris, Lyon, Marseille, Lille, Rennes, Bordeaux, Nancy and Fort de France. According to interviewees, the JIRS have contributed to the building of a professional shared culture around organised crime-related work, which facilitates investigations and the search for evidence. These investigative structures are deemed to be effective according to the vast majority of interviewees. This is less the case at the end of the spectrum, when cases are brought to trial.

In **Belgium** the existence of a national (federal) prosecutor specialised in the fight against organised crime received a very positive evaluation, especially regarding its coordinating role.

In **Italy** stakeholders stressed the key role in coordination played by the National Anti-Mafia Directorate (DNA) and by Anti-Mafia District Directorates (DDAs). DNA is tasked with the coordination, at the national level, of all mafia-related investigations and prosecutions. It comprises a General Attorney (Procuratore nazionale antimafia, PNA) and 20 magistrates (sostituti procuratori antimafia), chosen from among those with relevant expertise in proceedings against organised crime. The PNA coordinates investigations by the 26 DDAs, so as to ensure that relevant information is made available to the offices involved in a given case, and well as to connect them. (For further information on the Italian DNA, see the Italian case study in Chapter 9).

In **Croatia** USKOK is a special part of the State Attorney's Office. The Deputy Directors of USKOK are specialised in working on cases of organised crime. This increases their effectiveness. They are also subject to additional checks in order to prevent conflicts of interest and corruption. Specialisation is embedded in the criminal justice system as a whole: from the USKOK police department specialised in organised crime and corruption, to USKOK Courts (special departments of the judiciary – with selected judges – that deal with this type of cases). Such a structure allows preservation of expertise and also saves time and resources in investigations and prosecutions.

In **Romania** the existence of a specialised prosecutorial body that deals exclusively with organised crime offences has also been reported as a good practice that could be exported to other EU countries. The experience of the organised crime directorate (DIICOT) in prosecuting cybercrime and trafficking of persons has been praised at the international level. Also in Romania, the anticorruption directorate (DNA) was said to facilitate better management of cases and prioritisation of resources. It is a fully integrated structure that includes police officers, specialists and prosecutors under one command belonging to the head prosecutor of the DNA. DNA works together with other law enforcement bodies and intelligence units, but it is not dependent on them because it has its own group of police officers inside the institution.

Advanced information systems in Italy

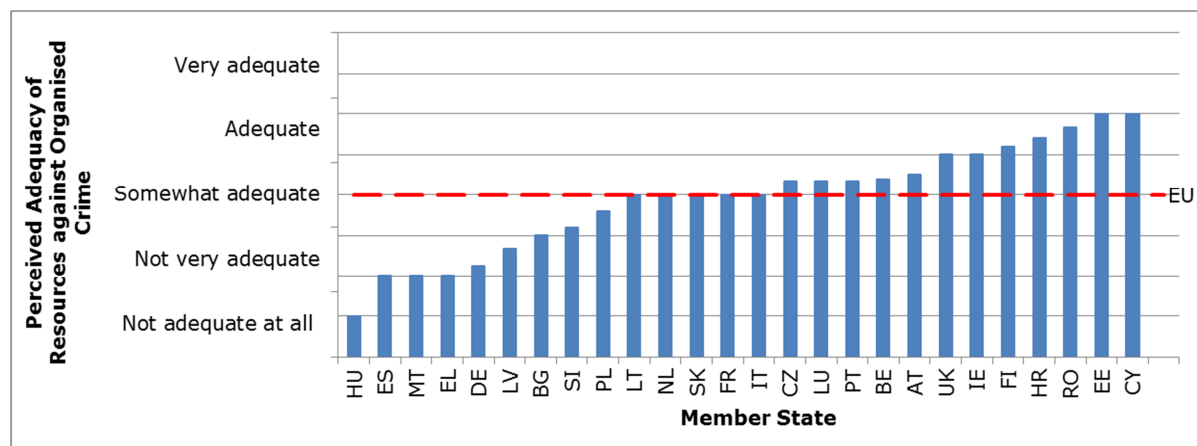
In **Italy** each of the 26 Anti-Mafia District Directorates has an information system (SIDDA) connected with a central information system (SIDNA) at DNA. SIDNA gathers, manages and shares information on all investigations and proceedings on organised

crime through secure communication channels. SIDDA includes a textual database and a relational database. The textual database includes, as a file, all the acts related to a given proceeding (or the most relevant ones). Simple searches (e.g. names, family names, phone numbers, car plates, nicknames, etc.) can be performed. An Oracle relational database (named Fulcrum) allows one to locate, retrieve and display contents. SIDNA includes not only information coming from DDAs, but also from data of other judiciary and non-judiciary databases. Some of the external databases connected with SIDNA are: the Court Records Office; the Tax Registry; the Social Security Service (INPS); the Department of Motor Vehicles; the Income Revenue Authority; the Surveillance Authority on Public Procurements; and the Department of Prison Administration.

6.5. Resources

Figure 6.6 shows responses to the question 'How adequate are the resources (financial, staff, organisational) allocated to implement criminal law offences relating to participation in a criminal organisation?'. The graph shows the views of the MS experts, country by country and at the aggregate EU level.

Figure 6.6: Perceived adequacy of resources allocated to implement criminal law offences relating to participation in a criminal organisation



Source: information provided by MS experts

Offences relating to participation in a criminal organisation are perceived to receive, on average, modest resources. 8 MS are below this average (HU, ES, MT, DE, LV, BG, SI, PL), 5 are equal to the EU average (LT, NL, SK, FR, IT) and the resources in the remaining MS were evaluated to be above the average but do not reach the highest score (i.e. very adequate). Below is an overview of the key problems arising in terms of resources.

In some cases respondents stated that no special budget was available for combating organised crime (AT, DE, LT, ES). In other cases dedicated offices have been set up at the Federal level, but not at the State level (AT). Even when resources were perceived to be somewhat adequate (BE), it has to be taken into account that criminal procedures and the use of special investigative tools can be extremely expensive.

Also, according to respondents, when the work of the police and special agencies is evaluated, there was a tendency to look for immediate results – but organised crime cases are often very complex and time-consuming. Accordingly, prosecutors tend to prefer prosecution and conviction of a few offenders for predicate offences over the more costly and time-consuming investigations in relation to participation in organised crime. This choice prevents magistrates, investigators and judges from getting a wider understanding of organised crime activities, and also from undertaking more complex enquiries, such as financial investigations (FR).

Another perceived weakness is the allocation of resources without any preliminary need assessment and impact assessment analyses (BG).

A number of MS also stated that they suffer from:

- Understaffing (BG, DE, EL, HU, LU, SK, ES) – though it is not clear what ‘proper staffing levels’ would look like.
- Lack of specialised/technical equipment (BG, EL, LV, LT, MT, RO, SK).
- Lack of dedicated training and specialised officers (FI, LV, LU, PL, PT, RO).
- Lack of specialised public prosecutor services in charge of organised crime cases. For example HU does not have a dedicated prosecutor or judge to handle organised crime (this was also mentioned in PL).
- High staff turnover/rotation (IT, LV, PL, SK), with the related loss of institutional memory and expertise (SK).

6.6. Key findings

This chapter has presented findings relating to MS experts’ perceptions of how offences under the Framework Decision are used in practice, along with common barriers and facilitators. Key findings drawn from the above analysis are as follows:

- *Frequency*: criminal law offences relating to participation in a criminal organisation were reported to be used in organised crime cases, at the EU aggregate level, **somewhat often**.
- *Usefulness*: criminal law offences relating to participation in a criminal organisation and alternative offences are regarded as **useful** by stakeholders in the vast majority of the MS.
- *Clarity*: the wording of criminal law offences relating to participation in a criminal organisation, and alternative offences, is on average regarded as **clear**.
- *implementation of participation offences*: putting such offences into practice was, on average, regarded as ‘**somewhat easy**’ when all responses are grouped together.

MS experts were asked to explain the barriers and facilitators to using criminal law offences relating to participation. The issues reported can be categorised as follows:

- **Issues relating to the wording of national legislation**. For example, in some MS a limited range of predicate offences was specified.
- **Issues relating to standards of proof**. In other words, it was difficult to prove elements of the offence such as ‘participation’ and ‘criminal organisation’.

- **Issues relating to staffing and resources.** Examples included too few specialist staff to deal with organised crime, and lack of specialist databases and centralised information.
- **Issues relating to how the legislation tends to be used in MS,** due to the knowledge and experience of practitioners and cultural reasons. For example: a preference to only use the participation offence for a limited number of typical, traditional, criminal organisations; lack of motivation and resources to prosecute offences linked to a criminal organisation on the top of predicate offences; choosing to prosecute for predicate offences where the available sentence for those predicate offences was higher than the sentence for the participation offence; preferring to use the participation element as an aggravating circumstance rather than prosecuting it as an offence in its own right; preferring to use conspiracy rather than the participation offence.

Experts highlighted some examples where the Framework Decision is not used enough – for example, where, in practice, offences under the Framework Decision are not used in the fight against the most serious types of criminal organisation. Experts also highlight examples where it is used too much. For example, it is used against associations that do not appear to meet the traditional definition of a cross-border organised crime group. While it is not possible for this study to draw firm conclusions on this matter, based on the views collected, experts have highlighted the risk of over criminalisation, which in part stems from the fact that the Framework Decision specifies minimum standards, but permits MS to go beyond those standards.

The factors that were reported to facilitate the use of the participation offence were related more to procedures, and specialised and knowledgeable staff, and not the legislative measures. For this reason greater training and awareness raising could be beneficial.

6.7. Recommendations

It is recommended that practitioners should be guided in relation to the interpretation of national provisions. This could be done by:

- Ensuring that the national transpositions of the EU legal instruments 'translate' the concepts included in the EU legislation in a way which is useful and clear for national authorities.
- Ensuring that the practical application of this legislation will be accompanied by the necessary measures, e.g. procedural.
- Issuing guidelines of interpretation at the national level on how to understand certain concepts.
- Ensuring training of the MS judiciary and law enforcement in this regard.
- Issuing EU interpretation guidelines to gather various concepts of interpretation.
- Ensuring sufficient awareness raising of the threat caused by criminal organisations in the EU in order to encourage MS to consider adjusting existing legal measures.
- Ensuring exchanges of best practices regarding the prosecution of the offences relating to organised crime.
- Ensuring that fundamental rights are being observed in relation to the

application of offences of Article 2 at the national level, especially in relation to avoiding over criminalisation.

- It is recommended that MS explore the possibility of adopting solutions similar to those envisaged in the best practices identified above. Coordination mechanisms, integration of knowledge, ways to promote a self-financing approach in the fight against criminal organisations and advanced information systems are key instruments to make these offences more effective in reaching their intended outputs and outcomes.

PART 3: LEGAL AND INVESTIGATIVE TOOLS¹⁰⁸

¹⁰⁸ Philip Gounev, Tihomir Bezlov, Anton Kojouharov, Miriana Ilcheva, Mois Faion, Maurits Beltgens - Center for the Study of Democracy.

7. Legal and investigative tools

7.1. Introduction

This section of the report looks at the use of special investigation techniques¹⁰⁹ used in the fight against organised crime. It is based on analysis of the questionnaires completed by national experts as well as key informant interviews and desk research conducted by the research team. The analysis makes a distinction between 'legal tools' sitting within the domain of the judiciary (e.g. witness protection) and special 'investigative tools' that are used operationally by law enforcement agencies. The report examines eight investigative techniques:

- Surveillance
- Interception of communication
- Covert investigations
- Controlled deliveries
- Informants
- Joint investigation teams
- Hot pursuit
- Witness protection.

These specific tools were selected for inclusion as over the years they have been established as key to cross-border investigations. For each of the tools, the following aspects have been examined:

- Definition of the tool, its scope, and the legislative basis for its use.
- Assessment of various approaches to the implementation of the tool. There is typically more than one model that law enforcement authorities use for implementation. Some models have their advantages above others and may make the tool more effective.
- Evaluation of the mechanism for judicial or other oversight of the tool: this is important as excessive or burdensome oversight process may limit effectiveness. At the same time oversight remains an essential element for the correct functioning of the tool. It ensures the trust of authorities and officers applying the tool and citizens who are subject to its application.
- Analysis of the issues and problems that typically limit the effectiveness of the tool.
- Suggested recommendations to improve cooperation within the EU in the use

¹⁰⁹ The Council of Europe has defined special investigation techniques as techniques that are 'applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aim[ed] at gathering information in such a way as not to alert the target persons.' Council of Europe, Comm. of Ministers (2005a).

of the tool, as well as measures to support individual MS in the use of the tool.

Most of these investigative tools have been incorporated in EU legislation, as shown in Table 7.1, which provides some examples which have been provided for in EU legal instruments. The obligations imposed on MS by these legal instruments are discussed further in later sections of this report. One impetus for cooperation between MS in relation to investigative techniques has come from the implementation of the Schengen Agreement, where the removal of border controls has created the need for more effective law enforcement cooperation.

Table 7.1: EU Legal framework for the use of investigative tools

Legal instrument	Investigative tool
Convention of 18.12.1997 on mutual assistance and cooperation between customs administrations (Naples II Convention)	Controlled delivery (Art.22); Covert Investigations (Art.23); Joint Special Investigation Teams (Art.24)
Convention implementing the Schengen Agreement of 19 June 1990 (CISA, Schengen Convention – Title 3 Police and Security), amended by Council Decision 2003/725/JHA of 2.10.2003	Cross-border surveillance (Art.40); Cross-border pursuit / hot pursuit (Art.41); Controlled deliveries (Art. 73)
Convention established by the Council in accordance with Article 34 TEU on Mutual Assistance in Criminal Matters between the Member States of the European Union, published in OJ C 197 of 12.7.2000	Controlled delivery (Art.12); Joint Investigation teams (Art.13); Covert Investigations (Art.14); Title III – Interception of Communications
Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (of 16 October 2001)	Request for information on bank accounts, banking transactions, monitoring of banking transactions
Council Framework Decision 2002/465/JHA of 13 June 2002	Joint Investigation Teams ¹¹⁰
COUNCIL DECISION 2008/615/JHA of 23 June 2008 ('Prüm Decisions') on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime	Access rights to participating MS automated DNA analysis files (Section 1), automated dactyloscopic identification systems (Section 2) and automated searching of vehicle registration data (Section 3)
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	Intelligence information related to the use of any tool
Directive 2011/36/EU of the European Parliament and of the Council of 5 April 20112 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA	Interception of communications, covert surveillance including electronic surveillance, the monitoring of bank accounts (Art. 9)
European Investigation Order	Controlled deliveries (Art. 28), Covert Investigations (Art. 29), Interception of communications (Chapter V)

A number of international legal instruments also refer to special investigative techniques:

- United Nations: Art. 20 of the UN Convention on Transnational Organised Crime refers to special investigation techniques, including 'electronic or other forms of surveillance and undercover operations', as well as 'controlled delivery'. Art. 11 of the UN Convention Against Illicit Traffic and Narcotic Drugs

¹¹⁰ Commission of the European Communities (2005); Long (2009).

and Psychotropic Substances also refers to the use of 'controlled delivery'.

- Council of Europe: The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters refers to cross-border observations (Art.17), controlled delivery (Art. 18), covert investigations (Art. 19), and joint investigation teams (Art. 20).¹¹¹

7.2. Structure of this chapter

Section 7.3 sets out the limitations to the data presented in this part of the report. Sections 7.4–7.14 present overall findings related to perceptions of the usefulness of different tools; how different tools were reported to be used in combination; and overall findings regarding MS experts' views of the barriers to cross-border cooperation in the use of investigative tools.

Each legal and investigative tool is introduced in a summary table at the beginning of the relevant section. The tables provide the basic facts on each tool, key findings on issues and problems, and recommendations or possible solutions. Recommendations have been deduced from the analytical portions in the main text. Other recommendations and solutions specifically pointed out by national experts are noted.

7.3. Scope and limitations of this part of the study

This study is based on, among other methods, questionnaires completed by MS experts. The questionnaire aimed to acquire a deep and thorough picture of the use of special investigative tools, based on the judgement of both MS experts and the stakeholders they interviewed (including from law enforcement agencies, judiciary and academia).

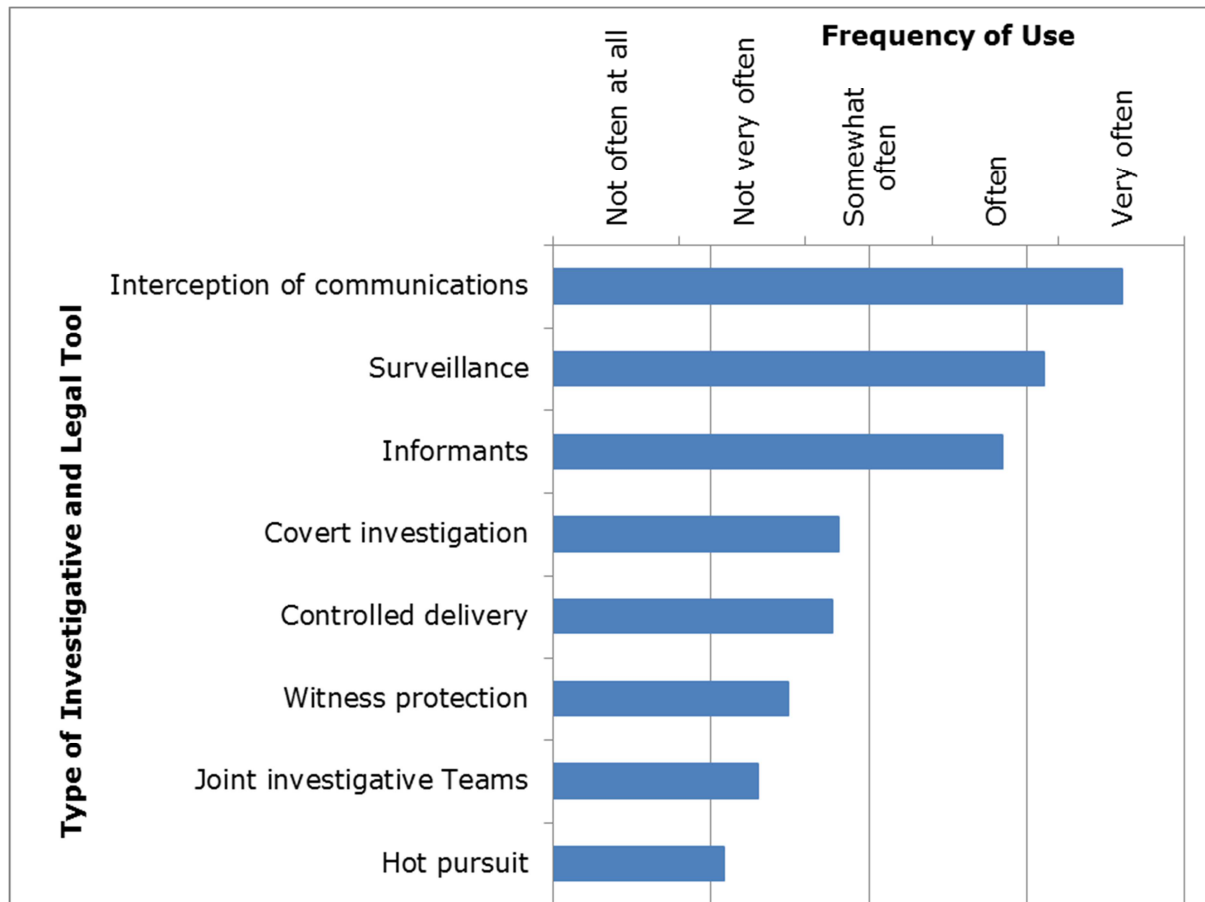
As outlined in Section 3.6, not all returned questionnaires contained all the information required. Moreover, not all questions had been answered in a uniform manner in order to allow for a comprehensive comparative analysis. Therefore, the description of the use of investigative tools in this section is not intended to be comprehensive (it will be seen in Sections 7.4–7.16 that not all MS are discussed in relation to every investigative technique). Findings derived from information contained in the questionnaires are, where appropriate, summarised and presented in table format. MS without completed questionnaires and for which data on the specific issues had not been available, are not included in the tables.

7.4. Key findings on perceived usefulness and frequency of use of investigative and legal tools

In the questionnaires, MS experts were asked to indicate how often or infrequently a range of legal and investigatory tools were used 'in organised crime cases'. Respondents were given five options ranging from 'not often at all' to 'very often'. In addition to these options, the questionnaires asked for narrative responses and opinions on facilitating factors, obstacles and recommendations for improvement. As shown in Figures 7.1 and 7.2, the results from the questionnaires indicate that interception of communications, surveillance and informants are the three instruments that interviewees found most useful *and* were reported to be used most often in the fight against organised crime.

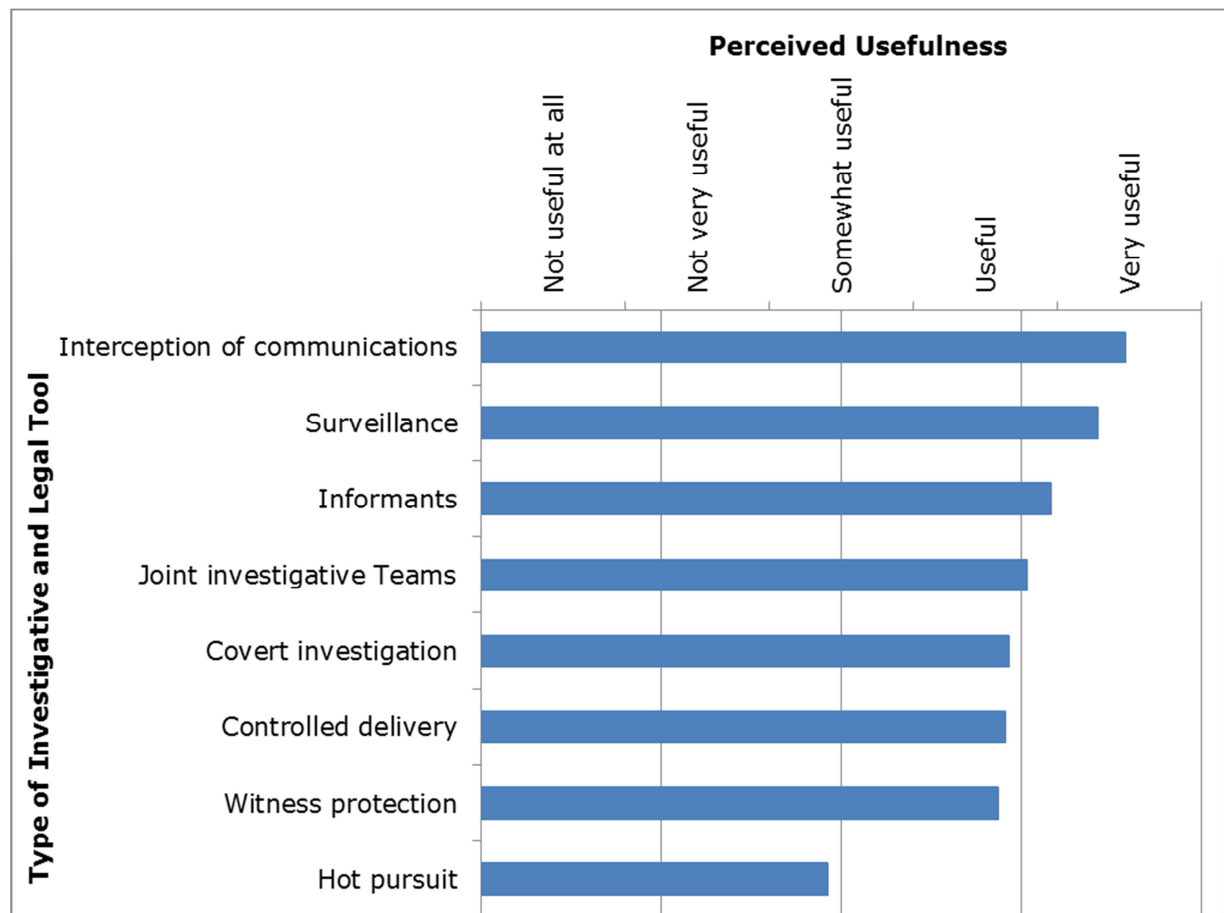
¹¹¹ Council of Europe (2001).

Figure 7.1: Questionnaire responses regarding frequency of use of investigative and legal tools



Source: information provided by MS experts

Figure 7.2: Questionnaire responses regarding usefulness of investigative and legal tools



Source: information provided by MS experts

7.5. Key findings on the use of tools in combination

Responses in the questionnaires indicate that special investigative tools are rarely used on their own. Usually a combination of two or more is employed in order to ensure a positive result. Organised criminal groups, in particular, have a sophisticated organisation, structure and means of communication. Therefore, a multi-pronged approach is often the most efficient choice in the evidence-gathering process. Judicial discretion and authorisation standards and procedures appear also to play a role in law enforcement agencies opting to employ a package of special investigative techniques. This is the case since no application for authorisation of a special investigative technique is guaranteed to be approved. Hence, investigators at times may choose to apply for several special investigative tools as a insurance strategy. Finally, where the health and livelihood of law enforcement officers may be at risk, investigative tools that minimise those risks are applied. This results in the high prevalence of interception and surveillance in combination with informants, covert investigations and controlled delivery.

7.6. Key findings regarding cross-border cooperation in the use of investigative tools

7.6.1. The variety of EU-level, regional and national frameworks

The EU legal landscape of cross-border investigation consists of EU, regional, national and ad hoc arrangements. There exists an EU framework for cooperation and information exchange, at the centre which stand CISA, the Naples II Convention and the Prüm Decision, as well as the legal bases for EU agencies (among others). In addition, there are myriad relevant pieces of national legislation, bilateral agreements and regional initiatives (e.g. the Baltic Task Force).

The EU framework provides a binding 'umbrella' legal structure, while the national and regional/bilateral arrangements usually build upon EU standards, and in the past have also been a stepping stone for the creation of EU standards.

Bilateral agreements are often more thoroughly regulated and have a much deeper scope and more comprehensive procedures than similar frameworks at the EU level. Naturally, some states may choose to action a cross-border initiative based on a bilateral agreement rather than an EU regulation and/or instrument, thus reaching beyond the scope of EU-level agreements. This means that inherent discrepancies exist between national, regional and EU practices. On the one hand these bilateral agreements have the potential to interfere with cross-border cooperation in crime investigations because they interfere with a coherent approach across all MS. But on the other hand, the existence of a range of different tools available at different (EU, regional, bilateral and national) levels means practitioners can select tailor-made solutions to cross-border cooperation.

7.6.2. Challenges arising from different legal frameworks

Differences in national legislation regulating the **minimum punishable offence** for which a special investigative tool may be authorised, can present jurisdictional challenges. It is unclear how an investigation should proceed when a MS with a lower authorisation threshold wishes to cooperate with authorities in a MS with a higher authorisation threshold for the same investigative tool.

Another example which highlights a potential jurisdictional issue is when a suspect under cross-border surveillance crosses from a state with comparatively longer period of surveillance into a state with a shorter allowed period. The expiration of the allowed period in the receiving state might threaten a breach of procedures and force the originating country to apply for an extension from the receiving state, thus making the process administratively burdensome. Therefore, further jurisdictional harmonisation and standardisation at the EU level could avoid these administrative burdens and make cross-border crime fighting more efficient. Introduction of EU-wide instruments, for example a unified **EU surveillance warrant**, has been suggested as one possible measure to facilitate cross-border surveillance efforts (CZ).

Furthermore, national legislation may define and treat similar operational issues and subjects differently, thus exacerbating difficulties in cross-border cooperation. In the field of covert operations, for example, there is no common or agreed definition of what an undercover agent is. Therefore, a law enforcement official who has undercover agent

status in one MS may not have that status transferred to another, because of **different legal definitions**.

In addition to jurisdictional differences, **inadequate transpositions** of EU law onto national legal systems has been established as an obstacle to effective Joint Investigation Team operations.

7.6.3. Challenges due to limited financial resources

An overall impression from national experts' responses across all legal and investigative tools is that **financial strain** is a serious obstacle to conducting cross-border operations utilising special investigative means. This is especially true when special investigative tools require continuous commitment to investment in the latest technologies, training and maintenance (with a view to avoid yielding competitive advantage to organised crime). Certain law enforcement structures, such as customs, have benefited from EU co-funding through FRONTEX in their efforts to modernise surveillance methods, while others are perceived to lag behind (FR). Funding from the DG Home ISEC program has also aimed to contribute to the improvement of cross-border capabilities and the enhancement of organisational capacity.¹¹²

7.6.4. Challenges from different judicial and administrative procedures

Because of their invasive nature, specialised investigative tools follow a strict **authorisation regime** in order to safeguard individual rights and freedoms, ensure the effectiveness of investigations, and provide sufficient instruments and levers for control and oversight. In some countries experts reported that as many as seven different levels of authorisation for interception of communications were needed, and such processes can be time- and resource-consuming and act as barrier to effective cross-border cooperation.

For example, some national experts were of the opinion that preparatory activities for cross-border surveillance are very time-consuming due in part to judicial and administrative discrepancies among the different countries (LV). There is at least one instance of a '**conditional**' **cross-border surveillance regime**, whereby the investigators leading the surveillance from the originating MS must transfer over surveillance responsibility to a local team (NL).

7.6.5. Challenges arising from the use of different technologies

The **lack of standardised technological solutions** in some areas often presents a challenge in cross-border surveillance activities. For example, the use of GPS tracking systems and imagery is not standardised across law enforcement in Europe. Because of the incompatibility of such systems, investigators may resort to attaching two or more GPS tracking devices onto a vehicle under cross-border surveillance. This enables authorities from the jurisdictions along the route of the vehicle under surveillance to monitor its movements, in cases when a MS' law enforcement use incompatible GPS tracking systems. Such discrepancies, however, take up additional time and resources, and increase the risk of being exposed to the suspects under surveillance. In this case

¹¹² DG Home Affairs programme for Prevention of and Fight Against Organised Crime (ISEC) (2007–13). For a list of projects funded see (as of 3 February 2015): http://ec.europa.eu/dgs/home-affairs/financing/fundings/projects/index_en.htm#/c/c_

Europol has implemented a workaround by providing access to a centralised database where movements recorded from different GPS standards can be monitored by law enforcement from various MS. Furthermore, Europol is working towards establishing a unified European standard for GPS tracking.

7.6.6. Challenges arising from multinational and multicultural environments

Increase in migration and the free movement of EU citizens over the past decade has meant that interception of communication and audio surveillance need to be undertaken in a multitude of languages. It was reported by MS experts that this has become an issue, putting additional financial strains on law enforcement agencies (BG, DE, HU, SK, LU). Interpreters and translators not only increase expenses but may require further training and administrative support such as vetting. In addition, finding and recruiting good quality interpreters and translators has also been identified as a problem (AT). The use of undercover officers and informants is also complicated by the ever more diverse ethnic and linguistic mosaic of organised criminal networks. Such complex multilingual and multi-ethnic environments have forced law enforcement agencies to arrange solutions and workarounds in an ad hoc and/or bilateral basis.

7.6.7. Challenges in mutual trust

Any cross-border utilisation of a special investigative tool by law enforcement may necessitate the **exchange of sensitive intelligence**, such as information about the source. It is vital that those sharing information trust each other in order to safeguard that information and protect it from further dissemination. Some national experts suggested that such a mutual understanding was lacking at times, especially in cases where law enforcement priorities of the cooperating partners differed. Therefore, this may further inhibit cross-border use of special investigative tools, particularly cross-border controlled deliveries. In instances where cross-border cooperation relies more on developed trust among individual officers in different MS, rather than on implemented systems, trust may become an issue when staffing changes occur.

7.6.8. General recommendations

The table below sets out possible solutions to the challenges of cross-border investigations, as identified by MS experts in the questionnaires. It should be noted that not all experts provided recommendations. All recommendations suggested by MS experts that were (in the view of the research team) sufficiently explained are included in the table.

Table 7.2: Cross-border investigations – issues and possible solutions

Issues & problems	Possible solutions
Lack of resources (financial, human, technical)	Increase EU funding for technologically demanding and training in intensive tools, such as surveillance, interception and hot-pursuit. Enhance EU-wide exchange of best practices and support training. Support establishment of specialised cross-border surveillance teams in MS, with a view to avoid lowering the priority of cross-border surveillance efforts because of financial strain and overwhelmed staff. Provide support and funding for acquisition and maintenance of up-to-date IT expertise in law enforcement agencies.
Administrative burden	Streamline, simplify and shorten the administrative processes required for initiating cross-border cooperation in the field of special investigation tools.
Judicial incompatibility	Continue efforts toward harmonisation, standardisation and cohesion of MS' legislations. Work toward researching and introducing EU-wide instruments for cross-border cooperation in applying special investigation tools, i.e. common definitions, agreed priorities, and common management and implementation models.
Information exchange	Work toward enhancing the framework for exchange of information and intelligence among MS, and between MS and the EU.
Cross-border cooperation	Continue and enhance CEPOL training. Specialised EU-funded projects to combat organised crime, which include funding for investigators, technical equipment and exchange of personnel, have been found of great use (AT).

The following sections of the report (7.7–7.14) review separately each of the investigatory tools and techniques.

7.7. Surveillance

Table 7.3: Surveillance – basic facts

Legal basis	Schengen Convention, ¹¹³ The Prüm Decision, ¹¹⁴ Naples II Convention, ¹¹⁵ EU Convention on mutual assistance in criminal matters between MS. ¹¹⁶
Frequency of use in organised crime investigations	Often to very often.
Scope	Due to its invasive nature, surveillance is usually limited to more serious crimes (i.e. a threshold) or specifically listed. It is used in organised crime cases involving smuggling/trafficking of human beings, illicit arms, drugs and excisable goods (i.e. illicit tobacco).
Obstacles	Privacy and data protection legislative safeguards, insufficient technical and financial resources, administrative burden in cross-border operations.
Recommended changes	Continue harmonisation of EU-wide surveillance legislation (i.e. equal thresholds and timeframes); Expand the use of cross-border cooperation centres (through Europol, Frontex, Eurojust) to enable more efficient communication exchange; Decrease administrative burden (i.e. introduce electronic/online-based authorisations, especially for cross-border operations).

¹¹³ Council of the European Union (1990).

¹¹⁴ Council of the European Union (2008a).

¹¹⁵ Council of the European Union (2000b).

¹¹⁶ Council of the European Union (2000a).

Surveillance is often perceived to be one of the most straightforward techniques used in proactive law enforcement investigations. Physical observation of the movement of persons and objects has long been a basic tool for investigators. Whereas physical observation may not require complex resources (especially compared to covert investigation, which is more costly and demanding), the ever-increasing reliance on technology-based communications, including by organised criminals, requires significant technological commitment and the sophistication of law enforcement organisations in order to successfully perform surveillance activities.

Inherent differences in MS legislation and varied degrees of national sensitivities, especially on the issue of privacy and sovereignty, have helped provide for a generally cautious approach to surveillance across the EU. The Temporary Committee on the ECHELON Interception System of 2000¹¹⁷ and the EU response to leaked information about alleged NSA covert surveillance on its territory highlighted European concerns regarding the transparent and legal use of surveillance tools and underlined the paramount position of personal privacy in European principles.

In April 2014 the European Court of Justice declared the Council's Data Retention Directive invalid.¹¹⁸ While the Court noted that 'data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime', judges concluded that the Directive 'entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU'. The EU Court of Justice's recent decision against Google's data retention policies is yet another manifestation of the values of Europeans, which often mould surveillance and interception legislations into measures with a relatively strict compliancy level for personal privacy and data protection.¹¹⁹

In this respect it is important to note the context within which European cross-border surveillance operates – a continuous legal struggle both on local and EU levels between efforts to balance cross-border cooperation in the fight against crime and the protection of privacy and personal data. Therefore, part of the EU-wide efforts on fostering special investigative tools and their facilitation in cross-border investigations appears to be founded on local and regional initiatives, which have already gained some legal standing. Investigation cooperation, including cross-border surveillance, has its roots, to a large degree, in bilateral/regional agreements, many of which predate common European efforts, and act as stepping stones and best practices across MS.

Discrepancies among national legislations have long hindered EU efforts in transitioning towards common policing and internal security management. Limited by these constraints, the EU's role in fostering the use of cross-border special investigative techniques has been one of ground-up inclusion rather than top-down imposition, i.e. legislating EU-wide policy by adopting pre-existing regional practices. For example, two of the main EU-level frameworks regulating the use of cross-border special investigative tools, the Schengen Agreement and the Prüm Decision, had already been initiated and in operation before the Council made the decision to include them in the community acquis.

¹¹⁷ European Parliament (2001).

¹¹⁸ ECJ case C-293/12.

¹¹⁹ Court of Justice of the European Union (2014b).

In this way the natural path of the EU in fostering and facilitating cross-border surveillance had been the adoption of existing best practices, their codification into EU law and their consequential extrapolation onto the legal frameworks of MS through the processes of harmonisation and standardisation.

7.7.1. Definition

There is no universal definition of surveillance. The various definitions for surveillance generally depend on whether it is used as an umbrella term or it is more narrowly defined. Advances in technology appear to be a factor in defining what surveillance is, as they hold the potential to periodically enable previously unavailable methods, techniques and tools for conducting surveillance operations (i.e. geolocation/tracking, electronic surveillance, cloud technologies, storage capacities).

Analysis of information in the questionnaires indicates that MS use different approaches in defining surveillance in their legislation. Some MS differentiate between simple observation conducted without technical means and surveillance utilizing technical tools (AT, BE, FI, FR DE, LU). In other MS legislation distinguishes short-term and long-term surveillance, wherein the defined periods may vary from state to state (AT, DE, BE). The significance of making a distinction in the periods for which surveillance is authorised is that most often short-term surveillance is regulated more loosely and/or does not require a judicial oversight. Some MS definitions isolate surveillance conducted on the premises of private homes as a special circumstance, whereby it requires additional judicial authorisation and oversight (AT, CZ, LU, UK).

Overall, MS definitions may be grouped into two main categories:¹²⁰

- *General / broad definitions.* In these instances surveillance is more broadly defined as a special investigative tool that may be executed through the utilisation of various technical and other means (BG, EE, HU, LT, SI, FI, SK, SE). Specific examples include:
 - The method of intelligence data gathering, when information collected identifying, recognizing and (or) watching an object (LT).
 - Covert surveillance of persons, things or areas, covert collection of comparative samples and conduct of initial examinations and covert examination or replacement of things... the information collected shall be, if necessary, video recorded, photographed or copied or recorded in another way (EE).
 - Secret observations made of a person with the purpose of retrieving information (FI).
- *Technically specific definitions.* Some MS have opted for a more detailed and specific approach to defining surveillance in their legislations. In such instances, legal provisions often define surveillance along the logic of the types of technical means and/or outcome from surveillance activities (BE, AT, FR, DE, LU, PT, SK, SE). In general, the different types of surveillance methods, such as video surveillance, photographic imaging, bugging, audio surveillance and geo-tracking may be separately detailed in the definition of surveillance. For example, in France geolocation/tracking and video-surveillance are

¹²⁰ Not all Member States are mentioned here: information was not provided for some Member States in the completed questionnaires.

regulated separately (FR). This is because different types of surveillance are deemed to have potentially varied levels of intrusion and may be regulated with differentiated criteria, e.g. period for surveillance, authorisation procedure, crime threshold (FR, SI).

Surveillance conducted using technical means is difficult to define as it covers a wide array of activities and capabilities, as well as methods and techniques. A breakdown of some the most used methods may help illustrate what is contained in the term.

Table 7.4: Electronic surveillance methods.

Audio surveillance	Visual surveillance	Tracking surveillance	Data surveillance
Phone-tapping Voice-over-Internet-Protocol (VoIP) Listening devices (room bugging)	Hidden video surveillance devices In-car video systems Body-worn video devices Thermal imaging / (forward-looking infrared) CCTV	Global Positioning Systems (GPS) / Transponders Mobile phones Radio frequency identification devices (RFIDs) Biometric information technology (e.g. retina scans at airports)	Computer / Internet (Spyware / Cookies) Blackberries / Mobile phones Keystroke monitoring

Source: Current practices in electronic surveillance in the investigation of serious and organised crime, UNODC¹²¹

There is a notable variation of approach in defining surveillance in the United Kingdom. In that country surveillance is generally defined as 'directed' and 'intrusive' as per the level of potential interference into the lives of its targets:

- Intrusive surveillance is covert surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle (and that involves the presence of an individual on the premises or in the vehicle or is carried out by a means of a surveillance device).
- Directed surveillance is covert surveillance that is not intrusive but is carried out in relation to a specific investigation or operation in such a way as is likely to result in obtaining private information about any person (other than by way of an immediate response to events or circumstances such that it is not reasonably practicable to seek authorisation under the 2000 Act) (UK).

7.7.2. Scope

The rationale behind using surveillance (and all special investigatory techniques) in investigations has always been one of necessity and of opportunity. On the one hand, concerns about privacy and misuse mean that most jurisdictions have installed a system of legal constraints, wherein surveillance (and other special investigative means) may only be used when all other tools have either been exhausted or proven inefficient. But on the other hand, the overall consensus among respondents was that surveillance provides invaluable information that illuminates the secretive nature of criminal activities, especially organised crime. This makes this instrument paramount in collecting

¹²¹ United Nations Office on Drugs and Crime (2009).

evidence which can be presented at the judicial stage. The limits on the maximum allowed periods for surveillance serve as an additional tool for control, evaluation and verification of the necessity criteria.

The scope of surveillance as a special investigative tool may be viewed from several angles: who can perform surveillance, for how long, and in what circumstances can surveillance be authorised.

Who performs surveillance

Surveillance, as is the case with other special investigative techniques, may be performed only by authorised organisations or structures within a state's law enforcement system, including intelligence, counter-intelligence and military intelligence structures. Generally the units in charge of investigating the respective criminal activities are involved in the surveillance activities. Some states however, utilise specialised institutions, separate from police, which perform surveillance, in addition to other investigating structures (FI, IE, LT, BG). In Ireland, only An Garda Síochána, the Defense Forces and the Revenue Commissioners may carry out surveillance (IE), while in Portugal the Polícia Judiciária is authorised to conduct surveillance activities in cases of serious organised crime (PT). In Greece surveillance is carried out by personnel of the State Security Division of Hellenic Police and by subdivisions investigating organised crime, drug trafficking, and economic crime (EL). In one instance the decision authority on surveillance activities lies with the organisation that is authorised to make an arrest (FI).










Time limitations

The temporal scope of surveillance may be generally divided into short- and long-term surveillance. This differentiation is an important factor in the decisionmaking and authorisation process. Short-term surveillance may range from 24 hours (DE) to 48 hours (AT, CZ, SK) and may only require a simple suspicion that a crime has been committed (AT).

Furthermore, in most jurisdictions short-term surveillance that is initiated under the urgency clause may not require immediate official authorisation from a prosecutor or a judge.

Long-term authorisation periods for surveillance vary significantly across MS, and are in certain cases dependent on the type of surveillance to be carried out. For example, real-time geolocation in France can be carried out for a maximum of 15 days in a preliminary inquiry and for up to 4 months in an investigation (FR).

Table 7.5: Maximum allowed surveillance period increments in some states

State	Maximum allowed surveillance period increments
 (CZ)	6 months
 (BE)	1 month
 (EE)	2 months
 (FI)	6 months
 (IE)	3 – 4 months depending on measure
 (SK)	6 months
 (SI)	2 months
 (RO)	30 days
 (LT)	3 months

Source: information provided by MS experts¹²²

The maximum allowed periods for surveillance are extendable and often act as increments used as a measure of control as each extension application requires renewed rationalisation and authorisation. In some legislation the total maximum period during which a person may be held under surveillance is also defined:

'Application of a measure may last a maximum of two months; however, if due cause is adduced, it may be extended every two months by means of a written order. The measure may last a total of:

- 1) 6 months in the case referred to in the sixth paragraph of this Article.
- 2) 24 months in cases referred to in the fifth paragraph of this Article if they relate to criminal offences referred to in the fourth paragraph of this Article, and 36 months if they relate to criminal offences referred to in the second paragraph of Article 151 of this Act'.¹²³ (SI)

Circumstances / conditions under which surveillance may be authorised

The scope of utilisation of surveillance is in some states regulated to include all types of serious crime, for example suspicion of an offence for which a person can be arrested would suffice in applying for surveillance approval (IE). There are however, jurisdictions wherein regulations specifically mention the admissibility of surveillance for particular crime types based on the respective penalties. The following examples were provided in the questionnaires:

- Crimes of murder, homicide, trafficking in persons, child pornography, drug trafficking, crimes related to currency (CY¹²⁴).
- Serious crimes punishable with imprisonment of more than 5 years (BG,¹²⁵ CY,

¹²² This table covers selected Member States because information related to this issue is not available in each questionnaire.

¹²³ Article 149.a (10) Criminal Procedure Act 2006, Slovenia.

¹²⁴ Criminal Procedure Code 1998, Cyprus.

¹²⁵ Special Investigation Tools Act 2013, Bulgaria.

FR,¹²⁶ LU,¹²⁷ SK¹²⁸).

- Crimes against public or state security and involving international terrorism (CY, SK).
- Crimes punishable with imprisonment of more than 1 year. (AT,¹²⁹ BE¹³⁰)
- Corruption (CY, SK).
- Abuse of office power (SK).

Covert surveillance may be carried out on persons who are not themselves suspect in criminal activities, but are believed to be useful in an investigation because of, for example, their likelihood of coming into contact with the suspect. (AT, DE, SI)

- The person under surveillance is under suspicion to have committed a crime of more than 10 years imprisonment, or is the instigator or a participant of such a criminal organisation; or certain facts give rise to the suspicion that the suspect of such crimes will establish contact with the person under surveillance (AT).

7.7.3. Resources

Surveillance, as an umbrella term, including physical observation, visual and audio surveillance, electronic/cyber surveillance and geolocation, is a resource-intensive activity. Resources involved in surveillance may be divided into two main groups:

- Conventional resources: human resources and training, vehicles and surveillance equipment, etc.
- High-tech resources: know-how and specialised training, access to latest technologies.

The technical equipment required to perform surveillance involves both technical staff for installation and maintenance, and specially trained officers with a remit and skills for analysis of the collected data.

An example of the need for specialist (and therefore expensive) equipment is maritime surveillance (often needed in cases of human trafficking or people smuggling). This can be especially resource-consuming as it requires significant investment in expensive niche equipment (special aircraft for surveillance and maritime patrol, coastal surveillance radars and boats, mobile scans, etc.) which in turn requires substantial spending on maintenance and highly specialised training of both operators of equipment and analysts. It was noted that some of this equipment had been co-funded by FRONTEX in France.

7.7.4. Usage in combination with other investigative tools

The increasing sophistication of organised criminal activities necessitates highly concerted multi-pronged efforts on behalf of law enforcement. The overall consensus of respondents is that investigations are most effectively facilitated when various special investigative techniques, often depending on the nature of the crime, are used in combination in an investigation. The different special investigative tools, when used

¹²⁶ Projet de loi relatif à la géolocalisation 2014, France.

¹²⁷ Code d'instruction criminelle 2010, Luxembourg.

¹²⁸ Criminal Procedure Code No. 301/2005 Coll., Slovakia.

¹²⁹ Strafgesetzbuch 2000, Austria.

¹³⁰ Code d'instruction criminelle 2013, Belgium.

separately, have the potential to reveal certain aspects of criminal workings. However when multiple special investigative techniques are employed in a planned and coordinated manner, officers have the opportunity to receive a more complete picture of suspect activity, organisation and structure. A combination of special investigative techniques is the desired norm in an investigation and in some jurisdictions they are always used in combination (LV). Others express the opinion that surveillance is insufficient when used without other supporting tools (PT).

Judicial standards, too, often require supporting and corroborated evidential materials for a case to be admissible and consequently lead to a conviction. It is apparent that the use of other tools in parallel increases the chance to gain additional evidence, charge a suspect with an offence, and potentially convict members of a criminal group. The more sources that can confirm the gathered information, the higher the quality of the evidence. This is especially true in jurisdictions with criminal codes that guarantee equality of all evidence regardless of the method or tool for collection (PL, BE).

There are certain special investigative techniques that, by their nature, may require additional tools to be applied in combination in order to be effective. Surveillance is identified as a supporting and facilitating technique in conducting effective controlled delivery and hot pursuits (FR, SI).

The use of surveillance in combination with other special investigative techniques is often decided on a case-by-case basis and the decisionmaking process may be dependent on the following factors:

- **The nature of the suspect criminal activity and organisation:** Investigators must assess and plan the most effective investigation tools that are pertinent to the criminal situation and would potentially yield the highest quality of intelligence. Officers must focus on those types of criminal activities and organisations for which surveillance is most feasible, and that are most 'open' to surveillance (FI). For example, trafficking and smuggling offences may be best suited for controlled deliveries facilitated through geolocation surveillance, while cybercrime may require extensive use of electronic surveillance.
- **The judicial standard in the respective MS:** Often the level and composition of combinations of conducted special investigative techniques is dependent on established judicial practice and is decided based on the merit of preliminary information presented to the authorizing organisation in the process of applying for a special investigative tool. Generally, there is no guarantee that the judge or prosecutor will at all times approve the special investigative techniques applied for by the investigation team (LV).

Surveillance appears to be most often used in combination with interception of communications (AT, BG, CZ, FR, EE, LT, MT, SK, SI, ES). The two methods mutually reinforce each other: the interception of communications gives investigators an advantage (and often provides an idea where to look) and surveillance can corroborate the contents of the intercepted communications (ES). When used in combination surveillance and interception of communications have the potential to define and limit the scope of an investigation and facilitate allocation of resources in areas where it is most likely that evidence will be collected (FR). Furthermore, by applying both

measures, investigators are able to identify more effectively the area where criminal activities occur and then track the movements of those involved (EL).

In addition, surveillance is used in combination with wire-tapping (BE, SE), undercover/covert investigations (BG, LT, CZ), informants (LT, SI), geolocation (SK, SE, UK) and audio-surveillance/voice recognition (UK).

7.7.5. Legislative basis

Several main treaties, as well as other initiatives, work to facilitate and foster cross-border cooperation at the EU level. Some of the major frameworks include:

The Convention on Implementing the Schengen Agreement (CISA)

The Schengen Agreement provided for the binding abolition of national borders and effectively assured the free movement of persons and goods among its parties. This, in turn, necessitated the introduction of compensatory measures to ensure and safeguard MS security. At the EU level, CISA laid a more general and binding guidance on cross-border surveillance. Article 40 provides for both pre-planned surveillance, when activities proceed after authorisation from the host state, and for urgent surveillance, which may proceed without prior authorisation from the host state. In effect, in the domain of cross-border surveillance, CISA provides an umbrella-type of a framework that intends to ensure smooth and swift cross-border activities in that field.

The Prüm Decision¹³¹

The Council continued to recognise and acknowledge cross-border crime fighting and information exchange efforts by MS that were initiated outside the legislative domain of the union. Similar to Schengen before it, the Prüm Treaty had built upon several bilateral and regional best practices and information exchange frameworks. Recognizing its practical and operational merit the Council decided to adopt and integrate part of the provisions of the Prüm initiative into EU legislation with the Prüm Decision of 2008. This new framework further widened the scope of cross-border cooperation and information exchange, particularly in the field of terrorism and cross-border organised crime.

The Naples II Convention¹³²

The Convention on mutual assistance and cooperation between customs administrations (Naples II) was adopted in 1997 by the Council to regulate cross-border cooperation in the prevention, investigation and prosecution of certain infringements of both the national legislation of MS and Community customs regulations. Article 16 of the Convention provides for both planned and spontaneous cross-border surveillance of suspected national and/or community customs infringements. More importantly, the convention covers money laundering of the proceeds from customs infringements, which opens the door to information sharing among organisations apart from customs, since in many MS jurisdiction over money laundering may sit outside the customs authorities.

¹³¹ Council Decision 2008/616/JHA.

¹³² Council Act 98/C 24/01.

EU Convention on mutual assistance in criminal matters between MS

This convention creates binding provisions that have a direct impact on exchange of information collected through interception. It mandates that a MS is obliged to respond to an interception request made by another state party to the convention.¹³³ As electronic surveillance is usually naturally preceded by an intercept the Convention has a facilitating effect on cross-border surveillance.

Bilateral arrangements between neighbouring states often offer the most comprehensive of scopes to cross-border cooperation, including surveillance. Bilateral agreements build upon Council regulations in their reach and scope. Thus, they are at times the preferred instrument for conducting cross-border cooperation, including surveillance (FR, DE). Therefore, the value of bilateral and regional frameworks in facilitating cross-border surveillance lies in complementing the already established EU-wide standard and in providing best practices.

There exist regional initiatives and formats both outside and within the EU that have developed and fostered specific cross-border cooperation activities. The Task Force of Organized Crime in the Baltic Sea region is perhaps the most prominent example of cross-border integrated maritime surveillance, including among MS that is outside immediate EU jurisdiction.¹³⁴


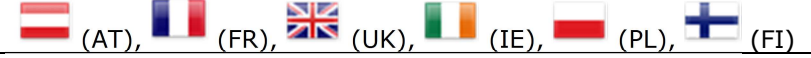

The Task Force Mediterranean is the European response to growing concerns over migrant pressure and the growth of organised criminal networks in the Mediterranean region. The initiative generally provides for enhanced maritime cooperation, including surveillance, in managing migrant flows and combatting transnational crime in the region. FRONTEX's involvement is a main factor in the region, providing equipment and assistance in implementing technological solutions in the task force's activities, including improving cross-border surveillance efforts (FR).

With a few exceptions (MT, EL), surveillance is regulated in the statutes of MS. In some states the regulations are part of the criminal procedures codes, in others special legislation governing the use of special investigative tools has been passed. Many states have gradually adopted specialised legislation on the use of covert investigation tools to improve control, prevent misuse and assure transparency and accountability. This is in part a result of a generally negative and suspicious public perception of surveillance techniques used by the state, which has generated sufficient public pressure. That pressure has materialised on the EU level as well in the adoption of Directives aimed to safeguard personal privacy and data. They often work to counter and balance the scope and effect of special investigative means. Most states work with a framework that includes a combination of specialised and non-specialised legislation, in conjunction with binding EU Directives on personal privacy and data protection, and conventions such as CISA, NAPLES II and Prüm, among others.

¹³³ For the text of the convention see Council of the European Union (2000a).

¹³⁴ Hollis & Ekengren (2013).

Table 7.6: Types of legislation regulating surveillance among MS

Legislative act	Countries
Criminal procedure code	 (AT), (RO), (CZ), (DK), (HR), (CY), (SE), (EL), (LV), (LT), (NL), (DE), (SK), (BE), (PL), (ES), (IT)
Police/Security act	 (AT), (FR), (UK), (IE), (PL), (FI)
Specialised laws	 (BG), (PT), (FR), (EE), (SI), (CY), (FI), (SE), (EL), (LV), (LT), (UK), (IE), (NL), (DE), (SK), (BE), (ES)

Source: information provided by MS experts

Some MS do not explicitly regulate cross-border surveillance in their local statutes and rely on bilateral agreements and international treaties (HR, RO, PT). Others have specific provisions (EE).

As technological advances provide new and improved ways for exchange of information and communication, lawmakers have had to adapt legislation to fit the scope of such developments. This necessity is further exacerbated by the trend for criminal elements to quickly take advantage of the latest technological solutions in communication and exchange of information that may still be below the law enforcement radar or outside the technical capacity and know-how of investigators. As European courts are presented with evidence collected using unprecedented methods and technologies, their decisions may impact on the use of that technology in investigation efforts. For example, a court decision in France has ruled that real-time geolocation tracking is an invasion of privacy, which has led French lawmakers to initiate and pass a specialised piece of legislation on the use of geolocation for investigation purposes, thus including it in the regime of special investigative tools.¹³⁵

7.7.6. Public concern

The use of special investigative means inherently carries a potential risk for abuse. Few are the European states that have not been affected by a nationwide scandal involving leakage of information collected through covert techniques. The phone hacking of celebrities by News Corporation in the UK,¹³⁶ leaked audio surveillance records of political figures and businessmen in Romania¹³⁷ and Bulgaria,¹³⁸ the government Trojan horse controversy in Germany,¹³⁹ the Garda phone recordings controversy¹⁴⁰ in Ireland – to name a few – have all shaped public opinion in opposition to such practices and produced significant pressure on lawmakers and governments to protect and safeguard

¹³⁵ Court decision available at (as of 3 February 2015): <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000027303638>

¹³⁶ Davies (2009).

¹³⁷ Neagu (2011).

¹³⁸ Novinite (2013).

¹³⁹ Spiegel Online International (2011).

¹⁴⁰ *Garda phone recordings controversy* (2014).

the right to privacy. While these particular cases are strictly related to *covert* surveillance, the general public often do not make this distinction.

7.7.7. Implementation

It has been ascertained that surveillance activities are rarely applied without additional, supporting or facilitating special investigative means. The nature of organised crime, as well as judicial standards, require that a balanced combination of investigative methods are deployed to ensure effective collection of evidence and successful judicial proceedings. The heightened probability of dealing with high-tech means of communication and jurisdictional difficulties related to technologies such as cloud computing add further difficulties to the investigation efforts. Therefore, effective surveillance requires careful planning, and a well-calculated and risk-assessed global approach on investigating the respective criminal activity or structures.

Some jurisdictions have delegated surveillance duties to specialised units within law enforcement (FI, IE, BG). This may provide for a more effective resource allocation and a highly skilled workforce specialised in surveillance. However, as surveillance cases are generally on the increase, while staffing is identified as problematic, there is a possible risk that such units may become overwhelmed¹⁴¹ (BE, EE, DE, LV, FI). Another concern with centralisation is the creation of so-called 'islands of knowledge' within an organisation, whereby knowledge management may be adversely affected resulting in potential encapsulation of units.

Most MS do not operate a centralised management system for surveillance activities. However, many have established and are enhancing national databases which contain information collected through surveillance, among other sources. Technically a central database is at the source of a central management system. However, because of public concern over privacy and legality issues, the decision to furnish central technical capabilities with national management responsibility will most likely be a political one. There are efforts underway in some jurisdictions to start operating centralised databases by merging existing ones and adding new capabilities. The Police National Computer/Database has similar functions in the UK.¹⁴²



7.7.8. Oversight

Efforts to mitigate the risk of misuse of special investigative techniques begin at the inception stage of law writing. Control is, almost ubiquitously, explicitly prescribed within the same laws that provide for and regulate surveillance, among other special investigative techniques.

¹⁴¹ Data and some statistics are available at (as of 3 February 2015) www.privacyinternational.org

¹⁴² UK Home Office (2013).

Table 7.7: Types of authorisation required prior to conducting surveillance activities

Authorisation authority	Countries
Prosecutorial authorisation	 (AT), (BE), (BG), (CZ), (CY), (EE), (FR), (EL), (LU), (PL), (SK), (SI), (ES), (IT)
Judicial authorisation	 (AT), (DK), (FI), (IE), (LU), (RO), (SK), (SI), (UK),

Source: information provided by MS experts¹⁴³

Judicial or prosecutorial discretion and approval is present and mandatory in all reviewed national regulations. Before approval, the application for authorisation of surveillance must demonstrate a minimum set of required information and criteria presented in written form.¹⁴⁴ These generally include the following principles:

- **Necessity:** the applicant must demonstrate that the proposed surveillance measure is absolutely necessary for the purposes of the investigation by demonstrating that all other means have either been exhausted or are inapplicable.
- **Least intrusive:** the application must prove that the sought after surveillance measure is the least intrusive one for the purpose of collecting the targeted information
- **Proportionality:** when invading personal privacy the measure must be proportionate to the seriousness of the crime
- **Threshold:** the applicant must demonstrate reasonable suspicion of crime being committed that falls within the threshold of allowing surveillance as a special investigative technique.

Box 7.1: Criteria example

If the investigation cannot be carried out in any other way or would be accompanied by great difficulties, the investigating judge may, upon the written request with a statement of reasons of the State attorney, order against the person whom there are grounds for suspicion that he committed or has taken part in committing an offence referred to in Article 334 of this Act, measures which temporarily restrict certain constitutional rights of citizens as follows (HR).

The information provided in the application for authorisation of surveillance may be submitted under oath by the police chiefs or authorised officers.

¹⁴³ This table covers selected Member States because information related to this issue is not available in each questionnaire.

¹⁴⁴ It is important to differentiate between short-term observation and long-term surveillance that may use technical means. The listed requirements are valid for the latter kind of surveillance.

Box 7.2: Required information examples

1. The serious indications of infringements which justify the observation and if the observation is part of a proactive investigation defined in Article 28bis, § 2, the particular indications related to the elements described in this provision; 2. The reasons why the observation is essential for the manifestation of the truth; 3. the name or, if not known, a description as accurate as possible of the person observed, as well as things, places or events referred to in § 1; 4. How the observation will be executed, including the permission to use technical means in the cases provided in § 2, paragraph 2, and Article 56a, paragraph 2. In the latter case, the judge's authorisation mentions as precisely as possible the address or the location which is the subject of the observation; 5. the period during which the observation can be performed/executed and which may not exceed one month from the day of the authorisation; 6. The name and the quality of the investigating officer directing the execution of the observation (BE).

a) that the surveillance is necessary, (b) that the least intrusive means available having regard to the objectives have been adopted, (c) that the surveillance is proportionate to its objectives having regard to all the circumstances including its likely impact on the rights of any person, and d) that the duration for which such surveillance is sought is reasonably required to achieve the objectives envisaged (IE).

Despite the many safeguards and precautions included in the surveillance regimes of most MS, there remain urgency clauses allowing for their circumvention. These are usually instances of imminent threat, immediate danger or other exceptional conditions where it is not possible to obtain authorisation in the legally prescribed manner. In such circumstances, police investigation units may commence surveillance without prior consent from the authorisation body or with a simple verbal approval (EL, UK, SK, CZ, EE). Certain conditions are outlined which need to be satisfied in order for the urgency clause to be triggered. Information was provided in the questionnaire for one MS (IE) which has further safeguarded the urgency clause, whereby only officers with a certain designated rank may approve such surveillance activities. Urgent surveillance is allowed to continue for a certain period of time, before official authorisation is granted – e.g. 24 hours in Estonia, 48 hours in the Czech Republic (SK, CZ, EE).

Control over surveillance is exerted during the process of its implementation as well. Investigation activities, including surveillance, are usually monitored by the authorising/supervising prosecutor (BG, CY). Continual periodic reporting back to the authorising prosecutor is one measure to ensure that the approved method continues to justify its validity and still satisfies initial requirements – 'the investigating officer gives a precise, complete written report in accordance with the truth, to the public prosecutor on each phase of the observation executions that he is directing' (BE). Such reports are kept in confidence by the prosecutor, who is the only person authorised to access the file (BE).

The statutory maximum time increments for carrying out surveillance are also a measure of control that aims to prevent potential abuse. The measure guarantees that persons would not be subject of covert surveillance for an extended time period and without the case being revisited. A panel of specially designated reviewers may be an extra

safeguarding measure that is triggered in case when a person has been the object of covert surveillance for more than 6 months (SI). Other surveillance regimes may include an external reviewer, such as the Ombudsman on personal data protection, who has supervisory authority during the period of the investigation with a remit to ensure the compliance to national personal data protection provisions (PT). A form of parliamentary control over surveillance is also a safeguarding measure that is present in some jurisdictions. In Sweden, government submits an annual report to parliament containing information on all surveillance that has been carried out during the previous period (SE), while in other MS a specialised parliamentary committee is tasked with overseeing the use of special investigation means (BG, UK, CZ).

Specialised laws in many states that regulate and safeguard the protection of privacy and personal data have created organisations (i.e. commissions, agencies) which also have a remit to exercise, more often indirectly, some oversight on the use of special investigative means as a whole. In some MS, a notification regime is implemented wherein authorities have to notify the administrative body tasked with overseeing privacy and data protection safeguards of each instance of surveillance, interception, wire-tap, etc. (BE, PT, FR).

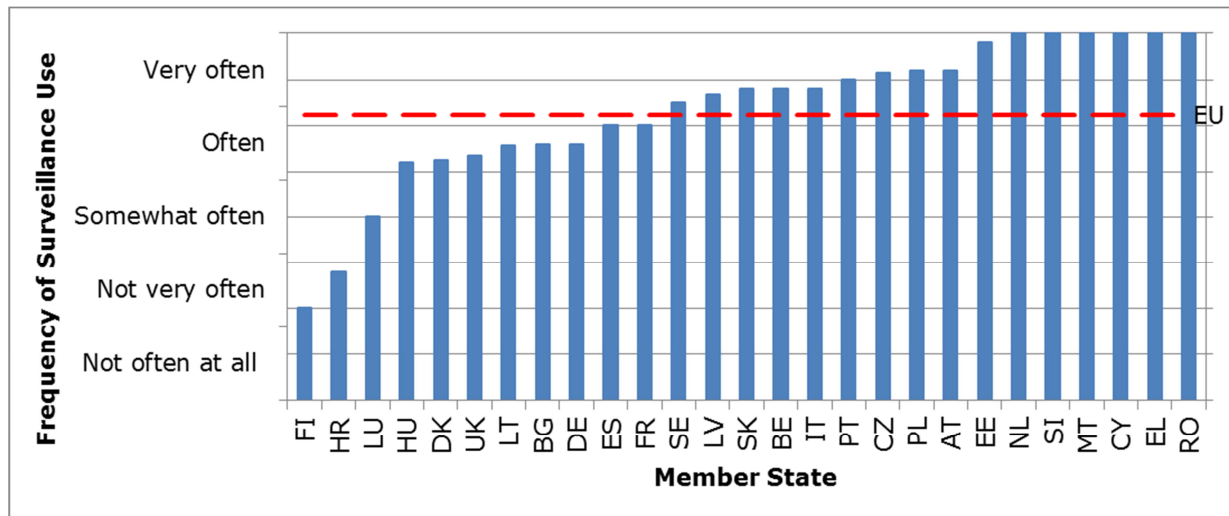
Privacy and misuse concerns are also addressed by the implementation of data retention policies and procedures in many MS, whereby data collected through the use of surveillance is deleted after a legally prescribed period. Furthermore, information which is collected through surveillance but bears no relation to the purposes of the investigation must be deleted within a short time (CY, SK, CZ).

7.7.9. Use and effectiveness

The usefulness and effectiveness of surveillance is at times difficult to assess, as it is rarely used as standalone measure. In this respect the outcomes of applying several special investigative means in an investigation are often merged or mixed, and the various outputs and results may not be easily isolated and discerned (BE, FI). This has led to some negative views on the effectiveness of surveillance, precisely because of its success being dependent on other supporting or facilitating special investigative techniques (LT).

Nevertheless, the comments on the usefulness and effectiveness of surveillance are of an overall positive nature, with some respondents rating surveillance as an 'indispensable', 'necessary' tool, as well as 'the most effective way to uncover criminal activities' (BE, ES, HU)

Figure 7.3: Frequency of use of surveillance

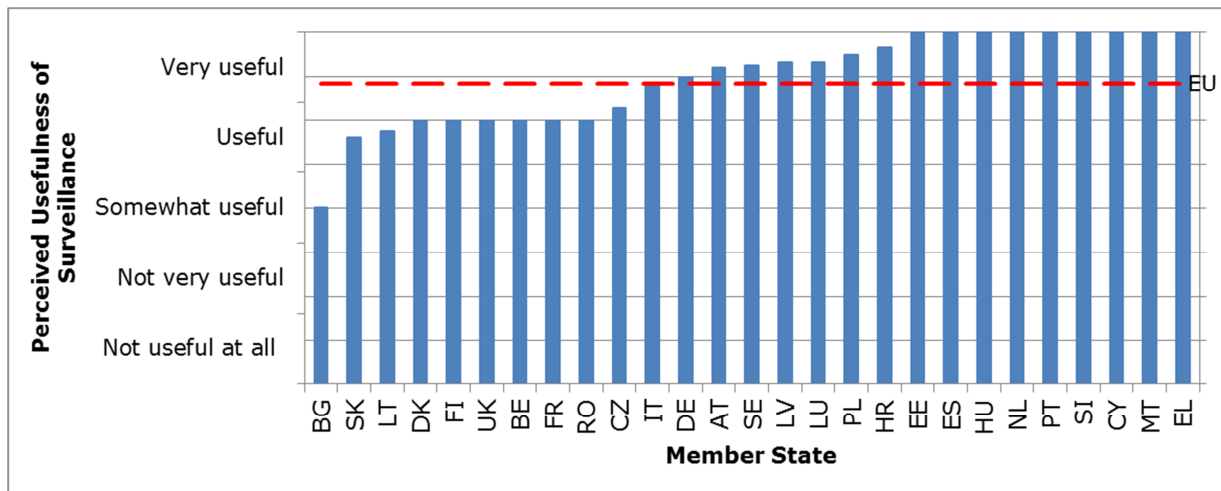


Source: information provided by MS experts

Surveillance has been rated to be particularly useful in the field of organised crime, with some respondents indicating that it can be effective in any criminal investigation (EL). Surveillance provides the opportunity for investigators to receive critical information for the search of evidential materials, as well to facilitate searches and seizures. It may provide the investigation effort with high-quality court admissible evidence such as photographic, video and audio materials (HU). Furthermore, surveillance allows authorities to locate, identify and demonstrate connections among suspects. According to some, surveillance provides the capability to penetrate the workings of an organised criminal group at its early stage of expansion, thus greatly increasing the possibility for disruption of criminal activities (PL).

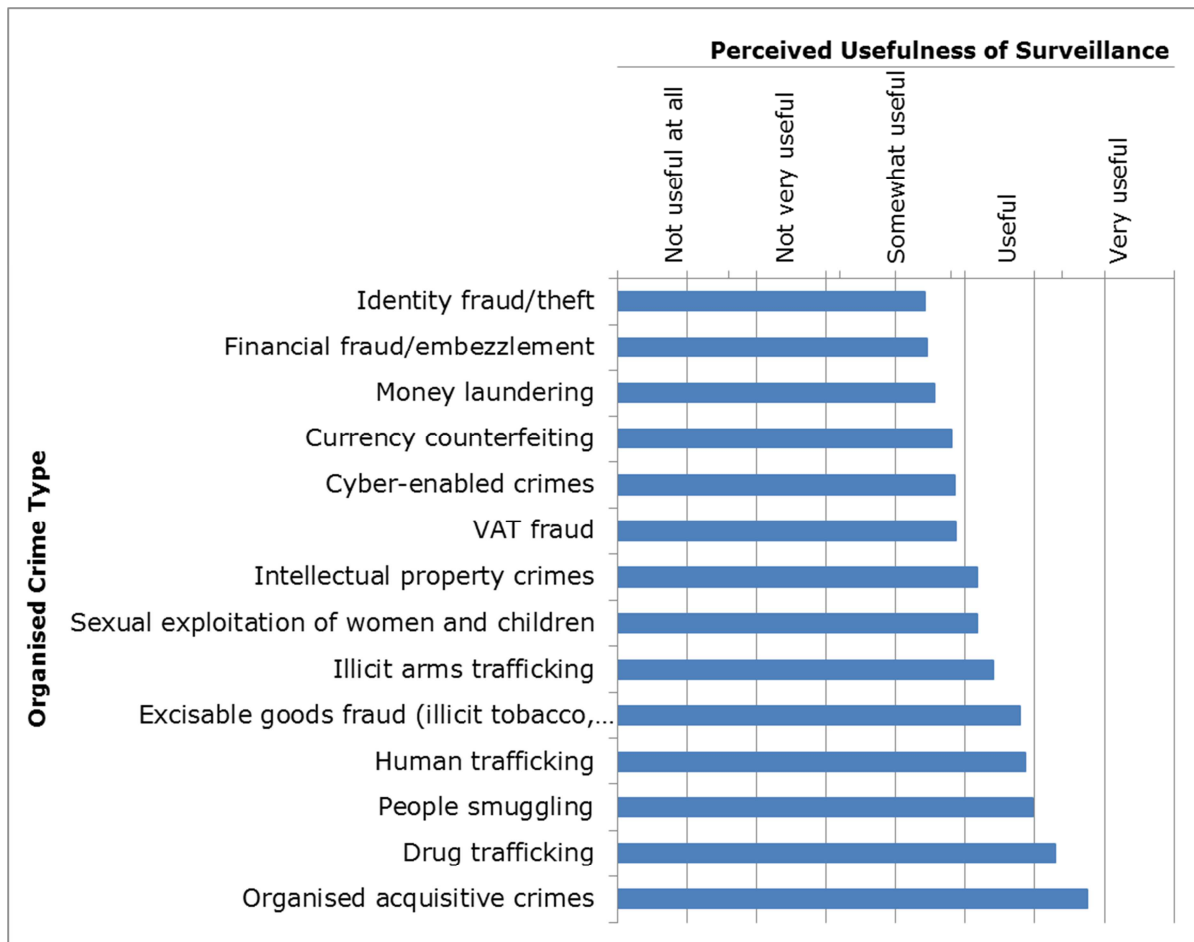
As far as identifying specific crimes against which surveillance is more effective respondents point out crimes related to the movement of goods and persons such as illicit goods trafficking, people smuggling, human trafficking and drug trafficking. In these situations, surveillance also helps facilitate controlled deliveries and hot pursuits (FR, LT). Surveillance is found to be effective in drug-related crimes (LU) and less useful in financial crimes and Internet-based offences (LU, PT). Observation techniques are naturally most effective when members of organised criminal groups use open spaces, public places or transport, as in cases of trafficking and smuggling.

Figure 7.4: Usefulness of surveillance



Source: information provided by MS experts¹⁴⁵

Figure 7.5: Usefulness of surveillance by crime type



Source: information provided by MS experts

¹⁴⁵ Data for IE is not available.

7.7.10. Facilitators

Because surveillance is a tool which combines in itself several elements – physical observation, video and audio surveillance, geolocation, electronic surveillance, etc. – its facilitation may be influenced by a number of factors.

As a basic requirement, a clear and practical legal framework has been identified as facilitating the use of surveillance (LT, DE). A provision allowing for surveillance officers to appear as witnesses in court is perceived as an advantage (EL, LT, FI). Organisational arrangements also appear to increase efficiency of surveillance efforts, especially in MS where specialised surveillance units exist (FI, LT). Ability to collect information from CCTV and other public surveillance devices is seen as a positive development too (DK).

In the UK the inclusion of cross-border cooperation into the regulatory framework greatly enhances surveillance efforts, while in the Netherlands, the operation of specialised Schengen Observation Teams, under the authority of the Prosecutor, improve cross-border crime-fighting activities.

7.7.11. Issues and problems

It can be argued that the rationale 'something is only as strong as its weakest link' is valid when attempting to assess surveillance as a special investigative tool. One reason this might be pertinent is that surveillance involves a number of components each having a significant impact on its overall effectiveness. A well-conceived approach and planning stage requires robust management models; meeting judicial standards means having established excellent inter-agency communications and understanding; relying on sufficient and up-to-date equipment requires solid financial backing; employing able analysts requires training; keeping up to speed with technological trends demands development of know-how, as well as human and financial resources; and outsmarting criminal elements means strategic investment in researching tactics and methods.

Investigators and experts indicate a number of issues that are identified as obstacles or potential hindrances to effective surveillance activities:

- **Technical difficulties / training.** Surveillance in private homes is a difficult and financially burdensome activity. It requires a strict authorisation process and highly skilled specialised staff (AT, CZ). Placing of tracking devices on vehicles can present difficulties as well (FR). The lack of overall training on surveillance techniques and analysis of collected data is also a major setback in some jurisdictions (PL).
- **Technical resources / equipment.** The lack of appropriate technical means and equipment is identified in a number of cases as detrimental to surveillance efforts, e.g. insufficient technical means for location of persons and vehicles (BE, FR), or for recording video and audio materials (EL). Inability to provide access to the latest technologies and keep up to speed with technical developments is seen as a comparative disadvantage, as criminal organisations are eager to make use of the latest technological solutions for communication and exchange of information (LV). Furthermore, some officers have shared concerns that suspects under surveillance begin to recognise their equipment (i.e. vehicles, cameras, etc.) and consequently their tactics. In some cases, suspects engage in counter-surveillance, which is made possible through the use of enhanced technological solutions, which may not be

available in the police force (SK).

- **Administrative burden.** Because of enacted safeguards for personal privacy and data protection, surveillance in certain circumstances, such as surveying a private home, may become administratively burdensome (SK, FR). Procedures and requirements for cross-border surveillance were also deemed by some experts to be too lengthy and difficult to satisfy (LV, IT).
- **Legal provisions.** The maximum allowed periods for which surveillance may be carried out vary across MS. In countries where this period is comparatively shorter, it is seen as a hindrance to a potential positive outcome of surveillance, as it proves too short for facts and circumstances to be evidenced and insufficient to gain insight into a criminal activity or organisation (BE).
- **Privacy issues.** Many jurisdictions have enacted strict privacy laws that often counter and balance the use of covert surveillance. Issues have been identified, whereby due to insufficient knowledge and training on privacy provisions, evidence collected through surveillance may become inadmissible (FR). Furthermore, breaching of privacy safeguards may not only render the collected evidence inadmissible in court, but also trigger counter-suits against the investigation.
- **Understaffing.** Insufficient staff and available working hours have been identified in certain MS as problematic for effectively carrying out of surveillance activities (EL, FI, LV, BE, EE, DE, LV).
- **Financial concerns.** Both domestic and cross-border surveillance have been identified as cost intensive. Because of the financial burden of such activities, especially in cross-border cooperation, cost often plays a decisive role in the decisionmaking process (NL, UK, IT).

Table 7.8: Surveillance – issues and possible solutions

Issues & problems	Possible solutions
Privacy and data protection regulations	<p>Adopt a way forward through multilateral formats, engaging all stakeholders, with a remit to achieve a working balance between EU citizens’ rights and freedoms, and their safety and security.</p> <p>Adopt and demonstrate clear safeguards for privacy and data protection in investigations, with a view to getting privacy advocates on board in the EU-wide fight against organised crime.</p> <p>Promote and provide support for training on privacy and data protection regulations of investigation units, with a view to enhance court admissibility rates of submitted evidence collected through surveillance; AND reduce counter suits against law enforcement.</p>
Lack of resources (financial, human, technical) at the MS level	<p>Increase EU funding for cross-border surveillance equipment and training e.g., acquisition and maintenance of up-to-date IT expertise in law enforcement investigation structures.</p> <p>Enhance EU-wide exchange of best practices and support training.</p> <p>Support establishment of specialised cross-border surveillance teams in MS, with a view to avoid lowering the priority of cross-border surveillance efforts because of financial strain and overwhelmed staff.</p>
Administrative burden	<p>Streamline, simplify and shorten the administrative processes required for initiating cross-border surveillance at the EU level.</p>

Judicial incompatibility	Continue efforts toward harmonisation, standardisation and cohesion of MS legislations. Work toward researching and introducing EU-wide instruments for cross-border surveillance – a European Surveillance Warrant is a suggested instrument.
Information exchange	Work toward establishing a unified framework for exchange of information and intelligence among MS, and between MS and the EU.

7.8. Interception of communications

Table 7.9: Interception of communications – basic facts

Legal basis	Privacy Directive 97/66/EC, ¹⁴⁶ Electronic Privacy Directive 2002/58/EC, ¹⁴⁷ Data Retention Directive 2006/24/EC, ¹⁴⁸ Directive on the European Investigation Order 2014/41/EU. ¹⁴⁹
Frequency of use in organised crime investigations	Very often.
Scope	Due to its invasive nature interception of communication is usually limited to crimes defined by level of gravity (i.e. a threshold) or specifically listed. It is used in organised crime cases involving smuggling/trafficking of people, illicit arms, drugs and excisable goods (i.e. illicit tobacco).
Obstacles	Privacy and data protection legislative safeguards, insufficient technical and financial resources, administrative burden in cross-border operations; advances in technology.
Recommended changes	Continue harmonisation of EU-wide surveillance legislation (i.e. equal thresholds and timeframes); Expand the use of cross-border cooperation centres (both at ME level and EU agencies) to enable more efficient communication exchange; Decrease administrative burden i.e. introduce electronic/online-based authorisations, especially for cross-border operations; Provide recommendations for EU-wide policy on remote searches.

7.8.1. Definition

MS make distinctions between the definitions of the different forms of intercepted communications: interception of post, wiretapping, remote searches and bugging. Wiretapping usually refers to the interception of mobile and fixed telephone communications. In addition to directly listening in to communications, wiretapping also authorises the transmission of other data such as location and duration of the calls as well as the numbers that were called. Remote searching refers to accessing a suspect's computer or phone remotely (i.e. hacking) through the Internet without the person's knowledge or consent.¹⁵⁰ As a result this type of search differs from searching a suspect's hard drive or mobile device after the items have been seized following an arrest. 'Bugging' refers to the interception of oral communications by means other than telecommunications.¹⁵¹ Consequently this form of interception requires the placement of an electronic recording device in or near the suspects, home, place of work or motor

¹⁴⁶ European Parliament and the Council of the European Union (1997).

¹⁴⁷ European Parliament and the Council of the European Union (2002a).

¹⁴⁸ European Parliament and the Council of the European Union (2006).

¹⁴⁹ European Parliament and the Council of the European Union (2014).

¹⁵⁰ Van den Berg, Idler, Slobbe & Verberkt (2011).

¹⁵¹ Di Nicola, Savona & Zoffi (1998).

vehicle. Other forms of 'bugging' may refer to the use of devices for remote eavesdropping of a conversation.¹⁵²

At the EU-level the recently adopted Directive on the European Investigation Order (EIO) provides a wider and more inclusive definition of interception – 'interception of telecommunications should not be limited to the content of the telecommunications, but could also cover collection of traffic and location data associated with such telecommunications.'¹⁵³

However, in the communications and working papers leading to the adoption of the EIO, the Council had specifically defined several types of cross-border interceptions, which were included in the research conducted on the subject.

- Type 1: Ordinary interception of telecommunications without immediate transmission.
- Type 2: Ordinary interception of telecommunications with immediate transmission.
- Type 3: Interception of satellite telecommunications (relation between the requesting State and the State hosting the terrestrial station).
- Type 3a: The interception of telecommunications takes place in the State hosting the terrestrial station and the result is later forwarded to the requesting State.
- Type 3b: Telecommunications are intercepted in the State hosting the terrestrial station but immediately transmitted to the requesting State.
- Type 3c: The interception of telecommunications takes place in the requesting State, which uses a remote control system to activate the transmission of telecommunications from the terrestrial station to one of its telecommunication service providers.
- Type 4: Interception of telecommunications in cases where the requesting State does not need the technical assistance of the MS where the target is located.¹⁵⁴

The 'interception of communications' is typically considered as part of broader 'surveillance' techniques and in many countries' legislation it is lumped with other forms of 'intrusive surveillance'. For example, 'bugging' is regulated as audio surveillance in some legislations (AT) (this may also be the case in other MS but was not explicitly mentioned in all the completed questionnaires).

In this report the 'interception of communications' is considered separately from other forms of surveillance simply as a way of simplifying the presentation of the data.

At the national level some interception regimes make a distinction between the different types of intercepts. This distinction is needed because the various types of surveillance may entail differentiated crime thresholds, interception periods, as well as additional authorisation steps, due to varied levels of intrusion. Overall, in cases where interception has been more narrowly defined and differentiated, the following categories can be outlined:

- *Interception of data transmission* – provides location, caller/sender number

¹⁵² One example is the IMSI catcher (IMSI-catcher 2015); a similar one is 'stingray' (Global Research 2014).

¹⁵³ European Parliament and the Council of the European Union (2014).

¹⁵⁴ Council of the European Union (2010a).

and numbers called/mailed/faxed, duration of call, including Internet communication (i.e. chat, VoIP) (AT, BE, BG, EE, HR, FI, FR, NL, DE, LV, LT, PT, SK, SI). This method generally also includes real-time interception.

- *Interception of content* – enables the investigators to examine actual content being transferred/transmitted (AT, HR, EE, FI, FR, LV, PT, SI).
- *Interception of retained data* – examination of data stored locally or by service providers (AT, BG, HR, LV, PT, SI).
- *Remote observation/search* – observation and recording in real time, from a distance, the data that appears on a computer screen, even when the data is not stored. And install software that can observe, collect, record, save and transmit keystrokes from the computers on which it is installed (FR). Remote control of e-mail and IP addresses (DE, HR, LV).

Some legislation also allows and explicitly regulates access to banking information (i.e. bank intercepts), such as lists of bank accounts, safety deposit boxes and financial instruments (BE).¹⁵⁵ Certain interception regimes make a distinction between interception in criminal cases and in national security issues (BG, PL, PT, RO). The differentiation is often included as an exception or deviation from the nominally prescribed procedures for authorisation, implementation and control.

7.8.2. Scope of interception of communications

The interception of communications has played a key role in the majority of contemporary organised crime prosecutions.¹⁵⁶ As organised crime groups continue to use telephones and other forms of electronic communications, the interception of these has the potential to lead to valuable evidence that can be used to prosecute criminals in court. Some MS (NL, BG, HU, MT, RO) make a distinction between the interception of communications in the intelligence and police services. Therefore the purpose of the collected information could be for intelligence purposes or for prosecution purposes. In some instances, the information collected through the interception of communications may only have a supporting role in the collection of additional evidence, rather than itself being used as evidence during court proceedings.

New technologies are being continuously introduced and deployed to enable and facilitate communication and exchange of communication. This necessitates a dynamic and evolving nature of the scope of interception as a special investigative means. This is especially true in regimes with more explicit definitions of what technologies may be intercepted. In such instances the scope of interception is being expanded through amendments of existing laws or passing of new regulations. Such is the case with geo-tracking in France, while regulated access to digital communication (i.e. remote search) is being currently developed in other jurisdictions (BE).

There are circumstances whereby the legally defined scope of interception techniques fails to cover new means of communications. One example was given when a court positively interpreted the current legislation to cases where intercepts used in a criminal investigation are outside the immediate legal scope of interception. This example was in Austria, where the court allowed evidence collected through covertly installed software

¹⁵⁵ The BE questionnaire was the only one to provide information on this – other Member States may have similar provisions.

¹⁵⁶ Di Nicola, Savona & Zoffi (1998).

on a suspect's computer, by applying the regulations designed for phone and e-mail interception (AT). In this sense the scope of interception activities may follow judicial interpretation and practice when legislation lags behind technological development.

7.8.3. Legislative basis

The intercept of communications typically concerns a wide range of legislation, starting from criminal procedure and surveillance legislation, to electronic communication and postal services legislation, and privacy legislation. At the EU level, a number of supporting initiatives have been implemented:

- **Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector** provided MS with the possibility to adopt legislative measures where necessary, for the protection of public security, defence or public order and for the enforcement of criminal law.
- **Following Directive 2002/58/EC on privacy in electronic communications**, traffic data generated by the use of electronic communications services must in principle be erased or made anonymous when those data are no longer needed for the transmission of a communication. The Directive provided MS with the possibility of adopting legislative measures derogating from the principle of confidentiality of communications, including under certain conditions the retention of, and access to and use of, data for law enforcement purposes.
- The **Data Retention Directive** (declared invalid by the ECJ as of April 8, 2014¹⁵⁷) obliged MS to adopt measures to ensure that data is retained and available for the purpose of investigating, detecting and prosecuting **serious crime**, as defined by each MS in its national law. The transposition of the Directive in MS took different forms, and to a certain extent shows how different the scope of communication interception can be. For instance the interpretation of 'serious crime' was transposed in the following way:
 - 10 MS defined 'serious crime' in terms of minimum prison sentence, the possibility of custodial sentence being imposed, or a list of criminal offences.
 - 8 MS broadened the scope to include not only serious crime but also other types of crime.
 - 4 MS did not define serious crime at all.¹⁵⁸

In 1997 the European Union launched a system of global surveillance communications together with the United States, in order to combat serious organised crime and protect national security.¹⁵⁹ The system drew on the 1995 resolution, arranging the lawful interception of communication in the EU:¹⁶⁰

- The first part of the Resolution states that, 'the legally authorised interception of telecommunications is an important tool for the protection of national interest' particularly in cases involving national security and investigations into

¹⁵⁷ Court of Justice of the European Union (2014a).

¹⁵⁸ European Commission (2011), 6.

¹⁵⁹ Di Nicola, Savona & Zoffi (1998).

¹⁶⁰ Council of the European Union (1995).

serious organised crime.

- The second part covers a series of obligations that service providers; network providers, businesses and individuals must meet to facilitate the interception of communications. Some of these obligations require that law enforcement agencies must be given access to the content of a communication and the associated data (i.e. list of all phone numbers called or received and the location of mobile subscribers). In addition the network and service providers are required to provide permanent interfaces from which the intercepted communications can be transmitted to the corresponding law enforcement agencies. If this information is encrypted the network and service providers must provide the decryption key.
- Lastly the network and service providers must ensure that the interception target or any other unauthorised person are not made aware of the interceptions and that the number of intercepts as well as the methods used are not disclosed to unauthorised parties.

7.8.4. Implementation

The institutional and operational organisation of communications interception varies significantly across the EU. While in some MS interceptions are concentrated within a single agency, which various intelligence and police services use, in others, police, intelligence, and customs services have their own electronic surveillance units that carry out the interception of communications.

There are two general operational models:

- **Dedicated intercept analysis unit:** In the first model the technical service that carries out the interception of communications also has dedicated units, which assess the intercepted communication, and select the information relevant to the investigation. The relevant information is then passed on to the investigators or prosecutors, depending on their needs. During ongoing investigations, the passing of information may need to happen immediately.
- **Delegated intercept analysis model:** In the second operational model, although technically the interception of telephone communications may be executed by the specialised unit or agency, the investigators themselves have direct access to the listening / observing of the communications. As a result they themselves assess and analyse the collected information.

The control regimes for the use of wiretaps vary significantly from one MS to another.¹⁶¹ Interception of communications is considered an intrusion to privacy and is typically only permitted through court orders. There are, however, exceptions as in some MS (FR, BG,) interception of communications may be done without a court order for matters of national security. In most MS the interception of telephone communications is allowed in cases concerning serious offences. The surveillance order is issued by a judge at the request of the prosecutor. In urgent cases prosecutors may issue the order to carryout interceptions by stating the reasons for the measure (IT, LT, LI). Here the prosecutor is usually required to submit a written application to the preliminary investigations judge within 24–72 hours, who must then confirm or deny the request within a specified time

¹⁶¹ Anderson (1996).

period. One MS (IT) allows the use of 'preventive'¹⁶² wiretapping, which must also be authorised by the public prosecutor or investigating judge. In Italy information obtained using such laws may only be used to collect evidence and cannot be used as evidence during a trial.¹⁶³

The **authorisation** for intercepting communications may come from:

- Investigating judge (AT, HR, CZ, BE, HU, EE, FR, IT, PT, DK, LV, LT, LU, NL, RO, SK, SI, ES, SE).
- Prosecutor (DE, CY).¹⁶⁴
- Investigating officer (FI).¹⁶⁵
- Minister of Interior (UK, MT).

7.8.5. Oversight

Authorisation for intercepts may be given under the following circumstances if the necessary legal thresholds are met:

- Serious crimes (e.g. terrorism, murder) or crimes carrying a punishment of more than 'x' amount of years (LT, BG, CZ, FR, DE, HU, PT).
- Gravity/ type of the crime¹⁶⁶ (CY, DK, DE, IE, LV, LT, NL, SI, UK).
- Sentence Length (AT, CZ, CY, DK, IE, LU, NL, PT).
- Strength of evidence (BE, LV).
- Danger to victims, witnesses, participants and/or their relatives (LT).
- When evidence cannot be collected using another method or its use is of particular added value (BG, EE, DE, LU, MT, PT, HR).
- When there is a justified assumption that criminal proceedings will be communicated through these means (CZ CY, SI).

Table 7.10 sets out the approving authorities for interceptions of communications. In many cases (SI, RO, NL, LT, DE, BG, BE, CZ, EE, SK, SE) the public prosecutor is responsible for requesting the use of the interception of communication. However in some MS (IE, UK) senior police officers are authorised to request the use of communication intercepts.¹⁶⁷ There is considerable variation regarding the level of authorisation which the requesting authorities need to receive in order to be able to begin the use of intercepts.

¹⁶² Preventive wiretapping is allowed under the Anti-mafia law. It is used to gather intelligence in developing evidence.

¹⁶³ Di Nicola, Savona & Zoffi (1998).

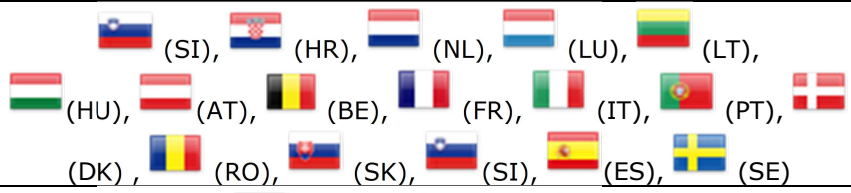
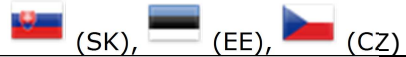
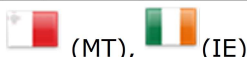

¹⁶⁴ In urgent cases the prosecutor may authorise the interception of telecommunications, but this must be approved by the pre-trial judge within a certain period of time.

¹⁶⁵ Only in cases of urgency; the court must be informed within 24 hours.

¹⁶⁶ Crimes of murder, crimes against public or state security, drug trafficking, international terrorism or crime.

¹⁶⁷ For example in Ireland only the Garda Commissioner and the Chief of staff of the defence forces are entitled to make applications for authorisations to intercept.






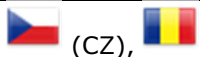

Table 7.10: Approving authority – interception of communications

Approving authority	Member States
Investigating judge	 (SI), (HR), (NL), (LU), (LT), (HU), (AT), (BE), (FR), (IT), (PT), (DK), (RO), (SK), (SI), (ES), (SE)
Pre-trial / presiding judge	 (SK), (EE), (CZ)
Minister	 (MT), (IE)
Chief Justice of the Supreme Court	 (LV)

In cases of emergency the level of authorisation may be lowered to the prosecutor’s office (EE, DE, LV, LT), senior law enforcement officers (BG, FI), attorney general (CY) or examining magistrate/investigating judge (NL, SI). In most cases such emergency intercepts must be approved in writing within 24 hours (BG, EE, FI, LT, SK) or 72 hours (DE, LV, NL).

The duration of the initial authorisation varies in each MS:

Table 7.11: Length of original authorisation for interception of communications

15 days	 (FR)
30 days	 (CY), (LU), (NL), (SI)
40 days	 (IT)
60 days	 (BG), (EE)
90 days	 (DE), (HU), (LV), (LT), (UK)
120 days	 (CZ), (RO)
180 days	 (SK)

In addition to the varying length of the initial authorisations, most MS allow the use of intercepts to be extended a number of times: for example in 15 day intervals (FR), 30 day intervals (NL, SI), 60 day intervals (EE, SK) or put in place maximum durations of one year (EE, LU, LT).

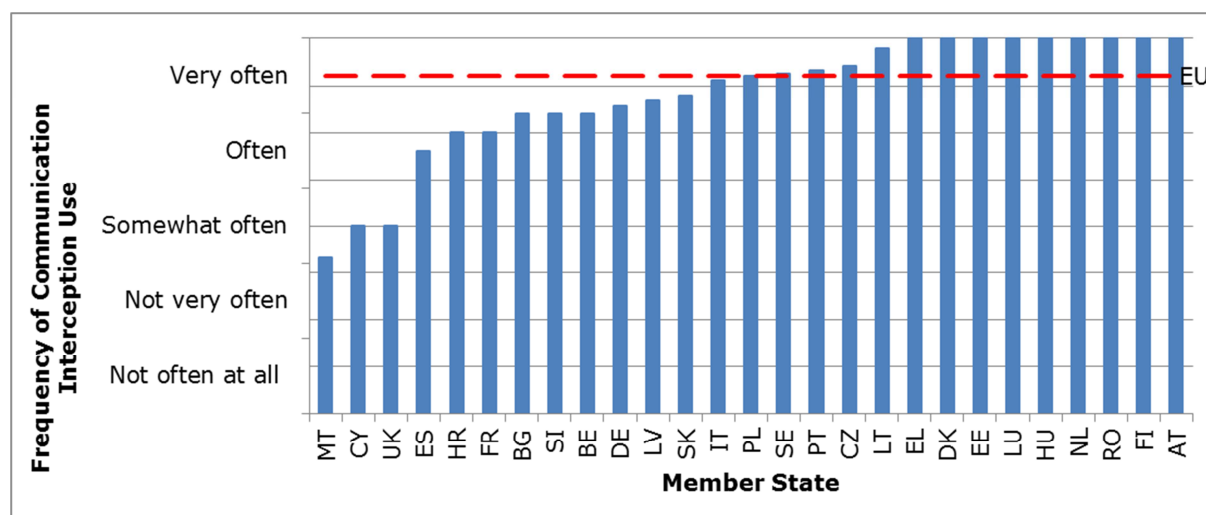
Initially envisioned as a control and safeguard measure, the regime of maximum increments of interception operations may present law enforcement authorities with some obstacles, potentially decreasing the usefulness and efficiency of the tool / application. Extending the period of interception requires de facto a renewed application

for the use of the tool. Some respondents expressed the view that the incremental periods are too short (HU, FR), while others point out that having to extend/re-apply for certain interception techniques provides for a cumbersome process (BE, FR, FI).

7.8.6. Use and effectiveness

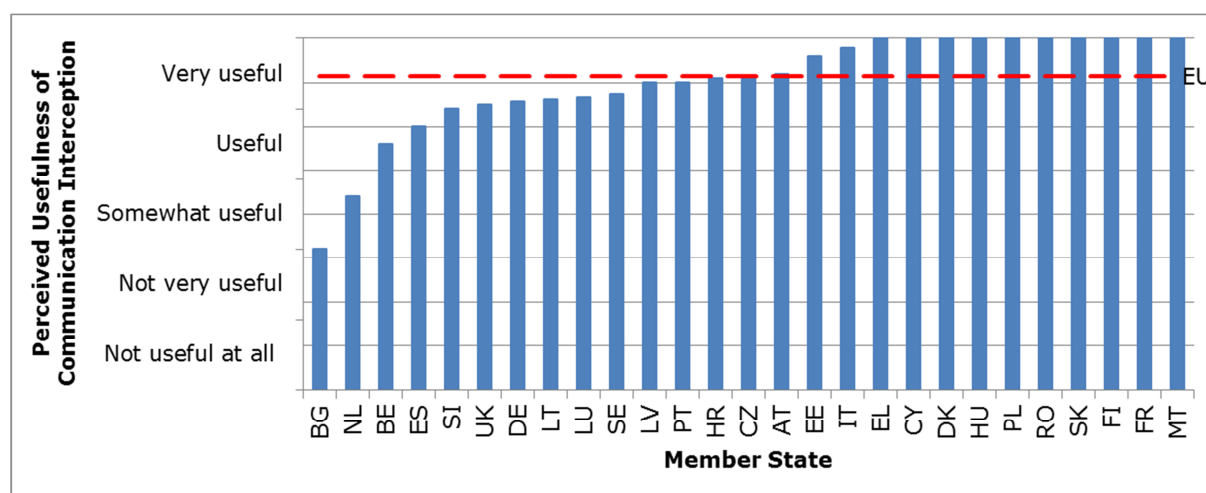
Communication is essential for the functioning of organised criminal networks. Results from the questionnaires indicate that interception of communications is perceived to be used very often, with experts from some MS asserting that it is deployed in almost every organised crime investigation (DK, IT). One reason for the prevalence in the use of this tool is its applicability across a wide range of organised criminal activities, as evident in Table 7.9. In addition, some MS insist that in many cases interception of communications is the only viable and practicable means to gather evidence, detect and/or prevent crime (BG, HR, CZ, DE, HU, LV). Still others describe it as the most important special investigative tool (FI, FR, DE).

Figure 7.6: Frequency of use of interception of communication



Source: information provided by MS experts¹⁶⁸

Figure 7.7: Usefulness of interception of communication

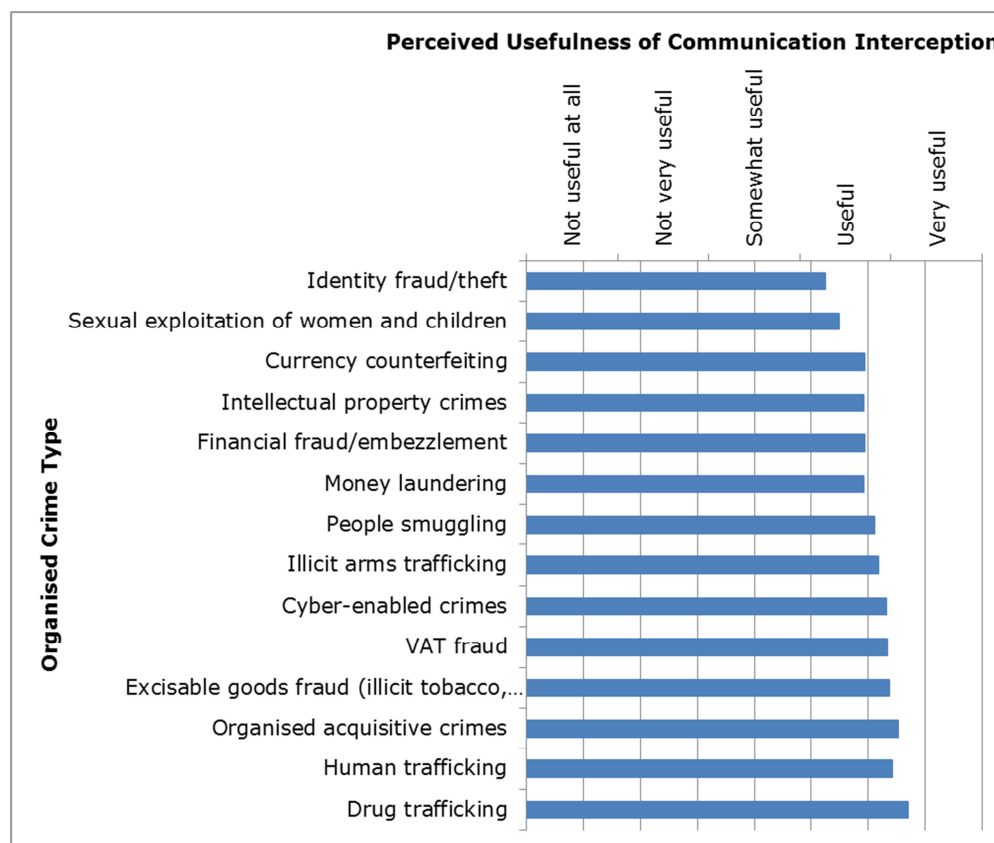


¹⁶⁸ Data for IE is not available.

Source: information provided by MS experts¹⁶⁹

Investigators in most MS share the view that interception of communications is essential in providing critical information about types of criminal activities, the modus operandi of the criminal network and the structure of the organised group. This enables investigators to acquire a meaningful picture of the actors involved in a particular criminal organisation. The analysis of such intelligence gives the law enforcement effort the ability to anticipate criminal behaviour within the intercepted group and prepare for activities leading to disruption and/or arrest.

Figure 7.8: Usefulness of interception of communication by crime type



Source: information provided by MS experts

7.8.7. Issues and problems

As organised crime groups have become more technology savvy and better informed about interception methods, they have begun using a variety of tactics to try and circumvent authorities listening in on their communications:

- **Use of cryptography:** One of the methods that criminals have used to thwart interception of their communications is the use of cryptography equipment. Intelligence agencies have been increasingly concerned that the growth of commercial cryptography might threaten intelligence and law enforcement capabilities.¹⁷⁰ Such concerns led the Netherlands to try to impose a ban on the civilian use of cryptography. As cryptography can also be used to verify

¹⁶⁹ Data for IE is not available.

¹⁷⁰ Anderson (1996).

the authenticity of data, more prosecutions might rely on cryptography as evidence during court proceedings. In addition to encrypting communication data criminals have used other methods to counter law enforcement interceptions. For example in some MS (UK) criminals have been known to regularly use reprogrammed address agile system mobile phones with other people's identities in order to avoid interceptions. In other MS (FR) criminals have been known to use cordless handsets to make calls outside of unsuspecting telephone subscribers homes.¹⁷¹ In Italy, experts reported that criminals often use encrypted-by-default service, such as Blackberry messaging.

- **Human rights and privacy concerns:** in a number of MS wiretapping scandals have made the use of interception a politically sensitive issue, with civil society and media organisations raising concern about the widespread use of wiretaps (IE, UK, DE, BG, RO). This has led to political pressure to reduce the use of intercepts by law enforcement agencies. Political scandals make special technical services very reluctant to deploy communication interception against criminals at a high level due to the risk of recording communications with politicians and magistrates (BG).
- **Abuse of wiretaps:** in some MS police officers may abuse wiretaps for private or political interests (IE, BG, RO). Lack of adequate control facilitates such abuse. The operational models presented above, in theory, provide some level of protection against the abuse of wiretaps by individual police officers. Nevertheless, corruption in surveillance units can lead to abuses of the system. There are two additional issues with the new technologies. First, it is technically possible for private persons to deploy interception of communications and then to accuse the law enforcement services of being responsible. Second, thanks to technologies enabling the manipulation of recorded electronic communications, the authenticity of the communications is hard to prove (BG).
- **Information processing:** the sea of information that may be collected via intercepted communications poses an issue regarding the effective extraction of relevant data from this information. Poor training or inadequate resources may be one reason such information is not collected. The development of software products to 'mine' data (especially 'metadata') is one approach law enforcement agencies use to counteract such problems, although this is less useful in the course of investigations. The processing of information by special units, rather than the investigators, may also make the detection of relevant information difficult.
- **Time limits:** in many MS there is a standard duration for which permissions for intercepts are granted, regardless of the types of criminal groups being investigated. Some criminal groups, especially those involved in cross-border cases, may require much longer time to gather evidence. Judges often prefer to discontinue the deployment of interception of communications if there are no quick results (BE). In a number of cases investigations are stopped due to formal expiration of the term, even when the case is about to be solved (HU).
- **Archiving of data:** there are various issues relating to storage costs and

¹⁷¹ Anderson (1996).

accessibility (including the abuse) of data collected from intercepts. Lack of well-organised storage and a management system for collected information may result in inefficiencies and abuses of data.

- **Legal strategies against intercepts:** defence lawyers and communication consultants may advise on the use of various communication strategies that make it difficult for the prosecution to collect evidence: these may include 'speaking in code' or various IT solutions to ensure 'safe' communication.
- **Private sector:** telecommunication and Internet companies, providing various electronic and voice communication services, are all trying to sell products that guarantee privacy of communication. Many providers are not even based within the EU's jurisdiction (e.g. Facebook, Skype), making it slow and difficult to obtain communication records. In addition to popular technologies like Skype, WhatsApp and Viber, criminal networks are using less widespread peer-to-peer software for voice communications, aiming at utilising the services of a company that is based outside the EU and US, or to add an additional software layer which provides extra encryption. A further problem in some MS in eastern and southern Europe is the poor control of technical employees in telecommunications companies. There have been cases where data from interception of communications was sold to private persons or companies. The private collection of metadata also presents a risk to privacy rights.
- **Admissibility in court:** In some MS the information gathered via electronic interception of communications may not be admissible in court proceedings (IE, SK, UK). The primary use of intercepted material is to assist an investigation. Therefore, a direct link between the use of this tool and effective prosecution is difficult to establish (UK).¹⁷²
- **Data-storage:** there are several data storage aspects that may affect the efficiency and effectiveness of the use of wiretaps. In some MS audio files may not be used in court proceedings and only written transcripts can be presented, while audio files are destroyed. In addition to being very time-consuming and labour intensive to transcribe many hours of conversations, the unavailability of digital storage of conversations may make difficult the inclusion of additional contextual information, or additional evidence in the course of a trial.
- **Data retention:** The Data-Retention Directive mandated that telephone records (not audio files, but records of telephone numbers that a person called) are kept for a certain period. Less than 1 per cent of a total of 2.8 million retained records requested (in 2009) in the EU concerned data held by a telephone company in another MS. Law enforcement authorities indicated that 'they prefer to request data from domestic operators, who may have stored the relevant data, rather than launching mutual legal assistance procedure which may be more time-consuming and do guarantee access to data'.¹⁷³ In April 2014 the Court of Justice declared the Directive to be invalid.
- The court noted that the data to be retained made it possible: (1) to know the identity of the person with whom a subscriber or registered user has

¹⁷² United Kingdom, Regulation of Investigatory Powers Act 2000, Art. 17 and 18.

¹⁷³ European Commission (2011), 22.

communicated and by what means, (2) to identify the time of the communication as well as the place from which that communication took place and (3) to know the frequency of the communications of the subscriber or registered user with certain persons during a given period. Those data, taken as a whole, may provide very precise information on the private lives of the persons whose data are retained.¹⁷⁴

- **Reports to issuing judge:** in some countries, there is a requirement to report to the judge who issued the authorisation for the intercept, about the progress of the investigation and the contribution of the intercept. While this ensures the intercept is conducted and used properly, it creates an additional administrative or bureaucratic burden.
- **Cross-border cooperation:** the interception of communications across borders may be difficult and ineffective due to the fact that when a suspect uses roaming services (even near borders, where mobile networks operators from neighbouring country typically have coverage), the interception of communication becomes difficult, patchy and often ineffective. An often-applied strategy by criminals is the regular change of international SIM cards. Multiple crossing of borders by the target suspect creates difficulties and delays the interception. The time and resources invested in cross-border investigations employing interception may be considerably higher than on the national level (IT).
- The fast decline of roaming charges offers opportunities for criminal networks to purchase thousands of SIM cards registered to socially disadvantaged citizens and to use them for communication in other MS (BG).
- Growing immigrant populations and intra-EU movement over the past decade has made the problem of interception of communications in a multitude of languages an issue in some MS, putting additional financial strains on law enforcement agencies (BG, DE, HU, SK).
- **Overly complicated authorisation regime:** the authorisation regime is a delicate balance between ensuring the rights of privacy and effectiveness of investigations. The number of required authorisations (in some countries as many as seven different levels of authorisation are needed) create too many points of vulnerability for information leakage, thus threatening the effectiveness of the tool.

7.8.8. New technologies and challenges to interception and surveillance

Some of the most widely used technological solutions additionally exacerbate the jurisdictional challenges in cross-border electronic surveillance at the EU level. Increased reliance on communication technologies such as VoIP (Skype, Viber, WhatsApp) by criminal networks has meant that investigators have had to employ a significant degree of IT know-how in attempting to intercept and record electronically exchanged data for evidential purposes. Networks such as Skype are a preferred method of criminal communication, because of the inability of law enforcement to conduct surveillance over

¹⁷⁴ Court of Justice of the European Union (2014a).

such technologies.¹⁷⁵ It is important to note that many electronic communication solutions are designed to provide solid protection of privacy, a feature that will be required by the proposed new European framework on the protection of data. Skype, for example, uses peer-to-peer VoIP technology whereby both ends of the communication are protected through robust encryption. In addition, because of the nature of peer-to-peer technology, the content of Skype communication is not stored in Skype servers. In this respect, intercepting and recording Skype content will require access (authorised hacking) of at least the devices used in the communication session. Another serious challenge for law enforcement is the regular change of communication devices and the setting up of new accounts for the various peer-to-peer technologies. There are reports pointing to alleged covert attempts by law enforcement to hack Skype technology.¹⁷⁶ However, because such a measure is technically difficult to complete and its legal status questionable, some jurisdictions have resorted to more extreme measures – e.g. the American Federal Communication Commission has required all providers of such communication technologies to offer a 'backdoor' option in their design and architecture for law enforcement purposes.¹⁷⁷

If Skype was a PC-based technology until recently, and its use by criminal networks was limited, nowadays its mobile application is widely used. It is very difficult for the special services of law enforcement to monitor such communication on mobile networks.¹⁷⁸

The use of cloud technology and especially cloud storage of data, the so-called 'data lockers', also present law enforcement with technological and jurisdictional challenges. Cloud storage providers often provide privacy and data protection guarantees as a marketing pitch and offer specialised technical solutions such as military grade end-to-end encryption on both access and transfer of data, password protection, Virtual Private Networks, proxies etc., many of which may be considered trade secrets and are fiercely defended by their proprietors.¹⁷⁹ Furthermore device encryption and anti-data-remanence technologies make it extremely difficult for a computer forensic expert to uncover traces and partial data from a seized device and use it as evidence. Therefore, in such cases covert electronic surveillance may potentially be one of few effective tools for gathering the necessary intelligence and evidence. Data from the Google Transparency Report shows a clear increase in the use of cyber intelligence by law enforcement – annual government requests for user data have risen from 12,539 in 2009 to 27,477 at the end of 2013.¹⁸⁰ Such surveillance has been found useful in Internet-enabled crimes as it can pinpoint the times and potentially the locations from which a suspect has accessed the Internet (ES). However, it has also been noted that electronic/cyber surveillance is only useful when suspects and activities are narrowly defined and specifically targeted (EL).

Cloud technologies enable the user to work with data in one jurisdiction and store it almost instantaneously in another. Moreover, they offer criminal elements the

¹⁷⁵ Dunn (2009).

¹⁷⁶ Zetter (2008).

¹⁷⁷ Caproni (2011).

¹⁷⁸ A partial solution is the setting up of double accounts (created by Microsoft for the law enforcement services). Double account allow to monitor text messages but only on one side of the communication, it is impossible to see the messages of the other side, unless the account is known and another double account is set up. Voice communication is not accessible with this technique.

¹⁷⁹ Henry (2013).

¹⁸⁰ Google Transparency Report (2015).

opportunity to avoid keeping incriminating data on their devices. This additionally impedes investigation efforts as the actual storage server may be located in less-cooperative jurisdictions or in certain cases, the exact geographical location of cloud storage content may not be easily determined, e.g. 'we store your content geo-redundantly in the European Union: numerous copies are stored at multiple locations'.¹⁸¹

The pace of technological development is faster than the speed at which new legislation is made. It is evident that lawmakers attempt to catch up with technology, apparent from court rulings, such as the decision in France ruling geolocation a covert surveillance measure. Legislative effort, however, can be burdensome because of administrative red-tape and political concerns, and is slow to respond and match the pace of technological advance.

7.8.9. Recommendations

Legislative limitations constitute the fundamental detriment to effective cross-border cooperation in the field of interception of communications. On the one hand, legislation is slow to adapt to the demands of ever-advancing communication technology. But on the other, legal safeguards for privacy and personal data are often perceived as interfering with the effective application of interception methods. The EU has had to adopt legislation in compliance with privacy standards, but it is at times soft laws that provide the needed dimensions to binding agreements that extend facilitation to cross-border cooperation.

Legislation – Efforts to facilitate cross-border interception and surveillance in the fight against organised and other serious crime, including cybercrime, have been underway both under the auspices of the EU and elsewhere. Recognizing the need for cross-border cooperation in matters of internal security the EU has adopted a number of binding legal instruments, as well as recommendations and best practices (i.e. soft law). The Convention on Mutual Assistance in Criminal Matters was the first EU instrument that included provisions on cross-border interception.¹⁸² Although establishing binding rules and setting the stage for an EU-wide interception regime, the convention fails to address important features of modern communications – including speed and ease of disposal. The specific regulations do not provide for real-time cross-border interception, which is vital in investigating contemporary organised crime, as technologies allow for almost instantaneous movement of potential evidence (data) across various jurisdictions, including outside the EU. The recently adopted European Investigation Order (EIO) adds provisions for real-time cross-border interception capabilities. In essence the EIO is the next step forward in the overall EU movement away from mutual assistance cooperation and towards cooperation founded on mutual recognition.

Official EU communications may carry the weight of soft law and are often the key to interpreting and understanding the de facto consequences of legal acts. Council conclusions during the drafting process of the EIO have pointed in the direction of practice under the new Directive enabling and facilitating real-time cross-border interceptions that may circumvent the burdensome formal request requirements that have been regulated under the 2000 MLA Convention.¹⁸³ Furthermore, the EIO would

¹⁸¹ See for example (as of 3 February 2015) <https://tresorit.com/features>.

¹⁸² Council of the European Union (2000a).

¹⁸³ Council of the European Union (2010b).

require the executing authority to recognise and execute the Order, without any further formalisation being required, taking all the necessary measures for its execution in the same way as if executed from a local authority.

In addition, it is argued that international crime-fighting policy forums, like the Lyon/Roma Group of the G8, contribute to extrapolating best practices from the international arena into EU policymaking and vice versa.¹⁸⁴ This exchange is partly facilitated via the circumstance that many of the European experts involved in the Lyon/Roma Group also participate in the reciprocal policy drafting structures within the EU. Because experts are most often law enforcement practitioners, the recommendations stemming from the conclusions of such working groups are actionable and practicable best practices, based on a common denominator principle to ensure their applicability across stakeholders.

Technology – Whereas legislation regulates what is allowed in cross-border interception, technology often determines what is possible. It is evident that organised crime is relying increasingly on new types of communication technologies and concentrating information exchange onto those, potentially presenting the most difficulties in being intercepted by law-enforcement. This puts an additional financial and technical strain on law enforcement agencies to keep up with emerging technologies.

The standard lawful interception model has been largely based on national jurisdictions¹⁸⁵. However, the proliferation of new forms of communication, such as satellite, 3rd and 4th generation mobile communications, Internet as well as various “plug and play” systems makes the national model of telecommunication regulation obsolete in managing effective cross-border interceptions.

Similar to cloud technologies, modern communication technologies allow a user to be located in one country, registered for a particular service in another, and use the network for that service in a third. Relying on national regulatory models to facilitate effective cross-border surveillance under such circumstances is time- and resource-consuming, jurisdictionally challenging, and may prove counterproductive. Therefore, efforts should continue toward a common standardised EU-wide regulatory regime for telecommunications.

Interviewees made a number of recommendations to facilitate the domestic and cross-border use of interception:

- Diminish the administrative burden of the authorisation procedure by reducing the time required to receive authorisation (i.e. introduce electronic authorisation procedures) (LV).
- Expand/amend legislation to regulate interception of new communication technologies (i.e. Skype, Viber and other VoIP services). Also provisions allowing for remote electronic search (i.e. installing ‘spyware’ in a suspect’s device) (AT, DE).
- Extend the total maximum allowed time for interception to allow more effective investigation of sophisticated criminal activities that span over longer periods of time (HU, IT).
- Provide text-analysis capabilities to interception and investigation units, such

¹⁸⁴ Scherrer (2009).

¹⁸⁵ ETSI (2004).

as automatic voice-to-text recognition and transfer (DK), as well as reliable translation services (DE, HU). This is necessary especially in MS with more active ethnic components to organised crime.

- Amend legislation and authorisation procedures to conduct interception activities on a specific person/suspect, rather than on a particular telephone number (NL). This is the case, since suspects often change dozens, or even hundreds of SIM cards, as well as devices.
- Enhance technical capacity to monitor, record and analyse collected voice data (DE, LV, HU, AT, BE).
- Improve 'big-data' processing and analysis capabilities (FR).
- Amend regulations to introduce a legal obligation for VoIP providers to make unencrypted communication available to law enforcement agencies (AT, FR).
- Work with the private sector to reduce the costs of interception of communications (Europol).
- Enhance cooperation with telecommunication companies in order to speed up the process of initiating interception (IT).

Table 7.12: Interception of communications – issues and possible solutions

Issues & problems	Possible solutions
Use of cryptography	Assist in developing standardised requirements for service providers to make unencrypted communications data available to law enforcement.
Information processing	The EU and local governments should provide funding for acquisition and training for 'big data' processing and analysis capabilities. OR, alternatively assist in the prescription of practicable rules for public-private partnerships in processing and analysing interception data.
Time limits	Adopt a recommendation for the increase of the total amount of surveillance periods allowed, while preserving the incremental structure of surveillance periods for purposes of control and accountability.
Overly complicated authorisation regime	Diminish the administrative burden of the authorisation procedure by reducing the time required to receive authorisation (i.e. introduce electronic authorisation procedures).
Cross-border cooperation	The EU and local governments should assist in providing text-analysis capabilities to interception and investigation units, such as automatic voice-to-text recognition and transfer, as well as reliable translation services. Work toward streamlining rules and procedures for real-time cross-border interception. Work toward regulating 'remote search' in cross-border interception and surveillance across the EU. Continue and enhance CEPOL training.
Data retention	Increase data retention periods, while providing for proportional privacy and personal data protection safeguards.

7.9. Covert Investigations

Table 7.13: Covert investigations – basic facts

Legal basis	Naples II Convention ¹⁸⁶ , The Convention on Mutual Assistance in Criminal Matters of 29 May 2000. ¹⁸⁷
Frequency of use in organised crime investigations	Somewhat often.
Scope	In the majority of MS, the undercover agents are defined as qualified and duly authorised law enforcement officers or intelligence services agents. The covert investigation is considered an investigative tool of 'last resort'. It is considered intrusive and high-risk, and as a result evidence needs to be presented that other investigative tools have been exhausted. It is also a tool whose use is confined only to the investigations of serious crimes and terrorism in most MS.
Obstacles	Required specialised skills and training; legal status and protection; operational difficulties – infiltration, entrapment, etc.
Recommended changes	Adopt an EU-level agreement on Undercover Operations, following model MoUs already developed by the European Cooperation Group on Undercover Activities, in order to stimulate cross-border deployment and hosting of undercover officers. Inclusion of cyber-related offences and considerations in EU legislation or agreements related to undercover operations.

7.9.1. Definition and scope

'Covert investigation' is the term commonly used in European legislation to refer to the 'use of undercover officers'.¹⁸⁸ The 2000 EU Convention of Mutual Assistance in Criminal Matters defines covert investigations as 'investigations into crime by officers acting under covert or false identity' (Art. 14).

There are two common types of covert investigations: one is the 'infiltration' of specially authorised law enforcement officers under assumed identities; the second is defined as 'pseudo' or 'test' purchase or service of illegal goods such as firearms or illicit drugs or 'sting operations'.¹⁸⁹ Other categories of operations may include 'befriend/approach a specific suspect' (EL) or participation in controlled deliveries (HU¹⁹⁰).

In the majority of MS, undercover agents are defined as qualified and duly authorised law enforcement officers or intelligence services agents. In some MS, 'civilians' are clearly barred from being used as undercover agents. In other MS, though, informants and civilians are allowed in some capacity to be involved in covert investigations (AT, DK, LT, PL,¹⁹¹ PT, SI).

The topic of covert investigations (organisation, recruitment, management, etc.) is *highly sensitive* for several reasons:

1. Covert investigations are considered the tools of highest risk to law enforcement. Therefore in most MS law enforcement prefers to be as covert as possible about specific operational methods and regulations, as a way to minimise risks.

¹⁸⁶ Convention on mutual assistance and cooperation between customs administrations (Naples II). See (as of 3 February 2015: http://europa.eu/legislation_summaries/customs/l33051_en.htm

¹⁸⁷ Council of the European Union (2000a).

¹⁸⁸ Council of Europe (2001); Council of the European Union (2000a).

¹⁸⁹ In Austria, for instance, the terminology for these two types of covert investigations is 'systematic' for the infiltration, and 'simple' for the pseudo purchase (Code of Criminal Procedure, Section 131, 41.1.1. undercover investigations).

¹⁹⁰ Act XXXIV of 1994 on the police (Rtv.) regulates the scope of under-cover police activity (§ 64 (1) b) c) f)).

¹⁹¹ Only in 'particularly justified cases' (Police Act of 1990. Article 20a).

2. It is also a tool used to gather intelligence by intelligence and counterintelligence services, where as a rule operational details are not discussed publicly.
3. The topic is politically sensitive, as in MS there have been various scandals involving abuse of power by officers, often with a political nuance.
4. The lack of transparency over undercover policing has drawn the attention of privacy advocates.
5. A number of cases have been brought to the European Court of Human Rights, where over the years case law has accumulated, generally legitimising but clearly circumscribing the scope of the tool.

Covert investigation is considered an investigative tool of 'last resort'. It is considered intrusive and high risk, and as a result evidence needs to be presented that other investigative tools have been exhausted. It is also a tool whose use is confined only to the investigations of serious crimes and terrorism in most MS. The legality threshold for covert investigation either refers to specific articles in criminal codes or to the minimum number of years.

Several types of covert investigations have been ascertained through the research:

- The first type of undercover investigation covers the systematic gathering of intelligence. In this type of undercover investigation the undercover officer will attempt to gather information on a suspect's involvement in a violent crime such as rape. For example the undercover officer will befriend the suspect in an effort to determine if he/she was involved in the crime.
- The second type of undercover activity generally focuses on the trading of stolen property, drugs or weapons. In these undercover investigations, which are typically very short, undercover officers will attempt to purchase illegal goods in order to obtain proof that the suspect is involved in the crime.
- The third type of undercover investigation is the most dangerous and is used to infiltrate organised crime networks. In addition to gathering direct evidence, undercover officers try to gain insight into the structure and modes of operation of the organised crime group when carrying out this type of undercover investigation. In general the application of systematic intelligence gathering and infiltration seen in the third type of undercover investigation is more labour intensive and time-consuming than when applying the first two methods.

7.9.2. Legislative basis

Covert investigation is covered by a range of EU and international instruments, including the Naples II Convention and The Convention on Mutual Assistance in Criminal Matters of 29 May 2000.¹⁹² In general, the principles of proportionality guide the use of covert investigation tactics.¹⁹³ In 25 MS covert investigation is regulated in the national legislation – either by codes of criminal procedure or in various special acts. The 3 MS

¹⁹² Art. 20 of the Palermo Convention also encourages its use and Art. 23 of the Naples II Convention.

¹⁹³ Fijnaut & Marx (1995).

where it is regulated by internal law enforcement regulatory acts are Sweden, Poland,¹⁹⁴ and Ireland.¹⁹⁵

7.9.3. Implementation and Oversight

Implementation

Undercover operations and undercover officers are typically part of specialised units. Although a proper comparison of organisational set-up was not possible within the scope of this report, interviews showed that there are no major differences between MS in terms of the key attributes of these specialised units. In larger countries, such as Germany, the units are decentralised geographically and institutionally, as customs (e.g. UK, FR), border guards (e.g. PL) and the intelligence services may be running their own units. In such instances, coordination mechanisms at a national level (resource sharing and activity coordination) are essential to avoid incidents (DE, UK). In smaller MS, specialised undercover units may be centralised (NL, BG).

Undercover management units typically consist of various departments or specialists responsible for:

- **Recruitment** of undercover officers: officers are usually subject to separate and special recruitment rules to preserve their confidentiality. The selection procedure could be very tough and only a small percentage could be selected (e.g. in FR an estimated 10 per cent pass initial selection).
- **Training:** training is key, and it includes training specialised crime-related skills, as well as psychological destabilisation under extreme pressure.
- **Creating the new identity** ('legend') of an undercover officer.
- Management and control:
 - Authorising officers, who assess the intelligence situation and the data that has been gathered, the alternative investigative tools used, and then decide on the necessity of using undercover investigators.
 - Supervision of the undercover officer or handlers – i.e. managing and handling the information of the undercover officer.
 - Liaising the information to the investigation team, typically done by an intermediary officer (in the UK, for instance, this person is called a 'cover officer').
- **Psychological supports:** psychologists are either involved in the preparatory phase, support and consultations during long-term deployment, and/or working with undercover officers on their exit strategy and plan.
- **Backup team / ghost officer:** officers who play a supporting role, either ensuring the security of undercover officers, or supporting the collection of evidence.

¹⁹⁴ In Poland the Police Act of 1990 (Art. 20a) only in a very general way arranges the issue of the use of covert identity by police officers.





¹⁹⁵ In Ireland to the extent that informants may also be involved in 'covert investigations', these are covered by the Covert Human Intelligence Source System and a Code of Practice.

Oversight

Since the use of undercover agents is considered to be a highly intrusive tool, various forms of restrictions and controls have been put in place to regulate their use within MS. One of the factors is the seriousness of the offence that is investigated. Some MS have introduced formal criteria by listing the crimes for which undercover agents can be used (ES, PT, RO). In other countries covert investigations are authorised based on the expected length of the prison sentence of the crime which is alleged to be taking place. (CZ, DK).¹⁹⁶

MS have adopted different models for controlling undercover investigations. In some countries control over the quality of information and the evidence collected by the agent is subject to periodic review by an investigative judge or prosecutor, in others such assessments are not mandatory.

Table 7.14: Authorisation regimes for undercover investigations

Authorised by	Member States
Law enforcement (police, customs, border guards, etc.)	 (AT) ¹⁹⁷ , (PL), (UK), (IT), (EL) ¹⁹⁸
Prosecutor	 (AT), (BE), (DE), (EE), (HU), (LV), (LU), (MT), (NL), (PT), (RO), (SI), (ES)
Investigating judge	 (BE) ¹⁹⁹ , (ES), (FR), (LU), (PT)
Pre-trial judge	 (BG), (CZ), (LT), (SK)

In some MS (FR, DE, NL, PT) public prosecutors or an investigating judge can order the use of covert investigations. In other MS (DE) the intrusiveness of the covert investigation determines whether the public prosecutor or investigative judge can authorise the use of a covert investigation. For example, in Germany a distinction is made between undercover investigations in a private dwelling and on public property. If the undercover officer carries out his investigation on public property the authorisation of the public prosecutor will be sufficient; however, once the undercover officer infiltrates a private dwelling the authorisation of a judge is required.

Some jurisdictions differentiate between different forms of covert investigations. For example, in some MS 'soft forms' of covert investigations are applied. These refer to situations when 'the police could act as clients in order to visit bars, massage parlours and premises where prostitution and trafficking (might be taking place). The police may also patronise the prostitutes as "clients"'. However, such actions are not outlined in the

¹⁹⁶ For example only crimes leading to a sentence of over three years will be considered.

¹⁹⁷ Only in the cases of drugs and counterfeit money when regarding a fictitious purchase.

¹⁹⁸ Needs to notify prosecutor. (Law 1729/87, Article 25B).

¹⁹⁹ Only when the infiltration concerns a lawyer or a doctor.

law (SE). The Netherlands, for example, differentiates between three forms of covert investigations which are outlined in the BOB Act.²⁰⁰ Another difference in the authorisation regime concerns the authorisation of foreign undercover officers, which may differ from the regime used for domestic officers.²⁰¹ Additional controls may be provided by undercover external bodies. For instance, in the UK the Office of Surveillance Commissioners (OSC) provides a measure of oversight of compliance by monitoring the use of powers granted by Parliament. The most intensive supervision, however, takes place once the evidence collected by undercover officers is presented in court. In some instances, officers can be deployed to develop general intelligence for the purpose of preventing crime or directing subsequent criminal investigations, rather than gathering material for the purpose of criminal prosecutions.²⁰²

7.9.4. Use and effectiveness

Despite having been used for a long time, very little empirical research has been done on the effectiveness of undercover operations.²⁰³ **Assessing statistical data** of MS on the use of undercover investigations is problematic and controversial, as it is difficult to assess the complexity of the cases in which undercover officers were involved. In some MS undercover officers are used in less complex cases (e.g. to penetrate a small group of low-level drug distributors), and they may show good results. In other MS the involvement of undercover officers in complex cases may be less successful or equally successful. Nevertheless, statistics (e.g. the share of cases where undercover officers were used resulting in convictions) tell us little about the effectiveness of the instrument, as no accompanying contextual information is available.

Another difficulty in assessing the effectiveness of covert investigation as tool is that it is often used in combination with other investigative tools. For safety or evidence collection reasons, physical or electronic surveillance and interception of telecommunications are often employed by support teams or undercover officers (FR, LV).

Box 7.3: Effectiveness of undercover investigations in the Netherlands

Typically undercover operations are assessed and reported, based on the number of arrests, convictions and seizures. However, academic research into this issues in the Netherlands suggests that this could be misleading. Such investigations may only produce evidence that a suspicion is untrue, and lead to the exclusion of certain suspects. They may also produce intelligence towards another investigation.

The study examined 34 undercover investigations that took place in 2004. It concluded that 12 of the 34 undercover operations made a contribution to the investigation and/or trial [7 (inclusion) + 4 (exclusion) +1 (steering information)]. It concluded that in 22 cases the operations produced no results. In some of these operations the undercover officer was unable to make contact with the main target, which explained the lack of results. In the majority, though, the undercover officer made contact with the target but could not gather evidence or other relevant information. An important factor behind the failure of those operations is the unpredictability of undercover operations. Therefore, any simple 'numbers-based' assessment of undercover operations could be misleading.

²⁰⁰ The Wet BOB provides for three undercover powers: covert investigation (infiltration), pseudo purchase/services and systematically obtaining intelligence about suspects through undercover investigations.

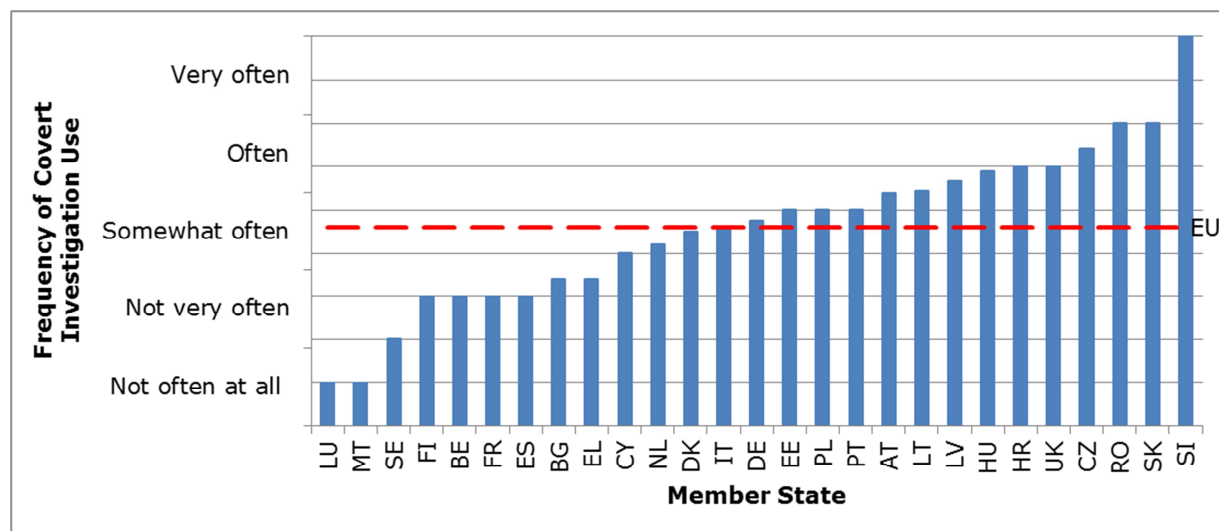
²⁰¹ In the Czech Republic the use of covert investigation is authorised by a high court judge upon the request of a high public prosecutor, whereas authorisation for a covert investigation by a foreign 'agent' is requested by the Supreme Prosecution and authorised by the Supreme Court.

²⁰² HMIC (2014), 7.

²⁰³ Kruisbergen, De Jong & Kleemans (2011).

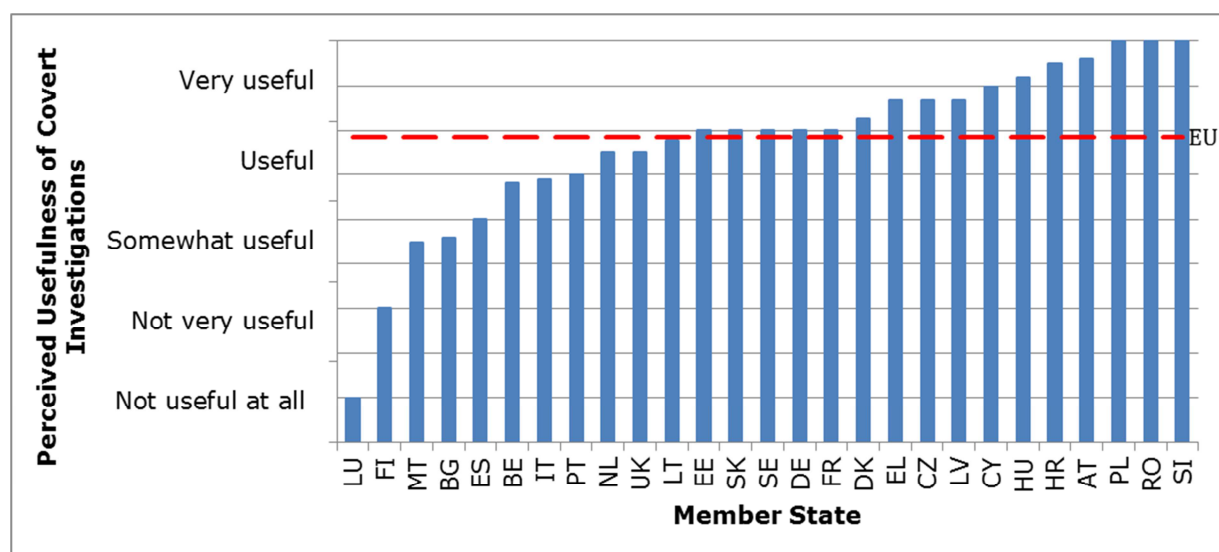
Figure 7.9 shows that, according to the view of MS experts, covert investigations were said to be used 'somewhat often'.

Figure 7.9: Frequency of use of covert investigations



Source: information provided by MS experts²⁰⁴

Figure 7.10: Usefulness of covert investigations

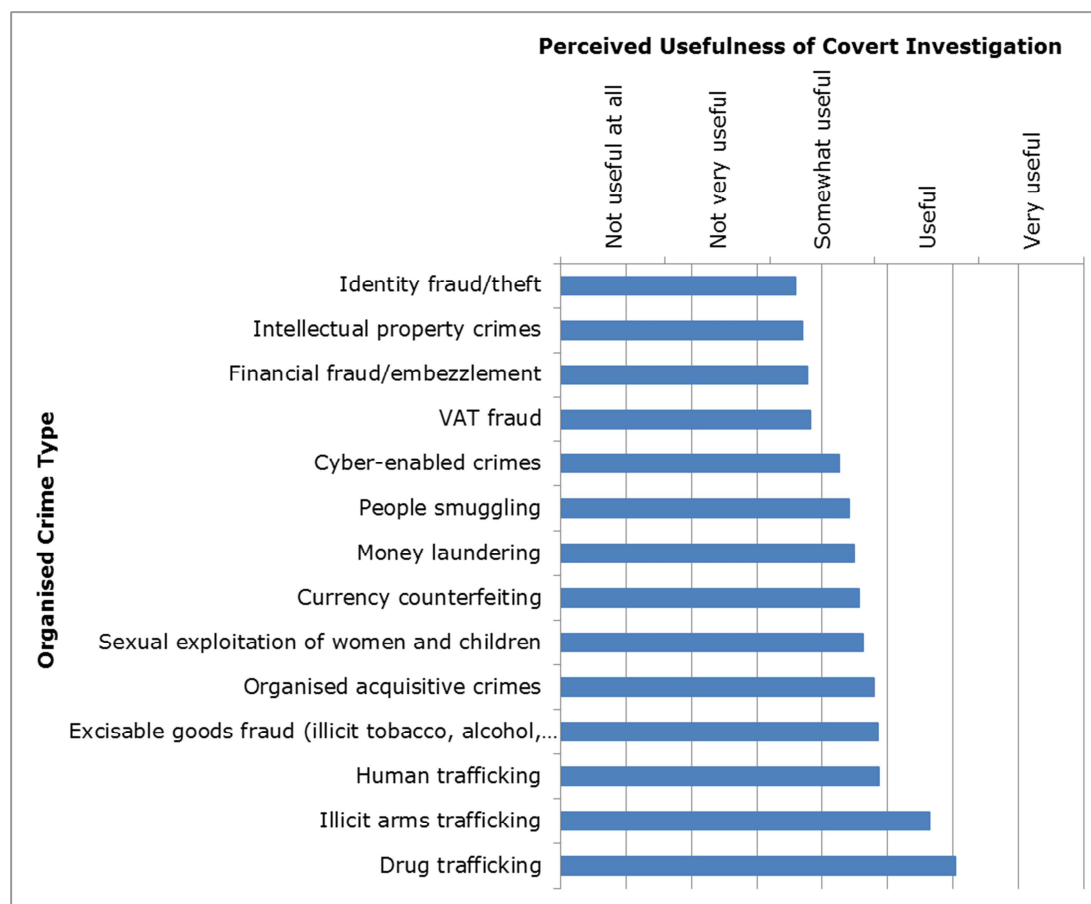


Source: information provided by MS experts²⁰⁵

²⁰⁴ Data for IE is not available.

²⁰⁵ Data for IE is not available.

Figure 7.11: Usefulness of covert investigation by crime type



Source: information provided by MS experts

7.9.5. Issues and problems

On the one hand modern policing culture views undercover investigations as an efficient and necessary strategy for combating crime. But on the other, undercover work is seen as a high risk activity, involving serious concerns over issues of privacy, exploitation of trust, danger to third parties and increased risk of police integrity and subsequently a compromised judicial system.²⁰⁶

Legal

Entrapment: the interviews of stakeholders showed that in their countries the use of undercover agents often raises the debate about the **provocation to commit a crime** (FR). Entrapment and provocation are clearly prohibited in all MS. However, 'proactive inducement', for instance, is permitted in the case of anti-corruption operations (SK).²⁰⁷ How can the court be sure that the agent has not incited the accused person to commit a crime? The question of provocation was said to be almost impossible to manage because it is not possible to monitor what the agent says in real-time situations (DK), especially in situations where no additional technical covert intelligence techniques are used. Unlike in the USA, attempting to manage provocation and agent behaviour using real-time

²⁰⁶ Fijnaut & Marx (1995).

²⁰⁷ Slovakia, Code of Criminal Procedure, Section 117.2.

technical covert intelligence means is considered a very risky concept in EU countries (SE, DK).

Witness anonymity: another issue with undercover investigations concerns the **use by courts** of the anonymous testimony of the undercover officer (UK,²⁰⁸ BG, IT). In cases where the undercover officer has infiltrated an organised crime group it could be necessary for them to give an *anonymous* testimony in court in order to ensure their personal safety and that of their families. In some MS, such testimonies could be provided by the officer's handler, or remotely (via video conferencing, using voice alteration, etc.). The insistence of some judges only to accept testimonies from officers whose identity is revealed is considered as threatening the safety of undercover officers (BE, BG).²⁰⁹ In some MS it is explicitly forbidden (RO) and it may be even considered a crime to reveal the identity of the undercover officer during or after the operation (BG, FR, SK). In some MS, the prosecutor may be authorised to know the real identify of the agent (RO, SK). The ECHR has determined that if the need for anonymity has been proven the police officer can appear before the trial wearing a disguise in order not to be recognised by the accused.²¹⁰ This issue is further discussed in the section on witness protection below.

Immunity: the limitations on agents to commit certain or all types of crimes have been seen as a serious restriction, believed to increase the risks to undercover officers. Criminals may be aware of such limitations, and may purposefully test potential buyers to make sure that they are not undercover officers by forcing them to use drugs (FI). In Luxembourg, for instance, it is specifically stated that undercover officers 'are allowed to acquire, possess, transport, dispense or deliver any substances, goods, products, documents or information resulting from the commission of any offences or used for the commission of these offences, as well as use or make available to those persons carrying out these offences legal or financial help, and also means of transport, storage, lodging, safe-keeping and telecommunications.' There is certainly an ethical aspect to such law provisions, and sensitivities differ across MS.

Lack of provisions regarding urgent cases: Table 7.14 above clearly outlines the variety of authorisation regimes that exist in MS. The possibility of providing verbal authorisation that is later followed by a written one (e.g. SK, UK, FR) provides a level of flexibility which is helpful, particularly in sting operations where illicit commodities are purchased, as opportunities for operations may arise suddenly. In MS where such a possibility is not foreseen in the law (e.g. BG, NL) this presents an obvious obstacle.

Informants as undercover agents: as noted above, in a number of MS the legislation may consider confidential informants to be a category of undercover officers. Such interpretation of the status of the informant provides a certain level of protection and an opportunity to use his/her testimony in court. In other countries, this is not seen as an acceptable approach or even deemed dangerous, as control over informants is difficult. The interviews showed that in some MS there are diverging positions and interests regarding this matter. Police officers and prosecutors argued that opening the possibility

²⁰⁸ In the UK, there are circumstances in which it is possible for the prosecutor to apply to the judge for permission not to reveal the true identity of a witness giving evidence (Coroners and Justice Act 2009). HMIC (2014), 39.













²⁰⁹ Special measures are taken in some Member States to protect the officer's identity, as the real names and undercover names are kept at separate secure locations, with separate individuals having access to each (BE).

²¹⁰ See *Kostovski v. the Netherlands* (1990) 12 EHRR 234.

for civilians to act as agents within organised crime groups would enable them to recruit some members of organised crime groups as agents, which would give them unprecedented access into the inner structures of such groups. Judges and academic experts on the contrary stated that allowing civilians to act as agents without the hierarchical command structures and the protection provided by the police would jeopardise the whole principle of undercover agents and the personal safety of those involved (SK, NL).²¹¹

Time limit: a number of MS report that the time period authorised by the law for the undercover operations is often insufficient to infiltrate a criminal group and to collect relevant information (FI, HU). In some MS, the time may vary depending on the types of crime undercover agents are investigating. In Romania, for instance, in the case of crimes that threaten national security and some forms of organised crime (e.g. arms trafficking or money laundering) the initial authorisation is for a two-month period, while for corruption crimes, it is only one month (RO).²¹² Limits may also be imposed on the number of extensions that could be received. Time limits are an important factor in the usefulness and effectiveness of the utilisation of special investigative techniques and may present an obstacle for a successful investigation in several ways. Firstly, certain types of organised crime require extensive collusive and organisational activities before they are brought into fruition, e.g. VAT fraud, and may respectively require a longer period for the use of a particular special investigative technique. Secondly, although extensions are usually granted, they are in many instances a de facto re-application for the use of the technique and may become an additional administrative burden to the investigation effort.

Table 7.15: Length of initial authorisation

Length of initial authorisation	Member State
12 months	 (UK)
6 months	 (EE),  (SK)
4 months	 (FR),  (LU)
3 months	 (AT),  (BE),  (BG),  (NL),
2 months	 (RO),  (SI)
Ad hoc according to needs	 (DE)

Source: information provided by MS experts

Operational issues

The practical obstacle to the effective use of covert investigations most often mentioned by interviewees was the '**small size of the country**' (BG, CZ, EE, HU, IE, LV, MT, PT,

²¹¹ In Denmark a proposal by a parliamentary commission for the use of civilians as undercover agents was rejected. The argument is that 'it is not possible to delineate a group of private citizens who can reassuringly work as agents' (source: DK questionnaire).

²¹² Law 78/2000, Art. 26¹(1 and 3), Art. 224².

SK). In small countries it is difficult to ensure undercover officers' anonymity. As a result the instrument is not used at all in some MS (MT).²¹³

Recruitment: some forms of covert investigation such as infiltration require high levels of mental fortitude. As a result the selection procedure for undercover officers must carefully evaluate a number of factors such as mental endurance.

Problems with the infiltration of the agent: there are serious difficulties concerning the law enforcement officer's ability to adapt as they need to be properly perceived by the criminals who have their own distinct subculture in terms of language, behaviour, etc. The restriction in using civilians as agents additionally hampers the use of this tool. Some of the stakeholders consider that in order for the operation to be successful, the infiltration should take place at an early stage. This, however, is in practice very difficult because the police services find out information about the criminal structure or criminal operation at relatively late stages. Additional problems may arise when the organised crime groups is comprised mainly of foreigners and in practice there are no suitable police officers to infiltrate those groups (HU).

Cover identity: one of the issues with undercover investigations in some countries concerns the need to create a cover identity or 'legend'. As of January 2012, the legal frameworks of only a handful of MS allow the falsification of public registers (PT, ES, PL, LT).²¹⁴ The cover identity approaches adopted by some MS (such as use of dead infants' personal data) has caused a public uproar.²¹⁵

Specialised skills: while recruiting and training of undercover officers is difficult in itself, it is even more challenging to provide the necessary specific training in a reasonable timeframe. While some skills and knowledge related to specific organised crime activities are fairly straightforward to teach, or officers may have them from prior investigations, some more specific technical knowledge (e.g. regarding financial markets, or the arts world) may be very time-consuming to develop (LV, PT). This, especially in smaller MS, may limit the ability of law enforcement to infiltrate certain types of organised criminal groups (EU,²¹⁶ HU).

Language barrier: ethnic groups are difficult to penetrate, as undercover officers often lack the relevant language skills (HU).

High level of risk: there are also various threats to the welfare of undercover officers, including violence and the psychological impacts that may arise from, for example, maintaining a different persona.²¹⁷ There is a problem not only with the personal safety risk, but also with the 'procedural risk' (PT). The latter refers to the risks that the information gathered by the agent may not be accepted in court as evidence. Such **risks are even greater in cross-border investigations**, when an agent may be acting in an unknown environment (DE).

Resources: undercover operations may require **substantial financial investment**, particularly if the 'legend' requires significant investments (DE, AT, EL, LV). Many respondents found that such funds are not adequate (LV, LT, SI, ES). For instance, the undercover officer's legend may require demonstration of a luxurious lifestyle and high

²¹³ The exception was cybercrime investigations (MT).

²¹⁴ Some Member States (UK, BE) allow falsification of public registers to a lesser extent. See Moonen (2010).

²¹⁵ House of Commons Home Affairs Committee (2013).

²¹⁶ Interview with Europol official (12 June 2014).

²¹⁷ HMIC (2014).

living standards, but even a more ordinary apartment may be needed. Technical equipment such as GPS tracking or voice alteration devices (LT) may also be needed. Long-term maintenance of such a legend can easily incur high undercover costs to law enforcement agencies. According to some respondents the use of undercover agents demands too many resources (ES, PT). Moreover apart from being limited, the resources are sometimes used ineffectively (BG) and significant organised groups are rarely infiltrated (BE, BG).

Legal culture: another issue, pointed out by academics in their research in the Netherlands, is the centralised authorisation procedures whereby some public prosecutors fear that they will lose control if they choose to deploy an undercover operation, particularly an infiltration, and therefore might avoid this investigative method.

Staging of a criminal offence: there are several ways in which law enforcement authorities can stage a criminal offence in order to gather evidence against a criminal organisation. For example the use of 'front stores' enables the police to create or operate a fictional company with the aim of providing goods and services to criminal organisations. In addition to setting up front stores law enforcement may also use 'test buys' where they gather evidence about the criminal organisation by purchasing their illicit goods. Similar to test buys the use of 'pseudo sales' and 'trusted sales' are used to gather evidence. In a pseudo sale law enforcement will sell illicit or illicit-appearing goods to members of the criminal organisation. A trusted sale differs from a pseudo sale in that the sale is actually allowed to go through in order for the undercover officer/informant to gain the confidence of the buyer, with the aim of obtaining more evidence. While these tools are listed as being effective by some MS (BE, EE), their use has been viewed as controversial as critics have argued that they may lead to provocation/entrapment.

7.9.6. Cross-border cooperation and issues

On 12 June 2007 the Council of the European Union adopted the Council Resolution on simplifying the cross-border deployment of undercover officers in order to step up MS cooperation in the fight against serious cross-border crime.²¹⁸ The conclusions pointed to five areas where cooperation was considered important to be stepped up, noting that Article 14 of the Convention on Mutual Assistance in Criminal Matters, was not sufficient:

- Requirements and procedures for cross-border deployment of undercover officers in urgent cases, when no time for agreement is available.
- Protection of undercover officers' identity.
- Equal legal status for national and foreign undercover officers.
- The possibility of seconding undercover officers abroad.
- Cross-border assistance in providing operational cover for undercover officers.

As a follow-up to the resolution, in 2008 the Council collected responses to a questionnaire assessing the barriers to cross-border cooperation in the deployment of undercover officers.²¹⁹ The issues identified by respondents in 2008 do not differ substantially to the ones identified in the present study.

²¹⁸ Council Resolution 6678/3/07 REV 3 CRIMORG 39 (Limité).

²¹⁹ Council of the European Union (2008b).

Legal issues

Scope of undercover officer definition: the lack of a common definition of an 'undercover agent', and the inclusion of 'citizens' and 'informants' as undercover officers in some legislations may create situations where hosting of such officers will be difficult. An example was provided where an undercover informant and a police agent were sent to another MS to take part in a sting operation, where the informant needed to participate in the transaction. While in the country of origin both were considered 'undercover agents', but in the recipient MS only the police agent had the status of an undercover officer, while the status of the informant remained unclear, and it was difficult to accept his participation and provide him with the necessary immunity from prosecution (BG).

Limited scope to deploy or host foreign undercover officers: in some MS, the legislation explicitly states that an undercover officer needs to be an officer of the national police or intelligence services (BG) or explicit legislation was simply missing (RO). In others there are separate provisions that allow the possibility for the acceptance of a foreign law enforcement officer (NL).²²⁰

Legal differences: in the sections above a number of issues, such as different definitions of and standards for 'provocation' were outlined, as well as different limitations for participation in crime.

Operational issues

Language and ethnicity: infiltration in a foreign environment can be far more difficult if one needs to take into account language, ethnic and cultural differences between the countries involved (FI, HU, BG). If the undercover agent does not possess local language skills his ability to collect intelligence may be fundamentally undermined.

Security concerns: some interviewees expressed concerns about the challenges that a foreign environment may pose for providing backup and security to the undercover agent.

Covert investigations alone will usually not lead to a successful investigation. If only for safety reasons, they must be accompanied by broad security measures, such as observations and monitoring of telecommunications.

Monitoring and control: lack of clarity as to who controls and monitors the activities of undercover agents when they are abroad could present difficulties in cross-border cooperation (NL).

Biometrics and border control: cross-border investigations are becoming increasingly problematic because of the growing collection of biometric data at border checks. If the undercover investigator has been registered during a previous visit with their true identity, then he or she may attract attention with the new identity. If a person is registered for the first time under the identity of an undercover investigator, he or she will attract attention later when he or she enters under his or her real identity.

²²⁰ Criminal Procedure Code Part IVA. Special Investigative Powers, Chapter One. Systematic Surveillance, Section 126g.

7.9.7. Recommendations

For over a decade European cooperation in the field of undercover investigations has largely remained within European Cooperation Group on Undercover Activities (ECG).²²¹ This group looks into the exchange of expertise and knowledge on undercover techniques/activities between investigators involved in these activities for law enforcement purposes. Within this scope, exchange of various professionals such as psychologists supporting undercover work has also taken place. The ECG is not an EU group. Instead it was established between authorities of European countries (both EU members and non-EU countries).²²² The group is independent of EU institutions such as Europol.

The existence of this group has largely made a parallel EU-level cooperation obsolete. The various risks and sensitivities regarding the subject of undercover officers explain why most law enforcement agencies prefer to refrain from EU-level cooperation. This has confined the process to law enforcement cooperation mechanisms: the role of the group as a trust-building mechanism that facilitates the cross-border deployment of undercover officers or as a platform for the exchange of best practices is clearly important.

The downside of this approach is that there has not been an underlying political process to strengthen EU-level cooperation in this area, or to deploy more EU resources regarding to training and exchange of best-practices. Further strengthening of EU-level cooperation may need a parallel policy process and measures that would inevitably pass via EU institutions.

In 2008 a questionnaire distributed by the Council asked MS to make recommendations in regards to possible actions needed at EU level regarding the five areas of concern listed above.²²³ Most MS agreed with the need for greater EU-level action, and many of them provided further ideas. The present study shows that little has been achieved in the meantime. Therefore, the recommendations made by interviewees overlap to a large extent with suggestions that have been already tabled in 2008.

- Many of the operational issues that were mentioned by interviewees could be settled if a **comprehensive Memorandum of Understanding**²²⁴ was signed between deploying and hosting country. The ECG has already developed such model Memoranda, and they could be taken to the next level by including them in a comprehensive agreement between all MS (e.g. similar to the Salzburg Agreement on Witness Protection – see Section 7.13 below).
- **Resources:** as indicated above, the funds that may be required are significant. Some interviewees called for increased domestic funding, as well as for EU funding for cross-border operations, either within JITs or separately (LV).
- A **shared EU resource database** is a possible solution that could help

²²¹ Statewatch (2012, 2013).

²²² Malmström (2013).

²²³ Council of the European Union (2008b).

²²⁴ A model MoU developed by the ECG on Undercover Activities from 17 February 2004 has been made available public by Statewatch.org. It arranges for the approval procedures, arrangement for legend and backstopping issues; clarifying objectives of the operation, management; evidence collection (e.g. it clears in advance issues of undercover officers' identify protection, involvement in crimes, and entrapment); sets the rules of communication; agrees on time scales, including national time limits that need to be respected; agrees on issues related to costs and expenses; insurance issues; rules of disclosure to third parties; safety rules; briefing and debriefing responsibilities and parameters.

smaller MS to more easily draw on undercover investigation resources that other MS are able to share. One interviewee suggested a database of profiles of undercover officers that could be deployed with certain linguistic, gender, age, etc., profiles (HU). Another interviewee advocated a database of officers with specialised professional skills (e.g. financial, IT, art crime, etc.).²²⁵

- **Cyber-investigations:** including provisions in national or EU -level legislation regarding undercover investigations that may involve the test purchase via the Internet of illicit goods or services (including drugs, cigarettes, etc.), investigation of child-pornography rings, or cybercrimes (DK). The collection of evidence, the interpretation of entrapment, or the use of modern means of payments (e.g. bitcoins) or technologies need to be regulated. Covert investigations remain the only means that has the potential to prevent and detect cybercrime. Techniques such as 'remote search' on devices and networks are indispensable in combating modern cybercrime. However, technical, financial and regulatory obstacles still hinder the use of such tools. Remote search, scanning and surveillance software is usually provided by the private sector and can be costly, while training of specialised staff and maintenance put additional strain on law enforcement agencies' human and financial resources.²²⁶ Working closely with the private sector, in a public-private capacity or other forms of cooperation, may prove helpful in avoiding technical obsolescence and unnecessarily high costs of law enforcement for developing and maintaining their own IT solutions.
- **More detailed national legislation:** in particular: provisions regulating the cases in which the undercover officers are not criminally responsible for an offence committed in the implementation of a covert investigation; the definition of the limit of undercover officers' powers; the definition of offences that are permissible as part of undercover operations; and clarification of the procedural status of undercover officers in criminal proceedings etc. (BG, LT).
- Recommended domestic legislation changes by interviewees included:
 - Allowing for a longer period of use, so that this technique could achieve its intended purpose (BG).
 - Broadening the scope of undercover officers to include civilians (DK)
 - Specific provisions for the deployment and hosting of foreign undercover officers (RO).
 - Providing more incentives for officers to engage in undercover work – one suggestion was to count 1 year of actual work as an undercover officer as 2 years of work (for the purposes of promotion or retirement) (LT).
- Training (DE, PL, FR):
 - In response to one of the recommendations for more adequate back-up team support, one former undercover officer has noted that cross-border training with back-up teams (especially SWAT extraction teams) could be very useful as it provides for safer and more effective back-up intervention.²²⁷
- In view of the fact that a number of respondents mentioned the issue of entrapment, exchange of best practices and more training in that area may

²²⁵ Interview, 12 June 2014.

²²⁶ Recent leaks have shown that such software products may reach costs of up to 1.4 million euros; see LeakSource (2014).

²²⁷ Jacobellis (2011).

also be sensible (in particular the design of operations in a way to avoid entrapment (SK).

Table 7.16: Covert investigations – issues and possible solutions

Issues & problems	Recommendations
Various operational and legal issues regarding undercover operations undermine the cross-border effectiveness of the tool. The small size of the country makes use of undercover officers difficult in some MS.	Adopt an EU-level agreement on Undercover Operations, following model MoUs already developed by the European Cooperation Group on Undercover Activities, in order to stimulate cross-border deployment and hosting of undercover officers.
Lack of legal clarity regarding involvement of officers in criminal activities and entrapment reduces the effectiveness of some undercover operations	More detailed national legislation; exchange of best practices and training.
Undercover activities on the Internet (including test purchases, or communication) are largely not regulated in national legislation.	Inclusion of cyber-related offences and considerations in EU legislation or agreements related to undercover operations. Legislate and regulate 'remote search' for devices and networks, or prescribe clear definitions and guidelines across the EU.

7.10. Controlled delivery²²⁸

Table 7.17: Controlled delivery – basic facts

Legal basis	Naples II Convention, ²²⁹ Schengen Convention ²³⁰ and the Convention on Mutual Assistance in Criminal Matters. ²³¹
Frequency of use in organised crime investigations	Somewhat often.
Scope	Mostly limited to cross-border drug trafficking cases but may be used for other cross-border smuggling investigations.
Obstacles	Losing the trail, temptation to intercept illicit goods upon discovery, time limitations, trust between MS, complicated formal procedures, legal differences, inadequate resources.
Recommended changes	Increased usage of new and improved tracking technologies; more direct contacts and channels for international cooperation; increased training opportunities; clearer definitions of duties, powers and responsibilities; expansion of the scope.

7.10.1. Definitions

Few MS have their own definitions of controlled delivery. Most rely on the definitions of Article 2 (i) of the United Nations Convention against Transnational Organised Crime or Article 1 (g) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Both definitions are almost identical, with the sole difference being that the UNTOC one has a broader scope as it does not focus exclusively on narcotics. Therefore, the UNTOC definition is more appropriate, as the majority of

²²⁸ Additional data in this section of the report is take from the country questionnaires of Council of Europe (2005) as well as from an EMCDDA review of legislation related to controlled deliveries.

²²⁹ Council of the European Union (2000b).

²³⁰ Council of the European Union (1990).

²³¹ Council of the European Union (2000a).

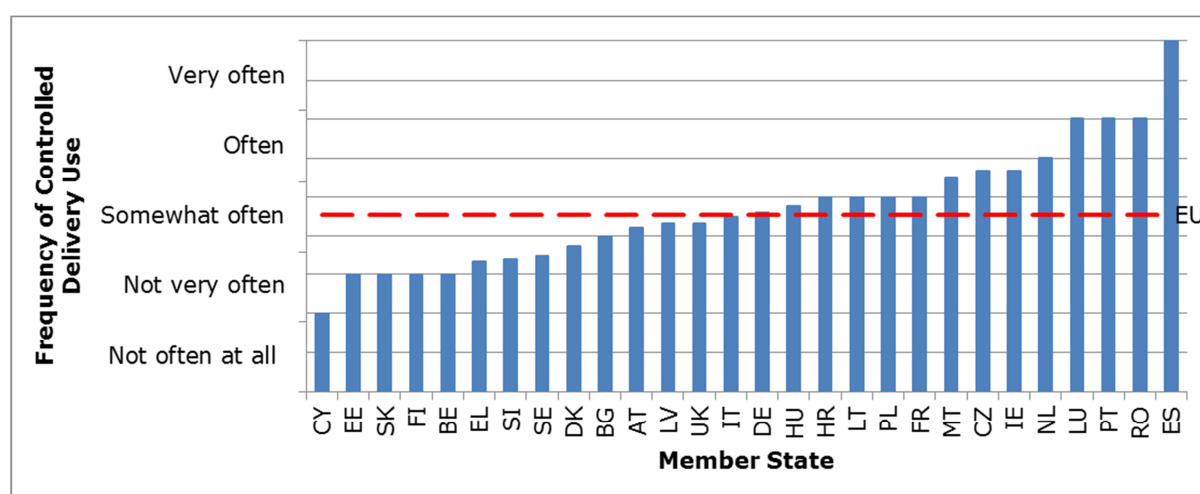
countries have adopted a broader scope to controlled delivery. Art. 2(i) of UNCTOC states that:

Controlled delivery [is] the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

In addition some MS include various categories of deliveries such as:

- Controlled importation
- Controlled exportation
- Controlled transit in their definition of controlled delivery (DE, SK).

Figure 7.11: Frequency of use of controlled delivery



Source: information provided by MS experts

The EU legislation, Naples II Convention, Schengen Convention, and the Convention on Mutual Assistance in Criminal Matters, collectively provide the underlying legislative framework enabling MS cooperation in control deliveries. The Manual on Cross-Border Operations²³² and related factsheets provide general guidance, which many states have adopted, on the approach and the type of information needed to cooperate during a cross-border controlled delivery operation. As **many MS have different conditions and approval procedures for authorising a controlled delivery**, various manuals assist MS in this process.²³³

According to the United Nations Office of Drugs and Crime controlled delivery is usually carried out using one of the following four variations²³⁴:

- **Controlled deliveries which use cooperating defendants:** This type of

²³² Europol updated and disseminated the manuals on cross-border surveillance and controlled deliveries in 2009. Currently the content of these manuals are stored on the dedicated Europol Platform for Experts on which all operational partners update their national 'fact sheets' when appropriate. See Council of the European Union (2009a).

²³³ For example the European Manual on Controlled Deliveries (Europol, 2001) and the Handbook for the Naples II Convention on Mutual Assistance and Cooperation Between Customs Administrations (Council of the European Union, 2000c).

²³⁴ United Nations Office on Drugs and Crime (2010).

controlled delivery is most commonly used following the discovery and subsequent seizure of illicit goods by customs, border guards or other law enforcement authorities at a border crossing point. In this form of controlled delivery the **apprehended traffickers agree to cooperate with the authorities by delivering the illicit goods to the intended recipient** in order to identify higher-level members of the criminal enterprise.

- **Cold convoys, i.e. no cooperating violators:** The so-called 'cold convoy' technique is used when illicit goods are discovered during the course of an inspection or other law enforcement activity and is deliberately allowed to proceed from the border to its intended destination while under the close surveillance of law enforcement officers. This form of controlled delivery differs from the previously mentioned method in that **the trafficker is unaware that law enforcement is aware of the illicit trafficking that is taking place and tracking their movement.**²³⁵
- **Controlled importations/exportation, aka 'the pass through':** The pass through technique differs from the previously mentioned techniques in that the illicit goods are imported or exported under the direction of law enforcement. This technique is **heavily reliant on the cooperation of confidential informants or undercover officers who are under the direct control of law enforcement officers.** In essence these undercover officers/informants act as traffickers for the criminal organisation which is being investigated.
- **Controlled delivery via the mail/courier service:** This type of controlled delivery usually takes place after the discovery and seizure of illicit goods that have been discovered in the examination facilities of postal processing facilities. In this form of controlled delivery **the package is delivered to the addressee of the package by an undercover law enforcement officer** often posing as an employee of the courier/postal service.

7.10.2. Scope of controlled delivery

A number of MS (AT, LT, LV, PT, UK) indicated that controlled deliveries are only used in cross-border investigations. Recently Finland has introduced a domestic version of controlled delivery which takes place within its own borders. Over the past decade the scope of 'controlled delivery' has gradually broadened from drugs to encompass a wider range of organised crimes. Currently, **in the majority of MS controlled delivery applies to all illicit goods** (see Table 7.18). For example France and Portugal initially allowed controlled delivery only for drug-related offences (criminal or customs), but both have expanded the scope to include a wide variety of illicit goods.²³⁶ France defined them as 'objects, goods or proceeds resulting from or furthering the commission of offences falling within the scope of organised crime' (FR). Belgium similarly has a broad scope allowing for controlled delivery of Illegal consignment of goods or persons (BE). It is important to note that while the scope of controlled delivery has expanded to include many crime types, many MS (AT, BE, LV, LT, SI, SK) have put restrictions on its use when there is a risk to human life, as can be the case in human trafficking investigations.

²³⁵ In some cases the trafficker might be unwitting facilitator who is unaware that he/she is trafficking any illicit goods.

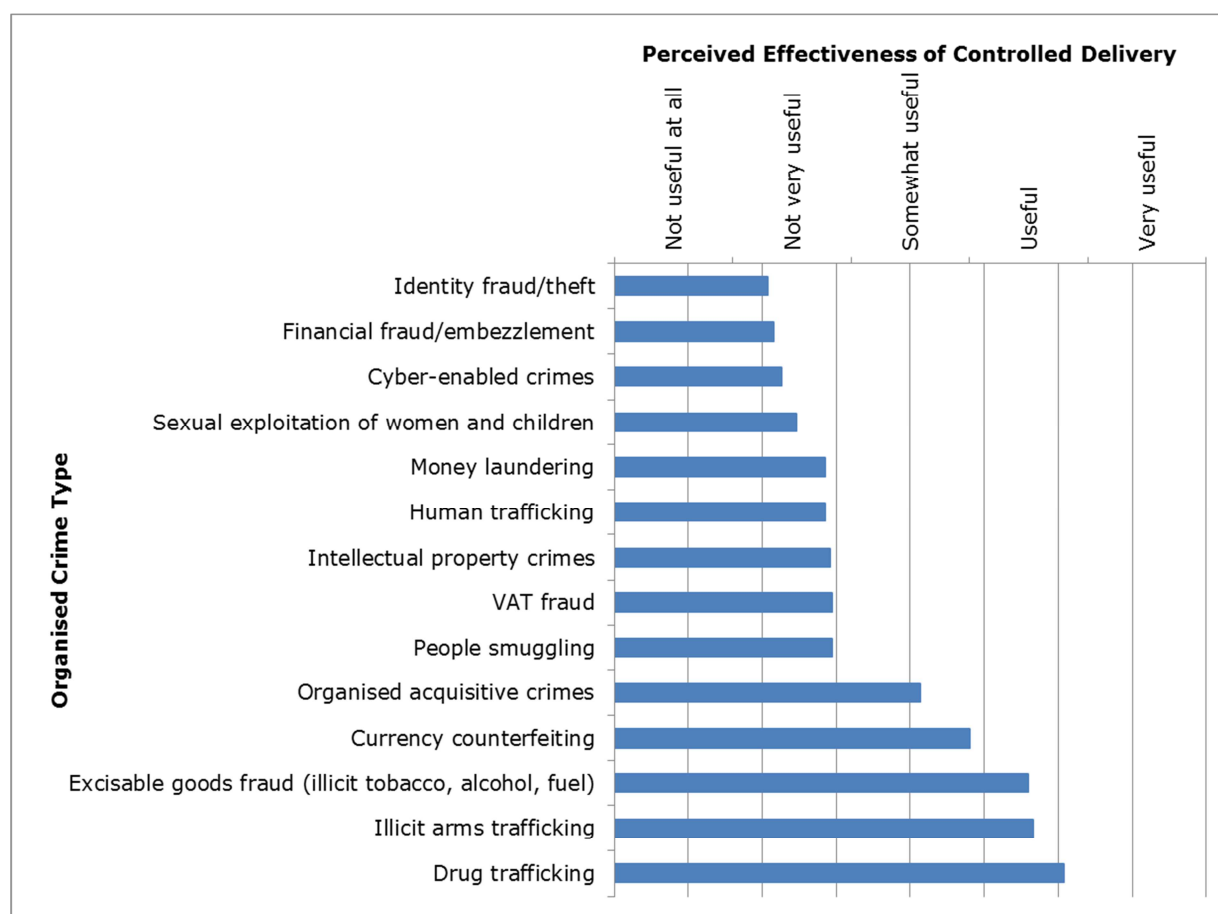
²³⁶ In Portugal controlled deliveries may be used in investigations for any offence that may lead to extradition.

Table 7.18: Scope of controlled delivery

Type	Country
Only drugs	(MT)
Extraditable offences	(FI), (LU), (PT)
Others types of illegal goods ²³⁷	(AT), (BE), (BG), (HR), (FR), (LV), (LT), (NL), (SI)

Source: information provided by MS experts

Figure 7.12: Effectiveness of controlled delivery by crime type



Source: information provided by MS experts

7.10.3. Resources

While some MS (AT, FI, LT) agreed that controlled deliveries are resource intensive there was less agreement about whether or not the available resources were adequate. For example some MS (BG, HU, LV, MT, UK) stated that the current resources are not adequate while others (HR, EE, LU, ES, SE) believed the opposite. One of the reasons for this mixed outlook might be a result of the fact that the demand for controlled deliveries is not consistent and is subject to large fluctuations. As one MS (BE) notes, this




























²³⁷ For example stolen/counterfeit antiques, historical artefacts, currency, etc.

fluctuation makes it difficult to determine how many full-time trained staff are needed in order to meet the demand. In addition to the **6–12 staff members that are normally needed to implement a controlled delivery**, a number of technical resources are also required.

7.10.4. Use of controlled delivery in combination with other investigative tools

Controlled delivery is frequently used together with other investigative tools. The most commonly used tools include interception of communications (11 MS), undercover investigations (7 MS), informants (5 MS) and fictitious purchases (3 MS).²³⁸

Table 7.19: Most commonly used special investigative techniques together with controlled deliveries

Type	Country
Interception of communications	 (BE),  (EL),  (FI),  (HU),  (LT),  (NL),  (PT),  (SK),  (SI),  (ES),  (SE),  (IT)
Undercover investigations	 (AT),  (CZ),  (DK),  (EL),  (LT),  (PT),  (RO),
Informants	 (FI),  (LT),  (NL),  (PT),  (UK)
Fictitious purchases	 (AT),  (CZ),  (NL)

Source: information provided by MS experts

While some of these investigation techniques are used during or immediately following the actual controlled delivery, in the majority of cases other tools such as the interception of communications, undercover investigation and informants are used to gather the intelligence needed to successfully carryout a controlled delivery.

Although controlled deliveries have the added advantage of creating situations where the criminals are caught red handed, some MS (HR, BE) believe that they are less impactful when used by themselves. In fact, one interviewee from Belgium believed that controlled delivery should only be used in combination with other techniques such as interception of communications, because otherwise the risk of feeding the criminal market (should the police lose track of the illicit consignment) is too high. Going even further, in Greece law enforcement authorities do not consider a controlled delivery to be 'controlled' unless other investigation tools are used to actually 'control' the delivery. For example surveillance might be used for tracing/following the shipment, interception of communications can be used to trace or identify the destination or meeting time, etc. However, there are limitations to how other investigations can be used together with controlled delivery. For example, in Denmark an informant (usually the courier) may only do as instructed by other criminals, otherwise they will be viewed as an agent provocateur, which is not permitted in Danish legislation. Overall, the main added value




²³⁸ While only one country (FR) listed the use of JITs, it did find that the use of JITs was particularly useful in cross-border investigations such as controlled deliveries. French customs have established mutual agreements on operational cooperation with many countries across the world regarding this tool.

of using other special investigative techniques was that they provided the increased level of monitoring which is necessary to successfully carry out a controlled delivery.

7.10.5. Legislative basis

There is significant variety in the legislative basis used to govern the use of controlled delivery across the MS. In some MS (see Table 7.20) the use of controlled delivery is regulated in specific domestic legislation, for example in the laws covering the suppression of drugs, drug trafficking, customs code or various other police acts. Other MS include specific rules and regulations concerning controlled delivery in their criminal procedure codes. Those MS that do not have specific domestic legislation governing controlled deliveries usually rely on either international conventions or agreements (i.e. the UNCTOC (United Nations Convention against Transnational Organised Crime) and various bilateral agreements.

Table 7.20: Legislative basis for controlled delivery

Legislative basis	Member States using this type of legislative basis
Criminal procedure code	 (BG), (HR), (CZ), (EE) ²³⁹ , (MT), (RO), (SK), (ES), (IT)
Specific domestic legislation and other forms of regulation	 (AT), (BE), (DK), (FI), (EL), (HU), (IE), (PL), (SI)
International treaties	 (LT), (LU)

Source: information provided by MS experts

At the EU level the basis for controlled delivery is grounded in Article 22 of the Convention on Mutual Assistance And Cooperation Between Customs Administrations²⁴⁰ (18.12.1997) and Article 12 of the Convention on Mutual Assistance in Criminal Matters between the MS of the European Union, which states that MS will ensure that controlled deliveries may be permitted in their territories in relation to criminal investigations which are extraditable offences. Whereas Article 73 of the Schengen Convention provides for controlled deliveries of drugs and psychotropic substances, and the aforementioned Conventions provide for controlled deliveries in relation to 'extraditable offences': these could therefore refer to illegal trafficking of money, firearms, etc.²⁴¹

7.10.6. Implementation and oversight

In some MS (AT, BE, EE, FR, EL, LV, LT, NL, PT, RO, SI, SE) the **authorisation** for controlled delivery may come from the public prosecutor; in others (HR, MT) the authorisation is granted by a judge/magistrate. In some cases (ES, CZ) when a controlled delivery needs to be carried out quickly, high-ranking police officers or border guards may initiate it. However, usually the prosecutor or an investigating judge needs to formally approve the controlled delivery within 24–48 hours in such cases. In order to

²³⁹ While there is no specific references to controlled delivery in Estonia's Criminal Procedure Code the use of controlled delivery is instead governed by the criminal procedure code on *Covert surveillance*.

²⁴⁰ Council of the European Union (2000b).

²⁴¹ European Monitoring Centre for Drugs and Drug Addictions (2010).

approve the controlled delivery, the controlling institution may have to be provided with justification and operational details (see Table 7.21 below).

Table 7.21: Information which needs to be provided to authorising authorities

Participating authorities	The name and position of the officer that hands in the request MS involved
Details about the suspect	Data on the persons suspected of delivering the controlled goods Expected duration of the controlled delivery Information showing where the controlled delivery will take place Expected results etc.
Evidence	Evidence that could substantiate the need to use a controlled delivery Evidence showing that an offence is about to be committed
Safety assurance ²⁴²	Authorities need to show that the controlled delivery will not endanger the health or life of those involved or the general public

Source: information provided by MS experts

Provisions of cross-border agreements

In cross-border controlled deliveries law enforcement agencies may seek assurances to avoid some of the issues mentioned in the next section. Therefore agreements for the implementation of cross-border controlled deliveries may contain the provisions listed in the example below.

Box 7.4: Types of provision in the agreements between MS carrying out a controlled delivery

Mandatory constant monitoring of transportation
Commitment to investigate the couriers, ringleaders and recipients with the aim of punishing them through the seizure of prohibited articles
Continually informing the partner MS's authorities of the progress of the case
Requirement to intercept the delivery if there is a risk of losing the consignment
Requirement to intercept the delivery if there is a risk to human life or health

In addition, as part of the agreement certain standard information may need to be exchanged between MS. A detailed list of type of information that is exchanged is presented below.

Box 7.5: Type of information that needs to be exchanged between MS during a controlled delivery

The content, expected route (country of origin and destination, including possible changes and transshipments) and duration of the consignment;
The mode of transport as well as data which can be used to identify the means of transport;
The person managing the controlled delivery;
The mode of communications of participants;
The mode of escorting;
The number of persons participating in escorting;
The circumstances of transferring and accepting the consignment;
The measures to be taken in the case of an arrest;
The measures to be taken in the case of a contingency.

²⁴² In practice such safety assurances mean that controlled delivery cannot be used in human trafficking cases as there is an increased risk of injury or loss of life if intervention is delayed.

7.10.7. Use and effectiveness

MS (AT, BE, BG, MT, RO) found controlled deliveries to be useful, particularly for investigating specific crimes such as the trafficking in drugs, firearms and counterfeit goods. However, a number of MS (BE, FI, UK) felt that controlled deliveries should only be used under the right circumstances or as a last resort. **The main added value of using controlled delivery includes its ability to provide hard evidence**, i.e. being caught red handed (CZ, DK, PL), as well as its ability to help identify more than just the couriers involved in illicit trafficking operations (DK, FR, HU, UK). As one respondent (LV) put it, 'without this tool it would be impossible to gather information about all parties involved in the offence, often it is the only method of identifying other members of the organised crime group.' As many countries' involvement in controlled deliveries is limited to the transit stage, respondents found it difficult to determine how effective the tool was in establishing the evidence needed to convict those involved of participating in a criminal organisation.

7.10.8. Issues and problems

Law enforcement officers shared a number of issues relating to the failure of or difficulties in using controlled deliveries:

- The temptation by police or customs to seize an illicit shipment and get credit for the seizure **without following through to uncover the entire illicit chain** and the ultimate sender or recipient is significant. Interviewees mention various examples when partner law enforcement officers in other MS decided to make a seizure, leading to the failed attempt at a controlled delivery. As one respondent from MT explained, 'everyone wants to catch the criminal, however sometimes it is necessary to sacrifice personal glory [for] more intelligence gathering] rather than catching the offender at your port.'
- **Losing the trail of a controlled delivery** operation is a problem that occasionally takes place. In some countries such losses have led to accusations that the law enforcement authorities intentionally 'lost the trail' and have become complicit in protecting international trafficking. As a result of this issue, a number of MS are required to provide assurances that they have the resources necessary to ensure that they do not lose track of the transported goods.
- **Time limitations on permissions** of controlling institutions and bodies may also make controlled deliveries difficult, although for example this is not a problem in Lithuania. Time limitations typically lead to investigations only at the low levels (e.g. drivers). A smuggling channel may have to be controlled for much longer time to reach the higher levels of the organisation. New smuggling channels may only be 'tested' by criminal leaders with small quantities of illicit goods, and with new people who are not close to the core of the criminal network. Only when the channel is deemed 'secure' are more substantial quantities smuggled.
- **Burdensome cooperation procedures:** Even though the legal framework at the EU level is similar and guidelines are unified, the coordination process is complicated and lengthy. If an immediate reaction is required, only personal contacts with foreign colleagues are considered effective, as the formal procedure is too time-consuming (FI, HU, SK). As one respondent from SK explained, 'there is a general lack of cross-border cooperation and the procedures for using legal

assistance are quite lengthy, which discourages its use.'

- **Different ways of prioritising resources** for controlled deliveries amongst MS may exist. For some countries, where larger shipments are common, small quantities of drugs, for instance, may not be of interest. Such countries may need some evidence that the shipment concerns a big smuggling channel or it involves an important criminal network in order to dedicate resources. An example was provided where a kilo of heroin was considered significant in Denmark (which has a very small drugs market), but was not seen as worthy of controlled delivery by the Netherlands, which is a major transshipment point for heroin.
- **Trust in sharing intelligence data**, such as the information's source, may also be needed, as there are occasionally incidents in which a partner law enforcement agency does not protect the informant. The issue of trust leads to other problems. If trust between individual officers from two countries is key to a cross-border cooperation, then, when an officer leaves or is replaced the whole operation may suffer.
- In cases of cross-border cooperation some officers found it **difficult to directly identify the relevant authority** to be contacted as well as the types of authorisations that were needed to carry out a controlled delivery varied, as in some countries the authorisation is granted by the prosecutor while in other it is granted by the judge or even senior police officers. In that sense the Greek approach of coordinating all controlled deliveries from one central office which has jurisdiction over the entire country could be viewed as a best practice for resolving this issue. In addition respondents felt that the legal guidelines, such as the ones developed by Europol, were incomplete or too quickly out-dated. This belief may be a result of a lack of knowledge of the available resources such as the Europol Platform for Experts, which provides regularly updated information on such tools.
- **Legal differences** amongst MS may lead to situations where one country in the chain denies the extradition of organised crime group members (LV). Many countries allow the use of or participation in controlled delivery only in the framework of criminal investigations into extraditable offences. Respondents from the Czech Republic have indicated that there can be difficulties with using the evidence obtained through controlled deliveries which were carried out in a foreign state. In the case of Finland there are even inconsistencies between the prerequisites for carrying out a domestic controlled delivery and international controlled delivery.²⁴³ Legal differences and operational practices are often detrimental to cross-border controlled deliveries. Some MS, such as Spain may not allow the transit of illicit drugs through its jurisdiction as part of an ongoing investigation, by rule of practice and legal regime (IT).
- **Inadequate resources** were identified by a number of MS as a limit to the broader use of controlled deliveries (BG, DK, IT, FI, HU, NL). First, the number of consignments intercepted that could theoretically lead to the initiation of a controlled delivery is too high, and human (surveillance staff) and technological resources are not available (UK, IT, LV). Second, in countries with more limited resources, tracking equipment (e.g. GPS trackers) is considered fairly costly, and

²⁴³ In Finland domestic controlled deliveries can be carried out for an offence which would result in a minimum of 4 years imprisonment while international controlled deliveries can be carried out for offences which would lead to only two years of imprisonment.

can be easily lost by being kept as evidence in court in another MS (or become lost for other reasons), and is considered to be a burden. Thirdly, the need to prioritise limited resources sometimes makes it difficult to ensure international cooperation involving multiple countries (FI). Lastly, some interviewees argued that occasionally aerial surveillance is also required for a controlled delivery, which could be prohibitively expensive (LV).

- **Legality vs. opportunity principle** in prosecution. Several MS use the opportunity principle in their criminal law systems (NL, DK, SE, SI, FR), which means that prosecutors have the discretion to act or not to act if a crime (e.g. 'drug shipment') is detected. This facilitates the use of controlled delivery, as prosecutors are not obliged to act on a crime. In addition some countries (ES) do not require a guarantee that the persons involved will be prosecuted. Such regulations enable several smaller shipments to go through if there is credible intelligence that the criminal network is testing a smuggling channel with smaller quantities while waiting until a large shipment is allowed (DK).

7.10.9. Recommended changes

EU policies related to controlled deliveries should not be developed separately from broader cross-border surveillance policies. There is less sensitivity with controlled deliveries than with cross-border surveillance in general, as there are fewer privacy concerns. Controlled deliveries are seen as more narrow in their scope, as the primary focus and cause of action is the illicit commodity. Therefore, there may be room for some bolder actions that could be more palatable to politicians and privacy advocates.

Over the past decade, in addition to including controlled deliveries in various EU legislation, EU bodies (including Europol) in cooperation with the practitioners from the expert group on cross-border surveillance have identified points of contact and provided legal guidance.²⁴⁴ The impact from the introduction of the European Investigation Order (Art. 28) on controlled deliveries is yet to be seen. (Some interviewees called for a special EU Directive on Controlled Deliveries (CZ).) Europol is operationally facilitating controlled deliveries and cross-border surveillance operations through the ELO network and Eurojust, with its judicial capabilities, also facilitates cooperation. Both agencies are actively seeking to formulate further ways to improve their role in supporting controlled deliveries and more generally EU-level cooperation.²⁴⁵ A variety of possible reforms both at the national and EU level could be used to make controlled deliveries more effective:

- **Increased use of new and improved tracking technologies:** A number of interviewees (BE, DK, FI, PL) referred to the need for increased use of new tracking technologies. The tracking of illicit shipments could be simplified by using the latest tracking technologies that are undetectable by the criminal organisations (PL). Wider use of surveillance devices could reduce the need for traditional controlled deliveries in which the police are actively following the shipment of illicit goods (FI). Some technologies are already on the market while they are not necessarily available to law enforcement officers (BE). Factory-

²⁴⁴ One example is the Manual on Cross-Border Operations (Council of the European Union, 2009) and the related and periodically updated National Fact-Sheets (Council of the European Union, 2012) (both are *limité*). Another example is the EMCDDA online source (European Monitoring Centre for Drugs and Drug Addictions, 2010).

²⁴⁵ Interviews at Europol and Eurojust (12 and 13 June 2014).

installed GPS devices in new vehicles, for instance, reduce the need for installing a tracking device. A standardised approach towards the use of compatible tracking technologies by law enforcement in MS will facilitate cooperation and will reduce the risks associated with installing multiple tracking devices on a target (DE, Europol).²⁴⁶

- More **direct contacts and channels** for international cooperation: Several countries (HU, BG, LV) cited the need for more direct contacts or other channels to improve international cooperation in this area. According to Hungarian experts, international cooperation could benefit from being less formal and bureaucratic. This is particularly the case when it comes to the authorisation process and perceived slow response to rogatory letters (BG, HU).
- **Training:** A number of interviewees conveyed the need to conduct more training and exchange of best practices for law enforcement officers on the use of controlled deliveries (PL, SK, SI, LV, LT). Although no specific recommendations were provided as to the nature of the training, they were seen as a way to build and expand personal contacts in this field, which have been cited as vital for the rapid implementation of controlled delivery.
- **Clearer definitions of duties, powers and responsibilities:** Some interviewees (UK) felt that clearer definitions of duties and powers between the different agencies (i.e. customs, border police, organised crime units, etc.) involved in controlled deliveries were needed. Others felt that more detailed legal provisions are needed regarding the legislation which governs the use of controlled delivery (BG, LU, PL). However, in some MS where no specific national legislation exists, the absence was not seen as a particular obstacle (FI, EE, LT). Legislation could be further strengthened by ensuring that it is regularly updated in order to remain effective against new criminal techniques/activities and technological advancements (BG).
- **Extending the scope of controlled delivery:** While some MS have already extended the scope of controlled delivery to go beyond drug trafficking, others have not, and therefore such an extension was suggested by some interviewees. Trafficking in human beings is one area which some interviewees felt should be included within the scope of controlled deliveries (BE), while others cautioned about possible dangers to victims that it may cause (LU). Other areas included trafficking in illicit arms, cultural goods (EL) and trafficking in currency (SK).

²⁴⁶ There are solutions that Europol has recently developed to effectively circumvent deficiencies in compatibility, and some Member States are already taking advantage of them (Interview at Europol, 12 June 2014).

Table 7.22: Controlled delivery – issues and possible solutions

Issues and problems	Possible solutions
Criminal groups use countermeasures to detect tracking technologies	Fund the sharing of best practices in the use of advanced tracking technologies (to help law enforcement stay ahead of criminal groups).
Bureaucratic and legal obstacles to swift cooperation regarding controlled deliveries.	Provide training and exchanges of best practices with the purpose to build trust and informal relations between law enforcement agencies to overcome bureaucratic obstacles. A suggested best practice is the coordination of controlled deliveries by a centralised structure, having jurisdiction and authority for the whole territory
Use of controlled deliveries mostly limited to drugs investigations.	Broaden the legal scope of controlled deliveries to include other crime categories on the national and EU level, as well as conduct exchange of best practices and training to stimulate use in new areas.

7.11. Informants

Table 7.23: Informants – basic facts

Legal basis	MS statutory, sub-statutory and specialised legislation, Schengen Convention and the Convention on Mutual Assistance in Criminal Matter, the Council Framework Decision 2006/960/JHA.
Frequency of use in organised crime investigations	Often to very often.
Scope	Informants are being used in a variety of organised crime cases and are usually deemed extremely useful.
Obstacles	Reliability of informant information; specialised training and skills; difficulty in using informant testimony in courts, and protecting the informant's; deficit of trust in cross-border deployment and hosting of informants.
Recommended changes	MS should work toward adopting the Dedicated Management Model for Informant Handling; adopting clear national legislation; enhance information and intelligence sharing within the EU.

7.11.1. Definitions

There is no formal definition of 'informant' in international / EU legislation, and it is absent from the statutory law of most MS.²⁴⁷ The (English-language) terms commonly used may include 'criminal informants', 'covert human sources' or 'confidential informants'.²⁴⁸ Europol's Permanent Working Group on Informant Handling defines an informant as 'a human being who is treated with confidentiality and who passes information/intelligence/inside knowledge and/or provides assistance to competent Law Enforcement /Secret Services' crime investigations and terrorism enquiries'.²⁴⁹

Across the EU the term 'informant' carries a broad meaning, especially in the everyday language of law enforcement officers. It may be used interchangeably for a range of human intelligence sources:

- Individuals (including criminals or associates) who provide information, which is already within their personal knowledge (i.e. they are not tasked with collecting

²⁴⁷ SE, BG and EL were reported to have only internal police regulations on informants:.

²⁴⁸ In other European languages surveyed there seems to be a variety of terms employed by Law Enforcement to describe the various categories of informants. These terms do not necessarily correspond to any English language term.

²⁴⁹ Europol (2012b) p. 7.

new information, or establishing and maintaining new relationships for the purpose of collecting information).

- Individuals who provide information, which is not derived from a relationship, but rather observation (e.g. a neighbour agrees to provide the police with the license plate numbers of cars that stop in front of the house across the street).
- Individuals who provide information to police based on professional or statutory duty – employees within organisations regulated by the money laundering provisions legislation, and who are required to report suspicious transactions.
- Financial officials, accountants, notaries, company administrators may have a duty to provide information that they have obtained by virtue of their position.

This chapter concerns only one particular category of informants, that some MS and also Europol refer to as 'covert human intelligence sources' (CHIS)²⁵⁰ (FR, BE, UK), while other countries consider them 'agents' (DK, BG). The CHIS is a fairly narrowly defined category of informants, who provide information regarding a person or group to the criminal prosecution authorities in a *systematic manner* and for a *given duration*. A key component of this definition is that the informant is *tasked* with using 'covert manipulation of a relationship to gain any information'.²⁵¹ The CHIS may use their relationship with other people/offenders to obtain information, provide/'feed' (mis)information to people/offenders and covertly disclose information already obtained in the course of a relationship. The CHIS, unlike the other types of informants, is tasked with collecting information. Therefore, while the broad range of human intelligence sources in any country may be in the thousands, the number of CHIS, even in big countries, are typically in the hundreds. For the purposes of the present report MS were not willing to reveal numbers of CHIS. CHIS are also typically registered and can be paid. Some also have a formal relationship with other agencies such as Her Majesty's Revenue and Customs Service.

Additional examples of the definition of informants in MS:

- **Belgium:** 'a person who is supposed to maintain close relations with one or more persons about whom there are serious indications that they are committing or will commit offences and who provides information and data to law enforcement authorities'.²⁵²
- **Czech Republic:** In the Czech Republic the law specifically mentions the confidentiality of the informant, 'an informant means any natural person, who provides the police with information and services, in such a way that his/her collaboration with the police is kept in confidence.'
- **Latvia:** In Latvia the informant is defined as a 'covert helper' and the legislation allows for their services to be remunerated, as well as including provisions whereby 'covert helpers' can be hired on a contractual basis (LT).
- **Estonia:** 'adults [who have been recruited] for voluntary temporary or permanent secret cooperation in surveillance activities with their consent' (ES).²⁵³
- **Netherlands:** the Dutch Criminal Procedure Code talks about the use of 'assistance by civilians', where the civilian collects information whereby targets,

²⁵⁰ HMIC (2007).

²⁵¹ UK Home Office (2009).

²⁵² Article 47decies § 1 C.I.cr.

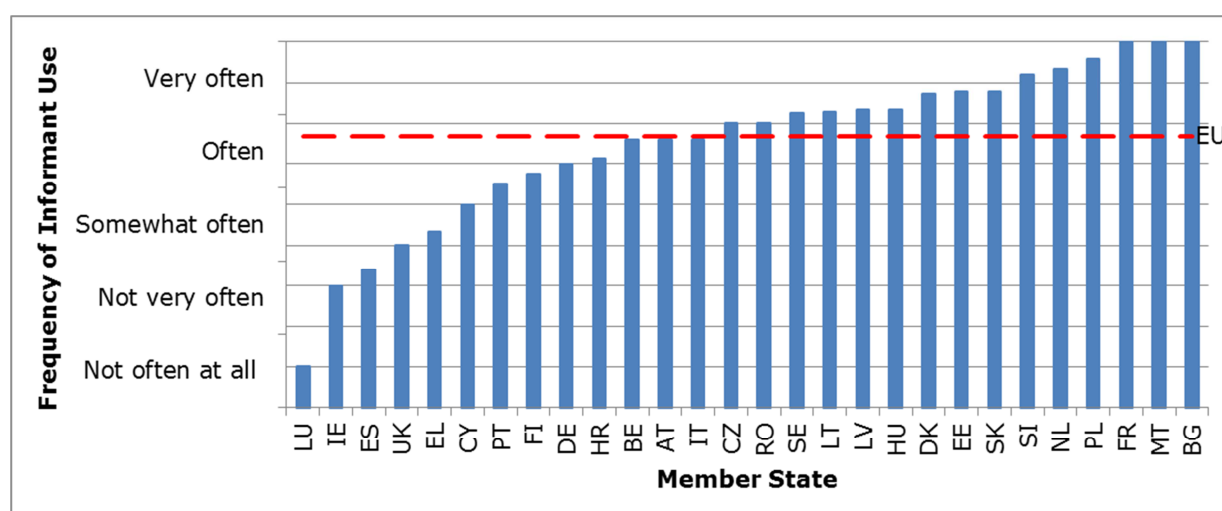
²⁵³ Estonia, Surveillance Act, Art. 14

time span and duties are specified in writing.²⁵⁴ A separate category is a civilian who is allowed to be involved with pseudo purchases or services.²⁵⁵

There are also special categories of informants:

- Informants as witnesses. Offenders who reach a plea bargain agreement to provide the police with information in exchange for lenient treatment (either reduction or exemption from penalties) – e.g. collaborators of justice in Italy or reformed criminals (*repentis*) in France.²⁵⁶ In some MS, the informants are considered witnesses, and regardless whether they testify before the court they are protected by the witness protection law provisions (EL, CY). This issue is further considered in Section 7.13 below.
- Individuals who are under some form of penalty (i.e. prison term, probation).
- Undercover officers and CHIS. In some MS, while there is no special legislation on informants, the legislation on undercover officers considers informants, in particularly those provided with specific tasks and remuneration as undercover agents. Therefore their responsibilities and rights are covered by such legislation (HR, EL).

Figure 7.13: Frequency of use of informants



Source: information provided by MS experts

7.11.2. Scope of informants' deployment

It is generally agreed that the value of informants input lies in providing intelligence on criminal organisations and illegal activities that are in principle founded in collusion and secrecy. Informants help investigators acquire a deeper understanding of the specific structure and actors involved in criminal activities. They may provide intelligence data that guides the use of other special investigative tools (e.g. they may supply mobile phone numbers to be intercepted or whereabouts of criminals to put them under surveillance, etc.) and collection of evidence (LT, EL, NL, SK, HU).

²⁵⁴ Title VA Criminal Procedure Code, Art. 126v

²⁵⁵ Title VA Criminal Procedure Code, Section 126ij
























²⁵⁶ Décret n° 2014-346 du 17 mars 2014 relatif à la protection des personnes mentionnées à l'article 706-63-1 du code de procédure pénale bénéficiant d'exemptions ou de réductions de peines.

Informants are deemed valuable in investigations of all types of serious and organised crime activities. Nevertheless, they are most often used in investigating drug trafficking offences (AT, FI, LU, PT, SE), and more rarely in economic, financial and some property crimes (NL, AT, PT, SE). Regarding the latter, significant resources may be needed to recruit informants as they may represent 'exclusive circles' to which law enforcement officers normally do not have access.

Informants are useful in infiltration of ethnic minority organised crime groups, which are more closed and difficult to penetrate using other investigative means (BE, FI). Others believe that the structure, strength and size of a criminal organisation are what determine the prospect of using informants. The argument here is that the larger the organisation the bigger the chance of one of its members becoming an informant (EL, PL).

Apart from providing valuable first-hand intelligence, informants often play the crucial role of a legal stepping stone in providing the investigation effort with sufficient reasonable doubt and legal grounds for initiating additional special investigative techniques, such as surveillance and wire-tapping, which helps facilitate meeting procedural court standards, such as the admissibility of evidence. In such cases informant testimony (if legally allowed) plays a corroborating role in judicial proceedings. This practice is prevalent in the EU, but especially relevant for MS where informant's legal status is ambiguously defined and regulations are not clear, and where informant testimony is not allowed in criminal proceedings (SK, EL).

Table 7.24: Types of crimes in which informants are most used

Type	Countries
Drug-related crimes	 (AT),  (FI),  (LU),  (SE)
Tobacco-related crimes	 (FI),  (EL),  (SE)
Sexual exploitation/human trafficking	 (EL),  (PT),  (SE)
Economic/financial crimes & money laundering	 (AT),  (EL),  (PL),  (PT),  (SE)
All	 (BG),  (FR),  (LV),  (LT),  (UK)
Other	Organised property crime  (AT) Arms trafficking  (EL) Victimless crimes (no paper trail)  (NL)

Source: information provided by MS experts

There is also difference across MS between the law enforcement agencies that may recruit and use informants. All police and intelligence services use informants, but customs agencies in some MS may also have their own CHIS (CY, FI, FR, UK). This raises the question about inter-institutional sharing of information.

7.11.3. Legislative basis

The legal framework regulating the use of informants in MS is quite diverse, ranging from statutory legislation (AT, ET,²⁵⁷ BE, FI, FR, HU, IR, UK,²⁵⁸ PL, PT) to specifically defined sub-statutory regulations (SE, DK), to sub-statutory agency regulations that remain classified (BG, PL, RO, LV). The use of informants is often left in a rather grey area. This stems from their double use as a source of intelligence, as well as possible witnesses. As a result the legal basis regarding the use of informants is most often in the form of intra-institutional regulations that are not public.

In some MS the statutory law treats informants as witnesses (EL, MT), while in others they are considered 'under-cover agents' (AT²⁵⁹). This can prove problematic as an investigation effort must treat a de facto informant as a de jure witness, which potentially yields controversial results.

Box 7.6: For MS where legal provisions related to the use of informants do exist, the areas regulated generally include

Authorisation/Control systems: covering the use of informants.
Grounds for using informant: for example, national security, preventing or detecting crime, protecting public safety or national economic interests, collecting taxes etc.
Admissibility of evidence obtained through informants: this also includes their use as witnesses. The laws in some MS allow the testimony of accomplice witnesses but prohibit the use of anonymous testimonies in judicial proceedings. According to the ECHR the admissibility of anonymous testimonies depends on the circumstances and three principles which have emerged from case law:

- Is anonymity justified by a compelling reason?
- Have the resulting limitations on the effective exercise of the rights of the defence been adequately compensated for?
- Was the conviction exclusively or substantially based on such anonymous testimony?

Limitations on the activities of informants: this might include prohibitions regarding informants being allowed to commit crimes or the extent to which they might incite others to do so.
Rights of the informant: for example regarding the termination of their informant status or ability to refuse to provide information about their immediate family.

7.11.4. Implementation and control

The effectiveness of informants as an investigative tool depends to a certain extent on the way the management of informants is organised. There are two general models for informant management and control. These differences are important, as they explain difficulties in cross-border cooperation as well as the effective use of the tool. In some MS there is a hybrid system, where two or more law enforcement institutions may use different models.

- Dedicated informant management (UK, BE, NL, LU, DE, SE, IE, HU, FR). This is the Europol-recommended centralised approach, where the investigators do not have direct contact with informants. Informants are recruited and managed by specialised informant handling units. The quality of the informant and their information is assessed independently by supervisors. The main objective of this approach is to ensure the quality of the informant and prevent

²⁵⁷ Estonia's Surveillance Act.

²⁵⁸ Regulation of Investigatory Powers Act 2000.

²⁵⁹ Section 131 Code Criminal Procedure.

any interference with / by the investigation (as investigators have no direct contact with informants). The UK example in the box below explains in more detail the operation and advantages of this model.

Box 7.7: The UK CHIS Management System

The UK system can be described as a two-tier system with a total of five levels of management.

Tier 1: General oversight

Assistant Chief Constable is responsible for ensuring that the requirements from the Acts, the Codes of Practice and the Manual of Standards are complied with.

Head of Intelligence is the Principal Authorising Officer, is designated as having independent oversight of the CHIS system within the Force.

Authorising Officer is responsible for the granting of authorisations for the use and conduct of a CHIS. The authorizing officer also supervises Source Management Unit (SMU), who is staffed by 'controllers' and 'handlers'.

Tier 2: Implementation

The Controller is responsible for the maintenance and of the legal and ethical standards in CHIS operations, and the assessment of suitable rewards.

The handler has day-to-day responsibility for dealing with the CHIS. The Handler reports directly to the appointed Controller on CHIS issues and obtains the permission of the Controller for all contacts / meetings with the CHIS.

The control system is supplemented by various written guidance documents. The recruitment and management of 'informants' is described in detail in Standard Operating Procedures (SOPs), which provide practitioners with step by step advice and guidance on every aspect of managing an informant: recruitment, types of information that may or may not be shared, levels of remuneration etc. In addition, a section of the Enforcement Handbook has been produced to give instructions to all staff on how to deal with human sources of information. Also, in some police forces, the adoption of an electronic system has provided management in some police forces with an auditable, durable and retrievable database.

Benefits of the dedicated control system:

Focused recruitment in support of objectives

Higher standards of professionalism / specialised training of staff

Focused tasking in line with intelligence requirements

Increased security of information

Enhanced control over informants

SMUs are separate from investigation teams, providing a useful firewall between the two, as well as 'checks and balances' between the two units – handlers may assess the assumptions of investigators about the seriousness of the criminal involvement of the offenders

Structures designed to provide protection for both handlers and CHIS from unnecessary exposure

Source: Home Office (2010) CHIS Code of Practice; Inspection of HM Revenue and Customs (2006) Handling of Human Intelligence Sources

- Direct informant management (BG, CZ, IT, ES, HU) is the traditional method of informant management. In most MS, this is the way all other human intelligence sources, besides CHIS, are typically managed. Yet, in some MS, this approach is also applied to CHIS. Under this approach investigators directly recruit and manage their own informants. The investigator's supervisors periodically assess the quality of the informant/information. In some MS, there is a mandatory number of informants that each investigator (even police officers) needs to recruit and maintain. However, there are no regulations for the quality control and the independent verification of the information obtained. In others (FR, DK), all informants need to be duly registered in a database, and the quality of informants is periodically reviewed and assessed by supervisors. The database then serves as a source to all investigators who may draw on the knowledge of informants. One MS (DK) stated, 'We have a register of informants, and each informant has a controller attached so that we check against false accusations. Informants are only used

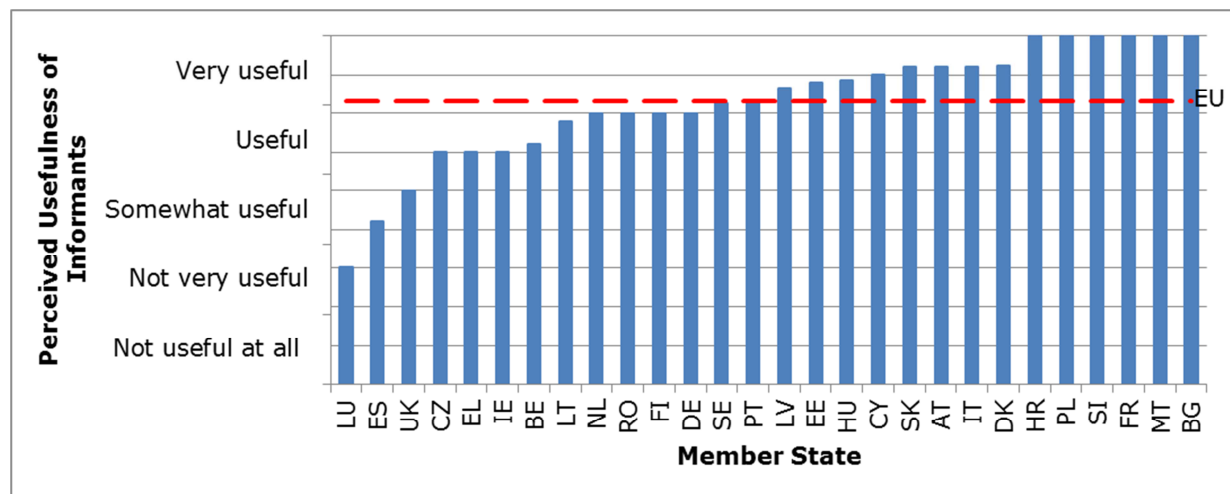
in the investigative phase because you cannot use their information in court, unless the informant goes public.’

The registration process and maintenance of an informant database are also features of the informant regime or framework in the EU (FR). Most MS implement some form of registration procedure and database, although in some jurisdictions informants are only registered if they meet certain criteria, such as receiving compensation or remuneration for their service (FI). Others include contractual obligations between the informant and agency, so as to prevent an informant from selling information elsewhere (AT). Furthermore, exchange of best practices is also being implemented, which is exemplified by the adoption of the ‘repentis’ regime in France similar to the Italian ‘pentito’, wherein a special commission presides over each case, with provisions for high-profile witness protection activities (FR).

7.11.5. Use and effectiveness

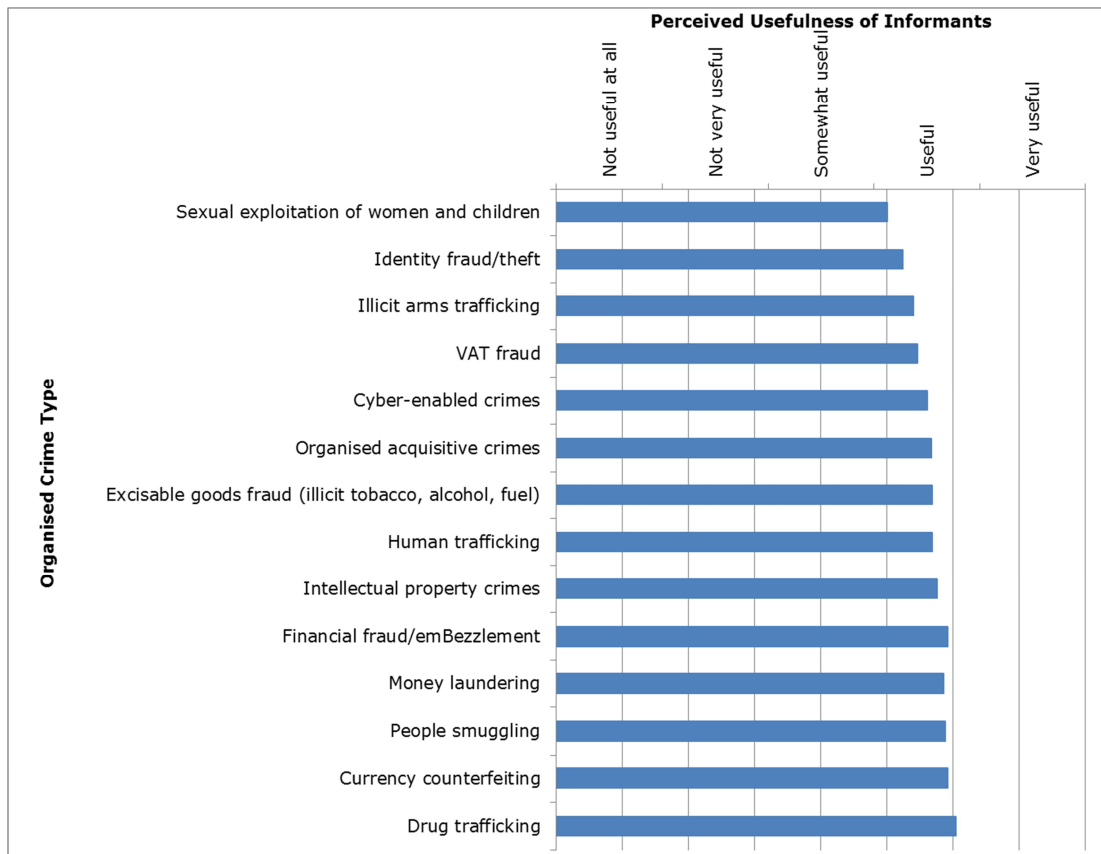
The use of informants (along with other human intelligence sources) is considered by law enforcement as one of the most useful tools in the fight against organised crime. However, one of the most challenging tasks is the maintenance of a good-quality network of informants by regular evaluation of the informants’ reliability.

Figure 7.14: Usefulness of informants



Source: information provided by MS experts

Figure 7.15: Usefulness of informants by crime type



Source: information provided by MS experts

Although there are concerns surrounding informant reliability, including exaggeration of facts and circumstances in order to collect financial gain (DK, AT), the vast majority of respondents are of the opinion that, firstly, informants are more willing to cooperate when provided with some form of compensation and, secondly, that informants are entitled to protection. In this sense, it may be concluded that the facilitation required for an efficient functioning of the informant model is a mix of financial motivation and legal provisions, such as confidentiality, plea-bargains, etc.

Some MS facilitate the use of informants by requiring them to enter into a contractual agreement with the law enforcement agency (AT), upon which they may be treated as an 'employee', being reimbursed for travel, hotel, food and other expenses, as well as being awarded bonuses for successfully completed cases (AT). The increase of informant financial compensation has proven to be a valuable step toward improving the quality of the informants' involvement (DK).

7.11.6. Issues and problems

Enforcement and control: the effectiveness of either model of informant management depends on the underlying enforcement and quality assurance procedures. Generally, these procedures are similar to the standard procedures for assessing intelligence information (e.g. 4x4 or 5x5 matrix). The informant is assigned a 'quality code' assessing his/her level of reliability, which may change over time depending on the quality of information provided. Decisions to extend contracts with informants are based on formal periodic evaluations, and also on informal ones in the process of work. The

existence of a formal programme, in itself, does not guarantee high quality. In the UK, for instance, an inspection by HM Revenue and Customs found that despite the existence of the 'HumInt system's Quality Assurance (QA) programme', the annual internal review/audits of the 'HumInt' system were patchy. As a result there were no guarantees that the system's QA programme adequately responded to the perceived levels of risks and the frequency of contacts of officers with CHIS.

Double agents: without a common register of informants and without good levels of information sharing, it is likely that one informant could serve more than one law enforcement agency in a MS (and, on rare occasions, even multiple agencies across MS). This is not cost-effective, as the informant may be getting paid by two different agencies (see below). In addition, there may be risks for the informant in certain situations.

The compensation of informants may be significant, especially when it concerns high-value information. Even though in most MS the amounts paid to informants are a secret a number of interviewees mentioned that lack of sufficient funding is a problem (PL, BG, LT, MT, CZ). In many jurisdictions the potential and/or right for financial compensation of an informant is explicitly stated in the respective statutes (RO, PL, LV). The study showed that there are quite different upper limits on the amounts: from €1,000 to over €20,000 (BG, DE, FR).²⁶⁰ The inability to pay higher amounts to informants limits the quality of information that can be obtained, forcing investigators and prosecutors to either seek alternative deals (e.g. plea-bargain agreements, trading in information) or alternative financing sources (e.g. the US Drug Enforcement Administration has made such payments in cases it considers of interest) (BG). Some studies point to the fact that the use of informants has been found to be cost effective.²⁶¹ Payments to informants can skew and influence the nature and content of information shared (UK). One way to limit potential abuse of informant payment and ensure the integrity of the information has been to establish specific rules and fixed payments (UK, FR). In the UK, for instance, a matrix with various categories of crimes and quantities of illicit commodities is used to determine the value of the informant's reward (UK²⁶²).

Another approach to stimulating informants is by providing special treatment in cases where they are suspects, are being prosecuted, or have been convicted. Suspension of a pending investigation, reduction of sentencing (EL) and general plea-bargaining arrangements are seen by many MS (BE, MT, PL, CZ, SK) as providing crucial leverage for gaining the most out of an informant.

Trust: the preeminent issue with using informants is the question of trust, i.e. how reliable is an informant's intelligence, what was the motivation behind their cooperation and whether or not it is the informant who is benefiting the most from such relations (ET, LT, EL IR, PT). The complex and precarious relationship between an officer and informant is viewed as a fine balancing act (BE, CZ). The opposite scenario has been raised as a concern as well, wherein a police officer may become over-reliant on informant intelligence, therefore increasing the risk of only collecting partial evidence (IT).

²⁶⁰ In the US, for instance, official guidelines suggest annual limit of \$100,000, which could be increased with permission of a federal prosecutor.

²⁶¹ May & Hough (2001).

²⁶² Interview with a former UK law-enforcement official presently employed by a major international tobacco company (17 June 2014).

High-risk informants: Controlling an informant's behaviour also proves to be a challenge in some MS, highlighting the potential for 'high-risk informants' (SE, NL). This in turn necessitates a well-composed, robust and systematic approach to informant recruiting, validation, management and monitoring, in order for the informant regime to be effective (BE, BG, NL, PL). The issue of trust, however, manifests itself in a bilateral way. In some MS informants are difficult to recruit due to a historic distrust towards security structures, especially in states with totalitarian histories (SK, ES).

Moral arguments have also been used by those who believe that the government should neither engage in criminal conduct nor tolerate it. The issue of morality is closely linked to the problem of participation of informants in crimes. In a number of MS specific internal guidelines exist either prohibiting informants from engaging in criminal activities, or setting specific thresholds or permissions that may circumscribe the types of activities in which informants may engage (NL²⁶³).

Issues with the Direct Management model

- The investigator and informant may have an informal relationship, where the informant is being 'paid' through an unregulated 'trade in information'. The investigator may not investigate the crimes of or provide information against the informant in ongoing investigations, in exchange for obtaining cooperation from the informant.
- Lack of formal registration and control over informants may result in losing informants when investigators change jobs or departments, or leave the police force. It also makes sharing informants' data with other investigations difficult. Lack of such formal registration may raise suspicions about corruption and lead Internal Control divisions to launch an investigation.
- Lack of a categorisation of informants or a system for assessment of their work may make control of the quality of informants very difficult.

Issues with the Dedicated Management model

An assessment of the use of covert human intelligence sources by the customs investigators in the UK highlighted some problems with the use of informants:

- 'Many officers employed in law enforcement were clearly reluctant to have any involvement with CHIS as an aid to intelligence gathering and have categorically stated that they would avoid CHIS deployments in any of their operations. This was due to a variety of reasons relating to [the UK customs authority's] use of CHIS, including concerns over failed prosecutions, knowledge of internal investigations and warnings by some senior managers over potential adverse effects that the mismanagement of CHIS could have on their careers.'²⁶⁴
- 'The increased use of telephone call centres has given many officers the opportunity to refer potential HumInts [informants] to Customs Confidential or the Direct Taxes Helpline, where they would be treated as anonymous callers,

²⁶³ In tile VA of Criminal Procedure Code concerning 'assistance by civilians' in cases of crimes committed in an organised setting, 126w states that the civilian can lend support to the criminal group, but is not allowed to commit criminal offences in the course of assisting the investigation unless given written permission beforehand by the prosecutor.

²⁶⁴ HMIC (2007), 16-43.

rather than engaging with them themselves. As a result, these HumInts are lost to HMRC for potential development.²⁶⁵

- **Selective feeding of information:** intra-institutional feuds could cause handlers/controllers to selectively supply information to some units or investigators and withdraw it from others.²⁶⁶
- **Limited sharing of information:** In some MS, all information that an investigation team has acquired must be accounted for in court. That is why the informant handling unit may be careful in sharing information with the investigation teams if this may compromise the informant, for instance. Other countries use a 'closed file' whereby information does not need to be shared in court. This means that the risk of exposing an informant is minimised. Problems arise when a foreign investigation team from such a country has contact with an investigation team that needs to share everything with the court. This may create problems for informants and feed mistrust between investigators and informant handlers (Europol Internal Survey).

EU cooperation and the use of informants

It is difficult to assess the scale and forms of informant-related cross-border cooperation within the EU. The few interviewees and participants in the Europol internal survey mostly reported 'a few cases per year' where they were asked to host another MS's informant. In such cases they typically required contact information about the controllers and handler, and other logistical details. Even though the informant was handled by their handler, the hosting country required that their own controller be involved as well (Europol Internal Survey). Obviously, this type of cooperation is possible only when both the hosting and the sending country have a 'dedicated informant management' system.

EU cooperation in the use of informants has been very limited for a number of reasons. Legally, the use of informants is not specifically mentioned either in the Council of Europe or in the EU police cooperation legislation. At the EU level, Europol maintains a High-Risk Informant database, where MS may store information about unreliable or high-risk informants.²⁶⁷ In 1999, within the Schengen Acquis, the Working Group on Drugs, under the German Presidency, examined the laws and practices relating to the payment of informers in each Schengen State, and devised common guiding principles for the payment of informers in the form of money or non-material benefits.²⁶⁸ These recommendations, however, seem not be used at present (EU²⁶⁹). Finally, the Council Framework Decision 2006/960/JHA on facilitating the exchange of intelligence information, although not explicitly referring to informants, sets out a common way to share information and to assess the reliability of intelligence that comes from informants.²⁷⁰

The complex approach adopted even for the use of the Europol database shows the sensitivity of the issue. High-quality informants are one of the most coveted and guarded

²⁶⁵ HMIC (2007), 16–43.

²⁶⁶ Garda Ombudsman (2013).

²⁶⁷ Europol (2012a). The actual names of the informants are not provided but special software is used to code the informant's identity.

²⁶⁸ Decision of the Central Group of 22 March 1999 on general principles governing the payment of informers (SCH/C (99) 25).

²⁶⁹ Interview with Europol official (July 12, 2014).

²⁷⁰ Council of the European Union (2006).

intelligence resources that law enforcement agencies have. The reality, though, is that informants in many MS are not shared even internally within some law enforcement agencies, nor with other law enforcement in a MS.

Therefore, while it was reported (by the stakeholders interviewed) that the use of informants in cross-border cases is widely practiced, and the sharing of information from informants to start investigations or in the course of investigations was frequently mentioned, the **sharing** of the informants themselves as a resource was extremely rare and is seen as a separate matter.

Based on information collected from interviews with stakeholders and from MS experts the research team suggests that in the short to medium term the efforts of European institutions should be focused on setting the ground for a closer level of cross-border cooperation. Such efforts would imply:

- **Changing the law enforcement culture:** enforcement officers start considering the informant, including the CHIS, not as a personal asset but as an institutional and even national resource.
- **Adopting a common model, such as Europol's promoted CHIS model,** would be a step towards improving cooperation. The model has a number of perceived benefits, outlined earlier in this chapter.
- **Adopting national legislation on informants,** as suggested by a number of interviewees (BG, HR, CZ, LU, MT, PL, SI), is key in order to have more effective recruitment and management, as well as better capacity to gather evidence or use informants as (protected) witnesses in courts. The existence of national legislation will also facilitate EU-level cooperation.
- **Training:** specialised professional training of officers with informant responsibility is also seen as a measure for improvement (PL, LT, NL). In fact, some officers noted that since **trust** is the most important ingredient in a decision to share an informant, such training in the past has been instrumental in building trust amongst informant-handling branches. (Europol Internal Survey). In terms of the focus of the training, interviewees were concerned with measures to improve the recruitment process, as well as assessing and ensuring the quality of intelligence provided by informants (BE, BG, FI, NL, PL).
- **Encourage the use of Europol's software** tool for sharing information on high-risk informants.
- **Financial incentives,** such as EU funding for payment for CHIS in cross-border cases (e.g. within JITs or in cases when the informant is used in another MS or in cases where the investigation is part of the agreed operational action plans feeding EMPACT) could also serve as a way to encourage MS to adopt the CHIS model.
- **New approaches to sharing intelligence:** 'sharing information in a more spontaneous way with other EU-countries' is the first step whereby countries will build trust and understand better the information opportunities that other MS may provide (Europol Internal Survey). Noting some past EU-level failures to prevent leakage of information and the threat that this posed to informants, one issue that must be settled concerns the handling of information along the criminal justice process: from intelligence to investigative departments to prosecutors, and finally to the courts. This could best be settled through an

EU-level solution for the protection of sources.

On the MS level, there are various improvements that could facilitate and make the use of informants a more effective tool in the fight against organised crime. Interviewees made a variety of proposals, including:

- Regulating the **commitment of crimes** under certain circumstances by informants (SI, DE).
- Prioritising recruitment of informants with the same **ethnic background** as criminal groups (BE).
- **Improving recruitment procedures** that (1) better protect the informant’s identity (BG) and (2) better vet the reliability of the informant (DE, NL).
- Better **legal protection** for informants, including better access to witness protection (HR, FI, LV, LU, MT, RO).
- Expanding **compensation** options, including plea-bargain agreements (BE, CY, PL).
- Allowing other law enforcement, such as **customs** to also manage informants (FI).
- **Increasing the overall number of informants** to prevent further isolation of criminal groups (DE).
- Introducing sufficient **transparency** that allows for judges to assess the reliability of informants during court proceedings (SI).
- **Exchange of best practices:** officers from one MS are being periodically sent to another MS to help with recruiting informers from the respective language community (e.g. Bulgarian officers are sent to Germany to assist in recruiting informants from the Bulgarian/Roma communities in Germany).

Table 7.25: Informants – issues and possible solutions

Issues and problems	Recommendations
Different models of handling and controlling informants and quality of intelligence, posing difficulties to cooperation.	MS should gradually adopt the Dedicated Informant Management model as a first step towards stronger EU cooperation.
Difficulty in using informant testimony in courts, and protecting the informant’s	Adopting national legislation on informants, as suggested by a number of interviewees (BG, HR, CZ, LU, MT, PL, SI) is key in order to have more effective recruitment and management, as well as better capacity to gather evidence or use informants as (protected) witnesses in courts.
Deficit of trust in cross-border deployment and hosting of informants.	Training and exchange of best practices in handling and controlling of informants, as way to establish closer links between informant handling units.
Challenges in protecting information and sources in cross-border cases.	Sharing intelligence: the sharing of actionable intelligence needs to further improve at the EU level with better guarantees for information security.

7.12. Hot pursuit

Table 7.26: Hot pursuit – basic facts

Legal basis	Schengen Convention (Article 41), ²⁷¹ Naples II Convention, ²⁷² UN Convention on the Law of the Sea. ²⁷³
Frequency of use in organised crime investigations	Not very often.
Scope	Due to its nature as an emergency measure hot pursuits are limited to crimes which are caught in the act (i.e. car theft, kidnapping etc.) but may be used for organised crime cases involving smuggling/trafficking of people, illicit arms, drugs and excisable goods (i.e. illicit tobacco).
Obstacles	Different rules regarding right to hot pursuit, do not allow the use of helicopters, technical compatibility/language issues, space and time restrictions.
Recommended changes	Create uniform rules at the EU level on the distance travelled, type of crimes and types of officers who can engage in cross-border hot pursuit; include provisions in legislation to allow cross-border hot pursuit using helicopters; expand the use of cross-border cooperation centres to enable more efficient communication exchange; remove space and time restrictions.

7.12.1. Definition and scope

'Hot pursuit' is a legal arrangement that enables law enforcement officers from one MS to pursue criminals who have been caught in the act of committing a criminal offence across the border of another MS in an attempt to **apprehend them**.²⁷⁴ Hot pursuit differs from 'cross-border surveillance', which allows law enforcement officers to continue across the borders their **surveillance** of persons suspected of taking part in a serious offence (but without the possibility of provisional arrest).

According to the Schengen Convention the following general provisions apply to officers involved in a hot pursuit²⁷⁵:

- Pursuing officers are required to comply with the laws of the territory in which they are operating and must obey the instructions of the competent local authorities.
- Hot pursuit can only take place over land borders.
- Pursuing officers are not permitted to continue their pursuit onto private property.
- Pursuing officers must be easily identifiable either by their uniform or vehicle in order to be able to prove that they are acting in an official capacity.
- Service weapons may only be used in cases of self-defence.
- Once the pursuing officers have apprehended the suspect they are allowed to carry out a security search and seize any objects which they are carrying before transferring the suspect into the custody of local authorities.
- Following the hot pursuit the pursuing officers are required to report on their activities and remain at the disposal of the competent local authorities until the circumstances surrounding their activities has been sufficiently clarified.²⁷⁶

²⁷¹ Council of the European Union (1990).

²⁷² Council of the European Union (2000b).

²⁷³ United Nations (1982).

²⁷⁴ European Commission (n.d.).

²⁷⁵ Art. 41 par. 7 Schengen Convention.

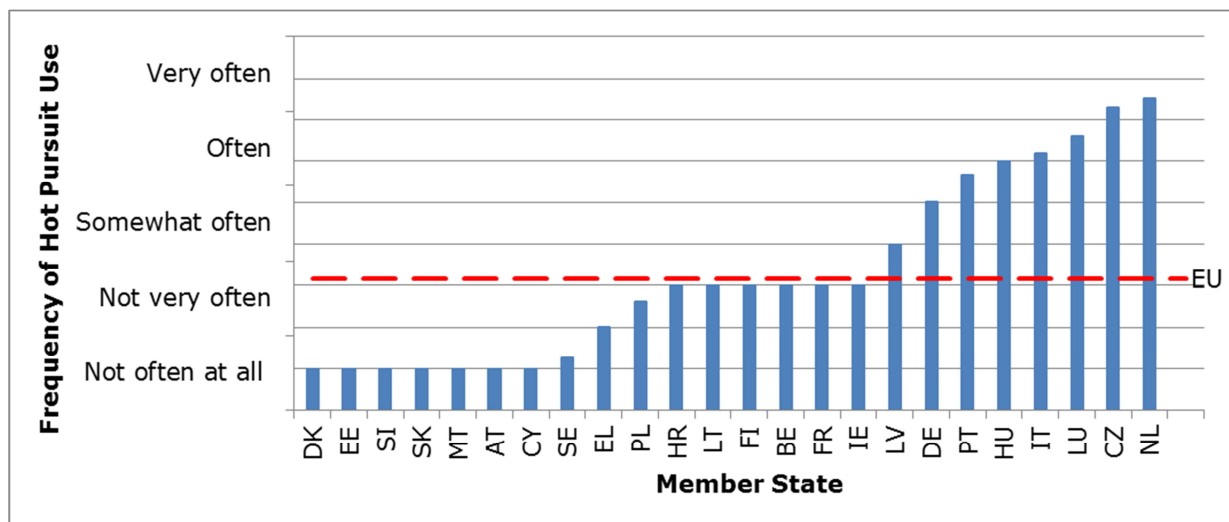
²⁷⁶ This also applies to instances where hot pursuit did not lead to an arrest.

- Authorities from the pursuing state are required to assist in the enquiry of the action and subsequent judicial proceedings.

7.12.2. Use and effectiveness

Overall the results from the survey indicated that while the use of hot pursuit is useful in tackling cross-border crimes, its usefulness in organised crime cases appears to be more limited. For example the survey showed that the use of hot pursuit is only useful in cases involving the smuggling/trafficking of people, illicit arms, drugs and excisable goods (e.g. illicit tobacco). Hot pursuits are seen as an emergency measure which is almost exclusively used in situations where the criminal has been caught in the act of committing a criminal offence.²⁷⁷ There are thus fewer opportunities for using it in combination with other special investigative techniques which are more time-consuming and intelligence-driven.

Figure 7.16: Frequency of use of hot pursuit in organised crime cases

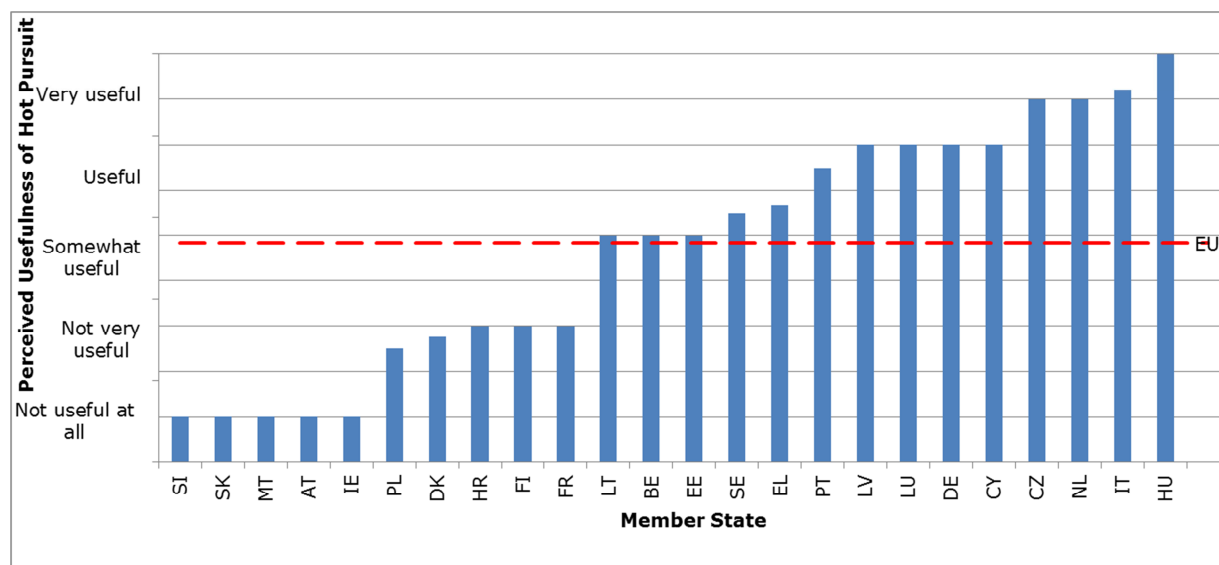


Source: information provided by MS experts²⁷⁸

²⁷⁷ Some examples of crimes in which hot pursuit might be used include hostage taking, robbery, smuggling of goods and human trafficking.

²⁷⁸ UK, BG, RO – not part of the Schengen area; ES – data not available.

Figure 7.17: Usefulness of hot pursuit



Source: information provided by MS experts²⁷⁹

7.12.3. Legislative basis

The legislative basis for hot pursuits is outlined in Article 41 of the Schengen Convention. At the time of signing the convention each country was required to make a declaration stating the details of hot pursuit on its territory towards the authorities of its neighbouring countries.²⁸⁰ The contracting **countries may extend the scope of the conditions of hot pursuit on a bilateral basis**. These conditions often include provisions regarding:

- The type of authority which can engage in a hot pursuit (i.e. border police, customs police, local police, national police).
- How far the pursuing authorities can pursue their suspects into the country. For example Germany does not specify any restrictions in this regard, while other countries such as Austria limit the pursuing authorities to carry out their activities within 10 km of the border for some countries (IT) while allowing unrestricted access for others (DE). Other bilateral agreements put restrictions on the duration of the hot pursuit.
- The type of crime committed by the fleeing suspect.
- Whether the pursuing officers have the power to make an arrest.

A good example of how bilateral agreements can affect the use of hot pursuit can be found in Hungary, which has seven neighbouring states (AT, HR, RO, RS, SI, SK, UA), three of which are Schengen Area members (AT, SI and SK), two are Member States, but not part of Schengen Area (HR, RO), and two (RS, UA) are not Member States. Thus different regulations regarding the use of hot pursuit are needed. For example, while Croatia is outside of the Schengen area, Hungary and Croatia have made agreements which enable near Schengen-style cross-border cooperation which in turn allows and regulates the use of hot pursuit as well as cross-border surveillance. Hungary's bilateral

²⁷⁹ UK, BG, RO – not part of the Schengen area; ES – data not available.

²⁸⁰ Art. 41 par. 9 Schengen Convention; these details can be found in the individual bilateral agreements that Member States have signed to outline the terms of hot pursuit within their borders.

agreements with its non-MS neighbours (RS, UA) are governed by more traditional forms of cross-border cooperation.

Additional European legislation covering hot pursuit can also be found in Article 20 of the Naples II Convention which covers mutual assistance and cooperation between customs administrations.²⁸¹ Hot pursuit via the sea is governed by 'The Geneva Convention on the High Seas' which was eventually subsumed by the United Nations Convention on the Law of the Sea. Article 111 of the treaty grants a coastal state the right to pursue and arrest ships escaping to international waters, under a number of conditions.²⁸²

Responses from the survey indicated that in practice regulations regarding hot pursuit are not explicitly stated in MS criminal codes. Some MS (BG, LT, LU) will directly apply the regulations of the Schengen Convention or in the case of Bulgaria rely on other international legal instruments such as the Police Cooperation Convention for Southeast Europe. In some cases a MS (SK) may authorise the use of hot pursuit by making general references to the fact that police may carry out actions on the territory of another MS on the basis of an international treaty or vice versa.²⁸³

7.12.4. Implementation and oversight

While most of the operational procedures for conducting a hot pursuit may be clearly outlined in a country's ratification of the Schengen Convention or individual bilateral agreement with neighbouring countries, some countries (PL) have put in place more comprehensive operational guidelines within their police departments in order to manage hot pursuits. Other MS (NL) have even set up special teams which have been specifically trained to take over a hot pursuit from neighbouring law enforcement officers.²⁸⁴ In Poland all activities related to conducting hot pursuits are coordinated by the duty service officer of the Police provincial command who is responsible for relaying relevant information to the officers engaged in the hot pursuit. These officers are responsible for communicating information relating to:

- The cause for initiating a hot pursuit.
- The number of persons being pursued including their physical descriptions and other relevant information such as whether they are armed.
- Information relating to the type of vehicle being used, i.e. make, model, colour, registration number or any other relevant identifying information.
- The direction of the pursued person's movement, location of the pursuing officers as well as the time and place where they are expected to cross the border.
- Information about the pursuing officers such as the number of officers engaged in the hot pursuit, name of their commanding officer, carrying of service weapons, vehicle used, communication capabilities and appearance (e.g. uniformed or not).

²⁸¹ Council of the European Union (2000b).

²⁸² United Nations (1982).

²⁸³ See Section 77b and 77c of the Police force act.

²⁸⁴ It is important to note that these 10 teams have also been trained in handling cross-border observation. It is unclear if these special teams are used more frequently for hot pursuits or cross-border surveillance activities.

However, some survey respondents (HU) have indicated that the lack of formal procedures for regulating the use of hot pursuit is seen as a benefit, as additional formal procedures would only hinder its use in practice.

7.12.5. Issues and problems

- **Different rules regarding rights to hot pursuit:** the considerable variation in rules regarding hot pursuit resulting from bilateral agreements has made hot pursuits overly complicated. **A uniform approach to hot pursuit would significantly simplify its use.** The German government has stated its dissatisfaction regarding individual MS varying regulations on hot pursuit. Germany has advocated for 'a harmonisation and extension of the provisions of observation and hot pursuit' and optimisation of space or time limits.²⁸⁵
- **Use of helicopters:** the use of helicopters during high-speed police chases has become increasingly common. The use of helicopters makes it extremely difficult for a fleeing suspect to evade police capture and reduces the need for dangerous manoeuvres by police vehicles during the course of a high-speed chase. However, current regulations do not permit the use of helicopters during hot pursuits over land borders.²⁸⁶
- **Technical compatibility and language issues** can also be a factor during a hot pursuit. For example, one of the law enforcement agencies might be using a different radio system which could lead to difficulties in communication between the authorities of two countries during a hot pursuit. In addition language barriers can also play a role in hindering effective communication between authorities from different countries. Some MS (PT, ES, BG) cite the 'Border and Police Cooperation Centres' which are located in border areas as facilitating such technical/language issues.²⁸⁷
- **Space and time restrictions** may also negatively affect the outcome of a hot pursuit. In some cases hot pursuits may only be carried out within 10 km of the border. During a high-speed chase this limit can be reached very quickly. In an effort to avoid problems with such issues some bilateral agreements make a distinction between the distances allowed to be covered by a pursuing officer based on the type of road. For example a 10-km limit may only apply to regular roads while hot pursuits on motorways can be extended to 30 km from the border.
- **Restrictions regarding the right to make an arrest** are another factor to consider. Without the right to make an arrest it is extremely difficult for a pursuing officer to end the hot pursuit. One possibility is that the restriction of arresting powers was put in place with the belief that pursuing officers from neighbouring MS activities should be limited to pursuing the suspect until the local authorities are able to continue the chase and ultimately carry out the arrest.
- **The limited application to organised crime:** the Schengen convention

²⁸⁵ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *O. J. L 239*.

²⁸⁶ The use of helicopters during hot pursuits at sea is permitted according to the United Nations Convention on the Law of the Sea (United Nations, 1982).

²⁸⁷ There are more than 40 of these cooperation centres scattered across the EU. Apart from the UK, IE and Scandinavian countries almost all Member States have them.

clearly lists the range of crime for which hot pursuit may be invoked. A range of organised criminal activities (trafficking in excisable goods, VAT frauds, trafficking in antiquities, etc.) are not included and fall outside the scope of hot pursuit.

7.12.6. Recommendations

There have been discussions of amending/further developing the legislative framework governing hot pursuits. In its Declaration on combating terrorism of 25 March 2004, the European Council instructs the Council, among other things, to examine measures in the area of 'cross-border hot pursuit' and calls for further development of the legislative framework.²⁸⁸ The proposed amendments of the European Commission on cross-border surveillance and hot pursuit suggested that these tools needed to be amended with a view to increase the effectiveness and success of criminal investigations and operations by authorizing cross-border surveillance and cross-border hot pursuit in the case of investigations into a criminal offence for which surrender or extradition is possible. Furthermore, it suggested that cross-border hot pursuit should not be limited to land borders.²⁸⁹ However the Commission ultimately decided to withdraw this proposal, which it considered to have become obsolete.²⁹⁰

The results from the survey did not indicate any significant suggestions for improving the use of hot pursuit. The main reason for the lack of recommendations had to do with the fact that hot pursuit is rarely used. As one stakeholder (SE) puts it, 'hot pursuit is not very common and the stakeholders do not know very much about it.' Furthermore interviewees were selected based on their knowledge of organised crime investigations and the tools used during such investigations. As was previously mentioned, hot pursuit is less applicable to organised crime investigations as these are normally long-term investigations that rely heavily on the collection of evidence, while hot pursuits are typically best used during rapidly developing situations regarding crimes such as hostage taking and robbery where criminals have been caught in the act of committing the crime. As a result of the lack of knowledge of this tool, **most recommendations focused on training exercises and the need for unified European legislation, including the need for detailed rules and actions for engaging in a hot pursuit** (LU, LT); and that such training should be organised together with officers from neighbouring countries (LT).

Table 7.27: Hot pursuit – issues and possible solutions

Issues and problems	Recommendations
Different rules regarding rights to hot pursuit	Create uniform rules at the EU level on the distance travelled, type of crimes and types of officers who can engage in cross-border hot pursuit.
Use of aerial surveillance equipment in hot pursuit	Include provisions in legislation to allow cross-border hot pursuit using helicopters. Such provisions should clearly indicate the rules governing this type of hot pursuit and be uniform across all MS.
Technical and language barriers	Expand the use of cross-border cooperation centres to enable more efficient communication exchange.
Space and time restrictions	Remove all space and time restrictions.

²⁸⁸ European Commission (2005b).

²⁸⁹ European Commission (2005b).

²⁹⁰ Official Journal C 71 of 25 March 2009.

7.13. Witness protection

Table 7.28: Witness protection – basic facts

Legal basis	UN Convention against Transnational Organised Crime, ²⁹¹ UN Convention against Corruption, ²⁹² no prominent EU law yet.
Frequency of use in organised crime investigations	Somewhat often.
Scope	Standalone tool against 'structured', but also other forms of organised crime, especially violent criminal organisations.
Obstacles	Some MS' small size, large volume of resources required, psychological and practical difficulties, experienced by protected witnesses, differences in normative and operational frameworks.
Recommended changes	Specific witness protection legislation, when there is no such in place, and introduction of more details in existing norms, greater use of pre-trial judicial interrogation, teleconferencing and videoconferencing, better regulation of witnesses' new identity and status under civil and tax law, unified European legal basis for processing witness protection cases, allocation of more resources.

Witness protection features in many instruments of international law, due to the need for law enforcement cooperation in assuring the best possible protection of those threatened in view of their testimony against organised crime. The UN Convention against Transnational Organised Crime and the UN Convention against Corruption oblige states to take appropriate measures to provide protection for witnesses testifying with respect to offences covered by the Conventions, without prejudice to the rights of the defendant. Agreements or arrangements for relocation of protected witnesses are also suggested. The Council of Europe has covered the issue in a series of recommendations. Recommendation (97) 13 on the intimidation of Witnesses and the Rights of the Defence set out basic definitions and guiding principles and expanded witness protection beyond organised crime to other serious offences. Recommendation (2005)9 on the protection of witnesses and collaborators of justice contained more detailed guidance on witness protection programmes and also extended them to terrorism-related crimes. No prominent EU law on witness protection is present yet, but practical cooperation and best practice sharing takes place through Europol.²⁹³

In the criminal justice-related legislation of MS, the concept of witness protection covers **special protection programmes**, stipulated usually in police specific laws and regulations,²⁹⁴ which generally list:

- The categories of witnesses which may be placed under witness protection programmes.
- The conditions which they have to meet in order to qualify for such programmes.
- The procedure for placement under such programme and the responsible authorities.
- The conditions under which witness protection may cease.

²⁹¹ United Nations Office on Drugs and Crime (2004a).

²⁹² United Nations Office on Drugs and Crime (2004b).

²⁹³ Library of the European Parliament (2013), 4.

²⁹⁴ Also understood as non-procedural protection; Library of the European Parliament (2013), 1.

There is also the figure of the **protected witness**, regulated, most often, by MS' codes and laws, governing criminal procedure. Protected witnesses, however, are not automatically included in witness protection programmes, so they do not fall directly under the witness protection concept.

The states, which do not have any explicit form of witness protection scheme are CY, FR, LU, MT and FI, so the present analysis covers those MS in terms of the witness protection measures they apply in the absence of an overall scheme. The large number of MS operating such schemes is 'linked to the increase in activities involving organised crime'.²⁹⁵

All MS have some form of anonymity or other protection of witnesses under threat in their criminal procedure laws, except for FI, MT and CY, where protection in criminal procedure is more a matter of practice than of legislative regulation. In Italy specialised legislation has been enacted since 2001 that regulates witness protection and collaboration.

Special protection programmes and protected witnesses will be looked at separately, although both are valuable tools to seek reliable witness statements as evidence to support the prosecution of organised crime, terrorism and other forms of serious crime.

7.13.1. Definitions

Definitions are almost never used in MS domestic legislation in relation to the concept of witness protection itself.²⁹⁶ Both **witness protection programmes** and **protected witnesses** as concepts are rather defined by their personal scope (groups of witnesses who may be included in them) and their substantive scope (the measures which they comprise).

Witness protection programmes cover witnesses by:

- The reasons for needing protection: the witness' capacity to give information about an impending dangerous attack or a criminal organisation (AT), the testimony given or to be given within the framework of a criminal case (BE), the material relevance of their testimony, explanations or information to the criminal proceedings (BG), their assistance for achieving the aim of criminal proceedings (CZ), knowledge of facts relating to a subject of proof in a criminal matter (EE), person's willingness to testify (DE).
- The danger they may be subject to: similar phrasings as for protected witnesses (please see below), supplemented by concepts such as unlawful influence (EE) and criminal impact (LT).
- Their various procedural roles, sometimes expanding the classic 'witness' concept: witnesses, victims, experts, professionals and counsels, suspects, accused, etc. and also magistrates (LT), witnesses, private accusers, civil plaintiffs, accused, experts and certifying witnesses, etc. (BG), suspects,

²⁹⁵ Library of the European Parliament (2013), 2.

²⁹⁶ On the contrary, the European Handbook on Witness Protection (Europol, 2013) starts (pp. 5-8) by defining, based on Council of Europe documents and related practice, ten basic witness protection concepts: protected persons, witness, collaborator of justice, victim, danger and threat, family, cover and change of identity, witness protection programme, witness protection unit and conditions for the admission of a witness at risk. These are defined as fundamental principles, which 'may have to be widened and redefined if the witness protection community deems it necessary'. This definitional approach may be useful to follow in the further development of EU Member States' legislation in order to put witness protection normative framework on a firm conceptual basis.

defendants, the injured party, witnesses, informants, employees of the judiciary (SE).²⁹⁷

- The crimes under cases for which they give testimony (AT, BG, HR, IE, PL, PT, SI, SE).
- Witnesses' personal characteristics: witnesses of high vulnerability, e.g. victims of trafficking testifying in court, are always protected (CY).

Witness protection schemes are based on the principle of neutrality, i.e. participation in them should never be seen as reward for testimony.²⁹⁸

Witness protection programmes' constitutive elements or measures which protect witnesses will be a key element of the section on the scope of witness protection below.

Protected witnesses under MS' criminal procedure law are delineated, using:

- The elements which have put them in danger and in need of protection: mostly the fact of them having given or their capacity to give information/evidence about a criminal case (e.g. BE, FR, EL).
- The specific danger which they may be exposed to: danger to life, health, bodily integrity or liberty of a witness or a third person (AT), credible risk to their life and health (BG), serious danger to life, health, freedom, property, etc. (HR), threat of bodily harm or any serious risk of violation of their fundamental rights (CZ), substantial harm (DK), serious danger to well-being which cannot otherwise be averted (DE), possible revenge or intimidation (EL), possibility of danger to life, health, liberty or property of significant value of the witness (PL).
- More rarely, since criminal procedure laws regulate criminal procedure in a universal manner, types of crimes witnesses testify about, sometimes delineated by minimum penalty: mainly organised crime and terrorism (EL), felony or misdemeanour punishable by at least 3 years of imprisonment (FR), criminal association and other organised crime cases, with the possibility to extend measures of protection to any offences (PT).

The types of protection the court or investigating authorities may offer, although part of the definition of witness protection, will be dealt with in the next section.

Pentiti (collaborators of justice) are considered a sizeable part, if not a majority, of persons admitted to witness protection schemes,²⁹⁹ but most MS do not make a separation between witnesses and *pentiti*, as regards protection.³⁰⁰ In this sense, the present analysis covers both groups, unless otherwise mentioned.

Only a few states have explicit provisions covering protection of *pentiti* (DK, FR, HU, IE, MT, PL, SI), and these are linked to other measures to motivate them to testify. For example, in Denmark it is noted that for persons having participated in criminal

²⁹⁷ In its definitional part, the European Handbook on Witness Protection (Europol, 2013), uses the categories witness ('any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony... who is not included in the definition of "collaborator of justice"'), collaborator of justice ('any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organisation of any kind... who agrees to cooperate with justice authorities') and victim ('any person who is subject to a crime but not necessarily obliged to give testimony in a criminal proceeding').

²⁹⁸ Library of the European Parliament (2013), 2.

²⁹⁹ Library of the European Parliament (2013), 2.

³⁰⁰ Sources: replies to Council of Europe questionnaires on protection of witnesses and 'pentiti' in member and observer States.

environments protection in practice is much more restricted.³⁰¹ In France, Act No. 2004–204 of 9 March 2004 tightened up the specific legal framework applicable under French law to *pentiti* and included exemption from punishment or reduction of penalty subsequent to conviction and protection measures. In Poland, the Crown Witness Act provides for the possibility of perpetrators acting as witnesses in organised crime cases and provisions are in place to include such witnesses in witness protection programmes.³⁰²

Most protection regimes both under criminal procedure laws and witness protection regulation include as additional factor the danger to relatives and other persons close to main protected witnesses. The family situation of the person to be protected may also be a consideration in admitting him/her to the programme, in terms of the number of family members to be also covered by the programme.³⁰³

7.13.2. Scope of witness protection

The scope of witness protection is most often delineated by the variety and nature of measures which the protection comprises.

Witness protection schemes display a wide variety of components, based on the great number of witness protection approaches MS apply. They include, separately or in combination:

- False identity/identity change (AT, BE, BG, HR, CZ, CY, DK, DE, HU, PL, RO, UK) including via explicit mentioning of plastic surgery (EE, LT, PL, PT).³⁰⁴
- Relocation (AT, BE, BG, CZ, EE, LT, PL, SE) including, explicitly, abroad (CY, LV, PT),³⁰⁵ change of residence (BG, CY, EE, HU, LV, LT, PL), workplace/place of study (BG, EE, LV, LT), changing place of detention or other special measures in detention (BG, CY, RO).
- Personal physical protection/escort (AT, BG, CY, EE, HU, LV, LT, PL, SE).
- Provision of self-defence equipment (EE, LT).
- Protection of property (BG, EE, LV).
- Related financial and other assistance (BE, BG, DK, LT, PL, PT, RO).³⁰⁶
- Provision of new telecommunications (EE).
- Provision of new licence plates (EE, BE).
- Special treatment of publicly available personal data (LV, LT, SE), potentially including new media.
- Inquiring or disclosing data about a relocated witness (IE) or injuring a protected witness (LU) being declared a crime.

³⁰¹ According to a national expert.

³⁰² Replies to Council of Europe questionnaires on protection of witnesses and 'pentiti' in Member and observer States.

³⁰³ Library of the European Parliament (2013), 3

³⁰⁴ Notably, in some Member States only essential identity elements are modified (UK, NL), while in others changes are 'more far-reaching' (IT). Also, it is noted that the growing use of electronic databases and biometrics adds to the challenge of dissociating the new from the old identity. Library of the European Parliament (2013), 3

³⁰⁵ International relocation is maybe the most central issue in the European Handbook on Witness Protection (Europol, 2013, 10 et seq.), which deals with MoUs between witness protection units, principal criteria for relocation between countries, submission of request, basic information to be provided to the receiving country's witness protection unit, termination of supporting actions, costs and communication.

³⁰⁶ Financial assistance should never surpass the witness' previous legal income, as it should not be reward for testimony. Library of the European Parliament (2013), 3.

The scope of measures to protect the **protected witness** in the criminal procedure is very much pre-determined by the specificities of criminal process in each MS and does not directly relate him/her to the witness protection framework. Nevertheless, some basic measures, alone or in combination, are present throughout a number of MS:

- Keeping witnesses' identity secret (AT, BE, FR, NL, PL, PT, RO, SI), sometimes in the form of separate recording/deletion from regular case files of their personal data (CZ, HU, SK, UK), assignment of a fictitious name/pseudonym (EE, LV, SI, UK) or an identification number (BG, LT).
- Alteration of appearance at trial (AT)/voice and image distortion (PT, UK).
- Other procedural measures like videoconferencing and *in camera* sessions.³⁰⁷
- Personal physical guarding (BG)/police protection (PT).
- Special manner of questioning a witness (HR).
- Keeping witnesses' addresses secret (FR, SK, PL).
- Declaring witness threat/intimidation (CY, HU, DK) or data disclosure (CY) an offence under substantive criminal law.
- Especially in newer MS, declaring special procedural protection (LV, PL) or related data (SI, LU) a state secret.³⁰⁸
- A number of MS do not permit judgements to be pronounced solely or exclusively based upon the testimony of anonymous witnesses (among them BG, BE, FR).

Although **protected witnesses** and **witness protection programmes** are not directly related, there are domestic legal orders which put them into normative or practical connection. For example, witnesses may enter witness protection schemes if they cannot be protected by the means provided for in the Criminal Procedure Code (BG); in a number of MS (for example, NL³⁰⁹), there is an overlap between witnesses under a protection programme and protected witnesses, whose identity must remain secret during proceedings, because the latter may also need to participate in the protection programme after the trial. Slovakia grades protection into three different degrees³¹⁰: the first degree is not stating the witness' place of residence, the second degree is removal of all the personal data of a witness from the case, and third degree is entering a witness protection programme, regulated by a dedicated law.

Witness protection measures as a matter of urgency is also an issue defining the scope of protection of those who testify in criminal cases with regard to factors, requiring immediate intervention on the part of authorities. They are in place and explicitly stipulated in the relevant law in Slovenia, as regards **protected witnesses in the course of criminal procedure**. The Czech Republic also recognises the need for urgent protection in case of immediate danger, as regards **witness protection schemes**, and provides for temporary protection and help even without the consent of the witness, if he/she is in temporarily impaired health. Urgent protection is also known, with regard to witness protection programmes, in other MS legislations (EE, LV, PL, RO).

³⁰⁷ Library of the European Parliament (2013), 1.

³⁰⁸ In some Member States, state secrecy is also said to cover witness protection programmes (PL, SI).

³⁰⁹ According to a national expert.

³¹⁰ According to a national expert

Witness protection is deemed a standalone tool separated from all investigation measures in order to ensure the neutrality against the witness as well as to guarantee a fair trial.

Risk assessment procedures are summarily mentioned in a number of MS legislations, mainly in terms of authorities' obligations to evaluate whether the witness meets the criteria of danger and importance of testimony, and are presumably further detailed in operative instructions and manuals outside the public domain.³¹¹

7.13.3. Legislative basis

Protected witnesses and **witness protection schemes** are usually regulated, respectively, in the MS' criminal procedure (sometimes covering protection schemes as well – BE, NL) and witness protection laws (sometimes police-related legislation – AT, DK). Several MS, however, make interesting normative exceptions, which are worth a more detailed description.

Finland does not yet have specific legislation on witness protection and authorities protect witnesses and their identity by 'standard' procedural means like witnessing over video link, recordings and from behind a screen. The police are also involved in protecting witnesses and other persons under specific threats, including magistrates.³¹² A similar situation is in place in Sweden, because of, inter alia, both MS' cornerstone criminal justice principle that no anonymous witnesses are allowed.³¹³

In Luxembourg, government bill N 5156 reinforcing the rights of victims of crime and improving witness protection was submitted to Parliament in 2003, but ultimately withdrawn.³¹⁴ It defines a threatened witness as a person or his/her circle of acquaintances who feels his/her integrity threatened because of a testimony or because of his/her refusal to testify because of the threat. This definition is supposed to appear in the country's future Criminal Procedure Code.

Witness protection in Ireland has no explicit legislative framework and a programme was established ad hoc in 1997. After an unsuccessful challenge, a landmark Supreme Court decision dealt with the issue³¹⁵ postulating that there is no reason in law why the state could not establish a witness protection programme, but the terms of the respective programme should be set out clearly for any participant. Campbell (2013, 150) has argued that the Irish witness protection programme (being a 'police-operated system rather than a judicial one, and no legislation exists governing its parameters and procedures') 'arguably contravenes the Council of Europe Recommendation which requires an "adequate legal framework" for WPPs.'

In the UK, there is no legislation establishing witness protection either, but Chapter 4 of the Serious Organised Crime and Police Act 2005 governs such schemes.³¹⁶ A protection provider (a chief officer/constable of a police force, the Director General of the National Crime Agency, a Revenue and Customs Commissioner or a designated person) may

³¹¹ Risk assessment is explicitly stressed upon in the European Handbook on Witness Protection (Europol, 2013, 9) as means to take 'a valid and informed decision... whether or not a witness should be made the subject of a witness protection programme'.

³¹² According to a national expert.

³¹³ Replies to the questionnaire on protection of witnesses and pentiti in relation to acts of terrorism – Sweden.

³¹⁴ According to a national expert.

³¹⁵ [2005] IESC 78 Source: expert reply to questionnaire.

³¹⁶ According to a national expert.

make arrangements to protect a person ordinarily resident in the UK if he/she considers that the person's safety is at risk due to his/her being a person described in Schedule 5 to the Act (witnesses, jurors, justices of the peace, prosecutors, collaborators, and staff (previous or present) of agencies like the Revenue and Customs Prosecutions Office, Customs and Excise, police and prison officers, or someone who is a family member of such a person or has/had a close personal relationship with such a person). Some provisions regarding anonymity of witnesses are found in the Coroners and Justice Act 2009.

Spain has seen a heated legislative debate regarding its special Law 19/1994 on witness and expert witness protection in criminal cases. Most practitioners approached³¹⁷ deem the law a failure in terms of lack of clarity and precision.

7.13.4. Implementation and oversight

The institutional setting of witness protection differs throughout MS, but a number of common points are found among different actors' proposing, deciding on, implementing and overseeing the measures constituting the protection.

Witness protection schemes work in a variety of patterns, but the following main models are in place:

- Dedicated inter-institutional bodies (councils, committees), comprising magistrates, police officers and representatives of the Ministries of Justice and Home Affairs (BE), magistrates, representatives of Ministries of Justice and Interior and the State Agency for National Security (SANS) (BG), Central Commission composed of Under-Secretary of State at the Ministry of Interior, two judges or prosecutors and five experts in organised crime (IT); protection programme ordered by the Board of Prosecutors General and reported to the Minister of Justice (NL), special security programmes commission (PT), a commission composed of a judge from the Supreme Court, who presides, the Supreme State Prosecutor, representatives of the Ministry of Justice and Ministry of Interior (SI);
- Models where police play the leading role: AT, CZ, DK, EE, FI, EL, IE, MT, RO, SK, UK. In Austria, the Ministry of Internal Affairs is given discretion as to what specific measures of protection to apply, and has a special unit, dealing with the matter. In the Czech Republic, the Minister of Interior approves protection proposals, even though these can be submitted by magistrates as well, through the Ministry of Justice. In Estonia, the Central Criminal Police organises witness protection, supervised by the Public Prosecutor's Office, which also decides on the witness' entering the protection programme. Police are also at the lead of threatened persons' protection in Finland, where no specific witness protection legislation exists. In Ireland, the Director of Public Prosecutions is only involved in the discussion about admitting a person in a protection programme.
- Models where the main role is given to the bodies of investigation and prosecution: CY, LV, EE, since witness protection is an essential part of

³¹⁷ According to a national expert.

securing valuable testimony.³¹⁸

The choice of any of these models by a MS can be explained by a number of factors. The inter-institutional mechanisms are based on the assumption that witness protection is a complicated legal and practical matter, touching upon many aspects of the protected witnesses' personal and official sphere. Therefore, it is necessary for a body, deciding on witness protection, to include representatives of agencies, responsible for all those aspects of the life of those under protection. Moreover, witness protection is a matter of extreme importance, and substantial funding, for the state and the functioning of its criminal justice, hence the frequent participation of highest state authorities in the process of deciding on eligibility of witnesses for protection. Even in those cases, though, inter-institutional mechanisms are mostly responsible for deciding on the inclusion of witnesses into a national witness protection programme, while the protection programme itself is still often driven by police.

On the other hand, with protection being one of the typical activities of police, many MS entrust the development and implementation of protection programmes, as well as main decisionmaking power, with police authorities, with varying degrees of supervision on the part of the prosecutor's office. Having the largest practical experience in averting threats to witnesses, the police are considered in the best position to develop a practically oriented and effective scheme.

Nevertheless, it is argued that a witness protection scheme can function well within any of those structures, as long as protection remains separate from investigation to ensure objectivity and minimise the risk of admission to the programme becoming an incentive for witnesses to give false testimony.³¹⁹ Notably, in Germany the organisational implementation to ensure effective witness protection is the responsibility of the 16 federal states and their police.

Regarding **witness protection schemes**, in a number of domestic systems authorities deciding on protection sign a specific form of written protection agreement with the witness under threat. This is considered an indispensable tool in securing the endangered individual's cooperation with a complex variety of measures, often requiring extreme dedication, which many of the witnesses lack (see section on effectiveness below).³²⁰ Besides the elements of the scheme itself and the reasons for which it may be discontinued (e.g. NL), the agreement may stipulate the witness' commitment to testify in the proceedings (BE) and otherwise cooperate with authorities (EE), the rights and obligations of the parties of the protection programme (BG), witnesses' consent to be subjected to the programme's restrictions (EE). Witness protection may also be a component of an agreement with the criminal witness to reduce his/her punishment in exchange for testifying in court (NL). The protection agreement is also known to MS like Slovakia, where the adherence to it is one of the main conditions for witness protection.

Termination of witness protection schemes is usually foreseen in the following cases:

³¹⁸ A similar division of models is also delineated in Library of the European Parliament (2013), 2

³¹⁹ Kramer, K., 'Witness protection as a key tool in addressing serious and organised crime', cited in Library of the European Parliament (2013), 2.

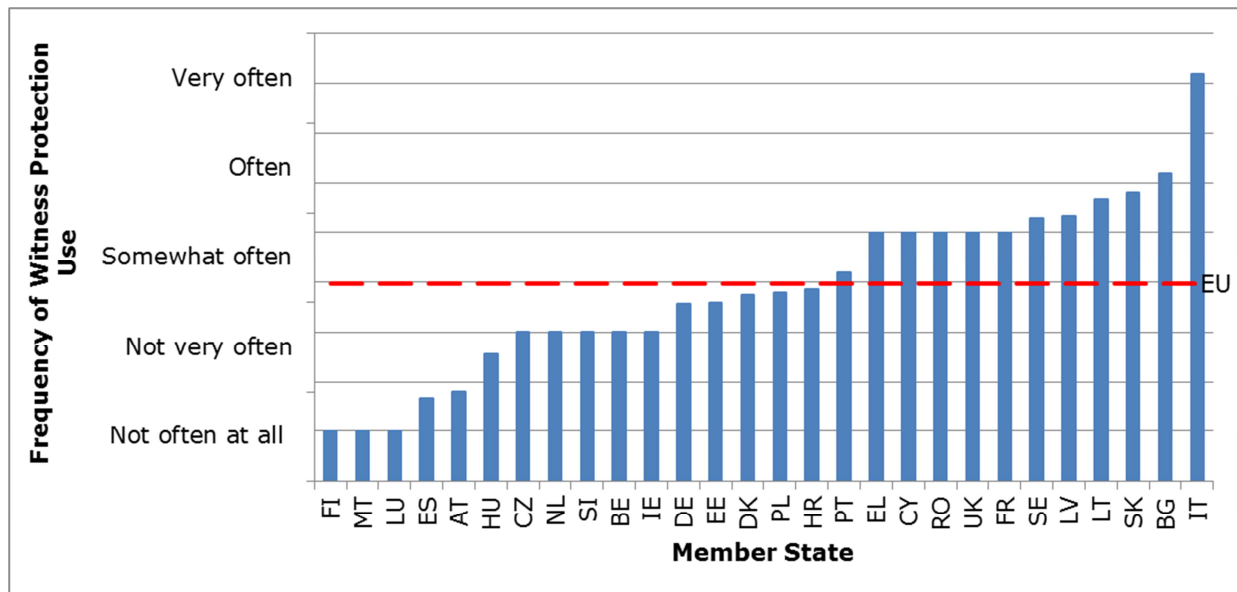
³²⁰ The Memorandum of Understanding (MoU) between the witness protection unit and the protected person is also an important element elaborated upon in the European Handbook on Witness Protection (Europol, 2013, 9–10). The Handbook lists the issues to be preferably covered by the MoU and, notably, recommends that a separate MoU is created focusing exclusively on IT-related issues due to the widespread Internet communication protected witnesses get into.

- Breach of the conditions of the agreement by the protected person (BG, BE, EE, LT, PL), including by commission of a crime or injury (BE, CZ, RO), refusal to assist in proceedings (CZ, LT) or giving false testimony (RO).
- Request by the protected person (CZ, EE, PL, RO) or his/her death (BG, EE, RO).
- Ceasing of danger to the protected person (BG, BE, CZ, EE, PL, RO).
- It is usually controlled by the authorities who authorised the protection.

The system of **protected witnesses**, as already outlined, is part of MS' criminal process, not of witness protection as such, and its main actors are the participants in the process on the part of the executive and the judiciary – investigative police, prosecutors and courts. Witness anonymity or other procedural protection takes place at various stages of criminal proceedings throughout MS.

In MS where the figure of the investigating judge is present (BE, HR, EE, NL), witnesses' anonymity or other protection, as stipulated in legislation, is mostly within his/her prerogatives. A number of MS (BG, CZ, HU, LV, LT, PL, PT, RO, SK) entrust the adoption, and the revocation, of protection measures to the authorities, conducting the proceedings at the moment when the protection necessity arises, and stopping them when protection is no longer necessary (prosecuting authorities, court). MS like Denmark, Slovenia and UK put the emphasis of witness protection within the framework of court proceedings.

Figure 7.18: Frequency of use of witness protection in organised crime cases



Source: information provided by MS experts

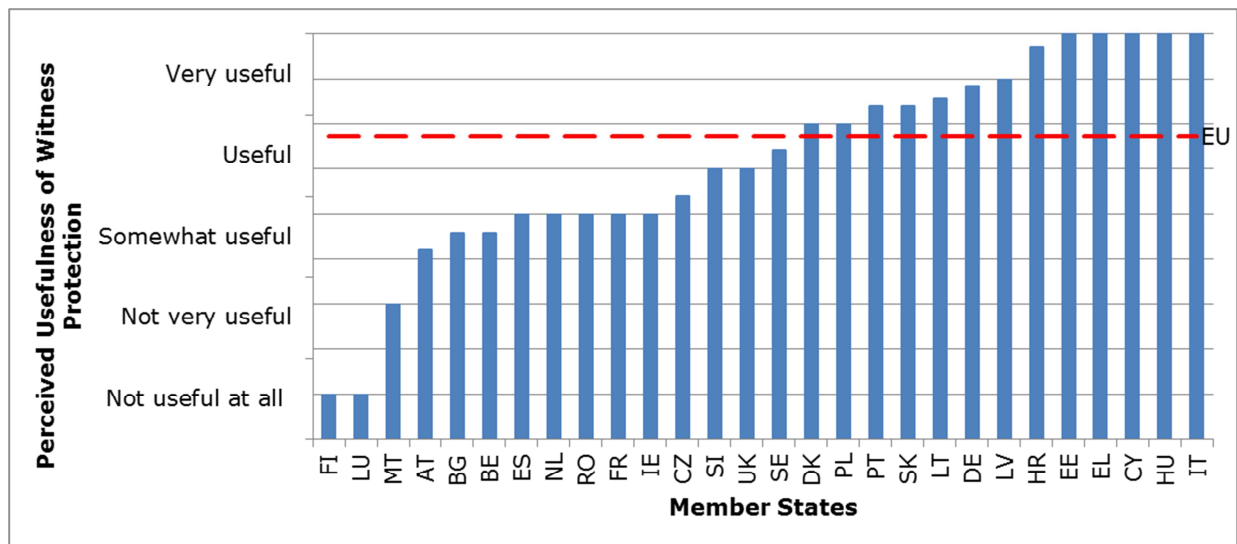
7.13.5. Use and effectiveness

- Besides the MS where no specifically regulated witness protection measures exist (see above), at least eight other MS (BE, EE, EL, HU, LV, PL, PT, SI) are said to use witness protection fairly rarely, especially in its most serious forms, involving change of identity. This contrasts with the relatively high number of persons quoted to currently be under some form of witness protection around

Europe – around 8,000 – and can be explained by the insufficient knowledge of stakeholders about relevant programmes and/or their inevitable secrecy. Another explanation could be their nature of last resort due to ‘the financial impact for the state and drastic changes in the life of the persons concerned’,³²¹ both considered as substantial barriers to their implementation.

- According to Europol professionals, the effectiveness of witness protection programmes very much depends on the structure of the programme. Europol has recently developed a self-evaluation index that considers a multitude of factors in the structure of the programmes, such as dedicated threat assessments, levels of psychological support, the corruption risks, etc.³²² As this is an ongoing effort and is not foreseen to result in a comparative analysis, it is difficult to assess the importance of this factor.

Figure 7.19: Usefulness of witness protection



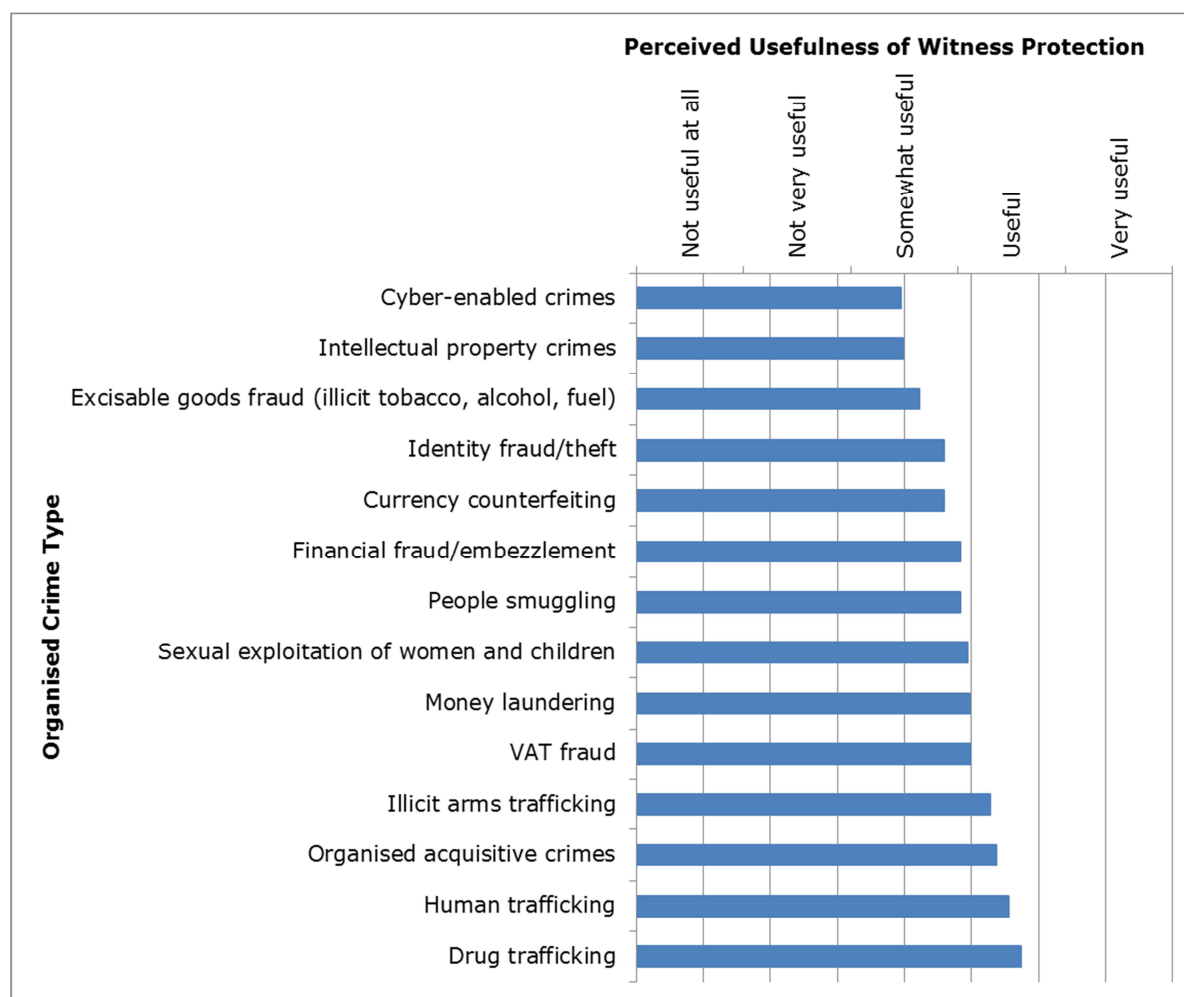
Source: information provided by MS experts

Opinions of national experts and stakeholders vary as regards the types of crimes witness protection is effective against. Among those mentioned are drug crimes (AT, EL, LT, PT), sexual exploitation (EL), human trafficking (EL, LT), financial fraud/embezzlement (EL) or, in more general terms, ‘structured’ and other forms of organised crime (CY, EE, EL, FR, LT).

³²¹ Library of the European Parliament (2013), 2.

³²² Interview with Europol professional (12 June 2014).

Figure 7.20: Usefulness of witness protection by crime type



Source: information provided by MS experts

- Moreover, the Greek national expert differentiated between crimes for which the testimony of a victim would be crucial for successful investigation and prosecution (sexual exploitation, human and drug trafficking, people smuggling, financial fraud/embezzlement and organised acquisitive crimes), crimes of which there is often no victim, but rather third-party witnesses (illicit arms trafficking, money laundering, excisable goods fraud, currency counterfeiting, VAT fraud) and crimes where there are victims, but they do not face the perpetrator directly, so their testimony is helpful, but not crucial (intellectual property crime, cyber-enabled crimes, theft). The Hungarian expert also differentiated between cases where victims have first-hand experience of the activity of the organised criminal group and other crime types, where the use of witnesses and the need to protect them is mainly situational. Other experts would rather reserve witness protection for the gravest cases of crime (BE) or the cases of the most violent criminal organisations (DE, LT, NL, PL, SK), putting potential witnesses in greatest danger.

7.13.6. Facilitators

- International cooperation, taking the form of bilateral or multilateral agreements, is universally pointed to as facilitating the difficult task of setting and maintaining a national witness protection scheme.³²³ The most prominent example of such multilateral agreement was concluded in 2012, when the Ministers of Interior of eight Salzburg Forum states (Austria, Bulgaria, Croatia, Czech Republic, Hungary, Romania, Slovak Republic and Slovenia) signed the Salzburg Forum Treaty on cooperation in the area of witness protection on the Cooperation in the Area of Witness Protection and expressed their determination for enhanced mutual cooperation in this field in the future. The treaty is ratified in Austria, Croatia, Czech Republic, Poland, Slovakia, and Slovenia. Bulgaria and Romania have started their ratification process in their national Parliaments. The treaty is open to ratification to all Schengen countries, thus Estonia ratified the agreement too. Other countries are in negotiation process for the agreement. The treaty regulates:
 - The designation of national contact points – the units running the respective national protection programmes, which cooperate directly in the area of witness protection upon written request.
 - Providing supportive measures to persons, placed under national protection programmes, in the other state parties to the agreement.
 - The applicability of various normative frameworks.
 - The bearing of costs.

- An example of regional cooperation is an agreement between Estonia, Latvia and Lithuania of 2005. Protection measures under the agreement include, among others:
 - Personal, as well as property guards.
 - Keeping witnesses' conversations and correspondence secure.
 - Changing of identity documents, relocation.
 - Change of permanent residence and place of work.

- EU cooperation may also involve the transferability of models from one MS to another. For example, the German system of witness protection has already been transferred to a number of other states. Officials from Austria, Switzerland, Netherlands, Croatia, Lithuania, Latvia, Poland, Romania and Slovakia have been trained by the witness protection department of the Federal Investigative Police Office (BKA). On a European level only Europol provides on annual basis a higher training course for witness protection officers at management level (not limited to MS).

- A number of practical measures have also facilitated organised crime trials, and related witness protection, including separate court rooms for cases related to organised crime (DK) and, universally, teleconferencing and

³²³ As evidence of successful international cooperation, data is supplied on the Netherlands that since the creation of the Team Witness Protection in 1995, more than 200 persons have received protection in 108 Dutch and 36 international protection programmes. Source: expert reply to questionnaire.

videoconferencing. Good rapport among law enforcement officers from different countries is also said to facilitate greatly operative work despite legislative differences.³²⁴

7.13.7. Barriers

- The complexity of witness protection, involving all spheres of the protected person's being, meets a number of practical difficulties, despite the overall positive evaluation of legal frameworks throughout MS.
- Experts and stakeholders from smaller MS almost unanimously cite their size as main physical barrier to setting effective **witness protection**, at the same time stressing upon the importance of international cooperation (BE, DK, HU, LV, LU, MT, NL, RO, SK, SI).
- The volume of resources required by **witness protection schemes** is considered by MS of both higher and lower financial capacity a barrier to their effective implementation (AT, BE, CZ, DE, EE, FI, FR, HU, LT, LU, RO), which often leads to witnesses' dropout from programmes and them changing testimony. A related hindrance stressed upon with regard to **protected witnesses** is the lack of specialised interrogation and identification rooms to better preserve witness anonymity, as well as videoconference and other secure equipment (BG). Some also mention the related difficulty in preserving **protected witnesses'** secrecy (BE, BG, RO), especially in view of the increase in their number.
- The psychological and practical barriers experienced by protected witnesses³²⁵ form another set of hindrances to effective witness protection. They can be expressed as general fear of reprisals, mentioned almost universally, excessively high expectations, leading to considerable dropout rates (AT, NL), violations of the rules of programmes, again leading to dropout (CZ, HU), lack of cooperation and discipline by the persons affected (DE), lack of ability to refrain from using old identity and contacting old acquaintances (DK) and, in general, insufficient psychological and social capacity to cope with the drastic change in lifestyle the witness protection programme requires (NL, UK). Cultural differences and language barriers also emerge in cases of international relocation.³²⁶ The problems of families of those to be protected have to also be accommodated (BE, EL, SK).
- Factors related to witnesses' frequent criminal background are often mentioned among the difficulties in implementing effective witness protection (AT, BE, EL).
- Legislative barriers among MS, though less regularly cited, concern differences in normative frameworks, regulating operational aspects of witness protection, such as issuance of covert documents and their upload into national databases, social and health insurance, carrying of arms, border crossing,

³²⁴ Anonymous survey among European law enforcement practitioners.

³²⁵ The European Handbook on Witness Protection (Europol, 2013), deals briefly, but concisely with the psychological aspects of witness protection, recommending both proactive (initial psychological assessment) and reactive (addressing psychological problems that already exist) activities. The psychological assessment of witness protection officers, being involved in highly stressful activities, is also considered.

³²⁶ Anonymous survey among European law enforcement practitioners.

etc.³²⁷

7.13.8. Recommendations

- As mentioned above, the average level of satisfaction with domestic normative frameworks among national experts is relatively high, in terms of them being adequate to the current state of affairs throughout MS. Nevertheless, a number of **legislative recommendations** are given, concerning the interplay among **protected witnesses** and **witness protection schemes**, both for witnesses and *pentiti* and the overall functioning of the investigation and prosecution.
- Where no specific witness protection legislation is in place, a recommendation is made for its introduction (FI, IE, LU, UK). Opinions are voiced for a more detailed regulation, where the current one is rather general (NL).
- Allowing anonymous witnesses (FI) and raising the probative value of anonymous testimony (BE) would encourage greater use of witness protection as an instrument.
- The greater use of pre-trial judicial interrogation of threatened witnesses as way of validating their testimony for the trial is also contemplated (BG, DK). Teleconferencing and videoconferencing also seem indispensable for the further development of witness protection and the use of protected witnesses' testimony during trial.
- Discussions also take place as to how to mitigate the situation of members of criminal organisations, having testified towards successful convictions of their peers, and how to better regulate their plea-bargain agreements with the prosecutors, of which witness protection is a key element.
- Concerns are also raised as to how to regulate the status of the protected witness, possessing a new identity, under civil, contract, tax or family law (PL). It is recommended that a central point is created in each EU country to issue covert documents, as needed.³²⁸
- Ultimately, a unified European legal basis for processing witness protection cases is also recommended (DE), with the **Salzburg Forum agreement**, described above, serving as possible starting point³²⁹ and the substantial support of Europol.
- Further on, a number of **practical recommendations** were raised regarding reallocation of more resources, both human and financial, to the very resource-intensive activity of protecting those testifying in organised crime and other cases, including specific IT solutions.³³⁰ Moreover, special EU funds are recommended to compensate for the frequently large difference in living standards and social benefits throughout the EU and the lack of resources within single witness protection units, especially in federal states, where there are several such structures.³³¹ This is also related to the strengthening of institutional capacity of agencies involved, including joint training of witness

³²⁷ Anonymous survey among European law enforcement practitioners.

³²⁸ Anonymous survey among European law enforcement practitioners.

³²⁹ Anonymous survey among European law enforcement practitioners.

³³⁰ Anonymous survey among European law enforcement practitioners.

³³¹ Anonymous survey among European law enforcement practitioners.

protection officers from different countries to unify approach.³³²

- International relocation, indispensable in view of many European states' small size and some states speaking the same language, is subject to a lot of discussions among law enforcement practitioners, some of the key ones concerning financing of international operations and the related reports. It is said to be best to have a report with categories of expenses made and the respective sums, to be circulated between witness protection units involved, while original bills should stay with the unit actually handling the witness to keep the secrecy of operative relocation measures.³³³
- Appropriate management of operations is stressed, centred around rigorous risk assessment (UK, European Handbook on Witness Protection). Covert Human Intelligence Sources (CHIS)-dedicated units are also contemplated as a practical management solution.³³⁴
- As with all criminal justice fields, further scholarly and policy research is highly recommended, as well as raising responsible authorities' awareness about the necessity for protection.

Table 7.29: Witness protection – issues and possible solutions

Issues and problems	Recommendations
Operational and legal difficulties often serve as barrier to cross-border cooperation in the use of witness protection.	Further adoption by MS of the Salzburg Forum Agreement will gradually create sufficient basis amongst MS to further improve and stimulate cooperation in the field witness protection.
Cross-border witness protection programmes could be resource intensive.	Provide EU-level funding e.g. linked to witness protection cases falling under EMPACT priorities or increase MS funding for witness protection in cross-border cases.
Operational shortcomings may be blamed for substandard witness protection programmes (e.g. failure to recognise threats to witnesses).	Further develop national witness protection programmes by periodic self-evaluation (e.g. via tools provided by Europol).
Difficulties and obstacles to creating new identity and documents, as well as getting rid of or changing old identities (especially cyber-related or biometrics). Common definitions and procedures.	Create national focal points that deal with matters of creating new identities to facilitate cross-border cooperation. Work with the private sector to facilitate changing of digital identities. Render the Europol Handbook on witness protection a EU Council recommendation. Implement the standards of the Europol handbook into national legislation and legal procedures in witness protection.

³³² Anonymous survey among European law enforcement practitioners.

³³³ Anonymous survey among European law enforcement practitioners.

³³⁴ Anonymous survey among European law enforcement practitioners.

7.14. Joint Investigation Teams

Table 7.30: Joint investigation teams – basic facts

Legal basis	Article 13 of the 2000 MLA Convention (2000/C 197/01); COUNCIL FRAMEWORK DECISION of 13 June 2002 on joint investigation teams (2002/465/JHA).
Frequency of use in organised crime investigations	Not very often.
Scope	Specific, serious, difficult and demanding cases involving more than two countries.
Obstacles	Issues relating to the implementation of JIT legislation; differing legal systems; administrative/bureaucratic hurdles, information exchange/trust; lack of expertise; timing.
Recommended changes	Simplify the procedure of setting up a JIT; expand training opportunities; increase EU funding; unify procedure/authorisation required for establishing JITs at the EU level; need for evaluation/assessment of the impact the JIT Secretariat.

7.14.1. Definition and scope

A joint investigation team (JIT) is a team consisting of judges, prosecutors and law enforcement authorities, established for a fixed period and a specific purpose by way of a written agreement between the States involved, to carry out criminal investigations in one or more of the involved States.³³⁵

Following the initiative of several MS (BE, FR, ES, UK) rapporteur Timothy Kirkhope pushed forward a draft proposal for the Framework Decision on JITs.³³⁶ The concept of JITs arose from the belief that existing methods of international law enforcement and judicial cooperation were, by themselves, insufficient in dealing with serious cross-border organised crime.³³⁷ Consequently JITs were created with the overall aim of optimising cooperation during cross-border criminal investigations. JITs differ from other special investigative techniques described in this report in that their main focus is on facilitating investigations rather than intelligence gathering. Nevertheless, several of the investigative tools may be used over the course of a JIT and can be carried out both individually or jointly by the JITs participants.³³⁸ There are a number of reasons why law enforcement authorities may choose to participate in a JIT (see Box 7.7). The setting up of a JIT will usually only be considered in investigations involving more serious forms of criminality. However, details concerning the specific crime types or seriousness threshold required for a JIT need to be examined by looking at the national legislation and operational guidelines within individual MS.

³³⁵ Eurojust (2015).

³³⁶ See *REPORT on the Initiative of the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the United Kingdom for the adoption by the Council of a draft Framework Decision on joint investigation teams* (12442/01 - C5-0507/2001 - 2001/0821 (CNS)).

³³⁷ Joint Investigation Team Manual, Council of the European Union, doc. no. 13598/09, 23 September 2009.

³³⁸ Article 1(7) of the Framework Decision (2002/465/JHA) specifies the conditions under which special investigative techniques are used during a JIT. According to an EC report (7.1.2005 COM (2004) 858 final), 'the aim of this provision is to prevent joint investigation teams from needing letters rogatory. Only three Member States (Spain, Finland, Sweden) have complied with this provision. One Member State (United Kingdom) has restricted investigative measures to search warrant and production orders and most of the national enacting legislation does not deal with it (Denmark, Germany, France, Lithuania, Hungary, Malta, the Netherlands, Austria, Portugal).'

Box 7.7: Reasons for participating in a JIT

- Disrupt an organised criminal group by applying constant pressure in all the countries where they are carrying out illegal activities.
- To respond to a series of high profile events (i.e. recent increase in organised-crime related murders, flooding of the market with illicit goods etc.).
- To retrieve/confiscate criminal assets.
- To facilitate intelligence gathering and information exchange between two or more countries.

A JIT is composed of an investigation team that is set up for a fixed period,³³⁹ based on agreements between two or more MS³⁴⁰ and/or competent authorities for a specific purpose. The team can be made up of law enforcement officers, prosecutors, judges and in certain cases other officers (e.g. customs officers). JITs by definition investigate specific cases and can therefore not be used to establish a generic task force for a specific crime type. Members of a JIT may provide information to the JIT as long as it is in accordance with their domestic laws. In addition information may be lawfully used by a member of a JIT when it is not otherwise available to the competent authorities of the MS concerned. In short JITs provide a platform which can be used to determine the optimal investigation and prosecution strategy.

The 2000 MLA Convention lists two situations in which JITs may be formed:

- When a MS's investigation into criminal offences contains difficult and demanding investigations with links to other MS, or
- When a number of MS are conducting investigations into criminal offences which require coordinated concrete action in the MS(s) involved.³⁴¹

However a number of MS have outlined specific grounds for refusing to participate in a JIT including:

- If the execution of the request negatively effects the sovereignty, security, public order/essential interests of the country (BE, LU).
- If the request concerns political or politically related offences (BE, LU).
- If the request is motivated by discrimination, i.e. reasons of race, gender, language, religion, age, wealth, political opinions, sexual orientation, disability, etc. (BE).
- If the request is related to an offence that could lead to a death sentence in the requesting state (BE).
- If the request concerns an offence linked to tax, customs or exchange-rate offences (LU).
- JITs provide a number of advantages (see Box 7.8 below) over traditional forms of judicial and law enforcement cooperation mechanisms such as 'mirror' or 'parallel' investigations, rogatory letters, etc.

³³⁹ The duration of a JIT may be extended following mutual agreement of the involved parties.

³⁴⁰ Non-EU Member States may participate in a JIT with the agreement of all other parties.

³⁴¹ Rijken & Vermeulen (2006), 10-13.

Box 7.8: Advantages of using JITs over other forms of cooperation

- The ability to share information directly between JIT members without the need for formal requests, such as mutual legal assistance requests.
- Clearly identified leadership responsibilities with the operation being headed by a team leader.
- The ability to request investigative measures between team members directly, removing the need for Letters Rogatory.
- The ability to entrust seconded members of the JIT (not nationals where the JIT operates) to take certain investigative measures in accordance with the national law of the State where the JIT operates.
- The ability for members to be present during house searches, interviews, etc. in all jurisdictions covered, helping to overcome language barriers in interviews, etc.
- The ability to coordinate efforts on the spot, and for informal exchange of specialised knowledge.
- The ability to build and promote mutual trust between practitioners from different jurisdictions and work environments.
- The ability for Europol and Eurojust to be involved and provide direct support and assistance.
- Ability to apply for available EU, Eurojust or Europol funding.

Source: Joint Investigation Team Manual, Council of the European Union, doc. no. 13598/09, 23 September 2009

7.14.2. Legislative basis

There are a number of key legislative documents which discuss the use of JITs. For example, the United Nations Convention against Transnational Organised Crime (Article 19) and United Nations Convention against Corruption (Article 49) make identical references to the concept of bilateral/multilateral agreements which enable competent authorities to establish joint investigation bodies during the course of an investigation.³⁴² Similarly Article 20 of the Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959 provides the legal basis for conducting JITs with third countries in Europe.

Within the EU the legislative basis for the use of JITs is outlined in two legally binding instruments, Article 13 of the 2000 MLA Convention³⁴³ and the Framework Decision of 2002.³⁴⁴ MS have chosen to implement the laws governing the use of JITs in different ways. For example some MS have adopted specific laws on JITs while others have chosen to include JIT provisions in their criminal procedure codes or simply refer to the direct applicability of the 2000 MLA Convention (see Table 7.31).³⁴⁵ Strictly speaking the 2002 Framework Decision cannot be used as an autonomous international legal basis for the formation and operation of JITs. Thus the extent to which JITs can operate depends on the degree to which participating states have created a legal basis for the use of JITs in their domestic legislation. It is important to note that the Framework Decision will terminate once the MLA Convention has been fully ratified by all MS.³⁴⁶

³⁴² United Nations Office on Drugs and Crime (2004a).



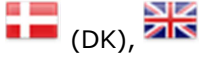
³⁴³ (2000/C 197/01).

³⁴⁴ Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

³⁴⁵ Joint Investigation Team Manual, Council of the European Union, doc. no. 13598/09, 23 September 2009.

³⁴⁶ To date only Italy has not yet implemented the Framework Decision or ratified the 2000 MLA Convention.

Table 7.31: Location of regulations regarding JITs

Location of JIT regulation within national legislation	Member States using this type of legislative basis
Criminal procedure code	 (BE), (BG), (CZ), (EE), (FR), (LV), (LT), (MT), (NL), (PL), (SK), (SI)
Specific domestic legislation and other forms of regulation	 (AT), (CY), (FI), (DE), (EL), (HR), (HU), (IE), (LU), (PT), (RO), (ES), (SE)
Direct reference to 2000 MLA Convention & Framework Decision	 (DK), (UK)

Source: information provided by MS experts

The setting up of a JIT is not only limited to MS. JITs can also be set up with third countries provided that the legal basis for the creation of a JIT exists. The legal basis for a JIT can take place in the form of an international legal instrument, a bilateral/multilateral agreement and within national legislation (i.e. articles within the code of criminal procedure). The legal instruments listed in Box 7.9 below could provide a suitable legal basis for setting up a JIT between an EU MS and a third country.

Box 7.9: Legal basis for establishing JITs between MS and third countries

- The Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (Article 20).
- UN Convention against Transnational Organized Crime, 15 November 2000 (Article 19).
- The Convention on mutual assistance and cooperation between customs administrations (Naples II Convention), 18 December 1997 (Article 24).
- Police Cooperation Convention for Southeast Europe (PCC SEE), 5 May 2006 (Article 27).
- Agreement on Mutual Legal Assistance between the European Union and the United States of America; (Article 5 and national implementation thereof).

Source: Joint Investigation Team Manual, Council of the European Union, doc. no. 13598/09, 23 September 2009

7.14.3. Implementation and oversight

According to Article 13 (1) of the 2000 MLA Convention, the seriousness of the crime will not serve as the sole criterion for setting up a JIT. As a result national authorities may have differing approaches to setting up a JIT. According to the guidelines:

- The JIT will be set up in the MS where the majority of the investigation is expected to take place (henceforth referred to as the home state).
- The JITs leader must be a representative of a competent authority of the home state, and must act within the limits of their competence under national law.³⁴⁷
- The JIT must carry out its activities in accordance with the laws of the home

³⁴⁷ The Framework Decision stipulates that each participating country may appoint a leader to the JIT. The JIT leader changes according to the Member State on whose territory the action takes place. When simultaneous actions are taking place in different Member States, there may be several JIT leaders at one time. It is not specified whether the team leader should be a public prosecutor, a judge or a senior police or customs officer.

state.

- The home state is required to make the necessary organisational arrangements to allow the JIT to operate.

The level of authorisation required to initiate a JIT varies considerably from one MS to the next. In most cases the prosecutors involved in the case (i.e. examining magistrate, district prosecutor, etc.) must receive approval from higher-level judicial authorities (such as the prosecutor general (AT), federal prosecutor (BE), state prosecutor/supreme public prosecution office (CZ), Attorney General (CY)) who are responsible for both sending and receiving requests to participate in a JIT. Some MS (FR, DE, PT) require an even higher level of authorisation for example at the ministerial level (i.e. the Minister of Justice).³⁴⁸ Once a JIT has been authorised, there is more freedom in determining who will be responsible for overseeing the JIT. For example in Belgium the JIT can work under the supervision of the federal prosecutor, competent prosecutor and/or examining magistrate.

Box 7.10: Typical steps prior to participating in a JIT

- Receipt of initial information about a particular criminal activity.
- Check/verify information received.
- Exchange of information with foreign partners.
- Start of joint investigation (i.e. parallel investigations).
- Collection of data for pre-trial proceedings.
- Start of pre-trial proceedings in two or more countries.
- Meetings at Eurojust or Europol.
- Signing of the JIT Agreement.

Source: Republic of Slovenia. Ministry of the Interior. *The Introduction of the Requirements for Establishing Joint Investigation Teams (JIT) to Fight Trafficking in Human Beings in South-East Europe (JIT THB): INITIATING A JIT 2nd Workshop Report.*

Eurojust and Europol's role in JITs

Eurojust and Europol play a key role in the formation/operation of JITs. For example the 2002 Eurojust Decision enabled Eurojust to make official requests to competent authorities in the MS to form a JIT,³⁴⁹ and likewise the Europol Council Decision allows Europol to do the same (see Art. 6 of the Europol Council Decision).³⁵⁰ In addition the revised Eurojust decision (Council Decision 2009-426-JHA) required MS to notify Eurojust of the formation and results of a JIT as well as enabled Eurojust's national members to participate in JITs. In addition Eurojust is able to provide Community funding to help fund JIT activities as part of their efforts to ensure that financial and other organisational constraints do not hinder the establishment or operational needs of JITs. Eurojust also plays a key role in facilitating the work of the Network of National Experts on JITs, having hosted the JITs Secretariat from its premises since 2011.

According to Article 6 of the Europol Council Decision, Europol officials may assist in all activities and exchange information; however, they cannot participate in taking coercive measures. In addition Europol may liaise directly with other JIT members and provide them with information contained in the computerised system of collected information.

³⁴⁸ In Slovakia the Attorney General's Office may authorise the use of a JIT, however it must first consult with the Minister of Justice before making its decision.

³⁴⁹ Council of the European Union (2002b).

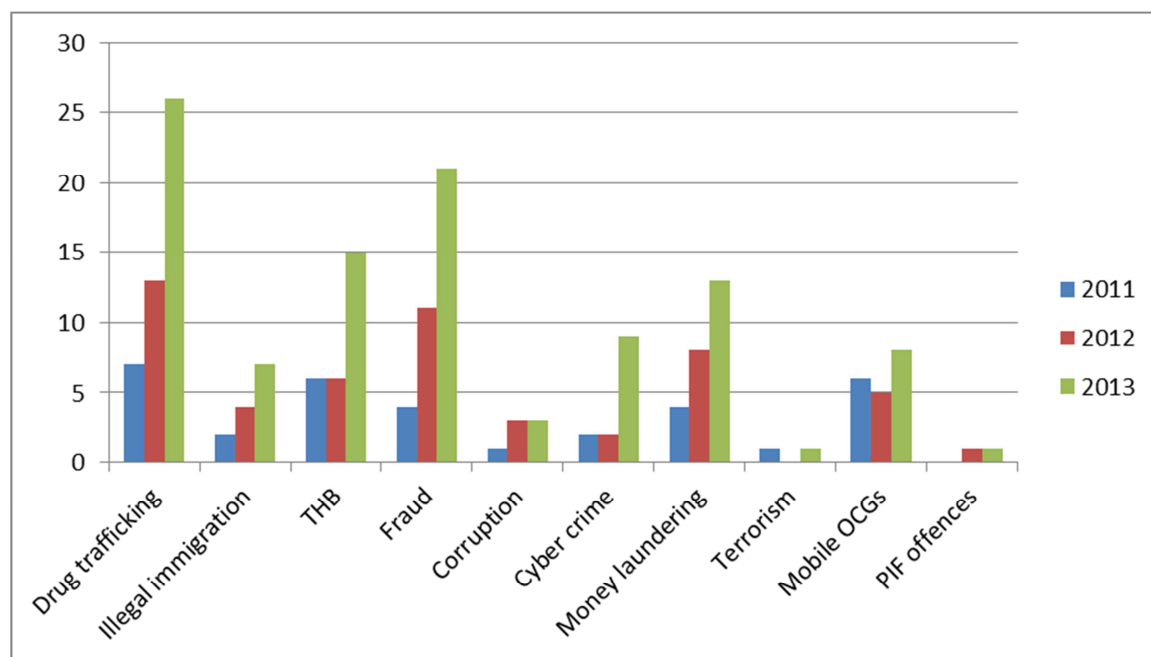
³⁵⁰ Council of the European Union (2009b).

In practice Eurojust’s involvement in JITs is most visible during the preparatory assessment and negotiation phases. Likewise Europol plays an important role in the execution phase of a JIT. Through coordination of the information exchange via secure lines, through provision of analysis and operational support (expert knowledge, instalment of a mobile office, etc.) Europol can act as a reliable partner for MS’ competent authorities. Europol’s and Eurojust’s regular involvement in JITs has put the organisations in a position where they can provide advice and expertise from prior JITs and has put them in a position to identify suitable cases for JITs.

7.14.4. Use and effectiveness

While JITs are used relatively infrequently, Figure 7.21 below shows that their use has increased steadily across most types of organised crime over the last few years. MS were initially cautious about the use of JITs, following the adoption of the Framework Decision on JITs. However, several actions were taken to promote their use. For example, the Hague Programme called upon MS to designate experts on JITs to exchange best practices and encourage the use of JITs, which led to the establishment of a Network of National Experts on JITs in 2005.³⁵¹ Since 2005 the Network has held annual meetings to discuss issues such as practical obstacles for setting up JITs, raising awareness, evidence gathering and noting lessons learnt.

Figure 7.21: JIT use by crime type between 2011 and 2013



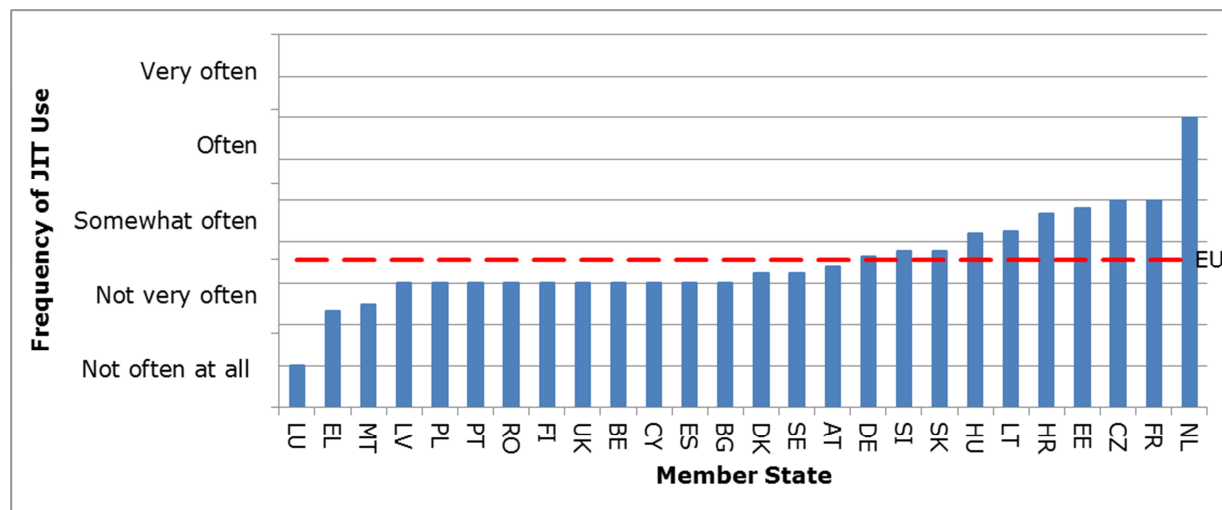
Source: 2011–2013 Eurojust Annual Reports

Overall, JITs are recognised as a major achievement in European cooperation against organised crime. Their effectiveness often depends more on the structure of the criminal network and the cross-border activities which they are engaged in, rather than the

³⁵¹ Since mid-January 2011, the JITs Network has a Secretariat to promote its activities and to support the National Experts in their work. See Eurojust (2012a).

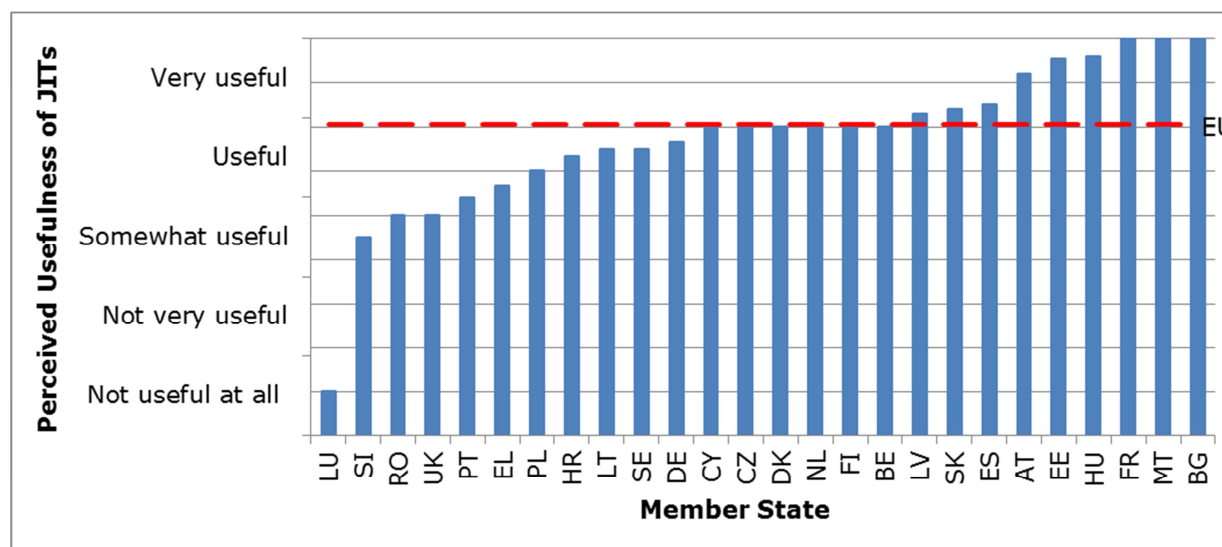
specific crime type they are involved in. However due to the lengthy set up process their use is mostly limited to large, complex and lengthy investigations. Respondents from Denmark stated that JITs are particularly effective when used together with MS who share a similar legal as well institutional approach to investigating organised crime cases.

Figure 7.22: Frequency in which JITs are used in organised crime investigations



Source: information provided by MS experts³⁵²

Figure 7.23: Usefulness of JITs in organised crime investigations

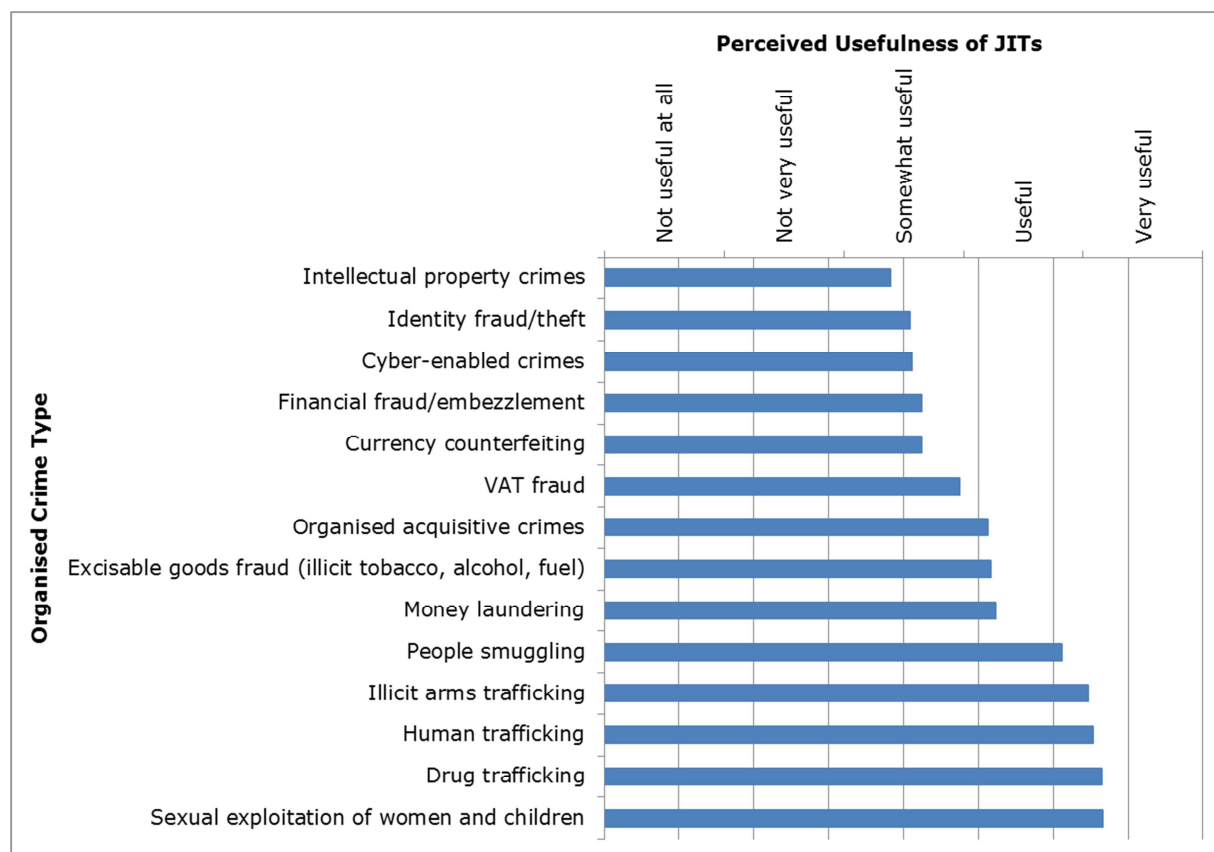


Source: information provided by MS experts³⁵³

³⁵² Data for IT and IE not available.

³⁵³ Data for IT and IE not available.

Figure 7.24: Usefulness of JITs by crime type



Source: information provided by MS experts

7.14.5. Issues and problems

Issues with the implementation of JIT legislation: there have been cases in which judicial authorities have experienced difficulties establishing JITs due to inadequate transposition of EU legislation into MS national legislation.³⁵⁴ The most notable case is Italy, where JITs were not able to be established because the country had not yet implemented Framework Decision No. 465/2002 on joint investigation teams or ratified the 2000 MLA Convention.³⁵⁵ In other cases the establishment of a JIT has been hindered as a result of the dual legal basis which currently exists (i.e. the Convention and Framework Decision). As was detailed in a European Commission report, 'the Framework Decision on joint investigation teams does not reproduce the whole of the 2000 Convention and this could lead, in this transition period before the entry into force of the 2000 Convention, to a lack of clarity concerning aspects such as the authority competent to set up the teams or the fact that certain investigative activities (for example covert investigation or controlled deliveries which may usefully be performed by the team) are not governed by the Framework Decision.'³⁵⁶ An example of such an issue can be seen in the set-up of a JIT between the United Kingdom and the Netherlands. In this case the problem was caused because the UK had enacted its legislation in compliance with the Framework Decision while The Netherlands had implemented the

³⁵⁴ Eurojust Annual Report 2010.

³⁵⁵ Over the past few years there have been several attempts to implement FD 2002/465, including drafting of several draft bills however these bills were never successfully voted into law due to political instability.

³⁵⁶ Commission of the European Communities (2005), 4.

Convention. This resulted in a situation in which strictly speaking the UK was not considered to be an eligible candidate according to Dutch legislation. This issue was ultimately resolved when a district court in the Netherlands ruled that the Decision's supranational character was binding on MS and that there was therefore a legal basis for setting up a JIT.³⁵⁷

Issues resulting from differing legal systems: differences in MS legal systems have been cited as obstacles to establishing JITs. According to Eurojust, these differences normally concern 'the rules for secrecy of proceedings, access to case file documents (disclosure issues), time limits for data retention, and the giving of evidence via videoconference in relation to judicial control mechanism.'³⁵⁸ Issues regarding disclosure rules can be illustrated by the following example between the UK and the Netherlands. In the UK the prosecution is required to disclose with the defence evidence which it has obtained.³⁵⁹ The prosecution is also required to disclose any relevant materials that they do not intend to rely on.³⁶⁰ On the other hand the duty to disclose is not required in the Dutch legal system. This difference posed problems in the work of a JIT involving the two countries. Ultimately the issue was resolved by having Europol serve as an intermediary for sensitive information, allowing the normal disclosure rules to not apply during the operation of the JIT.³⁶¹

Administrative/bureaucratic issues: traditionally the greatest benefit of conducting an organised crime investigation through a JIT is that it simplifies and speeds up cooperation between two or more MS in organised crime investigations. This is particularly necessary in organised crime investigations as organised crime groups thrive on their ability to remain flexible and adapt to changes to both the criminal market and law enforcement's attempts to thwart their activities. As a result the perceived slow process of setting up JITs is an issue of concern. Interviewees in several MS (AT, BE, CZ, DK, FI, DE, LT, LU, NL, PT) believed that the process of setting up a JIT was too formal and time-consuming to be able to be effectively used in organised crime investigations. For example, one interviewee (DE) cited accounting and billing/financial reporting as being particularly complicated. Denmark has tried to reduce such administrative hurdles by designating a 'JIT specialist' to set up all JITs. In the Netherlands the relinquishing of such control is seen as one of the main disadvantages to participating in a JIT. The problem is further exacerbated by the fact that MS have put in place different formal requirements for signing JIT agreements. It must be noted that while law enforcement officials found them difficult to set up, in most cases the same officials felt that JITs were ultimately very useful in helping speed up the investigation. However, several MS (DE, LT, PT, SE) did indicate that the high administrative burden of setting up a JIT is out of proportion to the results that they would achieve, which has led them to use alternative forms of cooperation such as conducting mirror investigations or relying on information exchange through other organisations such as Interpol. In addition, several MS (BE, FI, DE, LT, NL) stated that it can be difficult to persuade other MS to participate in a JIT; this can happen for a number of reasons including lack of mutual/shared interest in the

³⁵⁷ Rijken & Vermeulen (2006).

³⁵⁸ Eurojust Annual Report 2012.

³⁵⁹ The duty of disclosure refers to the prosecution's obligation to disclose pertinent information regarding the case to the defence prior to the trial.

³⁶⁰ A judge may eliminate this requirement for evidence that is deemed to be against the public interest if it were to be disclosed.

³⁶¹ Rijken & Vermeulen (2006), 113-14.

case (BE, NL) or failure to agree on the targets (LT, NL). In some cases participating states are only interested in charging and convicting their own citizens preferring to let other MS pursue their own targets.

Issues with sharing information: a lack of trust and reluctance to share sensitive information between States is cited as a significant obstacle to the formation of JITs. In particular countries appear to be very reluctant to allow foreign officers to carry out operational activities within their territory. In some cases JITs were not considered as a result of past disappointments in judicial cooperation between partnering MS.³⁶² However, once they have been established, JITs are often considered to be a vehicle which builds mutual trust and understanding between practitioners from participating MS. In addition, it is important that the MS participating in JITs are aware of the extent and timeframe for disclosing sensitive information when participating in a JIT. To make sure that these agreements are clear, some MS include annexes to the JIT agreement which specify additional details about the exchange of information and disclosure rules that must be adhered to.

Issues with expertise: as the investigation must be carried out in accordance with the national laws of the MS within which the JIT is located it is important that the team members from participating states have a thorough knowledge of the laws of the home state as well as the laws of other participating states. Given the complex nature of criminal procedures, it can be difficult to find JIT members who have a detailed knowledge of the procedures in different countries. Furthermore, several MS (BE, CZ, DK, EE, PL, SK) have alluded to shortages of investigators who have the necessary language skills to help make cooperation within a JIT go smoothly. As a result many have relied on interpreters to address these communication shortcomings; however their use is viewed as a costly financial burden.

Timing of starting a JIT: analysis of JITs revealed that in some cases they were not established because the proposal for formation of a JIT came too late or the investigations were in different stages within each country. A JIT will have greater added value the earlier it is formed during the investigation phase.³⁶³

7.14.6. Recommended changes

Overall the survey responses showed that law enforcement authorities had a mostly positive view of JITs. This was particularly the case for authorities who have directly participated in a JIT. Nevertheless, a number of recommendations were suggested, including:

- **Simplify the procedure of setting up a JIT:** several MS (AT, CZ, DE, HU, NL) indicated the need for a simplified, accelerated and more flexible way of setting up JITs. Having a more simple process for setting up a JIT should help with reducing the reluctance with which some MS approach JITs. Reducing this reluctance is key to the success of JITs as currently many MS have indicated that they prefer using less formal and more traditional forms of cooperation, which are believed to be less complicated and can therefore be executed more quickly. One way of simplifying the procedure for setting up a JIT is to reduce the number of parties that must be involved. For example, in Germany the

³⁶² Eurojust (2012a).

³⁶³ Eurojust (2012b),,21.

need to involve the Ministries is seen as resulting in unnecessary delays. The process could also be simplified by reducing the level of authorisation which is required. For example in Latvia the need to receive authorisation from the Prosecutor General is viewed as being overly high.

- **Expand training opportunities:** while CEPOL and the EJTN, supported by Europol and Eurojust, host several training sessions each year on JITs, most experts who were interviewed were not aware of such training. As a result more visibility on training possibilities should be provided in order to increase awareness of JITs as well as give investigators a better sense of the practical requirements they must be aware of when setting up or participating in a JIT. Increased awareness of JITs should help address several of the issues that were listed by experts, such as initiating JITs at earlier stages of the investigation. In addition, increased awareness of the procedure for setting up a JIT could also help with speeding up the process. Such standard JIT training introduced at national level could be a supplementary tool to the existing online JIT training developed by CEPOL, Europol and Eurojust, and would also be a welcome addition to mandatory training courses that law enforcement and judicial authority officials must complete before being assigned to their posts.
- **Increase EU funding:** interviewees (LT, UK) stated that when they received funding for their JITs through Eurojust the resources were adequate. However with the end of European Commission funding following the completion of the second JIT funding project, Eurojust is required to provide funding for JITs through their own regular budget, which will reduce the amount of JITs they will be able to provide funding for in the long term. In addition, funding for JITs could be prioritised based on the priorities identified in the EU's policy cycle for organised crime in order to ensure that funding goes where it is most needed.
- **Need for evaluation/assessment of the impact of the JIT Secretariat:** in 2011 the JITs network was given a secretariat to promote its activities and support the work of the national experts. To date there has been no evaluation of the impact the Secretariat has had on facilitating JITs or improving the work of the Network of National Experts on JITs, which has been active since 2005.

Table 7.32: Joint investigation teams – issues and possible solutions

Issues and problems	Recommendations
Insufficient EU funding to set up JITs	Increase EC/Eurojust-based JIT funding.
Lack of knowledge and expertise in setting up a JIT	Expand national training opportunities for JITs, e.g. through using more consistent the knowledge of the nominated national JIT experts (Law enforcement and judiciary). Increase training opportunities with support from CEPOL, Europol and Eurojust in JITs through multiplication of existing programmes. Increase foreign language training at the national level.
Complicated procedures for establishing JITs	Unify procedure/authorisation required for establishing JITs at the EU level. Appoint dedicated JIT departments at the national level to handle administrative responsibilities of JITs.
Disclosure issues	Include annexes to the JIT agreement which specify additional details about the exchange of information and disclosure rules that must be adhered to. Unify disclosure rules at the EU level.

7.15. Additional special investigative tools

In addition to the special investigative techniques described above, experts have highlighted several additional investigative tools that have been proven to be useful in organised crime investigations, described in greater detail below:

- **Financial investigative tools:** several MS (BE, EL, LU) have stated that the use of specialised financial investigation departments in organised crime investigations was particularly useful. These units/departments are able to use their specialised knowledge to identify suspicious financial transactions which can be linked to money laundering, terrorism financing and other organised crime activities. MS like Belgium have created special anti-money laundering and counter-terrorist financing systems to assist their investigations. Other MS (LU) allow law enforcement authorities to monitor specific bank accounts in order to gather evidence about the individuals under investigation. Finally, the obligation to report suspicious financial transactions by businesses or legal persons has also proven to provide valuable information in organised crime investigations (EL).
- **Asset seizure:** a number of MS (BE, FI, LU) have stated that the seizure of assets and freezing of bank accounts are useful tools in organised crime investigations.
- **Plea bargains:** the use of plea bargains was cited as a useful tool because of its ability to lead to prompt punishment of a crime. Judges and prosecutors have expressed a view that while it is better to impose a more severe penalty in some cases it is better to secure a lesser sentence if it means that a conviction for a lesser offence can be secured more quickly. Furthermore the use of plea bargains facilitates the likelihood that the accused will provide testimony against other (often higher-level) participants in the criminal organisation (BG). It should be noted that plea bargaining is a legal instrument, rather than a special investigative technique in the strict sense, and may be used in conjunction with other special investigative tools.
- **Issuing rewards for information:** one MS (DK) cited that providing citizens with rewards for information that can be used to investigate crimes has been

useful. In Denmark rewards of up to around 1,250 Euros are given to citizens who come forth with information that can be used to investigate gang-related crimes.

- **Clandestine searches:** several MS (DK, FR, LU) listed clandestine searches of a suspect's home with the purpose of tracking or confiscating their illicit earnings as a useful tool. In Denmark clandestine searches are only allowed in certain cases, for example concerning national security as well other serious crimes (e.g. serious drug- or firearm-related crimes and homicides). In such cases the law enforcement officers may examine, confiscate or replace illicit items with harmless substitutes of similar appearance.
- **Specialised intelligence software:** some newer types of evidence such as the metadata from telephone communications, bank transactions, GPS locations, VAT invoices, etc., are very difficult to analyse without the help of specialised computer programs like i2. By using this type of specialised software law enforcement is able to gain insights into the structure of a given organised crime group, the association between its members and their roles within the organisation.

PART 4: NATIONAL SPECIALISED JUDICIAL AND LAW ENFORCEMENT AGENCIES INVOLVED IN THE FIGHT AGAINST ORGANISED CRIME³⁶⁴

³⁶⁴ Marina Tzvetkova, Mafalda Pardal, Emma Disley and Jennifer Rubin, RAND Europe. Professor Michael Levi, Cardiff University.

8. An overview of national specialised judicial and law enforcement agencies, promising practices and challenges

This section presents findings from an analysis of information provided by national experts and stakeholders relating to national specialised agencies involved in the fight against organised crime. The questionnaire completed by national experts asked the following questions in relation to specialist agencies:

1. Which specialised judicial and law enforcement agencies in your country work particularly well or are particularly effective from the point of view of their impact on disruption of organised crime groups?
2. In what ways do these agencies work particularly well? What are the features that make these agencies successful? What would be missed if these agencies did not exist?
3. How, if at all, does each agency mentioned cooperate with other law enforcement agencies at EU and national level? Are there any obstacles to cooperation?
4. How is information and intelligence shared and disseminated? How can this process be improved?
5. How would you evaluate the capacity of each agency mentioned to accomplish its tasks? How could this be improved?
6. How could the resources of each agency mentioned be used better to achieve greater impact (in terms of investigation and disruption of organised crime groups)?

This chapter is not a comprehensive review of agencies tasked with fighting organised crime in MS. It is based on information provided by national experts and reflects their views (and the views of their interviewees), as to which are the agencies in their countries that work particularly well or are particularly effective from the point of view of their impact on disruption of organised crime groups. For this reason the term 'potentially promising practices' is used to indicate the views of experts, which have not been further validated by members of the research team.

A challenge in preparing this section of the report is that some specialised national agencies do not make publicly available information about their structures, practices and activities (some, for example, did not have even a webpage). Accordingly, experts in some MS have managed to report in greater detail on the work of the specialised

agencies in their countries relative to others. There were also instances in which agencies chose not to participate in this research or did not respond to requests from national experts for information.

Despite these limitations concerning data collection and available information, this chapter highlights some important issues with regard to the capabilities of national agencies working against organised crime, and discusses challenges and promising practices. This chapter is structured as follows:

- Section 8.1 provides an overview of the key features of specialist agencies in the 28 MS.
- Section 8.2 looks at the challenges and benefits stemming from reforms to specialist agencies.
- Section 8.3 considers issues related to recruitment and training.
- Section 8.4 discusses challenges related to resources and Section 8.5 discusses issues in relation to political pressures and how these affect the work of national specialist agencies.
- Section 8.6 reports comments related to cooperation between national specialist agencies and other national law enforcement agencies, and Section 8.7 looks at information exchange.
- Section 8.8 looks at international cooperation.

Each section first outlines some examples of the issues and challenges facing specialist agencies, then provides some potentially promising examples and practices, as identified by MS experts.

8.1. Characteristics of national specialist agencies: an overview

The majority of MS were reported to have special police units or dedicated law enforcement agencies tasked with fighting organised crime in their country (AT, BG, CY, CZ, DE, DK, EL, ES, FI, FR, HR, HU, IT, LU, LT, NL, PL, RO, SE, SK, UK).³⁶⁵ Some MS also have specialised prosecution offices or specialised courts (AT, EL, SK, BG, BE, IT, ES, LT). Appendix B provides an overview of the main national specialist agencies.

8.1.1. Age of agencies

Some MS have had units dedicated to fighting organised crime for a long time. A desire to tackle international drug trafficking and related crime in the UK resulted in the establishment of the National Drugs Intelligence Unit in the late 1970s. This Unit developed into the National Criminal Intelligence Service in 1992, expanding its competences to encompass all forms of (loosely defined) organised crime before undergoing several further transformations into the current National Crime Agency (NCA). In Spain, the Unidad Central Operativa (Central Operative Unit) was formed in 1987. It is part of the Guardia Civil, a long-established police body which retains military status. It specialises in complex investigations, including, among other spheres, organised crime. Since 1991, the Italian National Anti-Mafia Directorate has acted as the national anti-mafia prosecutor office and the Anti-Mafia District

³⁶⁵ As noted in Section 3.6, this list of MS is not intended to be comprehensive.

Directorates have acted as local district anti-mafia prosecutor offices; these are the only Italian prosecutor offices tasked with the fight against organised crime specifically (see Italian case study in Chapter 9 for more detailed information). The Bulgarian Service for the Fight against Organised Crime was created in 1991 and Croatia established a special police department to fight against organised crime in 1992.³⁶⁶

More recently, other countries have launched specialist structures, created new units to aid the work of existing law enforcement agencies or introduced changes to existing agencies and units. For example, in 2006 Spain created the Organised Crime Intelligence Unit in order to centralise intelligence on organised crime and coordinate investigations carried out by different bodies. Bulgaria created the State Agency for National Security in 2007.

8.1.2. The number of agencies and centralised coordinating functions

In the majority of MS there is more than one agency working on organised crime: some are very specialised (like the Public Prosecutors Office for Drug Trafficking in Spain, for example, or the department working against human trafficking within the Greek Police),³⁶⁷ while others cover more than one field of expertise.

Some MS have both a central agency that oversees and coordinates work against organised crime (PL, IT, UK) and units within the local and regional police forces (for example Regional Organised Crime Units in the UK). Others have a special unit within the police which performs a similar function, for example, the Subdivision of Organised Crime of Hellenic Police based in Athens and Thessaloniki with four specialised departments.

8.1.3. Specialist prosecution agencies

According to the national experts, a number of MS have specialised prosecution offices or bodies (EL, BG, BE, FR, ES, IT, AT, HR, EE, FR, NL, SK, SI). For example, in Italy, the Anti-Mafia Investigative Directorate was established in 1991 and is tasked with proactive and judicial investigations as well as international cooperation. Greece has an Organised Crime Prosecutor, located at the Police Headquarters, who is involved in the investigations undertaken by the Organised Crime Department of the Hellenic Police and is also responsible for the authorisation of the use of special investigative tools. The Netherlands has a special Prosecution Bureau for Fraud and Economic Crime and Slovakia has established an Office of the Special Prosecutor, which is a specialised section within the Prosecutor General's office tasked with the prosecution of crimes related to organised crime, criminal groups, terrorist organisations and corruption.

Spain has a Public Prosecutor's Office against Drug Trafficking. It handles drug trafficking and money laundering cases, including those with an organised crime component. It also coordinates the action of the rest of the Spanish public prosecution system in drug trafficking and money laundering cases. In addition, Spain also has another specialised prosecutor's office – the Public Prosecutor's Office against Corruption and Organised Crime, which handles cases in relation to the following

³⁶⁶ Risk Monitor (2011).

³⁶⁷ Fiscalía especializada antidroga.

crimes: tax fraud and contraband; misconduct of an executive or public official; insider trading; misuse of public funds; illegal taxation; trafficking; bribery; fraud; insolvency offences; public procurement offences; crimes regarding intellectual property and copyright infringement; corporate offences; and money laundering and handling of criminally acquired goods (unless committed in relation with drug trafficking or terrorism).

The Special Prosecution Unit for Economic Crimes and Corruption in Austria is an agency based in Vienna and covering the whole country. According to the national expert, this leads to an accumulation of knowledge, allows for more concerted measures and a tighter grip on organised crime.

8.1.4. Involvement of intelligence agencies

In some MS intelligence agencies are also involved in working against organised crime: for example, the State Agency for National Security in Bulgaria, the Internal Security Agency in Poland and the Organised Crime Intelligence Unit in Spain (Centro de Inteligencia Sobre el Crimen Organizado, which produces the Annual Report on organised crime in Spain). Interviewees in Greece also suggested that the police cooperate with the National Intelligence Agency, especially when they need the high-technology equipment that the National Intelligence Agency uses for interception of communications. The Internal Security Agency in Poland deals with homeland security, but also works on fighting all forms of serious economic and drug-related crimes and covers the activities of organised criminal groups. However, interviewees suggested that the Internal Security Agency are more interested in transnational organised criminal groups. The agency has also powers to start and conduct criminal investigations.

8.1.5. Agencies focusing on financial crime

Specialist financial investigation units have been established in most MS (see Appendix B). In Italy, for example, specialised units within police forces like the Servizio Centrale di Investigazione sulla Criminalità Organizzata of the Guardia di Finanza, whose main task is to prevent criminal infiltration into the legal economy, may assist the National Anti-Mafia Directorate in investigations.

In Spain, the Central Unit for Economic and Financial Crime specialises in money laundering and financial investigations and in Sweden the Economic Crime Bureau deals with tax fraud and financial crime.

The Financial and Economic Crime Unit in Greece was considered a model agency by experts, who pointed out that if it did not exist, expertise on financial crime would be missing, and the Police would not have all the knowledge and skills necessary to fight organised financial crime.

8.1.6. Agencies focusing on cybercrime

There is an element of information and communications technology in most contemporary crimes. Accordingly, many MS have cybercrime units and some examples were mentioned by national experts. The UK has a National Cyber Crime

Unit (within the National Crime Agency – more information is provided in Chapter 10). Belgium has a Federal Computer Crime Unit, which is part of the Belgian Federal Judicial Police. The Federal Computer Crime Unit is tasked with assisting investigations carried out by other Belgian police services with regards to cybercrimes. Lithuania has a Cyber Crime Investigation Board and the Greek police have a Subdivision on Electronic Crime. The Netherlands and France also have cybercrime units – Office central de lutte contre la criminalité liée aux technologies de l’information et de la communication in France and the High-Tech Crime Unit of the Dutch Police and the National Cyber Security Centre in the Netherlands. Several other MS have similar departments and units, some details of which are provided in Appendix B.

8.1.7. MS with no specialised agency

There are countries – Belgium and to some extent Austria and Sweden – that have adopted a different approach and have integrated the work against organised crime groups within their law enforcement agencies.

Within the Belgian system there is no single specialised judicial or law enforcement agency that is solely focused on organised crime. However, in Belgium there is a federal prosecutor in charge of cases involving human trafficking, terrorism, organised crime and money laundering, and there is a division for combatting organised crime within the Belgian Federal Police.

Experts reported that despite the fact that the country did not have one centralised agency, work against organised crime was successful in Belgium since it was integrated at every level of policing. Belgium has chosen to try to foster the efficiency of all units instead of investing in specialist services. Police services that are specialised in various types of crime can all deal with organised crime cases. Local police services and district judicial police services work at the local level and they can all rely on the central judicial police (and its specialised services) and also on the federal prosecutor specialised in the field of organised crime. Experts pointed out that this system allowed an integrated approach and action at each level when it was needed. A similar approach is adopted in Austria, where units specialise in various types of crime.

In Sweden the fight against organised crime is coordinated through the National Criminal Police and the Country Criminal Police. There are eight special regional task forces against organised crime (mostly including police officers) and one task force at the national level. The prosecutors specialising in organised crime investigations are part of the International Prosecutors Chambers. There is also a specialist Economic Crime Bureau which deals with many organised economic crimes including fiscal fraud.

8.1.8. Involvement of borders, customs and other agencies in the fight against organised crime

In most MS, border guards, coastal guards and customs also work on organised crime cases in collaboration with the police and specialised agencies, and also in collaboration with neighbouring countries and other MS. In some MS the counter-terrorism units also get involved in organised crime investigations (ES). In the UK and

the Netherlands, law enforcement also cooperates and exchanges information with the private sector, especially in the area of cyber security and information technologies.

8.1.9. Control and accountability

National experts gave examples of arrangements relevant to control and accountability and how these may influence the work of specialised agencies dealing with organised crime. There is a great deal of variation as to how MS specialist agencies are controlled and held accountable, stemming from different policing traditions, systems and practices, as well as the size of the MS, and whether or not the it has a federal structure.

In Greece, the Public Prosecutor's office is a judicial authority independent from courts and executive authority and during the execution of his duties and the expression of his opinion, 'acts under no obligation obeying only to the law and his conscience'.³⁶⁸

In the UK the Director General of the National Crime Agency has independent operational direction and control over the Agency's activities. The Director is accountable for the agency's performance to the Home Secretary who in turn reports to Parliament.

In Slovakia, interviewees suggested that the independence of the National Criminal Agency from local or regional power structures and its oversight by the President of the police force make it a very effective unit against organised crime. Moreover, according to the national expert, the three main agencies involved in work against organised crime in Slovakia – the National Criminal Agency, the Office of the Special Prosecutor and the Specialised Penal Court – are situated outside of the rest of the criminal justice system and this position enables them to act with a greater degree of independence from various pressure groups, which is vital in combating organised crime.

8.2. Reforms to national specialist agencies

Many MS experts reported that national specialist agencies dealing with organised crime had been subject to reforms and restructuring. The following sub-sections describe the key issues mentioned by MS experts regarding the challenges which reform could present, as well as some potentially promising practices where reforms had been well received.

8.2.1. Challenges stemming from reform and restructuring

In a number of cases reforms were considered disruptive and problematic by national experts and the people they interviewed, despite the fact that they were intended to improve agencies' work.

For example, in Bulgaria the transfer of the Chief Directorate 'Combating Organised Crime' from the Ministry of Interior to the State Agency for National Security was expected to improve its investigative capacity. However, according to law enforcement officers, the first months after the change (in October 2013) showed that old problems

³⁶⁸ According to the national expert.

had not been solved, and that new ones had emerged due to issues related to the legal framework.

A similar problem was reported by the national expert in the Czech Republic, with regard to the Organised Crime Detection Department. Here, as a result of a change in management (in 2006), many police officers were reported to be leaving the force and changes to the police career were introduced in 2008. The department suffered, as the national expert described it, 'a loss of collective memory'. Even though a new unit structure was put in place immediately after these changes, according to respondents interviewed by the national expert, in the first years after the change of management, important organised crime investigations were not handled successfully.³⁶⁹ Even in cases where reforms were implemented relatively smoothly (for example, the UK replacement of the Serious Organised Crime Agency with the National Crime Agency, in which the Serious Organised Crime Agency was actively involved), temporary disruption to the work of the agencies and officers was inevitable.

In some cases, reforms of law enforcement and specialised agencies resulted in the creation of a number of different entities, the work of which overlapped. For example, the growing number of different bodies dealing with criminal investigations (and organised crime) in Portugal was considered by respondents to be an impediment to effective working against organised crime.

In the Netherlands, the police underwent reorganisation in 2014: the 25 regional forces were replaced by a national police force, consisting of 10 regional units. It is expected that the police will work better under a single national police commissioner. Experts were not yet able to comment on how this reform will affect Dutch law enforcement capabilities against organised crime. Similarly, reform of the police in Finland started in January 2014.

In Bulgaria, the need for reform in the territorial organisation of the court system was identified by national experts. Interviewees suggested that currently there is a significant imbalance between the courts with regard to the workload of judges and prosecutors. Reform in this area could optimise the existing human resources in the system and allow more judges and prosecutors to be placed at busy courts and prosecution offices. In addition, a revision of the legal framework could narrow down the scope of criminal cases falling within the jurisdiction of specialised courts and public prosecution offices. National experts reported that the current framework allows too many cases not related to organised crime to be directed to the specialised criminal courts and prosecution offices, which unnecessarily increases their workload and prevents them from focusing on large-scale organised crime cases.

8.2.2. Potentially promising practices in the reform of national specialist agencies

While reforms in some MS were deemed disruptive, others were evaluated positively by experts and those they interviewed.

³⁶⁹ The abolishment of District Directorates in Czech Republic included the cancellation of approximately 320 director and deputy director positions and office manager positions that were part of the system (the total number of managerial positions has been reduced by 1128 positions). Ministry of the Interior of the Czech Republic (2008).

For example, in the UK respondents suggested that the introduction of the National Crime Agency allowed for shared tasking and better coordination with local police forces and other agencies. In Denmark, the national expert reported that reforms had been tailored to the specifics of work at the different levels of law enforcement and different kinds of agencies, which was perceived to be a good approach. An example of this tailored approach was that in relation to specialised prosecution units in Denmark, recent reforms had created larger units employing specialised prosecutors. However, for specialised investigative units in Denmark recent reforms had created smaller local units (such as Task Force East, Task Force West, Task Force Indbrud specializing in burglary, a National Investigation Centre and gang units in the police). The expert considered this to be a good approach – as a larger unit suited the work of the prosecution agency, whereas smaller local units suited the investigative units.

In Slovakia, the National Criminal Agency – one central office with three regional structures and its own tactical unit – provides nationwide coverage of work against organised crime groups. It was established in December 2012 as a result of the restructuring of special police units combating organised crime and corruption. Previously, Slovakia had two separate entities – the Bureau for Combating Organised Crime and the Bureau for Combating Corruption. The National Crime Agency was established in order to pool resources and expertise and thus make the fight against organised crime more effective. Moreover, concentrating the work against organised crime in the hands of this special unit prevents organised crime groups from using informants within the police to obtain knowledge on upcoming police raids, activities, etc.

Another example provided by the Slovakian national expert regards the Special Court in Slovakia dealing with crime and corruption. This Special Court handled some of the first convictions for high-ranking members of organised crime groups and became a focus of a strong counter-campaign in 2009–2010. However, it managed to preserve its position, and, according to national stakeholders, stands out as an example of independent judicial authority in Slovakia, where there have been accusations of corruption among first and second instance courts.³⁷⁰

In Austria, until ten years ago, special organised crime units existed in all State Criminal Investigation Departments, but according to national stakeholders they were not as effective as expected. As criminal organisations committed all kinds of crimes (such as theft, pick-pocketing, burglary, drug crimes, etc.), requiring different investigation methods and techniques, it was considered more efficient to have the investigators specialise in the offences carried out by criminal organisations. Accordingly, all nine departments in Austria are now divided into investigative units for ten 'crime-groups'. The coordinator for organised crime cases coordinates investigations and sets up the investigative teams.

³⁷⁰ For example Nejedly (2012). See also Vavrova, V. (2011) and European Commission (2014).

8.3. Human resources

National experts and interviewees highlighted several challenges in areas such as quality and consistency of staffing, skills, training and development and availability of resources.

8.3.1. Challenges in ensuring numbers, quality and consistency in staffing

Recruitment of police officers into specialised agencies, high staff turnover (especially of management), understaffing and staff management were areas that national experts and respondents identified as problematic (BG, EL, SI, DE, CZ, LV). For example, in Bulgaria, interviewees reported that both the Specialised Directorate 'Combating Organised Crime' and the Specialised Appellate Criminal Court were understaffed. There were vacant positions for judges and court clerks in the latter institution. The work of the court was further made difficult by the fact that some of the newly appointed judges who came from other courts had already participated in the hearing of the same cases at an earlier stage and were therefore not allowed to hear them again.

Some national experts also identified the problem of political pressures in relation to recruitment and staffing (political pressures are discussed separately below in Section 8.5).

8.3.2. Skills and development

National experts also expressed concerns about the lack of professionally trained specialists (LV) and the lack of opportunity for law enforcement officers to improve their professional qualifications (BG). National stakeholders from Latvia, Luxembourg, Greece and Romania felt that officers needed specialised training in investigating complex criminal activities such as financial crime and money laundering. In Bulgaria, interviewees suggested that additional training is needed for judges at the Specialised Criminal Court.

8.3.3. Guidance on employment after working for a national specialist agency

Another issue related to human resources raised by experts in the Czech Republic was the lack of 'service codes' regulating the rights and obligations of those who work or have worked in law enforcement organisations. The aim of such codes would be to impose restrictions on the ability of police officers from specialised police units taking up work in the commercial sector (the security industry, financial industry, etc.). Experts suggested that officers who left law enforcement continue to maintain links with their colleagues in the specialised police units and these links may be used for private benefit.

8.3.4. Potentially promising practices and examples in staffing

The Criminal Assets Bureau in Ireland was praised for adopting a multi-agency approach employing officials from the police, revenue commissioners and social

welfare. According to Irish stakeholders, the highly trained financial investigators were key to successful investigations.

The Spanish Audiencia Nacional³⁷¹ was noted for having investigative judges who are familiar with specialist investigative tools, which makes them more efficient in tackling organised crime, as they have a much higher ratio of organised crime cases compared to a regular investigating judge. These judges also form closer relationships with the public prosecutors in the specialised Fiscalías (prosecutor's offices) and with relevant police bodies.³⁷²

In response to ongoing debates in relation to privacy and data protection in France, law enforcement authorities undergo training in the field of data protection and privacy with sessions being organised at the École nationale supérieure de la police, within the French Gendarmerie and at the Ecole Nationale de la Magistrature.

Polish law enforcement agencies are developing their own technological solutions to improve analytical activities and national stakeholders suggested that 'crime analyst' has gained the status of a new profession within the police force. The Polish national expert mentioned that the police received the International Association of Law Enforcement Intelligence Analysts award for its achievements in the field of criminal analysis.

In Greece, a factor behind the perceived success of the Financial and Economic Crime Unit within the Ministry of Finance was that its personnel have educational qualifications in economics and officers have specialist knowledge and good expertise in relation to financial crime.

8.4. Constraints on resources

Perhaps not surprisingly, national specialist agencies face challenges relating to financial resources.

Some experts, especially from MS in Eastern Europe, noted the need for additional resources in organised crime investigations (SI, BG, SK, but also ES). The main problems experts discussed related to the inadequacy of personnel and material resources, including a lack of specialised questioning and identification rooms, modern forensic laboratories, secure video conference equipment, IT resources and databases. For example, in Slovakia, experts reported there were no electronic criminal case files and all evidence and materials related to a particular criminal case were only available in printed form. In Bulgaria, interviewees suggested that the Specialised Criminal Court lacked sufficient working premises (court rooms, storage space for preserving material evidence, an archive, etc.). The administrative personnel of the court (court clerks) were seen as insufficient.

³⁷¹ The Spanish Audiencia Nacional is a specialised judicial body located in Madrid which deals with terrorist cases and the criminal chamber of the Audiencia Nacional has jurisdiction over the most important cases of economic and organised crime.

³⁷² Although the Member State expert reported that this can also have downsides: law practitioners complain that the familiarity between the Audiencia Nacional judges and members of the other agencies tilts the scales in favour of the prosecution.

In Greece, experts reported that the Subdivision of organised crime of the Hellenic Police faced serious problems due to the economic crisis (such as inadequate staffing and equipment) and that in order to overcome these issues, officers work longer hours. Interviewees in France also suggested that the budget for the justice system and the police had dropped significantly in the last 5 years.

In Germany, according to national experts, understaffing in the public prosecutor services is problematic, as is having too few staff with legal expertise in other agencies that deal with organised crime issues (such as the Federal Financial Supervisory Authority). Moreover, interviewees in Germany suggested that after 9/11 state protection units that deal with terrorism were expanded at the expense of departments dealing with organised crime. Resources were needed for the state protection units and they were staffed with officers who had been trained in the organised crime departments, depriving the latter of resources.

Interviewees in Bulgaria reported that lack of resources prevented specialised (prosecution) units from using external expert examinations when necessary. In France, according to our respondents, resources were needed to maintain a centralised database and ensure its appropriate maintenance, control and regulation, as well as data protection. Keeping such databases up to date was identified as a challenge.³⁷³ The maintenance and management of centralised databases was also reported as being a problematic issue in the Netherlands.

The low salaries of law enforcement personnel were reported to be an issue of concern in Latvia and the Czech Republic. Interviewees from the latter suggested that salaries of officers working in specialist agencies should be increased, and suggested that officers with higher educational qualifications should be recruited.

Despite resources being an ongoing issue of concern for many specialised agencies working against organised crime, respondents in Lithuania mentioned that agencies working in that field had better resources compared to other specialised agencies. A national stakeholder in Germany also suggested that the German Federal Investigative Police Office, which deals with organised crime, has better financial and staff resources than the police of the federal states.

Finally, interviewees in France noted that drastic budget cuts have also led to some improvements, in particular in the rationalisation of some otherwise costly practices and in improving the collaboration between the French Police and the Gendarmerie.

8.5. Political pressures

Political pressures on national specialised agencies were discussed by several experts (BG, CZ, SK, UK). For example, according to interviews with national stakeholders in Slovakia, it is not unusual for law enforcement officers to be recruited on the basis of personal connections with the political establishment. This applied in particular to specialised agencies dealing with organised crime, which were considered to be more prestigious workplaces, and provided better pay and access to resources. Respondents from the Czech Republic also reported that regional police units have more

³⁷³ At present there is no centralised database but a number of other databases are being used in France.

experienced police officers than national specialised units, and that this could in part be explained by the fact that regional units had experienced less pressure and politically motivated changes of staff.

Improving continuity and abolishing the practice of periodically removing police management following a general election (a practice acknowledged in some MS in Eastern Europe) were considered by informants in Slovakia to be measures which could increase the effectiveness of specialised police units investigating organised crime.

A slightly different problem was discussed by experts from the Czech Republic and Bulgaria, who suggested that there was significant political pressure on some investigations undertaken by specialised law enforcement units. This, for example, manifested in frequent changes in the leadership of organised crime units. In contrast, interviewees in Slovenia suggested that the National Bureau of Investigation was well respected and considered relatively free of political pressure: it could, for example, investigate officials and members of the government. The latter is only possible if specialised agencies investigating organised crime are sufficiently independent from political decisions and appointments.

8.6. Law enforcement cooperation and coordination

Analysis of the responses to questionnaires in the 28 MS indicates that both cooperation between different law enforcement agencies and coordination of actions remain challenging issues. National experts reported that cooperation, coordination and exchange of information were affected by the different organisational cultures of the various anti-organised crime units, their management, competition for resources and fear from competition and, in some MS, the absence of shared systems for exchange of information.

8.6.1. Competition between agencies

Several national experts reported that there was still too much conflict and competition between the different police and other forces in their countries, which had adverse effects on the ability of agencies to share information and cooperate (FR, FI, HU, SI, CZ, FR, EL). Thus, in the Czech Republic respondents suggested that the relationship between the National Bureau of Investigation and other agencies was difficult. In France, experts discussed the competition between the Police and the Gendarmerie and mentioned that the customs agency had more resources than others, which created some tensions with colleagues in the Police and Gendarmerie. In Greece, the national expert reported that police officers admitted hesitation in sharing information because they did not want to 'lose' the cases, to which they had dedicated months. In Poland, interviewees noted that special services (e.g. military and civil intelligence or counterintelligence) usually prefer to obtain information from others rather than share information with law enforcement agencies. Reluctance to share information was also mentioned by interviewees in Slovenia; differential access to resources between districts was said to deepen such inequalities.

8.6.2. Risks of double working and insufficient coordination

Problems in coordination and a lack of shared intelligence databases could lead (and has led) to incidents where different units unknowingly work simultaneously on the same case (PT, HU, CZ).

In Greece there is only one Public Prosecutor specifically responsible for the fight against organised crime, and involved exclusively in organised crime cases under investigation by the Organised Crime Department of the Hellenic Police, as he is the Supervisor of this Department. The national expert from Greece suggested that this department should be involved in every organised crime case in the country and that this should be mandatory (at present cooperation is optional and national stakeholders interviewed for this study concluded that this is an obstacle to cooperation).

The heterogeneity of police forces was also reported to act as a barrier to cooperation: in Finland, each local police district has their own way of dealing with cooperation and information exchange with other districts. Different organisational culture (of different units) was also mentioned as a problem by Czech experts and in France. The national expert in France mentioned, for example, that the customs agency mostly operated alone, without collaborating with the Police or the Gendarmerie. The interviewees felt that this was due to the particular professional culture of the customs services, which gives strong priority to one-off seizures and confiscations.

8.6.3. Promising practices in coordination between national law enforcement agencies

In Portugal, the 2008 law on the organisation of criminal investigations tried to solve conflicts between police forces by placing public prosecutors in charge of investigations as the final decisionmakers. In addition, in order to improve cooperation, Portugal and some other MS have established formal institutions responsible for cooperation, such as the Coordinator Council for Criminal Investigation in Portugal, where members of different police forces have a seat. National experts reported that this offers a more practical approach to investigations as well as the possibility of setting-up national joint investigation teams for specific investigations.

In the UK, problems of coordination and information exchange were addressed through a shared tasking system within the National Crime Agency. This means that the National Crime Agency holds a complete overview in terms of intelligence relating to organised crime (collecting information from National Crime Agency sources, local police forces and other enforcement agencies). The Agency has the authority to ask police forces to take action: the Director General has the legal power to direct a Chief Constable of a local police force to work on a particular case. However, according to interviewees in the UK, this power has never yet been used, as senior staff within the National Crime Agency prefer to gain the cooperation of local forces through consent and cooperation, and therefore spend much time in relationship-building.³⁷⁴ There are many investigations into organised crimes that are undertaken outside the National Crime Agency framework in local constabularies and by non-police agencies such as Trading Standards and Revenue and Customs.

³⁷⁴ See further information in the UK case study in Chapter 10.

In Italy, the National Anti-Mafia Directorate, which is tasked with the coordination of all mafia-related investigations at the national level, was reported to be highly valued for this coordinating role, since organised crime investigations are highly complex, consist of many phases and thus may rely on more than one prosecution office. According to national experts and the stakeholders they interviewed, this coordinating role is a 'remarkable solution' that is exportable to other countries as it facilitates cooperation at the national level. Respondents in both Italy and the UK suggested that having a central coordination agency (the National Anti-Mafia Directorate and the National Crime Agency) was beneficial as it allows that agency to see the broader picture and share tasks. It also reduces the risk of competition between agencies and fosters economies of scale (see the Italian and UK case studies in chapters 9 and 10 for further information on these agencies).

The Criminal Assets Bureau in Ireland is a multi-agency body that brings together police, social welfare and revenue officials. According to a national stakeholder from Criminal Assets Bureau, a number of other countries are investigating the applicability of the CAB model. Benefits to this multi-agency approach were reported to include sharing of information across different agencies as well as a wider range of powers by virtue of having police, welfare and revenue officials working together.

The organised crime directorate in Romania works together with the specialised police force on organised crime, which falls within the structure of the national police. According to interviewees in Romania, this means that in practice there are two lines of command – the hierarchical one (police chief) and the procedural one (prosecutor) – and at times this may be detrimental to investigations. In contrast, the anticorruption directorate in Romania is a fully integrated structure that includes police officers, specialists and prosecutors under one command belonging to the head prosecutor of the anticorruption directorate. Experts in Romania suggested that this allowed for better management of cases and the prioritisation of activities. Interviewees commented that while the anticorruption directorate worked together with other law enforcement bodies and intelligence units, it was not dependent on them because it had its own group of police officers inside the institution with relevant expertise. The anticorruption directorate in Romania was suggested as a model to be exported at the European level.

In Finland, Police, Customs and Border Guards have managed to develop good cooperation practices in terms of countering organised criminal activities. According to the national expert from Finland, this has radically changed the situation, as previously each agency operated on its own and without awareness of the activities of other agencies.

In Scotland (part of the UK but with a separate legal and judicial system), the work of the Scottish Crime and Drug Enforcement Agency was identified as a good example by national stakeholders who suggested that the agency succeeded in balancing central resources with local knowledge. It combined the use of local teams that understood local communities with the work of major investigation teams based around the country. This close relationship meant that local officers could support major investigation teams by providing local cultural or geographical knowledge.

Regional intelligence centres were also suggested as a good example of multi-agency work. There are eight regional intelligence centers in Sweden situated within the police, but intelligence analysts from other agencies are also working together with the police (tax, social benefit, bailiffs, etc.). The National Criminal Police has a similar intelligence centre, but at the national level.

Finally, ad hoc cooperation initiatives were also reported to work well in practice: in Denmark, in an initiative referred to as the 'Al Capone-model', police worked together with the Tax Customs and Duties agency to confiscate valuable goods from members of organised crime groups that owed authorities money for taxes or fines. Suspects had to prove that it was plausible that the confiscated goods were purchased with legitimate earnings in order to prevent the police auctioning the goods.

8.7. Information sharing systems

8.7.1. Information systems not available to other agencies

One problematic issue reported by experts in some MS was the access of law enforcement to various national information systems and registries, which contained critical information required for prosecution – such as the tax registry, the real estate registry, etc. (CZ, EL). Experts from the Czech Republic suggested that in some cases the administrative process related to information exchange took too much time, which meant that the required information was out of date by the time it arrived. In Slovakia, the police maintain their own electronic databases of individuals, vehicles and property linked to organised criminal groups, but these are not accessible to anyone outside of the NCA. According to some interviewees, these kinds of issues hampered and slowed down investigations and prosecutions (CZ, EL, FR). There is no electronic database in Greece that allows information to be shared between different law enforcement agencies. As a result, when one agency wants to inform another about an investigation, an officer writes a report (that may be classified) which is sent to the other agency through administrative processes. Similarly, the lack of centralised databases has been underlined by interviewees in France.

8.7.2. Data protection issues

Interviewees in Denmark highlighted a particular issue in relation to data protection (similar issues were also raised by interviewees from France). They suggested that the tax authority in Denmark cooperates very well with the police but at the same time, the tax authority has access to vast amounts of information about Danish citizens, and interviewees believed that due to this positive collaboration the police have easy access to information which would otherwise not be allowed (as a citizen you are not required to provide police with information that may incriminate you). Interviewees suggested that the legal issues around this problem are yet to be resolved in Denmark.

8.7.3. Potentially promising practices and examples in information exchange

Some MS have successfully overcome problems of information exchange by devising shared databases and platforms. For example:

- In Estonia, Police and Border guards as well as the Tax and Customs Board store their intelligence data in the same database and there is the possibility of sharing information when needed.
- In Austria, there are shared databases and also discussion platforms through which officers from different agencies can exchange information and discuss issues relevant to investigations.
- In Finland, information and intelligence is shared over a joint information system maintained by the National Bureau of Investigation.
- In Portugal, an 'interoperability platform of criminal information' was recently introduced. It is a tool which will be available for the use of several police forces as well as public prosecutors. Experts reported that the system was in a test phase and was expected to be an effective instrument for information gathering and sharing, allowing for the automated linking of different databases and systems of those entities, public records and other public services.
- In Italy, the information system of the Anti-Mafia Directorate gathers, manages and shares information on all investigations and proceedings on organised crime conducted at the national level. This system was praised by national experts for contributing to the effectiveness of the Anti-Mafia Directorate.
- In the UK, the Police National Computer is a national information database available to all police forces and law enforcement agencies in England, Scotland, Wales, Northern Ireland, the Isle of Man and the Channel Islands.³⁷⁵
- In Lithuania there is a common intelligence data system available to law enforcement institutions, prosecution and judges.
- German national experts emphasised the rapid and effective exchange of information as a result of (among other factors) liaison officers working in different police units as well as the financial intelligence units.
- Greek experts noted that the Financial and Economic Crime Unit has direct access to tax data, which is useful information during crime investigations.

Finally, national experts also acknowledged that exchange of information was often based on informal contacts between police officers across different units.

8.8. International cooperation

Few countries have dedicated agencies dealing exclusively with international and cross-border cooperation. In most cases, specialist agencies have international cooperation as part of their mandate, and some have units or divisions specialising in

³⁷⁵ UK Home Office (2014c).

international matters and mutual legal assistance (see Appendix B). In Germany, for example, the Federal Criminal Police Office coordinates national efforts to combat organised crime, facilitates international information exchange for the Länder (federal states) police forces and acts as the central point for national and international cooperation. Agencies in other MS also have dedicated units for international cooperation, for example:

- Central Bureau of Investigation in Poland has an autonomous unit for international cooperation.
- In Austria, the Federal Criminal Investigation Department has a unit that deals with organised crime and cross-border cooperation.
- In France, the Direction Centrale de la Police Judiciaire has a specialised international cooperation branch. This department provides technical assistance in cases that require international cooperation. For the purposes of European cooperation it has significantly expanded its network of internal security attachés in Europe. The department hosts the Europol and Interpol units (see Appendix B for more information).
- In Italy, the National Anti-Mafia Directorate has an 'International Cooperation Office' (see the Italian case study in Chapter 9 for more detailed information).
- With the creation of National Crime Agency in the UK, its Border Policing Command became responsible for international cooperation on investigations against serious and organised crime.

Additionally, in most MS border guards and customs agencies cooperate with neighbouring countries (for example, through initiatives such as the Southeast European Law Enforcement Centre)³⁷⁶ and with EU agencies, such as Frontex.

There are various issues relevant to cross-border cooperation in investigations and the use of special investigative tools. These issues have been discussed in depth in Chapter 7 of this report and also in the Italian and UK case studies in chapters 9 and 10. However, there are broader issues in relation to law enforcement cooperation between MS that came to our attention during the course of our research and which are addressed in the following sub-sections.

8.8.1. Different legal cultures and language

One of the main problems discussed by the national stakeholders (SE, HU, UK) and EU experts is the different underlying legal cultures and traditions of MS. Whether the police or a prosecutor initiates an investigation differs between countries. Accordingly, officers sometimes felt confused regarding who they would need to contact first for a particular investigation to progress. The different legal traditions also limit possibilities for the exchange of experiences, since the specific legal tools and methods used in each country may differ or, if similar, may be used in different ways. Also, the

³⁷⁶ SELEC is a law enforcement organisation bringing together police and customs authorities from 13 countries: Albania, Bosnia and Herzegovina, The Former Yugoslav Republic of Macedonia, Croatia, Montenegro, Serbia, Bulgaria, Greece, Hungary, Romania, Slovenia, Turkey and Moldova. See Regional Cooperation Council (2015).

different 'cultures' (understood as ways of working and working styles) presented difficulties.

Some of these problems are illustrated by the following words of a Danish law enforcement officer:

The first Joint Investigation Team [JIT] in Denmark included collaboration with colleagues from Sweden. The team was with Sweden and concerned a case where a group of Lithuanians in Sweden distributed ready-made burglary plans to Danish criminals. I think it is a very efficient investigative tool; in particular when we work with countries that are comparable to us like Sweden, Germany, and England. We had a few less than successful JITs with southern European countries (...). There are reasons for this. Firstly, because our legal systems are very different. Secondly, we found that their (giving an example with a particular country) justice administration was close to impossible for us to understand. They have four or five different prosecutorial units, some of them even have internal strife between them. Secondly, the judges also have investigative functions. It was hard for us to work with them. There is a cultural difference... We have had JITs with the Baltic countries which would have been hard without the [financial] support because we need interpreters for everything.

Another example, discussed by a Danish law enforcement officer, was that Danish police could follow perpetrators for long distances on Swedish territory, but the Swedish police would not be able to do the same in Denmark because of legal restrictions. Similar arrangements between Norway and Finland work both ways, allowing hot pursuit 3 kilometres into Sweden and 7 kilometres into Norway (FI). More examples in relation to the challenges of cross-border collaboration are discussed in Chapter 7 of this report.

Language also remains a problem. Respondents from Europol reported that sometimes it can take up to 6 months to get translation of documents.³⁷⁷

8.8.2. Potentially promising practices in international cooperation

Both EU and national experts suggested that international cooperation developed well where law enforcement officials were able to establish not only good professional contacts but also good personal contacts. From this perspective, bilateral or multilateral socialisation campaigns were considered to be potentially more effective than even the formal Europol system of exchange of information. International conferences, workshops and cross-border training were reported as beneficial in developing such contacts.

³⁷⁷ This is not a new problem. In 1998, Ingleton explored the extent to which the fact that different police forces across the EU spoke different languages created difficulties. His research showed that a quarter of UK police forces admitted having communication problems in international law enforcement cooperation, but also thought that these problems could be ascribed to differences in the legal systems and procedures, rather than to differences in languages. More than a quarter of the responding forces, however, did foresee the need for effective communication and three additional police forces stressed the need for a comprehensive understanding of European policing systems. Although this research is almost two decades old, it shows the enduring nature of such problems. Ingleton (1998), 52.

Specific bilateral cooperation was considered to be useful too (by Bulgarian prosecutors, and mentioned also by experts from the UK and Finland). Swedish experts pointed out that police forces that recurrently cooperate with foreign agencies and colleagues, and therefore are familiar with such cooperation and have the relevant contacts, did not face many problems (similar opinion was shared by UK respondents). Conversely, they thought that units and agencies with less experience in cross-border collaboration struggled the most. At the same time, experts suggested that official requests, even to countries like the UK (generally considered to be efficient) were slow (CZ).

Initiatives that involved close cooperation with neighbouring countries or cooperation around specific issues that are priorities for the countries involved were considered very useful too (for example MAOC-N).³⁷⁸ Another example is the centre for information sharing at the EUREGIO level,³⁷⁹ called EPIC, which is designed to foster cooperation between the police services of the various regions that form the EUREGIO.

Irish experts noted that a good example of international cooperation was the case of Dylan Creaven, where Criminal Assets Bureau worked closely with HM Revenue and Customs.³⁸⁰ Criminal Assets Bureau in Ireland also works with other Asset Recovery Agencies and there are different forums (for example Camden Asset Recovery Inter-Agency Network)³⁸¹ for bringing matters forward or facilitating discussion with agencies and officers from other jurisdictions. The Criminal Assets Bureau interviewee told national experts that as recently as five years ago there were still difficulties in finding the right person to contact in other jurisdictions and it was not always possible to tell who was tasked with a particular area (relating to asset recovery). According to the interviewee this has changed and there is a greater level of personal contact (for which forums for discussing recovery issues helped) and this helps successful asset recovery.

8.9. Key findings

The majority of MS have special police units or dedicated law enforcement agencies tasked with fighting organised crime in their country. This includes Denmark and Sweden who, as explained in Chapter 4 of this report, do not have a self-standing offence of participation in a criminal organisation.

Some MS have had units dedicated to fighting organised crime for a long time. Key features of national specialist agencies and differences between MS are as follows:

- **Number of agencies and degree of specialisation:** In the majority of MS there is more than one agency working on organised crime: some are very specialised (like the Public Prosecutors Office for Drug Trafficking in Spain, for example, or the Department working against Human Trafficking

³⁷⁸ The Maritime Analysis and Operations Centre (Narcotics) is a platform for cooperation between its Parties and Observers in the fight against illicit drug trafficking.

³⁷⁹ EUREGIO is a European Region covering parts of the Dutch-German Border (Köln District – Germany, Limburg – The Netherlands, Provinces of Liège and Limburg and German Community – Belgium).

³⁸⁰ For more information see Leigh & Cobain (2006).

³⁸¹ See Europol (2015).

within the Greek Police)³⁸² and others cover more than one field of expertise. Specialist financial investigation units have been established in most countries.

- **Remit regarding intelligence and investigation:** Some agencies and units in MS only deal with intelligence and analysis, while others also carry out investigations and operational work.
- **Central, regional and local specialist agencies:** Some MS have both a central agency that oversees and coordinates the work against organised crime (for example Poland, Italy and the UK) and units within the local and regional police forces (for example Regional Organised Crime Units in the UK). Others have a special unit within the police which performs a similar function (for example, the Subdivision of Organised Crime of Hellenic Police based in Athens and Thessaloniki with four specialised departments).
- **International cooperation:** In most cases, specialist agencies have international cooperation as part of their mandate, and some also have units or divisions specialising in international matters and mutual legal assistance.
- **Working with other national authorities:** In most MS, border guards, coastal guards and customs also work on organised crime cases in collaboration with the police and specialised agencies and in collaboration with neighbouring countries and other MS.

Common challenges facing national specialist agencies, as reported by MS experts, included:

- Willingness to cooperate in some cases.
- Problems of coordination and information exchange.
- Limited material resources.
- Insufficient staff training.
- Lack of centralised databases.
- Recruitment of police officers into specialised agencies, high staff turnover (especially of management), understaffing and staff management.
- Political pressures faced by specialist agencies, which had repercussions in relation to recruitment and staffing.

National agencies dealing with organised crime were reported to have been subject to ongoing reforms in a number of MS. In some cases, such reforms were considered disruptive and problematic by national experts and the stakeholders they interviewed. In other cases, reforms were evaluated positively, especially when they improved coordination and collaboration and helped to decrease tensions and competition between different units working against organised crime.

8.10. Recommendations

Some of the following recommendations were made explicitly by MS experts, while others are suggested by the research team on the basis of analysis of the data collected:

³⁸² Fiscalia especializada antidroga.

- Improving processes of transition between old and new specialist agencies and ensuring reforms of specialist agencies are well-designed and orchestrated (the research team).
- Improving cooperation between national specialist agencies and other law enforcement units through central coordination, creation of specialist units or clear division of tasks and responsibilities (national experts from HR, BG, LT, BE, EL, DE, PT, ES, RO, LU, EE, UK).
- Improving national agencies accountability (mentioned by experts from Eastern European countries; experts from Spain and the UK mentioned the need for improved visibility in relation to transparency and accountability).
- Developing better information management and creating and maintaining centralised databases in order to facilitate information exchange (commonly mentioned, for example by experts from CZ, EL, PT, SK, SE, SI, RO).
- Improving management and sharing of resources (in particular when cybercrime investigations are concerned) (mentioned by experts in EL, BG, CZ, NL, DE, MT, LV).
- Providing ongoing, specialist training, in particular in relation to financial and cybercrime investigations and legal training (to assist cross-border and transnational cases) (discussed by experts from SK, SI, DE, CZ, BG, UK, RO, LV).
- Increasing opportunities for international training and personnel exchanges in order to facilitate formal and informal links between law enforcement officers from different MS and to increase awareness regarding other MS' legislation and practices in the fight against organised crime (the research team makes this recommendation based on experts' views that informal links are beneficial for cooperation and that it is useful for officers to know more about the legislation/procedures in other MS).

PART 5: CASE STUDIES

9. The Italian case study³⁸³

9.1. Introduction

This chapter presents the results of the Italian case study. It contributes to objectives 4 and 5 of the Study, and in particular to the identification of:

- Good practices in national legal and investigative tools for the fight against organised crime, as well as limits in their application;
- Good practices in the role/added value of national specialised law enforcement agencies in implementing criminal law and investigative tools.

More specifically, this Italian case study explores:

- Italian organised crime related issues, in terms of historical evolution, structure and organisation, criminal activities as well as the State and law enforcement response developed at the national level, to provide background knowledge to understand the specificities of the Italian situation. This is dealt with in par. 1;
- The structure and role of the Italian National Anti-Mafia Directorate ('Direzione Nazionale Antimafia', DNA) in the fight against organised crime. This is the national anti-mafia prosecutor office in Italy, whose main aim is to coordinate and support the 26 Anti-Mafia District Directorates ('Direzioni Distrettuali Anti-Mafia', DDA), i.e. the local district anti-mafia prosecutor offices. This will make it possible to understand a) strengths and weaknesses of this specialised prosecution system, also with reference to cross-border cooperation and b) to provide some inputs, from a national perspective, on the exportability to other MS and/or to the EU level. This is dealt with in par. 2;
- Selected Italian legal tools (anti-mafia solutions), i.e. a) Article 416bis of the Italian criminal code (c.c.), on 'Mafia-type associations, including foreign

³⁸³ With a joint research effort under the supervision of Andrea Di Nicola (scientific coordinator of eCrime, University of Trento), Fiamma Terenghi (senior researcher at eCrime) and Barbara Vettori (Catholic University of Milan, member of the Advisory Board), was written by them with Andrea Cauduro (senior researcher at eCrime), Serena Bressan, Fabrizio Costantino (researchers at eCrime), Gabriele Baratto (junior researcher at eCrime). Authorship is as follows: Andrea Di Nicola 9.3 (except *Historical background; Structure and organization*); Fiamma Terenghi 9.2, 9.4.1 (*Historical background; Application of 416 bis c.c. at glance: some statistics; Use of the mafia-type association offence in cross-border cooperation; Inputs to exportability*); Barbara Vettori 9.1, 9.4.1 (*Strengths and weaknesses of the Mafia-type association offence*); Andrea Cauduro 9.5; Serena Bressan 9.3.1 (*Historical background; Structure and organisation*); 9.4.2 (*Scope, Definition, Evolution of 41 bis with regard to European Human Rights Court sentences*); Fabrizio Costantino 9.4.2 (*Historical background; Statistics on the 'hard prison regime'; Strengths and weaknesses of the 'hard prison regime'; Inputs to exportability of the 'hard prison regime'*); Gabriele Baratto 9.4.1 (*Scope; Definition; Penalties; Judicial extensive interpretation of the scope of Article 416 bis c.c.*).

ones'; and b) Article 41bis of the Italian Prison Administration Act (p.a.a.) n. 354 of 26 July 1975 and subsequent amendments thereto (the so-called 'hard prison regime'), in order to understand a) their strengths and weaknesses in combating organised crime, also with reference to cross-border cooperation (when relevant) and b) to provide some inputs, from a national perspective, on the exportability to other MS. This is dealt with in par. 3;

- The Italian investigative tool 'interception of communications' (regulated under article 266 (and following) of the Italian criminal procedural code (c.p.c.) and related prescriptions) used in the fight against organised crime in Italy, also with reference to cross-border cooperation, in order to understand a) strengths and weaknesses; b) to provide some inputs, from a national perspective, on the exportability to other MS of some regulation and/or practices of the Italian system that make this tool particularly effective. This is dealt with in par. 4;

In order to gather information presented in this Chapter, the following methodology was applied: 1) desk research of available secondary sources; 2) a focus group with a selected sample of Deputy National Anti-Mafia Prosecutors of the DNA, held at the DNA Headquarters in Rome. This latter technique gathers relevant information from key observers/experts by asking them questions in a group where these key observers/experts are free to interact among each other. Participants are asked by researchers their opinions, beliefs, perceptions towards a certain issue.

More specifically, the assessment of strengths and weaknesses and the inputs on exportability expressed in this document are mainly based on the results of the focus group, that is on the opinions and judgments of the DNA prosecutors. The focus group it is particularly useful, in fact, when dealing with topics strictly related to daily work experiences. This technique and the involvement of DNA anti-mafia prosecutors were decided, in accordance with the Commission services, since they were considered the most appropriate to grasp the specificities of the Italian experience in prosecuting mafia offences. The DNA prosecutors, in fact, are the more adapt to express judgments and opinions on the overall anti-mafia systems since they detain an unique and comprehensive picture both of the overall anti-mafia prosecutorial activity throughout the Italian territory and of the anti-mafia criminal and criminal procedure legislation. Each of the DNA prosecutors daily oversees the prosecution activities of 2 or 3 of the 26 Italian Antimafia District Directorates and of specific organised criminal activities or sectors (see section 2.1). They deal with all aspects of organised crime and represent the most specialized and skilful anti-mafia public prosecutors in the field with long standing careers. Of course, the decision about using a focus group was taken also being aware of the limits of this method, among which: difficulties in generalisation from results; participants may be influenced by the context or by the moderator/s; findings may be influenced by the researcher/s own interpretation of the group's discussion. Of course, strategies to mitigate these problems were adopted.

The following 5 Deputy National Anti-Mafia Prosecutors (in alphabetical order; hereinafter also referred to as national experts or DNA prosecutors), of the 20 belonging to this office, took part in the focus group:

- Carlo Caponcello: Liaison prosecutor with the Catania Anti-Mafia District Directorate and with Germany; expert of the DNA in drug trafficking;
- Gianfranco Donadio: Liaison prosecutor with the Salerno Anti-Mafia District Directorate; DNA expert in subversion of constitutional law and terrorism;
- Antonio Patrono: Liaison prosecutor with the Turin Anti-Mafia District Directorate; DNA expert in fighting OC infiltration into public administration and public procurements;
- Leonida Primicerio: Liaison prosecutor with the Anti-Mafia District Directorates of Ancona, Messina and Perugia; DNA expert in money laundering and confiscation;
- Filippo Spiezia: Liaison prosecutor with the Anti-Mafia District Directorates of Cagliari, Campobasso, and Milan; Director of the DNA International Cooperation Office; DNA expert in human trafficking and smuggling of migrants.

9.2. Italian organised crime groups: evolution, main features and criminal activities

9.2.1. Historical background: transformation and adaptation of Italian organised crime groups

Italian organised crime, named with the most common and used term Italian Mafias, is composed of four historical organised crime groups (OCGs) situated in the South of Italy: Sicilian Cosa Nostra, Calabrian 'Ndrangheta (Society of the Men of Honour), Neapolitan Camorra and Apulian Organised Crime.³⁸⁴

Traditionally, Cosa Nostra (Our Thing) and the 'Ndrangheta (Society of the Men of Honour) represent the two largest and most steady criminal organisations, composed of about a hundred of Mafia groups. In particular, Cosa Nostra set in the Sicily region, 'tend to have a pyramidal organisation where relationships of vertical integration and a relatively unitary structure predominate'.³⁸⁵ On the opposite, 'Ndrangheta, which is originally from the Calabria region, has always presented an horizontal organisational structure (i.e. individual groups detain more independence) with a centralized coordination. Both 'Cosa Nostra and the 'Ndrangheta possess the distinguishing trait of organisations: independent government bodies that control the internal life of each associated family, different from the structure of authority belonging to their members' biological families. From the 50s, in Cosa Nostra first and secondly in the 'Ndrangheta (from the 90s), super-ordinate (i.e. commissions) bodies were funded in charge of regulating internal conflicts and recognizing the membership of individuals and groups. The presidents of these bodies are members elected by the representatives of the clans for a limited period of time, acting a symbolic and representative role. Indeed, more than to strongmen, this position is attributed to individuals considered wise, able to maintain traditions, mediate between clans and prevent possible conflicts. Rituals of affiliations impose on members a 'veritable status

³⁸⁴ Forgione (2009); Veltri & Laudati (2009); Naím (2005); Europol (2013a); Fijnaut & Paoli (2007), 263–302; Siegel & Nelsen (2008), 15–28; Paoli (2007).

³⁸⁵ Sciarrone & Storti (2014), 40.

contract', that is a new permanent identity (i.e. becoming a man of honour) based on secrecy (i.e. duty of silence in regard to composition, action and strategies of the group) and ties of brotherhood (i.e. act of fraternisation relying on reciprocity and mutual support without limits, also in criminal activities).³⁸⁶

More fragmented in structure are Camorra clans presenting the typical features of gangsterism. Indeed, Camorra, widespread within the region of Campania, is an horizontal cluster of families and clans usually associated in alliances, or in cartels when shared interests in criminal activities are present, and being characterised by a high degree of volatility in regard to their internal and external relationships. Differently from Cosa Nostra and 'Ndrangheta, and 'despite their extensive infiltration of the legitimate economy and the public administration contemporary Camorra groups have not succeeded in establishing stable coordination mechanisms. [...] As a result Campania [faced] the highest rate of murders and violent crime in all of Italy for more than a decade'.³⁸⁷ Similarly, Apulian organised crime has an heterogeneous structure pursuing different strategies at local level in regard to the places of settlement. The development of this Italian organised crime group is dated back to the 70s-80s, when neighbouring 'Ndrangheta and Camorra clans colonised the region in virtue of their interest in tobacco smuggling. In the following period, native crime groups and gangs spread in different areas of Apulia.³⁸⁸ Nowadays, the Sacra Corona Unita and the Società Foggiana are active in the provinces of Foggia and Salento and share some typical Mafia features. The former, in particular, is a consortium made of 10 to 15 criminal groups resembling rituals derived from 'Ndrangheta, although without the same cohesion and stability.³⁸⁹

Nevertheless, among all the Italian Mafias, Cosa Nostra and the 'Ndrangheta have played (especially Cosa Nostra), a crucial role in shaping the actual Italian organised crime scenario as well as the State response to their threat due to the extensive infiltration into the social, political and economic segments of the country. Since the early 1990s, Cosa Nostra and 'Ndrangheta families have gained an increasing percentage of their income from entrepreneurial activities due to the exercise of regional political domination. In the past time as well as at present, intimidation and collusion with corrupt politicians, allow the control on the market of construction and public works; while extortion and racketeering activities represent the means to control native communities. 'Their peculiarity lies in their will to exercise political power and their interest in exercising sovereign control over the people in their communities'.³⁹⁰ In order to conquer and enlarge their power a season of 'mafia terror' has characterised especially the evolution of certain Italian Mafias. From the beginning of the '80s Corleonesi clan headed by Salvatore Riina and Bernardo Provenzano of

³⁸⁶ Savatteri (2012); Paoli (2007).

³⁸⁷ Paoli (2007), 867.

³⁸⁸ Europol (2013a); Paoli (2007).

³⁸⁹ The etymology of the name Sacra Corona Unita has been explained by a Pentito as follows: 'The organisation is Holy (Sacra) because the Sacra Corona Unita, if you read its statutes, when it meets or affiliates, someone consecrates and baptizes (like a priest during religious functions); Crown (Corona), because it is like the crown (of beads), that of the Rosary, the kind used in church to do the Via Crucis, side by side; United (Unita) because we have to be united as the links of a chain'. Europol (2013a), 13.

³⁹⁰ Siegel & Nelsen (2008), 21.

Sicilian Cosa Nostra, after having defeated the other competitive clans, imposed an absolutistic and violent regime of power within the criminal organisation as well as against communities and governmental institutions. Numerous homicides of political and judicial representatives were committed in the attempt to defeat their counteraction, and in turn the State response consisted in the enforcement of both legal tools and dedicated investigation services. In particular, the homicides perpetrated against Carlo Alberto Dalla Chiesa (General-Prefect of Palermo) and Honourable Pio La Torre, represented the first cruel episodes leading to the introduction of a special offence for mafia-type association, Article 416bis c.c. and 41bis p.a.a. (see par. 3). At the same time, the homicide of judge Rosario Livatino in the '90s, together with other murders in Sicily, Calabria and Campania, acted as push factors for a meeting among prosecutors working in that regions and governmental representatives, elicited by the President of the Italian Republic via the Vice president of Supreme Council of Magistrates (CSM). It is in this occasion that, the idea of judge Giovanni Falcone to introduce an investigative model of collaboration and coordination among the local public prosecutors offices was framed and expressed clearly.³⁹¹ Within a year indeed the Anti-Mafia National Directorate and the Anti-Mafia District Directorates together with the Anti-Mafia Investigative Directorate ('Direzione Investigativa Anti-Mafia', hereinafter also referred to as DIA) were finally set up, respectively, with Law Decree n. 367 of 20 November 1991, converted in Law n. 8 of 20 January 1992, and with Law Decree n. 345 of 29 October 1991, converted in Law n. 410 of 30 December 1991. These major institutional innovations were also introduced before the Capaci and Via D'amelio slaughters in which judge Giovanni Falcone (23 of May 1992) and judge Paolo Borsellino were killed (19 July 1992).

This State response actually weakened the strength and power of Cosa Nostra above all and to a lesser extent of 'Ndrangheta as well (i.e. investigations and prosecutions leading to the confiscation of numerous valuable assets and to the increase in the number of members and affiliates that decided to collaborate with the judicial system) and as a consequence both organised crime groups reorganised their structure and strategy. No more crimes raising social alarm (e.g. murders of public servants) were permitted, instead the focus turned to entrepreneurial activities, and more in general invisibility and non-permeability to law enforcement were pursued. In particular, 'to ensure cohesion and reduce the number of potential defectors Provenzano [...] also envisaged and implemented a fully-fledged plan'³⁹² based on three main directives: 1. Restore traditional rules and codes that ensured to remain unnoticed; 2. Definite separation between the top level of the organisation and the bottom-level; 3. Increase the cultural and social standards of members and affiliates, also recruiting individuals with a good social position and high level of education.

³⁹¹ Before DNA and DDA, complex and challenging investigations on Italian Mafias, transcending the limits of judicial districts, were handled by offices of the Minister of Interior working in coordination.

³⁹² Paoli (2007), 865.

9.2.2. Contemporary structure and organisation of Italian organised crimes: main features and criminal activities

Nowadays it is possible to identify common features among Italian Mafias, which are on one side the result of historical, social and political factors pertaining to the Italian context (as shown above) and on the other of transformations occurred at global level (i.e. social and economic changes). Indeed, an 'ideal type of [Italian] Mafia' has been suggested that includes common characteristics and whose presence within Italian organised crime groups may vary to a certain degree:

- Individuals that belong to Italian organised crime groups create a secret society based on loyalty bonds, a clear and defined hierarchy of control, aimed at pursuing reputation, profits and security;
- The power is mainly obtained and exercised through the use of violence, intimidation, and 'exploiting traditional cultural codes and manipulating social relationships in order to establish mutual exchanges in political and economic circles. Thus what distinguishes Mafiosi is their capacity of accumulating social capital';
- The organisational structure corresponds to a network in which members are tied internally by strong bonds and externally by weak bonds. Links among members of the network can be either closer or looser depending on cases, allowing more independence to some parts of the organisation;
- The organisational form consists in two dimensions combined in different ways. An 'organisation for the control of the territory of the local societies in which [they are] embedded', that is an internal system of norms and rules, an apparatus useful to guarantee respect and domination, and the ability to make use of violence, physical compulsion to dominate local territories. An 'organisation for illicit trafficking' where Italian organised crime groups operate like enterprises between legal and illegal markets.³⁹³

Italian organised crime groups, due especially to their organisational characteristics, possess means both to deeply root within local communities and expand to non traditional areas (North part of the country and abroad).³⁹⁴ As a consequence, their criminal activities can be differentiated (although not *tout court*) in more local and more transnational crimes. The former, still aimed at gaining and maintaining power, consist in racketeering, extortion, usury, control of construction and waste industry, corruption of politicians; while the latter, profit-oriented in nature, regard mainly drug trafficking, counterfeiting of goods, trafficking of waste/toxic waste, money laundering. 'Italian OCGs today are the only EU economic competitors that suffer the opposite problem of all entrepreneurs: too much cash money and not enough possibilities of reinvest'.³⁹⁵ The huge availability of capital in the hand of Italian organised crime groups combined with the economic crisis facilitate infiltrations in the legal economy. Sophisticated money laundering schemes coupled with investments in

³⁹³ Sciarrone & Storti (2014), 39.

³⁹⁴ Campana (2011).

³⁹⁵ Europol (2013a), 15.

different legal sectors render these groups deceitful competitors, since they are able to operate even loosing and compromising the fundamental principles of free market.

The 'Ndrangheta, for example, represents the most threatening Italian Mafia in Italy but also in other European and extra European countries such as Germany, Spain, the Netherlands, France, Belgium, Switzerland, Canada, USA, Colombia and Australia. The rapid expansion of this group resides in different factors. First of all, the solidity, versatility and adaptability of its structure that maintains the power in the place of origin and, at the same time, rely on affiliates almost all around the world strictly interconnected and inserted in the essential structure. Second, the silent *modus operandi* that allows to lessen law enforcement counteraction. Third, the huge financial availability together with sophisticated money laundering techniques enabling to buy a high number of legitimate businesses, also used for criminal purposes. Cocaine trafficking, where cooperation with other Italian organised crime groups is common (Camorra and Cosa Nostra, the latter more in a subordinate position),³⁹⁶ represents the main criminal market in which 'Ndrangheta is involved both in Italy and at the international level. Notwithstanding this, in more recent times, the position of quasi-monopoly acquired within the national territory has started to be challenged by the increasing arrival and settlement of foreign organised crime groups.³⁹⁷

9.2.3. Foreign criminal groups operating in Italy

The presence of foreign criminal groups in Italy, due to the immigration flows and the internalisation of criminal activities started in the '80s, has assumed more and more visibility and predominance especially in the last ten years. In particular, internalisation was fostered during the '90s by the 'European integration process and the abolition of border controls, [...] the radical transformations that occurred in central and eastern Europe',³⁹⁸ and by law enforcement counteraction of Cosa Nostra and 'Ndrangheta. Empty spaces within local criminal markets left uncontrolled (especially in the Centre and North part of the country) were filled by a variety of foreign criminal groups. Compared to the Italian Mafias, these groups are profit-oriented and opportunity-based, presenting a less organised and centralised structure. Paoli has defined these groups as 'crews' addressing the inter-changeability of roles and tasks among members, as well as the overlapping of roles within different criminal enterprises.³⁹⁹

The main active foreign crime groups in Italy are Albanians, Rumanians, Chinese, North Africans, Nigerians and South Americans. As for their involvement in criminal markets within the national territory, differences have been underlined. For example, the main trafficking activity of Nigerian, Albanian and Chinese crime groups is

³⁹⁶ State counteraction against Cosa Nostra has indeed lessened the involvement of this Italian organised crime group in some criminal markets. But as a consequence the 'Ndrangheta has filled the gap. From the 1970s Cosa Nostra was the undisclosed 'owner' of heroin trafficking in Italy while the 'Ndrangheta was involved in the less lucrative cocaine market. When heroin demand declined and that of cocaine was raised, the 'Ndrangheta was able to exploit its direct contacts in the producing countries as well as established routes for importation. Europol (2013a).

³⁹⁷ Spagnolo (2010); Varese (2006); Calderoni (2012); Forgione (2009).

³⁹⁸ Paoli (2007), 869.

³⁹⁹ Paoli (2007), 869.

exploitation of prostitution. Albanian crime groups similarly to North Africans are also engaged in drug trafficking as well as South Americans in virtue of their contacts with the producing countries especially for cocaine. Again, Chinese crime groups are also involved in a variety of criminal activities among which waste trafficking, and counterfeiting of goods. At the same time, Chinese crime groups proved to be able to infiltrate into the national legal economy managing construction enterprises, commercial activities and import-export companies. The latter, in particular, are used both to launder profits and commit crimes. Finally, all of these foreign crime groups share a criminal activity which is human smuggling and trafficking in human beings.⁴⁰⁰

9.3. The Italian National Anti-Mafia Directorate in the fight against organised crime

The DNA was originally conceived to be the coordinating office for investigation/prosecution on mafia-type criminal associations carried out by the 26 Anti-Mafia District Directorates⁴⁰¹ in the Italian territory. However, in the past few years, due to the expertise and effectiveness gained in the fight against Italian Mafias (i.e. Cosa Nostra, 'Ndrangheta, Camorra, Sacra Corona Unita), the national legislation has expanded the coordinating role of DNA in order to cover also:

- 'Foreign' (i.e. non Italian) mafia-type criminal associations operating in Italy and/or other criminal groups;
- Some specific and serious crimes usually perpetrated by criminal organisations and/or criminal groups, although such offences can be committed by single offenders as well, not connected to any kind of criminal organisation/criminal group (Italian or non-Italian).⁴⁰²

This paragraph deals with 1) the scope, historical and legal background, organisation and functions of DNA; 2) some statistics on the activities of DNA; 3) its strengths and

⁴⁰⁰ Barbagli & Colombo (2011).

⁴⁰¹ A detailed view of the organisational model of the DNA/DDA is presented below in Section 2.1.

⁴⁰² In more detail, under Art. 51(3bis) c.p.c. the offences (committed or attempted) that fall within the mandate of DDA and DNA, and shall be investigated/prosecuted by the DDA under the coordination of DNA, are:

- a) criminal group set up for the commission of reduction into slavery/servitude, human trafficking, slave trade (Art. 416(6) c.c.);
- b) criminal group set up for the commission of child prostitution, child pornography, possession of child pornographic material, possession of virtual child pornography (i.e. materials depicting non-real persons assembled using pre-existing child pornographic material), tourism aimed at the exploitation of child prostitution, rape of a minor, sexual acts with a minor under 14 (or under 16 if the author is a relative/parent, corruption of a minor (i.e. committing sexual acts in front of a minor with the aim of making him/her assist the acts), rape committed by two or more persons against a minor, soliciting of a minor (Art. 416(7) c.c.);
- c) criminal group set up for the commission of counterfeiting (Art. 473 c.c.);
- d) criminal group set up for the introduction in the national territory of counterfeited goods (Art. 474 c.c.);
- e) reduction into slavery/servitude (Art. 600 c.c.);
- f) human trafficking (Art. 601 c.c.);
- g) slave trade (Art. 602 c.c.);
- h) mafia-type associations, including foreign ones (Art. 416 bis c.c.);
- i) kidnapping for ransom (Art. 630 c.c.) perpetrated using the 'mafia method' as explained in Art. 416 bis c.c. or perpetrated to facilitate the activities of mafia-type associations;
- e) criminal group set up for drug smuggling (Art. 74 Decree of the President of the Republic, n. 309/1990);
- f) criminal group set up for cigarette smuggling (Art. 291 quater Decree of the President of the Republic, n. 43/1973);
- g) criminal group set up for illicit trafficking of waste.

weaknesses, also with reference to cross-border cooperation; 4) some inputs, from a national perspective, on its exportability to other MS and/or to the EU level.

9.3.1. The DNA/DDA system

Historical background

One of the most relevant limits in the effectiveness of the Italian criminal response against organised crime was historically represented (in the 1970s and 1980s) by the absence, or the occasional nature, of the coordination among police forces and among the prosecutor's offices. This notwithstanding the fact that, in Italy, at least the most powerful endogenous criminal groups were progressively expanding their operative sphere in the country and beyond, often in connection with similar foreign criminal groups. It was a natural consequence, therefore, in front of such a criminal phenomenon, that law enforcement and prosecutorial bodies shaped themselves on its features so as to be able to effectively combat it. The action of each single law enforcement body, prosecutorial office and prosecutor was completely inadequate compared to the need for gathering and analysing information and evidence for fighting these criminal associations.

In the early 1980s, informal specialised pools of prosecutors inside some Italian local prosecutor's offices with specific expertise in organised crime offences were set up. These pools were aimed at sharing knowledge, information and documentation on handled organised crime cases to avoid concentration of specialisation and knowledge on single prosecutors. This concentration, in fact, was both ineffective (i.e. some prosecutors could have worked on the same or on 'connected' cases, without being aware and without a coherent direction) and risky (i.e. if one key prosecutor was killed in a mafia attack, all his work would have run the risk of being lost). In 1982 the informal Anti-Mafia Pool composed of the magistrates Rocco Chinnici, Giovanni Falcone, Paolo Borsellino, and Giuseppe Di Lello⁴⁰³ was founded within the local prosecutor's office in Palermo. This team of investigating magistrates deeply involved in counteracting the Sicilian Cosa Nostra well understood the added value to unite, share relevant information and coordinate the investigative activity more closely.

The need to coordinate and centralise prosecutions against mafia-type phenomena through similar forms, more and more spreading across the country arose with reference to the work of different prosecutorial offices across the nation. The latter, indeed, carrying out their independent judicial action governed by a principal of strict territorial-principle jurisdiction, run the risk of underestimating problems, duplicating efforts, and not connecting the dots.

The fragmentation of judicial competencies almost often prevent from a 'unified' vision of the different organised crime facts and, consequently, from the individuation of all the sources and elements of evidence, useful for an effective repression. So, always from the early 80's, forms of spontaneous and not institutionalized coordination saw

⁴⁰³ In 1983, after the murder of Rocco Chinnici, the pool was made up of the magistrates Giovanni Falcone, Paolo Borsellino, Giuseppe Di Lello, Leonardo Guarnotta and coordinated by Antonino Caponnetto. After 1983 and until the creation of the DNA, the pool modified and expanded its structure for functional reasons and because of the transfer to other courts or the murder of some magistrates. For further information see Dickie (2008), 410.

the light. Public prosecutors dealing with cases that went beyond their territorial competence started to meet, to exchange judicial materials and information from their respective prosecutions.

Backing upon these practises of 'self-coordination' that became more and more established, stemmed the idea to formalize local prosecutorial pools against organised crime and to create a national central institution with a coordination role in the investigation/prosecution of organised crime. Both were established by Article 7 of the Law Decree n. 367 of 20 November 1991, converted into Law n. 8 of 20 January 1992, with the institutionalisation of the Anti-Mafia National Directorate and 26 Anti-Mafia District Directorates.⁴⁰⁴

During the same period, this trend towards coordination and this 'unified' action was also evident in the law enforcement organisation, with the establishment of:

- Special central and inter-provincial police services within the three Italian police forces (Law n. 203 of 12 July 1991). These are specialized units within each Italian police force, i.e. ROS (Raggruppamento Operativo Speciale) within Carabinieri, structured in a central national office, and 26 local sections in the cities where the 26 DDA are placed; SCICO (Servizio Centrale di Investigazione sulla Criminalità Organizzata) within Guardia di Finanza at the central level, and 26 GICO (Gruppi d'investigazione sulla criminalità organizzata), local sections in the cities where the 26 DDA are placed; SCO (Servizio Centrale Operativo) within Polizia di Stato at the central level, and the 26 Sezioni Criminalità Organizzata (local Organised Crime Sections) in the cities where the 26 DDA are placed;
- Anti-Mafia Investigative Directorate (DIA) (Law n. 410 of 30 December 1991). DIA is a multi-force police body tasked with intelligence-gathering and pre-judicial investigations. It is made up of highly specialised officers seconded from the five Italian police forces, i.e. Polizia di Stato, Arma dei Carabinieri, Guardia di Finanza (this is the police force concerned with fiscal/financial matters), Polizia Penitenziaria (police employed in prisons) and Corpo Forestale dello Stato (i.e. the police force devoted to environmental protection). Law n. 410 of 30 December 1991 specifies DIA's assignments and relations with police forces, for both proactive and judicial investigations. DIA is charged with identifying, through close analyses, the trends of organised crime phenomena in order to timely orient judicial investigations towards a more effective counteraction. In particular, DIA has 12 regional offices and performs the following functions: 1) proactive investigations, also in collaboration with the Public Tenders Central Monitoring Authority; 2) judicial investigations (supervised by public prosecutors); 3) international cooperation with foreign institutions for the purpose of investigative work.

⁴⁰⁴ In particular, the idea to set up a National Anti-Mafia Directorate (DNA) came from judge Giovanni Falcone, who drafted the first version of the above-mentioned legislative decree. For further information see Bargi (2013).

Structure and organisation

The DNA is the National Anti-mafia Prosecutor Office in Italy, its main aim being to coordinate and support the 26 Anti-Mafia District Directorates, i.e. the local district anti-mafia prosecutor offices located in each district court of appeal at the regional level (prosecutorial coordination) and the law enforcement bodies dedicated to the investigation of serious organised crime, i.e. the Anti-Mafia Investigative Directorate (DIA) and the special central and inter-provincial police services against organised crime within the three Italian police forces (investigative coordination). DNA has these special law enforcement bodies at its disposal. Among Italian prosecutor offices, DNA and DDA are the only units specifically dedicated to the prosecution of mafia-type criminal associations (also foreign ones) and of the most serious forms of organised crime and related criminal activities.⁴⁰⁵

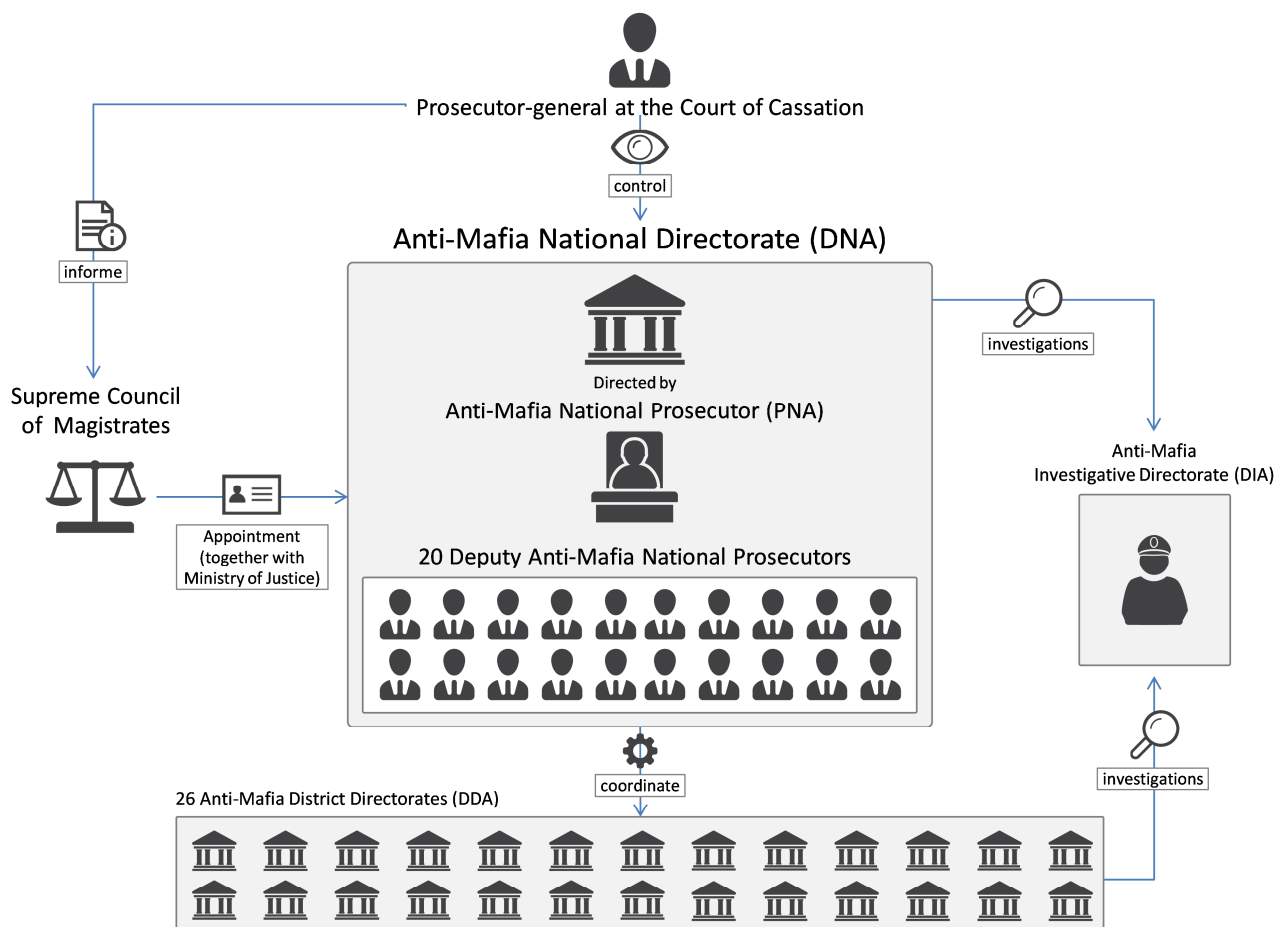
DNA is a body of the Central Office of the Public Prosecutor at the Court of Cassation (Corte di Cassazione) in Rome. It is managed by the Anti-Mafia National Prosecutor ('Procuratore Nazionale Anti-Mafia' or PNA), who is appointed by the Supreme Council of Magistrates (CSM) together with the Minister of Justice. The PNA is subjected to the control of the Public Prosecutor at the Court of Cassation, who is in charge to inform CSM about DNA activities and results. Its internal organisation comprises not only the PNA, but also 20 Anti-Mafia Deputy Prosecutors ('Vice Procuratori Nazionali Anti-Mafia', hereinafter referred to as DNA prosecutors), expert in criminal proceedings involving organised crime.⁴⁰⁶

DNA organisational flow chart is shown in Figure 9.1, where its connections with the Central Office of the Public Prosecutor at the Court of Cassation and CSM are also illustrated.

⁴⁰⁵ Fijnaut & Paoli (2007).

⁴⁰⁶ Direzione Nazionale Antimafia (2014a).

Figure 9.1: The National Anti-Mafia Directorate system



Source: Based on national legislation and scientific literature.

On a yearly basis, the Anti-Mafia National Prosecutor defines the most appropriate internal operational organisation of DNA to meet its functions. Since 2006 this resulted in a new internal and very articulated operational organisation to boost, besides the key task of coordinating DDA, its activities especially in relation to in-depth proactive analysis about trends is organised crime, and its international judicial cooperation functions. The activities of the DNA are articulated in:

- Five sections, that are: 1) Cosa nostra; 2) 'Ndrangheta; 3) Camorra, Sacra Corona Unita and criminal groups from Apulia; 4) Foreign criminal groups; 5) Financial measures to fight organised crime. These sections are coordinated by the DNA prosecutors. This division in sections shall not be confused with the DNA jurisdictional competence (DNA and DDA have a defined legislative mandate that has been discussed above in the introduction to this section). It is rather functional to the development and rationalisation of knowledge and (prosecutorial) actions on each of key above organised crime phenomena and countermeasures. These complex organised crime phenomena and measures are, according to the judgment of the PNA, those more articulated and thus deserving a more integrated

management of related information/knowledge. Different delegated DNA prosecutors take part in these Sections.

- Topics of interest. The current topics of interest are: 1) human trafficking; 2) smuggling of migrants; 3) drug trafficking; 4) environmental crimes; 5) counterfeiting; 6) gambling; 7) 'hard prison regime' under article 41 bis p.a.a.; 8) public procurements; 9) cigarette smuggling; 10) infiltration of organised crime in public administrations; 11) infiltration of organised crime into work world; 12) infiltration of organised crime into the agricultural sector; 13) infiltration of organised crime in relation to the Abruzzo's earthquake. These topics are annually identified based on emerging trends, also taking into account information from DDA activities. They change to time to time following upcoming investigative needs. Each topic is within the mandate of a single delegated DNA prosecutor so as to concentrate all relevant information. Knowledge is then spread and shared via periodic internal meetings. The periodic update of the list of topics of interest meets the need for a flexible and dynamic approach tailored on the continuous transformation of organised crime. Also in these case the selections of this topics does not reproduce all the competencies of the DNA/DDA in terms of criminal activities, but is rather a list of issues that have to be carefully monitored, according to the judgment of the PNA, and on which to concentrate the informative and intelligent efforts of the office.

To support these activities, the DNA has three Services: 1) Study and Documentation Service; 2) International Cooperation Service; 3) Security and Technological Resources Service.⁴⁰⁷ Their action develops along the strategic and programmatic guidelines of the office, as well as the topics of interest. For example, the Services could: draft agreements with foreigner judiciary authorities or others documents on cooperation with national and international organizations; update technologies; protect information and communication systems; analyse work flows and procedures for the coordination and circulation of knowledge; etc.⁴⁰⁸

Each of the DNA prosecutor, besides taking part in sections and supervising topics of interest, oversees the prosecution activities of 2 or 3 of the 26 Italian Antimafia District Directorates.

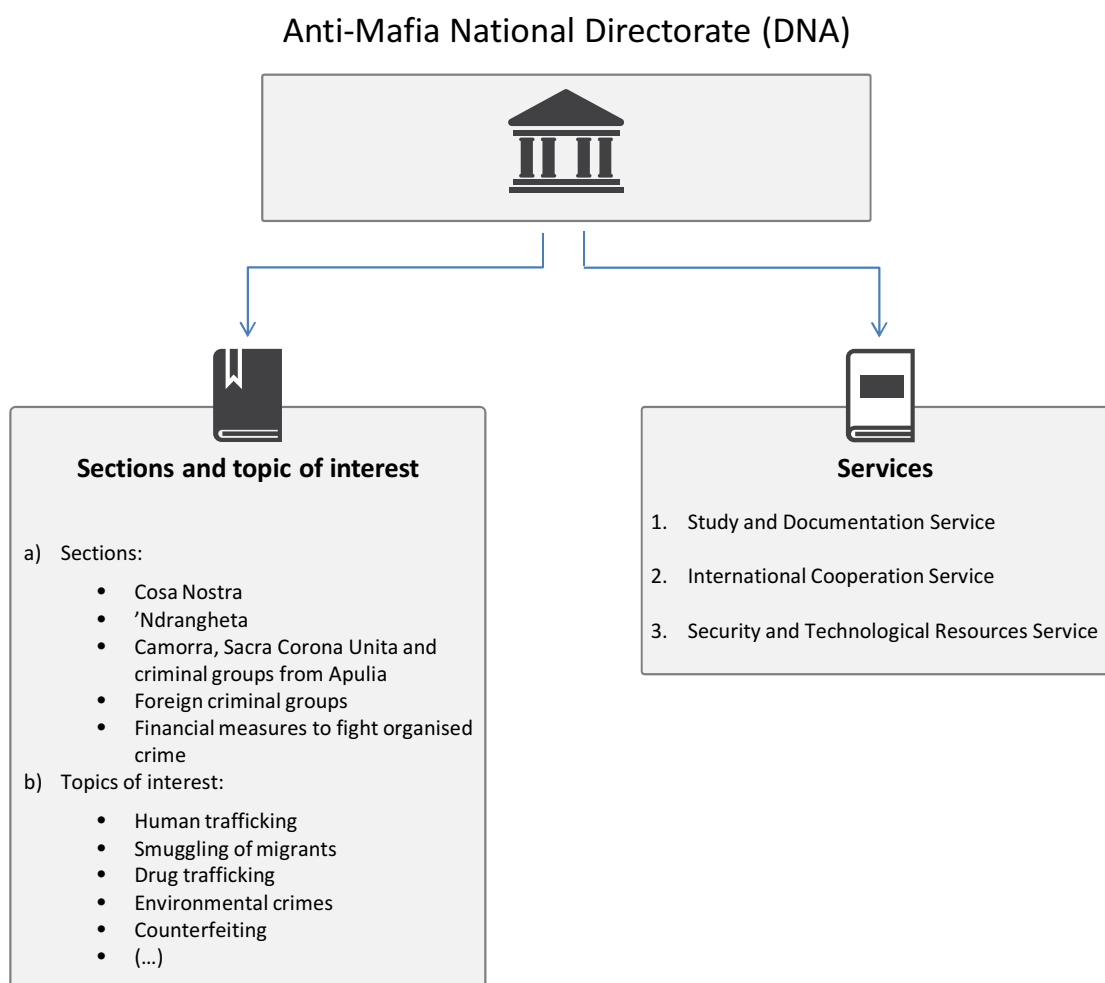
This organisational model allows to realise a constant 'territorial' link, with local DDA, while at the same time bringing territorial knowledge on the key identified issues to the central DNA level and fusing and analysing it, in order to:

- Reach an up-to-date and comprehensive understanding of Italian and foreign criminal associations and of specific criminal activities;
- Based on the previous point, also develop and spread investigative best practices in organised crime related investigations.

⁴⁰⁷ Direzione Nazionale Antimafia (2014a).

⁴⁰⁸ General information regarding the organisational model of DNA is available at the Ministry of Justice website (https://www.giustizia.it/giustizia/it/mg_2_10_1.wp). More specific information on this and on the activities carried out by PNA and DNA, as well as on dynamics and strategies of organised crime, is available in the DNA Annual Report. Even if not compulsory by law, the PNA considers it appropriate to submit this document yearly to the Prosecutor-General at the Court of Cassation, other national institutions and the general public.

Figure 9.2: Organisation of the activities of the National Anti-Mafia Directorate



Source: Based on national legislation and scientific literature.

Scope and functions

DNA and DDA have autonomous functions, powers and duties. There is not any hierarchical relation between DNA and DDA. DNA cannot interfere in the investigations carried out by the 26 DDA. National law provisions task DNA, through the PNA, with the coordination of the prosecution activities of the 26 DDA, which are vested with the power of investigating and prosecuting organised crime. Rather DNA, through the PNA, who avails himself/herself of the 20 Anti-Mafia Deputy Prosecutors, help maximise the effectiveness of the prosecutorial action carried out by the DDA, that, in the end, retain the direct prosecuting power.

To simplify, one can state that national laws provide DNA and PNA with the following two main functions: 1) push-function to coordination (specific push); 2) push-function to investigation (general push).⁴⁰⁹

Push-function to coordination (specific push)

This function is finalised to investigative and judicial coordination, both general and specific. The general coordination involves the search for and identification of prosecutions that can be connected across the country. PNA reports these cases to interested DDA and push them to coordinate each others. The specific coordination refers to already connected prosecutions handled by different DDA and aim to resolve conflicts when they arise. This coordination activity by the PNA includes three phases:

- Identification of connected prosecutions involving two or more DDA via: a) access to the register of offences for which criminal proceedings have started; b) gathering data, *notitiae criminis* and information by examining investigative files, accessing the various DDA databases (SIDDA, see below for further details), investigative interviews, and c) the analysis of all the information gathered;
- Informing the interested DDA, should they not know it yet, of the existence of connected prosecutions, so that they can coordinate among them to ensure timely and effective investigations by: a) exchanging, also via DNA, acts and information; b) informing each others about the guidelines they issued to judicial police; c) jointly carrying out specific investigative actions;
- Coordination of connected prosecutions by the PNA, who shall ensure its effectiveness.

In order to achieve this, powers are assigned to PNA. According to art. 371bis of the criminal procedure code the PNA: in agreement with DDA prosecutors, grants the investigative coordination via the DDA prosecutors; temporary seconds DNA and DDA prosecutors to ensure flexibility and mobility when specific and contingent investigative and prosecutorial needs arise; gathers and analyses *notitiae criminis*, information and data on organised crime; issues specific instructions/guidelines to DDA prosecutors in order to avoid or resolve disputes on the procedures under which coordination of investigative activities is to be achieved; holds meetings with the concerned DDA prosecutors, in order to resolve disputes which, notwithstanding the issued specific instructions, may occur and prevent the promotion or effective operation of coordination; takes it upon itself by motivated order preliminary investigations relating to any of the offences within the mandate of the DNA if the meetings arranged to promote or achieve effective cooperation have been unsuccessful and coordination has not been possible. PNA may also express his/her legal opinion on conflicts of authority among DDA during prosecutions (Articles 54, 54bis and 54 ter c.p.c.).

⁴⁰⁹ Spiezia & Liotta (2013).

Push-function to investigation (general push)

This function is not directly linked to connected prosecutions and is aimed at granting an effective investigative action, to be delivered in a complete and timely manner. The general push consists in the intelligence activity performed by the DNA with the view to assist the work by DDA. More concretely DNA follows all the prosecutions on certain criminal structures and exchanges the related information among interested DDA; identifies new investigative trails; elaborates new investigative methodologies; organizes investigative interviews; singles out new phenomena on which to focus pre-investigative activities to be carried out with the support of DIA and of the special central and inter-provincial police services specialized in organised crime within the three Italian police forces; explores the diffusion of specific criminal groups beyond their original territories; pinpoints new money laundering patterns. Results of these actions are made available to DDA and DNA prosecutors follow possible developments in their coordination function.

This push-function to investigation is strictly connected to the power, granted to the PNA (Article 371-bis, par. 2), to make use of DIA and of the special central and inter-provincial police services against organised crime within the three Italian police forces, by steering, through apposite guidelines, their investigative activities. PNA utilises these special law enforcement units against organised crime to carry out pre-investigations in order to get an exhaustive and complete picture of certain organised crime phenomena, independently from the results of specific prosecutions. Pre-investigations that PNA delegates to these judicial police forces is not aimed at gathering evidence on a specific offence, under a preliminary investigation, but at acquiring data that may be useful to strengthen certain specific prosecutions, from the one side, and, on the other, to identify new, unbeaten investigative tracks, due to their complexities and/or their location in the country and abroad.

In addition to this, PNA and/or more broadly DNA is given by law other specific tasks to perform both the above functions (push function to coordination and push function to investigation): he/she may also get access to DDA registers of criminal prosecutions and to the Anti-Mafia National Databases, named SIDNA (DNA Information System) and SIDDA (DDA Information System)⁴¹⁰ (see below); may conduct investigative interviews with persons imprisoned in relation to organised crime-related offences and receives communications on the investigative interviews conducted by criminal investigation divisions to persons imprisoned in relation to organised crime-related offences.⁴¹¹

Institutional cooperation at the national and international levels

Italian legislation also assigns further specific tasks to DNA in other fields.⁴¹² In particular, DNA participates in several institutional cooperation activities both at a

⁴¹⁰ Article 117, par. 2 bis c.p.c.

⁴¹¹ Article 18bis, Law n. 354 of 26 July 1975.

⁴¹² National legislation charges DNA also with the following tasks: it is one of the main receivers of anti-mafia disqualification notes, issued by local *Prefetti* (Article 4, Legislative Decree n. 218 of 15 November 2012); it is the main administrator of the National Anti-Mafia National Databases, i.e. SIDNA and SIDDA (Article 99, Legislative Decree n. 159 of 6 September 2011). The DNA has authority also in the field of: granting penitentiary benefits and alternative measures to detention (Article 4 bis, Law n. 354 of 26 July 1975); implementation of the special prison regime under Article 41 bis of the Prison Administration Act n.

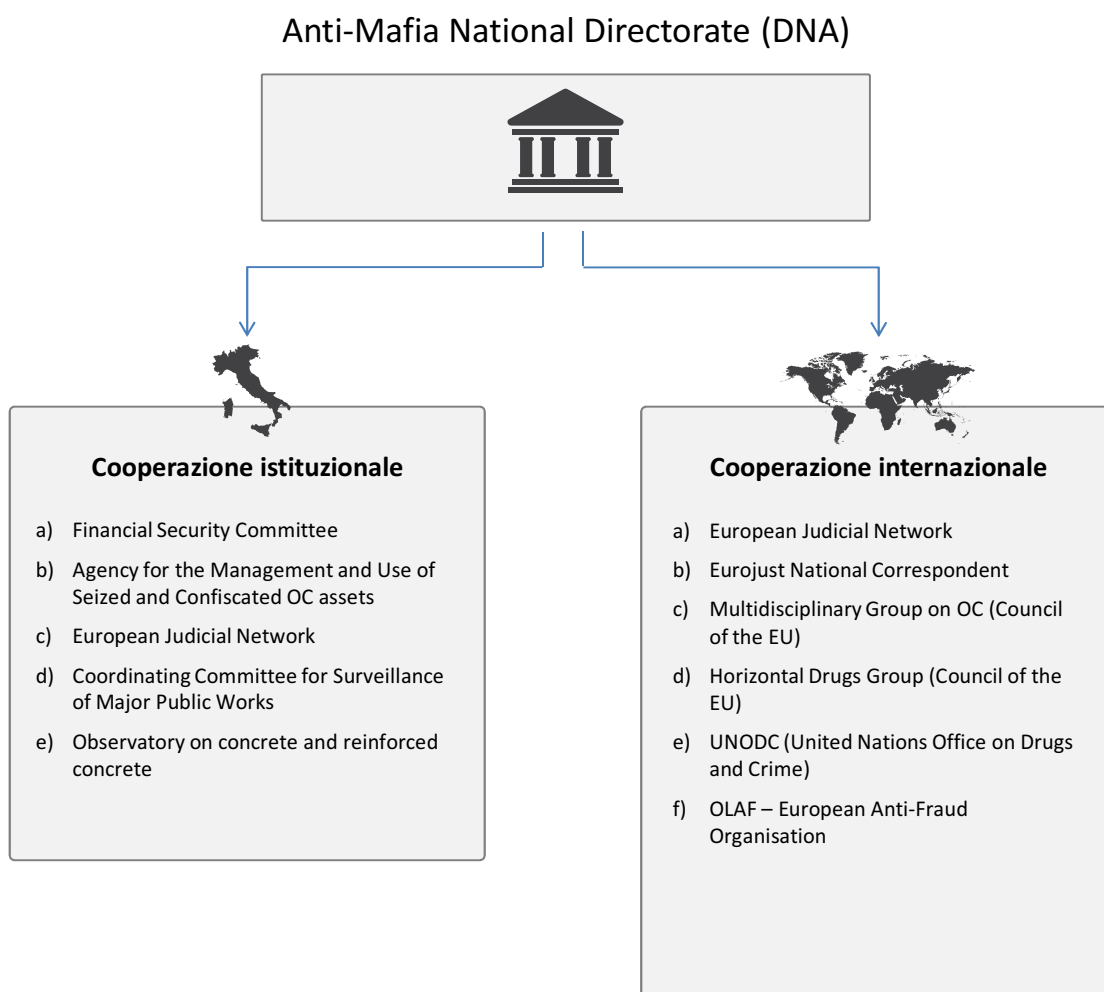
national and international level providing its expertise and know-how. At a national level it is one of the members of the Italian Financial Security Committee, founded to combat international terrorism-related activities; the National Agency for the Management and Use of Seized and Confiscated Organised Crime Assets; the European Judicial Network; the Coordinating Committee for Surveillance of Major Public Works of the Italian Ministry of Interior; the Observatory on concrete and reinforced concrete founded by the Italian Supreme Council for Public Works.

At the international level, DNA is: the main receiver of rogatory letters in the field of organised crime⁴¹³; one of the members of the European Judicial Network; the Eurojust national correspondent for Italy; one of the members of the Multidisciplinary Group on Organised Crime, founded by the Council of the European Union; one of the members of the Horizontal Drugs Group of the Council of the European Union. DNA also, cooperates with the United Nations Office on Drugs and Crime (UNODC) and the European anti-fraud organisation (OLAF).

354 of 26 July 1975; free legal aid (Article 96, Presidential Decree n. 115 of 30 May 2002); fight against money laundering (Articles 9 and 47, Legislative Decree n. 231 of 21 November 2007); undercover operations (Article 9, Law n. 146 of 16 March 2006); witnesses or collaborators of justice, e.g. admission to the protection program, penitentiary benefits and alternative measures to detention (Law n. 82 of 15 March 1991); preventive measures against persons suspected to belong to mafia-type associations and other organised crime groups (Article 5, Law n. 159 of 6 September 2011).

⁴¹³ Articles 724-727 c.p.c.

Figure 9.3: Institutional cooperation of the National Anti-Mafia Directorate at international and national level



Source: Based on national legislation and scientific literature.

Since its foundation, the role of DNA considerably extended over time, and nowadays in virtue of its power and tasks at investigative and prosecution level this agency detains all the necessary features to perform a more pervasive role in the fight against organised crime.⁴¹⁴ So, for instance, with the recent entry into force of the Anti-Mafia Code⁴¹⁵ PNA has been officially appointed as guarantor of the investigative effectiveness of criminal and preventive proceedings against organised crime all over country.

⁴¹⁴ Cisterna et al. (2013).

⁴¹⁵ The Anti-Mafia Code (Legislative Decree n. 159 of 6 September 2011, and subsequent amendments) is a legislative act aimed at consolidating and harmonising the many and scattered anti-Mafia provisions. It only partially reaches this goal, however, due to its partial coverage: it does take into account all the existing criminal and, especially, non-criminal (e.g. in administrative or commercial law) legislation. For further information see Fiandaca & Visconti (2012).

Data information systems: SIDNA and SIDDA

The functions of PNA could certainly not be achieved without expert information systems to gather, store, fuse and manage the immense informative assets relevant to investigate and prosecute very complex forms of crime. This, as mentioned above, is the SIDDA/SIDNA: DDA/DNA Information Systems.

SIDDA/SIDNA are strategic in order to identify links among DDA investigations, to increase effectiveness and efficiency of counteractions, to elaborate a comprehensive picture of organised crime all over the country and beyond.

SIDDA/SIDNA are the result of the interconnection of different databases:

- The local databases of the 26 DDA (SIDDA). In every DDA data on each criminal proceeding on organised crime are inputted into the local database. Every DDA is conceived as an autonomous unit connected with a central system managing the common informative asset (the *tactical database*, see below). The process of population of local databases of DDA is composed by a set of specialised activities which include the reading of relevant prosecution and judiciary acts and the extraction of relevant information from them (subjects, places, goods, communications, movements, associations, etc.). The extracted information are then archived in the DDA database, in a relational structure, and they are connected with the text of corresponding prosecution and judiciary acts.
- A central information system (SIDNA) for the integration and rationalization of information on organised crime. This is set up and managed by the DNA. The SIDNA is used both by each DDA in order to acquire an overall knowledge on information deriving from investigations carried out all over the national territory, and DNA for planning and coordinating investigative and prosecution activities on organised crime. In particular, SIDNA is composed of:
 - The national 'tactic' database ('TATTICA'), resulting by the integration of the information coming from the 26 local databases of DDA. At the basis of SIDNA are the DDA databases, i.e. SIDDA. SIDNA detects information of common interest and send alarms/reports to the periphery, i.e. to the interested DDA. Information coming from the DDA are connected and integrated in a centralised system. Then they are compared and merged if they are referred to the same facts, places, subjects, goods in order to obtain an 'unified' view of the overall criminal phenomenon. When available, identification data of investigative and judicial measures/actions are inserted together with data on subjects to whom they are referred, criminal associations connected to the identified subjects, and the entire texts of the related investigative and judicial documents.
 - The national 'strategic' database ('STRATEGICA'), which collects and fuses, in addition to the information coming from SIDDA, also information coming from: i) databases of the Ministry of Justice (such as REGE, General register of notitae criminis; SICP, Information System of

Penal Cognition; SIPPI,⁴¹⁶ Information System of Italian Prefectures and Prosecutor's Office of Southern Italy), acquired by DNA, and ii) other non-judiciary databases (such as the Tax Register database; the National Institute of Social Insurance, INPS, database; the Traffic Control Authority database). This strategic database allows to perform statistical elaborations and in-depth analysis fundamental to foster the role of coordination of DNA.

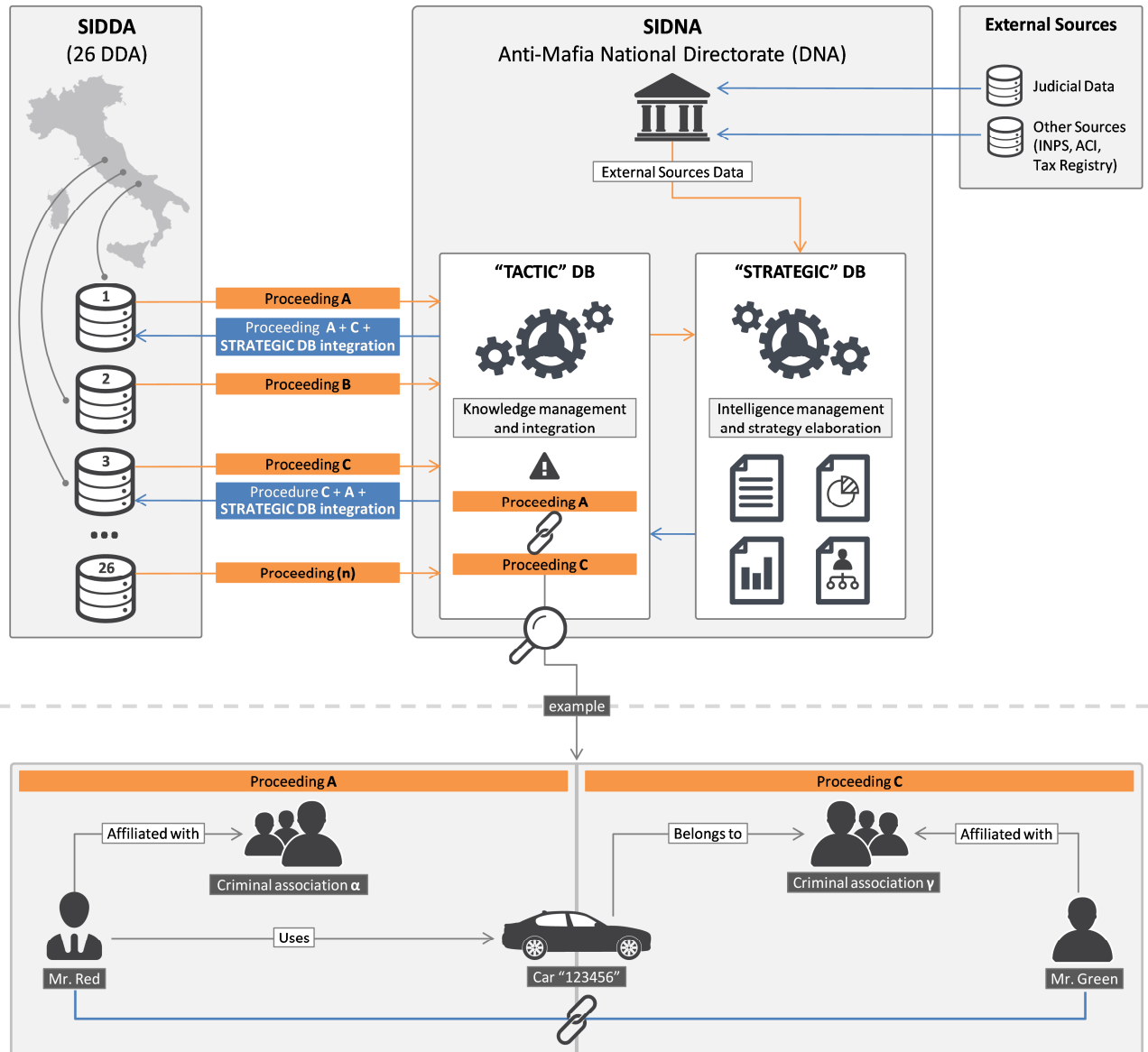
The SIDDA/SIDNA system is based on the archiving both of entire documents and of mere information indexed in different relational databases. This structure allows, for instance, to visualize all the available materials and information on a given person, with indications about the development of his/her personal criminal career, including connections with other criminal subjects or criminal groups or relevant facts.

The central database SIDNA can be consulted by DDA prosecutors as well as by judicial police forces to obtain relevant information for their investigative and prosecutorial activity; by the PNA and the Deputy Anti-Mafia National Prosecutors to gather significant elements on the evolution of criminal phenomena, and thus exercising, when necessary, their coordination activities on the prosecutions conducted by different DDA over the territory.⁴¹⁷

⁴¹⁶ The SIPPI database aims to manage data and information related to seized and confiscated goods from organised crime groups during prosecutions. It produces a form related to a good containing information on its consistency, destination or use.

⁴¹⁷ All the information on the data information systems SIDNA and SIDDA is from DNA annual reports (2007/2008 – 2012/2013).

Figure 9.4: Data information systems of DNA and DDA (SIDNA/SIDDA)



Source: Based on DNA Annual Reports.

9.3.2. DNA activities at a glance: some statistics

Here are some statistics showing the results achieved by DNA/DDA in recent years.

Table 9.1: Closed criminal proceedings against known persons for ordinary offences and offences within the mandate of DNA/DDA, by Court of Appeal District and year, 2008–2012

District	2008		2009		2010		2011		2012	
	TOT	DDA	TOT	DDA	TOT	DDA	TOT	DDA	TOT	DDA
Ancona	33.696	14	37.345	21	42.071	21	36.110	19	34.735	19
Bari	74.957	218	63.781	219	60.136	255	54.910	212	62.843	217
Bologna	92.142	103	94.471	100	95.353	81	94.884	68	87.542	122
Brescia	46.530	49	53.530	48	51.030	75	57.789	84	64.536	64
Cagliari	30.278	244	33.039	186	44.144	192	38.554	161	37.384	169
Caltanissetta	7.755	128	8.086	171	8.765	221	9.251	179	9.297	235
Campobasso	9.045	14	8.494	10	8.567	7	11.488	14	9.992	13
Catania	38.235	219	38.023	315	36.084	229	35.727	269	43.690	248
Catanzaro	32.399	256	38.856	226	39.756	213	36.107	249	39.224	220
Firenze	84.137	116	74.864	130	85.160	156	79.358	129	80.931	199
Genova	45.938	76	45.574	96	45.456	98	39.803	84	43.231	86
L'aquila	41.866	34	40.245	16	41.653	25	42.554	50	42.787	59
Lecce	31.265	125	37.286	100	39.374	81	35.090	90	36.203	86
Messina	18.016	161	15.299	122	14.043	108	18.350	106	17.995	95
Milano	103.227	134	121.296	141	129.308	159	119.470	178	123.103	167
Napoli	156.557	818	155.286	1.056	171.143	1.133	156.276	884	142.637	903
Palermo	37.710	408	40.770	622	39.984	639	39.386	443	47.945	438
Perugia	15.851	22	17.043	13	16.728	39	23.932	73	25.007	74
Potenza	12.500	30	13.110	57	13.484	66	16.411	58	17.100	53
Reggio Calabria	15.156	184	18.487	267	16.541	208	16.743	249	17.420	250
Roma	125.220	180	129.307	174	133.140	191	124.198	212	117.975	215
Salerno	23.576	191	27.380	256	31.082	132	30.644	132	31.323	125
Torino	80.876	57	85.657	76	86.826	45	79.007	128	88.127	70
Trento	19.665	48	21.424	39	20.407	25	18.329	17	18.178	29
Trieste	27.857	61	29.457	39	29.708	74	26.565	69	24.190	46
Venezia	81.288	85	87.948	47	79.687	49	78.993	38	79.078	78
Total	1.285.742	3.975	1.336.058	4.547	1.379.630	4.522	1.319.929	4.195	1.342.473	4.280

Source: Based on Ministry of Justice data.

Table 9.2: DNA activities from June 2011 to June 2013

Activity	06.2011-07.2012	07.2012 – 06.2013
PNA secondments of prosecutors	9	4
Communications concerning under-cover operations	29	9
Investigative interviews	37	30
Advices on the implementation of the special prison regime (Article 41bis p.a.a.)	329	157
Appeal against new applications or extension of the special prison regime (Article 41bis p.a.a)	419	435
Advices concerning witnesses and collaborators of justice (Law 82/1991)	1.639	1.716
Coordinating meetings	133	139
Advices concerning free legal aid	1.284	1.606
Rogatory letters (sent)	223	250
Rogatory letters (received)	92	105

Source: Based on DNA data.

9.3.3. Strengths and weaknesses of the DNA

In this section, aspects pertaining to the DNA system in terms of strengths (effectiveness) as well as weaknesses (limitations) are presented. The main source is represented by the opinions of the Deputy Anti-Mafia National Prosecutors gathered during the focus group.

Effectiveness

Main results suggest specific operational features (both in the investigation and prosecution activity) that render the DNA system particularly effective in the fight against serious organised crime.

Coordination as a key element in organised crime cases

The effectiveness of DNA lies, first of all, in the fact that it is an instrument to promote coordination in the fight against organised crime. Both legal basis and practices of the DNA system go in this direction.

Organised crime in Italy commits 'connected' offences all over the country (and beyond), but this is also true abroad for very serious forms of criminal organizations. Uncoordinated investigations and prosecutions would result in missing the broader picture, and therefore in a fragmented understanding of it. Coordination offers a wider knowledge of the organised crime phenomenon across the country and beyond, and also makes it possible to effectively follow its evolution over time and space. Both DNA and all DDA thus may count on a comprehensive view of all the dynamics of criminal evolution.

As seen, the coordination carried out by DNA guarantees an effective sharing of the available knowledge with all interested DDA and to connect, when needed, two or more DDA on specific cases. This is the reason why, the Italian legislator, relying on

the intuition of Giovanni Falcone, conceived DNA as a specialised agency completely focused on coordination and strategic activity so as to obtain the necessary comprehensive vision of organised crime, of its development, of the most effective counteractions to be put in practice. In this regard, in fact, it shall be remarked the specific nature of DNA, that is a judicial body that has no direct investigative/prosecution tasks, rather it coordinates other actors (DDA, specialised police investigative bodies, etc.), gathering and spreading information to favour the exchange of expertise, data, etc. The aim indeed, is to give impulse for further investigations/prosecutions carried out at a local level by DDA/specialised investigative bodies. Furthermore, the coordinating role of DNA reduces the pitfalls stemming from the Italian judicial system that is based on the principle of territorial competence,⁴¹⁸ that has profound limitations when dealing with organised crime. In fact, the fragmentation due to the territorial competence promotes competition among prosecutor offices, and a non cooperative approach; while coordination reduces the risk of the latter and fosters economies of scale, producing a broader picture going beyond the knowledge and the competences of a single, local, judicial office or investigative body.

So, for example, DNA monitors all interceptions and therefore may realise if different prosecutor offices are investigating on the same persons/cases. If so, they are connected. Knowing that a person is already under surveillance is important because a DDA, without knowing it, could intervene and jeopardise efforts by another DDA working in parallel on the case.

Finally, coordination makes it possible to rationalise investigative activities over the national territory. To achieve this, existing effective tools and practices include very frequent coordination meetings with DDA (2 per week) and instructions by PNA to DDA to go after some suspicions hinting at the commission of a crime.

Case 1. Coordination of different DDA to dismantle a Camorra clan

In January 2014 an operation coordinated by DNA involved DDA of Naples, Rome and Florence in the dismantling of a Camorra clan (Contini). In particular, DDA Naples conducted a long investigation against this clan and in particular on its financial investments of laundered money in Lazio and Tuscany. DNA favoured the coordination of the three DDA so as to speed up investigations and the exchange of information. The result led to the arrest of 90 persons and the seizures of assets and money for 250 million Euros.

Source: Direzione Nazionale Antimafia (2014a)

⁴¹⁸ An offence shall be prosecuted by the judge of the place in which such an offence occurred.

Case 2. Coordination of different DDA to dismantle a human smuggling ring

The central role of DNA coordination is outstanding e.g. in the case of operations 'Boarding Pass' and 'Bakara'. In these cases, DNA pivotal position allowed the information exchange between DDA of Catania and of Florence for the development and coordination of the abovementioned operations that led to the disruption of a Somali criminal organisation specialised in smuggling of migrants rooted in Sicily and Tuscany. The operations permitted the arrest of 48 Somali citizens by DDA of Catania (Boarding Pass) and other 7 Somali citizens by DDA of Florence (Bakara).

Source: Direzione Nazionale Antimafia (2014a)

Strategy as a key feature to anticipate, prevent and fight organised crime

As stated, DNA does not directly carry out investigations/prosecutions, rather it has a coordination role of the various DDA in the Italian territory with the aim of favouring them in their investigation/prosecution of organised crime related offences. Bearing in mind this, the strategic role of the DNA against organised crime is evident: this body possesses a broader vision of this phenomenon and of its evolution over space and time that stems from the inputs from and the collaboration with the various DDA. Such a position makes it possible for DNA to set medium/long term targets, predict future criminal developments, and to be one step ahead of criminals by knowing in advance their next step.

Such a concept of 'strategy' is at the heart of the DNA/DDA system, and it was in the mind of judge Giovanni Falcone when he had this intuition. The lack of a strategy, in fact, is the biggest vulnerability and weakness of any response to serious organised crime. It is a competitive advantage for serious organised criminals. Having a strategy is, instead, a competitive advantage for State institutions.

An example of strategy enacted by DNA that involved also other institutional actors is represented by waste smuggling. When DNA realised that there were some cases scattered on the Italian territory, it acquired information on all pending investigations carried out by some DDA, gathered the DDA prosecutors involved and centralised/digitised all the data collected in order to favour both the possibility of developing common investigations and the information exchange among the various actors involved, including Carabinieri.⁴¹⁹ Such an activity is an example of the strategic approach adopted by DNA that permitted to:

- Favour a coordinated and more effective investigation/prosecution strategy to reach the goal of dismantling criminal organisations devoted to waste smuggling;
- Provide all DDA in the territory with useful information that made them aware of possible trends in organised crimes in their competence territories.

The strategic role of DNA in the fight against organised crime includes also the possibility of conducting pre-investigations, i.e. activities for the collection of pieces of

⁴¹⁹ Two departments of Carabinieri, namely R.O.S. (Raggruppamento Operativo Speciale), which deals with organised crime investigations, and N.O.E. (Nucleo Operativo Ecologico), which deals with environmental protection.

information that can be used to discover the *notitia criminis*, that once transmitted to the relevant DDA, allows the formal development of investigation/prosecution activities.⁴²⁰ In this regard, the most outstanding example is the 'investigative interview' (*colloquio investigativo*),⁴²¹ i.e. the possibility for PNA to speak with detained persons⁴²² affiliated to criminal organisations and with the aim of acquiring useful elements that once elaborated by the DNA are provided to DDA that can use them to better coordinate and/or carry out investigation/prosecution activities.

DNA collects also a number of information through the cooperation with other bodies thus obtaining more comprehensive information on organised crime that is shared with DDA and other bodies (e.g. DIA and police forces in general) with the aim of improving and providing impulse to the development of investigations and prevention activities against organised crime. This is the case e.g. of financial investigations: the Financial Information Unit at the Bank of Italy transmits both studies, pieces of research, etc. and (above all) reports of suspect financial transactions to DIA and to DNA to be further analysed.⁴²³ The results of such analysis are used to develop further strategies and are provided to the competent DDA for the concrete conduction of investigations/prosecutions.

Finally, the participation of DNA in several national and international bodies follows the same 'strategy logic': on the one hand the expertise provided by DNA fosters these bodies in their activities against organised crime, on the other information and data exchanged within these bodies allow DNA to gather significant assets to improve the comprehensive knowledge on organised crime and to be used for the development of specific strategies deployed through DDA in the territory. This is the case e.g. of the participation into the Coordinating committee for surveillance of major public works, or in the Observatory on concrete and reinforced concrete.

The Italian criminal system is based on the principle of the 'mandatory criminal action', i.e. when a public prosecutor receives the information that a crime may have occurred (*notitia criminis*), s/he has to start investigating without any possibility of 'prioritising', e.g. concentrating on more serious crimes. For this reason, also DDA cannot set any priority: they have to start their investigation/prosecution as soon as they receive a *notitia criminis* related to the offences for which they are competent. The push-function to investigation by DNA is, anyway, of utmost important to strategically 'orient' the action of DDA. In fact, by strategically searching for information which are still not evidence but that can turn into evidence later on and for now 'produce' investigative paths on which to focus, it can help DDA in focusing their 'limited' resources and in working more effectively.

⁴²⁰ Art. 330 c.p.c.

⁴²¹ Art. 18 bis Ordinalamento Penitenziario (Penitentiary Regulation Act).

⁴²² Such an interview can also be carried out with free persons.

⁴²³ Art. 9(9) Legislative Decree 231/2007.

Operational example 1. DNA strategic action in the field of waste smuggling

An example of strategy enacted by DNA that involved also other institutional actors is represented by waste smuggling. When DNA realised that there were some cases scattered on the Italian territory, it acquired information on all pending investigations carried out by some DDA, gathered the Prosecutors involved and centralised/digitised all the data collected in order to favour both the possibility of developing common investigations and the information exchange among the various actors involved, including Carabinieri. Such an activity is an example of the strategic approach adopted by DNA that permitted to: a) favour a coordinated and more effective investigation/prosecution strategy to reach the goal of dismantling criminal organisations devoted to waste smuggling; b) provide all DDA in the territory with useful information that made them aware of possible trends in organised crimes in their competence territories.

Source: Direzione Nazionale Antimafia (2014a)

Operational example 2. Prevention of criminal infiltrations into the reconstruction after earthquake of L'Aquila

DNA is a member of the Coordinating Committee of Surveillance of Major Public Works. Such a participation allowed DNA to provide other institutional actors with relevant pieces of information that have been used in several cases to stop the possible infiltration of organised crime into public commitments. In specific, many enterprises have been banned from participating to public works related to the reconstruction after the earthquake of L'Aquila (2009), or from the EXPO 2015 commitments.

Source: Direzione Nazionale Antimafia (2014a)

Operational example 3. Pre-investigations and investigative interviews

The strategic role of DNA in the fight against organised crime includes also the possibility of conducting pre-investigations, i.e. activities for the collection of pieces of information that can be used to discover the *notitia criminis*, that once transmitted to the relevant DDA, allows the formal development of investigation/prosecution activities.⁴²⁴ In this regard, the most outstanding example is the 'investigative interview' (colloquio investigativo),⁴²⁵ i.e. the possibility for PNA to speak with detained persons⁴²⁶ affiliated to criminal organisations and with the aim of acquiring useful elements that once elaborated by the DNA are provided to DDA that can use them to better coordinate and/or carry out investigation/prosecution activities.

Source: Direzione Nazionale Antimafia (2014a)

⁴²⁴ Art. 330 c.p.c.

⁴²⁵ Art. 18 bis Ordinamento Penitenziario (Penitentiary Regulation Act).

⁴²⁶ Such an interview can also be carried out with free persons.

Specialisation as a key element in organised crime cases

The DNA system is effective because it focuses and specialises on serious forms of organised crime and organised criminal activities. Specialisation in every aspect of organised crime is fundamental, especially as regards investigations of certain organised crime-related offences such as money laundering, corruption, and infiltration into public administration. This is the reason why in the past few years, for instance, special attention was paid by the Deputy Anti-Mafia Prosecutors not only to traditional mafias, but also to international cooperation and influence coming from foreign crime groups.

The specialisation starts from the recruitment and training of the staff employed by DNA and DDA. In particular, national legislation specified the criteria that shall be adopted in the selection of those prosecutors who will be part of DNA,⁴²⁷ as well as of DDA⁴²⁸: 1) specific attitude; 2) professional experience.

In order to provide a detailed and unique interpretation of such criteria, the *Consiglio Superiore della Magistratura (CSM)*⁴²⁹ indicated that 'specific attitude' shall mean the particular capability of acting as a Anti-Mafia Prosecutor deriving from: pre-existing experience as a public prosecutor in dealing with cases related to organised crime or similar matters; pre-existing experience as a public prosecutor or a judge in dealing with preventive measures against organised crime; participation to training courses organised by CSM on organised crime, investigative techniques and tools; positive attitude toward teamwork; pre-existing experience in using IT tools for the management of trial data; pre-existing experience in working with foreign (i.e. non Italian) investigative and judicial authorities; pre-existing experience as a judge in dealing with cases related to organised crime as well as (not as a prosecutor/judge) in the field of organised crime; relevant publications and scientific works on organised crime with particular reference to investigative techniques and tools; any other element useful to determine the capability of working as an Anti-Mafia Public Prosecutor.⁴³⁰ Besides that, 'professional experience' shall mean all the professional experience emerging from: the referrals by Judicial Councils; reports drafted by chief officers for the staff professional evaluation; facts known by the Chief Prosecutor; CSM provisions; self-evaluation reports that testify professional capability, commitment in timely carrying out work, freedom from possible external conditioning that could affect the impartiality of the judicial activity, capability in directing police investigations.

Dedicated information systems as main tools to boost investigations

The effectiveness of the coordinating role of the DNA deals also with the success of its databases, named SIDNA (Anti-Mafia Directorate Information System) and SIDDA (District Level Anti-Mafia Directorates Information System), where all data on investigations and prosecutions and criminal organisations are stored, thus boosting investigating activity. These centralised information systems are the 'key' towards an

⁴²⁷ Art. 76-bis(4) Royal Decree n. 12/1941, as amended by Law Decree n. 367/1991.

⁴²⁸ Art. 70-bis, Art. 110-bis and Art. 110-ter Royal Decree n. 12/1941 on the Judicial system regulation (*Ordinamento Giudiziario*), as amended by Law Decree n. 367/1991.

⁴²⁹ The autonomous governing body of the Italian judicial system.

⁴³⁰ Circolare del Consiglio Superiore della Magistratura, P24930 of 19 November 2010.

effective national investigative/prosecution strategy against serious organised crime groups. Managing information is the key. It is the only way to 'connect the dots' grasping the broader picture. Within SIDNA/SIDDA it is easy to immediately find all the information necessary for investigations and prosecutions. This working method relies on the sum of all information obtained by different investigating bodies in the field of serious organised crime and also on their comparison and analysis. In this regard, the promptness of each public prosecutor office in putting new records into the integrated database is crucial. The phase of data collection and analysis assure more contacts between public prosecutor's offices and police forces, as well as continuous information exchange between DNA, DDA and DIA.⁴³¹

Operational example 4. Role of other public databases in SIDNA/SIDDA

Data inserted into SIDDA by the various DDA in the Italian territory permit DNA to timely monitor the presence of investigations that could/should be coordinated. Furthermore, a particular added value of SIDNA/SIDDA derives from its real-time interfaceability to a number of other public databases (which number has constantly increasing). In this field, e.g. the protocol signed in 2009 between DNA and INPS (the Italian main pension body) allowed DNA to detect possible infiltrations of organised crime in the agricultural sector. In detail, it was possible to compare SIDNA/SIDDA data with INPS data, allowing to individuate a number of agricultural enterprises in the province of Cosenza that were indirectly controlled by organised crime groups.

Source: Direzione Nazionale Antimafia (2014a)

Being a contact point as a key feature for cross-border cooperation

The International cooperation office of the Anti-Mafia Directorate is in charge of developing and expanding the relationships with political/judicial/prosecutorial institutions engaged in the fight against organised crime in other states, as well as of information and data exchanging in relation to transnational organised crime. To implement the coordination of the investigation and prosecution, the International cooperation office is also expected to acquire, release, and update news reports, information, and data about international criminal groups, which are collaborating with local mafias in illegal activities. DNA is the Italian contact point for judicial cooperation and has a central role as regards mutual legal assistance (i.e. the DNA prosecutors send/receive rogatory letters to/from foreign judicial bodies to investigate and/or perform other actions in its/their territory) and mutual recognition not only of judicial decisions but also of investigative measures. The responsibilities of the DNA in this regard include also the provision of news, information, and data to the DDA on foreign cases, which could lead to instituting new investigations or supplement an ongoing investigation.⁴³² For example, there is an extensive cooperation and exchange of investigative information between DNA and Dutch authorities, related especially to drug trafficking, and the reinvestment of illegal profits belonging to Italian organised

⁴³¹ See Spiezia & Liotta (2013) and Direzione Nazionale Antimafia (2014a).

⁴³² See also Vermeulen et al. (2010) and Direzione Nazionale Antimafia (2014a).

crime groups (Cosa Nostra, 'Ndrangheta, Camorra) into different entrepreneurial activities in The Netherlands.⁴³³ Similarly, a long standing cooperation activity has been established also with German authorities based on an exchange of information aimed at monitoring Mafia families active in Germany together with the identification of the economic sectors under their interest. The channelling of all this judicial cooperation activity from and to Italy through DNA is a very productive way of proceeding. Also in this case the centralisation of information, while considering the territorial needs, helps maximise effectiveness and make international cooperation very productive. DNA, in fact, has the general picture and is useful both for requests sent to Italy and for requests sent from Italy.

Case 3. International judicial cooperation in operations SOLARE and SOLARE II

Operations SOLARE and SOLARE II involved DNA as the focal coordination point for the collaboration between the USA and Italy. In specific, this cooperation started with a report by DEA and FBI to the DDA of Reggio Calabria concerning a huge international narcotic traffic between the USA and Italy and led to the identification and the arrest of several bosses of 'Ndrangheta as well as the seizure of hundreds of kilograms of cocaine and other drugs. DNA played a crucial role in favouring the information exchange among police forces and judicial authorities in Italy, Canada and USA. Furthermore, DNA granted the necessary judicial cooperation related to the interceptions of communications (as well as environmental interceptions) of 'Ndrangheta bosses who operated in Italy. Finally, it assisted in the extradition of persons arrested in the USA.

Source: Direzione Nazionale Antimafia (2014a)

Limits

Among the most significant limits:

- *Reluctance to coordination by some DDA.* In a few cases, some DDA (indeed 'strategic' for the national scenario and operating in areas interested by rooted criminal phenomena) do not fully implement the DNA coordination directives and fail to insert all the relevant data into the SIDDA/SIDNA system. The latter problem concerns not only the quantity of data, but also (and above all) their quality: they often refer to old cases and not the current ones. Such a situation prevents DNA from fully deploying its coordination potential and above all from acquiring all the necessary information on the most recent developments of organised crime activities in all its forms. This 'reluctant attitude' may affect DNA functioning, as well as the work of other DDA that could be potentially interested into the same investigations, yet are not able to get the necessary information. In other terms, such a situation, that is less and less frequent, may produce a partial paralysing effect on the entire DDA-DNA system as conceived by the

⁴³³ Direzione Nazionale Antimafia (2014a).

national legislation.

- *Asymmetry in the tasks of DNA and DDA.* In the past few years, national legislation has expanded the competences and tasks of DDA to crimes not originally included in the mandate of these bodies. More precisely, the provisions that have recently expanded DDA tasks (e.g. to terrorism, human trafficking, child pornography/prostitution) do not individuate a competent and centralised body with coordinating functions (nor indicate the DNA as this body). Such a situation moves in the opposite direction compared to the EU legislation that has conceived Eurojust as a coordinating body without any restrictions '*rationae materiae*'. Besides this problem, Law 125/2008 expanded the tasks of DNA also to the prevention of organised crime activities. Such a situation widened the disconnection between the competences of DDA and DNA.
- *Organised crimes investigated by ordinary prosecutor's offices instead of DDA.* In some cases, the organised nature or the mafia-type components of a crime are not immediately evident. For this reason, some offences are (at least initially) prosecuted by the ordinary prosecutor's offices instead of the competent DDA. This happens in particular for those crimes that are functional to the life of the criminal organisation. In such cases the competence is normally attributed to the ordinary prosecutor's office until it is discovered that such offences are functional to a criminal association. There are several crimes that can possess this functionality and in particular predatory crimes, smuggling of goods, arm trafficking, waste smuggling. In order to overcome the possible difficulties emerging from such situations, many general prosecution offices have drafted protocols together with DNA/DDA to individuate the potential crimes that are likely to be committed in the context of a criminal association and that are therefore assigned to the relevant DDA. Examples of such crimes are murders/attempted murders committed by members of criminal associations, drug related crimes, racketeering, money laundering, etc.

9.3.4. Inputs to exportability

The DNA, as seen, is perceived as an effective tool against organised crime. Because of this, the former Italian National Anti-Mafia Prosecutor Pietro Grasso, now President of the Senate, has recommended in a declaration to the Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) of the European Parliament on 19 June 2012 that the DNA model could inspire similar specialised prosecution agencies and good practices both in other EU MS and at the EU level, e.g. establishing similar coordinating activities at Eurojust and/or OLAF (European Parliament, 2012a).⁴³⁴

The possible adoption of an organisational model similar to that of DNA by the EU MS and European Union could combine the need of centralising the coordination of investigations/prosecutions against serious organised crime, with the necessary decentralisation of investigations/prosecutions at the local level.

⁴³⁴ European Parliament (2012).

The question now is: under which conditions can DNA be exported? The topic was also discussed during the focus group at DNA.

DNA prosecutors noted that what cannot easily/directly be exported to other countries is the DNA structure/organisational model as it stands in Italy. Though they believe that DNA is an effective and valuable instrument, legal differences (e.g. mandatory criminal prosecution vs. optional criminal prosecution; different role of the police and the public prosecutor in different systems) and cultural factors may hamper the adoption of this model without adaptations.

In order to build a strong and homogenous EU and MS prosecution system against serious organised crime, taking into account the DNA/DDA experience, therefore, one should realise that what responds to a universal need, and could therefore be exported, is the idea of coordination of investigations/prosecutions in serious organised crime cases that lies behind the DNA system, rather the system itself that was chosen in Italy. Coordination does not mean uniformity, but it means identifying common goals that are pursued by a plurality of coordinated actors, whatever organised, and identifying a national institutional actor that may play this coordinating role. Heterogeneity and different cultures/legal rules cannot be levelled out by having exactly the same institutions in all countries. What shall be homogeneous are the objectives to be reached. Institutional actors/structures may vary from country to country (e.g. a special police force, a judicial authority, an intelligence service), but coordination policies/practices can be similar (i.e. setting common objectives, strategies, ways of interacting among national/international partners, etc.). Notwithstanding differences in the organisational model at national level, having a specific 'central actor' – whatever its nature – charged with the coordination task of investigations and prosecutions against serious organised crime carried out at local level in each MS would result in a more effective fight: 1) at the national level, against criminal organizations that are spread across the territory of a given MS; 2) at the EU level, against criminal organizations that are spread across the territory of the EU (or beyond). These criminal organisations are organised and operating within the entire EU territory. For this reason numerous tasks in this regard were already entrusted to Europol in order to coordinate national efforts and provide necessary assistance to the Member States in course of criminal investigations. Its coordination role should also result in facilitation of interaction between the relevant authorities. A similar but still a more advanced example stems from the judicial level, namely the Eurojust model of supranational coordination. There is merit to consider entrusting further coordination within Europol which would enhance a coherent EU/national system in the fight against serious organised crime within and across MS. The effectiveness of the overall system would also be boosted by possible contributions, in terms of knowledge, expertise and organisation, from already existing specialised agencies in several MS.

In addition, what can be exported are effective mechanisms and practices to ensure coordination, with special attention paid to the DNA information system. Information is the key also to boost investigation and prosecution against serious (cross-border or not) organised crime. The adoption of a SIDNA/SIDDA-like information system at EU MS and EU level has been recommended by national experts interviewed. Combating organised crime requires in-depth knowledge of the phenomenon and a more

concerted effort to collect and disseminate information and data about it. The DNA prosecutors argue that before coordinating any investigation, it is necessary to have a specific knowledge of the investigation and its progressive results. It would be fundamental the creation of a mechanism which allows the acquisition and elaboration, sharing of information and data related to organised crimes/criminals. Particular attention should be put into rendering uniform the way data are entered into (possibly similar) national/local criminal databases in each MS and, possibly a central European database should be created.

9.4. Italian legal tools in the fight against organised crime: the mafia-type association (Article 416 bis c.c.) and the 'hard prison regime' (Article 41 bis p.a.a.)

This section provides an analysis of the two main legal tools in use in Italy to combat organised crime, which have proved to be particularly relevant in the fight against such a phenomenon, as it emerged in the first phase of the study (i.e. through the analysis of questionnaires and country fiches). These are: 1. the offence of 'mafia-type association' (Article 416 bis c.c.); 2. the 'hard prison regime' (Article 41 bis p.a.a.). More specifically, this part: a) gives an overview of the historical background, scope and definition of these legal provisions; b) provide some statistics on the application of these legal tools; c) examines their strengths and weaknesses in the fight against organised crime, also in relation to cross-border cooperation; d) offers some inputs, from a national perspective, on their exportability to other MS and/or to the EU level.

9.4.1. Article 416 bis c.c. (mafia-type association offence)

Historical background, scope and definition of the mafia-type association offence

Article 416 bis c.c. of the Italian criminal code is titled 'Mafia-type associations, including foreign ones'.⁴³⁵

Historical background

Until the beginning of the '80s, crimes committed by Italian Mafias (*Cosa Nostra*, *Camorra*, *Ndrangheta*, *Sacra Corona Unita*) were prosecuted as any other type of criminal association under Article 416 of the criminal code. The *Cosa Nostra*-related homicides of several journalists, law enforcement officers, civilians and politicians such as the murder of the Honourable Pio La Torre⁴³⁶ in April 1982 in Sicily, 'forced' the institutions to promulgate more severe measures. The first response consisted in the appointment by the Government in May 1982 of General Carlo Alberto Dalla Chiesa as Prefect of Palermo.

Carlo Alberto Dalla Chiesa, due to his specific expertise in the field of anti-terrorism developed since the '70s, was then entitled to special powers for counteracting the

⁴³⁵ The original title of this provision as foreseen by the 'Rognoni-La Torre Law' of 1982 was changed from 'Mafia-type association' to 'Mafia-type associations, including foreign ones' by the Law n. 125 of 25 July 2008.

⁴³⁶ Pio La Torre was a leader of the Italian Communist Party (PCI) and member of the Italian Parliament. He was killed by the *Cosa Nostra* after he proposed the law that aimed at introducing a new crime in the Italian legal system: 'Mafia-type association'.

Sicilian Cosa Nostra. In particular, during his activity he carried out an in-depth analysis regarding the structure of Mafia families in Sicily delivered to the Prosecutor Office of Palermo. The added value of this document resided in the comprehensive picture (i.e. organisational chart of Cosa Nostra) offered to law enforcement and prosecutors in order to fine tune their counteraction strategy. On the 3rd of September the murder of the General Carlo Alberto Dalla Chiesa represented the Mafia reaction in the attempt to maintain both the protection of the organisation and the power acquired.⁴³⁷

As a consequence, the Italian Parliament rapidly ratified the so-called 'Rognoni-La Torre Law' (Law n. 646 of 13 September 1982) that, for the first time, introduced a specific offence dedicated to Mafia-type associations, that is Article 416 bis c.c., into the criminal code. This significant change, allowed to recognise the Sicilian Mafia as an organised crime group within the Italian legal system, a phenomena previously denied especially by politicians and law enforcement agencies for social and cultural resistance.⁴³⁸

The definition of the Mafia-type offence stemmed from the acknowledgment by the Italian legislator of the typical *modus operandi* of Sicilian Cosa Nostra, nevertheless Article 416 bis c.c. was conceived to be legally applied to other criminal groups with similar features (see below). For example, this offence was used by Courts during the '90s to prosecute the members of other minor Italian organised crime groups such as the Venetian *Mafia del Brenta*.⁴³⁹

More recently,⁴⁴⁰ Article 416bis c.c. has been amended as to enforce its horizontal application,⁴⁴⁰ that is broadening its scope in including all forms of organised crime groups as illustrated in the following paragraph.

Scope

Article 416 bis c.c. can be applied to every criminal group resembling the Mafia-type association. This includes either Italian traditional Mafias (Cosa Nostra, Camorra, 'Ndrangheta, Sacra Corona Unita), or other criminal groups (also foreign ones) active in Italy and holding similar characteristics with the former. In particular, the last paragraph of Article 416 bis c.c. was amended to further specify the broad spectrum of this legal tool, considering explicitly:

- Two Italian-based criminal groups, i.e. Camorra and 'Ndrangheta, which are clearly mentioned as punishable;
- A specific reference to 'any other criminal association' (i.e. Italian/foreign criminal groups), whatever their names, making use of the power of intimidation (due to the bonds of membership) to pursue goals typical of a Mafia-type association (e.g. Italian Sacra Corona Unita; Albanian, Chinese, Russian criminal groups).⁴⁴¹

⁴³⁷ Ayala (2008); Falcone & Padovani (1991).

⁴³⁸ De Leo et al. (1995).

⁴³⁹ Vv. Aa. (2013).

⁴⁴⁰ Turone (1994).

⁴⁴¹ With Law n. 125 of 25 July 2008, the title of the Article 416 bis has changed: from 'Mafia-type association' to 'Mafia type associations including foreign ones'.

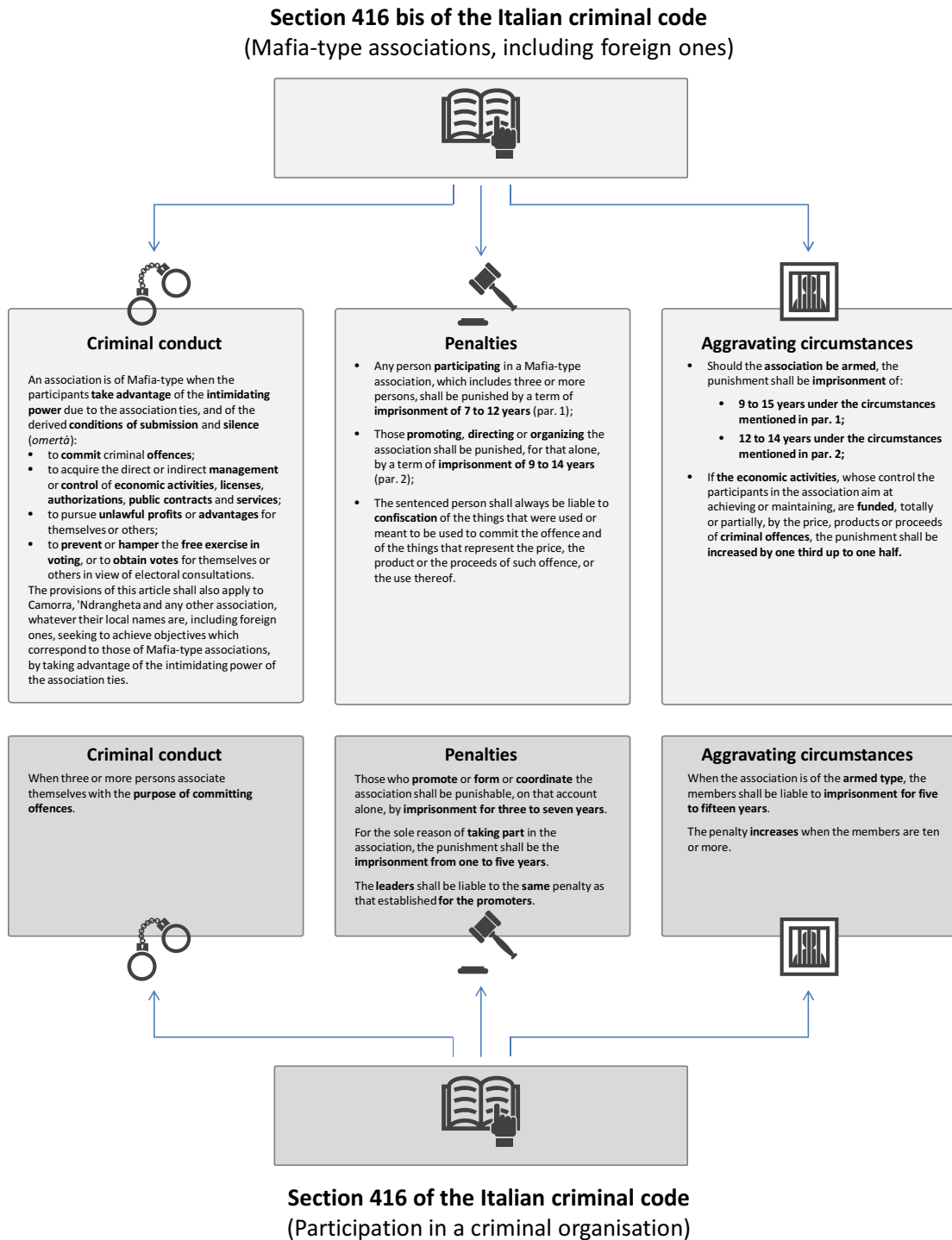
Article 416 bis c.c., paragraph 8

The provisions of this article shall also apply to Camorra, 'Ndrangheta and any other association, whatever their local names are, including foreign ones, seeking to achieve aims which correspond to those of Mafia-type associations, by taking advantage of the intimidating power of the association ties.

Article 416 bis c.c. may be considered as a special offence, characterised by a higher degree of sophistication and complexity, if compared to Article 416 c.c. concerning the general offence of participation in a criminal organisation⁴⁴² (see Figure 9.5).

⁴⁴² It is specified that Article 461 c.c. is literally titled in the Italian Criminal code 'Criminal Association', which in this case study equates to 'Participation in a criminal organisation', in line with Section 4 of this report.

Figure 9.5: 'Mafia-type associations, including foreign ones' (Article 416 bis c.c.) and 'Participation in a criminal organisation' (Article 416 c.c.): comparison between the general structures of the two provisions



Source: Based on national legislation

Case 4. Applying Article 416bis c.c. to a Nigerian criminal association

In 2010, the Court of Turin has convicted 36 Nigerians belonging to the criminal groups 'Black Axe' e 'Eiye' for the Mafia-type association offence. In the city of Turin, these groups managed various criminal activities ranging from drug dealing to exploitation of prostitution. According to the sentence, they actually employed the mafia-method, since using the force of intimidation due to the associative ties and the subjection as well as the code of silence to rule both internal and external relationships.

Source: <http://www.narcomafie.it/2010/06/09/a-torino-400-anni-di-detenzione-per-il-clan-dei-nigeriani/>

Definition

Since 1982, the Italian Criminal code has introduced a clear distinction between the 'Participation in a criminal organisation' (Article 416 c.c.) and the 'Mafia-type association' (Article 416 bis c.c.).

Participation in a criminal organisation (Article 416 c.c.)

When three or more persons associate themselves with the purpose of committing offences [...].

Mafia-type associations, including foreign ones (Article 416 bis c.c.)

An association is of Mafia-type when the participants take advantage of the intimidating power due to the association ties, and of the derived condition of submission and silence (*omertà*) to commit criminal offences, to acquire the direct or indirect management or control of economic activities, licenses, authorizations, public contracts and services, or to pursue unlawful profits or advantages for themselves or others, or to prevent or hamper the free exercise in voting, or to obtain votes for themselves or others in view of electoral consultations.

Article 416 bis c.c. extensively explains the *how* and *what* of Mafia-type associations. The 'mafia-method' is performed when members take advantage of the intimidating power due to the association ties, and of the derived condition of submission and silence. Criteria of this method are met when a criminal association displays three specific behaviours (all of them mandatory) in pursuing its aims:

- *Power of intimidation*, based both on the association bond *per se* and the criminal reputation (i.e. criminal career and continuative use of violent and threatening means);
- *Subjection*, a condition suffered by individuals (both internal and external) as a result of the power of intimidation;
- *Code of silence*, i.e. '*omertà*', reluctance of potential witnesses/internal members to denounce or collaborate with law enforcement agencies or institutional authorities as a result of the power of intimidation.

All these three conditions need to be present to prove the existence of the Mafia-type association.⁴⁴³ The 'mafia-method', represents the basis as well to:

- Commit criminal offences, *and/or*;
- Acquire the direct/indirect management or control of economic activities, licenses, authorizations, public contracts and services, *and/or*;
- Pursue unlawful profits or advantages for themselves or others, *and/or*;
- To prevent or hamper the free exercise in voting, or to obtain votes for themselves or others in view of electoral consultations.

As a consequence, a Mafia-type association may perpetrate criminal activities (e.g. racketeering, extortion, drug trafficking; etc.); illicit activities (e.g. any violations of labour/commercial legislation), and at the same time legal activities (e.g. running construction/waste companies, import-export businesses), underlying the peculiar character of entrepreneurship of the organised crime groups.

Point 4, in particular, pertains to another illicit behaviour, which compared to the others considered, is less profit-oriented, rather more aimed at acquiring political power. The conditioning of local communities in the voting procedures represents one of the main mean to infiltrate into the political sphere first, and economic sector secondly.

The Mafia-type association offence can be applied proving the solely membership to the criminal group, being the predicate offences not a necessary element, contrary to the provision envisaged for the crime of 'Participation in a criminal organisation' ex Article 416 c.c.⁴⁴⁴

Penalties

The penalties for the Mafia-type association offence are particularly severe: from seven to twelve years for the membership and from nine to fourteen years of imprisonment for those who promote, manage and organise such an association. In addition, each specific offence (e.g. drug trafficking, extortions, homicides) that may be committed within the criminal group shall be punished separately, thus further increasing the penalties.⁴⁴⁵ Therefore, article 416 bis c.c. envisages more severe penalties than Article 416 c.c. (Table 9.3).

Table 9.3: Penalties envisaged by Article 416 and Article 416 bis of the Italian criminal code

Conducts	Article 416 c.c.	Article 416 bis c.c.
Participation/Membership	From 1 to 5 years	From 7 to 12 years
Promotion/Formation/Coordination/Direction/Organisation/Leadership	From 3 to 7 years	From 9 to 14 years

Source: Based on national legislation.

⁴⁴³ Turone (2008).

⁴⁴⁴ Council of Europe (2004a).

⁴⁴⁵ Fiandaca & Visconti (2010).

Judicial extensive interpretation of the scope of Article 416 bis c.c.: the external complicity to Mafia-type association offence

Practise has underlined links between members of Mafia-type associations and legal professionals such as politicians, lawyers, accountants, judges and representatives of police forces that, although not belonging to the association, offer support for the realisation of a part of the criminal programme. They offer specific services while remaining outside, but being aware and with the will to help and strengthen the criminal organised group. As a result, both academics and magistrates (prosecutors and judges) started to reasoning in regard to the criminalisation of these individuals (if and under which conditions). Indeed, in the late '80s started a long-lasting debate on the legal construction of this conduct, that led to the development of the jurisprudential institute of the 'external complicity to the Mafia-type association offence'⁴⁴⁶ aimed at combating the 'political and economic weight' of organised crime groups. That is, accomplices ('fiancheggiatori'), although not being part of the criminal group, may contribute to a system of collusion that, in turn, reinforces the power of the organisation and that for this reason are prosecuted and convicted under Article 416 bis c.c.⁴⁴⁷ This judge-made creation envisages the possibility to criminalise individuals offering support to the Mafia-type association without actively and daily contributing to the achievement of specific criminal goals, or individuals participating in legal acts related to the association.⁴⁴⁸

Consistently, the Court of Cassation stressed that, while a real membership means a daily basis contribution to the activities of the Mafia-type association, nor is the external complicity in being characterised by an external and temporary support to the criminal group (e.g. Court of Cassation, Section I, 94/199386).

According to the judgement n. 22327 of 21 May 2003 of the Court of Cassation, the external complicity to Mafia-type associations recurs when the external contribution meets the following requirements⁴⁴⁹:

- *Sporadic and autonomous contribution* (no need of an effective and daily participation);
- *Utility of the contribution* to pursue the criminal purposes of the association;
- *Causal contribution* in reinforcing and strengthening the Mafia-type association (external complicity serves the criminal group and realises an effective improvement);
- *General intent* of the accomplice to sustain the achievement of the illicit purposes of the Mafia-type association (there is the awareness and the will of support the group).

⁴⁴⁶ The Italian term for this type of conduct is '*concorso esterno in associazione mafiosa*'.

⁴⁴⁷ Fiandaca & Visconti (2010).

⁴⁴⁸ The possibility of differentiating between internal membership in a Mafia-type association and external complicity has been long debated. With reference to the contribution given to a Mafia-type association by white-collar actors (e.g. lawyers, politicians, entrepreneurs), who entered into business with Mafia-type associations, legal practice and Jurisprudence opted for recognising an external complicity to the Mafia-type association offence (i.e. using Article 416 bis) rather than applying Article 416 c.c. This debate has been strictly connected to the lack of clarity in relation to the level of 'contribution' of a 'participant' to a Mafia-type association. See Turone (2008); Beare (2003).

⁴⁴⁹ Maiello (2014).

Even though, nowadays, this jurisprudential extension of the scope of Article 416 bis c.c. represents a common practise within Italian courts, still remains a part of the Doctrine and Magistrates (prosecutors and judges) arguing the impossibility to foresee, by judicial extensive interpretation, forms of external complicity in offences which are associative *per se*.⁴⁵⁰ This state of the art, in the opinion of some representatives of the academic and judicial sectors, needs to be clarified by the intervention of the legislator, that is the provision of a specific offence consisting in the 'facilitation' of Mafia-type associations activities. Such a provision, would allow to explicitly prosecute and punish accomplices, also with differentiated penalties from the ones envisaged by Article 416 bis c.c.: with the 'external complicity' indeed accomplices are considered equivalent to the members of the organisation.⁴⁵¹

Case 5. Conviction of a 'professional' intermediary for external complicity in mafia-type association

In 2014, the Court of Cassation has confirmed the 7-years imprisonment sentence to the politician and entrepreneur Marcello Dell'Utri, charged with external complicity in mafia-type association. In judges opinion, since the '70s he acted as an intermediary for the Sicilian Cosa Nostra and a segment of the business sector situated in the city of Milan 'offering a significant support to reinforce and strengthen the political and economic power of this organised crime group'.

Source: http://www.repubblica.it/politica/2014/05/09/news/dell_utri_sentenza_cassazione-85677592/

Case 6. Conviction of a 'professional' informant for external complicity in mafia-type association

In 2013, the Appeal Court of Milan sentenced the judge Vincenzo Giglio for having provided reserved information to the members of the 'Lampada' clan ('Ndrangheta) on ongoing investigations in exchange of his wife nominee as commissary of the Local Health Centre in Vibo Valentia (Calabria).

Source: <http://www.ilfattoquotidiano.it/tag/vincenzo-giglio/>

Application of 416 bis c.c. at a glance: some statistics

The Ministry of Justice gathers, on a yearly basis, the data on the number of individuals investigated and prosecuted by DDAs present within the Italian territory (North, Centre, South and Islands), under article 416 bis c.c. (Tables 9.4 and 9.5).

⁴⁵⁰ Arrigoni (2010).

⁴⁵¹ Fiandaca & Visconti (2010).

Table 9.4: Reported persons for whom DDA started a criminal proceeding for Article 416 bis c.c. and for all offences within their mandate, by regional area and year, 2004–2013

Regional Area	Year									
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
<i>for 416 bis c.c.</i>										
North	279	169	146	347	196	359	498	275	211	173
Centre	274	382	272	322	251	110	96	76	197	114
South	3.164	2.650	2.586	2.787	2.597	2.680	2.637	2.818	2.765	2.861
Islands	2.046	1.541	1.857	1.379	1.751	1.436	1.396	1.346	1.052	1.079
Total DDA	5.763	4.742	4.861	4.835	4.795	4.585	4.627	4.515	4.225	4.227
<i>for all offences within the mandate of DDA</i>										
Total DDA	25.735	21.888	23.099	21.864	23.744	24.024	25.135	23.775	23.342	24.481
% 416 bis c.c. on all offences	22,4 %	21,7 %	21,0 %	22,1 %	20,2 %	19,1 %	18,4 %	19,0 %	18,1 %	17,3 %

Source: Based on Ministry of Justice data.

Table 9.5: Reported persons involved in pending criminal proceedings started by DDA for Article 416 bis c.c. and for all offences within their mandate, by regional area and year, 2004–2013

Regional Area	Year									
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
<i>for 416 bis c.c.</i>										
North	995	1.011	733	988	1.044	1.050	905	1.109	1.040	1.015
Centre	680	622	781	677	765	917	673	614	698	664
South	9.653	9.198	9.745	10.616	10.950	12.198	12.796	13.449	14.182	13.586
Islands	4.706	4.586	4.609	4.704	4.899	4.667	4.116	3.828	4.698	4.119
Total DDA	16.034	15.417	15.868	16.985	17.658	18.832	18.490	19.000	20.618	19.384
<i>for all offences within the mandate of DDA</i>										
Total DDA	64.215	67.826	68.856	71.657	76.149	79.706	81.685	86.834	89.246	90.347
% 416 bis c.c. on all offences	25,0 %	22,7 %	23,0 %	23,7 %	23,2 %	23,6 %	22,6 %	21,9 %	23,1 %	21,5 %

Source: Based on Ministry of Justice data.

Strengths and weaknesses of the Mafia-type association offence

Based mainly on the opinions of the Deputy Anti-Mafia National Prosecutors gathered during the focus group, both strengths and weaknesses of Article 416 bis c.c. (Mafia-type association) were underlined. In the following paragraphs, aspects pertaining to this legal tool in terms of effectiveness and limitations are presented.

Effectiveness

Main results suggest specific features that render Article 416 bis c.c. particularly effective in the fight against organised crime.

The introduction of this offence formally acknowledged that Mafia associations exist, determining a change of perspective within Italian politicians, law enforcement authorities, practitioners and the general public. The main purpose of this new prescription was to overcome the limits of Article 416 c.c. in the fight against specific criminal organised crime groups: i.e. the traditional types of Mafias, namely Cosa Nostra, Camorra, 'Ndrangheta, and Sacra Corona Unita.

In line with the opinions of DNA prosecutors, one reason for considering this change particularly significant is underlined within the literature.⁴⁵² After the instauration of the Italian Republic in 1945, and even before 1982, Article 416 c.c. was applied in very few cases or with no success in the fight against criminal associations. The demonstration of guilty of the members of organised crime groups (*Mafiosi*), indeed, had to be proved in relation to each single case. As a result, many criminal proceedings were closed acquitting charged individuals (*Mafiosi*) for insufficient evidence. Actually, the introduction of Article 416 bis c.c. into the Criminal code

⁴⁵² Fijnaut & Paoli (2007), 263–302.

transformed the Mafia cultural and sociological concept into a legal category, an offence due to the mere membership in a criminal association as such.

Paving the way for anti-mafia comprehensive legal system tailored on the peculiarities of the Mafia-type associations

Article 416 bis c.c., dispatched its effectiveness in having paved the way for to the introduction of other Mafia-related provisions. For example:

- Article 41 bis p.a.a., 'hard prison regime' for Mafia members (see section X.3.5);
- Personal and financial preventive measures (*ante o praeter delictum*).

The personal preventive measures are intended to prevent certain individuals considered to be socially dangerous - including *Mafiosi* - as underlined by Article 416 bis c.c. from committing offences, and regard in particular special surveillance for public security and obligatory residence.⁴⁵³ While the financial preventive measures, are aimed at attacking the illicit capitals gained by *Mafiosi* through their criminal activity, and concern civil confiscation (the so-called *confisca di prevenzione*).⁴⁵⁴

Originally disciplined by Law n. 575/1965, as amended by Law n. 646/1982, at present the personal and financial preventive measures are regulated by the recent Anti-Mafia Code (see note 32), that is a consolidated text of anti-mafia provisions. According to the opinions of DNA prosecutors participating to the focus group, this comprehensive anti-mafia system, is particularly effective since it is tailored on the peculiarities of *Mafias*, and especially on their entrepreneurial and profit-oriented character.

Enhancing investigations against criminal groups whose strength lies in their connections with the legal system

Article 416 bis c.c. makes it possible to tackle the entrepreneurial feature of current *Mafias*, as well as their capacity to establish a network with politicians and the 'legal

⁴⁵³ Special surveillance for public security measures are defined and imposed in each case by Courts in order to avoid the further commission of crimes. The Public Security Authority then supervises the compliance in regard to the execution of such measures. Obligatory residence gives the power to restrict residence to one or more municipalities or provinces. This measure is particularly aimed at removing *Mafiosi* from the areas in which they exercise their influence.

⁴⁵⁴ The court may order seizure of the defendant's assets (art. 20 of Legislative Decree n. 159 of 6 September 2011). Two conditions shall be met for ordering such a seizure. Firstly, the assets must be directly or indirectly at the disposal of the person. The second condition is integrated with either: 1) the disparity between the defendant's wealth and his/her income or level of economic activity, or; 2) the existence of sufficient evidence that the assets are the proceeds of crime or the use thereof. The court then orders the confiscation of seized assets whose lawful origin has not yet been demonstrated by the defendant (Article 24 of Legislative Decree n. 159 of 6 September 2011). Under the discipline in force before 2011, a confiscation order normally followed the adoption of a preventive personal measure. Following the 2011 reform, this is no longer true, and therefore financial preventive measures may be adopted even if personal preventive measures have not been adopted (Article 18 of Legislative Decree n. 159 of 6 September 2011). Moreover, the measure of enlarged criminal confiscation was introduced in 1994 by Law n. 504, which added Article 12-sexies to Law n. 356/1992. It applies to persons convicted, amongst other, for crimes committed exploiting the conditions described under Article 416 bis c.c. or to facilitate activities of Mafia-type associations. In the case of conviction, the assets at the disposal of the convicted person and out of proportion to his/her income or to his/her economic activity are confiscated. A reversal of the burden of proof is envisaged: the measure applies if the defendant has not been able to prove the licit origin of his/her property.

world' in general, and to control and unduly influence economic activities, also through the power of intimidation and code of silence.

In such cases, as explained by DNA prosecutors, the added value of such a provision is the possibility to implement special investigative tools beforehand, when evidence of specific crimes has not been gathered yet, but there is only a suspect that a group of people is involved in Mafia-related activities. Indeed, Article 416 bis c.c. enables law enforcement authorities, for example through the use of interception of communications (see section 4 of this case study), to investigate the links between the members of Mafia-type associations and the 'legal world' (i.e. existence of grey areas), and to discover possible crimes being committed. The use of these special tools is not allowed during the investigations related to the participation in a criminal organisation (Article 416 c.c.).

Limits

Article 416 bis c.c. is theoretically applicable either to typical Italian Mafias (i.e. *Cosa Nostra*, *'Ndrangheta*, *Camorra* and *Sacra Corona Unita*), or other criminal groups (also foreign ones). As for the latter, in practise the Mafia-type association offence is rarely applied due to the difficulty to prove or recognise the 'mafia-method'. It is mainly due to the fact that the offence contains a relatively high number of elements that need to be proven at the same time. The offence aims at very specific types of criminal organisations that are considered very dangerous and sophisticated in their nature. The need to tackle this kind of criminal organisation entails the necessity to prove that those criminal organisations are, indeed, that dangerous and sophisticated. In those cases the burden of proof is higher than in the case of the 'basic' offence of Article 416. This problem is partly mitigated by the fact that the offence of Article 416 bis (contrary to Article 416) is based on the 'membership' (conspiracy) concept which does not require to prove any predicate offence which results in a possibility to launch the investigation for membership in a mafia-type association (namely 'being a mafioso' without the necessity to relate to any specific criminal offence).

As consequence, the number of reported convictions for 416 bis c.c. still remains low,⁴⁵⁵ and prosecutors resort to other types of offences to punish these criminal groups, such as 416 c.c.

Case 7. Russian-Ukrainian criminal group not sentenced for 416 bis c.c.

In 2006, the Court of Rimini has sentenced the members of a Russian-Ukrainian criminal group under Article 416 c.c. for their 'participation in a criminal organisation' (Article 416 c.c.). They were responsible of trafficking in gift and fancy goods in the Northern and Central areas of the country. In the opinion of the judges, notwithstanding the aims pursued and the operative strategies used typical of Mafias, the group did not detain the necessary criminal reputation, based on intimidation, to prove the mafia-method (Article 416 bis c.c.).

Source: Fiandaca & Visconti (2010).

⁴⁵⁵ Calderoni & Maiolli (2003).

Case 8. 'Banda della Marenella' is not a mafia-type association

In 2004, the Court of Rome did not apply Article 416 bis c.c. to the members of 'Banda della Marranella', a criminal group active in the city of Rome and involved in drug trafficking as well as extortion. The latter was perpetrated against insolvent shop keepers through intimidation and violent behaviours. In the opinion of the judges, contrary to the prosecutor, the 'mafia-method' was not possible to be proved.

Source:

http://roma.repubblica.it/cronaca/2012/07/27/news/allarme_mafia_sul_litorale_ma_niente_416_bis_per_i_giudici_solo_associazioni_a_delinquere-39795298/

Due to the transformation of the organised crime scenario in Italy (see paragraph 1 of this case study), in the opinion of DNA prosecutors Articles 416 bis c.c. results somehow outdated. Indeed, this legal tool was created in 1982, tailored on the traditional Sicilian Cosa Nostra and thus being aligned to the specific features shared also with the other Italian Mafia groups ('Ndrangheta, Camorra). These are: intimidation, subjugation and the code of silence. Nowadays, these characteristics remain although together with new ones related primarily to the entrepreneurial character of the Italian Mafias. This represents the critical aspect: in some cases it is easy to prove the infiltration in the legal economy, but at the same time it is particularly challenging to prove the presence of the 'mafia-method'. Consistently, more often investigations and prosecutions started under Article 416 bis c.c. fail to determine convictions under the same offence.

Use of the mafia-type association offence in cross-border cooperation

In recent years two main issues⁴⁵⁶ have emerged in regard to cross border cooperation in the fight against organised crime:

- The need to fight against organised crime groups beyond their origin areas, both at a the national and a transnational level;
- The need to fight 'new' mafias, that is emerging criminal groups acting with the 'mafia-method'.

Notwithstanding the vast majority of MS criminalises offences in relation to participation in a criminal organisation (i.e. all the MS with the only exception of Denmark and Sweden), a key problem faced by Italian prosecutors when sending rogatory letters to other MS is the non recognition of requests of cooperation based on Article 416 bis c.c. The main problem is the fact that the Member States require a link with a specific predicate offence (e.g. drug trafficking) while simple 'being part of a criminal organisation' as such is not considered to be a criminal offence.

As also stated by DNA prosecutors during the focus group, the added value of such a provision is the possibility to implement special investigative tools beforehand, when evidence of specific crimes has not been gathered yet, but there is only a suspect that a group of people is involved in Mafia-related activities.

⁴⁵⁶ Balsamo & Recchione (2013).

On the contrary, the participation in a criminal organisation offences in other Member States usually requires evidences of preparation for a specific crime (i.e. predicate offences), which means that those MS criminal groups may not be investigated pursuant to the associative bond *per se*, and members of Mafia-type associations risk suspicion of criminal activity only in exceptional cases. As a consequence, Italian requests of rogatory letters are more often refused since the Italian prosecution authorities are not able to indicate the specific predicate offences.

Operational example 5. DNA avoid the request to proceed with bugging interceptions in the Duisburg massacre under Article 416 bis c.c.

DNA prosecutors was aware that some members suspected belonging to 'Ndrangheta met periodically in the Pizzeria 'Bruno' in Duisburg, Germany. At that point of the investigation, they avoid the request of proceeding with bugging interceptions since, without the proof of any specific predicate offence, probably the rogatory would have not been granted by the German authorities. On the 15th of August 2007, six men belonging to the Pelle-Vottari-Romeo clan were killed in their cars in front of the Pizzeria. This massacre was part of a long-running feud between two clans of the 'Ndrangheta, named the San Luca Feud (Vendetta di San Luca) that began in 1991 in the Italian village of San Luca.

Source: Based on data gathered during a University of Trento focus group.

There is thus a clear need, to respond to the aforementioned threats in regard to cross border cooperation, to invite MS not to have recourse to non recognition or non execution of requests based on Article 416 bis c.c., especially at the investigative level. The existing *acquis* in the field of Member State cooperation allows the Member States to refuse such requests (due to the principle of dual criminality) but it does not force them to do so.

Inputs to exportability of the mafia-type association offence

Based on the results of the focus group, one main reason can be underlined for the importance to export this legal tool (Article 416 bis c.c.). This issue is worth being discussed not only for Italian typical Mafias spread well beyond Italian borders but also because in other Member States as well, exist criminal groups holding an entrepreneurial character together with the capacity to establish links with politicians and the 'legal world' to control and unduly influence economic activities, also through subjection and intimidation. Indeed, these criminal groups result to be underestimated in other MS, both for cultural and social factors and, in turn, for the lack of dedicated offences. Having an offence similar to Article 416 bis c.c. appears to be a key point to counteract both 'exported' Italian Mafias and native organised crime phenomena which are particularly complex and deep-rooted within territories. The mafia-type association offence should be considered as inspiration but it does not necessarily mean that it should be copied in the scope foreseen by the Italian legislation to any other jurisdiction. This is the case due to the fact that all other Member States do not have the definition of a mafia-type organisation and even if such a definition was introduced

it does not seem probable that they would use it in practice. At the same time it seems sure that the Member States need an offence to fight against the most serious organised criminality. Such an offence should be based on the national experience and judicial culture, taking into account the context of the whole EU, especially with regard to presence of the serious criminal organisations in the Member States. Such an offence could take into account some elements of the Italian Article 416 bis adjusting them to the specific national conditions (or peculiarities of the criminal groups present in MS) ensuring that it would keep the balance between the sophisticated nature and feasibility with regard to practical application.

The *how* should be the introduction into MS legal system of offences allowing to investigate, on the basis of suspect, individuals probably involved in criminal groups related activities even though specific predicate offences are not proved yet. It means that there is merit in considering, at least in cases of the most serious groups, to base the offence on the membership (conspiracy) concept which would facilitate the practical application of this provision. At the same time, MS should recognise offences in relation to participation in a criminal organisation of whatever nature, in a reciprocal way to boost cross-border cooperation.

9.4.2. Article 41 bis p.a.a. ('hard prison regime')

Historical background, scope and definition of the 'hard prison regime'

Article 41 bis p.a.a. of the Italian Prison Administration Act (Law n. 354 of 26 July 1975 and subsequent modifications thereto; hereinafter also referred to as 'p.a.a.') is commonly known as 'hard prison regime' (the so-called '*carcere duro*'). This regime suspends the standard prison treatment and introduces a series of restrictions for individuals in prisons for certain crimes when this is necessary to avoid a concrete danger for society.

Historical background

The introduction of Article 41 bis p.a.a. in the Italian legal system was the natural effect of years of contrast of the Mafia phenomenon during the '80s. Hence, Mafia members involved in organised crime tended to live their incarceration experience maintaining the relationships with other *Mafiosi* both inside and outside prison. These connections allowed especially bosses to preserve their pivotal role for the members of the organisation operating in the territory and to continue in regulating the criminal activities of the group.⁴⁵⁷ Moreover, a great number of homicides orders were issued by the bosses while in prison.⁴⁵⁸

For these reasons, the 'hard prison regime' was introduced within the Italian Prison Administration Act by Law n. 663 of 10 October 1986, which was subsequently modified by Law n. 356 of 7 August 1992, soon after the murders of the investigating

⁴⁵⁷ Ardita (2007).

⁴⁵⁸ Examples of homicides commissioned by Mafia bosses while in prison include: i) the homicide of the *Mafioso* Pietro Marchese in 1982; ii) the homicide of Carmelo Ianni in 1980, 'guilty' for having granted access to the police in the hotel where boss Gerlando Alberti was hosted, who later ordered his homicide while in prison. See Gaboardi et al. (2013).

judges of Palermo Giovanni Falcone and Paolo Borsellino (see section 1 of this case study).⁴⁵⁹

Scope

Article 41 p.a.a. was issued to excise any possible communications between imprisoned Mafia bosses and the other members of the criminal group inside and outside the prison.⁴⁶⁰

Definition

Article 41 bis p.a.a. allows the Minister of Justice (in exceptional cases and upon request from the competent magistrate or the Minister of Interior and by ministerial decree) to suspend, with reference to a specific detainee, those standard prison rules that can be in concrete contrast with security and public order, and to consequently introduce special restrictions to his/her prison treatment in terms of, among others:⁴⁶¹

- Contacts among inmates or correspondence with other prisoners;
- Use of telephone;
- Meetings with third parties;
- Receiving or sending money (over a given amount);
- Receiving parcels (other than those containing sheets and clothes) from the outside;
- Voting or standing in elections for prisoner representatives;
- Organising cultural, recreational or sporting activities.

Article 41 bis regime also include the possibility to restrict visits by members of the family, that are permitted only once per month. In such occasions family visitors are only allowed to communicate by intercom through thick glasses.

Such restrictions are aimed at protecting security and public order and can be issued only against individuals imprisoned (convicted or indicted) for a close list of crimes, including national and international terrorism; subversion of the constitutional system; mafia-type associations; human trafficking, and other forms of slavery; kidnapping for extortion purposes; tobacco smuggling; aggravated homicide; aggravated armed robbery; aggravated extortion; drug trafficking; sexual assault; domestic violence.

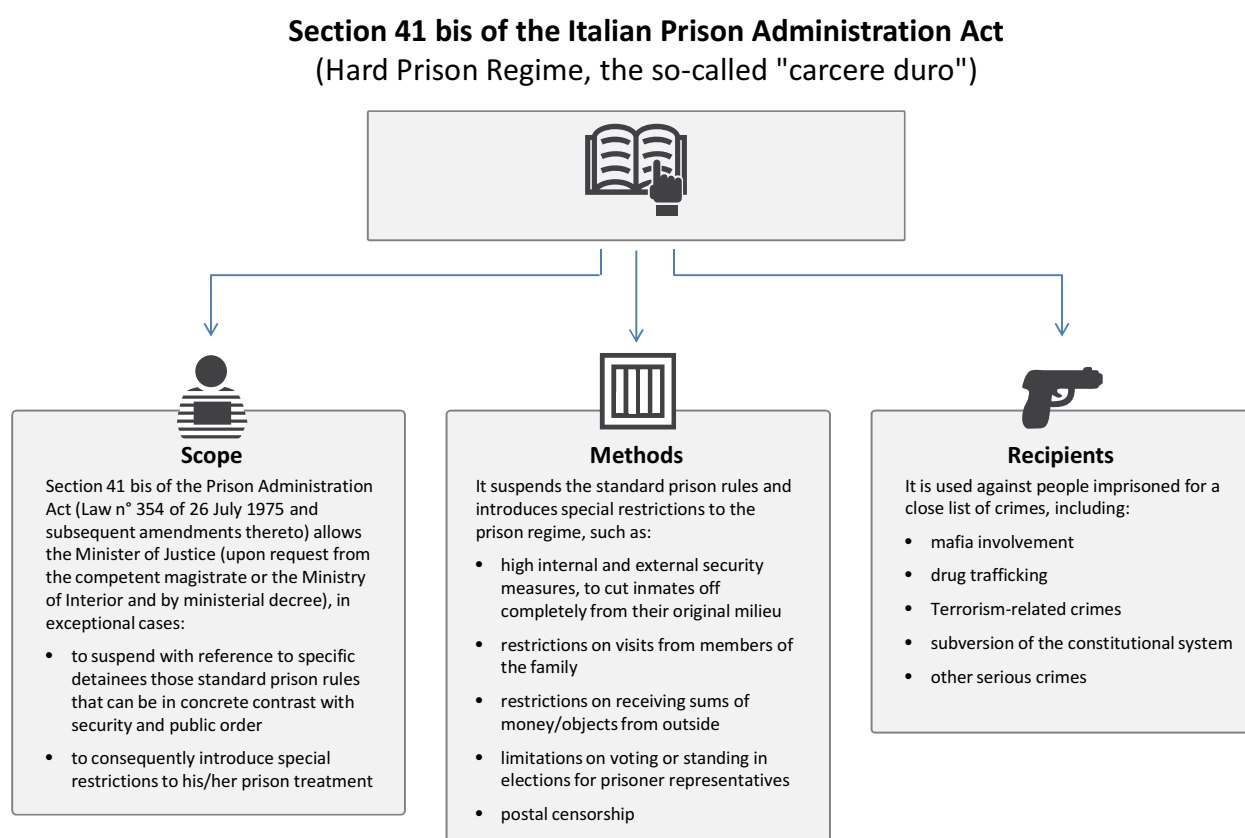
The general structure of Article 41 bis p.a.a. is shown in Figure 9.6.

⁴⁵⁹ Dickie (2013).

⁴⁶⁰ Siegel & van de Bunt (2012).

⁴⁶¹ Fiandaca & Visconti (2010).

Figure 9.6: 'Hard prison regime' (Article 41 bis p.a.a.): general structure



Source: Based on national legislation and scientific literature.

Evolution of 41 bis with regard to European Human Rights Court sentences

According to the Italian legislation and jurisprudence, the 41 bis regime is a crucial tool in the fight against organised crime groups and to safeguard civil society. Article 41 bis was first introduced by Law 10 of October 1986, n. 663 and covered only insurrections or situations of serious emergency within the Italian prisons. In 1992, with Law n. 356, the legislator added the possibility for the Ministry of Justice to temporarily suspend the standard rules of treatment for prisoners belonging to criminal organisations. These initial regulations suffered of a high level of discretion, since the concrete decisions on how to apply them were left to the Public Administration with reference to: 1) duration of the special prison regime; 2) duration of its possible extension; 3) internal and external communications (e.g. correspondence and contacts with other prisoners); 4) out-of-jail time; 5) prison interviews.

Although not questioning the basic idea behind this legal tool, the European Court on Human Rights highlighted specific violations of the European Convention on Human Rights (ECHR)⁴⁶² with reference to the too broad discretionary power in the application

⁴⁶² In violation of Articles 3, 5, 6 and 8 of the European Convention of Human Rights see: ECHR, *Labita v. Italy*, n. 26772/95, 6 of April, 2000. In violation of Article 3, see: ECHR, *Natoli v. Italy*, n. 26161/95, 9 January 2001, *Ospina Vargas v. Italy* no 40750/98, 14 October 2004. In violation of Article 8, see: ECHR, *Messina v. Italy*, n. 25498/94, 28 September 2000.

of the regime demanded to the Ministry of Justice and the Prison Deans. Therefore, the Court suggested to better define the content of this regime by law.⁴⁶³ As a result, Article 41 bis p.a.a. underwent 3 main legal reforms in 2002, 2004, and 2009.

First legal reform: Law n. 279 of 23 of December 2002

This legal reform aimed at defining by law the duration of the measure and of its possible extensions. The duration of the 'hard prison regime' was set from a minimum of one to a maximum of two years and the extension can only be of one year. The new Law also introduced two categories of intervention on correspondence: a) a procedure of security check; b) a procedure of control for the unread envelopes.⁴⁶⁴ The application of the tool was extended to crimes such as terrorism and subversion of constitutional order.⁴⁶⁵

Second legal reform: Law n. 95 of 8 April 2004

This reform introduced a new procedure for the control of correspondence. Before 2004, Article 41 bis p.a.a. allowed the Italian Minister of Justice to censor the correspondence of prisoners, including the one with lawyers. According to the European Court of Human Rights (e.g. Case of Argenti vs. Italy, Judgement of 10 November 2005), this power violated Article 8 of the ECHR since such a restriction should be imposed by means of primary legislation or judicial decision, and not through a basic Ministerial Decree. Following the European Court of Human Rights' decisions, the Italian Parliament amended the Prison Administration Act with Law n. 95 of 8 April 2004 in order to better legally define rules on correspondence.⁴⁶⁶

Case 9. ECHR: Argenti v. Italy (date of judgement: 10 November 2005)

The applicant, Emanuele Argenti, is serving a life sentence, imposed in 1997 for, among other offences, belonging to a Mafia-type association (*Cosa Nostra*). Since July 1992, he is subjected to the 'hard prison regime' pursuant to Article 41 bis p.a.a. In 2000, the applicant lodged an appeal with the EHCR stressing that the application of the special prison regime was contrary to Article 8 ('Right to respect for private and family life') of the European Convention on Human Rights, with regard to the limits on family visits and the inspection of his correspondence. The Court ruled that the regime provided for Article 41 bis p.a.a. was compatible with Article 8 of the Convention in relation to the restrictions on family visits. As regards the supervision of Mr. Argenti correspondence, the Court concluded that Article 18 of the Italian Prison Administration Act, which regulated the supervision of prisoners' correspondence, could not be considered 'legislation' within the meaning of Article 8 of the Convention. The Court therefore concluded that there had been a violation of Article 8 of the Convention. This was one of the judgments of ECHR

⁴⁶³ These amendments of the Prison Administration Act have been elaborated following the issues raised by the violation of Art. 3 of the European Convention of Human Rights. See: ECHR, Ospina Vargas v. Italy no 40750/98, 14 October 2004 and Natoli v. Italy, n. 26161/95, 9 January 2001. In violation of Art. 8, see: EHCR, Messina v. Italy, n. 25498/94, 28 September 2000.

⁴⁶⁴ Censorship of correspondence was, however, demanded by the Ministry of Justice.

⁴⁶⁵ Ardita (2007).

⁴⁶⁶ European Court of Human Rights (2010).

that brought Italy to the amendment of the Prison Administration Act with Law n. 94 of 15 July 2009.

Source: Database of the European Court of Human Rights (hudoc.echr.coe.int).

Third legal reform: Law n. 94 of 15 July 2009

Law n. 94 of 15 July 2009 deeply modified Article 41 bis p.a.a. by clarifying and consolidating its formulation, also harshening the regime. It amended the following parts: 1) duration of the special prison regime (4 years, instead of from 1 to 2 years; Article 41 bis p.a.a., para 2 bis); 2) duration of the possible extension of the special prison regime (2 years, instead of 1 year; Article 41 bis p.a.a., para 2 bis); 3) maximum number of prison interviews (always recorded, except for lawyers; Article 41 bis p.a.a., para 2 quater let. b); 4) reduction of the out-of-jail-time (2 hours a day, instead of 4 hours; Article 41 bis p.a.a., para 2 quater let. f); 5) impossibility of communications between prisoners, of exchanging objects, and of cooking (Article 41 bis p.a.a., para 2 quater let. f); etc.⁴⁶⁷ With this new reduction of discretionary power in the application of 41 bis, the Italian legislator aimed to follow the Jurisprudence of the European Court on Human Rights that, while stressing that Article 41 bis p.a.a. did not violate the Article 3 of ECHR on 'Prohibition of inhuman or degrading treatment or punishment' (e.g. Case of Gallico vs. Italy, Judgement of 28 June 2005), further remarked the necessity for a more accurate legal formulation.

⁴⁶⁷ See Direzione Nazionale Antimafia (2014b).

Case 10. ECHR: Gallico v. Italy (date of judgement: 28 June 2005)

The applicant, Domenico Gallico, is serving a life sentence imposed in 1994 for a Mafia-type association ('*Ndrangheta*) and since 1992 he is subjected to the 'hard prison regime' pursuant to Article 41 bis p.a.a. In 2000, the applicant made an appeal to the EHCR for degrading treatment (lasting 12 years under Article 41 bis p.a.a.) violating Article 3 ('Prohibition of inhuman or degrading treatment or punishment') of the European Convention on Human Rights. He further stressed that the delay by the Italian courts in sentencing on his appeals had broken his right to a court according to Article 6 ('Right to a fair trial') of the Convention. The Court ruled that the motivations put forward by the Italian judge to confirm the maintenance of the restrictions on the applicant's rights had not been disproportionate to the offences committed by Mr. Gallico. Accordingly, the Court concluded that there had been no violation of Article 3. However, the EHCR considered that the delay of the Italian courts in sentencing on the applicant's appeals had violated his right to a fair trial (i.e. the ECHR concluded that there had been a violation of Article 6). This was one of the judgments of ECHR that brought Italy to the amendment of the Prison Administration Act with Law n. 94 of 15 July 2009.

Source: Database of the European Court of Human Rights (hudoc.echr.coe.int).

Additionally, this new legal discipline mainly impacted on the possibility of extending the special prison regime. In particular, the extension may be issued only if the capability of the inmate to maintain connections with his/her crime group is still ascertained,⁴⁶⁸ taking into account: his/her criminal profile, his/her position within the criminal network/hierarchy, persisting activities of his/her Mafia syndicate, new (possible) convictions, living standards of the prisoner's relatives.⁴⁶⁹ Also following these legislative amendments, the UN Working Group on Arbitrary Detention, at the end of its Italian mission, affirmed that '*this form of detention does not amount to torture, inhuman or degrading treatment*', as also the European Court of Human Rights repeatedly stated.⁴⁷⁰

Prisoners under Article 41 bis anyway unsuccessfully continue lodging appeals with the European Court on Human Rights (e.g. Enea vs. Italy, Judgement of 17 September 2009).⁴⁷¹

⁴⁶⁸ To avoid contact between individuals belonging to the same organisation, they are never incarcerated with each other. Convicted individuals are placed in single cells to avoid communication between inmates.

⁴⁶⁹ This law also establishes the right of appeals against the application or extension of the regime to the sole Surveillance Court of Rome, with DNA as auditor. See Direzione Nazionale Antimafia (2014b).

⁴⁷⁰ United Nations (2009).

⁴⁷¹ See the Database of the European Court of Human Rights (hudoc.echr.coe.int).

Case 11. ECHR: Enea v. Italy (date of judgment: 17 September 2009)

The applicant, Salvatore Enea, was sentenced to 30-years imprisonment for, among other offences, belonging to a Mafia-type association (*Cosa Nostra*) since December 1993. On the 10th of August 1994, the Minister of Justice ordered the 'hard prison regime' under Article 41 bis p.a.a. Mr. Enea lodged some appeals with the Naples Court, which decided to ease some of his restrictions. On the 1st March 2005, the prison authorities placed him in a high-supervision area, where more dangerous prisoners are detained separately from others. Mr. Enea had a number of health problems and, therefore, lodged an appeal with the EHCR. The applicant stressed that his imprisonment had been contrary to Article 3 ('Prohibition of inhuman and degrading treatment') of the European Convention on Human Rights, in view of his state of health. The Court finally ruled that the restrictions imposed on the applicant under Article 41 bis p.a.a. had been necessary, in order to avoid him from keeping contacts with his criminal group. It also remarked that Mr. Enea had received treatments appropriate to his state of health. This was one of the judgments of ECHR that fuelled the public debate on Article 41 bis p.a.a. after the amendment of the Prison Administration Act with Law n. 94 of 15 July 2009.

Source: Database of the European Court of Human Rights (hudoc.echr.coe.int).

Case 12. ECHR: Riina v. Italy (date of judgement: 3 April 2014)

The applicant, Salvatore Riina, was sentenced to life imprisonment for, among other offences, being member of a Mafia-type association (*Cosa Nostra*). He has been imprisoned since January 1993 under the 'hard prison regime' pursuant to Article 41 bis p.a.a. On the base of Articles 3 ('Prohibition of inhuman or degrading treatment') and 8 ('Right to respect for private and family life') of the European Convention on Human Rights, Mr. Riina lodged an appeal with the EHCR in 2009, stressing that he was under permanent video-surveillance in his cell. The Courts ruled that Mr. Riina had not exhausted remedies within his national legal system in relation to his complaint on the video-surveillance in prison, since he had not lodged a dedicated appeal with Italian Courts. His application was rejected by ECHR for failure to exhaust domestic remedies. Notwithstanding the rejection of EHCR, this was one of the judgments of ECHR that fuelled the public debate on Article 41 bis p.a.a. after the amendment of the Prison Administration Act with Law n. 94 of 15 July 2009.

Source: Database of the European Court of Human Rights (hudoc.echr.coe.int).

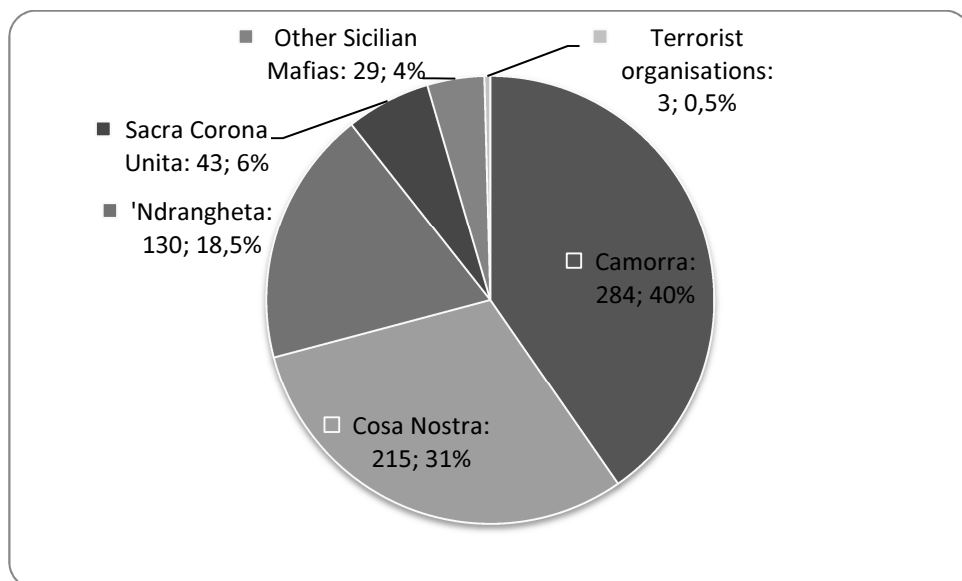
Statistics on the 'hard prison regime'

Prisoners under the 41 bis regime in 2014 are 715 (1.3% of the total incarcerated population). Of them, 648 are imprisoned for Mafia-type association (Article 416 bis c.c.) and 295 are serving a life sentence. These numbers are low if compared with the overall 6.009 prisoners for Article 416 bis c.c. in the same year.

In Italy, prisons having special detention units for 41 bis are 12.⁴⁷²

In 2013, prisoners under Article 41 bis p.a.a. were 704, and they belonged to the following organizations: 284 to *Camorra* (40%), 215 to *Cosa Nostra* (31%), 130 to *'Ndrangheta* (18.5%), 43 to *Sacra Corona Unita* (6%), 29 to other Sicilian Mafias (4%), and 3 to terrorist organizations (0.5%) (Figure 9.7).

Figure 9.7: Prisoners under the 'hard prison regime' (Article 41 bis p.a.a.) in 2013 (n = 704)



Source: Based on Direzione Nazionale Antimafia (2014b).

Strengths and weaknesses of the 'hard prison regime'

Mainly based on the opinions of the Deputy Anti-Mafia National Prosecutors gathered during the focus group, both strengths and weaknesses of Article 41 bis p.a.a. ('hard prison regime') were underlined. In the following paragraphs, aspects pertaining to this legal tool in terms of effectiveness and limitations are presented.

Effectiveness

Responding to a concrete and well-documented danger

According to the DNA prosecutors, before the implementation of the Article 41 bis p.a.a., Mafia bosses and members of criminal groups tended to maintain connections with other *Mafiosi* also when in prison. The same prosecutors stressed the success of the 41 bis regime in terms of capability of limiting contacts with the outside. The success of the 'hard prison regime' can also be judged from the fact that today it is one of the most hated and feared legal tool by *Mafiosi*, who keep on advocating its abrogation.⁴⁷³

⁴⁷² Direzione Nazionale Antimafia (2014b).

⁴⁷³ In June 2002, 300 Mafia prisoners declared a hunger strike, calling for an end to isolation conditions and objecting to Parliament's Anti-Mafia Commission proposal to extend the restrictions imposed by the legal measure. Apart from refusing prison food, the inmates constantly rattled the metalwork of their cells. See, for instance, the following newspapers articles (as of 5 February 2015):

Case 13. An example of what a boss can do from prison without 41 bis

One of the most recent examples concerning the problems caused by the revocation of Article 41 bis is the one of Aldo Ercolano. On the 27th of March 2014, the Surveillance Court at the Central Court of Appeal of Rome revoked the 'hard prison regime' for Aldo Ercolano, nephew of the *Cosa Nostra* boss Benedetto 'Nitto' Santapaola. The 41 bis measure has been effective in preventing Mr. Ercolano to carry out the above activities before being revoked. After the revocation, the DNA underlined that the situation within the Santapaola clan was to be considered as particularly alarming and deserving an accurate monitoring of the Italian prisons where the *Cosa Nostra* affiliates were jailed. Indeed it was plausible to assume that *Mafiosi* in liberty and in jail, with the coordination of Aldo Ercolano, would do enrolments among the prisoners on the verge of coming out of jail. Moreover, Mr. Ercolano could give strategic orders for his clan to spread out of the prison.

Source: Direzione Nazionale Antimafia (2014b).

Excising the bond between Mafia bosses and their criminal group of belonging

The measure of Article 41 bis p.a.a. is intended to cut inmates off from their original *milieu* and to separate them from their former criminal associates. In addition, the system prevents bosses from keeping their role as point of reference for the members of the organisation operating outside the prison. According to the DNA prosecutors, Mafia bosses are able to communicate from the prison with the outside members of the criminal organisation. This risk is concrete and proved by many cases, rendering Article 41 bis p.a.a. fundamental for an efficient contrast of criminal associations.

Supporting investigations against criminal organisation, because an increasing number of Mafiosi imprisoned under Article 41 bis p.a.a. decided to acquire the 'collaborator with justice' status

An increasing number of prisoners under Article 41 bis p.a.a. acquired the status of 'collaborators with justice'.⁴⁷⁴ The possibility of obtaining the revocation of the 'hard prison regime' is an incentive for the prisoners to collaborate. The cooperation between law enforcement authorities and the collaborators of justice is crucial in the Mafia-related investigations, for the corroboration of existing evidences or the acquisition of new elements. Being a 'collaborator with justice', allow members of criminal associations that are already serving prison in accordance with Article 41 bis p.a.a., to obtain the revocation of the special regime.

<http://news.bbc.co.uk/2/hi/europe/2117709.stm>

<http://www.independent.co.uk/news/world/europe/this-europe-mafiosi-spread-news-of-jail-protest-over-law-that-stops-them-talking-183791.html>

⁴⁷⁴ In 2011, 15 prisoners acquired the status of 'collaborator with justice', while in 2010 they were 8. See Human Rights Commission of the Senato della Repubblica, 26 of June 2014. Hearing of National Anti-Mafia Prosecutor, Franco Roberti. Available at: http://webtv.senato.it/4191?video_evento=1003.

Case 14. Revocation of the 'hard prison regime' to Salvatore Spatuzza

One of the most recent examples of Mafiosi imprisoned under Article 41 bis p.a.a. that decided to become a collaborator with justice is the one of Salvatore Spatuzza, a *Cosa Nostra* boss subjected to the 'hard prison regime'. Imprisoned in 1997 under Article 41 bis p.a.a., he decided in 2008 to start collaborating with justice. His declarations were very important for the investigations against Sicilian Mafia. For example, he confessed the theft of the Fiat 126, which carried the bomb that killed the judge Paolo Borsellino and his escort. In the same year, the Surveillance Court at the Central Court of Appeal of Rome revoked the special prison regime pursuant to Article 41 bis p.a.a. for Salvatore Spatuzza, because of his new status.

Source: Direzione Nazionale Antimafia (2014b).

Limits

A number of limits have been identified under the 41 bis regime. These are:

Necessity of including the 41 bis regime within the criminal code

The main shortcoming stressed by the prosecutors interviewed is the 'administrative character' of Article 41 bis p.a.a.. Thus, now the power for the application of the measure pertains to the Ministry of Justice. This may create difficulties in the attribution of competences resulting in a slowing of the procedures. In this regard, DNA prosecutors suggested turning Article 41 bis p.a.a. into an ancillary penalty ('pena accessoria') to be included into the Italian criminal code and to be ruled with a conviction by a criminal magistrate.

Increase of the number of prisoners under the 41 bis regime and difficulties in their management

Notwithstanding the report 'on the observance of the Law modifying the Articles 4-bis e 41-bis of the Law 26 of July 1975, n. 354, on prisoners treatment' of 2009-2011, written by the General Director for the Prisoners Treatment and presented by the Ministry of Parliamentary Affairs, stressed the importance of the innovations introduced by Law 94/2009 and the fact that they are effective,⁴⁷⁵ according to the prosecutors interviewed, the number of individuals imprisoned under Article 41 bis p.a.a. (i.e. 715 in 2014) is too high to reach an effective application of the regime itself,⁴⁷⁶ thus hampering the achievement of the goals of this tool. The following are examples in which the measure failed.

⁴⁷⁵ See Camera dei deputati (2011), *Relazione sullo stato di attuazione della legge recante modifica degli articoli 4-bis e 41-bis della legge 26 luglio 1975, n. 354, in materia di trattamento penitenziario (Triennio 2009-2011)*, available at the website:

http://leg16.camera.it/_dati/leg16/lavori/documentiparlamentari/IndiceETesti/117/002/intero.pdf.

⁴⁷⁶ See Camera dei deputati (2008), *Relazione sullo stato di attuazione della legge recante modifica degli articoli 4-bis e 41-bis della legge 26 luglio 1975, n. 354, in materia di trattamento penitenziario (Triennio 2006-2008)*, available at:

http://leg16.camera.it/_dati/leg16/lavori/documentiparlamentari/IndiceETesti/117/002/intero.pdf.

Case 15. The Casalesi clan and the 'hard prison regime'

The *Camorra* bosses Salvatore and Domenico Belforte of the Casalesi clan are subjected to the 'hard prison regime', pursuant to Article 41 bis p.a.a., since May 2013. According to the last report of the DNA, this special regime does not seem to be effective in preventing them to reinforce the presence of the Casalesi clan in the Mondragone area (Province of Caserta). Thus, during 2013 and 2014, they increased their activities of extortion and usury in the territory thanks to the coordination of their sons. Despite the application of Article 41 bis p.a.a., Salvatore and Domenico Belforte continued their territorial activity of control from the prison, also penetrating the entrepreneurial and administrative system throughout the whole Campania region.

Source: Direzione Nazionale Antimafia (2014b).

Case 16. The Ndrangheta boss and the 'hard prison regime'

Pietro Labate is a *Ndrangheta* boss subjected to the 'hard prison regime', pursuant to Article 41 bis, since July 2013. According to the last report of the DNA, the application of Article 41 bis p.a.a. towards him was necessary to limit his role as a point of reference for the members of the organisation operating outside the prison. However, Mr. Labate seems to manage in eluding the special prison regime through the use of a sign language, which allows him to give orders and directives. This boss continues to control the local territory, e.g. by imposing the '*pizzo*' (i.e. protection money paid by shop keepers and businessman to the criminal organisation, usually constituting extortion) while conditioning the rules of competition among legal enterprises.

Source: Direzione Nazionale Antimafia (2014b).

Case 17. The Sacra Corona Unita boss and the 'hard prison regime'

Notwithstanding the large part of the imprisoned bosses (e.g. Pasquale Briganti, arrested on 7 July 2012) belonging to *Sacra Corona Unita* is currently subjected to the 'hard prison regime' pursuant to Article 41 bis c.c., the prison remains one of the key structures where criminal strategies and handovers among the Mafia members occur. According to the DNA, the application of the 41 bis regime is necessary for members of criminal organisations, such as *Sacra Corona Unita*. Despite their captivity, imprisoned *Mafiosi* try to communicate anyway with their clans to undertake new criminal ventures or to understand how to avoid possible conflicts within the prison. For example, Mr. Briganti continued from the prison to communicate to his clan the strategies to be adopted, in order to ensure the flows of information necessary to the subsistence of the organisation. Several investigations on the *Sacra Corona Unita* confirmed that sometimes the sole

application of Article 41 bis p.a.a. is not sufficient to deprive imprisoned Mafia members of the contacts with the outside world.

Source: Direzione Nazionale Antimafia (2014b).

Progressive inadequacy of the special prison units for prisoners under Article 41 bis

The increase in the number of prisoners under Article 41 bis p.a.a. had to face a corresponding decrease in the number of special prison units for 41 bis prisoners throughout Italy. These issues were stressed by the prosecutor Nicola Gratteri (Public Prosecutor at the DDA of Reggio Calabria), during the session of the Extraordinary Commission of Human Rights held on 4 of June 2014 at the Senate of the Republic of Italy.⁴⁷⁷

Hence, prisons are considered inadequate by the prosecutor: a situation which may hamper in future the correct application of Article 41 bis p.a.a., in order to prevent communications between *Mafiosi* in and out the prison. Following the suggestion by Gratteri, to widen and modernise the Italian prisons, the DNA in its last report recommended locating adequate buildings within the new Italian 'Prison Programme', focused exclusively on 'special prisoners' under Article 41 bis p.a.a.⁴⁷⁸

Asymmetric treatment among 41 bis prisoners

According to the above-mentioned prosecutor Nicola Gratteri,⁴⁷⁹ there are still differences in treatment of prisoners under 41 bis from prison to prison. For example: a few types of food or clothes are banned in some prisons and allowed in others; some leisure activities (e.g. watching television) are permitted to certain prisoners, and to some others not; some prisoners are subjected to video-surveillance, and some others not.⁴⁸⁰

Increase of the number of suicides among prisoners under Article 41 bis

One important issue related to the application of Article 41 bis p.a.a. lies in the human costs to be sustained: since its introduction in the 1980s, 39 prisoners committed suicide (with a frequency that is 3,5 times bigger if compared to 'non-41 bis' prisoners).⁴⁸¹

⁴⁷⁷ See (as of 5 February 2015): <http://www.publicpolicy.it/41-bis-carceri-gratteri-audizione-senato-34174.html>

⁴⁷⁸ Direzione Nazionale Antimafia (2014b).

⁴⁷⁹ See (as of 5 February 2015): <http://www.publicpolicy.it/41-bis-carceri-gratteri-audizione-senato-34174.html>

⁴⁸⁰ See (as of 5 February 2015): <http://www.publicpolicy.it/41-bis-carceri-gratteri-audizione-senato-34174.html>; the Spoleto Prison, for example, forbids beans and allows eggs, while the Parma Prison does the opposite.

⁴⁸¹ See Camera dei Deputati (2011).

Inputs to exportability of the 'hard prison regime'

Just before the introduction of Law no 95 of 8 April 2004 that amended Article 41 bis p.a.a., the former Italian Minister of Justice Roberto Castelli recommended the possible exportability of the so-called 'hard prison regime' within the European Union, as an example for other EU MS and as a fundamental goal for the future European security scenario.⁴⁸² The DNA prosecutors interviewed do not believe that the experience of Article 41 bis p.a.a. could imply problems of exportability, at least at functional level. The 'hard prison regime', also according to them, proved to be an effective measure to fight Mafia-type criminal groups and has been applied also to convicted persons belonging to other criminal groups, including foreign ones. In this sense, the Italian experience of Article 41 bis p.a.a. could serve as a pivotal example, in order to provide MS Legislators with effective tools to tackle the continuity of the criminal organisations, while ensuring their effective

In terms of exportability of this concept to other Member States one need to keep in mind both the administrative burden (specific regime for a group of convicted persons may entail high costs) as well as the fundamental right concerns, namely the the balance between the necessity of applying specific penitentiary conditions and protected freedoms.

9.5. Italian investigative tools in the fight against organised crime: the interception of communications

As emerged from the results of the first phase of the study, i.e. through the analysis of the questionnaires and country fiches, one of the most effective investigative tools (i.e. a best practices) in combating organised crime in Italy is the interception of communications. Interception of communications (including wiretapping, remote searching and bugging) is regulated under Articles 266–271 of the criminal procedure code.

This paragraph deals with 1) the scope, historical and legal background, definitions of interceptions of communications in Italy; 2) their strengths and weaknesses; 3) their use with reference to cross-border cooperation; 4) some inputs, from a national perspective, on the exportability of some regulations and/or practices of the Italian system that make this tool particularly effective to other MS and/or to the EU level.

9.5.1. Historical background scope and definition

Historical background

Beyond the general discipline regarding interceptions of communications (Articles 266–271 c.p.c.), Article 13 of the Law Decree n. 152 of 13 May 1991 (converted in law by Law n. 203 of 12 July 1991) introduced for the first time new specific typologies of interceptions for investigating organised crime and/or terrorism that derogate general provisions. Such norms were introduced soon after the appointment of former

⁴⁸² La Padania (2004).

investigative judge Giovanni Falcone as Director General of Criminal Affairs at the Minister of Justice in March 1991.⁴⁸³

In addition, besides the specific discipline for interceptions of communications in organised crime cases, Article 226 of the implementation rules ('Disposizioni di attuazione') of the c.p.c. (entered in to force in 1989), regulates the so called pre-emptive interceptions for organised crime and/or terrorism. Finally, Legislative Decree 259/2003 introduced some fundamental provisions to regulate the interceptions via new technologies (e.g. VOIP). All these types of interceptions are detailed below, with a specific focus on those related to organised crime hypotheses.

Scope

The use of communication interception technologies (e.g. wiretapping, bugging, email interceptions) in criminal investigations against organised crime may cause serious problems to criminal groups. Exploring interception of communications within Italian policies, and how this investigative tool is integrated in practice, may demonstrate how this instrument is 'best placed within a proactive, intelligence-led policing framework'.⁴⁸⁴

Definition

As hinted above, in Italy there are four types of interceptions permitted and regulated by law, according to their nature.

- **Common interceptions.** The general discipline for interceptions of communications is regulated by Articles 266-271 c.p.c. Such provisions envisage that interception of communications may only be authorized in the case of ongoing legal proceedings, in front of the presence of serious circumstantial evidence and when they are indispensable for the conduction of investigations. Interceptions may be granted for periods of 15 days and be extended for periods of the same time span. Italian courts are in charge for monitoring the procedures of storing recordings and transcripts. Any recording or transcript not used in a trial shall be destroyed.
- **Interceptions on organised crime.** Article 13 of the Law Decree n. 152/1991 introduced derogation in case of investigations on organised crime. In such cases, interceptions can be authorised in front of sufficient circumstantial evidence and whenever they are necessary to the investigations. Compared to the general rule, also duration is derogated, since such interceptions shall not exceed 40 days and may be extended by the court with a decree (motivated) for periods of 20 days each.
- **Pre-emptive interceptions.** Article 226 of the implementation rules ('Disposizioni di attuazione') of the c.p.c. envisages the possibility of carrying out pre-emptive interceptions of communications. Such interceptions can be used only for organised crime and terrorism and are aimed to acquire useful pieces of information to prevent the commission of

⁴⁸³ Fiandaca & Visconti (2010).

⁴⁸⁴ Congram et al. (2013).

serious offences connected to organised crime and/or terrorism. Since the aim of such tools is prevention, the information collected cannot be used as evidence in a trial, but can be used only to develop further investigations. The request to activate such interceptions can be made by the Prime Minister, the Minister of Interior or by the directors of intelligence agencies acting as his/her proxies, the Chief of the Police at the Provincial level ('Questore') or the Chief of Carabinieri and Guardia di Finanza, and has to be authorised by the General Prosecutor of the Court of Appeal of the area in which the investigation is located (i.e. DDA in the case of organised crime). The public prosecutor may authorise the interception when there are sufficient reasons to support the need for preventive procedure. Such an authorisation lasts for a maximum 40 days; prorogation for further periods of 20 days each may be established and is allowed upon authorization of the General Prosecutor of the Court of Appeal. Operations are recorded and the public prosecutor in charge has the duty to destroy the records after the end of the operations. The above-mentioned prescriptions are deemed to be consistent with the Italian constitutional principles and legislation protecting the privacy of communications.⁴⁸⁵

- **Interceptions via new technologies.** Legislative Decree n. 259/2003 ('Electronic Communications Rules') disciplines interception by new forms of communications, such as Skype or VOIP.⁴⁸⁶ In this sense, an important step has been taken by the Italian Ministry of Economic Development and Telecommunications, which has recently deemed Skype connections to be included in the electronic communication rules and are, therefore, subject to the general regulation on interception of communications. Consequently, this involves the respect of national rules required by judicial/administrative authorities, and enables interceptions by competent bodies. For instance, if a law enforcement agency is able to demonstrate that some Skype communications (or other IT based forms of communication) are involving two Italian persons on the territory of the State, there are no legal obstacles to adopt the domestic rules on interception of communications. Limitation may still be found for cross-border investigations.⁴⁸⁷

Table 9.6, below summarises the features of the interceptions of communication in Italy. It is worth to specify that interceptions via new technologies can be applied to any kind of relevant judicial activity (i.e. common interceptions, pre-emptive interceptions or interceptions on organised crime), therefore the maximum duration, extension, validity as a piece of evidence, etc. follow the rules applied for the related judicial activity.

⁴⁸⁵ Nanula (2012).

⁴⁸⁶ Voice over Internet Protocol.

⁴⁸⁷ Cajani (2012).

Table 9.6: Typologies of interception of communications and related features in the Italian legal system

	Common interceptions	Interceptions on organised crime	Pre-emptive interceptions
Maximum duration	15 days	40 days	40 days
Extension	15 days, renewable	20 days, renewable	20 days, renewable
Valid as pieces of evidence in a trial	yes	yes	no
Motivations to authorise interceptions	presence of serious circumstantial evidence indispensable for the conduction of investigations	sufficient circumstantial evidence necessary to the investigations	only for organised crime and terrorism aimed to acquire useful pieces of information to prevent the commission of serious offences connected to organised crime and/or terrorism
Legal source	Artt. 266-271 c.p.c.	Art. 13 of the Law Decree n. 152/1991	Art. 226 of the implementation rules ('Disposizioni di attuazione') c.p.c.

The publication of legitimate interception transcriptions is regulated by the code of criminal procedure, and in particular by Article 114 c.p.c. that prohibits the publication of 'acts covered by secret' and regulates the publication of acts 'no more covered by secret' or 'not covered by secret', and by Article 115 c.p.c. that regulates 'the criminal liability and the disciplinary action against civil servants that violate the prohibition on publication'. Finally, Article 329 refers to the 'duty of secrecy' in the fight against organised crime. Following this regulation, the Italian Data Protection Authority has set out specific rules and tools in order to enhance the security of personal data collected by public prosecutor offices and used as part of intercepted communications (e.g. Communication n. 356 of 18 July 2013). The role of the Data Protection Authority is crucial in overcoming the obstacles linked to privacy issues and concerning organised crime-related cases.⁴⁸⁸

9.5.2. Strengths and weaknesses of the interception of communications

Based mainly on the opinions of the Deputy Anti-Mafia National Prosecutors gathered during the focus group, both strengths and weaknesses of the interception of communications were underlined. In the following paragraphs, aspects pertaining to this investigative tool in terms of effectiveness and limitations are presented.

Effectiveness

The interviewed DNA prosecutors argued that interception of communications is the basis for any successful investigations and prosecutions of organised criminals in Italy.

⁴⁸⁸ Direzione Nazionale Antimafia (2014b).

Participation in a criminal organisation and mafia-type associations pursuant to Articles 416 and 416 bis c.c. are associative offences: therefore, dialogue among members is an unavoidable fact. Also, compared to other evidence gathering methods, interceptions are more reliable (it is less likely that individuals lie when speaking to each other). In addition to traditional interceptions of phone calls, law enforcement authorities have recently rediscovered bugging as an important form of interception, also due to technological developments happened in the field in the last few years.

In addition, as stems also from literature, interceptions reveal to be particular useful in several complex investigations as reported in the investigative cases below.

Case 18. Interception of communications on organised crime

One of the most outstanding cases in which interceptions of communications played a crucial role is the one related to operation 'Crimine-Infinito'. In this investigation, carried out by DDA in Reggio Calabria and DDA in Milan, it was possible to discover and dismantle a diffused 'Ndrangheta infiltration in Lombardy. In particular, it was possible through both telephone wiretapping and environmental interceptions (in cars, public premises, etc.) to discover the failed attempt of some 'ndrine (i.e. 'Ndrangheta cells) located in Lombardy to become autonomous from the central organisation in Calabria. The use of interception materials allowed to shade a light on the murder of Carmelo Novella (killed in 2008) who led the scission attempt and, above all, brought to the arrest of more 300 persons affiliated to Calabria and Lombardy 'Ndrangheta'.

Source: Direzione Nazionale Antimafia (2014b).

Case 19. Interception of communications on organised crime via new technologies

This is the case of operation 'New Line', conducted by the DDA in Naples in 2013. Through sophisticated interceptions of web communication DDA was able to identify and dismantle an illegal betting organisation managed by Camorra and specialised in sport events. Such an organisation operated completely online (thanks to the support of professional webmasters and IT technicians) and created an illegal web platform able to collect thousands of Euros each week in various Italian regions (Campania, Apulia, Calabria, Sicily). In some cases it also fraudulently modified the display of sport results (mainly non Italian minor football leagues) to alter the payment of illegal bets. The income of these illegal activities was shared among the members of the organisation and in part contributed to fund the activities of the Camorra clan of Casalesi especially to provide financial support to the detained bosses under Art. 41 bis Law 354/1975 ('hard prison regime')

Source: Direzione Nazionale Antimafia (2014b)

Limits

Notwithstanding the great contribution of interception of communications in the fight against organised crime, both from the literature and from the focus group some weaknesses emerged.

In detail, interception of telephone communications present some shortcomings mainly concerning the three points listed below with the related examples:

New strategies adopted by criminals to avoid telephone interceptions

Operational example 6. Avoiding telephone interceptions

Organised criminals have recently started using South American SIMs (e.g. Uruguayan) that are hard to track due to both legal and technical reasons. In such cases, it is sometimes difficult to interface with national authorities and above all with service providers that are often 'virtual' operators: i.e. they formally provide services in a country, but their logistic bases lie in another nation, so e.g. an Uruguayan SIM could be managed by a society based in the Netherlands, thus requiring multiple authorisations that are not easy to obtain, above all in a short time.

Source: Direzione Nazionale Antimafia (2014b).

Use of new communication technologies

Operational example 7. New technologies and anonymity

Through the use of social networks (Facebook, Twitter, etc.), peer-to-peer services (Skype, VOIP, WhatsApp, etc.) organised criminals have access to a potentially limitless number of accounts that require no identification and can allow messages to be transmitted with anonymity. E.g. Skype and Facebook are 'secure' communicative channels, and are also exploited as tools of 'counter-surveillance' by organised criminals, since the 'logs' and the contents of communications are hard to obtain and it takes a long time to activate such procedures.

Similar difficulties regard child pornography cases. As stressed in the focus group, it is often very hard to obtain the logs of suspected paedophiles in child pornography websites, since the latter often lie in nations for which e.g. there are no judicial cooperation protocols or no other forms of collaboration have been established.

Source: Congram et al. (2013).

Double interceptions of the same criminals by two or more DDA

Operational example 8. Double interceptions

In some cases, two distinct DDA in the Italian territory start two parallel interceptions of communications on the same person(s). Such a situation could cause shortcomings and interferences in the investigations. For this reason, as stressed in the focus group, the DNA intervenes monitoring data contained in SIDNA/SIDDA and starts a coordination procedure among the various DDA involved so as to maximize their efforts.

Source: Direzione Nazionale Antimafia (2014b).

9.5.3. Use of the interception of communications in cross-border cooperation

Below are the main remarks of the interviewed DNA prosecutors on the use of interception of communications in the field of cross-border cooperation on organised crime cases.

According to the recent recommendations of the European Judicial Network and Eurojust, more advanced levels of mutual assistance between EU MS and wider spaces for intercepting communications of criminals, when investigating transnational organised crime cases, should be guaranteed. Such tools are often underused in cross-border investigations, while the most significant experiences of international cooperation teach that the experimentation of innovative and advanced forms of investigative/judicial cooperation, also by rationally using existent means (e.g. interceptions), may create the best conditions in order to implement new legislation aimed at realizing an effective European justice.

In this regard, the interviewed DNA prosecutors argued that the 50% of the incoming rogatory letters reaching their International Cooperation Office concern new telecommunications. This shows that Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters is already out of date, since it fails in specifying methods and legal/practical tools useful for the mutual cross-border recognition of this modern kind of communication between criminals. In this regard, in fact, a limited reference to new telecommunication interceptions (i.e. a mention of service providers) may be found only within the Preamble of such Directive. As a consequence, the EU legislative framework gives only some general hints that make it difficult to concretely apply effective and coordinated actions in the various MS. It is then recommended that this gap will be overcome.

9.5.4. Inputs to exportability

Interception of communications are regulated in all MS. The added value of the Italian experience, that could be considered for adoption by other MS, are the following two peculiarities of the interception system illustrated below with explanatory examples.

- 'Pre-emptive interceptions': though their findings cannot be presented as evidence in a trial, they are a key tool to gather intelligence information relevant to set investigative priorities and boost a proactive fight against organised crime and in general to prevent the commission of future organised criminal activities.⁴⁸⁹

Operational example 9. Pre-emptive investigations and human trafficking

Let us think about human trafficking, for which DNA has a specific competence. In these cases, the leaders of such organisations normally are not based in Italy, but in foreign countries (often non EU MS). When specific investigations on a trafficking network start, they run the risk to get only the 'end of the chain', namely *passeeurs*, abettors, accomplices that operate in Italy/EU MS. This situation leads to the negative

⁴⁸⁹ For further information on the discipline of interceptions in other MS, see Chapter 4 of this report.

consequence that no effective tackling is posed to the head of the criminal organisation that can continue its illicit activities substituting the arrested persons. In such cases, in a pre-investigation phase, the possibility of conducting pre-emptive interceptions can be a strategic asset to acquire (e.g. intercepting criminals operating in Italy) the necessary knowledge and a more complete picture of the entire criminal network. Such a knowledge allows, in a second moment, to activate investigations and the possible cross-border cooperation.

Source: Direzione Nazionale Antimafia (2014b).

- Real time sharing elements from interceptions using information systems: as noted above, the possibility of sharing information and results from interceptions in an easy way and real time among prosecutor's offices via SIDNA and SIDDA is very valuable and could represent a model for adoption by other MS.

Operational example 10. Real-time sharing of key data from interceptions via information systems

Many precious data deriving from interceptions are stored in SIDNA/SIDDA (names of intercepted persons, places in which environmental interceptions take place, transcriptions, etc). Such information, once elaborated by DNA, is shared in real time and can be used by other DDA for their investigative purposes.

E.g. DDA 'X' intercepts a Camorra boss in the course of an investigation on infiltrations in the construction market of Rome. His name and the transcription of the interception are inserted in SIDDA. One week later DDA 'Y' starts an investigation on waste smuggling in Caserta. Checking in SIDDA/SIDNA the name of the persons they are pursuing it is possible to discover that one of these persons was the same boss intercepted by DDA 'X'. In this case, DNA and the involved DDA start a coordination path to maximise the results of the two investigations so as to avoid overlapping and exploiting the real time data flow available through SIDNA/SIDDA.

Source: Direzione Nazionale Antimafia (2014b).

10. UK case study⁴⁹⁰

10.1. Introduction

This case study focuses on the UK approach to fighting serious and organised crime. The objective of the case study is to explore how the existing legal and investigative tools and specialist agencies actually operate to fight organised crime. The aim is to understand:

- How the selected tools agencies and practices are used nationally and in cross-border cooperation.
- Why these tools, agencies and approaches are effective and under what conditions.
- If they are exportable to other Member States (MS) and under what conditions.

The particular aspects of the UK approach which are highlighted in the case study, and which could provide promising practices for other MS, are:

- Focus on prevention and disruption.
- Collaboration between national and local law enforcement entities.
- Collaboration with the private sector.

10.1.1. Approach and limitations

The information included in the case study is based on desk research and interviews with key representatives of the National Crime Agency (NCA) and representatives of police, prosecution and national authorities in the UK.⁴⁹¹

The information presented in this case study is not intended as a comprehensive overview of the UK approach to fighting serious and organised crime. It focuses on issues that were raised by interviewees as being useful, and highlights challenges and promising practices identified by interviewees. The research team supplemented data from interviewees with a targeted literature search,⁴⁹² but is not able to confirm the

⁴⁹⁰ Marina Tzvetkova, Mafalda Pardal, Emma Disley and Jennifer Rubin, RAND Europe and Michael Levi, Cardiff University. The authors acknowledge the considerable support from Dr. Elizabeth Campbell in drafting Section 10.2 of this chapter.

⁴⁹¹ A list of interviewees is enclosed in Appendix C. In order to protect interviewees' confidentiality, the names of interviewees are not included and an identifier is used to refer to individual respondents: LE indicates law enforcement officer (broad category including NCA officers, prosecution and police officers), A indicates academic and G indicates representative of government.

⁴⁹² This included documents describing the establishment and work of the National Crime Agency and (its predecessor) the Serious Organised Crime Agency), for example, produced by the NCA and the UK Home Office. It also included academic literature and publications relating to the UK approach to fighting organised

accuracy of interviewees' accounts of how legal and investigative tools are used in practice in the UK. The research team are also not able to comment on the extent to which the views of interviewees outlined in the case study are typical of the views of law enforcement professionals in the UK.

10.1.2. Structure of this Chapter

The rest of this introductory section provides background to the UK approach to addressing serious and organised crime. The structure of the following sections of the case study is as follows:

- Section 10.2 provides an overview of the legal tools available in the fight against organised crime in the UK. This includes legislation on conspiracy and the forthcoming legislation on participation in organised criminal association, crime prevention orders and other tools used in the disruption of organised crime.
- Section 10.3 is about the NCA – the leading specialist agency in the UK. After outlining the structure and priorities of the Agency, the case study focuses on the NCA's Cyber Crime Unit and Behavioural Unit, and looks at how the NCA works with local law enforcement and with the private sector.
- Section 10.4 looks at how UK law enforcement, including the NCA, cooperates internationally, and some of the barriers and facilitators to this.

10.1.3. Background to the fight against organised crime in the UK

The UK has a long-standing intelligence-led approach to fighting serious and organised crime. It may be helpful to set this approach in context with some institutional history, which reflects the evolution of the approach as well as political constraints and preferences that have shaped it.

The first national effort to tackle international drug trafficking and related crime using more systematically collected intelligence resulted in the establishment of the National Drugs Intelligence Unit in the late 1970s. This Unit developed into the National Criminal Intelligence Service in 1992, expanding its competences to encompass all forms of (loosely defined) organised crime.⁴⁹³ The National Criminal Intelligence Service had no operational role, but supported police forces and the Regional Crime Squads and Regional Drugs Wings throughout England and Wales with intelligence gathering and analysis. It also supported Scottish Police forces.

The National Crime Squad was formed in 1998 by amalgamating the Regional Crime Squads, and took on an operational law enforcement role nationally and internationally for England and Wales. The National Criminal Intelligence Service sought to encourage inter-agency cooperation by providing a range of assessments, both at a strategic and tactical level, problem analysis, target profiles and operational intelligence. It also served a coordinating function.

crime. These were identified by the Member State expert, and by the research team searching using Google Scholar.

⁴⁹³ Carter & Carter (2009); Flood & Gaspar (2009).

In 2006 the National Criminal Intelligence Service and a number of other agencies⁴⁹⁴ were merged into the Serious Organised Crime Agency. The National Crime Squad was the fundamental building block for the Serious Organised Crime Agency, together with the National Criminal Intelligence Service, the Investigations Unit of HM Customs and Excise, and parts of the UK Immigration Service, all of which had their own intelligence units, which were amalgamated into the Intelligence Directorate of the Serious Organised Crime Agency. The new Agency focused on reducing the harm from Organised Crime.⁴⁹⁵

Therefore, the key agencies involved in work against serious and organised crime in the UK until late 2013 included the Serious and Organised Crime Agency, the UK Border Agency, Her Majesty's Revenue and Customs and the Metropolitan Police Serious Crime Directorate. Other police forces were also involved, such as the City of London Police, whose Economic Crime Department became the police national lead for 'economic crime', an undefined construct that included most types of fraud. There was also some overlap with Serious Organised Crime Agency, since some forms of economic crime were committed by career criminals.

A new agency, the NCA, was established on 7 October 2013 as a direct successor to the Serious Organised Crime Agency.

10.2. Legal tools against organised crime

10.2.1. Overview of UK law relating to organised crime

Although the UK is a unitary state, Scotland (and for some purposes Northern Ireland) has always had a different legal system, and on some issues Scotland in particular has different substantive criminal legislation to England and Wales.⁴⁹⁶

Table 10.1 shows the existing offences that are used against those involved in organised crime in the UK. Currently, there is no offence in England and Wales of participation in a criminal organisation. However, participation will become an offence under the new Serious Crime Bill, which is planned to enter into force in 2016 (this Bill is discussed below). UK national legislation also does not provide any definition of a criminal organisation.⁴⁹⁷

⁴⁹⁴ The following agencies were merged into the Serious Organised Crime Agency: the National Crime Squad, the National Criminal Intelligence Service, the National Hi-Tech Crime Unit, the drug enforcement sections of the HMRC and the organised immigration crime section of the Immigration Services.

⁴⁹⁵ According to the Association of Chief Police Officers (ACPO), the harm from organised crime includes: 'the exercise of control, significant profit or loss, serious violence, corruption, and/or having a significant impact upon community safety' (Gilmour 2008, 24). Also see Gilmour (2008b).

⁴⁹⁶ Matters reserved to the UK Parliament (i.e. issues where the UK Parliament makes law for Scotland) include financial and economic issues such as money laundering, misuse of drugs, firearms and interception of communications.

⁴⁹⁷ Legislation in Scotland also does not define a criminal organisation, although a definition of 'serious organised crime' is provided in Scotland. Campbell suggests that, in practice, the Home Office, the UK Serious and Organised Crime Agency and the Northern Ireland Office had adopted the definition from the National Criminal Intelligence Service: 'Those involved, normally working with others with the capacity and capability to commit serious crime on a continuing basis, which includes elements of planning, control and coordination, and benefits those involved. The motivation is often, but not always, financial gain' (Campbell, 2013).

Table 10.1: Organised crime legislation in the UK⁴⁹⁸

	Type of offence	Source
England/Wales	Conspiracy	Section 1(1) of the Criminal Law Act 1977
Scotland	Conspiracy Involvement in serious organised crime	Common Law (<i>HM Advocate v Wilson, Latta and Rooney</i>) ⁴⁹⁹ Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010 for participation offence
Northern Ireland	Conspiracy	Criminal Attempts and Conspiracy (Northern Ireland) Order 1983

10.2.2. The offence of conspiracy – England and Wales

In England and Wales, there is a common law crime of conspiracy as well as a statutory provision:

- The common law of conspiracy applies to (1) agreements to defraud, whether or not the fraud amounts to a crime, and (2) agreements to do an act which 'tends to corrupt public morals or outrage public decency', whether or not these acts would amount to a crime if completed.⁵⁰⁰
- The statutory provision is included in section 1(1) of the Criminal Law Act 1977. This legislation abolished all forms of common law conspiracy other than the two mentioned above.

A person is guilty under the 1977 Act of conspiracy to commit an offence if: 'he agrees with another person(s) to pursue a course of conduct which, if the agreement is carried out in accordance with their intentions, either will involve the commission of any offence(s) by one or more of the parties to the agreement, or would do so but for the existence of facts which render the commission of the offence or any of the offences impossible.'

The offence to conspire with one or more persons to commit a crime does not require perpetration or completion of the crime. Section 1A of the 1977 Act applies to conspiracy to commit offences outside the UK.

No report by victim needed

Prosecution of conspiracy offences is not dependent on an accusation or report by victims of the offence, even in the case of offences that involve specific victims. There is no specific statutory provision relating to the absence of a requirement or a report or accusation by victims. The case of *R v Metropolitan Police Commissioner, ex parte Blackburn*⁵⁰¹ held that while the police have a duty to uphold and enforce the law, they retain discretion in operational matters, including discretion about how much or how little resources to spend on investigation.

⁴⁹⁸ The offence of 'Encouraging and assisting' (s.44 and s.45 Serious Crime Act, 2007) can also be used against organised crime. However, there is limited evidence regarding its use or utility against organised crime. See Impact Assessment Participation Offence (2014).

⁴⁹⁹ See Campbell (2014).

⁵⁰⁰ (see *Scott v Commissioner of Police of the Metropolis* [1975] AC 819).

⁵⁰¹ [1968] 2 QB 118.

Penalties and sentencing

The penalty which can be imposed for conspiracy is equivalent to that for the completed offence.

No statutory provision exists in the UK (except Scotland) regarding aggravating factors for organised crime per se. However, the Sentencing Guidelines Council in England and Wales has noted that factors indicating higher culpability and meriting heavier sentences include offenders operating in groups or gangs, 'professional' offending, commission of the offence for financial gain (where this is not inherent in the offence itself) and high level of profit from the offence, all of which might be satisfied in cases involving organised criminality.⁵⁰² These sentencing guidelines are taken into account by judges when deciding on sentence and also by the Court of Appeal in the event of appeals against too lenient or too severe sentence.

Perceptions of the use and usefulness of the offence of conspiracy

According to the Home Office, 'the existing [statutory] offence of conspiracy is widely-used and central to the majority of law enforcement investigations into organised crime in the UK'.⁵⁰³ A law enforcement representative regarded the conspiracy offence in England and Wales as being clearer and easier to implement than an offence focused on organised crime groups that would involve a difficult-to-prove notion of belonging to such a group. He pointed out that 'the offence of conspiracy in England and Wales ensures that the actor is tied to the act'. Nevertheless an offence of participation is being introduced in England and Wales, in addition to the existing statutory and common law offences of conspiracy.

Experts in the UK pointed out that offences of conspiracy and participation may be most useful where witness testimony is difficult to gather, or where there is no specific victim. As noted previously, such offences are less likely to be relied upon where the sentence for an alternative charge is greater, at least where there is sufficient evidence against the individual target to justify this alternative.

10.2.3. Legislation on conspiracy in Northern Ireland

Northern Ireland has a common law offence of conspiracy. Part IV of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 is the relevant equivalent legislation in relation to the statutory offence of conspiracy in Northern Ireland.

10.2.4. Organised crime legislation in Scotland

Statutory offence of involvement in serious organised crime

In Scotland, Section 28 of the Criminal Justice and Licensing Act 2010 makes it an offence to agree with at least one other person to become involved in serious organised crime. This is punishable on indictment by up to ten years in prison. The agreement need not pertain to criminality. Involvement includes agreeing to do something that may not itself be illegal, 'if the person knows, suspects, or ought

⁵⁰² For a more comprehensive list of factors indicating higher culpability please see: Sentencing Guidelines Council (2004), 6.

⁵⁰³ Impact Assessment Participation Offence (2014).

reasonably to have known or suspected that so acting will enable or further the commission of serious organised crime’.

Thus, the person need not intend to be or become involved in serious organised crime, and an objective standard may satisfy the *mens rea*⁵⁰⁴ of this inchoate offence (i.e. if an average or reasonable person would have known, suspected the act would enable the commission of a serious offences, that is sufficient to prove this element of the offence).

Aggravating factors

In Scotland, section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that an offence may be aggravated by a connection with serious organised crime if the offender was motivated wholly or partially by the aim of committing or conspiring to commit serious organised crime, whether or not he in fact enabled himself or another person to commit such a crime. Where this aggravation is proved it must be taken into account by the court in determining the appropriate sentence, and the court must state on conviction that the offence was so aggravated and the difference in sentence had there been no such connection.

No report by victim needed

The Criminal Justice and Licensing (Scotland) Act 2010 makes no reference to the reporting by victims of the offence. At present in Scotland, each *factum probandum*⁵⁰⁵ must be corroborated. So, an accusation or report from a victim may corroborate other evidence, but is not crucial.

Statutory offence of directing serious organised crime

Section 30 of the 2010 Act criminalises directing or inciting a person to commit a serious offence or an offence connected to serious organised crime, or directing one person to direct another to so act, regardless of whether the person acts in this manner. This is punishable by up to 14 years’ imprisonment. This goes beyond the range of behaviour contemplated by Article 2 of the Framework Decision 2008/841/JHA.

Common law offence of conspiracy in Scotland

The common law crime of conspiracy also exists in Scotland, and this arises ‘when two or more persons agree to render one another assistance in doing an act, whether as an end or as a means to an end, which would be criminal if done by a single individual’.⁵⁰⁶

The common law and statutory measures co-exist. Section 28 (involvement) is easier to satisfy, insofar as the agreement on which the charge centres may pertain to something legal that nonetheless facilitates or enables serious organised crime, whereas for conspiracy, the agreement must be to commit a crime. But like the common law offence, s28 focuses on the purpose of the agreement, and not the result, and so in this respect the charges are comparable.

⁵⁰⁴ *Mens rea* is a Latin expression for guilty mind, knowledge or intention to commit a crime.

⁵⁰⁵ *Factum probandum* is a Latin expression for principal and ultimate fact sought to be established.

⁵⁰⁶ *HM Advocate v Wilson, Latta and Rooney* unreported, 1968, Glasgow High Court per Lord Justice-Clerk Grant).

The use so far of offences under the 2010 Scottish Act

Of the three charges that have concluded under s28 from the year 2011–2012, a guilty verdict was recorded in the Sheriff Court (at Sheriff and Jury level) for one charge and verdicts of not guilty were recorded in the High Court for two charges. Since 2010 there have been 289 charges (a large number of which are ongoing) under s28, 75 charges under s30 and four under s31.⁵⁰⁷

Use of the conspiracy offence

According to our experts, conspiracy is little used in Scotland relative to England and Wales and relative to substantive charges, although this was beginning to change prior to the 2010 Act. According to one national legal expert, it is likely that the statutory measures would be used over the common law offence in Scotland, as the former is slightly less onerous to satisfy. One representative of national authorities in Scotland considered that there were an appropriate number of prosecutions, and emphasised the presence of specialist prosecutors, which would assist in more frequent prosecutions for organised crime.

Expert views on the Scottish legislation

Provisions are clearly worded

A Cabinet Minister in Scotland regarded the Scottish provisions as an improvement and clarification of the common law position and emphasised the lack of any negative feedback from the Crown Office regarding these provisions. A representative of the law enforcement agency in Scotland considered that both the conspiracy offence and offences with a conspiratorial element to them were clear, and noted that critical interpretation by the judiciary is the only factor which could affect the clarity of definition.

A public prosecutor in Scotland viewed the provisions in the Scottish 2010 Act as very clear and reported that it was easy to put these offences into use. This prosecutor praised the consistent law enforcement understandings of the dimensions of offences and the requisite evidential components on which a case and prosecution must be based.⁵⁰⁸

Serious organised crime is widely defined as requiring only two or more persons

While a UK legal expert agreed that 'the wording in the Criminal Justice and Licensing (Scotland) Act 2010 is clear and straightforward' they also noted that it was 'overly expansive and lacking in some detail. This will need to be supplemented and delineated by the courts'.

The same expert noted that in Scotland, 'serious organised crime' is defined as crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of such offences. Thus, the definition is framed very broadly and may involve just two people, in contrast to both the general image and the sociological and criminological understanding of organised crime as a group activity. The expert concluded that it was questionable whether just

⁵⁰⁷ See Freedom of Information Request (2013).

⁵⁰⁸ Interview data collected for the report by the UK national expert.

two individuals in fact can commit organised crime, in terms of its commonly understood structure.

It is worth noting that in the UK government's most recent Organised Crime Strategy 2013,⁵⁰⁹ the number of persons required for application of the label of organised crime in the rest of the UK has been reduced to the Scottish level (two persons). There is thus a consistent lower limit in England and Scotland, even if it does not match popular conceptions of what organised crime is.⁵¹⁰

A representative from the prosecution office (interviewed by the UK national expert) noted the openness of the definition, but said this was as strength, as the interviewee valued the scope for prosecutorial and judicial discretion. While the definitions in the Scottish legislation are expansive enough to potentially encompass minor theft by two people (and indeed this possibility was mentioned before enactment of the legislation during hearings of the Scottish Justice Committee), this was viewed by the prosecutor as highly unlikely to occur, due to resource implications and the application of common sense.⁵¹¹ The respondent also emphasised the complementary relationship with the existing common law definition of conspiracy.

Section 30 aims to capture higher-level individuals

UK experts thought that one tool that may prove useful in fighting organised crime is the offence of directing serious organised crime in Scotland. According to our UK expert,

[T]he rationale for this provision is to make more likely the prosecution and conviction of those people who are part of the upper echelons of organised crime that may be far removed from the actions on the ground. The latter dimension of the offence, directing someone to direct another to so act, takes account of the often complex hierarchies and structures of organised crime groups, and the layers of communication involved. Though this offence also involves directing someone to commit a serious offence regardless of the nature of their relationship and the structure of the interaction, the intention of the directing person must retain the connection to organised crime.

The directing person must do something to direct another person to commit the offence; he must intend that the thing done will persuade that other person to commit the offence, and he must intend that the thing done will result in a person committing serious organised crime, or will enable a person to commit serious organised crime. It is notable that his intention must be towards the directed person being persuaded to commit the offence, but towards 'a person' committing the offence.

This offence seeks to ensure criminal liability for actors who do not physically perpetrate crimes themselves, but who play a critical role in terms of generating a common purpose, in

⁵⁰⁹ Serious and Organised Crime Strategy (2013).

⁵¹⁰ The government might argue that this is forensically necessary in order that offenders do not escape justice: but the image mismatch nevertheless remains.

⁵¹¹ Some advocates of the Rule of Law and defence lawyers might be less sanguine on the potential ambiguity and room for interpretation.

*ordering the commission of certain offences in the violations, and in managing the criminal network. Nevertheless, there is no requirement to prove control, nor to establish that his role is indispensable or that his withdrawal would affect the plans of the group.*⁵¹²

While this is similar to the common law offence of incitement, the statutory offence brought much needed clarity to the law in Scotland. Section 30 clarifies that a subsequent or resultant offence need not be committed for liability to accrue. The name of the offence also conveys 'moral opprobrium through its acknowledgment of the gravity of the behaviour'.⁵¹³

Nonetheless (as mentioned above), the provision has been used just once in a prosecution,⁵¹⁴ so it remains to be seen if and how effective it is in tackling organised crime.

Use of the 'involvement' offence in the case of drug trafficking

The maximum sentence for the 'involvement' offence is ten years,⁵¹⁵ whereas the maximum sentence for drug trafficking is life imprisonment, so a decision may need to be made as to which offence will be charged. Accordingly, this offence may be 'used' less in relation to those involved in drug trafficking, when compared with other substantive offences regarded as 'organised crime'.

The public prosecutor (interviewed by the Member State expert for the UK) highlighted the need for case-by-case decisions as to what best fits the prosecution strategy, and the maximum sentence that each attracts. Rather than calling for a necessary increase in the sentence for s28 (involvement in serious organised crime), which is ten years, the prosecutor considered this as an appropriate provision for targeting middlemen.

More time needed before evaluating the Scottish legislation

This prosecutor also stated that in a few years' time there should be more than the existing two prosecutions under s30 (directing serious organised crime),⁵¹⁶ and stressed that they have had only three years to implement it so far. The need to wait for a few years before evaluating new legislation may be an important point for other Member States (including the UK, and in particular England and Wales). Judgments that provisions 'do not work' may be premature, but at the same time there is no guarantee that provisions will work: it is precisely for this reason that the factors underlying take up or non-take up need to be empirically reviewed.

For one representative of national authorities (interviewed by the Member State expert), the recency of the offence's introduction into Scottish law was crucial and limited the extent to which one can be critical of its use. This interviewee stressed that the key issue is the translation of 'knowledge' or 'intelligence' into evidence that will

⁵¹² Direct quotation from Campbell (2014), 13–14.

⁵¹³ Campbell (2014) and Freedom of Information request: Scottish Government Court Proceedings Database, FoI/13/00657.

⁵¹⁴ Campbell (2014) and Freedom of Information request: Scottish Government Court Proceedings Database, FoI/13/00657.

⁵¹⁵ Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010. See (as of 5 February 2015): <http://www.legislation.gov.uk/asp/2010/13/contents>

⁵¹⁶ The Criminal Justice and Licensing (Scotland) Act 2010. See (as of 5 February 2015): <http://www.legislation.gov.uk/asp/2010/13/contents>

be admissible and sufficient in court. Also, while a prosecution may be for the statutory organised crime provisions as well as other substantive offences (e.g. drug trafficking), the conviction may be for the latter.

Therefore, at present, it is difficult to gauge the usefulness of the criminal law offences in Scotland.⁵¹⁷ It may be that at present the symbolism of these offences is more significant than their actual application. Having said that, they 'capture' certain behaviour on which it would otherwise be difficult to ground a prosecution/conviction, given that conspiracy needs an agreement to do something criminal. The involvement offence, in contrast, can apply to legal behaviour that would enable or further the commission of serious organised crime if the person knows, suspects, or ought reasonably to have known or suspected that would be the result.

10.2.5. The Serious Crime Bill 2014–2015 and the new offence of participation

A new law will come into effect in the UK in 2016 that creates an offence of participation in activities of an organised crime group.⁵¹⁸ This legislation had not been finalised at the time of writing.

The new offence will be in addition to the existing law on conspiracy. According to UK lawmakers, the new participation offence 'complements the existing offence of conspiracy, which is central to the majority of law enforcement investigations into organised crime and will remain so'.⁵¹⁹

Why create an offence of participation in the UK?

According to the Home Office, under the current offence of conspiracy it is 'difficult to pursue people in the wider criminal group who "ask no questions"' (an alternative phrase for 'wilful blindness').⁵²⁰ The UK Home Office states that the participation offence 'will reflect how "modern" organised criminal groups facilitate their criminal enterprises' (p.2)⁵²¹ and intends that the participation offence will increase risk for a higher proportion of those involved in organised crime.

The mental (*mens rea*) threshold for the new offence will be: 'reasonable grounds to suspect'. Accordingly, it is intended to 'better overcome the "network" that offers the protection and structure for those at the very top of such groups who can instruct or direct others to carry out activity on their behalf but who do not themselves carry out criminal acts and therefore prove difficult to prosecute'.⁵²²

⁵¹⁷ See Freedom of Information Request (2013).

⁵¹⁸ A Bill to amend the Proceeds of Crime Act 2002, the Computer Misuse Act 1990, Part 4 of the Policing and Crime Act 2009, section 1 of the Children and Young Persons Act 1933, the Female Genital Mutilation Act 2003, the Prohibition of Female Genital Mutilation (Scotland) Act 2005 and the Terrorism Act 2006 is at a report stage with third reading scheduled for 5th November 2014 in the UK Parliament. The Bill will also make provision about involvement in organised crime groups and about serious crime prevention orders; provision for the seizure and forfeiture of drug-cutting agents and will make it an offence to possess an item that contains advice or guidance about committing sexual offences against children

⁵¹⁹ Lord Taylor of Holbeach, Hansard, Citation: HL Deb, 8 July 2014, c145. As of 5 February 2015: <http://www.theyworkforyou.com/lords/?id=2014-07-08a.145.0>

⁵²⁰ Fact Sheet Participation Offence (2014), 2.

⁵²¹ Fact Sheet Participation Offence (2014), 2.

⁵²² Fact Sheet Participation Offence (2014), 2.Ibid. p. 2

The conduct (*actus reus*) element of the new offence is 'satisfied if a person takes part in any activities which are criminal activities of an organised crime group, or helps an organised crime group to carry on criminal activities'⁵²³ These criminal activities must be punishable by a sentence of at least seven years for the participation offence to be applicable (which includes a range of activities such as drug trafficking, human trafficking, organised illegal immigration, firearms offences, fraud, child sexual exploitation and cybercrime).

How might the new offence be used?

The 2014 Home Office Impact Assessment⁵²⁴ investigating the usefulness of the new offence discussed the following example (Box 10.1) to illustrate when the new offence would have benefits over the conspiracy offence in targeting the wider network and those who assist organised crime to occur.⁵²⁵

Box 10.1: Participation offence – an example of its use

An organised crime group based in Liverpool is involved in drug trafficking. The leader of the group keeps a low profile and uses haulage companies and corrupt port officials to assist his drug trafficking business. He moves to live abroad. P is a professional facilitator, who helps the leader to buy properties and in his legitimate endeavours. P has reasonable grounds to suspect that his client is involved in organised crime. The haulage company who arranges the collection of the cargo (drugs) also have reasonable grounds to suspect that they are transporting illegal cargo: port officials never inspect the cargo and allow it to pass. 'Under the existing law, D would very likely be charged with a conspiracy offence, and the port officials would be charged with a bribery offence. However, P is likely to evade prosecution, as is the haulage company. Under the new participation offence, we would expect to be able to also charge both P and members of the haulage company'.⁵²⁶

10.2.6. Legislative measures for preventing organised crime and managing organised criminals – overview

One of the important features of the UK approach to fighting serious and organised crime is that it expands beyond law enforcement to a more systematic approach to harm reduction and prevention.

There are formal tools used to prevent serious and organised crime and manage those convicted of involvement in serious organised crime. Those most commonly used are:

- Travel Restriction Orders (TRO)
- Financial Reporting Orders (FRO)
- Serious Crime Prevention Orders (SCPO).⁵²⁷

This section provides an overview of these tools and examples of how they are used. As further explained below, these tools are often used as part of a 'lifetime offender management' approach.

⁵²³ Fact Sheet Participation Offence (2014), 2.

⁵²⁴ Home Office (2014d).

⁵²⁵ Home Office (2014d).

⁵²⁶ Home Office 2014d(p. 4

⁵²⁷ National Crime Agency (2015a).

Travel Restriction Orders

The Criminal Justice and Police Act 2001 'makes provision for the Crown Courts to impose Travel Restriction Orders on certain drug trafficking offenders and to confiscate the passports of those who are British nationals for the period of the travel ban' (p.1).⁵²⁸ The TRO is intended 'to prevent convicted drug traffickers from travelling outside the UK for as long as the orders are in force' (p.1).⁵²⁹

Financial Reporting Orders

Financial Reporting Orders (FRO) were introduced by the Serious Organised Crime and Police Act 2005 and can be applied 'following conviction for a listed offence, in addition to sentencing or "otherwise dealing with" the person' when the risk of the defendant committing another listed offence is deemed 'sufficiently high' to justify the making of an FRO.⁵³⁰ An example of how FROs are used is given in Box 10.2 below.

An order comes into effect when made and lasts for a period specified in the order. An order made in the magistrates' court can be for a maximum of 5 years and orders in other courts can be for a maximum of 15 years. In cases of life imprisonment – very rare in organised crime cases except for homicides – the FRO can extend to 20 years.⁵³¹ Under Section 79 of the Serious Organised Crime and Police Act 2005, when a financial reporting order has been made the person it has been made against must:

- Make a report for the period named on the order.
- Detail, in the way stated in the financial reporting order, their financial affairs relating to the period in question.
- Include any specified documents with each report.
- Make each report to the specified person.⁵³²

Nevertheless, an expert has pointed out that the impact of the case above on the defendant is not yet clear. On the one hand, a suspended sentence is a 'Sword of Damocles', signalling a further sanction (and an opportunity for another order to be made) if he misconducts himself and is caught. The fact of detection alone will signal that he is under surveillance. On the other hand, the sanction itself is not particularly severe, and this limited severity is one reason for the proposed replacement of FROs with SCPOs with financial reporting conditions.

⁵²⁸ HM Government (2002).

⁵²⁹ HM Government (2002).

⁵³⁰ Crown Prosecution Service (2005).

⁵³¹ Crown Prosecution Service (2005).

⁵³² Home Office (2014a).

Box 10.2: Financial Reporting Orders – an example of use

The Home Office has recently presented a case study with regards to the use of a FRO:

'An individual was convicted of money laundering in 2008 and sentenced to three years' imprisonment. Upon his conviction, a confiscation order for £1.3 million pounds was granted and he was made the subject of an FRO. This individual was released from prison in 2010 and officers from the then Serious Organised Crime Agency met with this individual to explain in detail the requirements imposed upon him under the FRO. He was required to provide the following information on a six monthly basis:

- Details of all bank accounts held including copies of bank statements for the relevant six-month reporting period.
- Details of employment including payslips.
- Details of any other forms of income, including rent.
- Details of any expenditure incurred over £1000 during the relevant six-month period.
- Details of any assets acquired or transferred to the individual valued at over £1000 during the relevant six-month period.

In January 2013, the defendant submitted a report providing details of his employment and bank accounts held over the previous six months. No other information was provided. Routine checks revealed that in November 2012, a vehicle (valued at approximately £10,000) had been transferred to this individual. He was prosecuted and convicted for breach of the terms of the FRO; the offender was sentenced to eight weeks imprisonment, suspended for two years.⁵³³

Findings from the Home Office evaluation into FROs

The evaluation of SCPO and FROs carried out by the Home Office in consultation with other law enforcement agencies (mentioned above) concluded that the FRO is under-used as a means of preventing re-offending.⁵³⁴

Initially the NCA expected that around 1,500 FROs would be issued each year.⁵³⁵ However, the NCA estimates there are approximately 150 active FROs and according to the Home Office impact assessment, 'this is substantially less than the original expectation of some 1,500 per year.'⁵³⁶ This statistic reflects problems related to the nature and the application of FROs. The Home Office impact assessment further notes that:

A feature of the FRO is that breach of an order is a summary only offence: this means it is only dealt with in the magistrates court. The maximum sentence is six months in prison. This is not consistent with offences relating to the breach of other civil orders – such as the SCPO or travel restriction order. The maximum sentence for breach of these other civil orders is for up to five years in prison.⁵³⁷

⁵³³ Home Office 2014e

⁵³⁴ Home Office (2014a), 4.

⁵³⁵ Home Office (2014b), 4.

⁵³⁶ Home Office (2014b), 4.

⁵³⁷ Home Office (2014b), 4.

As a consequence, a search warrant cannot be applied for to investigate a suspected breach. Also, an investigation cannot be pursued if the offence was committed more than six months previously. The latter means that if a breach is discovered late, it cannot be sanctioned.

Serious Crime Prevention Orders

Serious Crime Prevention Orders (SCPO) were introduced through the Serious Crime Act in 2007 as a 'court order that is used to protect the public by preventing, restricting or disrupting a person's involvement in serious crime.'⁵³⁸

Key features of the SCPO are:

- An SCPO can be issued for a maximum period of five years and must state when it starts and ends. However, the court can delay the commencement of the order, e.g. to commence upon release from prison. It can also set different dates for the start and end of different provisions in the order, e.g. prohibitions on whom the person can associate and communicate with could commence while in prison, and those with regard to his working arrangements, where he/she is to live and premises to which he/she is allowed access could commence following release.⁵³⁹
- A SCPO can be made on application by the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Public Prosecutions for Northern Ireland. Application is to the High Court or to a Crown Court immediately after conviction there for a serious offence.

Following a consultation carried out in September 2013, the Scottish Government will make SCPOs available in Scotland.⁵⁴⁰

Restrictions that can be included in SCPOs

Some examples of provisions that could be contained in an SCPO against an individual may include prohibitions or restrictions on, or requirements in relation to: financial, property or business dealings; working arrangements; whom a person associates or communicates with and the means used to do so; the premises he/she is allowed to use and for what purpose; the use of any item and travel both within UK and abroad.⁵⁴¹

Their scope is thus quite broad as 'the possible terms of an order could restrict the persons' life in almost any respect, and to a very significant degree, including his/her home and where he/she lives, any term will still have to be objectively justified as appropriate for the purpose of protecting the public by preventing involvement in serious crime'.⁵⁴²

The most common types of restrictions that are imposed on serious offenders through SCPO are included in Box 10.3 below.

⁵³⁸ Home Office (2014b), 4.

⁵³⁹ Crown Prosecution Service (2007).

⁵⁴⁰ Home Office (2014c).

⁵⁴¹ Home Office (2014c).

⁵⁴² Crown Prosecution Service (2007).

Box 10.3: Common types of restrictions imposed through SCPO

- Notification of prison visitors
- Restrictions on using prison telephone system
- Notification of changes related to the order
- Not be involved in any Money Services Bureaux
- Shall only be signatory to one current and one savings account
- Shall only be in control of one mobile communication device
- Shall not have access to more than one vehicle
- Shall not borrow monies in excess of £3,000 without prior permission
- Not to be involved in the transmission of cash from the UK to abroad
- Restriction and notification of credit and store cards
- Restriction and notification of personal computers/devices and the internet
- Restrictions on access to the internet
- Restrictions on email accounts
- Restrictions on card making articles
- Restriction and notification of use of online market places
- Restrictions on use of name and identity
- Notification of premises
- Restriction and notification of bank accounts
- Restrictions on money transfers
- Restriction and notification of digital currency accounts
- Restrictions on possession of cash
- Prohibition on cash counting machines or apparatus
- Prohibition on sealing machines
- Restriction and notification of communication devices
- Prohibition of association with specific named individuals
- Restrictions on ownership and use of vehicles
- Restriction and notification of travel outside the UK
- Prohibition on sealing machines
- Notification of vehicles
- Notification of new passport or ID cards
- Not to transfer more than £1,000 per week within the UK
- Not to apply for loans, credit or mortgages in excess of £3,000
- No overseas travel
- Restrictions on third party bank accounts
- Notification of any changes of name by deed poll
- Restrictions on cutting agents
- Restrictions on possession of drug manufacturing equipment
- Prohibition on acting as sponsor/ countersignatory for visa/ passport application
- Restrictions on purchase of travel tickets
- Restrictions on possession of official documentation.

Use of SCPOs so far

As of 31 March 2014, a total of 181 SCPOs had been obtained by the NCA and the Serious Organised Crime Agency. A further 136 had been obtained by police forces and other agencies and one SCPO was imposed by the High Court outside of criminal proceedings.⁵⁴³ In 2013 48 SCPOs were awarded – the highest number yet.⁵⁴⁴ By May 2014, about 95 per cent of applications for SCPOs were granted. There have been four major appeals. Table 10.2 shows the number and types of SCPOs (as well as TROs and FROs) issued up to May 2013.

Table 10.2: Number of ancillary orders by type of offence up to May 2013⁵⁴⁵

Offence	Nr. of Orders	Types	Breakdown		
			FRO	TRO	SCPO
Counterfeit Currency	4	SCPO	-	-	4
Drugs	13	FRO; TRO; SCPO	2	6	5
Drugs Class A	62	FRO; TRO; SCPO	14	15	33
Drugs Class A & B	1	TRO	-	1	-
Drugs Class A & B, Money Laundering	3	FRO; SCPO	1	-	2
Drugs Class A, B & C, Proceeds Of Crime	1	SCPO	-	-	1
Drugs Class A, Money Laundering	4	SCPO	-	-	4
Drugs Class A, Proceeds Of Crime	2	SCPO	-	-	2
Drugs Class B	7	TRO; SCPO	-	4	3
Drugs Class B, Money Laundering	2	SCPO	-	-	2
Drugs Class C	5	FRO; TRO; SCPO	2	1	2
Drugs Supply	2	FRO; TRO	1	1	-
Forgery, Counterfeit Currency	1	SCPO	-	-	1
Forgery, Counterfeit Currency, Drugs	1	SCPO	-	-	1
Fraud	11	FRO; SCPO	9	-	2
Handling Stolen Goods	1	SCPO	-	-	1
ID Document Offences, Fraud	3	SCPO	-	-	3
Illegal Immigration	4	FRO; SCPO	2	-	2
Money Laundering	23	FRO; SCPO	10	-	13
Perverting Course Of Justice	2	SCPO	-	-	2
Proceeds Of Crime	6	FRO; SCPO	2	-	4
Theft & Handling Stolen Goods	1	SCPO	-	-	1
N/A	1	SCPO	-	-	1

Examples on how SCPOs worked in practice are presented in Box 10.4.

⁵⁴³ Home Office (2014c).

⁵⁴⁴ Serious Organised Crime Agency (2013).

⁵⁴⁵ Based on Publication of Ancillary Orders, May 2013.

Box 10.4: SCPOs – examples of use

Example 1

'In December, a Confiscation Order for £1.8 million was granted against the head of an organised crime group involved in conspiracy to supply heroin to communities throughout the UK. The individual had been jailed for 18 years in August 2011 following a Serious Organised Crime Agency investigation into the importation of 488 kilograms of heroin. A SCPO was also granted which will make it more difficult for him to re-offend when he is eventually released from prison.

The SCPO covers how much cash he can possess as well as restricting his use of cars, premises, computers and mobile telephones.⁵⁴⁶

Example 2

The Serious Organised Crime Agency investigated suspected breaches of an SCPO which led to the discovery of a conspiracy to produce a Class B drug and the dismantling of an organised crime group. The individual subject to the SCPO was 'originally imprisoned for trading in stolen identities and credit card details'. The Serious Organised Crime Agency's 'monitoring of his compliance with his SCPO indicated that he was breaching several terms of the Order. A formal investigation subsequently confirmed that he was continuing his fraudulent activity as well as conspiring to cultivate cannabis. He received a sentence of 16 months' imprisonment for breaching the SCPO, reflecting the seriousness with which the courts view such offences, and a further 15 months for his part in the drugs conspiracy. The SCPO was re-issued with additional terms to address the enabling factors of his latest criminality'.⁵⁴⁷

Example 3

Another crime prevention order was issued against a supplier of cocaine on his release from prison. The BBC reported the conditions of the crime prevention order in detail. It limits the offender to have one bank account, one savings account and one credit card within the UK, all registered with the police. Also, the subject of the order 'must not use anyone else's accounts or have interest in any other third party accounts. The order restricts him to one mobile phone, one SIM card and one number, one computer equipped with email software and one land-line telephone at home and at a workplace. He will not be able to use a hire or leased vehicle without telling police in advance why he needs it and how long for, and to provide the make and registration details. The order bans him from possessing any drug manufacturing equipment or chemicals used as cutting agents. And he must register his address or any other address he uses for more than seven days'.⁵⁴⁸

Findings from the Home Office evaluation into SCPOs

Findings from the evaluation of SCPO and FROs carried out by the Home Office in consultation with other law enforcement agencies (mentioned above) were as follows:

*There are gaps in the list of indicative offences that guide the use of SCPOs.*⁵⁴⁹

- There is a list of serious offences to guide the courts when they consider the imposition of SCPO (Schedule 1 to the Serious Crime Act 2007). The list covers offences in relation to drugs, people and arms trafficking, prostitution and child sex, armed robbery, money laundering, fraud, offences in relation

⁵⁴⁶ Serious Organised Crime Agency (2013).

⁵⁴⁷ Serious Organised Crime Agency (2013).

⁵⁴⁸ BBC News (2012).

⁵⁴⁹ Serious Crime Act (2007), Schedule 1.

to public revenue, corruption and bribery, counterfeiting, blackmail, several offences related to intellectual property crimes, several offences in relation to environmental crime. The list is not exhaustive.

- The evaluation states, that 'just because an offence is on the list does not mean an SCPO will automatically be imposed, nor does absence from the list mean that an order cannot be made. However, it is still important that the list is kept up to date to ensure the courts are given clear and unambiguous guidance. This list currently has some important gaps, particularly with relation to firearms offences and cyber crime.'(p.4) (Though where guns and cyber techniques are used to commit the offences listed above, they are included.)
- In order to improve the application and the impact of crime prevention orders, following an assessment, in May 2014 the government proposed to include the possession of firearms, computer hacking and cybercrime offences and the cultivation of cannabis plants on the SCPO offences list.⁵⁵⁰

There are problems related to the powers of a court dealing with breaches of SCPOs.

- When a SCPO is breached, the legislation allows an order to be varied by the Crown Court after a criminal conviction for the breach (for example, extending the duration of an order or adding further conditions). However, the court dealing with the breach cannot impose a new order 'nor can it extend the duration of an existing order beyond a five year limit' (p.4).⁵⁵¹
- In response to this, following criminal conviction for breach of a SCPO the government proposes to allow the Crown Court to replace it, especially in cases in which it is due to expire (in keeping with the preventative rationale, the breach will have an effect in reminding offenders of the downside risks).⁵⁵²

Overlaps between SCPOs and FROs

Given the limitations on FROs, there are proposals to replace them with SCPOs in the future (because SCPOs are broader in scope and include financial restrictions, and overall are believed to be a more effective tool).⁵⁵³ A fact sheet on the forthcoming improvements to SCPOs admits that there is an overlap between FROs and SCPOs and that the large majority of FRO and SCPO qualifying offences are the same. 'However, breach of an SCPO is an offence that can be dealt with by a magistrates' court or the Crown Court and therefore does not have the drawbacks of the FRO'.⁵⁵⁴ However, the role of FROs and their effectiveness has been debated and some policymakers do think that there is still a place for FROs.⁵⁵⁵

Expert views on SCPOs

⁵⁵⁰ Serious Crime Act (2007), Schedule 1.

⁵⁵¹ Home Office (2014b).

⁵⁵² Home Office (2014e).

⁵⁵³ Home Office (2014b).

⁵⁵⁴ Home Office (2014d).

⁵⁵⁵ See Standing Committee on Bills debate at (as of 5 February 2015):

<http://www.publications.parliament.uk/pa/cm200405/cmstand/d/st050113/pm/50113s02.htm>

SCPOs were mentioned by most interviewees and were considered an impactful tool. The following views were expressed:

- It is important to use these orders carefully, and not to use them too much, as this results in the NCA having insufficient resources to monitor and intervene and reduces its credibility and that of the Orders.
- The NCA interviewee thought that SCPOs were most impactful on release from prison as part of lifetime offender management programmes (LE6).
- Reporting requirements are most important on vehicles, phones, home and work.
- According to the NCA interviewee, one of the advantages of the SCPO over the FRO is that any breach of the SCPO goes to the Crown Court where judges 'take it seriously' (LE6), rather than to the Magistrates' Court where FRO breaches can only result in a maximum three months' prison or a modest fine.
- Whenever the NCA deals with a breach of SCPOs, they usually find other criminality and one of the leverage approaches is 'to spread the message to other criminals to make the SCPO person toxic' (LE6).
- The expert also noted that the Crown Prosecution Service is well versed in SCPOs and that neighbourhood policing teams are involved to detect breaches.
- One of the advantages of an SCPO is that it is less complicated to prove a breach of an order to inform or not to do specified things than it is to prove a connection with a specific offence.

Other legal tools: bad character legislation

Another tool that respondents considered very useful and which has been used during the last five years is bad character legislation (LE3 and LE4). Bad character legislation allows the use of previous convictions in evidence before the court to support the propensity of the defendant to commit similar offences and their disposition towards misconduct. The admissibility of bad character evidence is set out in Sections 98 to 113 Criminal Justice Act 2003 which applies to all criminal proceedings begun on or after 4 April 2005 (Section 141 Criminal Justice Act 2003). According to the Crown Prosecution Service, 'Bad character' in criminal proceedings means 'evidence of or a disposition towards misconduct' (section 99 Criminal Justice Act 2003). Misconduct means the commission of an offence or other 'reprehensible conduct' (section 112 Criminal Justice Act 2003.) This definition applies to both defendants and non-defendants. 'This definition is wide enough to apply to conduct arising out of a conviction, or conduct where there has been an acquittal and a person who has been charged with another offence, and a trial is pending, the use of the evidence relating to that charge in current proceedings.'^{556 557}

Another useful tool mentioned by interviewees from the NCA is financial investigation and proving that suspects are living beyond their legally declared means (LE3 and LE4). These interviewees considered the Proceeds of Crime Act 2002 to be very useful.

⁵⁵⁶ Crown Prosecution Service (2015).

⁵⁵⁷ See R v Z [2000] 2 AC 483.

It allows using tax and civil recovery and non-judicial disruptions – using tax officials and regulators of accountants and lawyers to target criminals, as well as reporting lawyers or other professionals that assist criminals to their professional regulators or other Associations.

According to interviewees from both the NCA and regulators, all regulatory bodies are willing to help the NCA to tackle crime, even if occasionally their regulations may inhibit action. Interviewees suggested that often regulatory bodies are willing to change their legislation to allow for cooperation because most regulatory bodies aim to ensure that their members are not involved in crime and corruption (LE6 and LE9).

The use of the legal tools is aided by other techniques and tactics to disrupt criminal activities. Although disruption is a very broad term covering a range of effects on criminal networks and crimes, the Serious Organised Crime Agency was involved in 1,008 disruptions of organised crime groups and 749 UK arrests in 2012–2013.⁵⁵⁸

10.3. The UK leading agency against serious and organised crime: the National Crime Agency

The following sections offer an overview of the NCA's core areas of work and mission, its strategic and operational priorities as well as relevant legislation that shapes its competencies.

The NCA aims to 'have strong, two-way links with local police forces and other law enforcement and intelligence agencies'.⁵⁵⁹

10.3.1. Overview of NCA structure and priorities

The strategic and operational priorities of the NCA

The NCA's work against serious and organised crime is developed around four key strategic areas, drawing on the so-called '4Ps framework' (developed initially for the UK response against terrorism), as illustrated in Figure 10.1 below.⁵⁶⁰

The NCA's strategic priorities, as set by the Home Secretary,⁵⁶¹ include also:

- Developing further the technical and human capabilities of the organisation.
- Maintaining 'close, collaborative and productive relationships with the police and other law enforcement agencies, Police and Crime Commissioners, the intelligence and security agencies, Government departments, local Government and the private and voluntary sectors, and Devolved Administrations' (p.6).⁵⁶²
- Maintaining representation in priority countries.⁵⁶³

The NCA's operational priorities are presented in Box 10.5 below.

⁵⁵⁸ Serious Organised Crime Agency (2013). There were also 1501 arrests in relation to international case work.

⁵⁵⁹ Unpublished presentation by Mark Bishop at a workshop in London in June 2014.

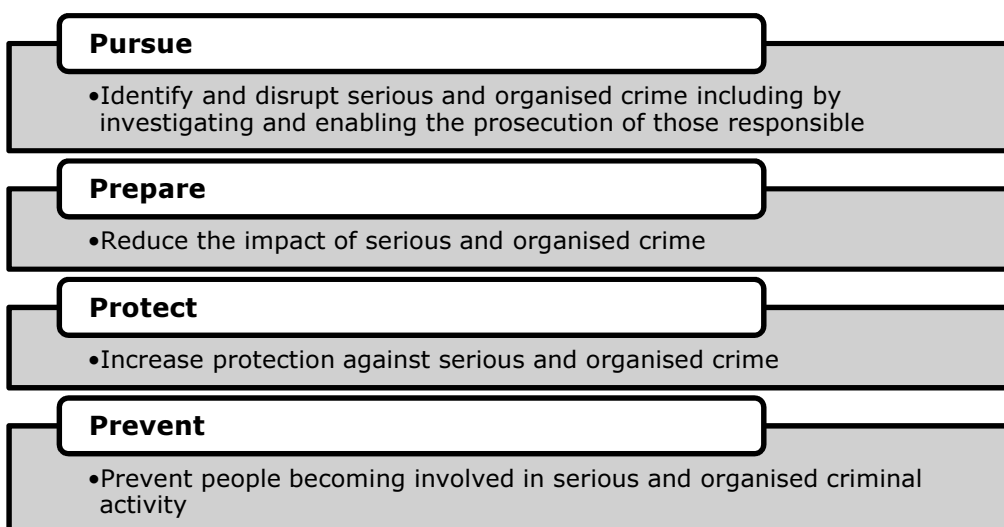
⁵⁶⁰ Serious and Organised Crime Strategy (2013), 7–8), and also National Crime Agency (2013). 5).

⁵⁶¹ The Crime and Courts Act 2013 provides for the Home Secretary to set strategic priorities for the NCA.

⁵⁶² National Crime Agency (2013).

⁵⁶³ National Crime Agency (2013).

Figure 10.1: NCA's core areas of work



Source: UK Serious and Organised Crime Strategy⁵⁶⁴

Box 10.5: NCA's overall operational priorities

- 'To lead the fight against those organised crime groups and criminals that cannot reasonably be tackled by partners; for example, those with significant impact nationally and internationally, operating across several jurisdictions and often with a high level of criminal sophistication';
- 'To tackle the enablers of crime that have both utility and impact across several threat areas. For example cyber-enabled criminality where access to the hidden internet can facilitate criminal acts such as illicit drugs supply, images of child abuse and the trade in stolen credit card data';
- 'To develop and deploy specialist national capabilities which are not normally affordable or easily available to partners';
- 'To build its reputation at a local, regional, national and international level as the agency responsible for leading the UK's fight to cut serious and organised crime';
- 'To use its new powers to task and coordinate, and become an established national leader and co-ordinator. The NCA will invest resources in this area to bring together partners in joint activities with shared endeavour, in order to ensure that UK law enforcement as a whole is deploying its crime-fighting assets as effectively as possible against serious and organised crime, and that all high impact crime groups and individuals are being targeted with an appropriate operational response';
- 'To produce a single comprehensive assessment of the threat and identify opportunities to cut serious and organised crime in the UK';
- 'To lead, support or coordinate complex international investigations and

⁵⁶⁴ Serious and Organised Crime Strategy (2013), 7–8), and also National Crime Agency (2013). 5).

strengthen the UK's borders';

- 'To become an established national leader that uses its mandate to task and coordinate and ensure that UK law enforcement is deploying its assets against serious and organised crime as effectively and efficiently as possible'.⁵⁶⁵

Table 10.3 lists the UK serious and organised crime priority threats, which shape the work of NCA.

Table 10.3: UK priority serious and organised crime threats

Child sexual exploitation and abuse	Contact child sexual abuse Indecent images of children- viewing and sharing Indecent images of children-production
Cyber	Malware Network intrusion
Drugs	Cocaine Heroin New and synthetic drugs and new psychoactive substances
Economic	Fraud against the individual, the private and third sector Bribery and corruption, sanctions evasion Counterfeit currency Market abuse/insider dealing
Firearms	Domestic supply International supply Exploitation of legitimate supply
Organised acquisitive crimes	Commercial robbery Metal theft
Organised immigration crimes	Human trafficking and modern slavery Clandestine people smuggling Facilitation of illegal immigration Production and abuse of documents
Prison and lifetime management	OC in prison or in remand OC in prison post-conviction OC whilst subject to an ancillary order or on license

Source: This table was included in an unpublished presentation given at a workshop in London, 20 June 2014. It is also part of NCA Annual Plan 2014–2015 (National Crime Agency 2014, 8).

Key powers and legislative basis of the NCA

NCA officers are able to use a wide range of powers under various pieces of legislation. These include but are not limited to the following:

- Crime and Courts Act⁵⁶⁶
- Serious Organised Crime and Police Act (SOCPA)⁵⁶⁷

⁵⁶⁵ National Crime Agency (2013, 2014)

⁵⁶⁶ The Crime and Courts Act was enacted in 2013. It created the National Crime Agency and abolished the Serious Organised Crime Agency and the National Policing Improvement Agency. Furthermore, this Act introduced new provisions in relation to 'the judiciary and the structure, administration, proceedings and powers of courts and tribunals', namely enabling youth courts to have jurisdiction to grant gang-related injunctions. For additional information about this Act, see Crime and Courts Act (2013).

- Regulation of Investigatory Powers Act (RIPA)⁵⁶⁸
- Serious and Organised Crime Bill (if enacted)⁵⁶⁹

The transition from the Serious Organised Crime Agency to the NCA

The establishment of the Serious Organised Crime Agency in 2006 aimed in part to overcome 'the lack of a coherent strategy, the confusion of responsibilities' amongst the agencies working in the field of organised crime.⁵⁷⁰ While the need to work in collaboration with national and international partners was emphasised, 'there was no clear obligation placed on others to do so. Tackling organised crime developed as a 'coalition of the willing', which led to a disjointed and patchy response, competing with other priorities'.⁵⁷¹ According to interviewees, the Serious Organised Crime Agency's experience shows that having a shared strategic understanding of the organised crime threats is essential for a coordinated national response to develop.

The Serious Organised Crime Agency worked towards the NCA transition in 2013. This included the provision of new systems to enable the early establishment of the shadow NCA leadership; Border Policing Command; and Joint Operation Team – part of the National Cyber Crime Unit. Work towards the transition also included pilot work on mobile data 'to improve mobility and support a more flexible, resilient and capable operating model'.⁵⁷²

During 2013, some of the key NCA posts were filled by senior Serious Organised Crime Agency staff. In addition, the Serious Organised Crime Agency was authorised to recruit 160 operational officers for the new agency, including 128 staff externally and a further 25 officers among candidates showing potential to provide future leadership. The 'high potential' scheme (introduced in 2009) is open to both external and internal applicants and the Serious Organised Crime Agency annual report suggests that there was a high level of response to it.⁵⁷³

The NCA also recruits volunteer officers known as 'NCA Specials' (who are appointed formally as 'Special Constables', with policing powers). They bring a range of specialist skills not traditionally found in law enforcement agencies. For example, volunteers can

⁵⁶⁷ SOCPA's core goal was the establishment of the Serious Organised Crime Agency. This Act also introduced changes to the powers of arrest. For additional information about SOCPA, see Serious Organised Crime and Police Act (2005).

⁵⁶⁸ The RIPA was originally enacted in 2000 and aims to 'make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed to provide for Commissioners and a tribunal with functions and jurisdiction in relation to those matters to entries on and interferences with property or with wireless telegraphy and to the carrying out of their functions by the Security Service, the Secret Intelligence Service and the Government Communications Headquarters and for connected purposes'. The list of public authorities allowed access to data collected in the context of RIPA has been expanded since 2000. For additional information about RIPA, see Regulation of Investigatory Powers Act (2000).

⁵⁶⁹ The Serious and Organised Crime Bill was introduced in the House of Lords (June 2014), drawing on recommendations from the Government's 'Serious and Organised Crime Strategy' (2013). This Bill 'will build on current law to ensure that the National Crime Agency, the police and other law enforcement agencies have the powers they need effectively and relentlessly to pursue, disrupt and bring to justice serious and organised criminals' (p.1). For further information on this Bill, see Serious Organised Crime Bill (2014).

⁵⁷⁰ Harfield (2006), 745; Elvins (2008).

⁵⁷¹ UK Parliament (2011). For a discussion of this issue from an European perspective please see also Berenskoetter (2012).

⁵⁷² Home Office (2013); Serious Organised Crime Agency (2013).

⁵⁷³ Serious Organised Crime Agency (2013).

include scientists, financial and technology experts. There is a general shortage in UK policing (as in many other Member States) of cyber-trained officers, and the unpaid but security-vetted volunteers are one way of trying to remedy this gap and get relevantly skilled staff.

NCA structure and the single tasking and coordination process

The NCA was developed with the view that there should be a single tasking and coordination process for the work against serious and organised crime. The aim of the 'single process' is to: 'reduce bureaucracy; identify the most cost effective response; avoid conflicting tasking with the NCA's own resources and those of partner agencies and act as a single "portal" for incoming requests for operational assistance.'⁵⁷⁴ The agency has the authority to undertake tasking and coordination of the police and other law enforcement agencies and aims to prevent unnecessary overlaps and conflicts between different organisations.

The NCA structure is currently based on four 'Commands':⁵⁷⁵

The Organised Crime Command

The work of this command is based on intelligence and analysis. It has an overview of the national threats from organised crime. It ensures that UK agencies work together to provide operational response to all organised crime groups in the UK. The Command also provides operational support to other agencies. It leads and coordinates a wide range of operations 'combining the unique skills and capabilities of the NCA with the local, regional and national law enforcement experts'.⁵⁷⁶

The Border Policing Command

The Border Policing Command works on strengthening national security and against trafficking of people, weapons, drugs and wildlife. The work of the command is based on a multi-agency assessment of border-related threats including cross-border criminal activity. The role of the Border Command is to ensure that all the law enforcement agencies operating in and around the UK border work together to provide border security. The Command also works with foreign governments and staff can be posted overseas to disrupt criminals and prevent threats to the UK.⁵⁷⁷

The Child Exploitation and Online Protection Centre

The Child Exploitation and Online Protection Centre coordinates national and international action to tackle paedophile and online exploitation networks, using financial and other data available from the economic crime section of the NCA Intelligence Hub and from overseas policing agencies (as well as other sources).

The Economic Crime Command

The Economic Crime Command coordinates response towards a wide range of economic crimes. It also works to 'ensure that the largest and most complex economic

⁵⁷⁴ UK Parliament (2011).

⁵⁷⁵ Interviewees explained, at the time of writing, that there were plans to create five commands – with the National Cyber Crime Unit becoming its own command.

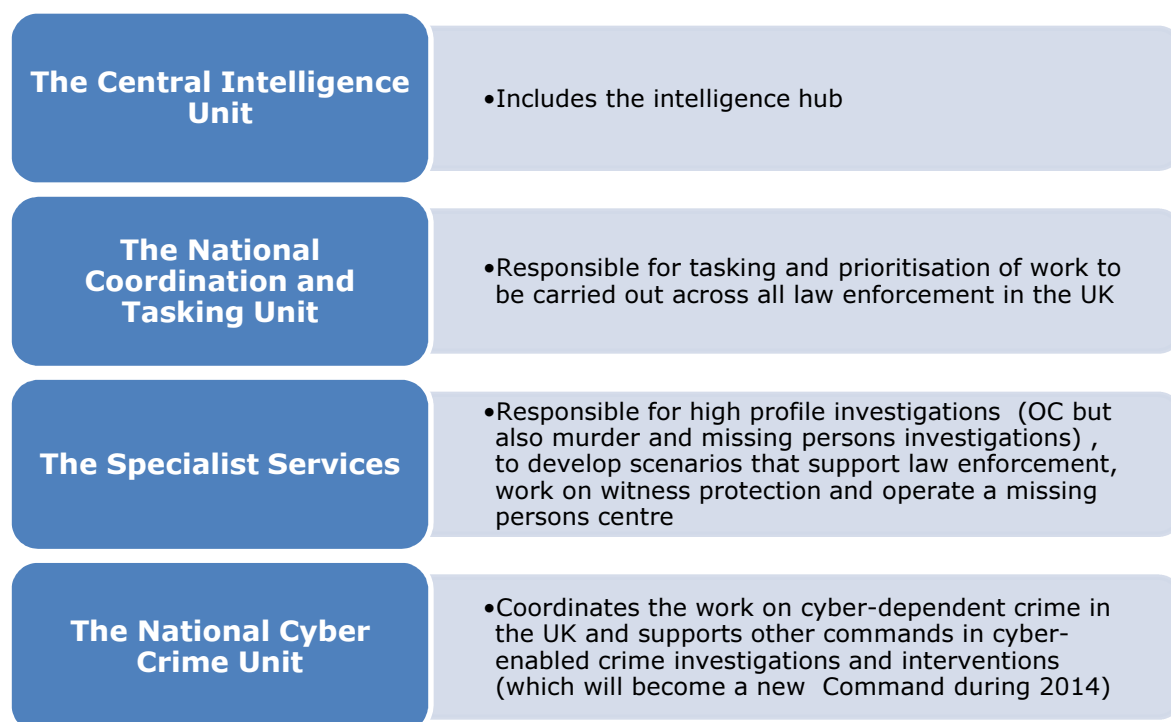
⁵⁷⁶ National Crime Agency (2011).

⁵⁷⁷ National Crime Agency (2011).

crime cases can draw upon the most advanced investigation techniques'.⁵⁷⁸ It is also involved in the civil recovery of criminal assets for England, Wales and Northern Ireland.

The units working underneath the four key Commands are presented in Figure 10.2 below. All units within NCA are formally interoperable. For example, surveillance officers from different places can be summoned to work on a case. All will have the same devices, training and would be able to operate together very quickly (LE4).

Figure 10.2: Units working alongside the four key NCA Commands



Source: Based on information provided by interviewees

How the NCA works with Scottish and Northern Irish policing

In Scotland, the NCA works in partnership with Police Scotland and other law enforcement agencies. Prior to the creation of NCA, the Serious Organised Crime Agency was a member of the Serious Organised Crime Task Force in Scotland and took part in the Association of Chief Police officers in Scotland.⁵⁷⁹

In Northern Ireland the Serious Organised Crime Agency was a member of the Organised Crime Task Force in Northern Ireland. The absence of a Legislative Consent Motion from the Northern Ireland Executive in relation to the Crime and Courts Act 2013 'limits the NCA's remit to tackling serious and organised crime to excepted and reserved matters which includes customs offences, immigration crime and some asset recovery work'.⁵⁸⁰

⁵⁷⁸ National Crime Agency (2011), 20.

⁵⁷⁹ Serious Organised Crime Agency (2013), 23.

⁵⁸⁰ National Crime Agency (2014), 11.

10.3.2. The approach taken by the NCA: prevention and disruption

An important feature of the Serious Organised Crime Agency was its harm reduction focus. The Agency was described 'as being a harm reduction agency with law enforcement powers'. From its genesis, the Serious Organised Crime Agency aimed to reduce the social harms caused by organised crime groups and other criminal markets.⁵⁸¹

The focus on harm reduction does not seem to be so explicitly present in official statements of the role and mission of the NCA, which describes itself as a 'crime-fighting agency'. However, expected harms from offences and impacts from interventions remain part of routine operational planning in how to make best use of scarce resources, and it remains to be seen how far the 'product mix' of the NCA will differ from the Serious Organised Crime Agency, except that more operational visibility and arrests will take place.⁵⁸²

According to the aims of the Serious and Organised Crime Strategy (2013), the UK government foresees launching a new 'Prevent' programme to stop people getting involved in serious and organised crime and raise awareness of the reality of serious and organised crime and the consequences for offenders

10.3.3. The National Cyber Crime Unit within the NCA

The UK National Cyber Crime Unit (NCCU) at NCA has brought together specialists from the Police Central e-Crime Unit in the Metropolitan Police Service and the Serious Organised Crime Agency Cyber Crime Unit. The aim is to respond quickly to rapidly changing cyber threats. The Unit collaborates with partners to reduce cyber- and cyber-enabled crime by:

- Providing an investigative response to cybercrime.
- Working proactively to prevent crime and pursue perpetrators.
- Working with partners in industry and law enforcement.
- Understanding the growing use of cyber and how this affects various types of crime.⁵⁸³

The NCCU delivers operational capacity for the investigation of some cyber dependent crime and supports other commands in relation to cyber-enabled crime. For example, work on the 'Dark Web' criminal information exchange and drugs marketplace 'Silk Road' would be supported by the NCCU but led by the Organised Crime Command. NCCU would send experts to help the Commands with operations (LE2).

At the time of writing, there is ongoing restructuring which will make the NCCU one of the Commands with its own director. According to NCA officers, it is good for the NCCU to be a command with a Director at the Board level because breaches of cyber security are a key threat and require priority treatment (LE2). On the other hand, it is also important for cyber-work to be mainstreamed across the whole NCA and the police generally, since ICT has become a routine feature of social and criminal

⁵⁸¹ Elvins (2008), 243.

⁵⁸² National Crime Agency (2015b).

⁵⁸³ National Crime Agency (2015c).

communication and e-Crimes are becoming an increasing integrated part of crimes for gain.

At the national level the work of the Unit is supported by dedicated cyber units in the nine Regional Organised Crime Units.

Developing the NCA NCCU

The preparatory work for the creation of NCCU started about 18 months prior to the NCA being created and the Unit operated for six months prior to the agency's launch.

These preparatory stages involved looking at models of cybercrime units in other countries – including the US (LE2). A blueprint for NCCU was developed, taking into account feedback from practitioners. The original team behind NCCU included a policy officer from the Home Office, two officers from the Serious Organised Crime Agency and officers from the Police Central e-Crime Unit.

NCCU Staffing, recruitment and resources

The NCCU can rely on the operational capability, technical support (including forensic and other support), intelligence officers, financial investigators, and prevention capabilities provided by the 'centre of excellence' networks.⁵⁸⁴

A technical unit is being developed at NCCU, which will be linked closely to the Innovation Centre to make sure the NCCU is at the cutting edge of technology.

The NCCU gained very useful skills and experience of staff from both the Police Central e-Crime Unit in the Metropolitan Police Service and the Serious Organised Crime Agency (LE2), and human resources are an essential element of the NCA. While other parts of the NCA are able to rely on police forces to find recruits, NCCU needs technical experts and more diverse recruitment strategies.

- NCCU has developed apprenticeship schemes.
- NCCU benefits from the NCA Specials scheme, whereby leading experts from other sectors work on secondments at NCCU for a limited number of days per year.

The UK College of Policing has included cyber investigation skills into the training of thousands of UK police officers,⁵⁸⁵ but it is generally accepted that police forensic skills are insufficient to match the growth of cyber-enabled crime (a point that may be applicable throughout the EU).

The NCA shares operational capabilities and property services with Regional Organised Crime Units (ROCU) and Counter Terrorism Units (CTU).⁵⁸⁶

International collaboration in the NCCU

International collaboration is essential to the work of the NCCU. Almost every operation is cross-border in cyber dependent crimes. The NCCU is actively involved in

⁵⁸⁴ ECENTRE (England's Cybercrime Centre of Excellence Network for Training, Research and Education) is a network of five regional clusters bringing together law enforcement, universities and companies to share research and training, educational materials and cybercrime forensics educational resources.

⁵⁸⁵ Cabinet Office (2013b).

⁵⁸⁶ National Crime Agency (2011, 2014).

EU level collaboration, for example, in the Joint Cyber Action Taskforce, which is being established at the Europol European Cyber Crime Centre.⁵⁸⁷ The aim of the Taskforce is to ensure a common understanding of threats and to promote collaboration on key issues. The Joint Action Taskforce will be flexible so that Member States can join in on issues in which they have interest.

Another example of international collaboration is the National Cyber Forensics and Training Alliance (NCFTA), based in Pittsburgh – where the NCCU also has staff. It was established in 2002 to facilitate collaboration between industry, law enforcement and academia on e-crime.⁵⁸⁸ Some examples of NCCU outreach and international collaboration are provided in Boxes 10.6 and 10.7 below.

Box 10.6: Transfer of knowledge and cooperation by the NCCU

- The Serious Organised Crime Agency placed cyber liaison officers in key locations overseas to achieve more effective operational responses.⁵⁸⁹
- NCCU currently supports Moldova in developing a cyber forensics lab (LE2).
- NCCU works with UK Foreign Office to assist countries in responding to cybercrimes.⁵⁹⁰

Box 10.7: E-commerce platforms

As part of a global 'day of action', 36 website domains used to sell compromised credit card data and data from 26 e-commerce type platforms known as AVCs were seized by the US Department of Justice working with the Serious Organised Crime Agency. The AVCs allowed criminals to sell large quantities of stolen data quickly and easily. Visitors trying to access these sites were directed to a page indicating that the web domain was under the control of law enforcement. In searching two London addresses, Serious Organised Crime Agency officers recovered a number of computers and data storage devices. The recovered data was shared with UK and overseas financial institutions to help prevent potential fraud and mitigate the impact of the data thefts. In addition, as a result of alerts that the Serious Organised Crime Agency issued, a further 44 AVCs were taken down. Retailers ultimately pay the cost of fraudulent card transactions which impact directly on the economy. Individuals also suffer when identity theft results from the trade in illegally acquired personal information. (NCA1)

Engagement with industry

According to NCA officers involved in work against cybercrime at the UK and also EU level, since the creation of the NCA there has been a more systematic engagement with industry (although the Serious Organised Crime Agency also engaged with industry). One interviewee commented that, 'stressing the lawfulness and proportionality of NCA's work helps in building these partnerships' (LE2). NCCU also works with 'network defenders' (for example, UK Cert; MOD CERT; GOV CERT; the Centre for the Protection of National Infrastructure). For example, the Cyber Crime

⁵⁸⁷ Europol (2014b).

⁵⁸⁸ Association of Chief Police Officers (2009).

⁵⁸⁹ Serious Organised Crime Agency (2013).

⁵⁹⁰ Cabinet Office (2014).

Unit worked with UK CERT to develop a cyber-information sharing platform for FTSE 50 companies.

The 2011 and 2014 Europol Threat Assessments on Internet Facilitated Crime emphasise the value of such partnerships: 'Active partnership with the private sector – especially Internet Service Providers, Internet security organisations and financial services – is essential to the success of this, not only for the sharing of intelligence and evidence, but also in the development of technical tools for law enforcement and design-based measures to prevent online criminality. The academic community also has an important part to play in the research and development of such measures.'⁵⁹¹ Boxes 10.8–10.10 below provide some good practice examples:

Box 10.8: Cyber Security Information Sharing Partnership

The Cyber Security Information Sharing Partnership is a secure platform that allows the government and the private sector to share information on cyber threats. 'The [Platform] includes a team of analysts (a "Fusion Cell") supported by the government's security services and NCA along with industry analysts in partnership. These analysts produce an enhanced picture of cyber threats facing the UK, which feeds in to the new organisation for national incident management, CERT-UK.'⁵⁹²

Box 10.9: Fraud Forums

Following an operation by the Metropolitan Police Service, individual fraud forums have been formed in Vehicles, Hotels, Construction, Property, Travel, Banking, Recruitment and Vetting and Screening sectors. The e-groups are self-managed and bring together companies to identify current fraud trends within their sector and prevent fraud.⁵⁹³

In addition, members of the public can go to the Action Fraud website (www.actionfraud.police.uk) to report fraud or get advice. The Action Fraud reporting tool 'is now the central point of contact for reporting online fraud and financially-motivated cyber crime'.⁵⁹⁴

Box 10.10: The Internet Watch Foundation

The Internet Watch Foundation was established in 1996 by the Internet industry to provide an Internet hotline for the public and IT professionals to report criminal online content.⁵⁹⁵ It was formed 'with the endorsement of the Metropolitan Police, Department of Trade and Industry (DTI), Home Office and the associations of the ISPs, such as the Internet Service Providers Association and the London Internet Exchange'.⁵⁹⁶ It may also pass on details of sites directly to the police.

Working with academia

The NCCU also builds on work done by the Metropolitan Police Central e-crime Unit in conjunction with academia in a variety of universities in England, Wales and Northern

⁵⁹¹ Europol (2011), 3.

⁵⁹² Establishing a Cyber Security Information Sharing Partnership (2014). See also CERT-UK (2015).

⁵⁹³ Association of Chief Police Officers (2009).

⁵⁹⁴ Cabinet Office (2013b), 2–3.

⁵⁹⁵ See IWF (2015).

⁵⁹⁶ Wall (2011), 10.

Ireland, covering areas such as networks, internet security, risk and forensic cryptography.⁵⁹⁷ Academic Centres of Excellence in Cyber Security Research are part of the UK Government's National Cyber Security Strategy, launched in 2011.⁵⁹⁸ The scheme is sponsored by the Department for Business, Innovation and Skills, the Centre for the Protection of National Infrastructure, Government Communications Headquarters, the Office of Cyber Security and Information Assurance and Research Councils UK.⁵⁹⁹

Challenges faced by the NCCU and other cybercrime units

During discussions with interviewees about NCCU addressing cyber security, and through desk research undertaken as part of the UK case study, a number of challenges were identified in relation to the fight against organised crime where it is cyber enabled or takes place online.

- **Updating equipment and training.** Respondents (LE6, LE9) mentioned that procurement rules may complicate or slow the purchase of equipment. The training of staff in cyber units and NCCU also needs to be updated regularly.
- **Staff retention** and as in all areas where there is strong private sector demand, there is regular leakage of staff to the private sector.
- **International cooperation – political priorities:** according to UK respondents, despite the considerable efforts of Europol European Cyber Crime Centre, governments of other MS have not necessarily seen cybercrime as a priority at the same level as it has been a priority in the UK (LE6, LE9). According to one interviewee, the UK government fully understands that a safe Internet is essential for economic growth and prosperity and is prepared to support work against cybercrime. There are political challenges concerning the collaboration on cyber security with countries such as China or Russia (LE9).
- **International cooperation – resourcing:** Criminals engage in crimes using the internet from a variety of locations, including non-EU countries which do not have adequate measures in place to prevent cybercrime, do not have the resources to tackle cybercrime or do not have good overall relations with the UK (and other countries).⁶⁰⁰ Some countries only have very small cybercrime units focusing only on fraud or sex crimes on the Internet. Hence collaboration can be difficult (or impossible).
- **Cooperation with private sector:** As observed in the main report, telecommunication and internet companies that provide various electronic and voice communication services may not be based within the EU's jurisdiction (e.g. Facebook, Skype), making it slow and difficult to obtain communication records.
- **Legislation on communications data retention** is and remains a serious challenge which NCCU (and other UK agencies) face in their work. European

⁵⁹⁷ Association of Chief Police Officers (2009).

⁵⁹⁸ Cabinet Office (2013a).

⁵⁹⁹ Centre for Secure Information Technologies (2015).

⁶⁰⁰ Europol (2014a).

court rulings about data retention⁶⁰¹ make it harder to collect and use evidence on cybercrimes (e.g. communications data linked to IP addresses).

- **Demonstrating 'proportionality'** to authorise online surveillance: Under the current Regulation of Investigatory Powers Act regime it is necessary to demonstrate proportionality in relation to a particular target when using investigative tools. This may not be practical in online surveillance situations where targets may be varied and the surveillance may yield information about previously unforeseen targets.
- **Techniques to detect and prevent cybercrime may breach the Computer Misuse Act.** For example, the NCCU could send alerts to an IP address they knew had been targeted by a cyber-attack, but this would currently be unlawful in the UK.

10.3.4. The NCA Behavioural Unit

The NCA work on prevention and disruption includes innovative work applying 'behavioural insights' to the prevention and disruption of serious and organised crime.

What are behavioural approaches?

According to a senior interviewee from the NCA Behavioural Unit, the aim of behavioural approaches is to disrupt and prevent crime by influencing the behaviour of those involved. The targets for behavioural interventions could be potential victims, criminals, and a range of other individual or group targets. Part of the inspiration behind setting up the unit was the use of psychological approaches in military settings, for example to develop support for coalition forces among local – possibly hostile – populations. The work of the Behavioural Unit also included insights from social marketing, the psychology of persuasion and behavioural economics (LE5).

Aims of taking a behavioural approach

The Behavioural Unit was set up as part of the Serious Organised Crime Agency, and was part of that agency's non-traditional approach to tackling organised crime.

It was hoped that using a behavioural approach would allow a wider reach and allows the NCA to engage lower-priority targets and issues.

How to use behavioural approaches

The interviewee suggested that the behavioural approach needs to be considered early, at the start of an investigation. It involves:

- Asking whose behaviour needs to change, and how.
- Paying attention to the context and the environment.
- Thinking about motivations of the actors involved.

⁶⁰¹ In April 2014, the EU Court of Justice declared the Data Retention Directive to be invalid. The rationale behind the Directive was to 'ensure that the data are available for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism' (p.1). The Court considered that the Directive violated the fundamental rights to respect for private life and to the protection of personal data, in a manner exceeding 'the limits imposed by compliance with the principle of proportionality' (p.2). Some of these issues are to be addressed in the UK by the Data Retention and Investigatory Powers Bill 2014, which has received all-party support.

- Working with the NCA communications Team on media and messaging (LE5).

Box 10.11 provides an example of the use of behavioural insight to disrupt crime.

Box 10.11: Stopping migrant stowaways in Heavy Goods Vehicles (HGV)

The NCA wanted to address the issue of migrants crossing into the UK by hiding in lorries and trucks. The NCA was issuing fines to haulage companies and drivers, but this had limited effectiveness – sometimes because smaller companies would dissolve before a fine could be levied. The Behavioural Unit at the NCA thought creatively about solutions. One of the findings from their problem analysis was that drivers of HGVs did not have much control over the situation, and were under a lot of pressure to make deliveries on time. This would mean, for example, that they rested in insecure locations and worked very long hours. The Behavioural Unit also thought about the communication with the customer (e.g. the owner/ recipient of the goods being transported). Working with the then UK Border Agency (now part of the NCA), BU started notifying consigners when stowaways were found in their vehicle, advising them to check the loads. As a result of this approach, customers started to complain to the haulage companies and reject the goods. This brought market pressures to bear on HGV operators. NCA also suggested terms which customers might consider including in their contracts with hauliers to ensure security (LE5).

Challenges in using behavioural approaches

During interviews the following considerations and challenges were mentioned:

- Taking a behavioural approach goes beyond traditional policing methods and as one interviewee pointed out, sometimes even internal audiences need to be convinced about the usefulness of its application (LE5).
- Behavioural approaches also need time and are not always compatible with the drive for results in law enforcement.
- Behavioural approaches can have unintended consequences and careful risk assessment and risk management are required.⁶⁰²

Are behavioural approaches transferable to other MS?

While there is, as yet, limited evidence of the effectiveness of behavioural approaches,⁶⁰³ these could be considered by other MS. Behavioural approaches aim to find cost-effective solutions, which do not require extensive time and resource commitment. In the example above, it would not have been possible with the resources of the NCA or Border agency to check every vehicle entering the UK, but the behavioural approach shifted the onus for prevention and disruption to those who benefited from the activity (consigners and the owners of the goods).

⁶⁰² See Van Duyne (2000) on the involvement of behavioural sciences in organised crime investigations a decade and a half ago.

⁶⁰³ Van Duyne (2000).

10.3.5. NCA collaboration with the National Offender Management Service to achieve 'lifetime offender management'

The Serious Organised Crime Agency had a particularly close relationship with the UK National Offender Management Service regarding the management of imprisoned offenders, for example through the use of licence conditions.⁶⁰⁴ The role of NOMS is summarised in Box 10.12.

This collaboration was needed in order to facilitate the approach of 'lifetime offender management'. The Serious Organised Crime Agency's lifetime management programme provided a structure through which all serious offenders of interest to the agency were individually monitored (including the monitoring of those who were subject to ancillary orders). Offender management also included other measures to disrupt their criminal activities in prison and prevent criminal activity upon release (for example, limiting the use of illegal mobile telephones in prison). Lifetime offender management also ensured that details of all offenders released from prison were 'systematically shared with the relevant Trust and police force'.⁶⁰⁵ As one interviewee explained, lifetime management was about 'keeping people on the radar and disrupting them' (LE6). The lifetime management regime against all its 'Persons of Interest' – high-priority and significant serious and organised criminals, included 7,500 individuals in 2012/13.⁶⁰⁶ This number creates the need to prioritise and risk-assess.

Box 10.12: Summary of the role of the National Offender Management Service

'The National Offender Management Service (NOMS) monitors the behaviour of offenders released from prison on parole license through the use of standard and bespoke license conditions'.⁶⁰⁷

A range of investigative and intelligence techniques are used to monitor individuals compliance with restrictions. The monitoring team works closely with other agencies to exchange information on these individuals in order to identify and reduce their opportunities for returning to criminal careers.

10.3.6. NCA cooperation with local and regional law enforcement

NCA powers to direct local police forces

An important change introduced with the creation of the NCA is that the Director-General of NCA has the legal power to direct a Chief Constable to work on a particular case. This power can be seen as a rare infringement on the autonomy of UK Chief Constables, given the tradition of police autonomy in operational matters. However, interviewees said that this power has never been used, not just because the NCA has not long been in existence but because the NCA prefers to operate by consent. Accordingly, senior staff spend much time relationship-building.

⁶⁰⁴ For more information on the working relationship between the Serious Organised Crime Agency and the National Offender Management Service see, for example, Serious Organised Crime Agency (2012).

⁶⁰⁵ Serious Organised Crime Agency (2013), 22.

⁶⁰⁶ Serious Organised Crime Agency (2013).

⁶⁰⁷ See National Crime Agency (2015a) for more information.

Collaboration with law enforcement in tasking and coordination

Another change introduced by the NCA relates to how threats are prioritised. The previous Serious Organised Crime Agency produced national threat assessments, but it was left to local police forces to decide whether to act on these and what to prioritise. Now NCA shares the prioritisation of threats with local police forces (LE10, 3 and 4). It is too early to say what difference this will make operationally, however, it may lead to greater procedural legitimacy – respondents suggested that NCA has stronger governance, in this respect, than its predecessor.

NCA tasking and coordination in operations against serious and organised crime involves the following elements:

- NCA is involved in the assessment of harm and geographical spread.
- NCA provides specialist support.
- NCA resolves issues of ownership and approach.⁶⁰⁸

For example, if an organised crime group is operating in the UK with some of its members living overseas, NCA would communicate and develop a plan of action with UK and international partners in order to investigate the group and its members, but if a local group is concerned the activities of which do not cause serious harm, then local forces will manage the investigation against the group.⁶⁰⁹ At the same time, if the group is involved in drugs, violence and intimidation, local forces would be able to rely on NCA to provide intelligence and specialist resources.

An example of national support for local policing operations against organised crime is provided in Boxes 10.13 and 10.14.

Box 10.13: Collaboration in a case against an organised crime group

The Serious Organised Crime Agency provided expert evidence in a case against an organised crime group in north-west England: 'This consisted of 'translating' the recordings obtained via covert techniques into a more understandable language. This included decoding the slang used to describe the products that the OCG was dealing in, for example "little fellas" (ecstasy tablets). The expert evidence also added context to the repeated use of the word "quid" and in doing so demonstrated that conversations regarding cash proceeds and value of their drug ventures regularly referred to tens and hundreds of thousands of pounds.'⁶¹⁰

⁶⁰⁸ National Crime Agency (2011).

⁶⁰⁹ National Crime Agency (2011), 15.

⁶¹⁰ National Crime Agency (2011), 27.

Box 10.14: Child abuse image investigation⁶¹¹

Operation 'Notarise' focused on abuse images online. It was led by the NCA in 2014, involved 45 police forces across England, Wales, Scotland and Northern Ireland. Police officers across the country searched 833 properties and examined 9,172 computers, phones and hard drives. The full scale of the investigation has not yet been revealed but according to BBC the following arrests were made:

59 in Wales
13 in Scotland
14 in Northern Ireland
41 in West Midlands
33 in Hampshire
26 in Merseyside
24 in Sussex
22 in Devon and Cornwall
19 in Staffordshire
16 in Lancashire
7 in Surrey

In addition, NCA plans for police forces to be supported by new local organised crime partnership boards, including local authorities and local agencies to exchange information and ensure that powers are used efficiently. Local partnerships will have an important role in the Prevent, Protect and Prepare functions of NCA.⁶¹²

10.3.7. NCA cooperation with the private sector

Building on cooperation with the private sector by the Serious Organised Crime Agency

Some types of serious and organised crime, especially fraud and cyber-attacks against the private sector, require public and private sector collaboration.

Prior to the creation of the NCA, the Serious Organised Crime Agency's industry engagement was wide (across all sectors) and prevention was a large component of the agency's work. The NCA has continued such engagement and has developed and maintained partnerships with private sector organisations: both parties to these partnerships were said to be contributing and to have a shared understanding of the importance of this work (LE1).

Organisations with which NCA may collaborate

Collaboration involves regulatory bodies (such as the Solicitors Regulation Authority) and financial institutions and representative bodies (for example, the British Bankers' Association, CIFAS – the UK fraud prevention service - ⁶¹³ and UK payments.)⁶¹⁴ Some of these organisations have secure members-only websites on which the NCA posts information and alerts. According to respondents, the NCA aims to build a genuine partnership with private sector organisation and not just to 'police' these sectors.

⁶¹¹ BBC News (2014).

⁶¹² Serious and Organised Crime Strategy (2013).

⁶¹³ UK databases of confirmed fraud data. See Cifas (2015).

⁶¹⁴ See UK Payments Administration (2015).

The NCA (and individual police forces) also collaborates with the Security Industry Association, a UK regulatory body established under the Private Security Industry Act 2001 which licenses security staff, including club door supervisors, security guards, CCTV operatives, and close protection operatives. In an example of collaboration provided by the Security Industry Association,⁶¹⁵ the police worked with the Association during an organised crime investigation into individuals linked to a security business. The Security Industry Association was able to conduct investigations which resulted in the business having its Security Industry Association approval removed. The Security Industry Association then informed organisations purchasing services from this business that it was no longer approved, resulting in the business losing several contracts.

Relationship management

Under the Serious Organised Crime Agency, relationships with industry were managed at deputy director level, as well as board/chair level, by sector relationship managers. Under NCA the relationship manager function is no longer centrally coordinated and the Commands manage the relationships (e.g. the Cyber Unit will manage Internet Service Providers; the Economic crime command will manage Banking). One possible disadvantage of this is that some sectors do not fall neatly within a Command (for example, the retail sector) (LE1).

Collecting and sending information to the private sector

The Serious Organised Crime and Police Act 2005 (SOCPA) enabled law enforcement also to *collect* information from private sector organisations, rather than just send information. This power was especially useful in relation to the banking sector, which has traditionally been reluctant to cooperate with the law enforcement (at least outside payment card fraud). The Act gave a legal basis to build relationships with the industry and to exchange information (LE9 and 1).

The use and benefits of alerts

The NCA provides knowledge and products to the private sector, sending non-sensitive 'alerts' to private sector organisations. Alerts are an intelligence product produced for private sector partners in the banking, insurance, retail sectors or for specific companies or organisations. Interviewees explained that there are several types of alerts:

- Thematic (they describe a particular problem or method of fraud).
- Bulk data (provide information on, for example, credit card numbers that have been compromised).
- One-to-one intelligence sharing (e.g. shared information with a care home that an employee had previously been convicted abroad for fraud against a vulnerable person).

An example of when an alert would be used is when NCA recovers compromised credit card data. These data are compiled and sent to financial institutions with the hope that

⁶¹⁵ Security Industry Authority (2014).

industry could use this information to improve fraud mitigation and potentially prevent economic loss. In 2012–2013 205 alerts were issued to other organisations.⁶¹⁶ Examples of alerts are set out in Boxes 10.15 and 10.17.

Box 10.15: Child sexual exploitation alert

The NCA was approached by a local police force because they wanted to send information about risks of child exploitation to hotels and Bed & Breakfasts in a particular area. The NCA helped the force to produce a package of information – and agreed to have the NCA brand on it. Having the NCA name added credibility and gave more weight to the alert than forces doing it on their own. (LE1)

Box 10.16: Boiler room fraud alert

The Serious Organised Crime Agency 'issued warning the higher education sector of the recruitment of students and young people by boiler room fraudsters. 'Boiler room fraud' is a term used where victims are cold-called by brokers and deceived into investing in valueless, over-priced or non-existent commodities. The Serious Organised Crime Agency identified that recruitment was being aimed at students and young people. The Alert helped the higher education sector recognise boiler room job adverts so that students could avoid applying for such roles either during or after their studies'.⁶¹⁷

Although some students and ex-students in search of employment will knowingly work for boiler room firms, the aim here was to reduce the pool of employees and perhaps increase intelligence flows if someone approached tips off the authorities, allowing intervention points before the frauds or laundering develops further.

The Serious Organised Crime Agency also warned financial institutions about foreign criminals known to be seeking to fraudulently secure loans.⁶¹⁸

The aim of the alerts is to allow organisations and individuals to protect themselves from threats and to prevent further incidents and attacks. Alerts can also help NCA to pursue individuals (for example, alerts could ask banks or insurance companies whether an individual has an account with them). Anyone at the NCA can propose an Alert. One factor that determines whether an alert is issued is whether it would allow recipients to take remedial action – alerts need to be specific and outline steps that can be taken. We were told by an interviewee (LE1) that about 80 per cent of Alerts that NCA issues are related to various forms of cyber-enabled crime, which illustrates the increasing importance of this type of work.

Some of the benefits of alerts were said by an interviewee to be as follows:

- Alerts are 'simple and effective' as they include information on what actions may be necessary by the institution receiving the alert (LE1).
- Alerts can be individualised for a particular company (for example, NCA had information regarding IP addresses which had been compromised, and sent out a large number of tailored alerts to ISPs (each containing IP addresses of their customers).

⁶¹⁶ Serious Organised Crime Agency (2013), 25.

⁶¹⁷ Serious Organised Crime Agency (2013), 25.

⁶¹⁸ Serious Organised Crime Agency (2013).

- Alerts allow NCA to engage with private sector on an equal basis – the NCA gives out information as well as asks for information to be provided (LE1).

Challenges in cooperation with the private sector

Collaboration with the private sector is challenging. While the NCA has managed to build good relationships with UK organisations, the challenges of building trust, building working relationships and reaching out to smaller sectors and companies remain.

A major challenge in relation to information exchange with private sector bodies is assuring the security of the information. The more sensitive the information is, the more challenging it becomes how to transfer it securely to a broad range of recipients. Previously, information was delivered by couriers. Data protection issues in a broader sense are important too, in particular when the reputation of financial institutions or companies is concerned.

10.4. International cooperation

10.4.1. International cooperation by the NCA

Prior to the creation of the NCA, the Serious Organised Crime Agency's International Department was responsible for international cooperation, including links with Europol, and provided 'the UK centre for UK law enforcement co-operation worldwide'.⁶¹⁹ With the creation of the NCA, the Border Policing Command became responsible for international cooperation on investigations against serious and organised crime.

Border Policing Command

Border Policing Command has a Border Section and an International Section.

- It leads on improving border security.
- It is responsible for international network and border investigators.
- It has a coordination role in relation to cross border.
- It has responsibility for maritime activity.
- It works against the criminal exploitation of the maritime borders of the UK. This includes checking and monitoring routes, vessels, commodities and providing intelligence to national fusion centres that involve partner organisations (public and private), such as, military agencies, fisheries, Coastal Guard, the International Maritime Organisation, etc.

NCA officers posted overseas

Similar to the Serious Organised Crime Agency, the NCA has about 140 officers permanently posted overseas to work on transnational organised crime. These are liaison officers are working with various agencies in partner countries and which support the UK mission in these countries. They also have diplomacy and capacity building roles and tasks.

⁶¹⁹ Berenskoetter (2012), 42.

The locations where officers are stationed are based on a number of criteria. For example, officers would be posted in Colombia and Afghanistan, which are source countries for drugs, or Greece and Turkey that are transit countries for drugs, human trafficking and firearms. In some countries it is useful to have officers because of links and proximity with countries, without which it is not possible to collaborate. Officers stationed abroad collaborate with a wide network of people and the aim of the international work is to extend the reach of the UK crime prevention and enforcement efforts and to tackle threats at source (LE10). Tackling serious and organised crime at source is an approach that the NCA inherited from the Serious Organised Crime Agency. Berenskoetter (2012, 9) pointed out that the Serious Organised Crime Agency also shifted away 'from the idea of a single liaison officer as a contact point towards the practice of creating outposts of the institution itself and extending the reach of operations, including financing the build-up of 'partner' police units in third countries'. The NCA is not the only body with liaison officers. HM Revenue and Customs has an experienced officer working with the US authorities to liaise over tobacco and counterfeit smuggling, offering and receiving assistance and working with law enforcement and with the private sector anti-counterfeiting bodies there (HMRC1). This reflects the awareness that without developing and sustaining long-term intelligence relationships.

Some NCA liaison officers have particular specialisations. Good examples include cyber officers based in the USA. There are also financial liaison officers in a number of countries and recently a specialist child exploitation officer has been stationed by the NCA in Thailand (LE10).

NCA officers posted at Europol, Interpol and at EU level

The NCA works with partner agencies in other MS and also with Europol and Interpol. The UK has a large liaison section at Europol and, in addition, UK officers are involved in a number of projects at EU level, for example the Empact Programme.⁶²⁰ In many investigations against serious and organised crime, cross-border collaboration is necessary and is a daily practice, as the examples below (see Boxes 10.17 and 10.18) suggest. (Serious Organised Crime Agency cases might equally be carried out by the NCA, and the powers and some cases continue):

Box 10.17: The Maritime Analysis and Operations Centre

The Maritime Analysis and Operations Centre – Narcotics (MAOC-N), which is based in Lisbon, was set up in 2007 is a European Law Enforcement unit. It can rely on military maritime and aviation intelligence. The unit works on illicit drug trafficking by maritime and air conveyances. MAOC-N is a collaborative initiative. The headquarters of the unit is staffed by Country Liaison Officers (CLOs) coming from the police, customs, military and maritime authorities of the participating Member States. The European Commission, Europol, the United Nations Office on Drugs and Crime (UNODC) and the European Centre for Drugs and Drug Addiction (EMCDDA) are involved in the work of MAOC (N) as observers. 'From 2007 to mid-August 2012, MAOC

⁶²⁰ European Multidisciplinary Platform against Criminal Threats.

supported the coordination and seizure of over 70 tons of cocaine and over 50 tons of cannabis'.⁶²¹

Box 10.18: International collaboration on mortgage fraud

The Serious Organised Crime Agency carried out an investigation, in partnership with the Crown Prosecution Service, the Financial Services Authority, HM Revenue and Customs, the Department for Work and Pensions, Essex and Metropolitan police forces, the Gambling Commission and the Dutch and Spanish authorities that resulted in the sentencing of four individuals on theft, fraud and money laundering charges. The original investigation targeted drug trafficking 'but insufficient evidence necessitated a change of focus to the trafficker's finances. Serious Organised Crime Agency intelligence showed that the principal subject had fraudulently obtained several mortgages...'⁶²²

10.4.2. Cross-border use of investigative tools

Several investigative tools were discussed with interviewees, who were asked to reflect on their use: interception of communications, controlled delivery, Joint Investigation Teams and surveillance.

Interception of communications

In general, intercept evidence remains inadmissible in the UK courts, though the courts have admitted material obtained by telephone-tapping abroad, including that on British citizens engaged in drugs trafficking in the EU. The rationale for the ban on intercept as evidence concerns the potential for revealing in court UK intelligence gathering methods and capabilities, as well as the costs of transcription, in the context of the disclosure procedures in England and Wales. Nonetheless, intercept evidence is admitted regularly and to good effect in trials in other common law jurisdictions like Australia, Canada, New Zealand, South Africa and the United States, and the Republic of Ireland.⁶²³

According to UK investigative officers, foreign law enforcement officials do not understand why domestic intercepts cannot be used as evidence in court (LE3, 4, 10), perhaps understandably because the UK is the only EU country where it is not allowed.

In such situations where there are different legal regimes in different MS, harmonising legislation across MS is one solution, but according to respondents from the NCA, knowledge and understanding of what each country can do in many cases can solve the problems that arise without the need for slow legislative reform (LE3, 4).

Opinions on whether intercepts should be admitted as evidence in court in the UK were diverging. Most officers were of the opinion that the UK system is good as it is and that intercepts are quite useful as an intelligence tool to guide evidential efforts and disruption. However, when intelligence from UK intercepts becomes available, sufficient other evidence has to be collected in order to build a case, which can take time.

⁶²¹ See Maritime Analysis and Operations Centre (2015).

⁶²² Serious Organised Crime Agency (2013), 21.

⁶²³ See Justice (2006); also Levi & Smith (2002) for an earlier analysis of how this issue might affect the introduction of racketeering legislation in the UK compared with the USA.

Foreign intercepts can be (and are) used in court the UK if not requested by UK investigators. However, officers pointed out that UK courts were sensitive about foreign intercepts used in relation to UK persons (LE3 and LE4).

The limitations of reciprocity between UK and other MS law enforcement regarding the use of intercepts is an issue in itself. Officers felt that ability to reciprocate is essential to collaboration and good working relationships with colleagues from other MS (LE3).

Controlled delivery

The NCA uses controlled delivery most often in drug trafficking investigations. One challenge to using this tool is the limited evidence officers usually have about the larger organisation when controlled deliveries are used. Limited knowledge can result in law enforcement only reaching the courier and not the organisers (LE4). When controlled deliveries are used in the UK, the product has to be removed and replaced because of the risk that the goods (often drugs) will successfully be delivered and may harm the public. Officers suggested that while having to remove the product creates challenges, it allows for controlled deliveries to run longer and for better evidence to be gathered (LE3, 4).

Joint Investigation Teams

Another tool respondents discussed is Joint Investigation Teams. One critique NCA officers had in relation to using JITs was that they were bureaucratic and 'slow down dynamic decision making within an investigation' and hampered 'live investigations' (LE4). This view was shared by respondents in a number of MS (AT, BE, CZ, DK, FI, DE, LT, LU, NL, PT), as indicated in the main report.

However, one UK officer commented that leaving the slow response aside in Joint Investigation Team cases, the levels of bureaucracy in the different MS were surmountable (LE9). According to one interviewee, there has to be an agreed set of minimum standards across the EU regarding the use of investigative tools (LE9).

Some officers preferred to use parallel investigations instead of Joint Investigation Teams (LE10). Respondents also discussed difficulties when parallel investigations were carried out. If an investigation in the UK is ongoing, evidence from it cannot be used elsewhere until it is over. Since the process in the UK can be slower, according to interviewees (LE3, 4), this can create challenges regarding cross-border collaboration.

Surveillance

On the other hand, respondents thought that the wide use of surveillance in the UK was an advantage and allowed the collection of good evidence, which resulted in UK officers leading on a number of cross-border investigations.

10.4.3. Other issues in cross-border cooperation

Differences in who leads investigations

The continental and UK/Irish systems are also different in terms of who leads investigations. In the UK, the Senior Investigation Officer makes decisions regarding

the investigation, while elsewhere, the investigative judge or prosecutor is the leading body. This can lead to communication problems, for example, prosecutors from MS that have civil law systems expect to talk to prosecutors or may not know with whom to communicate regarding a case. (Though the European Judicial Network ought to be well enough known among repeat players.)

Volume of requests

Unequal volume of requests between MS was discussed as a challenge to collaboration. For example, the UK is not usually a transit country for drugs and many controlled deliveries are coming through the Netherlands, so the volume of requests can be one way (LE9).

As already mentioned, the ability to reciprocate was considered important in collaboration with other MS.

Reliance on interpersonal relationships

In some cases officers would cooperate because of their personal relationships rather than because of institutional arrangements. Because of the importance of personal relationships and contacts, respondents considered CEPOL training particularly useful for cross-border working because it creates possibilities for open discussions and direct contacts between practitioners from different MS. The possibility for senior police officers to join different investigative teams was also considered useful, as well as informal meetings and communication: 'You learn from people sitting on the table. Police-to-police talk is the best approach' (LE3 and 4). European Commission investments in joint training and specialist conferences have an important benefit in generating better interpersonal contacts that can later be utilised (although high staff turnover in organised crime units diminishes the utility of this somewhat).

Information exchange

Exchange of information remains a major challenge. An interviewee pointed out that some countries were very cautious in the aftermath of the Edward Snowden allegations (LE9). In addition, MS have different opinions on the effectiveness of intelligence sharing through Europol – some countries are more sensitive to intelligence sharing and less willing to exchange in general.⁶²⁴ Different attitudes, resources and priorities of countries can be a problem too.

Political support for the fight against organised crime

Finally, an interviewee pointed out that in some countries, senior law enforcement officers working in the fight against organised crime are political appointees and in some cases the political will to tackle organised crime is not there, especially regarding cases that involve high-level corruption (LE9). Officers from other MS also discussed this problem, especially officers from countries where this has been a problem (e.g. CZ).

⁶²⁴ Berenskoetter (2012), 8, discusses the reluctance of UK police officers to share information outside the UK.

10.5. Conclusions

This case study has looked at the UK approach to fighting serious and organised crime in order to highlight approaches and practices which could potentially be transferrable to other MS. As with the study more broadly, the case study has relied on evidence from interviews with practitioners working in the NCA and other agencies, and their views and experiences of the UK approach. There is little objective data and evidence on which to evaluate the effectiveness of the UK approach.⁶²⁵ Also, the NCA is a recently created agency, and it would be premature to draw conclusions regarding its effectiveness.

This concluding section summarises the case study and highlights some potentially promising practices.

10.5.1. Legal tools against organised crime in England and Wales

In England and Wales there is a common law offence of conspiracy as well as a statutory offence of conspiracy. Currently, there is no offence in England and Wales of participation in a criminal organisation. However, there are proposals to make participation an offence under the new Serious Crime Bill, which is planned to enter into force in 2016. Legislation in the UK also does not provide any definition of a criminal organisation.

According to the UK Home Office, the existing offence of conspiracy is central to law enforcement investigations into organised crime in the UK. There is still a debate whether the conspiracy offence in England and Wales is clearer and easier to implement than an offence focused on organised crime groups that would involve a (potentially) difficult-to-prove notion of belonging to such a group. At the same time, under the current offence of conspiracy it may be difficult to pursue people in the wider criminal group. The introduction of the participation offence is expected to increase risk for a higher proportion of those involved in organised crime.

10.5.1. Legal tools against organised crime in Scotland

Unlike in the rest of the UK, in Scotland Section 28 of the Criminal Justice and Licensing Act 2010 makes it an offence to agree with at least one other person to become involved in serious organised crime. This is punishable on indictment by up to ten years in prison. Section 30 of the 2010 Act criminalises also directing or inciting a person to commit a serious offence or an offence connected to serious organised crime, or directing one person to direct another to so act, regardless of whether the person acts in this manner.

According to experts, at present it is difficult to gauge the usefulness of the participation offences in Scotland, but their symbolism may be significant. The common law crime of conspiracy also exists in Scotland.⁶²⁶

⁶²⁵ Levi & Maguire (2004). For an extended discussion in relation to money laundering, see Halliday et al. (2014).

⁶²⁶ Common law and statutory offences of conspiracy are also used to prosecute against organised crime in Northern Ireland.

10.5.2. The National Crime Agency

The agency that coordinates the fight against organised crime in the UK is the NCA. This was introduced in 2013 and replaced the previous national agency, the Serious Organised Crime Agency. The creation of the NCA was intended to harmonise and strengthen cooperation in against serious and organised crime.

The NCA works with police forces and other agencies to respond to threats from organised crime. In Scotland and Northern Ireland the NCA works with Police Scotland and the Police Service of Northern Ireland.

The NCA single system for tasking and coordination

A key feature of the NCA, which was not shared by its predecessor organisation, is its single tasking and coordination system for law enforcement in the UK.⁶²⁷ This system allows the NCA to share priorities and tasks with the police forces and other agencies. The tasking system was seen by interviewees from the NCA as an essential element in an improved collaboration and better prioritisation of threats.

Collaboration with local police forces

The Director-General of the NCA has the power to direct a Chief Constable to act to address organised crime threats. However, interviewees from the NCA explained that the agency prefers to work with police forces by consent, and that senior staff at the NCA spend much time relationship-building. This is a potential good practice that may be built on even in other MS.

Innovative approaches – potentially promising and transferrable practices for other Member States

The NCA continued approaches first applied by the Serious Organised Crime Agency in the areas of prevention and disruption of serious and organised crime:

- The NCA uses a 'lifetime offender management' approach. Lifetime offender management is a potentially promising practice that might be adopted by other Member States. Interviewees from the NCA felt that this approach was effective and worked well.
- The NCA can issue Serious Crime Prevention Orders (SCPOs) to support lifetime offender management. These place restrictions on individuals after their release from custody, and again, are a potentially promising practice that might be adopted elsewhere in the EU.⁶²⁸ Enforcement of SCPOs can be a challenge, however, since good collaboration between law enforcement and other agencies is required in order to successfully monitor the orders.

⁶²⁷ One interviewee from the NCA commented that, similarly to organised crime, the NCA has no boundaries.

⁶²⁸ The Parliamentary Joint Committee on the Australian Crime Commission (ACC) Report recommended that the ACC monitor the Serious Crime Prevention Orders, of the United Kingdom's Serious and Organised Crime Agency (now NCA), and report to both the Minister for Home Affairs and the Parliamentary Joint Committee on the Australian Crime Commission on the operation of the orders and on any benefits to Australian law enforcement agencies and continue to monitor the effectiveness of the United Kingdom's Financial Reporting Orders and consider whether similar reporting orders may be of benefit in the Australian law enforcement context. See Australian Government (n.d.).

They are also resource intensive.

- The NCA employs innovative behavioural approaches to crime disruption and prevention, which could again be considered promising practice and potentially useful to other Member States.
- The NCA approach to cybercrime involves cooperation with the private sector, NGOs, academic and individual experts. The NCA operates a 'NCA Special Constables' programme for experts with technical skills who volunteer to support the NCA part-time. This is a programme that Member States with less advanced cyber security infrastructure scene can learn from.

NCA is a newly created organisation

It is too early to say whether the NCA approach can be recommended as a model to be adopted elsewhere in the EU. One of the main challenges the new agency faces is funding)⁶²⁹ (although this is by no means unique to the NCA – all law enforcement agencies in the UK are experiencing reducing budgets). The NCA is still in the process of transition, which, according to NCA officers, has been stressful and unsettling and also has taken some time. There are also high expectations of the NCA and as interviewees suggested this could carry risks, for example, of making the organisation reactive. The creation of the NCA also brought pressures on local police forces in the UK, as lines of communication changed. Despite the challenges, interviewees from the NCA thought that the organisation was strong and had a good model of operation.

⁶²⁹ Edwards (2013).

PART 6: CONCLUSIONS

11. Conclusions

11.1. Overview of the aim, approach and limitations of the study

11.1.1. The objective of this study

This report has set out the findings from a study conducted for the European Commission DG Home which had three main elements:

1. Looking at the law relating to the fight against organised crime in all MS in order to: (a) assess whether MS comply with the Framework Decision 2008/841/JHA; (b) identify other national legislation (other than that which implemented the framework provisions) which is used in the fight against organised crime; and (c) gain insight into how the law is used in practice within MS, how effective it (or rather the range of relevant legislation) is perceived to be, and factors which inhibit or enhance the law's effectiveness.
2. Looking at the legal and investigative tools which are available to law enforcement and the courts in all MS in order to: (a) map the availability of different tools and describe the conditions under which they may legally be used; and (b) gain insight into how these legal and investigatory tools are used in practice, their perceived effectiveness and the factors which facilitate or act as barriers to their use.
3. Looking at national specialised judicial and law enforcement agencies involved in the fight against organised crime in MS in order to: (a) map the existence of key specialist agencies; and (b) gain insight into the perceived effectiveness of these agencies, and the factors that can enhance that effectiveness.

Cutting across these three main elements of the study was the objective of identifying potential good practice – in relation to law, investigatory tools and specialist agencies – which could be potentially helpful and transferrable to other MS who are looking to improve national practices.

11.1.2. The approach taken by this study

To collect the detailed information required to undertake the three elements of the study, national experts were identified in each MS. Each expert was asked to complete a questionnaire, based on their own knowledge and information from interviews with national stakeholders from the police, prosecution agencies, judiciary, academics and civil society organisations. The questionnaire was wide ranging, including questions on all of the three elements of the study, as well as eliciting experts' perceptions of effectiveness, barriers and facilitators.

The information in this questionnaire was supplemented by:

- Desk-based research undertaken by the research team (including extensive analysis of national legislation).
- Interviews with officials from organisations such as Europol, Eurojust and selected national experts conducted by the research team.
- Two case studies which focused on aspects of the fight against organised crime in the UK and Italy. These were based on desk research and interviews with practitioners (a focus group in Italy) working in specialist law enforcement and prosecution agencies in these countries.

Using this approach this study has collected a large amount of data on the fight against organised crime across the 28 MS.

11.1.3. Limitations of this study

An approach based on the use of national experts was selected as the only practical way to collect data from all 28 MS within the time and resources available. It does, however, have some drawbacks. The following limitations should be kept in mind when reviewing the findings and conclusions from this study:

- **Information from national experts:** national experts were predominantly academic lawyers, knowledgeable in their field and also on the control of organised crime. The scale and scope of the study was such that it was necessary to draw directly on these country experts' inputs regarding national legislation (for the mapping and assessment of transposition), and about the use of special investigatory tools and national specialist agencies in their countries. It should be noted that their descriptions of legislation and tools are more detailed in some areas than others, and there are aspects of MS law and practice which would merit further elaboration and elucidation outside the framework of the project.
- **Comprehensiveness:** national experts were asked to provide information about legal tools, investigative techniques and specialist national agencies. Given the scale of the task and time limitations, experts were not required or expected to be comprehensive. They were asked, for example, to describe the *main* specialist national agencies (rather than all agencies involved in combating organised crime). In the time available, some experts were unable to access all the information requested in the questionnaire. Experts aimed to conduct interviews with at least eight national stakeholders, but this was not always possible because, for example, the protocols involved in requesting lengthy interviews with officials introduced delays. Therefore, as anticipated in the planned methodology for this study, the report provides an overview, to the extent feasible, of investigative tools and national agencies, highlighting the main issues, agencies, etc.
- **Perceptions of effectiveness:** the study aimed to collect objective data regarding the effectiveness of national law, investigative techniques and national specialist agencies used in the fight against organised crime. However, official data were lacking for the majority of MS. For this reason, the research team primarily relied on national experts' perceptions of effectiveness (and the perceptions of the stakeholders they interviewed). For this reason the term 'promising practices' is used to describe elements perceived to be

working well within a country, and which other MS might be interested in learning about.

- **Availability of national statistics:** recognising the importance of policy informed by the best-available comparative data and statistics (and in the hope of validating the views reported by MS experts), the research team attempted to collect statistics compiled at the national level regarding the use of legal and investigatory tools, in order to assess the effects of policies via objective indicators. As expected, data were limited overall. The study had to rely primarily on the subjective data reported by experts.

11.2. Key findings regarding compliance with the Framework Decision

This section presents the key findings drawn from the mapping and transposition assessment of Framework Decision 2008/841/JHA, article by article.

Article 1 – definitions

Article 1 of the Framework Decision provides definitions of a 'criminal organisation' and a 'structured organisation'.

Article 2 – offences relating to participation in a criminal organisation

Article 2 of the Framework Decision states that MS should make one or both of the following forms of conduct an offence under national law: participation in a criminal organisation and/or conspiracy to commit offences. Article 2 requires that MS introduce a self-standing offence (the full reasoning behind the need for a self-standing offence can be found in Section 4.2.2).

Transposition of Article 2 was found to be satisfactory overall. All MS, with the exception of DK and SE (see Box 11.1 below) have transposed the key elements of the Framework Decision and introduced a self-standing offence relating to at least one of the two types of conduct from Article 2.

Box 11.1: Denmark and Sweden

Denmark and Sweden do not have a self-standing offence in relation to Article 2 of the Framework Decision. All other provisions (apart from potentially Article 3.2) of the Framework Decision are based on Article 2, which means it is not possible for Denmark and Sweden to transpose any of the other Articles. For this reason Denmark and Sweden were not included in the presentation of findings from the assessment of compliance.

These countries do, however, have other alternative legal instruments to tackle criminal organisations, even though they do not match the Framework Decision standards. These were discussed in Chapter 5. Denmark and Sweden also have national specialist agencies involved in the fight against organised crime, as discussed in Chapter 8.

Denmark and Sweden are discussed in section 11.3, below.

Of those MS who are compliant, the majority solely have the offence of participation in a criminal organisation. A minority (two) solely have the offence of conspiracy, and four have both offences.

Some minor discrepancies remain in MS' compliance with the Framework Decision:

- France, Hungary and Slovakia define a criminal organisation according to its commission of predicate offences punishable by 5 years imprisonment or more, despite the fact that Article 1 explicitly states that the threshold should be 4 years.
- Estonia and Lithuania alter the definition of criminal organisation by targeting organisations of 'permanent' duration, whereas the Framework Decision specifies that the organisation need only be established for a 'period of time'. Permanence implies a higher burden of proof and (most importantly) excludes the application of this provision to non-permanent organised criminal networks.

However, while remaining within the limits set by the Framework Decision, MS have adopted disparate definitions of criminal organisations, from the very broad, as in the case of Germany and the Netherlands, to the very precise and narrow, as with Lithuania.⁶³⁰ Although nearly all definitions comply with the Framework Decision, such disparity can lead to practical difficulties when it comes to application. There is no evidence that this has proven especially problematic in cross-border cases, but it is not clear whether this lack of obvious difficulty is because, in anticipating difficulties, some potential cases have been dropped.

Approximation between MS legislation is also hindered by the possibility granted to choose between criminalising participation in a criminal organisation or conspiracy (or both). The key outlier is the UK, which only has the conspiracy offence, but its proposed Serious Crime Bill 2014 may eliminate this disparity.

Article 3(1) – penalties

Article 3(1) of the Framework Decision requires MS to have the following penalties available for offences relating to participation in a criminal organisation: a maximum term of imprisonment of at least 2 years for the predicate offences in relation to Article 2(1) (participation in a criminal organisation); the same penalty as for the full offence in relation to Article 2(2) (conspiracy).

As discussed in Section 4.5, the wording of Article 3(1) is unclear. It states: 'punishable by a maximum term of imprisonment of at least between two and five years'. But this actually means a maximum of at least 2 years.

All the 26 assessed MS are compliant with the Framework Decision in relation to the minimum threshold required by the Framework Decision (the minimum level of the upper threshold of 2 years of imprisonment).

However, there were considerable differences between MS in the penalties for offences relating to participation in a criminal organisation: for example, in Finland the maximum penalty is up to 2 years, while in Lithuania (with its restricted definition) it is up to 15

⁶³⁰ Lithuanian criminal law states that 'a criminal association shall be one in which three or more persons linked by permanent mutual relations and division of roles or tasks join together for the commission of a joint criminal act – one or several serious and grave crimes. An anti-state group or organisation and a terrorist group shall be considered equivalent to a criminal association.'

years. These differences could partly be due to the fact that some MS distinguish many forms of participation (e.g. founding, playing a leading role, participation, recruitment, participation in the legal activities of a criminal organisation), while others do not. For example, Bulgaria, Greece and Lithuania differentiate among forms of participation and envisage high imprisonment penalties; while Austria and Finland do not have such differentiation and envisage low penalties for all conduct.

Another difference between MS relates to those countries said to be partially compliant (BE, CY, CZ, DE, LV, LU), because although the imprisonment threshold is in line with the Framework Decision, a fine or another penalty can alternatively be imposed.

Article 3(2) – aggravating circumstances

Article 3(2) of the Framework Decision requires MS to allow the fact that an offence was committed as part of a criminal organisation to be an aggravating factor in sentencing.

The assessment of compliance shows that 11 MS made some specific reference in their national legislation to aggravated penalties for predicate offences when committed in the framework of a criminal organisation. Of those who made some reference:

- Some MS provide for a general aggravating circumstance for all offences (not only the minimum required by the Framework Decision, namely at least offences for which the minimum level of the upper threshold is 4 years imprisonment).
- Others refer to a list of offences for which the aggravated circumstance should apply. Offences on these lists do not always match the requested scope of predicate offences (those with a minimum of 4 years of imprisonment).
- Other MS state that Article 3(2) is covered by the exercise of judicial discretion in sentencing and/or the non-exhaustive list of aggravating circumstances included in their criminal codes.

Our research suggests that the wording of Article 2 and Article 3(2) is not entirely clear in terms of the obligations these articles impose. This may have caused misunderstandings regarding the exact obligation stemming from the Framework Decision, as the articles have been at times seen as potentially competing with one another or even imposing a double punishment (e.g. an offender convicted for a robbery committed in the framework of a criminal organisation could be charged and convicted both for participation in a criminal organisation and aggravated robbery). This can be avoided by not prosecuting the same person for both offences, or by judges using discretion where allowed to do so. In practice, many MS have in fact introduced aggravating circumstances for offences displaying certain organisational features and/or committed by criminal groups, but not within the framework of a criminal organisation under the meaning of Article 1 of the Framework Decision.⁶³¹

National legislation on predicate offences often makes reference to a 'group' or 'persons acting in association' and not necessarily to the definition of the criminal organisation as provided in a certain MS. It means that those cases of aggravation relate also to situations beyond the specific concept of a criminal organisation covering all other possible associations (for further details see the table 4.12).

⁶³¹ These alternative methods of criminalisation are examined in Chapter 5.

Article 3(2) is not very precise in determining the type of aggravation and renders the obligation relatively vague, by stating that 'ensuring that offences referred to in Article 2, as determined by this MS, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance'. The problems are that:

- The wording covers the scope of predicate offences (at least those for which the minimum level of the upper threshold is 4 years imprisonment).
- The legal obligation relates only to a possibility to aggravate ('may be regarded') and not an obligation to do so.
- It does not exclude that such an eventuality can be covered by some horizontal provisions or simply by judicial discretion concerning the determination of the penalty on a case-by-case basis.

Most national judges could apply some kind of aggravation relating to the commission of the offence in the framework of a criminal organisation in a particular case. For those reasons it is difficult to be sure that any MS is non-compliant with Article 3(2) and to declare this formally.

Article 4 – special circumstances

Article 4 of the Framework Decision requires that MS allow for special circumstances for the reduction or exemption of penalties for offences relating to participation in a criminal organisation where, for example, a person cooperates with the authorities by providing information which supports prosecution or prevents organised crime. This Article is not binding (it states that MS 'may' provide for special circumstances).

All the 26 assessed MS were found to be compliant with the Framework Decision. It might be argued that this is not difficult given that Article 4 is not binding. However, all MS have adopted some form of special circumstances for the reduction of penalties for offences relating to participation in a criminal organisation or exempting the offender from those penalties. The extent of compliance with this optional element suggests that MS value the contributions of *pentiti* in relation to criminal investigations against organised crime groups.

Article 5 – liability of legal persons

Article 5 of the Framework Decision requires MS to provide for the liability of legal persons for the offences included in Article 2. Article 5 further specifies:

- That legal persons should be liable for the conduct of individuals taking a 'leading position' in the legal person. Such individuals are specified as those with: power of representation; authority to take decisions; and authority to exercise control.
- That legal persons should be held liable for conduct which was made possible by a lack of supervision of control exercised by individuals in a 'leading position'.

Lastly, Article 5 states that the liability of legal persons should be without prejudice to criminal proceedings against natural persons.

All assessed MS except Cyprus envisage criminal or non-criminal liability for legal persons involved in offences relating to participation in a criminal organisation. 10 MS recognise the liability of legal persons arising from all the three types of 'leading

positions' identified in the Framework Decision. 2 MS (Germany and the UK) only recognise liability of legal persons from two types of 'leading positions'. 13 MS extend the liability of legal persons beyond individuals in three 'leading positions' to other individuals (and therefore have provisions which are broader than the Framework Decision). 17 MS ensure that liability may be imposed also for lack of supervision or control by persons having a leading position (in two of these countries this liability stems from case law and jurisprudence, rather than legislation).

National legislation of 12 MS expressly mentions that no prejudice arises from proceedings against legal persons to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences relating to participation in a criminal organisation. A further 12 make no express mention of this in legislation – and for these countries compliance is assumed (provided there is no legislation stating the contrary). Two MS (Poland and Hungary) state that proceedings against legal persons can be launched only following the conviction of a natural person for the same offence.

Article 6 – penalties for legal persons

Article 6 of the Framework Decision requests MS to introduce penalties in relation to the liability of legal persons for offences relating to participation in a criminal organisation. The article states that MS must implement fines (criminal or non-criminal) and may introduce other penalties. 25 MS (i.e. all those assessed – Cyprus is excluded because it does not have liability of legal persons) envisage criminal or non-criminal penalties for legal persons.

In relation to the optional 'other penalties', including the non-exhaustive list enumerated in the provision, all but 5 MS also provide measures other than fines. Those principally include forfeiture/confiscation of the entity's assets and/or publication of the conviction.

Article 7 – jurisdiction

Article 7 provides rules regarding MS jurisdiction and judicial cooperation in the prosecution of transnational offences related to Article 2 of the Framework Decision. All 26 assessed MS envisage the required standards under Article 7 in terms of jurisdiction and cooperation in cross-border investigations.

While all assessed MS establish their own jurisdiction in whole or in part within their territory and over offences committed by their nationals, wherever the criminal organisation is based or pursues its criminal activities, only 4 MS (CZ, IR, IT, NL) extend their jurisdiction to offences committed for the benefit of a legal person established in the territory of that MS.

No MS has restricted the jurisdiction in Article 7(1)(b) and (c) to specific circumstances applying when the offences are committed outside their territory.

Article 8 – absence of the requirement for a report or accusation by victims

Article 8 requires MS to ensure that a report or accusation from a victim is not needed to conduct investigations into and prosecutions of offences relating to participation in a criminal organisation. All MS were found to be in compliance with this Article.

11.3. Key findings regarding further and alternative criminal law tools

Chapter 5 of this report described whether MS had further criminal law tools in addition to offences under the Framework Decision. It also looked at the existence of alternative criminal law tools in Denmark and Sweden, where there is no self-standing offence of participation or conspiracy. The information regarding the existence of further tools was provided by national experts (as described in more detail in Chapter 3).

Further tools

Some 11 MS (AT, BE, BG, DE, ES, FI, FR, HU, IT, LU, PT) had further tools available. In several cases these aimed to tackle the most serious or largest organised crime groups (by setting higher requirements for elements such as the number of persons involved), or set out law on specific topics, such as organised crime groups involved in drug trafficking. In 5 MS the further laws included offences which were broader (less specific) than required in the Framework Decision.

The situation in Denmark and Sweden

Denmark and Sweden have criminal legislation that does not include as a self-standing offence either participation in a criminal organisation or conspiracy to commit offences relating to participation in a criminal organisation. However, these MS do have alternative criminal law tools to fight organised crime. The existence of these offences to fight against organised crime indicates that the problem of organised crime is fully recognised by these MS, even though they have not transposed the Framework Decision.

Danish national experts consider a self-standing offence unnecessary as criminal conduct of concern to Denmark can be covered by the existing provisions. These are:

- *Complicity* (Article 23 of the Danish Criminal Code⁶³²).
- *Aggravating circumstances based on organised crime* (Article 81(2) c.c.), increasing punishment when a crime is carried out by several people acting in association. Here, no definition of criminal organisation is provided or regarded as necessary.
- Criminalisation of organisations that use violence to achieve their ends.

Swedish national experts consider it difficult to prove the existence and the specific roles of the members of an organisation. As a result, the 'participation in a criminal organisation' concept is considered too vague to be practicable. Instead, Sweden punishes participation in a criminal organisation with alternative criminal law tools through:

- *Aggravating circumstance based on organised crime* – Chapter 29, Section 2 of the Swedish criminal code envisages general aggravating circumstances if the offence has been committed 'as part of a criminal activity which is conducted in an organised way or if the offence has been committed in a systematic way or has been planned'. Moreover, some special pieces of legislation deal with specific aggravated offences when criminal activities are perpetrated

⁶³² 'The penalty provisions laid down for an offence shall apply to all persons who have aided, abetted, counselled or procured the commission of the offence. The penalty may be reduced in the case of a person who has only intended to lend assistance of minor importance or strengthen a determined intent and in case the crime has not been completed or an intended contribution has failed.'

systematically or on a large scale (e.g. Section 5, Tax Fraud Law), or when the offence has been committed 'as part of a criminal activity which is conducted systematically' (e.g. Section 5, Smuggling Code), or when it is conducted 'in a large scale or professional' manner (e.g. Section 3, Drug Penal Law). The legislation does not define criminal organisation.

- Criminalisation of offences that require involvement of several persons and/or organisation, such as smuggling of migrants (e.g. Chapter 20, Section 9, Foreign Law).

Danish and Swedish legislators do not currently acknowledge the need to provide a separate offence relating to the existence of an organisation and participation therein. It is considered enough to provide for aggravated sentences due to the fact that offences were committed in a group. Although national experts did not give examples of any particular problems experienced in other MS in cases involving Denmark or Sweden, the legislation in both countries prima facie contravenes the requirements of the Framework Decision.

11.4. The use in practice of offences relating to participation in a criminal organisation and perceived usefulness

Chapter 6 of this report described the practical use of criminal law offences relating to participation in a criminal organisation, based on interviews with national stakeholders conducted by MS experts, as well as the views of those national experts regarding clarity, ease of use and usefulness.

There was variation between MS in the reported frequency of use, ranging from 'not often at all' and 'very often'. There was similarly variation in the reported clarity and ease of use of offences, but overall (taking all national experts together) the provisions were reported to be clear and somewhat easy to implement.

National experts were asked to report the perceived usefulness of offences relating to participation in a criminal organisation. Overall they were considered to be useful, particularly in relation to organisations involved in drug trafficking, human trafficking and people smuggling (which probably account for the majority of investigations). They were reported to be less useful for cyber-enabled crimes, identity fraud/theft and intellectual property crimes. However, it is possible that this could partly be due to the fact that the latter crimes generally do not come to the attention of the authorities until a late stage, when it is too late to collect evidence of criminal association proactively.

Overall, in addition to the usual concerns about resource limitations, important inhibitors to the use of participation offences were reported to include:

- **Issues relating to the wording of national legislation.** For example, in some MS a limited range of predicate offences were specified, and in others definitions were not clear.
- **Issues relating to standards of proof.** It was difficult to prove elements of the offence such as 'participation' and 'criminal organisation'.
- **Issues related to staffing and resources.** Examples included too few specialist staff to deal with organised crime, and a lack of specialist databases and centralised information.
- **Issues stemming from low penalties** for participation in a criminal

organisation especially if compared to penalties for predicate offences.

- **Issues due to conflicts over the use of the self-standing offence** of participation in a criminal organisation and using participation in a criminal organisation as an aggravating circumstance.
- **Issues related to how the legislation tends to be used in MS**, due to the knowledge and experience of practitioners and cultural reasons. For example, a lack of motivation and resources to prosecute offences linked to a criminal organisation on top of predicate offences; limited appetite to use the offence other than in relation to stereotypical, traditional, criminal organisations (e.g. if organised crime is not like the mafia, then it is not organised crime).
- **Issues related to knowledge and awareness**, including limited understanding of the organised crime phenomenon among law enforcement, investigators and prosecutors, and low investigative capabilities, skills and tools to investigate networks in depth.

11.5. Overall conclusions regarding compliance with the Framework Decision and its impact

The findings summarised in Sections 11.2, 11.3 and 11.4 led the research team to make a number of observations and conclusions regarding the added value of the Framework Decision:

The Framework Decision differs considerably from its original proposal and the most important provisions are optional

The approximation of the criminal law with regard to offences in relation to a criminal organisation has not been fully achieved through the adoption of the Framework Decision. It differs greatly in substance from the Commission proposal put forward to the MS. During the process of approving the Framework Decision, MS made the main obligations optional (e.g. offences in relation to participation in a criminal organisation – Article 2), relatively vague (e.g. definitions – Article 1) or of modest impact (e.g. penalties – Article 3). For this reason, the content of the Framework Decision adds little value in relation to the international UNTOC standards and the previous EU Joint Action.

Motivations for creating organised crime legislation are primarily national, rather than stemming from a need to comply with the Framework Decision

While the research team has limited information regarding the motivations of legislators within MS, comments from national experts suggest that MS tend to develop legislation on organised crime issues (including proceeds of crime confiscation and recovery) for their own domestic reasons, taking account of the threat they believe organised criminality – however defined culturally and operationally – poses to them. This is perhaps less the case for recently admitted countries that have been subject to the *acquis communautaire* as a condition of entry to the EU.

Motivations stemming from comity and consideration of the interests of other MS usually come second, unless the mutual interaction is frequent or particularly important to the government in question. However, the EU and its courts reinforce a sense of mutual comity and encourage mutual legal assistance in the collective interest.

Most MS were compliant with the minimum standards before the Framework Decision was issued

Some 20 MS were fully or partially compliant with the terms of Article 2 before the Framework Decision was introduced, and only 8 changed their national legislation following the introduction of Framework Decision.

The Framework Decision should be seen in the context of a range of other measures in the fight against organised crime

This study has focused on compliance with the Framework Decision, but that is a relatively modest part of the measures taken by MS in the fight against organised crime. The provisions and aims of the Framework Decision must be seen against the pre-existing landscape of measures and processes used in the fight against organised crime within MS, including substantive and evidential law, asset recovery, and the wide variety of preventative processes implemented by businesses, citizens and public authorities, which can have a large impact on crime threats and public security. MS also have numerous *lex specialis* alternative offences, not related to the Framework Decision.

MS law often goes beyond the minimum standards set out in the Framework Decision

Most MS further extended the scope of application of the Framework Decision. For example, in relation to Article 3 (penalties) most MS impose penalties that are higher than the required minimum. Several provide for further aggravation of sentences, beyond that set out in Article 3(2). Others extend the scope of predicate offences (Article 1(1)) to all criminal offences. Article 4 regarding special circumstances is optional but all MS (excluding SE and DK) foresee in some circumstances the reduction of penalties or the exemption of offenders from penalties for crimes committed in the framework of a criminal organisation. The extension of the scope of the Framework Decision standards is permitted under the principle of minimum harmonisation.

Following from the principle of minimum harmonisation, transposition of the Framework Decision is in some instances too broad

Because MS are permitted to go further than the Framework Decision, some national experts were concerned about over-criminalisation and consequently threats to fundamental rights. MS law was sometimes seen to target activities that were not sufficiently serious or not of a cross-border nature. The result is that serious organised crime activities are less affected by specific tailor-made measures designed to address them.

While national legislation is often broadly worded, it was reported to be infrequently used in practice

There were both legal and non-legal reasons for this. Legal reasons included difficulties in meeting the standard of proof and proving all the elements of the offence. The non-legal, cultural reasons included practitioner preference for conspiracy over participation (perhaps due to greater familiarity with the use of the former by law enforcement personnel). Along similar lines, evidence from national experts indicated a preference for predicate offences and using participation in a criminal organisation as an aggravating factor. Factors said to facilitate the use of participation offences were related to

procedures such as exchange of information and coordinating agencies, rather than legislation.

Compliance through case law or jurisprudence may increase uncertainty

MS are required to ensure that the national transposition of a Framework Decision is clear and precise and reflects the spirit of the Framework Decision. The flexibility stemming from the Framework Decision as a legal instrument is meant to give MS the opportunity to shape national legislation according to their specific needs, within the overall philosophy and purpose of the Framework Decision.

Some MS comply through jurisprudence or case law and while this is permitted, this could create a problem because the status of these types of law may vary between MS.

It is not clear that future, additional legislation would address the limitations of the Framework Decision

This study has shown that that the legal implementation of a Framework Decision or other instrument is no guarantee that MS will use it to the extent intended. The shape of any possible future revised legal instrument would largely depend on the willingness of MS to enhance the current legislation.⁶³³

Below are some possible recommendations to the EU and to MS drawn from the above key findings and conclusions and developed by the research team:

1. Measures undertaken by MS should focus on the fight against the most serious types of organised crime; to this end a more specific, narrower definition of criminal organisation might solve the problem of very diverse approaches within the EU, thus promoting a higher degree of approximation and, perhaps, better cooperation. As a matter of principle, the definition should confine the approach to only serious criminal activities.
2. It is recommended that greater clarity be inserted as to which features of serious crime should generate 'aggravation' of penalties.
3. It is recommended that MS are invited to identify a variety of specific roles within the offence of participation in a criminal organisation (e.g. founding, leading role, participation, recruitment, participation to the legal activities of a criminal organisation), and to set out tailor-made penalties for them.
4. It is recommended that MS are invited to identify possible features that could be regarded as aggravating circumstances in relation to offences involving participation in a criminal organisation. Those should be inspired by specific features of organised criminality in specific MS and throughout the EU.
5. It is recommended that the potential conflict between Articles 2 and 3(2) of the Framework Decision is eliminated, by inviting MS to introduce in their criminal systems clear criteria distinguishing the application of both provisions. Awareness-raising events are recommended, especially with regard to the cross-border dimension of organised crime, for judges and prosecutors. Those could not only improve the EU-picture of organised crime but also trigger a fuller national

⁶³³ This is so despite the fact that under the Lisbon Treaty, the approximation of criminal legislation is dealt with under co-decision involving both the Council and the European Parliament as equal partners.

debate on the possible solutions to the problem. The latter also means focusing on a better interpretation of the concepts introduced by the EU legislation based on a deeper reflection of national and cross-border needs.

11.6. Key findings in relation to special investigative tools

Chapter 7 of this report looked at the use of eight investigative techniques which can be used against organised crime:

- Surveillance
- Interception of communication
- Covert investigations
- Controlled deliveries
- Informants
- Joint investigation teams
- Hot pursuit
- Witness protection.

For each of these techniques, Chapter 7 sets out considerable detail regarding what these techniques are; their legal basis and scope; and how they are authorised and overseen. Chapter 7 also presents findings related to the perceived usefulness of each measure, and the barriers and facilitators relevant to their application.

The context for discussing special investigative tools: balancing rights and law enforcement

Any discussion of the use of special investigatory techniques must clearly recognise the need to balance concerns about privacy and misuse with the fact that many techniques provide invaluable information that illuminates and generates legally admissible evidence about criminal activities, especially organised crime, that normally are secretive and inaccessible to routine policing. Most jurisdictions have installed a system of legal constraints wherein special investigative means may only be used when all other tools have either been exhausted or proven inefficient, or where because of the nature of the activity under review they are very likely to be so.

Use of tools in combination

Special investigative tools were reported to be rarely used on their own, and were more usually used as part of a multifaceted approach to gathering evidence. This is primarily due to the complex nature of organised crime cases, which require the use of a selection of tools to gather necessary evidence and intelligence. Additional investigative tools may be deployed as needed during the course of an investigation, as evidence is uncovered which makes further enquiries necessary. Tools might also be used in combination in order to reduce the risk to law enforcement personnel – for example using interception and surveillance in combination with informants, covert investigations and controlled delivery. The use of tools in combination makes it difficult to assess their utility in isolation.

Cross-border use of tools

Cross-border cooperation in the use of investigative techniques is regulated and guided by a complicated landscape of MS' legal frameworks, plus a large number of regional and national bilateral agreements and arrangements. The advantage of having these many different options when conducting cross-border investigations is that law enforcement officers can select an approach and regulatory framework which best suits the needs of the case. On the other hand, variability in the approach could hinder effective collaboration, since it means each case is different and approaches are not standardised. It also places a premium on legal expertise among changing career officials, if problems of evidential admissibility are not to arise in subsequent proceedings.

MS experts identified some factors which could operate as barriers to cross-border cooperation:

- Differences in legal frameworks between MS related to the investigative techniques which are permitted, when they may be used, and the thresholds for authorisation.
- Limited financial resources, in particular, to ensure law enforcement have access to up-to-date technology and training, especially as their personnel change.
- Different MS use different technologies, which are not always interoperable.
- The need to operate (increasingly) in a number of languages – not only to communicate with law enforcement officials in other MS, but also in relation to the subjects of investigative techniques. This leads to additional costs from hiring translators and interpreters.
- Lack of trust and understanding between law enforcement officials in different countries, which inhibits full cooperation and especially the sharing of sensitive intelligence.

MS experts suggested possible solutions to these barriers to using special investigative techniques in cross-border contexts. These included: increasing EU-level funding to purchase and train law enforcement in technologies for investigation; enhancing the sharing of good practice between MS and the provision of training by organisations such as CEPOL; streamlining administrative processes required for authorising the use of investigative techniques in cross-border contexts. For other recommendations see Table 7.2 in Chapter 7.

A review of eight special investigative techniques

MS experts were asked (based on their own judgement and that of the people they interviewed locally) to make an assessment of how often each tool was used and the extent to which the each technique was useful.

Putting together responses from all 28 MS experts, the interception of communications, surveillance and informants were reported to be most useful and used most often in the fight against organised crime.

The techniques reported to be least used were hot pursuit, joint investigative teams and witness protection. Of these three, only hot pursuit was in addition reported to be 'not very useful'. Witness protection was considered 'somewhat useful' and joint investigation teams were considered 'useful'.

For each tool, Chapter 7 outlines barriers to the use of the tool within MS and in cross-border investigations. Readers are directed to the summary tables at the start and end of Sections 7.6–7.14 for details of each tool. Here some of the most commonly identified problems (across all tools) are highlighted:

- **Differences in MS' legislation:** different MS permit the use of investigative techniques in different circumstances. For example, some MS only allow controlled delivery in criminal investigations which relate to extraditable offences. It was reported that some judicial authorities experienced difficulties establishing JITs because EU legislation had not been fully transposed into all MS' national legislation.
- **Differences in processes for authorisation:** there are a variety of authorisation regimes for covert investigations in MS. In some, it is permissible to seek verbal authorisation that is later followed by a written authorisation, permitting authorisation to be granted quickly to meet operational demands.
- **Differences in the admissibility of evidence:** one example of this is that evidence gathered through interception of communications cannot be admitted in court in some MS (UK, IE, SE). But differences were also mentioned in relation to the admissibility of testimony from undercover officers.
- **Administrative and bureaucratic requirements:** due to the need to balance concern for individual rights with the need to fight serious and organised crime, all the special investigative techniques have authorisation procedures, intended to ensure that investigative measures are used lawfully and proportionately. However, it was reported that undue delays were sometimes caused by complicated authorisation procedures (for example in relation to interception of communications and surveillance, where a number of authorisation stages were reported to be required in some MS). The administrative requirements for joint investigative teams were also mentioned by experts in several MS as inhibiting the effectiveness of the measure.
- **Different criminal justice processes:** in relation to joint investigation teams, for example, different MS were said to have different rules regarding disclosure, time limits for data retention and giving evidence by video link.
- **Limited resources:** all of the special investigative techniques are resource intensive, but it was pointed out that some were potentially very costly (especially covert surveillance and witness protection). Some techniques also required expensive equipment, such as GPS tracking for controlled deliveries.
- **Skills, recruitment and training:** the use of some special investigative techniques required technical skills (for example, in the use of devices for covert surveillance). Others required certain psychological traits or characteristics (for example, the characteristics required of undercover officers or those infiltrating criminal groups). It is also important that law enforcement personnel have good knowledge of the legal framework in all countries in which the techniques are being used. These features lead to challenges in recruiting staff and in and maintaining the training and skills of law enforcement officers using these techniques.

A number of recommendations and suggestions were set out in Chapter 7 for ways in which these barriers might be overcome. Again, the detailed recommendations for each

investigative technique can be found in Sections 7.6–7.14. Below, some common themes are identified which featured in recommendations in relation to a number of special investigative techniques.

- **Harmonising MS legislation:** several recommendations suggested steps to make the law and rules in different MS more compatible. In relation to controlled delivery, some MS have extended its scope beyond drug trafficking, for example to trafficking in illicit arms and cultural goods, and it was suggested that this approach could be adopted by all MS. In relation to hot pursuit, it was mentioned that there could be value in common rules regarding the distance over which hot pursuit was permitted. MS experts suggested that more consistent national legislation on the use of informants would enhance recruitment and ensure that evidence gathered could be used in court in different MS. There was said to be scope to unify the procedures for authorising and establishing JITs in different MS.
- **Improving access to technology to enhance investigations:** in relation to a number of special investigative techniques it was recommended that steps might be taken to ensure that all MS have access to technologies which could improve the effectiveness and efficiency of investigations. Some MS experts suggested that EU-level funding might be made available to purchase equipment. One example was the use of tracking and surveillance technologies in controlled deliveries, which could reduce the need for law enforcement officers to physically follow goods. Another example was automatic voice-to-text recognition and transfer, which could improve the use of interception of communications. Cross-border surveillance equipment and processing capacities for the analysis of 'big data' were also mentioned as areas where funding for technology could enhance investigations.
- **Training investigative staff and facilitating contact between law enforcement professionals in different MS:** in relation to a number of investigative techniques, training was recommended both to enhance technical skills and knowledge, and as a way to build and expand personal contacts and trust between law enforcement officers in different MS. Training was suggested for officers who have responsibility for managing informants; in relation to JITs; on privacy and data protection regulations (to enhance court admissibility rates); and to improve foreign language abilities.
- **Improving existing legislation:** a number of the suggested recommendations related to possible amendments to existing legislation (at the EU and/or national level). For example, there was a recommendation from MS experts to improve the way in which legislation regulates and permits undercover investigations that may involve the test purchase, via the Internet, of illicit goods or services in relation to cybercrime investigations. It was also suggested that legislation was needed to permit and regulate the interception of new communication technologies such as Skype and other VoIP services. It was recommended that legislation should be developed to allow and regulate remote electronic search (i.e. installing 'spyware' in a suspect's device).
- **New EU-level instruments and memoranda of understanding:** it was suggested that an EU-level agreement on undercover operations (following memoranda of understanding already developed by the European Cooperation

Group on Undercover Activities) might stimulate cross-border deployment and hosting of undercover officers. It was also suggested that there might be value in EU-wide instruments for cross-border surveillance (for example, a European Surveillance Warrant).

- **New models and channels:** it was recommended that MS might usefully adopt the Dedicated Informant Management model, as a first step to enhanced cooperation. In relation to controlled delivery, some MS experts suggested that there could usefully be more channels for cooperation and to reduce bureaucracy.
- **Exchange best practice:** sharing good ideas between MS was recommended on several occasions. For instance, in relation to controlled delivery one suggestion was to fund the sharing of best practices in the use of advanced tracking technologies. It was suggested that international forums, like the Lyon/Roma Group of the G8, usefully contribute to extrapolating best practices from the international arena and into EU policymaking and vice versa.

Reflecting on these recommendations, EU-wide harmonisation is not likely because the ability of the EU to act in relation to special investigative techniques is limited by Article 72 of the Treaty of Lisbon. However, not all the recommendations suggest EU-level legislation. Many look to MS to act to harmonise their approaches, or suggest measures such as training and relationship-building between law enforcement officers from different MS.

11.7. Key findings regarding national specialist agencies

Chapter 8 of this report focused on national specialised agencies involved in the fight against organised crime. Appendix B provides more detail on some of the key agencies in each MS. Based on information provided by national experts, supplemented by desk research undertaken by the research team, Chapter 8 was not intended to be a comprehensive overview of all agencies. Instead it described the main agencies and aimed to highlight those that were considered by national experts and the stakeholders they interviewed to offer examples of promising practices. The findings set out in Chapter 8 can be summarised as follows:

The majority of MS were reported to have more than one specialist agency tasked with fighting organised crime in their country

Chapter 8 maps some of the similarities and differences between MS' specialist agencies, and outlines the dimensions across which agencies can be compared (including whether they were centralised, regional or local, the degree to which they are specialised or deal with all kinds of organised crime, and so on). Specialist financial investigation units have been established in most MS, and the majority reported having a specialist cybercrime unit (or division). There is a great deal of variation as to how MS specialist agencies are controlled and held accountable, in part stemming from different policing traditions, systems and practices, MS size and internal structure.

A minority of MS had no specialist agency, but that was not considered to be an obstacle

Exceptions were Belgium and to some extent Austria and Sweden, where work against organised crime groups was integrated within respective law enforcement agencies. Experts reported that despite the fact that the country did not have one centralised agency, work against organised crime was successful in Belgium since it was integrated at every level of policing.

Reforms to specialist national agencies were sometimes said to be disruptive

Some of the problems mentioned in relation to reforms to agencies included the disruption of the work of an organisation during transition periods; the creation of a number of agencies which sometimes had overlapping functions; and increasing staff turnover. Some experts did mention benefits which had stemmed from reforms: the creation of the NCA in the UK was said to have brought about improved coordination with local police forces.

National specialist agencies were said to face challenges in recruiting and retaining staff with appropriate skills

In Bulgaria, for example, there were said to be vacancies at the Specialised Directorate 'Combating Organised Crime' and the Specialised Appellate Criminal Court. Even after recruitment, MS experts reported concerns about whether there was sufficient specialist training (for example in investigation of financial crime).

Cooperation between different law enforcement agencies within MS remains a challenging issue

Experts in several MS reported conflicts and competition between national agencies which impeded cooperation and information sharing. This can risk 'double working' by several agencies on the same case or suspect. In order to improve cooperation, Portugal and some other MS have established formal institutions responsible for cooperation.

Lack of access to information systems can hinder the work of specialist agencies

One problematic issue reported by experts in some MS was the access of law enforcement personnel to various national information systems and registries, which contained critical information required for prosecution – such as the tax registry, the real estate registry, etc. There were several examples of promising practice mentioned by MS experts. For example in Estonia, Police and Border guards as well as the Tax and Customs Board store their intelligence data in the same database and there is the possibility of sharing information when needed.

A minority of MS reported having units dedicated to international cooperation

In most cases specialist agencies have international cooperation as part of their mandate, and some have units or divisions specialising in international matters and mutual legal assistance. The study collected data regarding barriers to international cooperation, including lack of shared language and differences in legal systems. But

there were also examples of cases or institutions that demonstrated promising practice in relation to cooperation.

The study highlights some potentially promising practices

While this study has highlighted many of the challenges faced by national specialist agencies, there were also many instances where national experts reported good practices. A selection of these is presented in Box 11.2 below (this list is not comprehensive and other examples of promising practices can be found in Chapter 8).

Box 11.2: Selected examples of promising practices of national specialist agencies

(DE) The German Centre for Organised Crime at the Attorney General Celle in the state of Lower-Saxony 'excels as the best-equipped and trained prosecuting agency in this area of criminal prosecution'.

(EL) The Financial and Economic Crime Unit in Greece was considered a model agency by experts who pointed out it provided essential expertise on financial crime, which provided the police with the knowledge and the expertise necessary to fight financial organised crime. A factor behind the perceived success was that staff have qualifications in economics and officers have specialist knowledge.

(ES) The Spanish Audiencia Nacional was noted for having investigative judges who are specialists in investigative tools, making them more efficient in tackling organised crime. These judges also form closer relationships with the public prosecutors in the specialised Fiscalías and with relevant police bodies.

(IR) The Criminal Assets Bureau in Ireland was praised for employing officials from the police, revenue commissioners and social welfare and for having highly trained financial investigators, who were said to be key to successful investigations. Benefits to this multi-agency approach were reported to include sharing of information across different agencies as well as a wider range of powers by virtue of having police, welfare and revenue officials working together.

(IT) The Italian National Anti-Mafia Directorate is tasked with the coordination of all mafia-related investigations and was reported to be highly valued for this coordinating role, since organised crime investigations are highly complex, consist of many phases and thus may rely on more than one prosecution office.

(PT) The Portuguese Coordinator Council for Criminal Investigation is made up of representatives from different police forces. National experts reported that this offers a more practical approach to investigations and the possibility of setting-up national joint investigation teams for specific investigations.

(RO) The Romanian anticorruption directorate is a fully integrated structure that includes police officers, specialists and prosecutors under one command under the head prosecutor. Experts in Romania suggested that this allowed for better management of cases and the prioritisation of activities. The directorate worked with other law enforcement bodies and intelligence units but was not dependent on them because it had its own police officers inside the directorate with relevant expertise.

(SK) The National Criminal Agency in Slovakia has been recently created and interviewees suggested it had usefully consolidated resources and expertise from a

number of existing agencies. It was also thought that the independence of the NCA enhanced its effectiveness. This independence was achieved through oversight by the President of the police force and because the Agency – along with the Office of the Special Prosecutor and the Specialised Penal Court – was situated outside of the rest of the criminal justice system.

(UK) The UK National Crime Agency was highlighted as a potentially promising practice through its single tasking and coordination, involving the collection of information from NCA sources, local police forces and other enforcement agencies. This means that the NCA holds a complete overview in terms of intelligence relating to organised crime. According to national experts and the stakeholders they interviewed, this coordinating role is a 'remarkable solution' that is exportable to other countries as it facilitates cooperation at the national level. Respondents in both Italy and the UK suggested that having a central coordination agency (the DNA and the NCA) was beneficial as it allows the agency to see the broader picture and share tasks. It also reduces the risk of a competition between agencies and fosters economies of scale (see Italian and UK case studies in the appendices for further information on these agencies).

11.8. Key findings from the Italian case study

The Italian case study looked in detail at the work of the Italian National Anti-Mafia Directorate (DNA) in the fight against organised crime. The DNA coordinates and supports the 26 Anti-Mafia District Directorates (DDAs) and the law enforcement bodies dedicated to the investigation of serious organised crime, and is managed by the Anti-Mafia National Prosecutor.

Key features of the DNA perceived to contribute to its effectiveness (and which could be potentially promising practices transferable to other MS) include:

- The DNA is mandated to coordinate the fight against organised crime. Organised crime offences are often committed all over the country (and beyond). The coordination carried out by DNA aims to ensure effective sharing of the available knowledge with all interested DDAs and to connect, when needed, two or more DDAs on specific cases.
- The DNA has no direct investigative or prosecution role, allowing it to focus entirely on coordinating other actors (DDAs, specialised police investigative bodies, etc.) and gathering and sharing information.
- Because the DNA does not itself prosecute cases, this allows it to take a more strategic role: it is able to take a broader view of organised crime, and its evolution over space. The DNA can therefore set medium- and long-term targets and predict future criminal developments.
- The DNA specialises in serious forms of organised crime and organised criminal activities. The specialisation starts from the recruitment and training of the staff employed by DNA and DDAs and recruitment procedures look carefully at both the attitudes and professional experience of applicants to the DNA.
- The DNA has special databases – SIDNA (Anti-Mafia Directorate Information System) and SIDDA (District Level Anti-Mafia Directorates Information System) – where all data on investigations and prosecutions and criminal

organisations are stored. All public prosecutors put information into the system.

- The DNA is the contact point for cross-border cooperation, in charge of developing and expanding the relationships with political/judicial/prosecutorial institutions engaged in the fight against organised crime in other states, as well as of information and data exchanging in relation to transnational organised crime.

While it is clearly noted by the authors of the case study that some features of the operation of the DNA are specific to the Italian legal system (for example, the Italian system is based on mandatory criminal prosecution) the idea of a coordinating organisation, with specialist skills and databases, is potentially exportable to other MS.

Some of the challenges faced by the DNA included:

- Some DDAs do not fully implement the DNA coordination directives and fail to input relevant data into the SIDDA/SIDNA system. Such a situation prevents DNA from fully deploying its coordination potential.
- There is some asymmetry in the tasks of DNA and DDAs. In the past few years, national legislation has expanded the competences and tasks of DDAs to crimes not originally included in the mandate of these bodies.
- Some organised crimes are investigated by ordinary prosecutor's offices rather than by DDAs. This is often where the organised nature or the mafia-type components of a crime are not immediately evident.

Key findings from the UK case study

This case study looked at the UK approach to fighting serious and organised crime in order to highlight practices which could potentially be transferrable to other MS.

The agency that coordinates the fight against organised crime in the UK is the National Crime Agency. This was introduced in 2013 and replaced the previous national agency. The creation of the National Crime Agency was intended to harmonise and strengthen cooperation against serious and organised crime.

While it is too early to say whether the National Crime Agency approach can be recommended as a model to be adopted elsewhere in the EU, based on interviews with practitioners working in the National Crime Agency, the following were identified as areas of potentially promising practice:

- The National Crime Agency has single system for tasking and coordination with all UK police forces. The tasking system was seen by interviewees from the Agency as an essential element in an improved collaboration and better prioritisation of threats.
- Although the National Crime Agency has the power to direct Chief Constables in local police forces, it prefers to work with police forces by consent, and senior staff at the Agency were said to spend much time relationship-building.
- The National Crime Agency uses a 'lifetime offender management' approach. This creates a structure through which serious offenders are individually monitored, and measures are put in place to disrupt their criminal activities in prison and prevent criminal activity upon release. Lifetime offender management also ensures that details of all offenders released from prison are

shared with probation services and police forces.

- The National Crime Agency can issue Serious Crime Prevention Orders to support lifetime offender management. These place restrictions on individuals after their release from custody. Enforcement of these Orders can be a challenge, however, since good collaboration between law enforcement and other agencies is required in order to successfully monitor the orders. They are also resource intensive.
- The National Crime Agency employs innovative behavioural approaches to crime disruption and prevention.
- The National Crime Agency approach to cybercrime involves cooperation with the private sector, NGOs, academics and individual experts. The Agency operates a 'Special Constables' programme for experts with technical skills who volunteer to support the National Crime Agency part-time.

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Appendix A: Legal sources⁶³⁴




This appendix provides the full text of the provisions mentioned in section 4 of the report.



Member State	Relevant legislation
 <p>Austria</p>	<p>Criminal Code</p> <p>Section 278</p> <p>(1) Who founds a criminal organization or participates in it as a member, shall be punished with imprisonment up to three years.</p> <p>(2) 'criminal organisation' is an association, set up for the longer term, of more than two persons for the purpose of one or more members of the organisation committing one or more crimes, other serious acts of violence against life and limb, not only minor damage to property, theft or fraud, offences under Sections 104a, 165, 177b, 233 to 239, 241a to 241c, 241e, 241f, 304 or 307, other offences specified in Section 278d(1) or offences under Sections 114(1) or 116 of the Immigration Authorities Act.</p> <p>(3) Is a member participant in a criminal organization, who commits a criminal offense within its criminal orientation or participates in the activities of the organization through the provision of information or assets or otherwise, in the knowledge that he thereby promotes the association or their criminal acts.</p> <p>[...]</p>
 <p>Belgium</p>	<p>Criminal Code</p> <p>Section 324bis</p> <p>Constitue une organisation criminelle l'association structurée de plus de deux personnes, établie dans le temps, en vue de commettre de façon concertée, des crimes et délits punissables d'un emprisonnement de trois ans ou d'une peine plus grave, pour obtenir, directement ou indirectement, des avantages patrimoniaux.</p> <p>Une organisation dont l'objet réel est exclusivement d'ordre politique, syndical, philanthropique, philosophique ou religieux ou qui poursuit exclusivement tout autre but légitime ne peut, en tant que telle, être considérée comme une organisation criminelle au sens de l'alinéa 1er.</p>



⁶³⁴ This appendix was prepared by researchers at eCrime

	<p>Section 324ter</p> <p>(1) Lorsque l'organisation criminelle utilise l'intimidation, la menace, la violence, des manœuvres frauduleuses ou la corruption ou recourt à des structures commerciales ou autres pour dissimuler ou faciliter la réalisation des infractions, toute personne qui, sciemment et volontairement, en fait partie, est punie d'un emprisonnement d'un an à trois ans et d'une amende de cent euros à cinq mille euros ou d'une de ces peines seulement, même si elle n'a pas l'intention de commettre une infraction dans le cadre de cette organisation ni de s'y associer d'une des manières prévues par les articles 66 à 69.</p> <p>(2) Toute personne qui participe à la préparation ou à la réalisation de toute activité licite de cette organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article 324bis, est punie d'un emprisonnement de un an à trois ans et d'une amende de cent euros à cinq mille euros ou d'une de ces peines seulement.</p> <p>(3) Toute personne qui participe à toute prise de décision dans le cadre des activités de l'organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article 324bis, est punie de la réclusion de cinq ans à dix ans et d'une amende de cinq cent euros à cent mille euros ou d'une de ces peines seulement.</p> <p>(4) Tout dirigeant de l'organisation criminelle est puni de la réclusion de dix ans à quinze ans et d'une amende de mille euros à deux cent mille euros ou d'une de ces peines seulement.</p>
 Bulgaria	<p>Criminal Code</p> <p>Section 93</p> <p>[...]</p> <p>(20) 'organised criminal group' means a stable, structured association of three or more persons created for the purpose of coordinating the commission, both in Bulgaria and abroad, of criminal offences punishable by more than three years' imprisonment. Such associations shall be deemed structured regardless of any formal distribution of tasks among its members, the length of their involvement or the existence of a well-developed structure.</p> <p>[...]</p> <p>Section 321</p> <p>(1) Forming or leading an organised criminal group shall be punishable by three to ten years' imprisonment.</p> <p>(2) Taking part in such groups shall be punishable by one to six years' imprisonment.</p> <p>[...]</p> <p>(6) Conspiring with one or more persons to commit, in Bulgaria or abroad, offences punishable by more than three years' imprisonment in pursuit of material gain or for the purpose of gaining illicit influence over bodies of state or local government shall be punishable by up to six years' imprisonment.</p>
 Croatia	<p>Criminal Code</p> <p>Section 327</p>

	<p>(1) Whoever conspires with another to commit a criminal offence for which a punishment of imprisonment exceeding three years may be imposed under the law shall be punished by imprisonment not exceeding three years.</p> <p>(2) A perpetrator who uncovers the conspiracy referred to in paragraph 1 of this Article before the agreed upon criminal offence is committed may have his/her punishment remitted.</p> <p>Section 328</p> <p>(1) Whoever organises or directs a criminal association shall be punished by imprisonment from six months to five years.</p> <p>(2) Whoever participates in the association referred to in paragraph 1 of this Article but has not as yet committed any criminal offence for this association, or whoever carries out an act which in itself does not constitute a criminal offence but which he/she knows furthers the goal of a criminal association, or whoever financially or otherwise supports a criminal association shall be punished by imprisonment not exceeding three years.</p> <p>(3) The perpetrator of a criminal offence referred to in paragraph 1 or 2 of this Article who by timely disclosure of a criminal association prevents the commission of any of the criminal offences set forth in paragraph 4 of this Article or a member of a criminal association who discloses a criminal association before committing, as its member or on its behalf, any of the criminal offences set forth in paragraph 4 of this Article may have his/her punishment remitted.</p> <p>(4) A criminal association shall be made up of three or more persons acting in concert with the aim of committing one or more criminal offences that are punishable with imprisonment for a term longer than three years and shall not include an association randomly formed for the immediate commission of one criminal offence.</p>
 <p>Cyprus</p>	<p>Criminal Code</p> <p>Section 63a</p> <p>(1) Any person who participates in a criminal organization is guilty of an offence and in case of conviction is liable to three years imprisonment.</p> <p>Section 63b</p> <p>(1) Whoever, having knowledge of the unlawful purpose or activities of a criminal organisation:</p> <p style="padding-left: 40px;">(a) participates in any operation involved in any illegal act or criminal organisation;</p> <p style="padding-left: 40px;">(b) engages in any act of a criminal organisation, of which it should reasonably have been known that it is in any way connected with the commission of a criminal offence</p> <p>shall be guilty of a felony punishable by imprisonment for up to ten years or a fine of up to fifty thousand pounds, or to both such penalties.</p> <p>(2) The court may also judge offences covered by subsection (1) of this Article where the criminal organisation is situated or operating wholly or partly outside the Republic.</p> <p>(3) A criminal organisation means a structured group of three or more persons</p>

	<p>established and operated for the purpose of committing criminal offences punishable by a maximum sentence of at least three years.</p>
 <p>Czech Republic</p>	<p>Criminal Code</p> <p>Section 129</p> <p>An organised criminal association is a community of two or more persons with an internal organisational structure, a division of functions and division of activities, focusing on the sustained commission of intentional criminal activities.</p> <p>Section 361</p> <p>(1) Any person who establishes an organised criminal association, who participates in the activities of an organised criminal association, or who supports an organised criminal association shall be punished by the deprivation of liberty for two to ten years or with the forfeiture of property.</p> <p>(2) The perpetrator shall be punished by the deprivation of liberty for three to twelve years or the forfeiture of property if he commits the act specified in paragraph 1 in relation to an organised criminal association designed for or focused on the commission of treason (Sec. 309), terrorist attack (Sec. 311) or terror (Sec. 312).</p> <p>(3) The perpetrator shall be punished by the deprivation of liberty for five to fifteen years or the forfeiture of property if he is a leader or representative of an organised criminal association designed for or focused on the commission of treason (Sec. 309), terrorist attack (Sec. 311) or terror (Sec. 312).</p> <p>(4) The provisions of Sec. 107 and 108 shall not apply with respect to a perpetrator referred to in paragraphs 1 to 3.</p>
 <p>Denmark</p>	<p>Danish national legislation does not cover either options of Article 2a or b. there are not related definitions either.</p>
 <p>Estonia</p>	<p>Criminal Code</p> <p>Section 255</p> <p>(1) Membership in a permanent organisation consisting of three or more persons who share a distribution of tasks, created for the purpose of proprietary gain and whose activities are directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree, is punishable by 3 to 12 years' imprisonment.</p> <p>[...]</p> <p>Section 256</p> <p>(1) Forming or leading of or recruiting members to a criminal organisation is punishable by 5 to 15 years' imprisonment.</p> <p>[...]</p>

 Finland	<p>Criminal Code</p> <p>Chapter 17</p> <p>Section 1(a)</p> <p>(1) A person who</p> <ol style="list-style-type: none"> 1. by establishing or organising a criminal organisation or by recruiting or attempting to recruit persons for it, 2. by equipping or attempting to equip a criminal organisation with explosives, weapons, ammunition or with materials or equipment intended for their production or with other dangerous supplies or materials, 3. by arranging, attempting to arrange or providing a criminal organisation training for criminal activity, 4. by obtaining, attempting to obtain or providing a criminal organisation premises or other facilities needed by it or means of transport or other equipment that is particularly important for the organisation, 5. by directly or indirectly giving or collecting funds to finance the criminal activity of a criminal organisation, 6. by managing financial affairs that are important for the criminal organisation or by giving financial or legal advice that is particularly important for the organisation or 7. by actively promoting the accomplishment of the aims of a criminal organisation in another substantial manner <p>participates in the activities of a criminal organisation with the aim of committing one or more offences for which the maximum statutory sentence is imprisonment for at least four years or one or more of the offences referred to in chapter 11, section 10 or chapter 15, section 9, and if such an offence or its punishable attempt is committed, shall be sentenced for participating in the activity of a criminal organisation to a fine or imprisonment for at most two years.</p> <p>(2) What is provided above in subsection 1(6) regarding legal advice does not apply to the performance of the duties of legal counsel or representative in connection with the pre-trial investigation or court proceedings regarding an offence or the enforcement of a sentence.</p> <p>(3) What is provided in subsection 1 does not apply if an equally or more severe penalty is provided elsewhere in law for the act.</p> <p>(4) A criminal organisation refers to a structured association, established over a period of time, of at least three persons acting in concert to commit the offences referred to in subsection 1.</p>
 France	<p>Criminal Code</p> <p>Section 450-1</p> <p>A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.</p> <p>Where the offences contemplated are felonies or misdemeanours punished by ten years'</p>

	<p>imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of €150,000.</p> <p>Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of €75,000.</p>
 Germany	<p>Criminal Code</p> <p>Section 30</p> <p>(1) A person who attempts to induce another to commit a felony or abet another to commit a felony shall be liable according to the provisions governing attempted felonies. The sentence shall be mitigated pursuant to section 49 (1). Section 23 (3) shall apply mutatis mutandis.</p> <p>(2) A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable under the same terms.</p> <p>Section 129</p> <p>(1) Whoever forms an organization, the objectives or activity of which are directed towards the commission of crimes, or whoever participates in such an organization as members, recruits for it or supports it, shall be punished with imprisonment for not more than five years or a fine.</p> <p>[...]</p>
 Greece	<p>Criminal Code</p> <p>Section 187</p> <p>(1) Anyone who forms or joins a structured group of three or more persons, operating for a period of time (organisation), with the aim of committing one or more crimes provided for in Articles 207 (counterfeiting), 208 (circulation of counterfeit money), 216 (forgery), 218 (forgery and use of forged stamps), 242 (false declaration, falsification), 264 (arson), 265 (arson in forests), 268 (flood), 270 (explosion), 272 (offences involving the use of explosives), 277 (deliberate shipwreck), 279 (poisoning water sources and food), 291 (undermining the safety of railways, ships and aircraft), 299 (murder), 310 (grievous bodily harm), 322 (kidnapping), 323 (slave-trading), 323A (human trafficking), 324 (abduction of minors), 327 (forced abduction), 336 (rape), 338 (sexual abuse of incompetents), 339 (corruption of minors), 348A (child pornography), 351 (pimping), 351A (sexual abuse of minors for payment), 374 (certain types of theft), 375 (embezzlement), 380 (robbery), 385 (blackmail), 366 (fraud), 386A (computer fraud), or 404 (usury), or in Article 87(5), last sentence, or Article 88 of Law 3386/2005 (Government Gazette 212A) where such crimes (facilitating the illegal entry or exit or smuggling of third country nationals) are committed for gain, or one or more offences provided for under legislation on narcotics, firearms, explosives and protection from materials that emit harmful radiation, or one or more offences provided for and punished under legislation for the protection of antiquities and the cultural heritage in general, and the legislation for the protection of the environment, and more offences provided for and punished under the Article 41F of Law 2725/1999, as exists, as well as more offences</p>

provided for and punished under Article 128 I of Law 2725/1999 shall be punished by incarceration for up to ten years. For offences provided for by this article the status of doctor, coach or therapist is an aggravating factor. The perpetrator of the act of the first subparagraph, if the criminal organization aims to commit more crimes so as to avoid payment of legitimate tax, fee, duty or other charge on the purchase, sale, receipt, delivery, transportation, transit, trade, possession, storage, import or export of goods or fake, counterfeit or pirated products, shall be punished by the same penalty.

(2) Anyone who provides material information or means with a view to facilitating or assisting an organisation referred to in the previous paragraph to commit the offences referred to therein shall be punished by incarceration for up to ten years.

(3) Anyone who leads an organisation referred to in the first paragraph shall be punished by incarceration for at least ten years. The member of the organisation who at the time of committing the crime provided for the second subparagraph of the first paragraph was a civil servant or employee within the meaning of article 263A shall be punished by the same penalty.



(4) Anyone who uses threats or violence against court officers, investigating or court officers, witnesses, experts or interpreters or who bribes such persons and thus subverts the discovery or prosecution or punishment of organised crime or who joins a criminal organisation referred to in paragraph 1 shall be punished by incarceration for up to ten (10) years and a fine of between EUR 100 000 (one hundred thousand) and EUR 500 000 (five hundred thousand). Anyone who, in the above cases, subverts the discovery or prosecution or punishment of the crime of setting up or joining a criminal organisation referred to in paragraph 1 or of any other crime listed in that paragraph shall be punished by incarceration and a fine of between EUR 100 000 (one hundred thousand) and EUR 1 000 000 (one million).

(5) Anyone who conspires with another person in order to commit a crime outside the scope of paragraph 1 shall be punished by imprisonment for at least six months. Offenders shall be punished by imprisonment for at least three months if the conspiracy referred to in the previous sentence was entered into in order to commit a misdemeanour punishable by at least one year's imprisonment for the purpose of achieving financial or other material gain or of attacking a person's life, physical integrity or reproductive freedom.

(6) The manufacture, supply or possession of firearms, explosives and chemical or biological materials or materials that emit harmful radiation for the purposes of an organisation referred to in paragraph 1 or a conspiracy referred to in paragraph 3 or action for the purpose of achieving financial or other material gain for its members are aggravating circumstances. The fact that any of the planned offences referred to in paragraphs 1 and 3 were not committed is a mitigating circumstance. Simple moral support for the crimes of forming or joining an organisation in accordance with paragraph 1 or a conspiracy in accordance with paragraph 3 shall not be punished, provided that the members of the organisation or conspiracy are not seeking financial or other material gain. The perpetration of the act referred to the last sentence of the first paragraph with material object the crude oil or other oil or energy product is an aggravating factor.

(7) The provisions of the present article shall also apply where the criminal offences provided for herein were committed abroad by a Greek national or against a Greek citizen or against a legal entity established in Greece or against the Greek State, even if they are not criminal offences under the laws of the land in which they were committed.

(8) The provision of Article 238 shall apply mutatis mutandis to the crimes referred to in paragraphs 1 to 4 herein.

 <p>Hungary</p>	<p>Criminal Code</p> <p>Section 459</p> <p>(1) 'criminal organization' shall mean when a group of three or more persons collaborate in the long term to deliberately engage in an organized fashion in criminal acts, which are punishable with five years of imprisonment or more;</p> <p>[...]</p> <p>Section 321</p> <p>(1) Any person who instigates, suggests or offers, or joins or collaborates to engage in criminal activities in the framework of a criminal organization, or who provides the means intended to be used for such activities, or supports the activities of the criminal organization in any other manner is guilty of felony punishable by imprisonment between one to five years.</p> <p>[...]</p>
 <p>Ireland</p>	<p>Criminal Justice Act of 2006 as amended by section 3(1)(a) of Criminal Justice Act of 2009</p> <p>Section 70</p> <p>[...]</p> <p>'criminal organisation' means a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence;</p> <p>[...]</p> <p>'serious offence' means an offence for which a person may be punished by imprisonment for a term of 4 years or more.</p>

'structured group' means a group of 3 or more persons, which is not randomly formed for the immediate commission of a single offence, and the involvement in which by 2 or more of those persons is with a view to their acting in concert; for the avoidance of doubt, a structured group may exist notwithstanding the absence of all or any of the following:

- (a) formal rules or formal membership, or any formal roles for those involved in the group;
- (b) any hierarchical or leadership structure;
- (c) continuity of involvement by persons in the group.

Section 71

(1) Subject to subsections (2) and (3), a person who conspires, whether in the State or elsewhere, with one or more persons to do an act

- (a) in the State that constitutes a serious offence, or
- (b) in a place outside the State that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence, is guilty of an offence irrespective of whether such act actually takes place or not.

(2) Subsection (1) applies to a conspiracy committed outside the State if

- (a) the offence, the subject of the conspiracy, was committed, or was intended to be committed, in the State or against a citizen of Ireland,
- (b) the conspiracy is committed on board an Irish ship,
- (c) the conspiracy is committed on an aircraft registered in the State, or
- (d) the conspiracy is committed by an Irish citizen or a person ordinarily resident in the State

(3) Subsection (1) shall also apply to a conspiracy committed outside the State in circumstances other than those referred to in subsection (2), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings for an offence under subsection (1) except in accordance with section 74(3).

(4) A person charged with an offence under this section is liable to be indicted, tried and punished as a principal offender.



71A



(1) In this section


- (a) 'directs', in relation to activities, means
 - (i) controls or supervises the activities, or
 - (ii) gives an order, instruction or guidance, or makes a request, with respect to the carrying on of the activities;
- (b) references to activities include references to
 - (i) activities carried on outside the State, and
 - (ii) activities that do not constitute an offence or offences.



(2) A person who directs, at any level of the organisation's structure, the activities of a criminal organisation is guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.

(3) Any statement made orally, in writing or otherwise, or any conduct, by the defendant




	<p>implying or leading to a reasonable inference that he or she was at a material time directing the activities of a criminal organisation shall, in proceedings for an offence under this section, be admissible as evidence that the defendant was doing such at that time.</p> <p>Section 72</p> <p>(1) A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not)</p> <p>(a) intending either to</p> <p>(i) enhance the ability of a criminal organisation or any of its members to commit, or</p> <p>(ii) facilitate the commission by a criminal organisation or any of its members of, a serious offence, or</p> <p>(b) being reckless as to whether such participation or contribution could either</p> <p>(i) enhance the ability of a criminal organisation or any of its members to commit, or</p> <p>(ii) facilitate the commission by a criminal organisation or any of its members of, a serious offence.</p> <p>(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.</p>
 Italy	<p>Criminal Code</p> <p>Section 416</p> <p>When three or more persons conspire with a view to committing offences, those who initiate or form or organise the association will be punishable, on that account alone, by imprisonment for a term of three to seven years.</p> <p>Those who participate in the association will be punishable, on that account alone, by imprisonment for a term of one to five years.</p> <p>The leaders will be liable to the same penalty as that established for the promoters.</p> <p>Where the members bear weapons in the countryside or on the public highway, they will be liable to imprisonment for a term of five to fifteen years.</p> <p>[...]</p>
 Latvia	<p>Criminal Code</p> <p>Section 21</p> <p>(1) An organised group is an association formed by more than two persons, which has been created for purpose of jointly committing one or several criminal offences and the participants of which in accordance with previous agreement have divided responsibilities.</p> <p>(2) Liability of a person for the commission of an offence within an organised group shall apply in the cases set forth in this Law for formation and leadership of a group, and for participation in preparation for a serious or especially serious crime or in commission of a crime, irrespective of the role of the person in the jointly committed offence.</p>

	<p>Section 89.1</p> <p>(1) For a person who commits the establishment of such a criminal organisation (association), in the composition of which are at least five persons, for the purpose of committing especially serious crimes against humanity or peace, war crimes, to commit genocide or to commit especially serious crimes against the State, as well as for involvement in such an organisation or in an organised group included within such organisation or other criminal formation, the applicable punishment is deprivation of liberty for a term of not less than eight and not exceeding seventeen years, with or without confiscation of property and with or without probationary supervision for a term not exceeding three years.</p> <p>(2) For a person who commits the leading of a criminal organisation or participates in the committing of the crimes provided for in Paragraph one of this Section by such an organisation, the applicable punishment is life imprisonment or deprivation of liberty for a term of not less than ten and not exceeding twenty years, with or without confiscation of property and with probationary supervision for a term not exceeding three years.</p>
 <p>Lithuania</p>	<p>Criminal Code</p> <p>Section 25</p> <p>[...]</p> <p>(4) A criminal association shall be one in which three or more persons linked by permanent mutual relations and division of roles or tasks join together for the commission of a joint criminal act – one or several serious and grave crimes. An anti-state group or organisation and a terrorist group shall be considered equivalent to a criminal association.</p> <p>Section 11</p> <p>[...]</p> <p>(5) A serious crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of the duration in excess of three years, but not exceeding ten years of imprisonment.</p> <p>(6) A grave crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of the maximum duration in excess of ten years.</p> <p>Section 249</p> <p>(1) A person who participates in the activities of a criminal association shall be punished by imprisonment for a term of three up to fifteen years.</p> <p>(2) A person who participates in the activities of a criminal association armed with firearms, explosives or explosive materials shall be punished by imprisonment for a term of six up to twenty years or by life imprisonment.</p> <p>(3) A person who organises the criminal associations provided for in paragraph 1 or 2 of this Article or is the leader thereof shall be punished by imprisonment for a period of ten up to twenty years or by life imprisonment.</p> <p>(4) A legal entity shall also be held liable for the acts provided for in this Article.</p>
	<p>Criminal Code</p>

<p>Luxembourg</p>	<p>Section 324bis</p> <p>Constitue une organisation criminelle, l'association structurée de plus de deux personnes, établie dans le temps, en vue de commettre de façon concertée des crimes et délits punissables d'un emprisonnement d'un maximum d'au moins quatre ans ou d'une peine plus grave, pour obtenir, directement ou indirectement, des avantages patrimoniaux.</p> <p>Section 324ter</p> <p>(1) Toute personne, qui volontairement et sciemment, fait activement partie de l'organisation criminelle visée à l'article précédent, est punie d'un emprisonnement de deux ans à cinq ans et d'une amende de 2.500 euros à 12.500 euros, ou d'une de ces peines seulement, même si elle n'a pas l'intention de commettre une infraction dans le cadre de cette organisation ni de s'y associer comme auteur ou complice.</p> <p>(2) Toute personne, qui participe à la préparation ou à la réalisation de toute activité licite de cette organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article précédent, est punie d'un emprisonnement d'un à trois ans et d'une amende de 2.500 euros à 12.500 euros, ou d'une de ces peines seulement.</p> <p>(3) Toute personne qui participe à toute prise de décision dans le cadre des activités de l'organisation criminelle, alors qu'elle sait que sa participation contribue aux objectifs de celle-ci, tels qu'ils sont prévus à l'article précédent, est punie de la réclusion de cinq à dix ans et d'une amende de 12.500 euros à 25.000 euros ou d'une de ces peines seulement.</p> <p>(4) Tout dirigeant de l'organisation criminelle est puni de la réclusion de dix à quinze ans et d'une amende de 25.000 euros à 50.000 euros ou d'une de ces peines seulement.</p> <p>(5) Les comportements visés aux points 1 à 4 du présent article qui se sont produits sur le territoire national sont poursuivis selon le droit luxembourgeois quel que soit le lieu où l'organisation criminelle est basée ou exerce ses activités.</p>
<p> Malta</p>	<p>Criminal Code</p> <p>Section 83A</p> <p>(1) Any person who promotes, constitutes, organises or finances an organisation of two or more persons with a view to commit criminal offences liable to the punishment of imprisonment for a term of four years or more shall be liable to the punishment of imprisonment for a term from three to seven years.</p> <p>(2) Any person who belongs to an organisation referred to in subarticle (1) shall for that mere fact be liable to the punishment of imprisonment for a term from one to five years.</p> <p>(3) Where the number of persons in the organisation is ten or more the punishment in the preceding subarticles shall be increased form one to two degrees.</p> <p>[...]</p> <p>Article 48A</p> <p>(1) Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence.</p>

	<p>(2) The conspiracy referred to in subarticle (1) shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between such persons.</p> <p>(3) Any person found guilty of conspiracy under this article shall be liable to the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees.</p> <p>(4) For the purposes of subarticle (3), in the determination of the punishment for the completed offence object of the conspiracy account shall be had of any circumstances aggravating that offence.</p>
 Netherlands	<p>Criminal Code</p> <p>Section 140</p> <p>(1) Participation in an organisation which has as its purpose the commission of serious offences, shall be punishable by a term of imprisonment not exceeding six years or a fine of the fifth category.</p> <p>(2) Participation in the continuation of the activities of an organisation that has been declared prohibited by final judicial decision or is prohibited by operation of law or against which an irrevocable declaratory judgment has been pronounced as referred to in Section 10:122(1) of the Civil Code, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.</p> <p>(3) The terms of imprisonment for founders, directors or managers may be increased by one third.</p> <p>(4) Participation, as defined in subsection (1), shall also include the provision of financial or other material support as well as the raising of funds or the recruitment of persons on behalf of the organisation defined in said subsection.</p>
 Poland	<p>Criminal Code</p> <p>Article 258</p> <p>(1) Whoever takes part in an organized group or association aimed at committing a criminal offense or a tax offense, is punishable by imprisonment from 3 months to 5 years.</p> <p>(2) If a group or association referred to in (1) are armed or intended to commit a terrorist offense, the perpetrator is punishable by imprisonment from 6 months to 8 years.</p> <p>(3) Who sets up a group or association referred to in (1), including of an armed character or such a group or association directs, is punishable by imprisonment from one to 10 years.</p> <p>(4) Who sets up group or association aimed at committing a terrorist offense or such a group or compound directs, is punishable by imprisonment for not less than 3 years.</p>

 Portugal	<p>Criminal Code</p> <p>Article 299</p> <p>(1) Who promotes or establishes a group, organization or association whose purpose or activity is directed to the crimes shall be punished with imprisonment from 1 to 5 years.</p> <p>(2) The same penalty applies to anyone who is part of such groups, organizations or associations or those who support them, including providing weapons, ammunition, instruments of crime, custody or places for meetings, or for any aid that recruit new members.</p> <p>(3) Who heads or leads groups, organizations or associations referred to in the preceding paragraphs shall be punished with imprisonment for 2-8 years.</p>
 Romania	<p>Criminal Code</p> <p>Section 367</p> <p>(1) The initiation or constitution of an organized criminal group, joining or supporting in any form such a group shall be punished with imprisonment of one to five years and prohibited from exercising certain rights.</p> <p>(2) If the offense which is the purpose of the organized criminal group is sanctioned by law with imprisonment for life or imprisonment exceeding 10 years punishment is imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights.</p> <p>(3) If the deeds stipulated in paragraph (1) and (2) were followed for an offense, punishment is calculated according to the rules for concurrent offences.</p> <p>[...]</p> <p>(6) Organized criminal group shall mean a structured group, consisting of three or more people, constituted for a period of time in order to act in a coordinated manner towards committing one or more crimes.</p>
 Slovakia	<p>Criminal Code</p> <p>Section 129</p> <p>[...]</p> <p>(4) For the purposes of this Act, 'criminal group' means a structured group of at least three persons existing for a certain period of time and acting in a coordinated manner with a view to committing one or more crimes, the offence of money laundering under Section 233 or the offence of corruption under Heading Eight of the third division of the special part with a view to direct or indirect financial gain or other benefits.</p> <p>[...]</p> <p>(6) 'Activity for a criminal group or a terrorist group' means intentional participation in such a group, or other intentional conduct with a view to</p> <p>a) maintaining the existence of such a group, or</p> <p>b) the commission of the offences listed in paragraph 4 or 5 by such a group.</p> <p>(7) 'Support for a criminal group or terrorist group' means intentional conduct consisting of the provision of financial or other resources, services, cooperation or the creation of other conditions with a view to</p>

	<p>a) establishing or maintaining the existence of such a group, or b) the commission of the offences listed in paragraph 4 or 5 by such a group.</p> <p>Section 11</p> <p>(1) A 'crime' means an intentional offence in respect of which the special part of this Act specifies a penalty of imprisonment with a maximum length exceeding five years.</p> <p>(2) The definition of a 'crime' also covers the more serious elements of a misdemeanour committed intentionally, for which a maximum penalty exceeding five years is specified.</p> <p>(3) A crime for which this Act specifies a penalty of imprisonment of at least ten years shall be regarded as a particularly serious crime.</p> <p>[...]</p> <p>Section 296</p> <p>Whoever establishes or plots a criminal group, is a member thereof, or acts for or supports a criminal group, shall be punished with a period of imprisonment of between five years and ten years.</p>
 Slovenia	<p>Criminal Code</p> <p>Section 294</p> <p>(1) Whoever participates in a criminal association which has the purpose of committing criminal offences for which a punishment by imprisonment of more than three years, or a life sentence may be imposed, shall be punished by imprisonment of three months up to five years.</p> <p>(2) Whoever establishes or leads an association as referred to in the preceding paragraph, shall be punished by imprisonment of six months up to eight years.</p> <p>[...]</p>
 Spain	<p>Criminal Code</p> <p>Section 570 bis</p> <p>(1) Anyone promoting, organising, coordinating or directing a criminal organisation shall be liable to a penalty of four to eight years' imprisonment if the organisation's aim or purpose is to commit serious crimes, and a penalty of three to six years' imprisonment in all other cases; and anyone taking active part in the organisation, belonging to it or cooperating with it financially or in any other way, shall be liable to penalties of two to five years' imprisonment if the purpose is to commit serious crimes, and one to three years' imprisonment in all other cases.</p> <p>For the purposes of this Code, a criminal organisation means a group of more than two persons organised on a stable basis or for an indefinite period of time who act in concert to coordinate various tasks or functions for the purpose of committing offences and of repeated perpetration of misdemeanours.</p>
 Sweden	<p>Swedish national legislation does not cover either options of Article 2a or b. there are not related definitions either.</p>



**United
Kingdom**

Section 1(1) of the Criminal Law Act 1977 (England and Wales)

(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

Part IV of the Criminal Attempts and Conspiracy Order 1983 (Northern Ireland)

(1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

Section 28 of the Criminal Justice and Licensing Act 2010 (Scotland)

(1) A person who agrees with at least one other person to become involved in serious organised crime commits an offence.

(2) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person

(a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and

(b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.

(3) For the purposes of this section and sections 29 to 31

“serious organised crime” means crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences,

“serious offence” means an indictable offence

(a) committed with the intention of obtaining a material benefit for any person, or

(b) which is an act of violence committed or a threat made with the intention of obtaining

such a benefit in the future, and

“material benefit” means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.

(4) A person guilty of an offence under subsection (1) is liable

(a) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.

Appendix B: Main national specialist agencies operating in the field of organised crime⁶³⁵

This appendix provides an overview of the information provided by national experts regarding national specialist agencies, supplementing Chapter 8 of the report. **It is important to note that this overview is not comprehensive.** The primary focus of this study was identifying potentially promising practices in relation to national specialist agencies. National experts completing the questionnaire were asked the following questions:



- In your view, which specialised judicial and law enforcement agencies in your country work particularly well or are particularly effective from the point of view of their impact on disruption of organised crime groups? For each agency please explain why in as much detail as possible.
- With reference to each agency mentioned: according to your experience, in what ways does this agency work particularly well? In your view, what are the features that make it successful? What would be missed if this agency did not exist?
- How, if at all, does each agency mentioned cooperate with other law-enforcement agencies at EU and national level? Please specify below which other agencies are cooperated with and provide examples? Are there any obstacles to cooperation? Please explain.
- Thinking about the work of each agency mentioned, how is information and intelligence shared and disseminated? How can this process be improved?
- How would you evaluate the capacity of each agency mentioned to accomplish its tasks? How could this be improved?
- In your view, how could the resources of each agency mentioned be used better to achieve greater impact (in terms of investigation and disruption of organised crime groups)?

The research team does not have comprehensive information regarding all specialist agencies. For those which are listed, the tables below provide some information about their size and mandate, based on information provided by national experts.


While the research team has made attempts to verify information provided by national experts, this has not always been possible. Furthermore, different experts provided


⁶³⁵ Marina Tzvetkova and Mafalda Pardal, RAND Europe.



different levels of detail in their responses, and not all were able to interview practitioners from specialist agencies.



Country	National agencies by MS	Mandate	Scope	Collaboration	Size	Date established
	AT Federal Criminal Investigation Department – <i>Bundeskriminalamt</i> (BK)	The BK is a special organised crime unit. It operates at the national level and liaises with international partners for cross-border operations.	National / International	Periodic mandatory reports are exchanged between the BK and the LKA (see below). The BK maintains also a discussion platform open on a case by case basis with the WKStA (see below).		2002
	AT State Criminal Investigation department – <i>Landeskriminalämter</i> (LKA)	The LKA is an investigative body organised in crime-units targeting with different techniques and expertise the different types of crime committed by criminal organisations.	National	Periodic mandatory reports are exchanged between the BK and the LKA.		
	AT Special Units – <i>Sonderreferate</i>	The <i>Sonderreferate</i> are prosecution units specialising in organised crime.	National			
	AT Special Prosecution Unit for Economic Crimes and Corruption (WKStA)	A special prosecution office located in Vienna, but with jurisdiction at the national level, which allows for a better understanding and accumulation of knowledge in the fight against organised crime.	National	The WKStA maintains a discussion platform, open on a case by case basis, with the BK.		
	BE Belgian Central Office for the Repression of Corruption (OCRC)	This office belongs to the Belgian Federal Judicial Police. The OCRC investigates complex and serious crimes of corruption in the public service and the private sector; misappropriation of public funds; conflicts of interest; embezzlement.	National	The OCRC cooperates with 27 district judicial police services who also handle corruption-related investigations.		1998

	BE	<i>Office central de lutte contre la délinquance économique et financière organisée</i> (OCDEFO)	The OCDEFO belongs to the Belgian Federal Judicial Police. It investigates financial and economic crimes (e.g. money-laundering, VAT-fraud, tax-fraud, insider trading, stock-manipulation, etc.). The OCDEFO is also specialised in locating and seizing patrimonial gains derived from the above listed crimes.	National	The OCDEFO is the contact point for the CTIF (Belgian Financial Unit tackling money laundering cases) and the administration in Ministry of Finance (for tax-fraud offences).		
	BE	Federal Computer Crime Unit (FCCU)	The FCCU belongs to the Belgian Federal Judicial Police. The FCCU is tasked with assisting investigations carried out by other Belgian police services with regards to the ICT environment. The FCCU has also a pre-emptive and proactive mission which aims at reducing societal harm caused by ICT-related offences (e.g. online frauds, paedophilia, etc.).	National	The FCCU works with Regional Computer Crime Units (RCCU) at the district level.		
	BE	Federal Prosecutor Office	Coordinates the activity of all the relevant agencies and police forces.	National / International	This office acts also as the contact point for cooperation with the Europol and Eurojust forces.		
	BE	EPIC	The EPIC is a centre designed to boost information sharing and cooperation between police forces at the EUREGIO level (i.e. Köln District, DE; Limburg, NL; Provinces of Liège and Limburg, BE).	International	Cooperation at EUREGIO level.		

	BG	Specialised Directorate Combating Organised Crime	This body, embedded within the State Agency for National Security, known until 2013 as the Chief Directorate Combating Organised Crime of the Ministry of Interior. Information in this entry and the cooperation section pertains to that iteration of the body and is supposed to remain largely unchanged after its reallocation.	National / International	The Directorate cooperates on a regular basis with foreign law enforcement institutions, from both the EU and the US. It also acts as the contact point for international organisations such as Interpol, Europol, the Southeast European Law Enforcement Centre (SELEC), the Salzburg Forum, etc.		2013 (Restructuring)
	BG	Specialised Public Prosecution Offices	Newly established offices responsible for the prosecution of organised crime cases. The Specialised Public Prosecution Offices, together with the Specialised Appellate Public Prosecution Office, were created to improve the effectiveness of the criminal prosecution of organised crime.	National	Works with the Specialised Appellate Public Prosecution Office. Normally, Specialised Public Prosecution Offices are not directly involved in international cooperation, although there have been cases of single offices doing so in the past. There are also bilateral agreements for sharing information with a number of national institutions (e.g. the State Commission on Information Security, the Ministry of Interior, the Ministry of Foreign Affairs, the Asset Forfeiture		2012

					Commission, etc.) and the Uniform Information System for Countering Crime (UISCC) is being developed.		
	BG	Specialised Criminal Courts	The Specialised Criminal Courts are responsible for the hearing of criminal cases related to organised crime. A set of second-instance Specialised Appellate Criminal Courts was created alongside them.	National	Specialised Criminal Courts will take part in the Uniform Information System for Countering Crime (UISCC), adding to their current exchange of information done in compliance with the provisions of the Criminal Procedure Code.		2012
	CR	National Police Office for Suppression of Corruption and Organized Crime (PNUSKOK)		National	Together, PNUSKOK, USKOK and Specialized Departments in county courts are part of a so-called 'USKOK Vertical', designed to tackle offenses threatening the life of the community. On the international level these agencies cooperate with international bodies, such as Interpol and Europol, as well as with agencies of other EU or third countries. Nationally they also cooperate with customs service.		

	CR	Special department at the State Attorney's Office (USKOK)	A body specialising in cases pertaining to corruption and organised crime.	National	See above for details about the 'USKOK Vertical'.		2001
	CR	Specialised Departments at the Country Courts	These departments have been activated in the courts of Zagreb, Split, Osijek and Rijeka.	Regional	See above for details about the 'USKOK Vertical'.		
	CY	Cyprus Police	The Cyprus Police is the main law enforcement agency responsible for fight against criminality, including organised crime. Staff members take part in several meetings and activities at the European and international level targeting organised crime.	National / International	Actively collaborates with Europol, Interpol, Frontex, CEPOL.		
	CY	Office of Combating Organized Crime	Special office located at the Cyprus Police headquarters specialised in fighting organised crime.	National			
	CZ	Organised Crime Detection Department – <i>Útvar pro odhalování organizovaného zločinu (ÚOOZ)</i>	Department specialised with tackling organised crime.	National			
	CZ	National Anti-Drugs Central Office – <i>Národní protidrogová central (NPC)</i>	Office tackling drug related crime, active with international cooperations.	National / International			
	CZ	Corruption and Financial Crime Detection Department – <i>Útvar odhalování korupce a finanční criminality (ÚOKFK)</i>	A department specialised in tackling financial crimes (e.g. frauds, VAT, money laundering, etc.), also in connection with organised crime groups.	National			
	CZ	Alien Police – <i>Cizinecká policie</i>					

	CZ	Special Sections of the Regional Directorate of Czech Police		Regional			
	DK	National Investigation Centre (NEC)	An investigative centre which comprises a number of regional and specialised task forces: namely the East, West, Burglary and Pusher Street task forces.	National / Regional Task Forces			
	DK	National Police	The National Police coordinates the activities of various investigative bodies (with the exception of the SØIK and SKAT).	National			
	DK	State Attorney of International Economic Crime (SØIK) Internal Revenue Service (SØK and SKAT)	SØIK and SØK were two units, now joined into one body, specialised in the fight against organised crime.		SØK, SØIK, Finanstilsynet and SKAT work closely together with the NEC on the economic aspects of organised crime cases. These agencies work together on specific cases, but share information on a regular basis.		
	DK	Police Intelligence Service (PET)					
	EE	Central Criminal Police	This is the main agency with qualifications, tools and knowledge for fighting organised crime in the Estonian system. It is tasked with tackling particularly complex cases of organised crime.	National / International	At the national level it cooperates with Police Prefectures and the Security Police Board. At the international level it works in Joint Investigative Teams with foreign counterparts, as		


					well as with Europol and Interpol. Along with Border Guards and the Tax and Customs Board, Police stores gathered intelligence data in the same database for better sharing.		
	EE	Office of the Prosecutor General	Unlike District Prosecutor's Offices, this office receives special training and resources for tackling organised crime issues.	National / International	This office cooperates at the national level with District Prosecutor's Offices. On international level it works with Eurojust as well as prosecutors' offices of other countries.		
	EE	Tax and Customs Board	This board is tasked with fighting cases of tax fraud linked to organised crime.	National	Along with the Police and Border Guards, this board stores gathered intelligence data in the same database for better sharing. Prefectures and Tax and Customs Board are mostly involved in domestic cases and work in cross-border cases only on request.		
	FI	National Bureau of Investigation (NBI)	This is the main body with specific organised crime disruption expertise in Finland, although police forces in big cities might also have special units focusing on organised crime activities. The NBI is mainly tasked	National / International	Acts as the contact point in Finland for corresponding bodies in EU countries, as well as other international agencies.		

			with gathering intelligence and fostering cooperation in the fight against organised crime.				
	FI	Narcotics Unit of the Helsinki Police	The Narcotics Unit of the Helsinki Police has developed in-house expertise in the fight of narcotics and organised crime. This unit makes use of several investigative tools, including special coercive measures and anonymous informants.	Local			
	FI	Act on Police, Customs and Border Guard	This Act has established a permanent cooperation arrangement and good cooperation practices. This has boosted information exchange, cooperation and intelligence sharing between the agencies involved in the fight against organised crime.	National	Multi-agency cooperation arrangement involving Police, Customs and Border Guard forces.		2009
	FR	The <i>Direction Centrale de la Police Judiciaire</i> (DCJP)	The DCJP is the national judicial police responsible for investigating and fighting serious crime.	National			
	FR	<i>Service d'Information de Renseignement et d'Analyse Stratégique sur la Criminalité Organisée</i> (SIRASCO).	To assess the threat of organised crime groups in France. This body aims at centralising information and intelligence pertaining to organised crime and its trends.	National			2009
	FR	<i>Service de coopération technique internationale de police</i> (SCOPOL)	Department of the DCPJ specialised in international collaboration	International	Extensive network of internal security <i>attachés</i> in Europe. Hosts units from Europol, Schengen and Interpol.		


	FR	<i>Sous-direction de la lutte contre la criminalité organisée et la délinquance financière (SDLCODF)</i>	This body encompasses several offices designed to fight organised crime, which were created according to various international conventions on relevant issues. See below for specifications.	National			
	FR	<i>Office Central pour la Répression du Trafic Illicite des Stupéfiants (OCRTIS)</i>	Part of SDLCODF. Office tasked with targeting drug trafficking.	National			1953
	FR	<i>Office central pour la répression de la grande délinquance financière (OCRGDF)</i>	Part of SDLCODF. Office tasked with targeting financial crimes.	National			
	FR	<i>Division nationale d'investigations financières et fiscales (DNIFF)</i>	Part of SDLCODF. Office tasked with targeting financial crimes.	National			2004
	FR	<i>Office central pour la répression de la traite des êtres humains (OCTREH)</i>	Part of SDLCODF. Office tasked with targeting human trafficking.	National			1958
	FR	<i>Office central pour la répression du faux monnayage (OCRFM)</i>	Part of SDLCODF. Office tasked with targeting currency counterfeiting.	National			1929
	FR	<i>Office central de lutte contre le trafic de biens culturels (OCBC)</i>	Part of SDLCODF. Office tasked with targeting the illicit import, export and transfer of ownership of cultural property.	National			
	FR	<i>Office central de lutte contre la criminalité liée aux technologies de l'information et de la communication (OCLCTIC)</i>	Part of SDLCODF. Office tasked with targeting cybercrime related activities.	National			2000


	FR	<i>Office central pour la répression des violences aux personnes (OCRVP)</i>	Part of SDLCODF. Office tasked with targeting violence against individuals.	National			2006
	FR	<i>Office central de lutte contre le crime organisé (OCLCO)</i>	Part of SDLCODF. Tasked with targeting organised crime. It coordinates the national police brigades (BRI – <i>Brigades de recherché et d'intervention</i>) that are in charge of detecting, surveillance and arresting offenders in organised crime-related activities.	National / International	This office acts as the contact point for JITs and international requests.		2006
	FR	<i>Direction centrale de la police aux frontières (DCPAF)</i>	A branch of the Police Nationale dedicated to border patrols. It comprises two offices: one dedicated to irregular immigration (<i>Office central pour la répression de l'immigration irrégulière et l'emploi d'étrangers sans titre – OCRIEST</i>), and one dedicated to migrant smuggling (<i>Unité de coordination opérationnelle de la lutte contre le trafic et l'exploitation des migrants – UCOLTEM</i>).	National			1999
	FR	<i>Brigade Nationale de lutte contre la criminalité organisée en Corse (BNLCOC)</i>	Special brigade fighting organised crime in Corsica, created by the Police Nationale.	Regional			2013
	FR	<i>Office central de lutte contre la délinquance itinérante (OCLDI)</i>	Office of the Gendarmerie Nationale dedicated to the fight of itinerant delinquency.	National			2004

	FR	<i>Office central de lutte contre les atteintes à l'environnement et à la santé publique (OCLAESP)</i>	Office of the Gendarmerie Nationale, active in the field of environmental protection and public health.	National			2004
	FR	<i>Office central de lutte contre le travail illégal (OCLTI)</i>	Office of the Gendarmerie Nationale, working against illegal work.	National			
	FR	<i>Direction Nationale du Renseignement et des Enquêtes Douanières (DNRED)</i>	This body carries out investigations into smuggling, counterfeit money, and customs fraud. It works both as an investigating unit and an intelligence agency.	National	Works for the <i>Direction Générale des Douanes et Droits Indirects</i> with the support of the <i>Service national des douanes judiciaires (SNDJ)</i> .		1991
	FR	<i>Bureau de lutte contre le crime organisé, le terrorisme et le blanchiment (BULCO)</i>	Acts as a central agency against organised crime within the Ministry of Justice. It is placed under the <i>Direction des Affaires Criminelles et des Grâces (DACG)</i> . It coordinates the activity of the JIRs, gathers a high level of judicial expertise in the field of organised crime and detects gaps in the existing laws and procedures.	National / International	In charge of carrying out international cooperation.		
	FR	<i>Juridictions inter-régionales spécialisées (JIRS)</i>	The JIRS work as special judicial panels that gather public prosecutors (<i>Magistrats du Parquet</i>) and investigating judges (<i>Juges d'instruction</i>). These panels are specialised in organised crime and 'complex' cases.				2004
	FR	<i>Service interministériel d'assistance technique (SIAT)</i>	An agency working for the Police, the Gendarmerie and the Customs,	National			


			providing technical assistance for the use of STIs.				
	FR	<i>Traitement du Renseignement et Action contre les Circuits Financiers clandestins</i> (TRACFIN)	An information service working within the Ministry of Economy and Finance which gathers declarations about suspicious activities sent by financial institutions.	National			1990
	FR	<i>Agence de recouvrement des avoirs saisis et confisqués</i> (AGRASC)	Agency active within the Ministry of Justice tasked with facilitating the seizure and confiscation of criminal assets.	National			2011
	DE	Federal Investigative Police Office (BKA)	Staff of more than 5,500 people, including not only policemen but 70 other occupational groups. Carries out nationwide monitoring, evaluation system, overview of the organised crime situation as well as own research on the subject. The SO department is the central point for information on organised crime and works in conjunction with the organised crime departments of the Federal Criminal Police (BKA, CCC, BPOL) and the sixteen Federal States.	National / International	Cooperates at the international level with Europol, EU Policy Cycle, Interpol, OC services in all European MS, international research and training bodies, judicial authorities; FIU, Egmont, FATF. It also deploys liaison officers worldwide. BKA comprises specialized bodies for general cooperation independent of individual cases like the Commission OC (KOK) and the Working Group Investigative Police (AG-Kripo). The BKA coordinates national efforts to combat OC and facilitates information		

					exchange for the Länder police forces. In each of the 16 German Länder (federal states) a State Criminal Police Office coordinates the state efforts to combat organized crime and acts as information sharing node for the regional and local police elements		
		<i>Bundesanstalt für Finanzdienstleistungsaufsicht</i> – BaFin (Federal Financial Supervisory Authority)	Specialized organised crime department for the prosecuting services.	National			
		Prosecutor General	The Prosecutor General is primarily responsible for the prosecution of crimes against the internal security and external security of the Federal Republic of Germany. It has a high degree of specialisation and gained considerable experience as an institution during the fight against terrorism in the 1970s.	National			
		<i>Landeskriminalämter</i> (LKÄ)	The Landeskriminalämter are the Central Investigative Police Offices of the sixteen Federal States and specialized departments in organised crime in the police forces of the	Regional	Coordinates with the BKA for national/international information exchange and cooperation.		

			Federal States				
		<i>Zentralstelle für Organisierte Kriminalität bei der Generalstaatsanwaltschaft Celle (ZOK)</i>	In each of the 16 German Länder (federal states) one to three attorneys general oversee the public prosecution authorities. One of them, the Center for Organized Crime at the Attorney General Celle (covering the fight against organized crime in the state of Lower-Saxony), excels as the best-equipped and trained prosecuting agency in this area of criminal prosecution.	Regional			
	EL	Department of Organised Crime	This is a Subdivision of the Hellenic Police based in Athens and Thessaloniki. It comprises the Department of Information Management and Strategy, the Department of Information Verification, the Department of Anti-Human Trafficking and the Department of Witnesses Guarding. Units from this subdivision may operate outside of their district of competence to pursue investigations and are tasked with pursuing any organised crime activity, even if the type of crime investigated would normally fall within the competences of another department (e.g. financial crime, etc).	National / International	Cooperates at the national level with other subdivisions of the Hellenic Police (e.g. Financial and Economic Crime Unit; Cyber Crime Unit). Maintains ties with the Organised Crime Prosecutor, Customs Office, Coastal Guard. Members of these units participate also at European-level for the exchange of information and knowledge about organised crime. Cooperates with Europol and other foreign law		

					enforcement agencies.		
	EL	Organised Crime Prosecutor	Part of the Ministry of Justice, but located within the Police Headquarters in Athens. This office cooperates closely with the Department of Organised Crime and is also tasked with granting permission to use special investigative tools. It has no hierarchical authority over other prosecutors even for organised crime cases.	National / International	Cooperates with the Department of Organised Crime. As a Prosecutor Office this unit maintains active links with all law enforcement agencies within the country. Coordinates activities with Eurojust.		
	EL	Financial and Economic Crime Unit	Part of the Ministry of Finance. This unit does not specialise in fighting organised crime only, but due to its area of activity it is often facing it. In particular, this unit specialises in the fight against financial and economic crimes (e.g. money laundering; illegal financial transactions; VAT and tax frauds; criminal activities carried out through innovative electronic means; surveillance of maritime areas against drug/human/hazardous substance trafficking). It comprises also a special unit against drug trafficking.	National	It cooperates with the Hellenic Police, the Justice System in general, the Economic Crime Prosecutor, the Customs Office. Members of this unit also participate in European fora in order to share information and knowledge of economic crime in Europe.		
	HU	National Investigation Bureau – <i>Nemzeti Nyomozó Iroda (NNI)</i>	This bureau has dedicated units focusing on various topics, such as drugs, THB, illegal immigration, asset recovery, etc. One of these units constitutes the Department against	National			


			organised crime.				
	HU	Criminal Directorate – <i>Nemzeti Adó- és Vámhivatal Bűnügyi Főigazgatósága</i> (NAV BF)	The Criminal Directorate is embedded within the National Tax and Customs Office (NAV). The directorate plays a coordinating role that allows it to detect and tackle financial crimes connected to organised groups.	National			
	HU	FIU	A separate and independent unit working within the NAV.				
	HU	Coordination Centre against Organised Crime	This body is subordinated to the minister directing national security services. It serves as an information hub on organised crime for all relevant institutions. Its main task is to gather and analyse information gained by law enforcement agencies, judicial bodies and other authorities.	National			
	HU	Office of the prosecutor general					
	IE	Criminal Assets Bureau	This is a multi-agency bureau with officials coming from the police, revenue commissioners, and social welfare. This type of structure allows for better sharing of information and data across agencies. The bureau maintains a specific focus on criminal assets (post-conviction and non-conviction based approaches) as well as welfare offences. Taxation of assets is its most potent power, though the NCB powers receive most attention.	National	Multi-agency body (Police; Revenue Commissioner; Social Welfare).		1996

	IE	Police	There are a number of dedicated police units in the fight against organised crime, such as: the Special Detective Unit, the National Bureau of Criminal Investigation and the Organised Crime Unit. Special targeted operations are also carried out according to budget availability (e.g. Operation Anvil).	National			
	IT	Central Directorate for Antidrug Services - <i>Direzione Centrale per i Servizi Antidroga</i> (DCSA)	An interagency organization staffed with personnel, in equal numbers, from the State police, Arma dei Carabinieri and Financial and Customs Police. The Directorate is responsible for the enforcement of directives issued by the Minister of Interior concerning coordination and planning of activities. It also provides intelligence for police and custom forces.	National / International	With regards to its area of expertise, the DCSA acts as the national representative and maintains operative connections with OICP-Interpol, UNODC, Council of Europe, EU, Schengen and the Dublin Group. The DCSA also sends antidrug experts in Italian Embassies and Consulates. The DCSA is the sole national agency responsible for special investigative operations such as simulated drug acquisition and controlled deliveries.		1975
	IT	Central Anticrime Directorate - <i>Direzione Centrale Anticrimine</i> (DAC)	The DAC is one of the directorates subordinated to the Public Safety Department of the Ministry of Interior. The DAC aims to coordinate	National / International	The DAC hosts in its premises an office of the US FBI staffed with two investigators, as well as a		2005


			the activities of national and local police forces against common and organized crime; it also targets international organizations, money laundering and weapons trafficking, the penetration of legitimate economy by criminal enterprises. It comprises an Office for General Affairs, a Forensic Service, a Central Operative Service and a Service for the Control of the Territory.		French Police Liaison Office.		
	IT	Central Directorate for Immigration and Border Police – <i>Direzione Centrale dell'immigrazione e della Polizia delle frontiere</i>	The Directorate is in charge of gathering and analysing information on measures taken to monitor, prevent and fight illegal immigration by sea.	National	It coordinates operations carried out by the Italian Navy, police forces and harbour offices.		2002
	IT	Anti-Mafia Investigations Directorate – <i>Direzione Investigativa Antimafia</i> (DIA)	Investigative Body subordinated to the Public Safety Department of the Ministry of Interior. It is an interagency body staffed with member of the State police, Arma dei Carabinieri, Financial and Customs Police, State Forestry Corps, Penitentiary Police and employees of the Civil Administration. DIA is tasked with undertaking criminal investigations regarding crimes related to the Mafia and other organized crime groups, both at the pre-emptive and judicial levels. The DIA Director has a relevant role in proposing pre-emptive protecting	National / International	At the national level, DIA works in close cooperation with the DNA, the office of the Procuratore Nazionale Antimafia and the DDAs. At the international level, DIA maintains active cooperation with the relevant agencies in European states, as well as in other continents.		1991



			measure at the individual and economic level (protection programmes, seizures, etc.).				
	IT	Finance Guard - <i>Guardia di Finanza</i> (G.diF.)	<p>Guardia di Finanza is one of Italy's five police agencies; even though it has a military organization and is part of Italy's Armed Forces, G.diF. is placed under the control of the Ministry of Economy and Finance.</p> <p>The Guard performs tributary police functions and is responsible for dealing with financial crimes and smuggling; it is also involved in the fight against the drugs trade. It hosts a series of special departments dedicated to the fight of specific categories of crimes (see below).</p>	National			1881
	IT	Central Service for Investigation on Organised Crime - <i>Servizio centrale di investigazione sulla criminalità organizzata</i> (SCICO)	The SCICO is a special branch of the Guardia di Finanza which targets the penetration of legitimate economy by criminal organizations. The SCICO is responsible providing technical and logistic support to the work of the GICO.	National	At the national level cooperates with the DIA, the Procuratore Nazionale Antimafia and closely cooperates with GICO.		1993
	IT	Investigation Groups on Organised Crime - <i>Gruppi d'investigazione sulla criminalità organizzata</i> (GICO)	GICO are investigative groups present in the 26 districts where DDAs offices are located. GICO are specialised on fiscal, economic and tax-related crimes. Within GICO are operative the Anti-Drug Operational Groups (Gruppi Operativi Antidroga -	District			1991

			GOA) and the Fraud-Repression Groups (Gruppi Repressione Frodi - GRF).				
	IT	Anti-Mafia National Directorate – <i>Direzione nazionale antimafia</i> (DNA)	The DNA is a national body, headed by the Procuratore Nazionale Antimafia which hosts 20 magistrates, experienced in anti-organised crime activities, who work as deputy public prosecutors. The DNA is articulated in two offices, the ‘Service for Study and Documentation’ and the ‘Service for International Cooperation’	National	At the national level the DNA cooperates and can require the assistance of the DIA, ROS and SCICO.		1992
	IT	Anti-Mafia National Prosecutor – <i>Procuratore Nazionale Antimafia</i>	This is the office which manages the Anti-Mafia National Directorate. It does not have normal prosecutor’s powers, but it works as the coordinator, facilitator and guarantor of national prosecutions and investigations carried out against mafia and organised crime groups.	National			1992
	IT	Anti-Mafia District Directorate – <i>Direzione distrettuale antimafia</i> (DDA)	There are 26 DDA offices located within the 26 districts for Courts of Appeal. DDA offices take responsibilities for anti-mafia and anti-organised crime prosecutions within their district.	District			1992
	LV	State Police		National			
	LV	Security Police		National			
	LV	Financial Police		National			


	LV	Military Police		National			
	LV	Latvian Prison Administration		National			
	LV	Corruption Prevention and Combating Bureau		National			
	LV	Customs authorities		National			
	LV	State Border Guard		National			
	LV	Captains of seagoing vessels at sea					
	LV	Commander of a unit of the Latvian National Armed Forces located in the territory of a foreign state					
	LT	Lithuanian Criminal Police Bureau	This is a specialised police agency established on a non-territorial basis. It aims at preventing and investigating serious crimes and comprises the following investigating units: Organized Crime Investigation Board 1-2-3; Cyber Crime Investigation Board; Asset Recovery Board; Serious Crime Investigation Board; Pre-trial Investigation Board. The following special assignments units: Special Assignments Board 1-2-3; International Liaison Office. Two management and control units: Activity Coordination and Control Board; Information Technology Board.	National / International			


	LT	General Prosecution Service	This institution comprises prosecutors and special divisions focusing on organised crime. Among other things it plays a very important role in coordinating pre-trial investigations. It also contributes to the legislative process.	National / International	Plays the role of the central institution in communicating with foreign institutions and international organizations. Maintains contacts and representatives at Europol, OLAF, Eurojust and at the European Judicial Network.		
	LT	Division of Fight against Organized Crime	A special division part of the Prosecutor's General Office focusing on organised crime and corruption cases.	National			1995
	LU	Public Prosecutor Office	Although there is no specialised anti-organised crime agency in Luxembourg Justice system, the Public Prosecutor Offices comprises a service specialised in organised criminality.	National / International	Due to country's size, Luxembourg's prosecution services cooperate with other national and European agencies on a day-to-day basis.		
	LU	<i>Police Judiciaire – Service Criminalité organisée</i>	A specialised department for organised crime within the Judiciary Police.	National / International	Due to country's size, Luxembourg's police services cooperate with other national and European agencies on a day-to-day basis.		
	LU	Luxembourg Tax Authorities – Anti-fraud service – <i>Administration de l'enregistrement et des domaines, service anti-fraude</i>	The Anti-Fraud Service is located within Luxembourg's Tax Authority and it faces organised crime issues in relation to tax-fraud. This service is not part of the judicial or law enforcement systems.	National / International	Due to country's size, Luxembourg's authorities cooperate with other national and European agencies on a day-to-day basis.		


	LU	Financial Intelligence Unit – <i>Cellule de renseignement financier</i> CRF	The CRF forms part of the prosecution office in Luxembourg city. It is an agency specialized in combatting money laundering and terrorism financing, but that might also intervene in organised crime cases. It plays in particular a pivotal role in collecting data from private institutions (moreover, all professionals of the finance sector have the duty to report to the CRF suspicious activities that may constitute money-laundering or terrorism financing).	National / International	Due to country's size, Luxembourg's authorities cooperate with other national and European agencies on a day-to-day basis.		
	MT	Malta Police Force	Malta Police Force represents Malta's principal investigative unit and the only force, besides the Attorney General, with prosecution powers.	National			
	MT	Customs	Customs forces monitor goods transiting in and out of Malta. Furthermore, Customs gathers intelligence with regards to the movements of goods in the territorial waters, which they then transmit to Police forces.	National			
	MT	Armed Forces of Malta	The Armed Forces of Malta monitor Malta's borders, investigates human trafficking and cooperates with other forces in cases where sea vehicles are needed.	National			
	MT	Malta Security Service	This is a special branch comprising	National	Multi-agency service		


			members of the Malta Police Force, Customs and the Armed Forces. This service may use communication intercept tools.		(Malta Police Force; Customs; Armed Forces of Malta).		
	MT	Financial Intelligence Analysis Unit	This unit is responsible for the collection, collation, processing and analysis of regarding money laundering and the funding of terrorism.	National			
	NL	National Prosecution Bureau - <i>Landelijk bureau (OM)</i>		National	The National Prosecution Office and Prosecution Bureau for Fraud and Economic Crime facilitate co-operation between crime-squads, fiscal police and investigative agencies for special laws (e.g. social security fraud).		
	NL	National Detective Service		National			
	NL	Prosecution Bureau for Fraud and Economic Crime		National			
	NL	Fiscal Police		National			
	NL	Royal Military Police	Border control	National			
	PL	Central Bureau of Investigation (CBI)	The CBI is a specialized elite structure of the Polish Police which is tasked with combating organized crime and narcotics. Besides having access to all the data available to the Polish Police,	National / International	The CBI comprises an autonomous cell for international operations which pursues Polish offenders outside of		

			the CBI may use additional legal tools such as surveillance, wiretapping, undercover operations and informants to pursue its investigations. The CBI is allocated a special budget separated from the rest of Police forces.		Poland. The CBI is also responsible for Poland's participation in the OCTA programme.		
	PL	Border Guards	Border Guards target cross-border criminal activities including smuggling of goods, illegal migration and other organised crime-related offences.	National / International	Due to Poland's eastern border being an EU outer border, Border Guards maintains close ties with FRONTEX. Besides providing technical and financial assistance to Border Guards, FRONTEX maintains its headquarters in Warsaw.		
	PL	Internal Security Agency	The Internal Security Agency (ISA) works on all forms of serious economic, drugs-related and organised crimes.	National / International	ISA's activities are mostly confidential, however, past international joint operations have been disclosed (e.g. Operation Gringo with the United States Drug Enforcement Agency).		
	PT	Judiciary Police - <i>Polícia Judiciária</i> (PJ)	The PJ is the national police force and has the exclusive legal attribution for criminal investigations related to the 'criminal association' offence and for the investigation related to a catalogue of other serious offences, particularly when said offences have	National / International	Being the main law-enforcement agency in the country, the PJ hosts liaison officers from other national forces, as well as from Europol and Interpol.		


			a cross-border dimension or are committed in a 'highly organised' form. This is a highly specialised body comprising: the National Unit for Economic and Financial Crime; the National Unit for Counterterrorism; the National Unit for Drug Trafficking.		At the National Level, there are formal cooperation institutions, like the Coordinator Council for Criminal Investigation, where members of different police forces have a seat; and more pragmatic and case-by-case opportunities, like the possibility to set up a national joint investigation teams for special cases.	
	PT	Central Department for Investigation and Prosecution – <i>Departamento Central de Investigação e Ação Penal</i> (DCIAP)	The DCIAP is a national department of Public Prosecution. It coordinates and oversees preventive actions and investigations conducted by police forces (mainly PJ) with a legal attribution for the prosecution of 'violent, especially complex or highly organised crime'.	National	It coordinates the investigations made by different police forces. It coordinates also the work of other prosecution departments operating at the regional level. In this last instance it not only shares information, but also advocates concrete investigations when a connection to organised crime arises.	1999
	RO	Directorate for Investigations of Organized Crime and Terrorism (DIICOT)	This directorate focuses on organized crime cases working in partnership with the specialised forces present within the ranks of the National Police. The DIICOT is thus placed	National	The DIICOT works on organised crime cases with the special units of the National Police focusing on these issues.	


			effectively under two chain of commands, that of the Police and that of the prosecutor.				
	RO	National Anticorruption Directorate (DNA)	The DNA is a fully integrated structure that includes police officers, specialists and prosecutors under one command belonging to the head prosecutor of the DNA.	National	Multi-agency structure with an independent command. The DNA works also with other law-enforcement agencies and intelligence bodies.		
	SK	National Criminal Agency (NAKA or NCA)	The NCA was established in 2012 by merging the Bureau for combating organised crime (UBOK) and the Bureau for combating corruption (UBPK) in order to pool resources and expertise, making fight against organised crime more effective. It comprises four national units: anti-narcotic, anti-corruption, anti-organised crime and financial. The NCA comprises a central office with three regional structures and its own tactical unit, providing nationwide coverage and minimising the risk of information leak.	National / International	National Criminal Agency, Office of the Special Prosecutor and Specialised Penal Court are closely interlinked and form a three stage system from investigation to indictment to final judgement. Each of them is situated outside of the general criminal justice system and this position enables them to act with a greater degree of independence from various pressure groups, which is vital for combating organised crime. Furthermore, the NCA maintains bilateral cooperation, especially with neighbouring countries (CZ, PL, HU, AT).		2012

	SK	Office of the Special Prosecutor (OSP)	The OSP is a specialised section within the Prosecutor general`s office tasked with the prosecution of crimes related to organized crime, criminal groups, terrorist organisations and corruption. The OSP, NCA and SPC were created at the same time in an attempt to complement each other in the fight against organised crime.	National / International	See above for a presentation of the links between NCA, OSP and SPC. Furthermore, the OSP maintains bilateral cooperation with neighbouring countries (CZ, PL, HU, AT) as well as with international bodies (e.g. OLAF, Eurojust, CARIN).		2012
	SK	Specialised Penal Court (SPC)	This court works as the first instance court for the same group of criminal offences which are prosecuted by the Office of the Special prosecutor (OSP). Due to the nature of these cases, SPC judges are given special protection by the police.	National	See above for a presentation of the links between NCA, OSP and SPC.		2012
	SI	Office for Money Laundering Prevention	This office is tasked with providing evidences and report crimes. It has proved particularly important in providing bank data from both Slovenia and abroad.	National			
	SI	National Bureau of Investigation	A body comprising experts from different fields tasked with the investigation of various criminal acts (including high-profile cases).	National			
	SI	Specialised Office of the State Prosecutor	This office possesses jurisdiction for prosecution and works particularly well in the field of drug trafficking.	National			

	SI	Commission for the Prevention of Corruption	A commission reporting crime and providing evidences for cases pertaining to corruption.	National			
	SI	Specialised Department of the Circuit Criminal Court in Ljubljana	Case work				
	ES	<i>Court System (Audiencia Nacional)</i>	The <i>Audiencia Nacional</i> is a specialised judicial body, created with the main purpose of dealing with terrorist cases. The Criminal Chamber has also jurisdiction over important cases of economic and organised crime, as well as decisions about extradition and the execution of European arrest warrants.	National			1977
	ES	Public Prosecution System (<i>Fiscalía de la Audiencia Nacional</i>)	The <i>Fiscalía de la Audiencia Nacional</i> represents the public prosecution service before the Audiencia Nacional in all cases but those where competence lies with one of the two specialized bodies listed below. This office is headed by the <i>Fiscal General del Estado</i> (Attorney General).).	National	This office is fully integrated within the <i>Audiencia Nacional</i> (see above).		2007 (Last Charter Review)
	ES	Public Prosecutor's Office against Drug Trafficking (<i>Fiscalía Especializada Antidroga</i>)	This office handles drug trafficking and money laundering cases under the jurisdiction of the Audiencia Nacional, including those with an organised crime component. It also coordinates the action of the rest of the Spanish public prosecution system in drug trafficking, money	National			2007 (Last Charter Review)

			laundering related cases.				
	ES	Public Prosecutor's Office against Corruption and Organised Crime (<i>Fiscalía especializada contra la corrupción y la criminalidad organizada</i>)	This office handles 'especially relevant cases' indicated by the Attorney General for the following crimes: Tax fraud and contraband; Misconduct of executive or public official; Insider trading; Misuse of public funds; Illegal taxation; Trafficking; Bribery; Fraud; Insolvency offences; Public procurement offences; Crimes regarding intellectual property and copyright infringement; Corporate offences; Money laundering and handling of criminally acquired goods (unless committed in relation with drug trafficking or terrorism).	National			2007 (Last Charter Review)
	ES	Organised Crime Intelligence Unit - <i>Centro de Inteligencia sobre el crimen organizado</i> (CICO)	This body is part of the Ministry of Interior and is placed under the direct supervision of the <i>Secretario de Estado</i> . The CICO centralizes the intelligence and coordinates investigating activities on organised crime. It publishes the ' <i>Informe anual sobre la situación de la criminalidad organizada en España</i> ' (Annual Report on the Situation of Organised Crime in Spain)	National			2006
	ES	Central Unit for Drugs and Organised Crime - <i>Unidad Central de Drogas y Crimen</i>	A special unit focusing on drug trafficking and organised crime in general.	National	It coordinates its operation with the Policía Nacional.		1997

		<i>Organizado (UDYCO)</i>					
	ES	Central Unit for Economic and Financial Crime - <i>Unidad Central de Delincuencia Económica y Financiera</i> (UDEP)	This unit is specialised in cases pertaining to money laundering. The Activities of the UDEF have proven instrumental to the advance of organized crime investigations.	National			
	ES	Central Operative Unit - <i>Unidad Central Operativa</i> (UCO)	This unit is part of the Guardia Civil and specialises in complex investigations including, among others, organised crime cases. It has helped Spanish courts in some of the most complex criminal cases in the last years.	National			1987
	SE	National Criminal Police (RKP)	This is the only police force existing in Sweden which operates at the national level and coordinates its activity through the activities of 21 Criminal Police counties (see below). It comprises one national task force against organised crime.	National / International	Maintains ties and cooperates with Europol and Interpol forces.		
	SE	County Criminal Police	County Criminal Police offices are active at the county level (21 existing).	County			
	SE	Regional Intelligence Centers (RUC)	There are eight RUC in Sweden each of which maintains a special task force against organised crime, comprising around 20 individuals, mostly from police forces. These task forces may operate beyond their region provided they are granted permission from the Operative	Regional / National			

			Council.				
	SE	International Prosecutors Chambers	These chambers belong to the National Prosecutor's Authority and operate at an international level through joint operations.	International	This chamber works jointly with prosecutors from other countries and with Eurojust.		
	SE	Economic Crime Bureau	This is a bureau specialized in the fight of economic and financial crimes (e.g. tax fraud, false account insider trading). The Economic Crime Bureau is staffed by police officers and is commanded by the Police itself.	National			
	SE	Tax Authority	This authority is also tasked with investigating tax-fraud and other financial crimes. It comprises special Tax Crime Units which can be seen as a Police Force devoid of arms.	National			
	UK	Scottish Crime and Drug Enforcement Agency (SCDEA)	From 2012 this body is part of the Police of Scotland. It aims to prevent and detect serious organised crime; storing and analysis of information relevant to the prevention, detection, investigation or prosecution of drug and organised crime offences.	National (Scotland) / International	SCDEA works with police forces from across the UK and with the NCA for investigations and use of the European Arrest Warrants. The SCDEA maintains an embedded police officer at Europol's office at The Hague.		2006
	UK	Crown Office and Procurator Fiscal Service	Cooperates in joint investigations by means of 'letters of request' and could also avail of the JIT process.	National	Maintains close collaboration with the SCDEA thanks to the structure and procedures of the Scottish system.		

	UK	National Crime Agency (NCA)	Previously known as the Serious Organised Crime Agency (SOCA). The NCA has a coordinating and overseeing role, complimentary to that of other police forces, with regards to organised crime and life-long offenders.	National / International	The NCA works through Europol and Interpol networks, it also provides UK and international liaison support to the PSNI.		2006
	UK	Police Service of Northern Ireland (PSNI)	The Police Service of Northern Ireland is a leading service active on a number of issues relating to organised crime (e.g. drugs; human trafficking; cyber-crime).	National / International	The PSNI has active collaborations with other UK and EU forces (e.g. joint operations against human trafficking with the Swedish Police).		

Appendix C: Interviewees for UK Case Study

Interviewees included senior offices from Investigations Command, the Border Commands, the National Cyber and Behavioural Crime Units, Specialist Services and Crime Prevention at NCA, as well as senior government, law enforcement and legal practitioners from other institutions as indicated below.

Note: LE = law enforcement officer; A = academic; G = representative of government.

- 1) LE1: NCA
- 2) LE2: NCA
- 3) LE3: NCA
- 4) LE4: NCA
- 5) LE5: NCA
- 6) LE6: NCA
- 7) LE7: NCA
- 8) LE8: NCA
- 9) LE9: NCA
- 10) LE 10: NCA
- 11) LE11: NCA
- 12) LE12: NCA
- 13) LE13: Crown Office (Scotland)
- 14) G1: Cabinet Secretary, Scotland
- 15) G2: Minister, Northern Ireland
- 16) A1: Dundee University
- 17) A2: Stirling University
- 18) LE14: HMRC
- 19) LE15: SIA
- 20) LE16: City of London Police