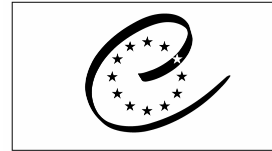

Council of Europe

Effectiveness of provisions on membership in criminal organisations

Organised crime – Best Practice Survey n°7

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1 Introduction

1.1 BACKGROUND

The Group of Specialists in Criminal Law and Criminological Aspects of Organised Crime was established in 2000, replacing and continuing the work of the Committee of Experts on Criminal Law and Criminological Aspects of Organised Crime, set up in 1997. Its terms of reference state that the committee should – *inter alia* – carry out best-practice surveys to study existing solutions to combating organised crime in member states, as examples for other member states.[1]

Incriminating membership of or participation in criminal organisations can be a potentially powerful tool for combating organised crime and dismantling its structures; it has therefore been included in a variety of international legal instruments, in particular:

- the EU Joint action of 21 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the member states of the European Union;[2]
- the United Nations Convention on trans-national organised crime (November 2000);[3]
- the Council of Europe Recommendation (2001) 11 of the Committee of Ministers to member states concerning guiding principles in the fight against organised crime.

As a consequence, it was found necessary to try to determine how effective this mechanism of incriminating membership really was– in the light of specific practices and experience with such provisions – and to examine whether it was possible to draw lessons for other countries' policy-makers, practitioners and others involved in the fight against organised crime.

1.2 PURPOSE OF THE SURVEY

The basic idea behind these best-practice surveys is that member states should be enabled to learn from the way the theory and practice of combating organised crime are applied in other member states. Each survey concentrates on a particular topic.

Since it is practically impossible to study the situation in every member state, few are selected on the basis of their experience in the field and their characteristics, such as legal system and geographic position.

It is not necessary to try and provide a complete picture of the topic in each of the countries visited: for instance, it is clear that in the present case ("the effectiveness of provisions on membership in criminal organisations"), it could have been interesting to analyse also the relevant jurisprudence. Instead, the Council of

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1 The previous best-practice surveys (e.g. on witness protection, reversing the burden of proof, interception of communications, crime analysis) are available at http://www.coe.int/economiccrime.

2 The text is available on the well documented website of the European Judicial Network: http://ue.eu.int/ejn/.

3 See http://www.unodc.org/unodc/en/organised_crime.html.

Europe survey team concentrated on those elements of the situation that could serve as good examples ('best practices').
It soon appeared that a constellation of further aspects – in addition to the mere legal provisions incriminating membership in criminal organisations – would need to be taken into account. These concern practical and accessory issues, which constitute *per se* wide topics of research and discussion.

These allied topics include such things as the common understanding of the relevant concepts among those responsible for their application, the importance of collaborators of justice, intelligence and information gathering, dual incrimination in the framework of international co-operation, post-conviction screening and so on.

In order not to dilute too much the topic of the present survey, developments on these accessory issues are limited to what the delegation considered particular relevant. They are presented here due to their importance within the global problem. And also as a kind of reminder.

1.3 DEFINITIONS

For the purpose of this best-practice study, the following definition is used:

Organised crime means[4] the illegal activities carried out by structured groups of three or more persons existing for a prolonged period of time and having the aim of committing serious crimes through concerted action by using intimidation, violence, corruption or other means in order to obtain, directly or indirectly, a financial or other material benefit.

Although the concept of organised crime comes close to certain other similar criminal-law concepts such as, for instance, "association of criminals", "gangs", "organised band" and the like, it should at least be considered as distinct from the concept of conspiracy.

Such a distinction is sometimes difficult because the criminalisation of membership in a criminal organisation and the criminalisation of conspiracy follow a similar goal, which is of a preventive nature. But the time element to which the idea of organised crime refers ("prolonged period of time") indicates that the organised crime group is not a merely temporary group of persons working together in the framework of an isolated crime.

This was also made clear in the UN Convention.[5] Furthermore, the idea of conspiracy generally applies to the preparatory stage before the committing of an offence.

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4 See Recommendation No. R (2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime.

5 *Article 2: Use of terms*
For the purposes of this Convention:
(*a*) "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;
(*b*) "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
(*c*) "Structured group" shall mean a group 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;(…)

1.4 SITE VISITS

The use of provisions criminalising membership of criminal organisations was studied in three countries: Germany, Italy and Poland. As in previous best-practice surveys, certain considerations guided the selection of countries. In the present case:

- organised crime is officially considered a crime policy issue in the three countries and they all experience problems because of the illegal activities of organised criminal groups;
- they have different legal and institutional systems/traditions, from which it was expected that the countries would vary in their background and use of provisions incriminating membership in criminal organisations;
- in order to have a high level of input for the study, care was taken to include countries that have significant experience.

The member states selected for this best-practice survey were visited in the period 3-7 February 2003.

The delegation was composed of Dr Maria Holtkamp-Panagiotidou (lawyer), Professor Kauko Aromaa (member of PC-S-CO and Director of the Institute for Crime Prevention and Control affiliated with the United Nations-HEUNI) and Mr Christophe Speckbacher (Administrator, Department of Crime Problems of the Council of Europe).

In each of the three countries, the delegation met with representatives from the ministries of justice, law-enforcement agencies, prosecutors and judges. A number of these representatives (the police and prosecutors in particular) were eminent specialists and practitioners dealing mainly with cases typically related with organised crime activities.

The purpose of the discussions was to obtain an overview of the application of the relevant legal measures, and to identify possible strengths and weaknesses of each approach. The end result is summarised in a conclusion comprising certain suggestions.

In addition to the interviews, relevant documents provided to the delegation, or resulting from a limited search in the literature, were studied.[6] On the basis of this material, this report was written. The views expressed do not necessarily represent the official views of the Council of Europe.

The authors would like to stress once again that this survey is not meant to be a comprehensive study. It is nevertheless expected that the findings will provide food for thought. It also aims at sharing awareness of a number of challenges that have (or will have) to be faced, in order to strengthen dialogue and find common responses within and outside the Council of Europe. Finally, it could also assist such dialogue by contributing to a common conceptual understanding.

[6] notably the Council of Europe annual reports on the situation of organised crime in the member countries. See www.coe.int/economicrime

1.5 INCRIMINATION OF MEMBERSHIP: AN INTERNATIONAL STANDARD

Under the auspices of the Council of Europe and other international organisations, a series of texts have been adopted that countries should take into consideration with the aim of strengthening domestic and international modes of countering organised crime. In addition, as far as the Council of Europe is concerned, a number of human rights standards remind us of the need to remain vigilant in order to maintain a proper balance with the respect of such standards.

1.5.1 The requirement to criminalise membership

These requirements are repeated here only for the purposes of the present study, and not to assess whether the corresponding provisions in Germany, Italy and Poland are in line with these requirements.

> **Article 2 of the EU joint action of 1998**[7]
>
> 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.

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[7] This text was the result of work which started in 1993, when the Council of the European Union agreed to start collecting data on the phenomenon of organised crime. For this purpose, a list of criteria – both mandatory and optional – was used:
Mandatory criteria: collaboration of three or more people, for a prolonged or indefinite period of time, suspected or convicted of committing serious criminal offences, with the objective of pursuing profit and / or power
Optional criteria: specific task or role for each participant, internal discipline and control, use of violence or intimidation, influence on politics, media, public administration, law enforcement, justice, economy by corruption or otherwise, use of commercial or business-like structure, money laundering, international co-operation

As far as the UN Convention on Trans-national Organised Crime (November 2000) is concerned, Article 5 on "Criminalisation of participation in an organised criminal group" provides that:

> 1. 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 organised criminal group;
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in:
> a. Criminal activities of the organised criminal group;
> b. Other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above described criminal aim;
> (*b*) Organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organised 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 party whose domestic law requires involvement of an organised 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 organised criminal groups. Such states party, as well as states party 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.

On 19 September 2001, Recommendation R (2001) 11 of the Committee of Ministers to member states, concerning guiding principles on the fight against organised crime, was adopted. Under Section III, titled "Principles relating to the criminal justice system", the first guiding principle mentioned is the following:

Member states should strive to criminalise the participation of any person in an organised crime group, as defined above,[8] irrespective of the place in the Council of Europe member states in which the group is concentrated or carries out its criminal activities.

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[8] The introductory part of the Recommendation contains the following definitions:
"For the purposes of this recommendation:
-"organised crime group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes, in order to obtain, directly or indirectly, a financial or material benefit;
-"serious crime", shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;"

In Germany, Italy and – as confirmed recently – Poland, international instruments ratified by the country are directly applicable and can, thus, be invoked before the courts.

It is clear that there are a number of theoretical, legal and practical obstacles to the direct applicability of legally binding, international penal law instruments at domestic level, in particular as far as provisions foreseeing certain incriminatory obligations are involved (including the level of punishment which needs to be determined).

However, one could imagine that certain provisions or elements – such as a definition of organised crime and/or membership in a criminal organisation – could be directly applied by domestic courts, in particular bearing in mind that the UN Convention entered into force on 29 September 2003.

1.5.2 Risks of conflict with human rights standards?

Investigation work, judicial proceedings and repressive actions in general bear potential risks of infringement of human rights standards. Theoretical conflicts between a criminal case brought on the grounds of "membership in a criminal organisation" on the one hand, and human rights standards on the other hand, are not necessarily obvious (apart from the specific ones already identified with regard to operational activities such as interceptions of communications, or the protection of the witness' identity in court).

The interlocutors, whom the delegation met in the framework of the present study, experience – in their daily work – no repercussion of the intrinsic opposition between the two requirements, even when questioned about the applicability of certain rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms. Nor has the European Court of Human Rights – in this specific matter – rendered any decision that would indicate the existence of risk areas, or establish limits to respect.

The research team had the following provisions in mind during the interviews:

- As far as Art. 6 para 2 and the presumption of innocence is concerned, the idea behind the possibility of risks is that when dealing with the criminalisation of "membership in a criminal organisation", the involvement of the suspect in a group carrying out criminal activities may need to be inferred from objective elements (types and frequency of services/support provided etc.). The risk would be that these elements are insufficient. Another (theoretical) question is the mental element and the extent to which the suspect was aware (good faith or not) of the group's criminal activity; this issue might become quite complex in a group intermingling legal and illegal activities;
- conflicts could also possibly arise from the legality principle enshrined in Art. 7 entitled "no punishment without law" (*nullum crimen, nulla poena sine lege certa*), depending on the level of accuracy of the provisions incriminating membership in criminal organisations (bearing in mind the difficulties inherent to a definition);
- likewise, and as far as Art. 11 and freedom of association is concerned, one might think of risks connected with the prosecution of a person involved in a (whether or not legally recognised) structure that would appear to be

carrying out illegal activities, where the suspect did not know the aim and purpose of a project to which they contributed, or they were deceived.

Another area, which might be worth examining further, derives from the principle that prohibits self-incrimination,[9] as constructed by the European Court through its jurisprudence on Art. 6 para 1 (right to a fair trial).

On the other hand, as mentioned in previous best-practice surveys, limits have already been identified to protect privacy (in the context of interceptions of communications, electronic surveillance etc.), the presumption of innocence (in the context of simulated offences and certain covert operations), data considered as personal (usual forms of investigations and crime analysis), the right to a fair trial (in the context of the protection of witnesses' identity in court) and other rights.

[9] In brief: the right of a person to chose between remaining silent or talking shall not be infringed by unfair or deceptive means. In the case of *Quinn v. Ireland* (21 December 2000 - in the context of IRA membership): "although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. (…). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.(…). Apart from the fact that that solicitor did not attend the applicant's interviews with the police, the position remained that the applicant had to choose between, on the one hand, remaining silent, a criminal conviction and potentially a six-month prison sentence and, on the other, forfeiting his right to remain silent and providing information to police officers investigating serious offences at a time when the applicant was considered to have been 'charged' with those offences and when it was unclear whether, in domestic law, any section 52 statements made by him would have been later admissible or not in evidence against him. (…)" [The reference is to Section 52 of the Offences against the State Act 1939]. Section 52 of the 1939 Act reads as follows:
"1. Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the [police] may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.
2. If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the [police], fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.".

2 Findings

2.1 BACKGROUND TO CURRENT PROVISIONS ON MEMBERSHIP

From a general point of view, there are at least two sets of considerations which could explain why a country has adopted vigorous anti-organised crime measures, among which is the criminalisation of membership in criminal organisations:

- the country has longer experience with the problem of organised crime
- the country had to implement such measures by virtue of international standards.

Among the three member states surveyed, Italy has the longest experience with organised crime. The criminal society known as the Mafia made its appearance in Sicily at the beginning of the 1800s.

Initially, the Mafia was formed in order to unify the Sicilian peasants against their enemies. Therefore, the word Mafia was a synonym of "manly" and the Mafiosi historically considered themselves as "Men of Honour". The Mafia changed in the 1920s to become a powerful criminal organisation, which spread out not only in Italy but also internationally.

Corruption and the use of violence had an intimidating effect on everyone who would dare to stand up against Mafia. Nevertheless, the violent events which took place in the 1980s, the assassination of the anti-Mafia magistrates Giovanni Falcone and Paolo Borsellino in 1992 and the increased intolerance of public opinion led to the current legal provisions and the state's war against the Mafia.

A large variety of working methods have been introduced: special investigative means, protection of witnesses and magistrates, confiscation of proceeds of crime, special regime for collaborators of justice – *pentitis*, special investigative/prosecutorial teams and so on.

Such historical factors related to criminal organisations did not exist in Germany and Poland. Germany experiences nowadays a constellation or patchwork of various organised crime groups with a variety of patterns. A number of these groups have a specific ethnic origin.

The early 1990s were marked in this country too by the adoption of vigorous measures, first to deprive criminals of the proceeds of their activities, then to implement intrusive investigative means. These focused to a large extent on drug trafficking-groups. Overall, Germany has developed working methods similar to Italy and the level of resources devoted to the problem is probably comparable.[10]

Poland, like a number of other central and eastern European countries, experienced a drastic change in the late 1980s with the liberalisation of the regime. Organised crime was not unknown in the past, but due to the system of state monopoly (over resources), it was not an issue. Poland has also reviewed its law-enforcement and judicial working methods, with special investigative means, witness-protection measures, specialisation and so on.

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[10] It is for instance illustrated by the continuous presence of bodyguards accompanying certain senior prosecutors/magistrates met by the research team.

It is admitted in all three countries (in Germany and Poland this was perhaps more obvious) that the current efforts devoted to the fight against organised crime result to a large extent from international inputs or commitments. The Italian experience has served as a model for a number of countries, both directly and indirectly (through the interface of international working groups in which Italy was represented).

2.2 CRIMINAL ORGANISATIONS, THEIR STRUCTURE AND ACTIVITIES

2.2.1 Italy

A large number of criminal organisations now operate in Italy. The complexity of their structures is a consequence of the gathering of individual organisations into larger structures of federal-type criminal groups: the Sicilian Mafia, the Calabrian 'Ndrangheta, the Campanian Camorra and Apulian organised crime. The latter is quite different from the first three groups: it has to a large extent developed in recent times and it does not necessarily bear some of the typical mafia-type features.
The Sicilian Mafia includes approximately 180 criminal groups, the so-called "families", that through progressive aggregation formed a single organisation, the "Cosa Nostra" (= our thing, our affair).

Other "families", not belonging to Cosa Nostra, formed independent organised criminal groups called "stidde", aiming at objectives and using operational systems similar to Cosa Nostra and maintaining diversified relations, according to different local situations and historical facts.

Cosa Nostra differs from other mafia organisations because of its pyramid-shaped structure and its ability to create unified strategies, in spite of its approximately 6 000 active members. Its activities take place not only in Italy and other European countries (such as Belgium, Spain, Germany, Greece, UK, Switzerland, Czech Republic and Romania), but also in non-European ones (USA, Canada, Brazil, Venezuela).

Recently, Cosa Nostra reorganised in order to better face the counter-action led by the Government. Its main illegal activities include extortion, loan sharking, illegal infiltration in public contracts, drug trafficking and money laundering. The infiltration in public contracts enables Cosa Nostra to maintain continuous connections with businesses and infiltrate some administrative areas.

The Camorra (= gang) appeared in the middle of the 1800s in Campania. It consists of approximately 173 groups and 9 000 active members. Frequently, conflicts take place between these groups in order to keep control over the most profitable activities.

It has a horizontal rather than a hierarchical organisational structure, and it spreads also internationally, mainly in South America, Germany, Netherlands, France, former Yugoslavia and former Czechoslovakia. Its most important activities are money laundering, drugs, arms and especially cigarette smuggling.

The 'Ndrangheta (= courage, loyalty), formed in the 1860s in Calabria, has also a horizontal structure. It comprises approximately 151 organised groups (the so

called “ndrine”) and 5 225 active members (including some from Albania, Kosovo, Egypt and Turkey).

After a gradual national and international expansion (mainly in Germany, Australia, Canada) and close contacts with other Italian and international mafia organisations, it seems that ’Ndrangheta conducts effectively most complex operations. Its main activities are drug trafficking (having permanent settlements in Argentina, Brazil and Colombia) and infiltration in major public contracts, which provides significant economic power.

Investigations against Mafia groups are particularly challenging due to its traditional features, namely the Omerta (or law of silence), the intimidation factor connected with membership and the resulting dependence for individual members.

Apulian organised crime consists of approximately 52 groups (with about 2 170 active members) which are independent and have a horizontal organisational structure. Two of them only, the Sacra Corona Unita and the Sacra Corona Libera have an overall structure and operate in certain geographical areas in this region.

The Italian authorities became aware of the Sacra Corona Unita in the 1980s, as it started as a prison gang but continued to grow and maintained links after their release. Their headquarters are in Brindisi, Lecce and they operate in several areas of the Taranto province. The Sacra Corona Libera operates in the Brindisi province and in particular in the city of Mesagne.

Apulian organised crime is involved primarily in trafficking activities with narcotics and arms, in illegal immigration and in cigarette smuggling. The groups recently expanded their criminal activities at national level and increased the role of Apulia as a “meeting area” for international mafia organisations. In this area also operate other permanent associations with a single leader, the most important of which is the Nuova Sacra Corona Unita.

2.2.2 Germany

In Germany, there have been no criminal organisations of that kind, although recently some mafia-type groups have tended to form, particularly in the region of Nordrhein-Westphalia. In the year 2001, 787 investigations were carried out against organised crime groups (854 in 2000).

The analysis of conducted investigations reveals that the structures of criminal organisations vary from small groups comprising less than ten members, to groups with possibly over a hundred members. Their activities extend to the regional, supraregional and international levels.

In each relevant investigation, at least one crime scene was located in Germany. The most important international links have been established with Albania, Russia, Romania, Bulgaria, China and Southeast Asia. The major activities of German criminal organisations are drugs trafficking, money laundering, fraud, armed bank robberies, human trafficking, crime associated with night life, tax and customs offences, theft and smuggling of stolen vehicles.

According to data for the year 2001, their influence extends to the public administration (35 cases in Germany, 33 abroad), the justice system (6 cases in

Germany, 12 cases abroad), business enterprises (11 in Germany, 4 abroad), media (8 in Germany, 3 abroad) and to the political world (3 cases in Germany and 15 cases abroad).

2.2.3 Poland

The situation in Poland is similar. The structures are rather simple and mostly hierarchical, with two or three levels, a single leader and few members belonging to some kind of collective leadership.

Some other members, the so-called soldiers, are not permanent members of the group; they are hired to carry out a one-off operation or task. Consequently, the group has a changing and flexible structure, adapting to the needs of the moment, with the exception of the leader and maybe a few co-leading members.

More solid structures are found in foreign groups, of whom the family-like connections play a foundational role. From the 485 organised criminal groups identified by the police in the year 2001, 388 are purely Polish, 77 international, 9 with one ethnic component and 11 "Russian-speaking-groups".

Groups with very complicated structures are rare, but also more dangerous and difficult to penetrate and dismantle. The "Pruszków Group" was such a group (named after a small town near Warsaw), characterised by a strong hierarchy and international relations. Within two years, the gang was neutralised, especially thanks to the use of crown witness regulations.

Although – according to data of the Polish Central Bureau of Investigations (CBI)[11] – organised crime groups change their activities periodically (every two years or so) in order to avoid police attention, the CBI detected constant features as regards the various criminal activities: robbery and extortion (159 groups involved – data for the year 2001), drug trafficking (134 groups), fraud and money laundering (129 groups).

Two other important activities, which also represent an increasing trend, are trafficking in human beings (mainly from Asia, because of the geographical key-position of Poland between east and west) and luxury vehicle theft.

The use of violence and – as in Italy – intimidation is characteristic of the activities of the Polish organised criminal groups: in 2001, a total of 88 bomb explosions was recorded, with 12 persons killed and 35 injured; 54 bombs were located in time to prevent any harm. In comparison with the 161 explosions recorded for the year 2000, the violent activities seem to have decreased.

It also seems that a kind of "change of generation" is taking place in recent years among Polish criminal groups, with the leadership being taken by less traditional and much more violent young criminals.

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[11] A special police unit established in May 2000, which focuses almost exclusively on organised crime.

2.3 THE CENTRAL PROVISIONS ON MEMBERSHIP

All three countries have adopted penal provisions on membership in criminal organisations, which are detailed below. All three countries also have, of course, provisions on criminal acts which may or may not be connected with the activities of criminal organisations (corruption, money laundering, extortion, blackmailing and the like). To a large extent, these legal tools to combat organised crime result from adjustments and amendments in the 1990s.

2.3.1 The Italian Penal Code

The Italian penal code makes a distinction between (armed) gangs and criminal associations, and as regards the latter, between normal criminal associations and mafia-type associations. The central provisions of the material penal law are contained in Article 416 and 416 *bis* of the Penal Code:

> **Article 416 (Illegal association to commit a crime)**
> When three or more persons associate in order to commit several criminal offences, those promoting or setting up or organising such association will be punished, for this sole offence, by imprisonment for three to seven years. For the sole fact of participating in the association, the punishment shall be imprisonment for one to five years. Those directing the association will be punished with the same punishments as those promoting it. If the participants in the association carry out armed raids in the country or on the public roads, the punishment shall be imprisonment for five to fifteen years. The punishment shall be increased if the association includes ten or more persons.

Article 416 *bis* (Mafia-type illegal association)

- Whoever participates in a mafia-type illegal association including three or more persons will be punished with imprisonment for three to six years.
- Those persons promoting, directing or organising the mentioned association will be punished, for this sole offence, by imprisonment for four to nine years.
- The illegal association is of mafia-type when the participants 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 control, either directly or indirectly, economic activities, concessions, authorisations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for others, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for others on the occasion of an election.
- If the association is armed, the punishment will be imprisonment of four to ten years in accordance with paragraph 1 and for five to fifteen years in accordance with paragraph 2.
- The association is considered as armed when the participants have firearms or explosives at their disposal, even hidden or deposited elsewhere, in order to achieve the goals of the abovementioned association.
- If the economic activities of the participants in the abovementioned association aim to maintain control funded, totally or partially, by the price, the products or the proceeds of criminal offences, the

punishments referred to in the above paragraphs will be increased by one-third to one-half.

- The offender will always be punished by confiscation of the things that were used, or meant to be used, to commit the offence and of the things that represent the price, the product or the proceeds of such offence or the use thereof.
- The provisions of this article apply also to the Camorra and to any other associations, whatever their local titles, seeking to achieve objectives that correspond to those of mafia-type illegal association by taking advantage of the intimidating power of the association.

In addition, Article 416 *ter* criminalises electoral, political-mafiosi transactions[12] and Art. 418 incriminates support given to members of criminal associations (by providing accommodation and subsistence).

The combination of Article 416 *bis* with burglary (Art. 628), personal profit (378) or homicide (Art. 575) is an aggravating circumstance, Article 416 only in combination with homicide. The penal code also provides for the following offences: formation and participation in an armed gang (Art. 306), assistance to an armed gang (Art. 307), instigation to commit a crime (Art. 302), political conspiracy through an agreement (Art. 304) or association (Art. 305).

The plurality of persons involved in a crime is an aggravating circumstance under the heading of various specific crimes (burglary, extortion etc.). Also, the general part of the penal code deals with joint perpetration of crimes and general aggravating circumstances including, in particular, when the crime is committed by five or more persons, and when the offender has promoted or organised the co-operation leading to the crime (Chapter III on the concourse of persons for the commission of an offence).

It is sometimes said that Italian legislation provides for a third category of criminal structure, namely drug-trafficking organised crime associations. This category was introduced by Art. 74 of the Law No. 309 on narcotics of 1990; the associations targeted are basically similar to the non-mafia type of Art. 416, with the main difference that the regulations of Art. 74 are applicable if the objective of the criminal association is related to the trafficking of narcotics. The basic penalties are raised to a minimum of ten years' imprisonment.

2.3.2 The German Penal Code

The German Penal Code makes a distinction between the concepts of *Vereinigung* (association or organisation) and *Bande* (group or gang). The former was retained in the main provisions of the penal code about criminal organisations and membership (Art. 129 reproduced below).

> **Art. 129 on criminal organisations (*Kriminelle Vereinigung*)**
> 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 a member, recruits for it or supports it, shall be punished with imprisonment for not more than five years or a fine.
> 2. Subsection (2) shall not be applied: 1. if the organisation is a political party, which the Federal Constitutional Court has not declared to be

[12] "The penalty provided under the first paragraph of Article 416 bis applies to whoever obtains the promise of a vote according to the third paragraph of Article 416 bis in exchange for money."

unconstitutional; 2. if the commission of crimes is only an objective or activity of minor significance; or 3. to the extent that the purposes or activity of the organisation relate to crimes under Sections 84 to 87.
3. An attempt to form an organisation indicated in subsection (1) shall be punishable.
4. If the perpetrator is one of the ringleaders or supporters or there exists an especially serious case, then imprisonment from six months to five years shall be imposed.
5. The court may in its discretion mitigate the punishment under sections (1) and (3) in the case of participants whose guilt is slight or whose involvement is of minor significance.
6. The court may in its discretion mitigate the punishment (Section 49 subsection (2)) or dispense with punishment under these provisions if the perpetrator: 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.

As seen above, political parties can be considered as criminal organisations in the meaning of Art. 129 if they have already been declared illegal by the supreme constitutional court of Germany (confirmed by a decision of the Supreme Constitutional Court: BVerfGE 17, 166).
This situation, and the solution found by Germany, are interesting in the framework of the issue of potential conflicts between the repression or criminalisation of membership in organised crime groups on the one hand, and the requirements of the European Convention on Human Rights on the other.[13] Thus, a delimitation line is foreseen in Germany, that has to be determined by the judicial power.

Article 129 (a) also contains provisions on the formation of terrorist organisations (but this issue is left out of this study's scope).

As in Italy, German penal law provides for punishments in cases of formation of, and participation in, an armed group (Art. 127 of the Penal Code). Committing a crime as a member of a gang constitutes an aggravating circumstance for a large number of offences (extortion – Art. 253; money laundering and concealment of unlawful acquired assets – Art. 261; armed theft – Art. 244a; Robbery – Art. 250; Fraud – Art. 263; dissemination of pornographic writings – Art. 184; trafficking in children – Art. 236 etc.).

Besides, the general part of the Penal Code also contains a catalogue of dispositions regarding incitement, being an accessory, attempted participation, perpetration though others and joint perpetration, abandonment of attempted participation and so on (Title III on "Perpetration and incitement or being an accessory"). There is no general mechanism making the plurality of offenders an aggravating circumstance.

[13] See part 1.5.2, as well as the comment on the Italian provisions above.

2.3.3 The Polish Penal Code

The central provision on membership in criminal organisations in Poland's penal code is Article 258:

> 1. Whoever participates in an organised group or association having for its purpose the commission of offences, including fiscal offences, shall be subjected to the penalty of deprivation of liberty for up to three years.
> 2. If the group or association specified in § 1 has the characteristics of an armed organisation, the perpetrator shall be subjected to the penalty of deprivation of liberty for a term of between three months and five years.
> 3. Whoever sets up the group or association specified in § 1 or 2 or leads such a group or association, shall be subjected to the penalty of deprivation of liberty for a term of between six months and eight years.

Art. 259, like Art 129 para 6 of the German penal code, deals with possibilities of commutation of punishment:

> 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 has voluntarily averted the impending danger shall not be subject to the penalty for the offence specified in Article 258.

This provision is complemented by the mechanism of Art. 60 para. 3 of the general part, whereby the court may apply an extraordinary mitigation or even suspend the execution of the penalty if a perpetrator co-operating with others in the commission of an offence reveals information to prosecutorial bodies.
The general part of the penal code also disposes (Art. 65) that the commission of a crime as a permanent source of income or as a member of an "organised group or in an association whose purpose is to commit offences" is an aggravating circumstance.

Art. 18 deals with indirect perpetration, instigation, and aiding and abetting:

> 1. Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person, or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration.
> 2. Whoever, willing that another person should commit a prohibited act, induces the person to do so, shall be liable for instigating.
> 3. Whoever, with an intent that another person should commit a prohibited act, facilitates by his behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission, shall also be liable for aiding and abetting.

2.4 OBSERVATIONS ON THE PROVISIONS

2.4.1 Scope of the provisions

Each of the three countries under survey has criminalised both the creation of and participation in a criminal organisation and, in principle, these provisions may apply to the vast majority of crimes (with the exception of minor and traffic offences).

The Italian penal code criminalises two different types of criminal organisations: the common or general form of criminal association, and the mafia-type association. The latter represents a special form of criminal organisation, based on the intimidating potential of the Mafia and its increased power of financial and political control. Germany and Poland have criminalised only one form of organised crime structure.

Apart from this, all three penal systems contain – in the general part of the penal code – mechanisms which, added to the provisions in the special part, provide a set of tools to apprehend a wide range of criminal co-operation schemes, with weaker or softer forms of association (incitement, being an accessory, instigation), intermediate ones (gangs, criminal groups) and the most integrated ones (criminal organisations and associations).

The Italian and Polish rules provide that persons playing a leading role are subject to more severe penalties, compared to those applying to the participation in such a structure. In Germany, there seems to be no real distinction between the two types of function, since the formation and participation are put on an equal level, and the maximum penalty in the case of a leading role is the same as for formation or participation.

The three countries provide for mitigation factors in the general part of the penal codes. In addition, the German and Polish penal codes guarantee expressly mitigating circumstances or some form of impunity for those members of criminal organisations who collaborate with the authorities. In Germany, this is stated in Art. 129 paragraph 6, and in Poland in a specific article (Art. 259).
In Italy, voluntary denunciation is regulated in relation to some particular crimes (such as sequestration for the purpose of extortion). General mechanisms also exist under specific laws dealing with collaborators of justice and witnesses (also called sometimes *pentitis*, in Italian practice).

From a theoretical point of view, provisions on membership in criminal organisations raise two categories of interrogations relating to:

- the existence of the criminal organisation
- membership in the organisation

In practice, as confirmed by the discussions held in the three countries, obtaining a conviction for membership in a criminal organisation requires, in general, a similar approach:

- obtaining evidence to qualify the group as a criminal organisation
- obtaining evidence to qualify the membership

2.4.2 Defining or not defining?

Only the Italian provisions of Art. 416 *bis* (on mafia-type organisations) include some elements of the definitions provided in international texts (including the working definition, with mandatory and optional criteria, of the EU).

Apart from this specific article, none of the countries has a legal definition of the concept of an organised crime group. As a result, the determination of the concept has been left to national guidelines and the relevant case-law. These reflect to a large extent the criteria listed at international level.

In Italy, the mandatory and optional criteria defining organised crime worked out at EU level are generally accepted in practice, except that there is no need of a prolonged period of crime to consider a group as an organised crime structure.

In Germany, a common working definition was agreed in 1986 by the *Länder* and the Federation (notably the minimum number of people, which is three). The Supreme Court has confirmed the essential difference between the concepts of organisation or association, and band or gang. The former are more dangerous because of their own inner dynamic and their ability to cause substantial harm to protected interests (Supreme Court decision: BHG 31, 207).

The Supreme Court has confirmed a number of differentiating criteria, not met in the presence of gangs or the mere participation in the commission of a crime, according to which a criminal organisation:

- is based on the common will of committing offences,
- has a common sense of togetherness,
- consists of three or more persons,
- forming a hierarchical organisation which
- undertakes illegal operations for a prolonged period of time.

Thus, the mandatory and optional criteria mentioned in the EU directive are widely accepted in German jurisprudence and science.

In addition, they are to a large extent reflected in the annex to a federal guideline amended last in 1999. The document lists a series of general indicators for the identification of organised-crime related cases (see the whole text in Appendix 4.3). These indicators are grouped into eleven categories:

- preparation and planning of the offence
- execution of the offence
- financial aspects
- outcome of the criminal assets
- conspiracy-like behaviour
- offender-relationships/offence-relationships
- group structure
- assistance to group members
- use of corruption
- monopolisation as a goal
- actions in the public sphere

In Poland, where the relevant provision makes a conceptual distinction between an organised group and simple association, but without legal consequences (in the

provisions themselves), a closer description of a criminal organisation is delivered in the jurisprudence of the Supreme Court, still under development.

A unified jurisprudence would require that several cases reach the level of the Supreme Court, but most of them have not gone beyond the court of appeal. Therefore, existing Supreme Court decisions of the last four or five years have to be gathered together in order to give a complete unified jurisprudence.

The research team was told that there had been an evolution in jurisprudential definition of an organised crime structure. The first decisions of the Supreme Court had established the following criteria:

- at least three members
- some kind of criminal goal
- a division of tasks
- no structure necessary unless it is a sophisticated group
- no continued criminal activity necessary

At the time of the delegation's visit to Poland, the following criteria were applicable, although with some uncertainties:

- at least three members
- some kind of vertical (hierarchical) structure, with at least two levels
- a directing body (one or several persons)
- a division of tasks
- continued criminal activity (but prosecutors allege that one crime would be enough) with profit
- emotional ties (loyalty, solidarity, but such ties do not need to be present among all members, since some do not know each other)
- internal discipline

The criteria in place in the three countries still do not give a clear, permanent law definition. To what extent this kind of scheme is in line with the penal science requirement of *nullum crimen nulla poena sine lege certa* is yet to be debated.[14] Even Article 416 *bis* of the Italian penal code, despite its comprehensive provisions, describes more the criminal activities than the Mafia itself.
In Italy, the provisions were kept on purpose a little indefinite, in order to achieve a certain flexibility, to ease the work of law enforcement and public prosecution. In Poland and Germany too, it is considered that the absence of a strict definition provides the necessary flexibility, in order to deal with a variety of forms of organised crime groups.

In Italy and Germany in particular, the interlocutors of the research team emphasised that the absence of a definition offers procedural advantages with regard to other specific anti-mafia or anti-organised crime provisions (for example, on temporary measures against the proceeds of organised crime, on the use of the most intrusive investigative techniques such as electronic surveillance, interception of communications, and so on). Thus, a strong suspicion that a person belongs to a criminal organisation is enough to start an investigation with sufficient means.

[14] See part 1.5.2, as well as the comment on the German provisions below.

2.4.3 Difficulties and practical solutions

The strong accent put on the fight against organised crime in Poland and Italy may have led quite quickly to a strong awareness of the relevant legal provisions on organised crime among practitioners. In contrast, the application of Art. 129 in Germany has occasionally been a matter of individual initiative (such as a prosecutor looking for the best legal basis for the accusation, who then comes across the provisions on membership in criminal organisations).

It is admitted in all three countries that there are some difficulties connected with the application or applicability of the provisions under consideration. However, and although there were no overall figures available during the discussions, it appears that Italy and Poland make quite wide use of these provisions, including using them as a basis for convictions. In Poland for instance, in the last three years, the number of cases based on Art. 258 ranged between 643 and 1 142, with an average of over 130 subsequent indictments per year.

Compared to these two countries, German authorities rather make use of secondary provisions which relate to the underlying, substantive offence (such as drug trafficking). As a consequence, about four to five convictions take place every year on the basis of Article 129, whereas a greater number take place on the basis of other provisions dealing with typical organised crime activities.

ITALY

In Italy, a solution was found as regards the applicability of the provisions, in particular Art. 416 *bis* on mafia-type organisations. If a court decision has already declared the association as an organised crime or mafia-type one, this "label" can be used for all future proceedings against those who are part of it. Only the membership has then to be proved which makes the task of law-and-order authorities much easier.

This favourable situation derives, of course, from the stability over time of the group, which is specific to the mafia. But also, permanent observation of organised crime groups means the authorities know a lot about them and can ascertain their continuous existence, core group, activities and so on. It has taken up to ten years to "label" certain organisations as organised crime or mafia-type ones.

In the other cases (including most cases under Art. 416) where no preliminary qualifying verdict exists, the prosecutor will need to reconstitute the group and to draw a picture of the relationships and networks. Overall, obtaining convictions against the common type of criminal associations (Art. 416) seems facilitated in those cases where the group already has an entrepreneurial dimension. Then, the main focus would be to establish that the entrepreneurial activity is orientated towards illegal activities.

The theoretical distinction between evidence of the group and evidence of its members is thus of little relevance in Italy. Another reason for this is that Italy mainly applies a global approach, targeting the entire group instead of some of its members only. The reconstruction of the group is done on the basis of all kinds of information: exchange of mails, persons who have been seen together, surveillance of communication traffic, transfer of monies to prisoners, existence of deals or contracts, information gathered through telephone-tapping and other electronic means, testimonies from outside and inside, and the like.

Certain prosecutors have used mainly the letters exchanged between suspects to draw a picture of the group. The frequency of contacts, services or collaborations with a group is a good indicator for the membership. A financial adviser who works only with the group would obviously be a member of it, whereas the one who has provided their services also to other persons or legal persons would not be considered as a member.

In the case of a group trafficking with weapons and stolen cars, the owner of a garage where the cars are kept and the narcotics are hidden, who contributes thereby to the group's existence, can be accused of membership of the group, even without any other specific conduct. The only prerequisites would be that they acted voluntarily together with at least two other persons, being aware of the illegitimate origin of the cars, and being aware of the illegal economic business and drug trafficking happening in their premises.[15]

It was also underlined that a number of cases against the Mafia which have not been successful (from the perspective of the general interest) were probably cases which were not prosecuted at the right time or moment ("There are moments which are not favourable"). This was due to a transition or mutation phase of the organisation, leading to changes in its structures or activities, to the extent that evidence gathered in that context and the subsequent prosecutorial steps were not significant enough to really affect the organisation.

It may take some time to observe and understand such changes, in particular when they are connected with new waves of criminal groups operating or coming from abroad. They may have other customs, codes, rules or practices.

GERMANY

In Germany, it was said that Art. 129 offers a high dissuasive potential, provided the entire criminal group can be punished. As a matter of fact, the provisions are very important for initiating proceedings, and the suspicion that a person is a member of a criminal organisation opens many legal possibilities for the investigation (a "golden key").

But, when it comes to the accusation or conviction, two requirements in particular – deriving from the jurisprudence – make the application of Art. 129 difficult in comparison with Art. 129a on terrorist organisations (which is drafted in comparable terms).

The first requirement concerns the concept of organisation: according to the jurisprudence, it must have a structure of a hierarchic nature, with each member being subjected to the authority of the structure. The second requirement is that part of the organisation must be based in Germany in order to be prosecutable. This requirement is of particular importance when it comes to organised crime activities of a foreign origin or operating from abroad.

The jurisprudence also requires a clear sign that the person suspected of being a member did belong to the group, or expressed the wish to be part of it, and participated in its activities (*Mitgliedschaftliche Betätigung*).

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[15] Example given by Giuliano Turone on the occasion of a Multilateral seminar on organised crime held in Minsk (Belarus) on 16-18 September 1996.

Furthermore, the full rigour of the principle of completion of the offence (*Straftatenverbrauch*) applies, requiring that – to be prosecuted as a member – the suspect has committed a crime, with a clear intention and in full awareness of their act. The participation in a crime must have been concrete and active, and not be that of a mere "companion" (*Mitläufer*).

Also interesting is a recent decision of the Supreme Court, according to which an attorney can be punished for getting involved in financial operations based on monies deriving from organised crime operations.

A number of requirements were present in a major case in the mid-1990s called the European King's Club, a fund-raising structure using a pyramid scheme on the "grey" capital market. It was labelled as an organised crime structure and then dissolved.

Apparently consideration is currently being given to the redrafting of Art. 129. It was also underlined that the level of punishment in Art. 249 is probably low, compared to other, more "common" offences, so that the investment in time, gathering of evidence and so on, would not be justified by the end result.

Thus, a number of proceedings are initiated on the basis of Article 129, but afterwards the charges are usually based on another, autonomous offence, which was committed in the framework of the criminal organisation's activities (money laundering, counterfeiting of money and stamps, fraud and the like), or the charges may be based on provisions meant to deal with the activities of a gang (which is then an aggravating circumstance).

There is no general provision in Germany making the multiplicity of offenders an aggravating circumstance but, by virtue of Section 46, the judge may take into consideration certain factors against the accused when making the decision.

The dogmatic problem of the provision of Art. 129 of the German penal code is that the weight of the interests' protection lies long before its damage. This means that the member of the criminal organisation can be punished not only for injuring a protected interest, but also by putting it in danger.

Critics of this model claim that there is a big quality difference between endangering and injuring an interest. If the role of penal law is not to avoid conflicts, but to enlarge the state competence, then it becomes a legal-political instrument and it loses its main purpose. Maybe this is another reason why Art. 129 supports investigation procedures, but rarely leads alone to a conviction.

POLAND

In Poland, it was underlined that the provisions on membership of a criminal organisation and the concept of "participation" in Art. 258 are very important to apprehend bosses, because they often do not participate directly in the criminal activities. (It was underlined that bosses are not necessarily the founders, the latter being subject to the specific provisions of para. 3 of Art. 258.)

The approach followed in that country is similar to Italy and based on accumulation of indices (with strong ones and secondary ones), notably to reconstruct and provide a description of the group. But the Polish representatives

met indicated that they cannot use the “organised crime label” given by a court, although certain groups may have a name or be notorious in the *milieu*.

In Poland too, all crimes detected in the course of authorised interception of communications can be prosecuted with the evidence gathered. However, it is not possible to convict a person on the basis of a witness’s testimony only (even a crown witness).

It was also confirmed during the discussions that Art. 258 para. 1 incriminates membership even in the absence of an offence committed personally by the suspect. However, for the suspect to be convicted, it must be proved that they were aware of the group’s criminal activity, and that they supported it in one way or another (it being understood that a certain significance of support is required, “not just bringing coffee”).

The criteria identified so far raise certain difficulties, due to a lack of homogeneity, as the research team was told. The first difficulty stems from the time factor and the continuity of the group’s existence. Prosecutors allege that the formation of an association for the commission of a single crime could be enough. The interlocutors of the research team mentioned a case where several dealers had joined to carry out a major operation but the appeal judge refuted the arguments of the prosecution.

The drafting of Art. 258 also raises some questions, in practice, as to the relevance of a distinction between “organised group” and “association”. If such a distinction is to be made, what would be the difference between the two concepts? One of the judges met underlined that an interpretative decision by the Supreme Court could be useful.

On the other hand, it seems agreed that an organised crime group does not necessarily require a vertical structure: occasionally, judges have accepted the demonstration of the existence of a horizontal structure when there was no unique person heading the entire group of criminals. Another agreement concerns the requirement of emotional ties and it is accepted that such ties do not need to be present among all members, since some do not know each other.

Charges of membership are brought under the provisions of Art. 258 if enough information or evidence has been gathered, which can be used or shown in court. Otherwise, other provisions are used (for example, on drugs or stolen cars trafficking), possibly in combination with the aggravating circumstances of organised crime or continued crime (both are provided for, by Art. 65 of the penal code).

It was stressed that the overall function of Art. 258 is very important, because it applies to any offence committed, without regard to its seriousness (with the exceptions already mentioned), as soon as membership of a criminal organisation has been established. If the existence of an organisation cannot be proved, then the individuals are sentenced for the separately committed offences.

2.5 VARIOUS FACTORS CONDITIONING THE EFFECTIVENESS OF THE PROVISIONS

It appeared that the effectiveness of provisions on membership in criminal organisations may depend on a variety of factors which are – to a large extent – external to the legal considerations and the way the legal provisions are drafted.

These factors relate to access to information on the group's structure and composition, the efficiency of investigations against organised crime groups, the effectiveness of sanctions, the ability of organised crime to interfere in the processes of law and order and such matters. The discussions held in each country were, here too, very instructive. The following sections try to highlight the essentials.

2.5.1 Institutions, jurisdiction and co-ordination

Germany, Italy and Poland are larger European countries. Their administrative structure differs (Germany is a federal State, Italy and Poland are both unitary states with strong decentralisation) but all have bodies specialising in the fight against organised crime. In addition, efforts are made to centralise the information.

ITALY

1991 was a decisive year in Italy. Prior to that date, the multiplicity of provincial investigating bodies, the restricted territory on which each of them operated, the difficulties in introducing effective forms of coordination among various activities, all this led to fragmented investigations unable to highlight the ties and relations established among the various organised crime offences, and incapable of understanding the underlying crime strategies. All 164 prosecutors' offices were also entitled to handle cases related to mafia-type organised crime.

In order to overcome these shortcomings, in 1991, the multi-agency central and inter-provincial police departments were created with a view to combating organised crime. While the central department was entrusted with investigative powers throughout the national territory, the inter-provincial ones had jurisdiction extending over several provinces, with each of them linked to the central department. The same year, an additional investigative body was created – the Mafia Investigations Office – with the specific task to conduct investigations on Mafia-type organisations and the criminal offences committed by them. The functions of this multi-agency police force (comprising members of the State Police, *Carabinieri*, and revenue police) include analytical work and the establishment of contacts with foreign counterparts. It has national jurisdiction.

Moreover in 1991, the Public Prosecutor's Office was reorganised with the establishment of twenty-six district anti-mafia prosecutors with responsibility over a larger area, and the creation of the National Anti-Mafia Bureau to coordinate investigations centrally. The National Anti-Mafia Prosecutor performs his functions throughout the country or delegates his powers to the twenty prosecutors attached to the Bureau.

There is a constant information flow to the central Bureau in Rome, where information and intelligence are centralised in a secured database. From there,

data are available on-line throughout Italy for intelligence, analytical, investigational and procedural purposes.

In Italy, the principle of the "natural judge" applies. The competence belongs to the prosecutor's office of the place where the first offence took place, if the place of creation of the organisation or the place where a crime was committed is unknown. The co-ordination between the offices of south and north Italy is of great importance.

The experience with organised crime groups in Italy is that, due to the importance of such cases (which may include a national, cross-jurisdictional or cross-border dimension), it is preferable to mobilise several prosecution offices to "approach" the group and concentrate information.

GERMANY

In Germany, the co-operation of law enforcement, public prosecution and court is also of great importance, notably due to the federal structure of Germany (where the *Länder* have the main competence in penal matters).

The practice is that cases involving the authorities of more than one *Land* are dealt with together. This requires good co-ordination between the various police and prosecutorial bodies of the *Länder*, since it is difficult to concentrate the proceedings for a given case in one specific *Land*.

The lack of provisions for the determination of the competent jurisdiction is compensated by the fact that all *Länder* in Germany have specialised bodies at the level of the police and/or prosecution, which may be assisted in certain cases by the Federal Police Office (*Bundeskriminalamt* – BKA). A great deal of technical support is provided by the infrastructure and all investigators (about 600 at the time of writing) are in permanent online contact, ready to act.

As mentioned above, Art. 129 of the German penal code provides many further investigational and procedural facilities.

POLAND

In Poland, the special bodies dealing with organised crime are the department for combating organised crime of the Public Prosecutor's Office (with similar units at the level of the appellate and regional prosecutor's offices) and the Central Investigation Office of the Police, which comprises specialists dealing with organised crime and narcotics cases (and similar units at lower levels).

Besides these bodies, the Agency for Internal Security, the Border Guard and state financial institutions provide support and co-operate with the main responsible agencies. In a given case, they would operate under the co-ordination of the prosecutor in charge of the case.
On 1 April 2002, an interagency co-ordination group was set up under the responsibility of the Prime Minister. Its duties are the prevention of organised crime and terrorism, and therefore to co-ordinate, analyse and submit proposals of initiatives.

The National Polish Intelligence Centre became operational on 1 January 2003. Its task is to centralise and analyse information flowing in from the prosecution,

police, border guard, Customs, Revenue Office, and other fiscal and financial organs of the state. As in Italy, special measures have been taken to ensure the security of the system (such as restricted access, identification and recording of access).

An important issue in Poland, when dealing with organised crime cases, which involve many accused, is whether the case should be split or not? The splitting of a case may lead to risks that a person is at the same time accused and witness, for instance. From a practical point of view, court premises need to be able to accommodate a unified, bigger case, with all the special police measures to be taken into account (more police staff, for example).

In general, it was underlined that experienced and psychologically reliable staff are needed to handle organised crime cases, especially at the level of prosecution and the courts. In Italy, where some cases have been lost by the prosecution, this was clearly because of the psychological weakness of the prosecutors or judge.

In Poland, it was emphasised that organised crime cases are given to the (normal, first instance) district courts. These courts are generally staffed by young judges, who are not the most experienced to deal with organised crime cases. Some practitioners wondered whether, instead, appeal jurisdictions should not become the first instance jurisdiction to handle such cases.

In the same spirit, Italy considers that Art. 51 para. 3 *bis*[16] of the criminal procedure code, which provides for the automatic jurisdictional competence of the public prosecutor's office of the district's capital city, has become a very important tool. It allows cases to be handled under better conditions (for example, far from the area where moral and other pressure could be excessive).

2.5.2 Collaborators and witnesses

In the light of the German, Italian and Polish experience, obtaining the collaboration of members of the criminal group is the most valuable source of information on the inner life of the group, its composition, the links and interactions between the various members, and the functions of such members.

This kind of information is used either directly as evidence in court (typically, the Italian *pentiti*) or, at least, as intelligence to understand and draw a picture of the group's structure and membership. Italian prosecutors do not hesitate to hold interviews with persons in custody to obtain information on the whereabouts of a group. Such evidence mostly remains in the (electronic) files as intelligence, in particular if the origin of information could be easily deduced by other group members.
In Poland, the first big organised crime group, known in the early 1990s as the "Pruszków Group", was disrupted thanks to the testimony of a crown witness who gave information on its hierarchy and structure.

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[16] "In the event of proceedings relating to the crimes, whether attempted or completed, as per article 416 bis … the functions … shall be exercised by the office of the public prosecutor attached to the Court of the capital city in the district where there is the seat of the judge having jurisdiction."

USE OF COLLABORATORS

Although the Italian and Polish experience with the institution of the crown witness is particularly positive, it appears that intermediate schemes for the use of witnesses, collaborators or informants are helpful, and offer alternatives for less crucial witnesses.

In the case of a criminal structure where there is a strong distribution of tasks, some members do not know very much and have no overview of the structure. In this respect, the Polish authorities consider intermediate members of criminal groups as particularly precious because they have a knowledge of the top and the bottom of the structure. Precautions are also taken in Poland and Italy to make sure that a person willing to collaborate is not motivated by interests that would be detrimental to the work of the police/prosecution.

This is one of the reasons why, in all three countries, the sole testimony of a witness is not sufficient to bring charges against a person for membership of a criminal organisation. On the other hand, the level of proof needed is not necessarily high: in Poland, the testimony of a crown witness, combined with a recorded, monitored purchase was enough to obtain a conviction in one case.

All three countries offer a whole range of witness-protection measures, up to the relocation programme with a new identity. For understandable reasons, this kind of first-class service is reserved for those who are in a position to provide extremely valuable information or testimonies.[17]

2.5.3 Information, intelligence and special investigative techniques

In the three countries under consideration, the fight against organised crime enjoys the most powerful legal means in terms of special investigative techniques (leaving aside terrorism and state security-related issues).

Interception of communications, electronic surveillance and bugging, electronic tracking, undercover operations and infiltrations, and observed deliveries or purchases are generally used. And it is clear that these are major sources of information and evidence.

For instance, telephone surveillance is a powerful tool in Italy: if the operation is directed against a given suspect – say A – and if, during his conversations with B, C and D, evidence is collected indicating that B, C and D are involved in criminal activities, or are members of a criminal group, then the evidence collected can be used against them by the prosecution.

Efforts have been made to centralise information and this is crucial when it comes to drawing a picture and understanding relationships, with the assistance of crime analysis schemes (such as mapping). The concentration of information appears to require adequate safety and protection measures, against intrusions from both outside and inside. Centralisation of information is also a useful tool to prevent different judicial bodies approaching the same group without knowing of each other’s activities.

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[17] For a deeper insight into witness-protection schemes, see Best-Practice Survey 1 on this subject.

Financial information seems to have become increasingly important, due to the anti-money laundering mechanisms put in place in recent years. The reporting of suspicious transactions has become efficient, a number of law-enforcement and prosecution staff have become more familiar with this and the business culture, and Financial Intelligence Units forward more information to investigation bodies.

Increasingly interesting are also certain legal measures, such as those aiming at moving the burden of proof from the prosecution side to the suspect, when the latter must explain the origin of their assets to avoid the application of preventive measures (seizure or confiscation).

This could become of more interest in the framework of the metamorphosis of organised crime, which is becoming more underground, more trans-national and more involved in the economic sector, in legal business.

2.5.4 Common understanding at national level

All three countries have specialised law enforcement and prosecutorial bodies to deal with organised crime-related cases, and no equivalent specialisation at the level of courts for constitutional and historic reasons. In addition, law-enforcement and prosecutorial bodies work closely together.

Occasionally, the delegation was also given confirmation that joint events (conferences, seminars and the like), involving bodies from the various procedural levels, can be useful to develop a common understanding of organised crime-related issues.

In Italy and Germany, there seemed to be no major variation in the understanding of the concept and definition of organised crime (and, therefore, of the concept of membership). It is true that mafia-type organisations are now well known in Italy and there is a significant practice in this regard, and that in Germany a limited number of court decisions have applied the provisions on membership in criminal organisations so far.

In Italy, the nationwide co-operation scheme may have facilitated the development of a common approach, and judges and prosecutors are from the same corps (that of magistrates). In Germany, which is a federal state, the *Bundeskriminalamt* plays an important role in harmonisation, through its support to the Länder and its strategic work, research and publication effort.

Polish interlocutors admitted that in their country, where quite a number of cases have applied provisions on membership in criminal organisations, jurisprudence is not fully homogeneous. For instance, in some court decisions, criteria related to the vertical structure of the group have prevailed, whereas in other cases, it was the criteria related to the horizontal structure. Also, as indicated earlier, there is no unanimity among judges and prosecutors as to the time criterion. This shows that practitioners may need more time to work with (newer) provisions on membership in criminal organisations.

In all three countries, "test cases" have not been used due to the specificities of cases connected with organised crime (importance of proceedings involving many accused, involvement of important means and costs in the investigation, use of special investigative means in particular).

2.5.5 International co-operation

The usual obstacles to the effectiveness of international co-operation in criminal matters are known. There is no need to list and discuss all of them here but, in the context of this study's scope, the sharing of common legal standards among countries could be of crucial importance for the purpose of mutual legal assistance.

As requesting states, Germany and Italy do not seem to be affected by any obstacle in particular when exchanging requests for information or extraditions. In contrast, Poland is facing a problem because of the lack of legal provisions on membership in criminal organisations.

Due to the principle of dual incrimination, under the rule of which most assistance is classically provided under international penal law, certain extradition requests sent abroad by Poland are not (or cannot be) executed. Poland must then use other provisions, such as those on drug trafficking – but then, of course, the prosecution can only be based on this ground.

The research team did not discuss in details the whereabouts of such cases, but it noted that this situation was foreseen in some international instruments: for instance, the EU Joint Action of 1998 states that the lack of harmonisation should not be an obstacle to international legal assistance.[18]

As was underlined by one interlocutor during the week of the interviews, lack of compliance with international instruments (whether by the requesting or requested country) can sometimes be overcome by "certain ways" to obtain information and evidences, but this endangers the case.

It also appears that specific agreements on the exchange of information on organised crime groups can be necessary (see Appendix 4.4, memorandum of 2002 between Italy and Moldova).

2.5.6 Criminal influence and post-conviction monitoring

The use of influence, threats or violence is a criterion provided in the Italian Legislation and in the German federal guidelines as amended in 1999.

Although this issue is sometimes considered a grey area and the nature of the problem is inevitably sensitive, it was admitted by the research team's interlocutors from Italy and Poland (there was no unanimity among the interlocutors met in Germany) that organised crime groups not only have the power and means to exert influence, but also do exert some influence (corruption, threats and suchlike) on members of the judicial system.

Some senior and well-informed practitioners confirmed during the meetings that assessments and research on vulnerabilities are or would be useful. In Germany, for instance, the Federal Police Service (*Bundeskriminalamt* – BKA) has conducted a research project on corruption in the police, judiciary, prosecutorial bodies and Customs, using opinion polls and indirect or confidential questionnaires.[19]

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[18] "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".

[19] See "Assessments regarding Corruption in Police, Judicial and Customs Authorities", 2000 (available in English on the website of the BKA, www.bka.de).

The situation in Poland is quite well documented. Although there is no connection between the mafia-type Polish criminal organisations and the Polish Government, there is a certain use of influence, mainly through corruption, which extends to the central administration (6 cases – data for the year 2001), the territorial administration (13 cases), the police (22 cases), Customs officers (27 cases), justice (16 cases), fiscal departments (11 cases) and other areas (37 cases). Polish specialists confirmed that probation staff remain at risk and that effective protections for judicial bodies are sometimes lacking.

In Italy, members of organised crime groups involved in legal activities (typically the Mafia) are frequently notorious for their membership and this is sometimes enough to be influential, especially in a smaller community (it could hinder the functioning of the anti-money laundering system and the reporting of a suspicious transaction).

The same problem applies to post-adjudication screening – the observation of the effectiveness of sanctions applied to persons convicted for activities typically connected with organised crime groups. Even if the example of people who – although convicted – would evade (at least partly) the execution of a prison sentence (perhaps thanks to "influence" at the level of trial judge) seemed somewhat extreme to the interlocutors met by the delegation, it was occasionally admitted that some detainees would at least be able to overcome their "neutralisation" by, for instance, using mobile phones in prison.

In Germany, the *Land* of Nordrhein-Westphalia has elaborated a 'top 100' list of the most dangerous (including organised crime) criminals who are subject to special monitoring. This avoids some of them being located in the same jail.

As far as Italy is concerned, special measures have been applied since the mid-1990s to imprisoned leaders of organised crime, to avoid their orders being transmitted outside the prison.

2.6 FUTURE PERSPECTIVES

The phenomenon of organised crime is in constant evolution and, in all three countries, the fight against terrorism has set new priorities on the agenda. It is hard to say whether these new priorities divide the efforts of law enforcement as to the observation and understanding of changes affecting organised crime, or whether in one way or another the fight against organised crime is taking advantage of the fight against terrorism (perhaps by the increased exchange of information generated thereby).

In Italy, the fact that many groups have become particularly isolated is considered as both encouraging and alarming. This newer situation could witness to the effectiveness of their repression. But it could also indicate that organised crime is now operating underground.

At the same time, Italy is confronted with a new generation of criminal groups coming from abroad, partly in the category of Apulian organised crime, partly in the category of new organised crime . The phenomenon has led to a number of diverging interpretations: have the previous mafia groups abandoned the field, or certain markets only (to infiltrate more actively legal businesses), or is there some form of complementarity or sharing of activities between the two types of groups?

Whatever the answer, the new situation in Italy represents a challenge, even though new organised crime groups are characterised by a strong “ethnic” factor, which is becoming a useful indicator for the police and for strategic or intelligence work. Should the classic, well-understood working method be pursued, the country’s judicial bodies would need at present to obtain new court decisions “labelling” certain organised crime groups as such.

A number of attempts have been made in court with regard to groups from neighbouring countries but these have failed so far and it was stressed that information and assistance from abroad (based on all relevant international instruments) remain of particular importance.

Thus, it could still be argued whether the absence of a legal definition represents a serious obstacle, if one considers that it took ten years in order to establish a jurisprudence outlawing Sicilian crime on the basis of the provisions on criminal organisation.

In Germany, there are ongoing discussions on reviewing those criminal provisions dealing with offences involving structure: the redrafting of Art. 129 to facilitate its application, introduction of provisions on criminal gangs (autonomous offence) and/or on crimes committed through business-like structures.

The attention of the research team was called to the fact that, for the time being, the concept of organised crime supposes that profit-making is the underlying motivation. This could raise some problems with regard to activities connected to child pornography. A definition of organised crime would probably be necessary at international level to avoid such grey areas.

3 Conclusions and suggestions

3.1 CONCLUSIONS

The present study was largely based on the empirical experience of the interlocutors met. It could be usefully complemented by a thorough study of the relevant domestic jurisprudence. Its main findings are the following:

- the effectiveness of the fight against organised crime is not conditioned by the facility of applying provisions on membership in criminal organisations, nor by the accuracy of their drafting;
- but such provisions may offer – at the least – investigative advantages, which make them a powerful tool;
- the effectiveness of the fight against organised crime will much more depend on the use made of these provisions, that is, the level of experience of practitioners involved in the investigative, prosecutorial and managerial work;
- the latter, in particular, are in a position to contemplate a variety of accessory aspects, which need to be taken into account to deal with the fight against organised crime as a global entity and in the most efficient and effective way.

Provisions criminalising membership of criminal organisations do exist in the three countries under survey, as is to be expected according to the relevant international instruments. A distinction is also made between this form of incrimination and other general mechanisms (complicity, gangs, conspiracy) as well as other matter-specific mechanisms (drug trafficking, trafficking in human beings and other crimes).

These mechanisms need to be seen in their entirety, as a set of tools allowing authorities of law and order to use the most adequate one in a given case, subject to law-enforcement and prosecutorial bodies being sufficiently familiar with them.

The application of those provisions dealing with the most integrated forms of structure is likely to be facilitated – that is, the evidence would be easier to obtain – when the structure is already defined as such, ideally a business structure or commercial network. In other cases, the criterion of the degree of professionalism (to what extent is the criminal activity a permanent source of income and to what extent do members of the group act as specialists or divide the tasks?) would be determinant.

It appears that the absence of a legal definition of organised crime and of the concept of membership provides for flexibility. This could be interesting in the perspective of the growing phenomenon of organised crime groups becoming more professional, delocalising their activities, becoming more discrete and/or involved in legal businesses.

Organised crime is in constant evolution and is adapting to police and legal activity; and the state authorities, without any doubt, also need to adapt to these changing circumstances. This puts in question the solution found in Italy, the judicial labelling of organised crime groups, and to some extent in Germany regarding illegal political parties.

Such solutions offer alternatives only insofar as a certain level of identity of the structure persists, despite its evolution and adaptation to the environment and law-enforcement pressure. The short time spent in the countries did not allow time to discuss possible ways of redefining the identity of criminal structures[20] from a prospective point of view.

It appears that the concept of membership in criminal organisations also fulfils, to a large extent, a practical function: it eases the applicability of special investigative means, the use of which is normally limited to the most serious offences for reasons of proportionality. The suspicion that the investigation is facing an organised crime group or targeting a person suspected of being a member of a criminal organisation facilitates the use of the most powerful and intrusive investigative techniques.

At the same time, judicial bodies called upon to authorise the application of such techniques may require a reasonably high (or low) level of suspicion. If weak evidence is gathered as to membership, the prosecutorial authorities may then swap to other substantive, underlying offences as a basis for the criminal proceedings.
It is remarkable that a substantive criminal-law provision could mainly serve for investigative purposes rather than for obtaining a conviction. Normally, this function is devoted to procedural penal law. Whether such a situation could generate possible diversions of the use of provisions on membership in criminal organisations is yet to be explored.

Interestingly, it was never mentioned in any of the three countries that statutes of limitation are a constraint for the successful prosecution or adjudication of cases, even in Italy and Poland where a number of cases have been brought to court on the basis of the provisions studied.

Compared to the legal means available generally in European countries to investigate other forms of serious crime (for example, corruption),[21] those at the disposal of the fight against organised crime – including its most notorious expressions, such as drug trafficking – comprise the most offensive working techniques. Thus, it is likely that the quality of evidence and testimonies takes advantage of such facilities.

This is not to say that in organised crime cases, means are unconditionally available. The application of provisions on membership of a criminal organisation may in certain instances depend on a cost/advantage balance. Proceedings aimed at dismantling a criminal organisation on the basis of such provisions require the use of special investigative techniques, strong evidence, personal involvement and commitment from the security authorities.

If the end result – in terms of conviction(s) – could have been achieved on the basis of provisions requiring less investment, or if the end result is not significantly better than the one obtained by other legal means, provisions on membership in criminal organisations are of little value.

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[20] Such a topic would probably deserve a specific study, extending also to terrorist groups.

[21] See notably the first-round evaluation reports of the Group of States against Corruption (GRECO) – the Council of Europe monitoring body in the field of anti-corruption measures – at www.greco.coe.int; for instance, a number of recommendations have been made to countries to allow for interceptions of communications or telephone-tapping, as well as witness-protection schemes in corruption cases.

The overall problem of the necessary balance between human rights aspects and proceedings on the basis of provisions on membership in criminal organisations seems not to have raised difficulties for the time being; it appears that the three countries under survey handle these provisions quite carefully.

Having a legal framework applicable to the incrimination of membership in criminal organisations is of major importance from the perspective of individual countries, but also from the perspective of the community of states. Mutual legal assistance based on such a legal framework may otherwise remain ineffective for reasons of lack of dual incrimination although, in some instances, international instruments provide that this kind of gap should not be an obstacle for effective co-operation (see EU Joint Action of 1998, Art. 2 para. 2). One should bear in mind that organised crime may have become trans-national by nature in a number of countries.

To a large extent, the effectiveness of provisions incriminating membership in criminal organisations is subject to accessory factors of which experienced practitioners involved in the fight against organised crime are generally aware (witness protection and special investigative means, for instance). The present survey has, however, tried to point at some aspects that could be worth considering further. These are briefly highlighted below in the form of suggestions. Anecdotal evidence also suggests that, within these countries, round-table conferences to discuss such issues and bring together ministerial personnel and field practitioners are generally mostly welcome.

Finally, it appears that the major challenge remains the gathering of information from different sources and converting it into reasonable suspicion or evidence (depending on the stage of the procedure considered). Now, this could also be true from a strategic point of view. The discussions held in the three countries focused largely on forms of organised crime that can probably be considered "traditional" (violent groups involved in trafficking, smuggling, prostitution and so on).

What the delegation was told, notably in Germany and Italy, about organised crime groups being increasingly discrete and increasingly involved in business structures, could witness to a radical change in some countries. It is true that business and financial crimes are often subject to lower sanctions than "street crimes", are less dangerous for offenders and are harder to apprehend for the authorities. On the involvement of organised crime in activities carried out on the licit markets, see the PC-S-CO annual report 2001.[22]

3.2 SUGGESTIONS

1. Provisions on membership in criminal organisations offer a high potential; but practitioners expect that the legislation, level of proof required, sanctions and suchlike are set so that the cost/advantage balance will not inhibit the use of these provisions;

2. If the use of provisions on membership in criminal organisations is inhibited by requirements which are difficult to meet (as regards the structure or the form of participation), it might be useful to introduce and/or apply alternative provisions, for instance on criminal gangs, or on crimes committed through business-like structures.

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22 Pages 14, 51, 108.

3. The absence of a legal definition of organised crime and of membership in such groups offers the advantage of flexibility; however, some guidance and/or joint awareness-raising activities may be useful; criteria which are present in international definitions may provide such guidance;

4. Depending whether or not organised crime groups offer sufficient stability in their existence, and thus a certain "identity", it may be useful to obtain a "basic" court decision qualifying the group as criminal, in order to facilitate subsequent prosecutions against its members;

5. Provisions on membership of criminal organisations offer some interesting potential, not only for proceedings against a variety of actors who are variably involved in criminal activities – leaders are not necessarily directly implicated – but also to facilitate the use of special investigative means, including the gathering of evidence or information about persons who are not necessarily the primary target of these operations;

6. Schemes aimed at the protection of witnesses and collaborators seem to be the most powerful tool to break into the structure of a criminal organisation. High-profile measures (change of identity and relocation) and simpler mechanisms for less crucial witnesses can usefully complement each other;

7. Due to the nature of organised crime, information and intelligence play a crucial role in successfully combating it; this requires good circulation (and protection) of data and information at national level, but also with foreign countries; centralisation offers various advantages (such as the quality of information, and avoiding the risk of duplicate investigations/operations leading to unnecessary warning signals given to the suspects); the quality of information and evidence collected may, in turn, determine the best moment for action by the authorities;

8. Prosecutors and investigating magistrates are in a position to play a crucial role in obtaining collaboration or information from suspects; this requires certain psychological and tactical skills, in particular during informal interviews (as with persons under arrest);

9. An organised crime group represents a major challenge for law enforcement and prosecutorial bodies, and the court system; various bodies may need to interact in the case of a given group, notably to avoid splitting the case between several jurisdictions when a high-profile approach is decided on (targeting the entire group of suspects);

10. Given the international dimension of organised crime groups, mutual assistance (such as extradition) could be largely facilitated if the setting-up and membership of criminal organisations were criminalised throughout Europe; as regards co-operation on EU territory, it may be useful to recall the provisions of Art. 2, para. 2 of the 1998 joint action;

11. The effectiveness of provisions on membership may depend on external factors, such as the degree of influence (corruption, threats, violence, political influence) on the authorities of law and order, including the execution of court sentences (probation officers, prison staff and suchlike); also, screening of persons in jail and proceedings – and research on all these aspects might be useful;

12. Psychological support, protection and adequate working conditions are needed by those law-enforcement officers and judicial practitioners handling organised crime cases;

13. Vigilant, continued observation and research can clarify the *modus operandi* of powerful criminal groups, including looser structural forms and activities on "licit markets";

14. In connection with this, it might be worth revisiting the commonly accepted components of the definition of organised crime, to test to what extent the objective of profit is relevant.

4 Appendices

4.1 SELECTED REFERENCES

Much has been written on organised crime. Persons interested in having a quick overview may refer to the following sources.

Annual reports on the situation of organised crime in member countries (1996, 1997, 1998, 1999, 2000, 2001), prepared by the Group of Specialists in Criminal Law and Criminological Aspects of Organised Crime (PC-S-CO) – see http://www.coe.int/economiccrime

Best-Practice Surveys:

- 1 Witness protection
- 2 Reversing the burden of proof in confiscations
- 3 Interception of communication and intrusive surveillance
- 4 Crime analysis
- 5 Cross-border co-operation
- 8 Co-operation against trafficking in human beings
- 9 Preventive legal measures against organised crime

EUROPOL annual reports on the situation of organised crime in the EU: – see http://www.europol.eu.int

National Legislation on Organised Crime, compendium of national provisions prepared under the aegis of the UN-ODCCP, last update 11 August 1999 – see http://www.uncjin.org/Documents/Crtoc/webtocid.pdf

Interpol international crime statistics and other information – see http://www.interpol.int

Rechtliche Initiativen gegen organisierte Kriminalität, ed. Walter Gropp/ Barbara Huber (Deutschland: Walter Gropp/ Liane Schubert/ Matthias Wörner; Italien: Renzo Orlandi; Polen: Piotr Hofmanski/ Emil W. Plywaczewski), Max-Planck-Institut, Freiburg im Breisgau, 2001.

Mafias du monde: Organisations criminelles transnationales. Actualité et perspectives by Thierry Cretin, PUF (Presses Universitaires de France), Paris, 2nd edn, 1998.

4.2 RELEVANT PROVISIONS FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6 – Right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7[23] – No punishment without law

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 11[24] – Freedom of assembly and association

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

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23 Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

24 Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

4.3 IDENTIFYING ORGANISED CRIME-RELATED CASES

1977 GERMAN GUIDELINES, REVISED 1999

(Generelle Indikatoren zur Erkennung OK-relevanter Sachverhalte, Anlage zu den Richtlinien für das Strafverfahren und das Bussgeldverfahren) [Translation by the Council of Europe Secretariat]

Preparation and planning of the offence
- precise planning
- adaptation to the market through the use of "niches", exploration of demands etc.
- work upon contract
- high level of investment, e.g. preliminary financing using non-identifiable resources
- creation and exploitation of areas of influence
- maintaining rest-places in foreign countries

Execution of the offence
- precision and skill in perpetrating the offence
- use of technical means and skills that are relatively expensive or difficult to mobilise
- use of specialists, possibly from abroad
- sharing of tasks
- use of persons with no police record
- construction of company networks that are difficult to penetrate

Financial aspects
- use of monies of unclear origin in combination with investments
- acceptance of economic losses in the course of business
- discrepancy between financial investments and profits to be expected
- suspicious investments, e.g. the acquisition of property or goods disproportionate to income

Destination of criminal assets
- re-circulation in the economic market
- trading in (legitimate) business activity
- money-laundering operations

Conspiracy-like behaviour
- reciprocal observation
- maintaining distance
- use of pseudonyms
- speaking and writing in code
- use of very advanced techniques to counter law-enforcement surveillance

Offender/offence-relationships
- cross-regional
- national
- international

Group structure
- hierarchical construction

- unexplained dependence and authority-based relationships between suspects
- internal sanction-system

Assistance to group members

- support to flight from justice
- use of given barrister and their payment by third party
- use of large cash amounts on the defence
- offering of high warrants
- threats and intimidation against participants in the proceedings
- disappearance of previously available witnesses
- fear and silence of persons concerned
- surprising names among defence witnesses
- care provided during custody and execution of jail sentence

Use of corruption

- involvement in the criminals' social sphere
- creation of dependence (through sex, prohibited gambling, interest/credit usury)
- payment in bribes, use of holiday homes, luxury cars etc.

Monopolistic tendency

- "taking over" companies and shares
- management of companies through "front men"
- control over certain business sectors
- "protection" in exchange for monies

Actions in the public sphere

- manipulation or tendentious initiatives in the public sphere, aimed at diverting attention from suspected crimes
- systematic attempts to exploit social institutions (e.g., through peculiar sponsorship)

4.4 MEMORANDUM ON CO-OPERATION

between the General Prosecutor's Office of Moldova
and the National Anti-Mafia Bureau of Italy
in combating organised crime and laundering of the proceeds of crime

The General Prosecutor's Office of Moldova and the National Anti-Mafia Bureau of Italy, hereinafter referred to as the "Parties"

Aiming at establishing and developing co-operation in combating organised crime and laundering of the proceeds from crimes committed by criminal associations;
Based upon the principles of sovereignty and equality of rights among states;
Bearing in mind the principles and rules universally recognised by the international law.

HAVE AGREED AS FOLLOWS

The Parties within their jurisdiction and in compliance with their domestic laws, shall co-operate in combating organised crime and laundering of proceeds from crimes committed by criminal associations.

Co-operation within the Memorandum shall be implemented by the Parties through the exchange of information and documents on organised crime and persons involved in it.

In this case the Parties, in compliance with investigation secrecy requirements, shall mutually exchange information where any of their nationals, foreign nationals and stateless persons are being investigated for organised crime.

The Parties, within the scope and limits of their powers, shall adopt such measures as may be necessary to favour the effective and prompt execution of any request for extradition and legal assistance in criminal matters relevant to organised crime, provided that such requests have been accepted by the competent authorities of the requested Party.

The Parties undertake to promote the development of professional contacts and relations between members of their respective offices with a view to effectively update their experiences and to exchange information and data on their national laws, including the exchange of laws and other legislation, analytical materials, statistical data and reports concerning organised crime and laundering of proceeds from crimes committed by criminal associations.

In order to implement this Memorandum, the Parties shall contact each other directly, which does not exclude that they may use diplomatic channels.

Co-operation within this Memorandum shall be implemented on the basis of requests for information. Yet, a Party may, without prior request, forward to the other Party information when it considers that such information might assist the receiving party in initiating or conducting investigations.

The requests for information and the relevant responses shall be sent, in writing, in the language of the requesting Party accompanied by the English translation. In the event of urgency, such requests may be sent by telex or fax, with formal confirmation to follow.

Each Party shall appoint a prosecutor responsible for arranging co-operation and contacts within this Memorandum. Within three months as of the date when this Memorandum is signed, each Party shall notify the other, in writing, the name and address of the prosecutor involved.

The Parties, in mutual agreement, may send their own representative to take decisions over issues arising from mutual co-operation.

Each Party shall execute the requests for information in accordance with domestic laws. Where it is impossible to execute a request, the requested Party shall promptly inform the requesting Party of the reasons for refusal.

The Party which provides information and documents pursuant to the provisions of this Memorandum may request the other Party to ensure that they be kept confidential when used.

Where it is necessary to use such information at trial, the requesting Party shall submit a request for judicial assistance in compliance with the rules governing international and national law.

Any issue concerning the construction and implementation of this Memorandum shall be decided by the Parties according to principles of mutual understanding and respect. Nevertheless the Parties may, in mutual agreement, amend or change this Memorandum at any time.

This Memorandum does not establish any new international and interstate legal obligation for the Parties and their States and does not affect any of their present international obligations. Co-operation within this Memorandum shall be effected through the constant willingness of the Parties aimed at adopting practical decisions in combating organised crime and in the co-operative spirit which characterises this document.

Done at__________________ ________________________
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In two copies, respectively in Moldovan and Italian, both texts being equally authoritative.

Each Party receives the official translation in English together with a copy of this Memorandum.

For the General Prosecutor's Office of Moldova	For the National Anti-Mafia Bureau of Italy