

# THE ORGANISATION OF CRIME FOR PROFIT

CONDUCT, LAW AND MEASUREMENT



Petrus C. van Duyne, Almir Maljevic, Maarten van Dijck,  
Klaus von Lampe, James L. Newell

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*(editors)*



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The Cross-Border Crime Colloquium is an annual event since 1999. It brings together experts on international organised (economic) crime to discuss the latest developments in empirical research, legislation and law enforcement, with a special geographical focus on Western, Central, and Eastern Europe. The Colloquia aim at building bridges in three respects: between East and West Europe, between scholars and practitioners, and between old and young. The Cross-border Crime Colloquium, so far, has been organised eight times:

- 2006 Tallinn, Estonia
- 2005 Sarajevo, Bosnia and Herzegovina
- 2004 Berlin, Germany
- 2003 Airing, Germany
- 2002 Ljubljana, Slovenia
- 2001 Bratislava, Slovakia
- 2000 Budapest, Hungary
- 1999 Prague, Czech Republic

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### **Wolf Legal Publishers**

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+31 (0)24 355 1904 (phone)

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## **List of authors**

*Maarten van Dijck*

Researcher at the Department of Criminal Law, Tilburg University

*Petrus C. van Duyne*

Professor of Empirical Penal Science at the Department of Criminal Law, Tilburg University.

*Klaus von Lampe*

Researcher at the chair of criminology, Freie Universität Berlin

*Rob Hornsby*

Lecturer at the Department of Sociology, University of York

*Almir Maljevic*

Senior lecturer at the Faculty of Criminal Justice Sciences, University of Sarajevo

*Anna Markina*

Researcher and lecturer at the Faculty of Law, University of Tartu

*James L. Newell*

Professor of Politics at the University of Salford

*Brendan Quirke*

Senior lecturer at Liverpool John Moores University

*Miroslav Scheinost*

Director of the Czech Institute of Criminology and Social Prevention, Prague.

*Karen Verpoest*

Researcher at the Institute for International Research on Crime Policy, Gent University.

*Barbara Vettori*

Researcher in sociology of deviance at the Faculty of Sociology of the Università Cattolica del Sacro Cuore, Milan and research coordinator of the Milan office of Transcrime, Joint Research Centre on Transnational Crime, Università degli Studi di Trento/Università Cattolica del Sacro Cuore di Milano.

# **Introduction: Counting clouds and measuring organised crime**

*Petrus C. van Duyne*

If we were to ask a man, standing motionless in a meadow looking up at the sky what he was doing and if he answered: “I am counting the clouds”, we would think him a bit peculiar. Clouds come, disappear, fuse, split up or become a fog. What is the point in counting them? As this is a harmless exercise, we would be inclined to leave the eccentric in peace. However, if we were to come across a functionary in a police head quarters or in Europol working through a pile of police reports to determine the extent of organised crime, few of us would think this an eccentric undertaking. But what is the difference?

If it may be that there is little difference between the weird cloud counter and the many organised crime counters, then we face a most interesting social phenomenon. Of course, not one concerning the lonely cloud counter but conall those educated professionals who are collectively engaged in assessing the organised crime phenomenon. This involvement has acquired a history of its own: in the USA at least since the Kefauver Committee of 1950<sup>1</sup>; in Europe since the 1980s and in international organisations at least since the Naples world conference of 1994.<sup>2</sup> Let us say that organised crime as a recognised ‘phenomenon’ is with us for between half a century (USA) and two decades (Europe). Given this long-term involvement, we would be justified in expecting there to be more than ‘organised crime cloud counting’ and a solid body of knowledge instead.

How solid is the state of the (knowledge) art today? The ‘serious’ organised crime literature is vast, though the amount of strictly empirical

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<sup>1</sup> This was an historical event which started with local concerns about interstate crime. It was almost hijacked by Senator McCarthy, who did not succeed and instead indulged himself in hunting domestic communists (Abadinsky, 1991: 469).

<sup>2</sup> Unfortunately the ceremony of this event was marred when two gentlemen in black walked into the conference tent to notify the chairman, Mr. Berlusconi, that public prosecutors had initiated a criminal investigation against him.

research is modest.<sup>3</sup> Aside from its volume, to what extent does the research literature shed light on (a) the nature of the purported phenomenon and (b) on its extent? That depends in the first place on the methodological quality of the research and particularly on the definition on which it is based. If there is no unity of definition or if it fails to delineate unambiguously what the research or assessment is about, the findings are hard to compare. The resulting reports all portray their own cloudy skies. Together they may yield a fascinating collage, but they are far from determining the existence of something, let alone *measuring* its extent. And if this is true, then threat assessments which are assumed to be derived from preceding descriptions have no basis either.

Therefore, the comparison with the cloud counter is not so far-fetched after all. However, there is a difference. Organised crime studies are usually also about estimations of the dimensions of threats. In terms of our metaphor, they are about *threatening* dark clouds looming over society, not only nationally, but in the current common parlance, 'transnationally'. For the organised crime discourse this threat connotation is more than an undertone. It leavens the whole debate, in the political arena as well as in the more analytical setting of academic research. Researchers are not only charged with the task of determining the extent and nature of 'organised crime', but they are also expected to give their authoritative 'scientific' opinions about the nature of the threat (a task which most accept without demur). If only they would restrict themselves to 'organised crime cloud counting' their endeavours could be met with methodological scrutiny (Van Duyne and Van Dijck, 2007; Black et. al., 2000). But by additionally accepting the task of threat assessment they engage in the interpretation of clouds as *threatening*, as thunderstorm clouds, or clouds with thunder *potential* as a risk assessment (Vander Beken, et al., 2004). This is carried out despite the continuous and widespread disagreement about the definition of the intended phenomenon itself in the first place. Thus, while European policy makers and researchers have decided energetically to pursue 'Organised Crime Threat Assessment' (OCTA)<sup>4</sup>, the basic question 'What does a threat assessment of something undefined mean?' remains unanswered. From the perspective of measurement methodology this constitutes a basic neglect of elementary research principles. What do the authors of this volume tell us on this and related issues?

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<sup>3</sup> Most empirical research is based on either police or court files or interviews with law enforcement agents. Interviews with criminals are somewhat rarer (but not exceptional) and so are studies based on participant observation (Von Lampe, 2004a).

<sup>4</sup> Council of the European Union, 14959/1/01, CRIMORG 133, Brussels, 10 December 2001.

## **The disorganisation of measuring**

The broader framework within which this impossible undertaking takes place has been set out by the combined research team of *Tilburg University*, the *Freie Universität Berlin*, the *University of Ghent*, *Durham University* (later replaced by *London School of Economics*) and the *University of Tartu*. Within the European Commission's 6<sup>th</sup> Framework Programme<sup>5</sup> the research team set out to survey the huge number of definitions and conceptualisations of organised crime. They applied a meta-theoretical classification to the existing literature to get hold of the breadth of the diversity of approaches to the conceptualisation and to assessment 'organised crime'.

Needless to say, that this was a huge undertaking. The organised crime literature is vast consisting of thousands of titles, expanding daily. Apart from that, many authors are not very explicit in the way they use concepts, assuming that 'we all understand what we mean when we talk about organised crime'. This suggests some kind of common 'discourse family' engaged in the same language game (I will discuss that later). Therefore, after surveying their predecessors' (failed) attempts to create some order in the conceptual chaos surrounding the study of organised crime –whether by designing models, creating typologies of components of definitions– the authors refrained from piling another typology or definition on top of the existing ones. Instead, they analysed a substantial sample of the European and international organised crime literature (66 titles) to determine how is it conceptualised. Their classification 'tool' consisted of what they called 'basic dimensions': individuals, structures, activities or systemic conditions.

The outcome was as disorganised as 'organised crime' can be. Not much conceptual order could be discerned. For example, the concept of 'criminal structures' was found to be used in terms of market relationships, groups, networks or all of them. In addition, the clarity is often obscured by the loose and imprecise way in which the key words are used. The four basic dimensions of organised crime form no coherent pattern connected to other aspects, like type of crime, instruments or causes. Worse, there is considerable arbitrariness in the ways categories are used. For example, on the one hand, 'organised crime' is portrayed as 'business' (as in the case of drug trade), but on the other hand, it is connected to predatory crime which is a rather anti-business affair.

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<sup>5</sup> Research project: Assessing Organised Crime. Testing the feasibility of a common European Approach (CIS8-CT-2004-501767).

The authors formulate their opinion about the state of the knowledge diplomatically, indicating “a lack of common theoretical understanding”. Given the nature of the conceptual juggling and the careless mixing up of concepts –frequently non-delineated and therefore fuzzy– one may rather speak of a fundamental lack of scholarly discipline (Van Duyne and Van Dijck, 2007). There is not a scientific debate between identifiable ‘schools’ or certain streams or a thoughtful building on predecessors. Of course there is no lack of citations. But after this customary quotation ritual and display of wide reading, authors follow their own course. Because they use the same or similar words, it looks as if they are talking about the same subject. Still, each stares at a cloud formation of his own.

This isolated cloud staring is not a strange scholarly trait. *Barbara Vettori* of the Catholic University of Milan provides an intriguing account of the study that was undertaken to develop a body European Union ‘organised crime statistics’ to measure organised crime (‘EUSTOC’). The general idea is that a proper survey of the organised crime situation in Europe will contribute to more harmonised and effective policy making. As every criminologist engaged in international comparative studies knows, this is not a sinecure. The disciplinary requirements necessary to make such an instrument work are strict and once put into place it must be maintained continuously. A watered down statistical data base is a nightmare for every researcher. And what does Dr. Vettori convey to us?

It goes without saying that there are no statistics without definitions of phenomenon as a whole, its component parts and all of its accompanying features. No bird flu definition, no bird flu statistics. Bird flu is very much dreaded, so we know much about it. What about the dreaded ‘organised crime’? Yes, there is a ‘politically agreed-upon definition’ of organised crime.<sup>6</sup> The emphasis is on ‘politically agreed-upon’, because as an *empirical* definition it does not cut much ice. This aspect is not discussed, perhaps because in the European context questions about validity are rarely raised. Whether or not the ‘agreed-upon’ definition is a valid one, the author sharply observes that member states in the EU only partly adhere to it. And if they do so they apply it in such varying ways that the results are incomparable nonetheless. Sometimes the deviation is a conscious policy decision, in other cases deviation simply slips in. This nonchalance contrasts strongly with the rhetoric surrounding the organised crime debate.

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<sup>6</sup> For a rough selection of the organised crime definition literature: see: Maltz, 1990; Dobovšek, 1996; Van der Heijden 1996; Fijnaut et al. 1998; Levi, 1998; Finckenauer 2005. For a detailed overview of OC definitions, visit the website maintained by Klaus von Lampe, <http://www.organized-crime.de/OCDEF1.htm>.

If the imprecise application of the imprecise definition leads already to uninterpretable statistical outcomes, the underlying methodology of database building is sufficient to render vain all hopes of developing any reliable organised crime statistics. Databases are based on counting units: no counting units, no statistics. What do member states do? The author provides us a penetrating insight on this point. Member states use *offence* based or *offender* based systems or a combination of both. An offence based system weighs the ‘seriousness’ and ‘complexity’ of the crime and subsequently concludes it must be ‘organised crime’, *because* it is serious and complex. The offender based system starts the circle of reasoning from the other end: suspects ‘known’ to ‘commit organised crime’. Hence the crimes committed by these suspects is ‘organised crime’. So, we can choose between offence or offender based circular data collection, or a mixture of the two circular reasoning systems. At least, the circle will be round. If databases can be built on these principles at all, one may wonder how useful they will be for the purpose of comparative analysis.<sup>7</sup>

An aspect of database building is defining the variables that denote the distinctive features of the criminal activities or offenders. These range from ‘person variables’ (like age, gender, marital status), previous convictions, modus operandi to external relationships etc. Many variables are common, but that does not entail comparability. Variables (with the same name) may be coded differently, while the data collection techniques may be different too. In simple research terms: lists of identically worded variables but with different ‘code books’ (if present at all) yield different databases. In that case there is nothing to compare, because statistically these are different statistical ‘populations’.

The author optimistically concludes by putting forward a list of improvements, which would certainly make sense, if only that stubborn definition problem could be solved. Thus far this has not happened, despite all the political resolutions aimed at doing just that.

## **Financial and economic crime problems**

Though the existence of organised crime is usually presented as an obvious fact, albeit one that is somewhat difficult to assess as soon as more clarity is required and a proper methodology is applied, the organised-crime status of financial and economic crime has always been an unclear and uneasy matter.

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<sup>7</sup> A proper database can easily be built on (a) offenders *and* (b) offences. Actually, most databases of money-laundering are based on suspects and suspected transactions.

Even when we do not add the adjectival clause ‘organised crime’, financial and economic law breaking is fraught with conceptual difficulties. The director of the Czech Institute of Criminology and Social Prevention, *Miroslav Scheinost*, leads us through this hazy economic crime landscape. From a legal and law enforcement perspective it is an ‘old landscape’ and one would have expected that most of the difficulties would have been sorted out by now through a process of legal and conceptual ‘maturing’. However, Scheinost’s elaboration destroys this illusion. Though economic crime has a longer legal and criminological history than ‘organised crime’, there is much conceptual disorder in this field. This is as foggy as ‘organised crime’ which makes the counting job just as meaningless. Despite this, it is remarkable that in the area of economic crime there is no definitional controversy, nor anyone who proclaims to have coined the only correct definition as ‘organised crime thinkers’ are sometimes prone to do (Maltz, 1990; Fijnaut et al., 1998; Finckenauer, 2005). Economic crime researchers recognise the ambiguous nature of any economic crime definition and move forward to more important matters like selecting and defining a topic for research.

Selecting economic crime research topics is not just a methodological issue. Surrounding the research topic are broader social and economic issues, that turn economic crime research into something more than the processing of tables of official statistics. While in the area of ‘organised crime’ the authorities succeed in evoking some kind of ‘threat feeling’ (however imprecise), this does not work to the same extent field of economic crime field. It depends on what is at stake. If the authorities intervene in market relations by making coveted goods more expensive, customers have other things to worry about than ‘organised crime’. It requires little imagination to see that tripling the prices of coveted consumer goods, like tobacco in the UK or alcohol in Norway, does not contribute to depicting the related smugglers as ‘organised crime’ bogeymen (Johansen, 2005). Nevertheless, as soon as such criminal entrepreneurial activities are upgraded to the category of ‘serious crime’, it is also qualified as ‘organised crime’. The author’s discussion of organised crime and economic crime, trying to clarify the distinction between them, may convince the reader that the attempt to differentiate the two is as successful as keeping clouds apart. At certain moments one can say: ‘Yes, they are apart’ and at the next moment they fuse again.

If all these conceptual endeavours fail to bring clarity to the distinction between economic and organised crime, the fight economic crime should not suffer from this. This should especially not be the case at the European level, where the financial stakes are very high, as the chapter of *Brendan Quirke* of Liverpool John Moores University makes clear. The positioning of the

UCLAF, the European fraud watchdog, within the European Commission has failed to contribute to the intended clarity. It was felt that a watchdog should not be part of the environment it is supposed to watch. In addition, there was discontent with the handling of case files and intelligence. Hence, in 1998 OLAF, an agency within the Commission with independent operational powers was established to protect the European Union against any wrongdoing, like fraud or corruption, which may impair its finances. In order to realise that objective OLAF was given far reaching powers, such as the authority to carry out on-the-spot inspections and investigations without prior notice.

That would bring some clarity. However, a year after it was criticised for its slow handling of the *Eurostat* case, amendments to its statute diluted some of OLAF's powers. One of the amendments states that OLAF has to notify a EU institution when it comes under investigation; possibly to the delight of the EU institution being investigated, which may thus be induced to tamper with evidence. OLAF's powers in cases of external investigations imply a strengthening on the one hand, and a weakening on the other hand. Not all courts may accept the evidence collected by OLAF, which may nullify its efforts. Other aspects of the status and positioning of OLAF demonstrates that it is not easy to remain transparent while pleasing everybody at the same time. OLAF has its own budget, but it is still part of the Commission. It is unable to report to the European Parliament on its own account, but only as part of the Commission, which may entail some influence.

OLAF is not the only institution with powers to clarify investigate fraud against the EU financial interests. There is also EUROJUST, made up of national prosecution offices and other law-enforcement staff. It is accountable to the Council of Ministers, and hence independent of the Commission, though not financially. This was made quite clearly when the Commission reduced EUROJUST's budget request by almost three million euros. Though OLAF and EUROJUST should cooperate in a sunny synergy, their relationship is a troubled one. This is partly due to overlapping interests: OLAF is entirely devoted to the EU financial interests while EUROJUST covers a broader field, among them 'organised crime'. And here, at the unclear intersection of the undefined 'organised crime' and economic crime, obscuring clouds of legal competences and jurisdictions are pulling together. Given the earlier observations on 'organised crime' and economic crime, this not at all surprising after.

Where EU-policy makers have apparently failed to translate firm intentions into a crystal clear structures to fight economic and organised crime, in the field of money-laundering, the blue prints have been transparently put into place. Actually this mainly applies to the *legal* lay-out, as

is demonstrated by the paper of *Almir Maljevic*, lecturer at the University of Sarajevo, on fighting money-laundering in Bosnia and Herzegovina. The author describes how in a country still nursing its war wounds, a new phenomenon was addressed: money-laundering. One has to remember that this had to be achieved in a country which in all respects of law enforcement has come close to complete disintegration. In addition, the economy was a complete shambles, one in which transparency in matters of paper work was not an everyday virtue. Nevertheless, legislators in the Federation and *Srpska Republika* succeeded in passing a bill which complied with all the standards of the Financial Action Task Force on money-laundering. Given the high standards of transparency maintained by the FATF, this was quite a feat.

Apart from putting all the legal instruments into place, the authorities also established an organisational structure: a Financial Intelligence Department (FID) within the Ministry of Security of BiH. This body has wide powers of supervision and investigation. It sits at the centre of all public and private institutions that have anything to do with financial matters. All private enterprises engaged in any kind of financial service have to report suspicious financial transactions and/or all cash transactions above the threshold of € 15.000.<sup>8</sup>

What happened after this anti-laundering scaffold was erected? Did it work? Well, yes and no. The banks rushed to comply with the new legal requirement and reported a stunning volume of financial transactions: almost 109.000 in one year, with other institutions like the stock exchange and the tax office reporting a mere 700 transactions (less than 1 %). What about the other institutions and enterprises obliged to report? One can say that ‘darkness set in’: probably due to a mixture of unwillingness and incompetence. Granted, the reporting ‘tsunami’ of the bank should not be considered as an unambiguous sign of success: only 0,01 % of the reported input were related to something suspicious. In the end, there were six indictments and one conviction. To this it must be added that the FID was operational for only *one* year which is a too short time span to judge its effectiveness.

When we survey this field of fighting money-laundering, we discover that the law enforcement yield is universally poor, even in countries with more than ten years’ experience. It remains difficult to shed light on the underground economy, ‘grey’ or criminal. And yet, this is an important aspect of the threatening ‘organised crime counting’ undertaking. If we are ignorant of

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<sup>8</sup> In this volume all figures are in continental European annotation: the comma for the decimals and the point separating the thousands.

the crime-economy, how can we make statements about the level of threats it poses? (Reuter and Truman, 2004; Levi and Reuter, 2006)

## **Scenarios and reality**

One of the methods enabling us to make statements about potential organised crime situations is to draft scenarios, as described by the authors of the *Landeskriminalamt Nordrhein-Westfalen*. Drafting scenarios on the future state of organised crime in 2009 or later cannot be compared to a statistical extrapolation of a time series. Scenario building is rather an artful undertaking. Basically the ‘method’ hinges on experts’ opinions, which are the ‘counting units’. As a research design it would be objectionable, but the scenario game is not a validity and reliability contest. It helps a number of experts in a collective setting to identify a number of factors and to translate these into conditional ‘if *A*, then *B*’ statements.

The workshops in which 23 factors were differentiated produced (with a special computer programme) some 35 organised crime scenarios for Nordrhein-Westfalen, of which 3 were singled out as being distinct enough. The three scenarios for 2009 were redrafted into narratives and given the nicknames ‘Neck and neck’, ‘Light and darkness’ and ‘ap-OC-alyse’. The reader may sense already some kind of threat crescendo. Indeed, the ‘neck to neck’ scenario is relatively mild for Nordrhein-Westfalen. Organised crime (undefined) opportunities will increase, but the lag in investigative technology has not worsened, while legislative harmonisation in the EU (which is supposed not to expand anymore) has improved the justice system. The gap between rich and poor and Islam fundamentalism remain worrying.

The following ‘light and darkness’ scenario contains a bit more darkness than light. Fewer people benefit from the slow economic growth, unemployment (among migrants) increases together with polarisation and law enforcement agencies lagging behind in technology. This is but an intermediate position to the next, really gloomy scenario: the ap-OC-alyse. With worsening economic conditions, retreating government, ghetto-isation, deficits in law enforcement, an expanding Europe and more globalisation ‘organised crime’ opportunities increase.

Scenarios may be interesting criminal weather forecasts. It would be interesting to wait a few years and to compare them with what the real criminal situation is then. However, I doubt whether the variables are formulated with sufficient sharpness to allow such a test.

A gloomy scenario that has become a continuous grim reality is the one found in Italy. True, as far as organised crime counting is concerned, Italy

represents a most transparent situation: it has only four criminal organisations – the Mafia, Camorra, N'drangheta and the Sacra Corona Unita. But that is where the transparency in Italy ends. This applies particularly to the muddy relationship between the Italian authorities and the Mafia, as the author, *James L. Newell* of the *University of Salford* describes in his contribution.

As far as the definition question is concerned, the author is perhaps correct in subsuming the Mafia under 'organised crime as popularly understood' (loosely denoting large powerful organisations having a complex division of labour). In the case of Italy this choice is not an easy way out of a fuzzy problem. The problem of the Mafia is the problem of the state. More precisely: the obscure relationship between the two. Most criminal organisations are involved in market transactions concerning illegal products and the way they organise themselves is to a large extent determined by the nature of the commodity and the social potential of the market. As far as most prohibited commodities and market relationships are concerned, developing large organisations can be risky, if not self destructive. Therefore the research literature has repeatedly indicated the ephemeral, shifting nature of criminal commercial enterprises, which are so difficult to assess (Levi, 2002). In contrast to this the Mafia's core business is not illegal trade but illegal protection, which requires stability. Since in a constitutional state the authorities are by law the only protectors of citizens, there is a direct competition with any organisation which offers protection too. To the extent that the state is weak and ineffective in its protection, illegal organisations may take over that task, as has also happened (partly) in Russia (Varese, 2001).

Newell describes how the Mafia has succeeded in defying the state-competitor by overcoming obstacles inherent in other forms of the crime-business. The key to its success is the wide-spread corruption in Southern Italy together with the accompanying deep distrust of the population towards the authorities. This applies particularly to Sicily where the state, considered an alien imposition, has never been welcome. But still the 'state' is there and is in need of support to get things done. Since it lacked popular support a secret (and toxic) exchange relationship developed between the state (or rather its officials and political parties) and the Sicilian Mafia. As the Mafia is (partly) embedded in the popular culture and values, these corrupt interactions are not considered as an alien phenomenon. In addition, the Mafia 'gives and takes': Locally it can give protection (scantily provided by the authorities), but it takes its share by extortion. It provides jobs, but also forces entrepreneurs to accept useless staff. It can generate votes for politicians, but can at the same time exercise undue and uncanny influence. The Mafia thrives in a landscape of deep mistrust, while itself must operate on a basis of trust within the family.

As such an organised crime phenomenon is clearly identifiable as a ‘cloud’, there is little to count. Pointing at it is sufficient. That is true because the Mafia –as all other secret protection ‘brotherhoods’– has a very restricted and well demarcated commercial market place: it is bound to static geographical perimeters and tends to loose cohesion as soon as it engages in the dynamics of trade (Paoli, 2003). Trade transcends the local base and thus creates uncertainty of control and the maintenance authority and respect. This is reflected in the difference between the two Palermo markets: the fish and taxi markets (Gambetta, 1993). The first is static and therefore pretty well controlled by the Mafia. The second market is not Mafia controlled, for the simple reason that the mobility of the drivers and distances involved in their affairs make it difficult for the Mafia to exert control. Outside the uncertain winds of illegal dynamic commerce ‘organised crime’ probably settles down and may be countable after all.

That may be a nice scenario for organised crime assessment, but the daily unfolding criminal reality takes mainly place against a commercial horizon as set out by *Petrus C. van Duyne*. He points to another cloud formation which usually floats by with little attention paid to it (with the exception of Scheinost in this volume): the organisation of *business crime*. In the organised crime literature this type of crime has received hardly any attention, perhaps because the offenders in this field are not of the ‘usual suspect’ type, the preferred focus of organised crime researchers. From the perspective of measuring ‘organised crime’ (and its threat), including this motley collection of ‘organised’ economic criminals in the set is quite disturbing. Because the variety of ‘organised crime’ types increases, the meaning of the ‘organised crime’ concept becomes even more diluted than it already was.

The author gives short shrift to the cobwebs created by scholastic debates about organised crime definitions (Van Duyne, 2003). If ‘organised crime’ is a topic for behavioural science research, what matters is to map and explain the variance of the organisational conduct of the law breakers under study. As the art of organising crime-for-profit is to remain out of the hands of the law, the first behavioural question is how crime-entrepreneurs interact with their environment to achieve that. If these environments differ widely it is likely that we will accordingly find accordingly different modes of conduct. We can try to subsume them under the common denominator ‘organised crime’, but such a subsumption is pretty empty lacking explanatory power.

To demonstrate this thesis the author compares the findings of the analyses of entrepreneurs operating in three markets: the illegal cigarette market, the illegal labour market and illegal cartel building. How do the traders operate, given the nature of the commodity and the entrepreneurial environment?

Taxes on coveted consumer goods are experienced as draconian and unjust. Therefore, illicit traders in the cigarette market find themselves in a popular, at least condoning environment (Von Lampe, 2005). In this market there are many small entrepreneurs and many small-time bootleggers, some of whom surprisingly develop into serious organised suppliers. Parallel and supporting them we find wholesalers, whose organisation is to a large extent determined by the bulky nature of the cargo (similar to hash). This requires a basic logistic know-how, shared by ad hoc networks of ‘cooperatives’. Such know-how is required to develop successful ‘*criminal mimicry*’. This should not be equated with corrupt interaction with the underworld. This term, borrowed from biology, denotes the art of surviving in a hostile environment by blending into it. Every criminal entrepreneur’s environment is different. The wholesale cigarette smugglers must blend into the landscape of bona fide hauliers, which requires proper knowledge of customs procedures (and loopholes in the control system).

Illegal labour intermediaries, the Dutch ‘*koppelbaas*’, operating from outwardly licit ‘temp offices’ have other more complicated problems of mimicry to solve. They must obtain contracts from principals, organise their labour force, escort them to the locations, maintain discipline and see to regular payments. Employees and employers have to play along with the game. In addition, there is the complicated paper work and the need to fend off the fiscal police by installing a straw man to evade criminal and fiscal liability. Against these obstacles the landscape has eased a bit because some licit entrepreneurs not only play along passively, but have set up their own *koppelbazen*: the licit upperworld has created its own economic underworld.

Compared to the usual smuggling, operating a *koppelbaas* firm is not a leisurely undertaking, either technically or from the point of view of personnel management.

When we subsequently turn to the ‘real’ upperworld, we can observe a different mimicry, at any rate in the conspiracies illegally to ‘regulate’ the market by cartel building. This phenomenon has an old history, though its *criminal* history in Europe is of a quite recent date. In some countries like the Netherlands and Germany it is not even a criminal offence, but an administrative transgression: ‘illegal but not criminal’. Nevertheless, the stakes in secretly regulating the market, setting prices and limiting market entrance, are high, in terms of profits as well as penalties, either imposed by the national authorities or by ‘Brussels’.

Illicit cartel building is basically organised cheating. The principals and the authorities are cheated into believing that they are tendering contracts in a free and competitive market setting; excluded market players must be cheated and above all, the organisation must be such that the conspirators do not

cheat each other. When in a market like the construction industry the number of participants increases, keeping the conspiracy going requires a very professional organisation. And so did the Dutch constructors, elaborating a complicated system of stealth and deception. Apart from an elaborate bidding system, they set up an organisation to settle hundreds of hidden accounts for which they hired professional accountants who worked in a separate corporation only established for that task. If contracting authorities were not deceived, they were corrupted by pleasure trips, valuables or coveted services, libidinous temptations included. Were these gentlemen organised criminals? As a matter of fact the organisational sophistication of their activities exceeded that of most other forms of organised crime described in most narratives.

## **Organised crime and mental history**

We must now return to the odd personality describe at the beginning of this introduction, the one staring at the sky in an attempt to count the clouds and answer the question: is that weird man odder than the strategic analysts who are ordered by policy makers to assess organised crime? What insight would we obtain by counting the ‘respectable’ cartel builders together with the cigarette smuggler and the *koppelbaas*, plus the dope dealers (on at least four markets) and the illegal mafia protectors? What insights do we get into the threat supposedly stemming from all these manifestations of ‘organised crime’? Illegal traders operate mainly in ephemeral shifting networks (McIllwain, 1999): small changing clouds fading in a fleecy sky.<sup>9</sup> On the other hand, cartels form solid cumulus clouds against a background of economic ‘sunny’ weather (hence few see them as a criminal threat and in some jurisdiction cartel building is only an administrative transgression). We end up with as many different threats as there are manifestations.

If many cannot help feeling (though without acknowledging it publicly) that it does not make much sense to continue along this path, one should wonder why so many nevertheless persevere in doing so. If the concept of organised crime is mainly a political construct and otherwise ill-defined with no observational value or explanatory power, why is its use so tenaciously used, also among criminologists (Levi, 2004)? The answer is banal and simple, as with most of the human conditions: the word string is a core element of the word play of mainstream ‘problem owners’ and interested actors. Even if they all have different understandings in the way they discuss ‘organised

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<sup>9</sup> Von Lampe (2004) proposes to use networks as referents in organised crime research. That is valuable, but the operationalisation problems have not been solved, yet.

crime’, they recognise a shared sing-song.<sup>10</sup> Those who do not hum the song are not part of the ‘organised crime’ research or policy making community. The reader just thumbs through the ‘usual’ organised crime literature, like the latest volume of Fijnaut and Paoli (2004) and counts the authors who deviate from that common sing-song (except Kinzig and Luczak, 2004). In this organised crime sing-song choir, ‘measuring’ the undefined organised crime, spotting vague threats and sensing fuzzy vulnerabilities is not weird at all. All participate and all have a few verses to sing.

However, researchers should not be part of such choirs. They have other tasks and responsibilities like independent behavioural research on the organisation of crime: how criminal market players operate in their hostile environment and succeed (for a while) in their criminal mimicry and how society responds.

Does this belittle the importance of the organised-crime theme itself? Certainly not. It is fascinating to observe how (international) policy makers, law enforcement officials and the public have reacted to the sonorously expressed concern aroused by an unmeasurable threatening something. It requires the interdisciplinary efforts of political science, sociology and psychology to interpret and explain that collective criminal cloud counting.<sup>11</sup> Woodiwiss (2003) has raised this question already, though with a strong emphasis on the role of the USA. If we follow this course, we will probably discover that with the passage of time the organised-crime theme may have become a major topic of interest for the students of history of the history of ideas, to whom it should be left.

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<sup>10</sup> This is accompanied by apparently unavoidable abbreviations, as can be found in the professional journals. For example TOC for ‘Transnational Organised Crime’ and ROC for ‘Russian Organised Crime’, which yields phrases like ‘the TOC of ROC-criminals’.

<sup>11</sup> This is the more intriguing if we compare this methodology with the approach of a threat like the bird flu. Reflect on the many heads that would roll if policy makers would adopt the organised crime methodology in world health issues.

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# Organised Crime is ... Findings from a cross-national review of literature<sup>1</sup>

*Klaus von Lampe*  
*Maarten van Dijck*  
*Rob Hornsby*  
*Anna Markina*  
*Karen Verpoest<sup>2</sup>*

## Introduction

It has become commonplace to observe that there is no uniform understanding of organised crime, not to speak of a generally accepted definition (Levi, 1998; Finckenauer, 2005). At the same time, there is a tendency to reduce the diversity of views to two or three ‘currents’, ‘schools’ or ‘models’. This implies that a choice can be made between a small number of clearly delineable homogeneous conceptions of organised crime so that in the end the entire issue of organised crime, though disputed it may be, is not that complex after all. This chapter reports on a review of a sample of international literature (n=66) conducted with the aim of arriving at a meta-theoretical classification of existing approaches to delineate, conceptualise and assess organised crime. The review suggests that contrary to the notion of two or three competing models of organised crime there is a confusing multitude of concepts and conceptions. Accordingly, there may be many people who are convinced that they know organised crime when they see it. But they obviously see different things. We would like to argue that this is because the term ‘organised crime’ does not denote a clear and coherent phenomenon. Rather, myriad aspects of the social universe are lumped together in varying combinations within different frames of references depending on the

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<sup>2</sup> Klaus von Lampe is researcher at the chair of criminology, Freie Universität Berlin; Maarten van Dijck is researcher at the Department of Criminal Law, Tilburg University; Rob Hornsby is Lecturer at the Department of Sociology, University of York; Anna Markina is researcher and lecturer at the Faculty of Law, University of Tartu and Karen Verpoest is researcher at the Institute for International Research on Crime Policy, Gent University.

respective point of view of each observer; and it takes a cognitive and linguistic construct for these phenomena to be seen to be interrelated in the first place (Eisenberg and Ohder, 1990; von Lampe, 1999; 2001).

### **Classification of conceptions of organised crime: current approaches**

With the ambition to capture the organised crime discourse in its breadth, mapping the spectrum covered by the literature, the review in varying degrees draws on previous approaches to classify conceptions of organised crime. These approaches are:

- typologies of models,
- typologies of definitional components, and
- meta-theoretical classification schemes.

These approaches have to be distinguished from attempts to develop typologies of organised criminal groups or typologies of manifestations of ‘organised crime’ (see *e.g.* Beare, 1996:49; Maltz, 1976:343).

A typology of organised crime ‘models’ or ‘paradigms’ has first been proposed by Albanese, who distinguished ‘hierarchical models’, ‘local, ethnic models’ and an ‘enterprise model’ of organised crime (Albanese, 1989; 1994). This typology, often simplified to a dichotomy of Mafia model vs. enterprise model, is helpful insofar as it provides a rough orientation. At the same time it is problematic because it stresses isolated features which are closely linked to specific historical manifestations of organised crime and specific texts (Cressey, 1969; Albin, 1971; Ianni and Reuss-Ianni, 1972; Smith, 1975) that are not representative of the wide range of conceptual literature in the United States in particular and the international literature in general. Other authors have proposed more refined and extended typologies (see *e.g.* Halstead, 1998; Williams and Godson, 2002), but the problem remains that because of the close link to specific manifestations of organised crime and a few selected texts, the pertinent literature is not adequately represented.

A different approach is to build a typology based on definitional components. Hagan, for example, conducted a content analysis of thirteen academic definitions of organised crime (12 from the U.S., one from the U.K.) and distinguished these with regard to the consideration or non-consideration of eleven characteristics, such as “non-ideological”, “organized hierarchy continuing” and “violence” (Hagan, 1983:53). While a list of definitional components appears to be more likely to apply to a broad range of texts than the basic perspectives on which typologies of ‘models’ have

come to rest, there are still substantial caveats. The main objection is linked to the fact that there are more conceptions of organised crime than formal definitions so that definitions are not necessarily representative of the discourse on organised crime. Formal definitions are not necessarily representative of the underlying notions of the texts where they are presented. Often, they appear to be mere window dressing, suggesting a conceptual certainty that is difficult to find and even trickier to define. This is an impression that was reinforced in the course of the analysis on which this chapter is based. Finally, definitions also tend to be restricted to a few aspects of the phenomena, ultimately resulting in the situation where underlying notions are only partially reflected.

A third approach is to develop meta-theoretical classification schemes. These schemes are designed to assess more or less the entire range of conceptual components contained in a large body of literature. These conceptual components are not viewed in the concrete context of their use but within an abstract system of basic dimensions. Aniskiewicz, for example, argued that “(m)uch of the theoretical and empirical work on organized crime can be categorized in terms of a micro/macro and a structure/process distinction” (Aniskiewicz, 1994:319). A more detailed categorization was proposed by von Lampe who reviewed the American literature on organised crime using a classification scheme that included structure, action, process and function as basic dimensions relating to four levels of analysis: individual, group, underworld, and legal-illegal nexus (von Lampe, 1999:165-166).

The meta-theoretical approach refines the idea of distinguishing definitional components and transfers it, beyond the realm of formal definitions, to the organised crime discourse as a whole. However, its successful utilisation depends on how comprehensive the defined dimensions are and how well they serve to systematize the literature.

The methodology adopted here generally follows the philosophy of the meta-theoretical approach. A sample of international literature on organised crime is analysed with a view to a diverse set of categories, assuming that these categories are likely to characterize variations in the conceptualisation of organised crime.

## **Methodology**

The aim of this meta-theoretical classification is to obtain an understanding of the breadth, depth and diversity of approaches to conceptualise and, ultimately, assess organised crime. Preceding this task an inventory of literature

on organised crime has been produced which is continuously growing and currently comprises more than 3.000 entries.<sup>3</sup>

### **The sample of literature**

Obviously, this large body of literature could not be included in the analysis. Instead it was necessary to draw a sample which is small enough to permit a thorough analysis and at the same time is sufficiently diverse to cover as much of the spectrum of conceptualisations as possible. To this end it was decided to select a sample of official, journalistic and academic literature from each of the five countries represented by the authors (Belgium, Estonia, the Netherlands, Germany and the UK) and a sample of international literature with a size of  $n=12$  for each national sample (except for Estonia which does not have an organised crime literature as such) and for the international sample, respectively. The national samples were selected individually, the international literature sample, in contrast, collectively. The selection was guided by the intention to include diverse literature, including texts that have been influential in a political and/or scientific sense, texts that present original, non-mainstream, perspectives and texts that are based on original empirical data. Quality, in one way or the other, was not a criterion for selection.

A considerable number of the texts analyzed are not nominally about organised crime, but are concerned with specific activities or individuals that are otherwise labelled 'organised crime'. This approach is particularly important in the UK, where until the early 1990s 'organised crime' as a phenomenon was barely acknowledged.

Of course, with the applied selection method the samples are not representative in a statistical sense. However, they are more likely to be representative of the spectrum of organised crime literature than a random sample of the same size would be. This is because few texts contain an elaborate discussion on the concept of organised crime while the bulk of the literature appears to limit itself to the repetition of certain well-worn phrases. In the end, the following literature ( $n=66$ ) has been included in the analysis.

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<sup>3</sup> See the Online Bibliography on Organised Crime at: [www.assessingorganisedcrime.net](http://www.assessingorganisedcrime.net).

**Table 1: National and International Literature Samples**

<b>National sample Belgium</b>
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Schulte-Bockholt, Alfried, <i>A Neo-Marxist Explanation of Organized Crime</i> , <i>Critical Criminology</i> , 10(3), 2001, 225-242
Williams, Phil; Godson, Roy, <i>Anticipating organized and transnational crime</i> , <i>Crime, Law and Social Change</i> , 37(4), 2002, 311-355

## **The framework for analysis**

The texts were analysed using a template designed as the result of a general discussion on how conceptions of organised crime may vary. The discussion led to the identification of a set of formal, content and context factors. This set of factors was calibrated throughout the analysis process.<sup>4</sup>

The formal classification focused on whether or not a text contained a formal definition of organised crime. Furthermore, attention was directed to the empirical base of a text, specifically to the source type, aggregate level and context of generation of the data, provided an empirical base was discernible at all.

With a view to potential external influences on the conceptualisation, the texts were also analysed for the context of use (scientific, law enforcement etc.) and the frame of reference in terms of academic discipline.

The core issue of the conception of organised crime was addressed with a set of categories, beginning with the identification of basic or paradigmatic dimensions. This category acknowledges the fact that the basic understanding

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<sup>4</sup> The actual analysis was done with the help of an online and real-time accessible database. This allowed each member of the research team to directly observe the insertions made by the other researchers and therefore to provide direct feedback.

of organised crime may vary, depending on whether organised crime is primarily perceived in terms of activities, structures or systemic conditions (von Lampe, 2001).

If a text focuses on organised crime in terms of structure, it was further explored what type of collectivity (network, organization, market etc.) the author(s) referred to, and, in the case of group structures, what functions (economic, social, quasi-governmental etc.) were ascribed to these structures, and on what level (micro, macro) these structures were dealt with.

A second key category in the template refers to the types of crime associated with organised crime, regarding particular crime types and the not always easy to draw distinction between market and non-market crimes.

A number of categories are intended to capture the notions regarding where 'organised crime' is located in social and geographical space and in time. The category "geographical scope" refers to the degree to which 'organised crime' is perceived to be a local, national or international phenomenon. The category "instruments" pertains to notions about how 'organised crime', in whatever way it may be conceptualised, interacts with its environment, for example by means of corruption or violence. The category "consequences" is intended to capture statements on the more far reaching impact of 'organised crime'. Conversely, the category "causes" comprises notions about how the environment impacts upon 'organised crime'. Finally, the category "time dimension" refers to the dynamic processes that occur over time assumed to be inherent to or characteristic of 'organised crime'.

## **The analysis**

The completion of the template required for the most part a hermeneutic content analysis which aimed at filtering from each text the understanding of the author(s) about what 'organised crime' is and how it fits into the immediate and wider social context. To extract these notions proved to be no simple task. First of all, not all texts contain a clearly formulated conception of 'organised crime', be it as a formal definition or as a less restrictive outline. More often, a conceptualisation of 'organised crime' is only implicitly made and – at times merely – take the form of vague associations. Secondly, in some cases it appeared difficult to distinguish between claims concerning organised crime as a concept, such as regarding essential, distinctive features of organised crime, and claims about the way organised crime, in the view of the author(s), manifests itself empirically, e.g. in a certain region or social context. For example, the discussion of organised crime along ethnic lines may be seen as reflective of the underlying notion

that ethnicity is an essential component of 'organised crime'. However, at the same time it may be represented as 'a matter of fact', for example, that certain areas of crime in certain geographical areas are dominated by actors of specific ethnic backgrounds.

Thirdly, even where clear conceptual statements are discernible, it is not always obvious whether or not they reflect the view of the author(s), namely when definitions or conceptual statements by others are quoted. In such cases the general orientation of the text had to be taken into account.

All three aspects entail an interpretation of the text which inevitably is subjective. This raises the issue of inter-coder reliability, i.e. the question to what degree the analysis, which was conducted by five different researchers, is comparable. In the course of analysis it was decided that the subjective factor cannot be eliminated in such an endeavour. At the same time, mechanisms were installed which allowed an exchange of opinions during the analysis and after the completion of the analysis (see also footnote 2). These mechanisms included the use of an online-template which allowed reviewing the coding decisions of every researcher as soon as a template was completed. In addition, problems of interpretation encountered by an individual researcher were discussed collectively until an agreement was reached. Finally, one researcher monitored the coding decisions on the basis of a plausibility check and provided feedback to the individual researcher concerned. In most cases, however, the original coding decisions were not changed.

## **Results of the content analysis**

### **Overview**

The results of the content analysis have to be reviewed with several questions in mind: Do the defined categories have distinctive power? Do the categories have to be broken down further to highlight differences? Do certain patterns of conceptual components emerge?

The main finding of the content analysis is perhaps that the literature on organised crime appears to be more diverse than had been assumed beforehand, even considering the diversity inbuilt in the sampling method.

44 out of the 66 texts are of a scientific nature, the others fall in the categories of political, law enforcement or journalistic literature. Most texts (35) are in English, 18 in Dutch or Flemish, 11 in German, and one respectively in Estonian and French.

Only a small share of the literature in the sample (18) contained a formal definition of organised crime. Of the eighteen texts that provided an

organised crime definition all went beyond or even deviated from the formal definition. For example, in one case organised crime was defined in terms of the supply of illegal goods and services. Yet, at the same time various types of fraud, i.e. crime not involving the supply of illegal goods and services, were linked to ‘organised crime’. This underlines the importance of looking at the whole text and the explicit or implicit conceptualisations contained within them.

### **Basic dimensions**

One issue that runs as a common thread through the conceptual debate on organised crime is whether the focal concern should be on “structures of activity or structures of association” (Cohen, 1977: 98; see also Kollmar, 1974; Maltz, 1976). Another recurring but not as dominant theme is to view organised crime not primarily in terms of activity or association but in terms of a social condition or a social system (Block, 1983; Potter, 1994). Finally, a theme that is prominent in media depictions of organised crime, the focus on individuals, also emerged in the analysed literature.

While these perspectives are not necessarily mutually exclusive, each view suggests a very specific understanding of organised crime, so that it appeared important to analyse the literature sample with a distinction of these basic dimensions in mind. However, as it turned out, almost all texts (59) focused on collectivities, although only 14 did so exclusively. In comparison, 36 texts conceptualised organised crime in terms of activities, but only 7 did so exclusively. Finally, the five texts which depicted ‘organised crime’ as a systemic condition at the same time also viewed ‘organised crime’ in terms of activities and/or structures. Interestingly, despite the focus on collectivities, in several texts (30) individuals appeared as a reference point for the discussion of organised crime.

While these broad categories of basic dimensions displayed little distinctive power –with the exception of the activity–structure dichotomy in a minority of cases– a more refined and more detailed analysis within each category reveals some clear variations across the sample.

### ***Activity***

It is noteworthy that despite the predominance of the focus on criminal structures, organised crime is often defined as being essentially an activity, described, for example, as the “systematic commission of crimes” (Frans, 1998; Dienst Nationale Recherche Informatie, 2004). Some authors explicitly state that organised crime should first and foremost be conceptualised in terms

of activity, namely because criminal structures were shaped by market forces and market activities (see Albanese, 1994; van Duyne, 2003; Porteous, 1998; Pütter, 1998).

### **Structure**

As mentioned, 59 out of the 66 analyzed texts explicitly or implicitly link the concept of organised crime to criminal collectivities. If collectivities ('criminal networks', 'criminal groups', 'criminal organisations' etc.) are not included in formal definitions (see *e.g.* Fijnaut et al., 1996; Kreutz, 2003) or appear as components of explicit conceptualisations (see *e.g.* Calster, 2002), they at least serve as key reference points for the discussion of organised crime (see *e.g.* Adamoli et al., 1998).

### **System**

The five texts which view organised crime *inter alia* as a systemic condition do so explicitly (Block, 1983; McIlwain, 1999; Potter, 1994) or implicitly (Albrecht, 1998; Bundesministerium des Innern and Bundesministerium der Justiz, 2001) with the underlying notion that the term 'organised crime' stands for a particular constellation between criminal, business and political spheres. Organised crime in this sense appears as "a social system" (Block, 1983: vii), "an integral part of the social, political and economic system" (Potter, 1994: 183), or as "a facet of the cultural, economic and social differentiation of modern societies" (Albrecht, 1998:39).

### **Individual**

Some conceptualisations of organised crime contained in the sample include individuals as a reference point in one way or the other. Most notably, whereas commonly collectivities are regarded as the basic operating unit in the area of organised crime, in some instances individuals are placed in this role. Several of the analyzed publications emphasize the role of individuals as facilitators or as key figures, typically associated with the network notion of organised crime (see *e.g.* Dienst Nationale Recherche Informatie, 2004; WODC, 1998). In one case the "individual offender of organised crime" is described as someone who operates as an individual, although embedded in a network of connections that enables him to draw on others for assistance as the need arises (Rebscher and Vahlenkamp, 1988: 39-40). In a similar vein, another author in an historical study notes that "(t)he most efficient 'organised criminals' were the most individualistic, the least committed to particular structures" (Block, 1983: 256). More moderate and typically very

brief references to individuals include the mentioning of famous gangsters like Al Capone or the enumeration of personal characteristics and skills (clever, talent for cultivating relationships, unscrupulous and smart, business acumen) of “organised criminals”.

### **Collectivity types**

The fact that most texts in the sample conceptualise organised crime in terms of collectivities does not imply that these conceptualisations are largely homogeneous. On the contrary, significant differences emerge with regard to the type of collectivity in terms of the level of integration into more or less cohesive units (networks vs. organisations) and in terms of the aggregate level (individual groups vs. underworld and illegal market structures). This differentiation is fuelled by the often imprecise use of key terms such as ‘network’ and ‘group’. Despite a large body of theoretical literature on these concepts, the words are often used in an intuitive (hence shallow) sense. Thus the notions of network and group, it appears, both encompass a wide variety of cooperation structures and even may overlap.

### **Networks**

About three-quarters (43) of the texts which conceptualise organised crime in terms of collectivities do so with reference to networks. But of these 43 texts, only five do so exclusively without a simultaneous reference to “criminal groups”, “criminal organisations” or similar terms commonly applied to more cohesive, clear cut collectivities. However, it must be stressed that this distinction may not be uniformly shared and that the use of terms such as “criminal network” and “criminal organisation” are in fact regarded as synonyms.

This reservation notwithstanding, it can be noted that the concept of ‘network’ does not appear in the formal definitions of organised crime contained in the sample.<sup>5</sup> Yet, networks are frequently a component in explicit conceptualisations of organised crime or serve as a reference point for discussions of ‘organised crime’ (see *e.g.* McIllwain, 1999).

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<sup>5</sup> A formal definition of criminal network is given in one text: “If at least three natural persons have formed at least two different suspect combinations [defined as: “If two or more persons are suspected of involvement in a crime, then these persons form a suspect combination in relation to that crime”], then these persons form a criminal network” (KLPD/DNR Noord- en Oost-Nederland, 2004: 35).

## **Organizations**

50 out of the 59 texts in the sample that conceptualise organised crime in terms of collectivities refer to organisational units using terms like “criminal group” or “criminal organisations” which, if not stated otherwise, were interpreted to mean entities capable of coordinated, goal-oriented actions. Criminal organisations in this sense either appear in formal definitions or form a component of otherwise explicit conceptualisations, or they provide at least a key reference point in the way organised crime is addressed.

## **Market structure and underworld structure**

Some conceptualisations of organised crime pertain not only to the micro level of particular networks or organizations, but to more comprehensive, overarching structures, namely illegal markets and what is commonly referred to as the “underworld”.

One text contained in the sample explicitly argued that attempts to monopolise illegal markets is a characteristic of ‘organised crime’ (Amir, 1999: 233). In other instances, the structure of illegal markets serves as a reference point for describing ‘organised crime’. One aspect in this context is market density, meaning the ratio between the actual and the potential number of suppliers in a market with regard to available resources (Potter, 1994; Rebscher and Vahlenkamp 1988). Another aspect is the degree of monopolisation in the slicing up of market shares. In this respect, differences of opinion become apparent as to whether monopolistic structures or rather fragmented structures are more characteristic of ‘organised crime’ (Adamoli et al., 1998; Williams and Godson, 2002).

Some texts also conceptualise organised crime in terms of macro structures independent from particular illegal markets, for example by alluding to the relationship between different criminal groups (Galeotti, 1998), or even by treating organised crime largely synonymous with the “underworld” (Pihl, 2001).

## **Functions**

The various structures associated with organised crime are typically viewed as serving economic functions, in that their ascribed purpose is to supply illegal goods and services, or that their profit orientation or entrepreneurial nature is stressed. However, in some instances, non-economic functions, namely social and quasi-governmental utility are also attributed to criminal structures. The notion of social functions is reflected, for example, in statements about how criminal organizations cement patterns of social interaction and ensure

loyalty, referring primarily to fraternal criminal organizations like Chinese Triads or the Sicilian and American Mafia (see *e.g.* Adamoli, 1998; Paoli, 2002; Potter, 1994). Quasi-governmental functions, in contrast, are addressed, for example, in references to the protection services offered to illegal entrepreneurs by criminal groups or in references to the taxation of illegal activities imposed by criminal groups (see *e.g.* Wilzing, 1996). At times, criminal groups are seen to develop into para-governmental institutions when the state is weak (see *e.g.* Kerner, 1995).

## **Crime Types**

A different light is cast on the conceptualisations of organised crime when one looks at the types of crime that are mentioned in the context of 'organised crime'. These crime types are typically listed as 'organised crime related', or due to specific crimes which are discussed to give an illustration of 'organised crime'. The content analysis produced a list of some 100 different offence types which were later grouped into more comprehensive categories. Table 2 shows the most frequently mentioned crime categories and gives for each the number of texts and the share of the overall sample (n=66).

Other crime categories that were mentioned only once or twice and are not listed in table 2 include: embezzlement, trade in body parts, trade in non-ferrous metals, illegal security services, arson, mobile banditry, skimming, trafficking, espionage, piracy, cattle-rustling, football hooliganism, terrorism, state organised crime, black market, and the recruitment of mercenaries.

**Table 2: Crimes Mentioned in the Literature Sample**

Type of Crime	n	%
<b>Drugs</b>	53	80,3
<b>fraud: all</b>	39	59,1
fraud: private funds (incl. credit card fraud, investment fraud, insurance fraud)	31	47,0
fraud: public funds (incl. health care fraud, VAT fraud, subsidy fraud)	24	36,4
<b>Extortion</b> (incl. racketeering, kidnapping)	29	43,9
<b>Property crimes</b> (incl. theft, burglary, robbery)	25	37,9
<b>sex industry</b> (incl. illegal prostitution, pimping, illegal pornography)	24	36,4
<b>money laundering</b>	23	34,8
<b>cars</b> (incl. theft, trafficking)	22	33,3
<b>smuggling</b> (incl. alcohol, cigarettes, fuel, gold, currency, gemstones)	22	33,3
<b>human trafficking</b>	21	31,8
<b>Arms</b>	18	27,3
<b>Gambling</b>	17	25,8
<b>economic crime</b> (excl. fraud, excl. money laundering, incl. illegal labour, price fixing)	16	24,2
<b>environment</b> (incl. poaching, illegal waste management)	16	24,2
<b>alien smuggling</b>	13	19,7
<b>Counterfeiting</b>	13	19,7
<b>product piracy</b>	9	13,6
<b>Fencing</b>	8	12,1
<b>false documents/forgery</b>	7	10,6
<b>Forgery</b>	4	6,1
<b>loan sharking</b>	4	6,1
<b>Art/cultural property</b>	3	4,5
<b>Bootlegging</b>	3	4,5
<b>nuclear material</b>	3	4,5
<b>steroids/hormones</b>	3	4,5

Not surprisingly, most texts mentioned drug trafficking (53 or 80,3 %). However, it is somewhat surprising, considering the common focus on illegal markets and the supply of illegal goods and services, that the most frequently mentioned crime types following drug trafficking are offences that fall in the broad category of predatory crimes, namely fraud (39 or 59,1 %), extortion (29 or 43,9 %) and property crimes (25 or 37,9 %).

## **Social scope**

The analyzed texts vary according to the degree to which ‘organised crime’ is linked to certain sub-sets of the general population. The social scope of the conceptualisations was analysed with a view to three categories: ethnicity, socio-economic status, and gender.

### ***Ethnicity***

The way the subject of ethnicity is addressed ranges from no mentioning at all of the issue to treating ethnicity as a core aspect of ‘organised crime’. Most texts in the sample (47) contain references to the ethnic background of ‘organised criminals’. In some cases, ethnicity appears as a focal point of the discussion, typically by arranging the organised crime picture along ethnic lines (see *e.g.* Bundeskriminalamt, 2004). Other authors view ethnicity as a factor impacting on how crime is organised (Queensland Crime Commission and Queensland Police Service, 1999). Some note that criminal groups composed of foreigners are more tightly structured and more prone to violence (see *e.g.* Rebscher and Vahlenkamp, 1988). Some assume that nationality provides an informal network guaranteeing trust (see *e.g.* Halstead, 1998), or that language and cultural barriers serve as a defence mechanism (see *e.g.* Williams and Godson, 2002). In contrast, some authors argue that the role of ethnicity is overstated and that underlying ethnicity other social relations like kinship and the social proximity to source countries are at work (see *e.g.* WODC, 1998). From this perspective, the predominance of certain ethnic groups in certain areas of crime is explained as an “accidental competitive advantage” (Halstead, 1998:20).

### ***Socio-economic status***

The social status of ‘organised criminals’ is less often addressed than ethnicity, even though ethnicity often implies a lower or marginalised social status. It seems to be a widespread notion that organised crime is confined to the lower strata of society. Where it is not explicitly stated (see *e.g.* Bovenkerk, 1992), it is typically reflected in a dichotomy of underworld and upperworld. When, for example, the need of criminal groups to obtain professional expertise from lawyers and accountants is stressed (see *e.g.* Doraene, 1995), this implies that criminal groups are not composed of members of mainstream society themselves. On the other hand there are other authors who explicitly regard high-status actors – politicians and businessmen – as being part of ‘organised crime’ (see *e.g.* Albrecht, 1998; Van Duyne et al., 1990; Van Duyne, 1995).

## **Gender**

The importance of gender for ‘organised crime’ is rarely discussed. Most texts seem to implicitly assume that ‘organised crime’ is primarily or exclusively a male phenomenon. Some authors, however, also discuss the role of women within particular organised criminal activities (see *e.g.* WODC, 1998).

## **Geographical scope**

While the literature sample was largely selected with a view to national literature, most texts conceptualise organised crime as an international phenomenon. Only 9 texts address organised crime exclusively within a national or local context. 34 texts discuss organised crime with regard to particular countries but with a view to international ramifications. 23 texts treat organised crime as a global phenomenon.

## **Instruments**

The category “instruments” pertains to notions about how ‘organised crime’, in whatever way it may be conceptualised, interacts with its environment. The texts in the sample were analyzed with a view to three sub-categories: corruption, violence and influence on the media. An open category for other instruments was also included in the template.

## **Corruption**

Most texts in the sample (49) contain a reference to corruption. Some authors view corruption as a defining characteristic of ‘organised crime’ or organised criminal groups (see *e.g.* Amir, 1999; Wilzing, 1996), whilst others disagree and do not view corruption as a core feature (see *e.g.* Weigand and Büchler, 2002). When it comes to explaining the purpose of corruption, the answers given in the texts are quite diverse, ranging from the facilitation of crime and the immunization of law enforcement, to gaining influence and power in the public and private sphere. A number of authors specifically address the relationship between corrupter and corruptee. While the implicit notion seems to prevail that ‘organised criminals’ tend to assume the active role in corrupt ties, these explicit discussions see criminals and office holders more in partnerships of equals or the criminal component in a subordinate position (see *e.g.* Amir, 1999; Schulte-Bockholt, 2001).

### ***Violence***

Similar to the issue of corruption, most texts in the sample (51) contain a reference to violence. And while a number of authors view the use or threat of violence as a core characteristic of ‘organised crime’ (see e.g. Wilzing, 1996), others disagree and state that non-violence is more typical of ‘organised crime’ (Rebscher and Vahlenkamp, 1988). When it comes to explaining the purpose of violence, again the answers given in the analyzed texts differ, ranging from eliminating competition in market and territorial disputes, and enforcing internal discipline, to intimidating witnesses and gaining influence over legal institutions (see e.g. van de Bunt, 1996).

### ***Influence on media***

The influence on media is one of the optional components in the BKA-definition (Bundeskriminalamt, 2004). Despite the relative popularity of this definition in Germany and other countries, only some texts in the sample (9) address this issue, however without going into any detail.

### ***Other instruments***

Apart from corruption, violence and influence on the media, the use of a number of other instruments or methods were linked to ‘organised crime’, including shielding, counter observation, gaining support from influential people, careful planning, and the capability to adapt to changing conditions (see e.g. Hamacher, 2000; Landman *et al.*, 2002).

### **Consequences**

While the category “instruments” is directed at notions about how ‘organised crime’, in whatever way it may be conceptualized, interacts with its immediate environment, the category “consequences” is intended to capture conceptualizations extending to more far reaching and longer-term impacts of ‘organised crime’. The literature in the sample was analyzed with a view to four distinct sub-categories: individual safety (13 times addressed), public order (18), political system (25), and economic and financial system (28). Open subcategories “general” (29) and “other” (8) were also included in the template.

### ***Individual safety***

Some texts in the sample (12) mentioned consequences of ‘organised crime’ for individual safety, most frequently in terms of negative effects of drug abuse (see *e.g.* Porteous, 1998). But overall it appears as if the consequences of ‘organised crime’ are primarily discussed in more systemic dimensions.

### ***Economic and financial system***

To the extent consequences of ‘organised crime’ are discussed at all, consequences for the financial and economic system are most frequently mentioned. 28 Texts fall into this category. However, there are some substantial differences. While a majority of texts addresses negative effects, such as the distortion of competition due to the use of illicit profits in legal business or the damage caused by product piracy (see *e.g.* Porteous, 1998), one author points to effects that may be viewed as positive, such as the creation of jobs and the provision of business capital (Potter, 1994).

### ***Public order and political system***

25 texts contained in the sample address consequences of ‘organised crime’ for the political system and four texts mention consequences for public order. Most often concerns are voiced that ‘organised crime’ has or can potentially undermine state authority and destabilise democracy (see *e.g.* Cesoni, 1999). Authors from Canada and the Netherlands also argue that crimes like human trafficking and drug smuggling might have negative effects on liberal immigration, drug, and prostitution policies and on the international reputation of these countries (KLPD/DNR Noord en Oost-Nederland, 2004; Porteous, 1998).

### ***General consequences***

Frequently, the assumed consequences of ‘organised crime’ are not spelled out. Rather, diffuse concerns about the infiltration of the legal spheres of society are raised or references are made to unspecified threats and dangers.

### **Causes**

While the categories “instruments” and “consequences” refer to the question how ‘organised crime’ impacts on its environment, the category “causes” reversely comprises notions about how the environment impacts on

‘organised crime’. No *a priori* defined sub-categories were used for the analysis of this aspect.

Three broad lines of argument about the aetiology of ‘organised crime’ emerged in the analysis of the literature sample. First, there is the notion of ‘organised crime’ being the product of broad social forces of historic dimensions, like urbanization, technological advance, globalisation, the transition from soviet-type regimes to market economies, international migration, and social inequalities (see *e.g.* Adamoli et al., 1998). Second, there is the notion of ‘organised crime’ emerging from cultural conflicts, namely the restriction or prohibition of certain goods and services for which there is a sustained demand (see *e.g.* van Duyne, 1996; Hobbs, 2004). Third, there is the notion that ‘organised crime’ emerges and flourishes in the presence of weak and inefficient formal and informal systems of social control (see *e.g.* Beste, 1995).

### **Time dimension**

To capture notions about the dynamic side of ‘organised crime’, the category ‘time dimension’ was included in the analysis. Many references to assumed general trends in the development of ‘organised crime’ could be identified in the literature sample, falling into different sub-classes, pertaining either to ‘organised crime’ as a whole or to particular aspects.

One identified notion is to view ‘organised crime’ as a process occurring over time (Potter, 1994; Rebscher and Vahlenkamp, 1998). More frequent are allegations about continuous upward trends, expressed, for example, in claims about the increasing complexity, internationalisation or professionalism of ‘organised crime’ (see *e.g.* Adamoli et al., 1998; Frans, 1998). Another aspect is the perceived evolution of criminal groups, for example from predatory to symbiotic (Schulte-Bockholt, 2001) or from hierarchies to networks (Galeotti, 1998). A contrary notion is to view ‘organised crime’ in terms of opposite or non-linear trends. One author, for example, analyzes ‘organised crime’ in the sequence of social crises and recovery phases, stating that ‘organised crime’ becomes problematic only in times of crisis (Kerner, 1995). Others emphasize the fluid nature of ‘organised crime’ over time, or, more generally, point to historic processes within which ‘organised crime’ develops (McIntosh, 1971; Hobbs, 1995; 2001).

## **Conclusion**

The intended aim of the meta-theoretical classification has been to obtain an understanding of the breadth of approaches to conceptualise, study and assess organised crime. While diversity was one of the selection criteria for the analysed literature sample, the diversity exposed by the content analysis summarized above appears to go further.

In the content analysis, four basic approaches to the understanding of organised crime were identified, conceptualising organised crime either in terms of individuals, structures, activities or systemic conditions. However, these basic approaches are not necessarily mutually exclusive. They appear in various combinations without a discernible pattern. Only 21 out of the 66 texts included in the sample rest exclusively on one basic approach: 14 conceptualise organised crime only in terms of structure, 7 only in terms of activity. Thus, these four basic dimensions provide for a grid to analyse individual texts that have organised crime as their object of study, rather than that they help in categorising the bulk of studies into a limited number of clusters.

Texts that conceptualise organised crime in terms of structure tend to focus on ‘criminal groups’ and ‘criminal organisations’ in the sense of entities capable of coordinated, goal-oriented action as opposed to ‘criminal networks’ in the sense of webs of ties between actors that are therefore able to cooperate in crime. However, five texts refer exclusively to networks as the intrinsic factor in the composition of ‘organised crime’. At the same time, some texts also refer to ‘criminal structures’ in terms of illegal markets and notions of an ‘underworld’. It must be stressed at this point that the significance of these observations is undermined by the rather ‘loose’ and imprecise use of the terms ‘group’ and ‘network’.

At any rate, when one takes these basic notions as a starting point, there are no obvious patterns that link these essential concepts to other specific conceptual components, such as the types of crimes associated with organised crime, the social scope, instruments, consequences, or causes of ‘organised crime’. Rather, it seems that the various conceptual categories that have been defined beforehand and refined during the analysis appear in rather arbitrary, unpredictable and even contradictory combinations. For example, widespread claims about the business nature of ‘organised crime’ are at odds with the fact that apart from drug trafficking, predatory crimes are most often associated with organised crime. As a result, it is not possible to develop a more complex typology of conceptualisations of ‘organised crime’ based on the content analysis.

Likewise, there are no obvious links between certain conceptions of organised crime and external factors that have been taken into consideration, namely the context of use of the texts, distinguishing law enforcement, political, academic and journalistic purposes. The only patterns that have become obvious are two country-specific peculiarities. Whereas the British literature in the sample tends towards a focus on individuals, there is a tendency among Belgian authors included in the sample to conceptualise organised crime in terms of activities.

The conclusions to be drawn from the analysis of different approaches to the conceptualisation of organised crime are twofold:

1. The breadth of international organised crime literature reflects a lack of a common theoretical understanding, allowing a confusing picture to emerge. Far from achieving a consensus on the concept of organised crime it seems that there is not even a general understanding of the differences that stand in the way of such an agreement. This is at odds with attempts to divide the literature into only two or three main currents.
2. If different concepts in the sense of comprehensively linked propositions about 'organised crime' are to be identified, namely to point out alternative avenues to assessing organised crime, this might have to be completed in a synthetic manner rather than by drawing on the existing literature. However, in the end conceptual clarity will only be derived from a concise appreciation of the phenomena under discussion in their own right. And this may well require breaking down the broad concept of organised crime to account for the diversity and complexity of social reality (Eisenberg and Ohder, 1990).

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# Comparing data sources on organised crime across the EU

## A first step towards an EU statistical apparatus

*Barbara Vettori*<sup>1</sup>

### 1. Why compare EU data sources on organised crime?

Considering that a process for approximating organised crime data collection procedures in the EU framework has existed since the mid-90s, this paper aims at understanding at which stage of this process we are and what further actions, if any, should be taken for further development. In order to do so, the paper compares existing data sources on organised crime established at national level within the fifteen original EU Member States, revealing symmetries and asymmetries in the collection of these data.<sup>2</sup>

Why is it so important to compare existing data sources on organised crime in terms of who collects statistics, what kind of data are collected and how these are collected? It is important because it produces a detailed comprehension of the contents and mechanisms used for gathering information on the phenomenon in the EU, and consequently evidences symmetries and asymmetries in the collation of these data across the member states. Understanding these common points and divergences is necessary background knowledge for further promoting the development of comparable statistics on organised crime at the EU level, which would be of use to:

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<sup>1</sup> Barbara Vettori is researcher in sociology of deviance at the Faculty of Sociology of the Università Cattolica del Sacro Cuore, Milan (Italy), and research coordinator of the Milan office of Transcrime, Joint Research Centre on Transnational Crime, Università degli Studi di Trento/Università Cattolica del Sacro Cuore di Milano.

<sup>2</sup> The paper draws upon the results of the EUSTOC Study (“Developing an EU Statistical apparatus for measuring Organised Crime, assessing its risk and evaluating organised crime policies”). The Study was carried out by Transcrime in cooperation with the Applied Criminology Group (University of Huddersfield, UK), the Centre National de la Recherche Scientifique (France), and Europol as an ‘associate support member’. It was financed by the European Commission under the 2003 AGIS Programme. The full results of the Study are in Savona, Lewis and Vettori (2005).

- policy makers, both at the member state and at the EU level, so that they can plan effective crime prevention policies and measure their impact with a view to reshaping policies whenever they have proved less than fully effective. The significance of information on criminal groups and their activities to this end has been commented upon by the European Commission, which pointed out that “there is a need for comparable crime statistics [...] for Community risk assessments, monitoring and evaluation of Community funding programmes and as a tool for general policy planning” (European Commission, DG JHA, 2004: 1). This applies in particular to organised crime, where especial attention should be paid to the development of comparable statistics, since it is here that “the knowledge gaps are biggest” (European Commission, DG JHA, 2003: 2). A clear obligation in this direction is imposed by article 30 2d) of the Treaty on European Union, which refers to the need to establish “a statistical network on cross-border crime”. In the same way, the Council Action Plan of 27 March 2000 “The Prevention and Control of Organised Crime: a European Union Strategy for the Beginning of the New Millennium” includes a chapter (2.1) on Strengthening the collection and analysis of data on organised crime, whose political guideline declares that “the EU strategy should be based on reliable and valid data on organised crime and on offenders”;*
- national law enforcement agencies, as it would provide them with information crucial to combating these groups and promote cooperation among agencies at the European level. Recommendation n. 2 of the 1997 Action Plan to combat organised crime adopted by the Council on 28 April 1997 states on this point that “the Member States and the Commission should, where it does not already exist, set up or identify a mechanism for the collection and analysis of data which is so constructed that it can provide a picture of the organised crime situation in the Member State and which can assist law enforcement authorities in fighting organised crime [...]. The information so collected and analysed shall be organised in such a way that it is readily accessible for investigations and prosecutions at national level and can be effectively used and exchanged with other Member States”.*

Despite the importance of mapping organised criminal groups operating within the European Union arose relatively recently, in the 1990s, little attention was initially paid to the need to push Member States to follow some kind of common criteria in the collation and processing of these data.

To promote police cooperation amongst the Member States, the European Council decided in November 1993 to produce an annual strategic report on the scale of and trends in international organised crime in the Union, mainly based on contributions from the Member States (Europol,

2000). This decision was implemented thereafter through the design of a questionnaire consisting of six open-ended questions on the organised crime situation in 1993. This questionnaire was sent out in 1994, and the first European Union Organised Crime Situation Report was drafted on the basis of the replies. The report has been issued annually since 1994, initially by the Drugs and Organised Crime Working Groups and then, in 1998, by Europol in cooperation with the multidisciplinary group on organised crime (MDG) and the Contact and Support Network (CSN), under the guidance of the Presidency of the EU.

The first measurement exercise of 1994 produced very meagre results. This can be seen from its findings on the number of active criminal organisations that were summed up as follows:

“In Italy, there are four main groups (Mafia, Camorra, N’drangheta and Sacra Corona Unita). Ireland is mainly confronted with four groups. France is confronted with three groups of Italian origin (Mafia, Camorra and N’drangheta) and several Chinese groups. The Netherlands listed 321 groups in 1993, 98 of which can be considered as very organised” (Ad Hoc Working Group on International Organised Crime, 1994:6).

In 1994 therefore:

- ☛ *only 4 of the then 12 Member States reported organised criminal groups active in their country;*
- ☛ *there was a large discrepancy in the magnitude of the phenomenon as reported by the small number of reporting countries, with the Netherlands stating that there were more than three hundred organisations in that country, while the other three countries reported fewer than ten.*

The dearth of results and the great disparities between the few reporting Member States were due to a variety of factors, notably:

- ☛ the lack of a common definition of ‘organised criminal group’;
- ☛ differing national criteria and parameters to collect and analyse information;
- ☛ the lack of a common data collection system;
- ☛ the lack of a standardised structure for the preparation of national contributions to the overall EU-report (van der Heiden, 1996).

To overcome these problems, at least in part, and to improve the quality and comparability of the organised crime picture in the Union, a series of expert

level meetings were held in the following years. The first result coming from these meetings was the reaching of an agreement on a common EU definition for organised crime to be used to count groups, which is contained in 6204/2/97 Enfopol 35 Rev. 2.<sup>3</sup> Another major innovation was establishing a clear and unitary structure that national reports should follow, with a list of topics to be addressed as well as other guidelines, thereby to a certain extent encouraging Member States to produce a detailed quantitative and qualitative picture of organised crime. Given this background, the questions that this paper aims to respond to are as follows: at which point of this approximation process are we (section 2)? and what further actions, if any, should be taken in order to develop it further (section 3)?

## 2. Comparing EU data sources on organised crime

This section compares the national data sources on organised crime of the 15 original EU Member States. These systems are compared on the basis of:

- ☛ *some key features (2.1);*
- ☛ *the variables on organised crime on which information is gathered (2.2);*
- ☛ *who collects the data on organised crime (2.3).*

### 2.1 Key features of the organised crime data collection systems

Below, Table 1 sums up the key features of the Member States' OC data collection systems, in terms of:

- ☛ *definition(s) of OC used to collect data, i.e. whether the European definition contained in Enfopol 35 is used or other definitions are preferred;*
- ☛ *OC data collection system typologies, i.e.:*

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<sup>3</sup> The definition contained in 6204/2/97 Enfopol 35 Rev 2 comprises the following 11 criteria (criteria 1 to 4 and, in addition, two from 5-11 must be met for an organised criminal group to be defined as such): 1. involvement of more than two people; 2. for a prolonged or indefinite period of time; 3. suspected of involvement in serious crimes; 4. determined by the pursuit of profit and or power; 5. separate roles for each member; 6. use of some form of discipline or control within the group; 7. active internationally; 8. use of violence or other means suitable for intimidation; 9. use of commercial or business like structures; 10. engagement in money laundering; 11. influence on politics, the media, public administration, judicial authorities or the economy.

- offender-based, where the unit of analysis is the person suspected or known to be a member of an organised crime group, while data on offences are collated as a consequence of the variety of criminal acts committed;
  - offence-based, where the unit of analysis is the offence and various techniques or presumptions are employed to identify organised crime related crimes, amongst all reported crimes, or
  - mixed systems (i.e. both offence and offender-based).
- ☛ *relation between ordinary crime data sources/OC data sources;*
- ☛ *time of collection of the data on OC.*

**Table 1. Key Features of OC data collection systems in the 15 EU member states**

	OC definition(s) used to collect data	OC data collection system typology	Relation between ordinary crime data sources/OC data sources	Time of collection of the data on OC
<b>Austria</b>	Enfopol 35 & § 278a criminal code	Offence-based system	Data on OC collected as part of the general crime data collection system, but grouped in a specific database	When there is concrete suspicion that someone has committed a crime, police fill out a standard form and send it to the court
<b>Belgium</b>	German <i>Bundeskriminalamt</i> definition	Offender-based system	There are specific data sources for OC	When a crime has been committed, local police agencies complete a standardised form and send it to the Federal Police
<b>Denmark</b>	Enfopol 35	Both offence and offender-based system	There are specific data sources for OC	When intelligence relating to OC is received, police districts and the operational support units of the national police complete an electronic report and send it to the Serious Organised Crime Agency (SOCA)
<b>Finland</b>	Enfopol 35 & chapter 17:1a penal code	Offender-based system	Data on OC collected as part of the general crime data collection system (the Criminal Complaint File System) and there is also a specific database (the suspects' database)	As soon as a police officer starts an investigation, info on it is placed in the database
<b>France</b>	No operational definition	Offence-based system	There are no specific data sources; general data on offences are interpreted to shed light on OC activities	When the service dealing with a given offence decides that the case is linked to OC
<b>Germany</b>	1990 German Working Party of Police and	Both offence and offender-	There are specific data sources for OC	Once collecting law enforcement agencies decide, on the basis of the

	Judicial Authorities (AG Justiz/Polizei)	based system		OC definition and of fifty indicators, that an OC event occurred and report it to BKA
<b>Greece</b>	Enfopol 35 & law 2928/2001 (artt. 1, 2)	Offence-based system	There are specific data sources for OC	When a crime defined as organised crime related in law 2829/2001 by a variety of different organisations happens
<b>Ireland</b>	Enfopol 35 & a (different) national definition of 'major criminals'	Both offence and offender-based system	Neither specific data sources for OC nor specific sections for it in ordinary crime data sources. The National Criminal Intelligence Unit of <i>An Garda Síochána</i> uses its data collection procedures to build a picture of OC from PULSE (the single system for recording all crimes)	When multi-agency thematic units (e.g. the Criminal Assets Bureau and police forces) submit any intelligence which may relate to OC to NCIU
<b>Italy</b>	Artt. 416 and 416-bis penal code & art. 74 Presidential Decree 309/1990	Offence-based system <sup>3</sup>	There are both specific data sources (MACRO database for qualitative data - to be shortly implemented) and specific sections for OC within ordinary crime data sources (for quantitative data, 165 model, replaced by SDI - <i>Sistema Di Indagine</i> , Investigation system - in June 2004)	<i>Quantitative data:</i> data on organised crimes are collected by the provincial offices of the police by completing the 165 model form and sent to SAC and ISTAT. Since July 2004, they directly access SDI database online <i>Qualitative data:</i> when info from intelligence, investigative and judicial activities is sent to SAC
	OC definition(s) used to collect data	OC data collection system typology	Relation between ordinary crime data sources/OC data sources	<i>Time of collection of the data on OC</i>
<b>Luxembourg</b>	Enfopol 35	Offence-based system (on a case basis)	Neither specific data sources for OC nor specific sections for it in ordinary crime data sources	<i>When the police departments register typical OC cases and inserts the related data in a template</i>
<b>Portugal</b>	Enfopol 35 & art. 299 penal code	Offence-based system	Neither specific data sources for OC nor specific sections for it in ordinary crime data sources	<i>When a criminal investigation starts, an electronic report on the case is submitted by the local police information unit to SIIC database (Sistema Integrado de Informação Criminal), managed by Polícia Judiciária</i>
<b>Spain</b>	Enfopol 35	Offender-based system	There are specific data sources for OC	<i>After each law enforcement agency has identified an OC group, it completes a standard questionnaire and send it to UCIC</i>

<sup>3</sup> As soon as the MACRO system will be implemented, Italy will have a both offence and offender-based system.

<b>Sweden</b>	Enfopol 35, but applied extensively (also to groups that only fulfil criteria 1,2,3,4)	Offender-based system	There are specific data sources for OC, i.e. OBiS database (since 1998), plus the Police Surveillance Registry and the Criminal Intelligence Database	<i>The collecting authorities (police, customs, Economic Crime Inspection Service, Fiscal Information and Investigation Service) use a common input form, and collect info in separate databases. These are then merged into OBiS database</i>
<b>The Netherlands</b>	Enfopol 35, section 140 penal code, Parliamentary Committee of Inquiry on Methods of Investigation, UN Convention against Transnational Organised Crime, National Police Agency/ National Criminal Intelligence Division	Offence-based system	Neither specific data sources for OC nor specific sections for it in ordinary crime data sources	<i>When an investigation on an OC related crime starts</i>
<b>The United Kingdom</b>	NCIS	Both offence and offender-based system	Neither specific data sources for OC nor specific sections for it in ordinary crime data sources	<i>When an investigation on an OC related crime starts</i>

Table 1 suggests the following comments on the key features of MSs data collection systems on organised crime:

*OC definition(s) used to collect data, this is not fully harmonised*

With reference to the operational definitions used to collect data on organised crime, these are not yet uniform.

Ten out of fifteen Member States make use of the European definition contained in Enfopol 35; while in the remaining countries national definitions prevail. However, this does not imply that two-thirds of the MSs use precisely the same definition of organised crime to collate data on it. We need to recognise that:

- *in eight out of the ten countries where the European definition is applied, it is not the sole definition used but coexists with other national definitions that are used alternatively or cumulatively to collate information on criminal groups. Very often*

*the way in which the two types of definition interact is unclear, as happens in Austria;*

- *as well as this problem, sometimes the Enfpopol definition is applied differently, because of a conscious choice (as in Sweden, when it is always applied extensively, i.e. also to groups that only fulfil criteria 1, 2, 3, 4 of the definition) or because of different interpretations of the eleven criteria contained in the definition itself.*

One can therefore conclude that the uniform collection of data on organised crime is hampered in the Member States both by the Enfpopol definition not being adopted by all states, and by its heterogeneous application even in those countries formally adhering to it (due, as seen, to different national interpretations of Enfpopol criteria and to the coexistence and application of national definitions together with the European one). This lack of harmonisation in defining organised crime or in interpreting the same definition of it probably impacts negatively, in the end, on the comparability of the organised crime picture among countries.

*OC data collection system typologies: most countries have offence-based systems, but there are also offender-based and mixed systems.*

As for the OC data collection system typology, within the European Union Member States there are both offence-based systems, offender-based and mixed systems (i.e. both offence and offender-based).

About a half of the countries (i.e. seven Member States) have an offence-based system, which means that the unit of analysis for the data collection systems in these countries is the offence (indeed, any offence). The consequence is that in these Member States data are collected on all offences and various techniques (e.g. ticking the button ‘OC relevance’ if the case meets the criteria of the OC definition, as happens in Austria, or an ex post case by case analysis, as happens in Luxembourg) or presumptions (e.g. that certain crimes, because of their seriousness, require a complex form of organisation and can therefore be considered as organised crime related, as occurs in France) are subsequently employed to identify, amongst all reported crimes, only those offences committed by organised criminal groups.

In four countries (Belgium, Finland, Spain and Sweden) the organised crime data collection system is, instead, offender-based. Subsequently, in these countries the unit of analysis is the person suspected or ascertained to be a member of an organised crime group, and data on organised crime related offences flow from information on crimes carried out by its members.

Both approaches are adopted in four Member States (Denmark, Germany, the Netherlands and the United Kingdom), where, in addition to OC data collected as part of the general crime data collection system, specific information on OC members is also collected.

It is worth noting that, compared to an offence-based system, which is reactive (since it reacts to an offence already committed), an offender-based system is proactive and allows intelligence information to be collected that could enable the prevention of organised criminal acts. Also, offender-based systems normally provide a more reliable picture of organised crime because the information they collect is based on the monitoring of organised criminal members, rather than on the employment of often artificial techniques to identify OC related crimes among all reported crimes.

*Relation between ordinary crime data sources/OC data sources: in only eight out of the fifteen MSs are there specific data sources for organised crime or at least specific sections for it within ordinary crime data sources.*

In only eight out of the fifteen Member States are there specific data sources for organised crime or at least specific sections for it within ordinary crime data sources. In the remaining cases there are neither specific data sources for organised crime nor specific sections for it within ordinary crime data sources, so that data on organised crime are reconstructed indirectly, on the basis of general crime data.

*Time of collection of the data on OC: there are relevant differences among the Member States*

Member States, also depending on the OC data collection typology adopted, differ from each other with reference to the time when data on organised crime are collected. So, in offence-based systems the collection of data on organised crime normally takes place as soon as a crime is discovered and recorded by the police; however, it may occur (e.g. Austria) that the time of collection is moved forward, to the time when it is necessary to submit a full report on the case to the court so that prosecution can begin.

In an offender-based system, information is mainly collected at the time when suspicion arises that a given person is a member of, or connected to a criminal group, and therefore is not necessarily linked to the commission of any offence.

This difference in the time of collection of data is another factor hampering the collection of comparable statistics among Member States.

## 2.2 Variables on organised crime on which information is collected

Below, table 2 sums up the variables on organised crime on which data are gathered in the Member States.

**Table 2. Variables on organised crime on which information is collected in the 15 EU member states**

	<b>Variables on organised crime on which information is collected</b>
<b>Austria</b>	<i>Variables on the crime</i> (e.g. type of crime, number of crimes, economic damage caused, <i>modus operandi</i> ); <i>variables on the perpetrator/accomplices</i> (identity, age, gender, nationality, status in the country); <i>variables on the victim</i> (age, gender, nationality, status in the country), plus some <i>additional variables</i> in drug cases (e.g. kind of drug, amount) and in cases of <i>people smuggling and illegal immigration</i> (e.g. number, age and nationality of smugglers & of immigrants)
<b>Belgium</b>	<i>Variables on the OC group</i> : name, structure, composition, types of crime committed, geographical areas where the organisation is active, <i>modus operandi</i> , estimated proceeds, trends and impact <i>Variables on OC suspects</i> : surname and first name, function in the organisation, gender, nationality, place and country of birth, police or legal measures taken against them (if any)
<b>Denmark</b>	<i>Variables on the OC groups</i> : all data available on individuals, whereabouts and contacts (not predetermined set), and in any case all variables described in Enfopol 35 <i>Variables on the OC activities</i> : for <u>drug trafficking and manufacturing</u> : name, location, type of offence, type of drug, <i>modus operandi</i> , means of transport, route, contacts, violence used, weapons used; for <u>other offences</u> : name, location, type of offence, <i>modus operandi</i> , means of transport, contacts, violence used, weapons used
<b>Finland</b>	<i>Variables on the OC suspects</i> : number of followed-up (i.e. monitored) persons, basic personal data (e.g. age, nationality), serving of time in prisons and connections to other criminals, crimes of which these persons are suspected (time and place of commission, <i>modus operandi</i> , connections to other criminal activities, connections to companies/legal world) <i>Variables on the OC groups</i> : number of OC groups, shares of different nationalities in the group, main geographic area of activity, main criminal branches
<b>France</b>	The variables normally collected on any offence
<b>Germany</b>	<i>Variables on OC group</i> : on <u>offences</u> : geographical location, offence type, number of offences; on <u>organised crime relevance</u> : special criteria of the OC definition plus fulfilment of fifty indicators, calculation of the organised crime potential of the group; on <u>suspects</u> : number, nationality, ethnicity, weapons used, previous arrests, outstanding arrest warrants; on <u>the duration of the collaboration of the organised crime group</u> ; on <u>fields of activity of the group/crime</u> : <i>modus operandi</i> , country of origin, transit and destination of criminal goods; on <u>financial aspects</u> : damage caused, profits earned, confiscation of assets

	<p><i>Variables on OC offences:</i> on <u>drug trafficking and drugs manufacturing</u>: name, address, evidence, links to firm/organisation, material i.e. information on the drug involved, evidence of communications, vehicle, means of payment, tip-off/lead, weapon, designation of offence/incident, use of counterfeit money/notes; on <u>illegal migration and human trafficking</u>: name, address, evidence, links to firm/organisation, material, evidence of communications, vehicle, designation of offence/incident, accounts; on <u>money laundering</u>: name, address, evidence, links to firm/organisation, buildings/places/addresses (this may include deeds/certificates or ownership), banking and transactions, tracking money; <u>other offences</u>: no data collection criteria specific to organised crime</p>
Greece	<p>Data on the following 19 variables related to OC groups are collected: structure of the organised crime group, crimes committed by the group, geographical area in which group operates, name of the group (according to the nationality of key members), estimated total number of members, number of suspected or arrested members, number of key members, citizenship of key members, nationality of key members, relationship to other organised crime group, use of violence (within the group, against members of other organised crime groups, or against others), infiltration into criminal justice officers, courts, businesses, politicians, others, use of specialist methods (such as offsetting, internet, etc.), countermeasures, employment of skilled workers (such as lawyers, chemists, experts, technicians, etc.), risk estimates for legal markets, risk estimates for illegal markets</p>
	<p><b>Variables on organised crime on which information is collected</b></p>
Ireland	<p><i>Variables on OC groups:</i> levels of violence used, levels of profit derived from groups' activity, impact upon the public (either as victims or as users of illegal drugs), possible effect upon legitimate business, levels of cross border activities, potential for harm to the economy</p> <p><i>Variables on OC offences:</i> on <u>drug trafficking</u>: type of drug, routes, mode of transport; on <u>drugs manufacturing</u>: precursor chemicals; on <u>smuggling</u>: product involved, use of legitimate businesses; on <u>illegal firearms and explosives trading</u>: type of weapons, routes, connection to other forms of crime; on <u>money laundering</u>: source of money, means employed, use of legitimate business; on <u>intellectual property theft</u>: type of product, location manufacturing; on <u>extortions, including money for protection</u>: levels of violence, motive, level of paramilitary involvement; on <u>fraud</u>: means, targets, state or major business; on <u>illegal migration</u>: routes, identity of facilitators, abuse of systems, false documentation; on <u>trafficking of human beings</u>: routes, identity of facilitators; on <u>prostitution</u>: use of force or intimidation, on <u>works of art, antiques, jewellery, archaeological material trafficking</u>: type of product stolen, routes for export; on <u>organised crime related theft and robbery</u>: identity of persons involved, means of disposal of proceeds, levels of violence, possibility of inside involvement; on <u>kidnapping for ransom</u>: identity of those involved, motive; on <u>organised vehicle theft</u>: types of vehicles stolen, means of disposal of vehicles; on <u>organised lorry load theft</u>: type of product, means of disposal</p>
Italy	<p><i>Quantitative variables on OC:</i> till June 2004, 165 model the following variables on associations for purposes of committing offences, Mafia - type association and organised crime related homicides: number of reported crimes (total), number of reported crimes in the chief city, number of reported crime of known author, number of reported people (total), number of reported minors; since July 2004, SDI</p>

	<p><u>database</u>: all the variables listed in the 165 model plus other information of interest to the database on persons (physical or legal) and objects (documents, vehicles/plates, stock titles, banknotes and arms)</p> <p><i>Qualitative variables on OC</i> (to be shortly reported in MACRO database): denomination of the organisation, ethnic predominance (if any), origin area, influence area, criminal activity/ies carried out, eventual beginning and ending date of the criminal activity, names and personal data of members, role of the members in the organisation</p>
<b>Luxembourg</b>	<p>Main variables collected: number of human resources involved, amount of material resources involved, illicit gain obtained over a certain period of time, nationality of the members, regions of origin, ethnic origin, period of activity, form of organisation and structure, type of internal control mechanisms</p>
<b>Portugal</b>	<p><i>Variables on OC offences</i>: number of offences perpetrated by organised crime groups, number of offenders linked to organised crime and their features, numbers of groups and their features, numbers of victims linked to organised crime and their features, financial harm caused by organised crime, for the offence category where it makes most sense</p> <p>Starting from the data related to group members it is possible to deduce the following <i>variables on the group</i>: main activity of the group, <i>modus operandi</i>, size of the group, composition of the members by sex, age and nationality, role of the members within the group, connections to other persons and to possible legal entities, geographical level of activity (local, national, international), possible international connections and transborder operations</p>
<b>Spain</b>	<p><i>Information on OC groups</i>: when and how the group was detected; about members: number of members, gender, nationality and ethnic origin of members and core members, organisational structure of the group (hierarchical structure, cellular structure), collaboration with other criminal groups, places and regions of activities (local, provincial, inter-provincial, national or international); material resources (estimated group assets and annual income); use of violence (within criminal group itself, by criminal group against another one, against people outside the criminal world; number of deaths); use of corruption; use of expertise (e.g. in chemistry, money laundering, weapons, IT systems, etc.); use of complex methods in such areas as communication, technology, asset management, political/judicial manipulation or penetration of enforcement agencies</p>
<b>Sweden</b>	<p><i>Variables on OC groups in OBiS database</i>: name of members, nationality and task within the group, info on people having contacts with them; period of activity; structure of the group (how many members in the core, how many outside of it, type of hierarchy, etc.); connections to other groups; types of crimes committed, place, <i>modus operandi</i>, members involved; discipline within the group; companies used in criminal activity (name, legitimate business, which member uses it and how is it used for criminal activity); contacts outside the criminal world (name and task of the contacts, member of the group linked to these contacts); tools used in crimes (i.e. explosives, computers, weapons, etc.)</p>
	<b>Variables on organised crime on which information is collected</b>
<b>The Nether-</b>	<p><i>Variables on OC groups</i>: number of core members and other members; names, dates of birth, places of birth, gender, residence; nationality and ethnicity; roles</p>

<p><b>lands</b></p>	<p>of the suspects; core and subsidiary activities; confirmed, assumed or unconfirmed information; duration of collaboration; growth trend of group; latest criminal activities committed/planned; contacts with other OC groups; geographical area of work; infrastructural area of work (ports, airports); level of psychological/physical damage within and outside the criminal circuit; nature of any positive or negative sanctions; estimate of extent of turnover and/or profits; estimate of extent and nature of assets; abuse of sectors/legal entities (including <i>modus operandi</i> and description of sector); use/abuse of people in the professions; use of corruptive contacts (including <i>modus operandi</i>); shielding (active or passive obstruction of government authorities, defensive or offensive strategies); description of business; sources (of investigation) used</p> <p><i>Variables on OC offences:</i> on <u>hard &amp; soft drugs</u>: type, quantity, <i>modus operandi</i>, logistic process (acquisition of drugs, countries of origin, transit and destination, smuggling route, form of transport), nature of trade (production, import, export/wholesale or distributive); on <u>environmental crime</u>: <i>modus operandi</i>, nature of environmental crime (dumping of chemical waste, nuclear waste, illegal fireworks, endangered animal and plant species), nature of activities (import, export, dumping, discharging, mixing, etc.), potential damage; on <u>extortion</u>: <i>modus operandi</i> (perpetrators, victims, blackmail, hostage-taking, kidnapping), size of sum, frequency of extortion; on <u>fraud</u>: <i>modus operandi</i>, nature of fraud (fraud with taxes, social legislation, legal entities, etc.), involvement of other countries, structures of opportunity; on <u>vehicle crime</u>: types of vehicles (private cars, goods vehicles, etc.), form of crime (theft, carjacking, home jacking, ram-raiding, ringing, stripping, etc.), logistic process (countries of origin, transit and destination, smuggling route), <i>modus operandi</i>; on <u>human smuggling</u>: countries of origin, transit and destination, smuggling route, <i>modus operandi</i> (division of jobs among suspects, logistics, nationalities, forms of transport), men, women, minors; on <u>human trafficking</u>: countries of origin, transit and destination, smuggling route, <i>modus operandi</i> (division of jobs among suspects, logistics, nationalities, forms of transport), men, women, minors; on <u>smuggling</u>: <i>modus operandi</i> (logistics, countries involved); on <u>firearms crime</u>: nature, quantity, type of weapons, <i>modus operandi</i> (logistics, countries of origin, transit and destination, smuggling route, extent of trade); on <u>misappropriation and embezzlement</u>: <i>modus operandi</i> (nature and destination of misappropriated goods/embezzled money); on <u>theft, burglary and handling stolen goods</u>: nature, division of tasks, locations, logistics; on <u>robbery</u>: <i>modus operandi</i>, nature and extent, locations, use of weapons and violence; on <u>money-laundering</u>: <i>modus operandi</i>, method (money transfers, loan-back constructions, etc.), estimate of amounts; on <u>computer crime</u>: nature and form, <i>modus operandi</i>; on <u>child pornography</u>: nature/use of media, <i>modus operandi</i>, logistics (production, processing, sales distribution, scale)</p>
<p><b>The United Kingdom</b></p>	<p><i>Variables on OC groups:</i> criminal activities (main, secondary and supporting), ethnicity/nationality, <i>modus operandi</i>, finances, co-operation with other criminals, use of violence and intimidation, use of corruption, use of other methods to protect and support criminality</p> <p><i>Variables on OC offences:</i> on <u>drug trafficking</u>: product, routes, groups involved, methods, links to other group; on <u>drugs manufacturing</u>: product, methods, location; on <u>environmental crime</u>: incident totals, location, source, pollutant, cause, impact, prosecutions, cautions and convictions; <u>smuggling of animals</u>: number of incidents, location, demand for rare animals, smuggling routes, markets, forged certificates, illegal dumping, method; on <u>fraud</u>: volume, financial</p>

	losses, type of fraud (card not present, counterfeit, lost and stolen, mail non-receipt and identity theft), place (cash machine, internet, abroad), method; on <u>illegal immigration &amp; trafficking in human beings</u> : methods, routes, groups involved, key nexus points, links to other crimes, exploitation; on <u>kidnapping for ransom</u> : number of national incidents, motivation (domestic, stranger, criminal, vendetta, people-trafficking, political); on <u>cybercrime</u> : number of incidents, methods; on <u>organised vehicle theft</u> : types of load at risk, methods, potential losses; on <u>organised lorry load theft</u> : types of load at risk, methods, potential losses
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Table 2 evokes the following comments on the variables on organised crime on which MSs collate statistics:

*Variables on organised criminal groups and members: a large number of variables are common to most Member States, but there are many different modalities and data collection techniques.*

There are a large number of variables on OC groups and members on which information is collected by the vast majority of Member States.

These are, first of all, *variables on OC suspects*, including: total number of OC suspects, basic personal data (identity, age, gender, nationality), function in the organisation, measures already taken against them (if any), connections to other criminals, crimes of which these persons are suspected.

These are also *variables on OC groups*, such as number of OC groups, group denomination, number of members (total/key members/suspected or arrested members), shares of different nationalities in the group (or ethnic predominance, if any), structure, role of the members in the group, geographical areas where the organisation is active (or most active), types of crime committed (or core/subsidiary activities or main/secondary/supporting activities), *modus operandi*, collaboration/relationship with other criminal groups, use of violence (within the group, against members of other organised crime groups, or against others/people outside the criminal world), use of corruption.

The existence of a bulk of variables on organised criminal groups and members on which most Member States collect data does not imply, however, a full harmonisation and comparability of the related information, due to:

- *different modalities used for the same variables (e.g. the use of violence is measured by Member States through a list of modalities which varies from country to country);*

- *different data collection techniques, depending on different data collection system typologies, dissimilar legal and police systems and timing of the collection, as well as on the different level of detail reached by the Member States on the same variable, with countries collecting information on the basis of standardised forms (which may lead to less detailed but more nationally comparable information) and countries opting for more flexible templates, with more attention paid to the complexities of reality.*

*Variables on organised criminal groups and members: a limited number of Member States collect data on variables crucial to understanding the level of penetration and corruption of the legal economy by organised crime and its financial basis.*

Only in a limited number of countries are the following variables – crucial to understanding the level of penetration and corruption of the legal economy by organised crime and its financial basis – also taken into account: connections to companies (companies used in criminal activity or abuse of legal entities), political/judicial manipulation or penetration of enforcement agencies, employment of skilled workers (such as lawyers, chemists, experts, technicians) and financial aspects of the groups (such as profits earned).

*Variables on organised criminal activities: there is a lack of a predetermined set of variables common to all Member States*

There is no predetermined set of variables common to all Member States on OC offences. There is, however, a tendency to collect information on the crimes typically related to organised crime, namely:

- *drugs manufacturing: precursor chemicals (or product), location, method;*
- *drug trafficking: routes, groups involved, methods, links to other groups, info on the drug involved (type of drug, amount), modus operandi, means of transport, smuggling routes, contacts, violence used, weapons used, links to firm/organisation (or use of legitimate businesses);*
- *trafficking in human beings: routes, countries of origin, transit and destination, identity of facilitators, modus operandi;*
- *money laundering: source of money, links to firm/organisation, buildings/places/addresses, means employed (money transfers, loan-back constructions, underground banking, etc.), use of legitimate business.*

Also in this case, the same factors mentioned above with reference to variables on OC groups and members may apply.

### 2.3 Comparing the main actors involved in the collection of data on organised crime

Below, table 3 sums up the main actors involved in the collection of data on organised crime. In particular, the following elements are herein taken into consideration:

- ☛ *collecting organisation(s), i.e. which are the main organisations collecting data on organised crime;*
- ☛ *coordinating bodies, i.e. which are the bodies bringing together the data collated by each collecting organisation, if any;*
- ☛ *level of cooperation between collecting organisations and coordinating bodies;*
- ☛ *tools & media used by coordinating body/ies to bring together data on OC by collecting organisations;*
- ☛ *time intervals at which the transmission of data on OC to coordinating body/ies takes place;*
- ☛ *feedback from coordinating bodies to collecting organisations, i.e. whether the coordinating body provides the collecting organisations with feedback based on the data provided by the latter.*

**Table 3. Who Collects Data on Organised Crime**

<b>Austria</b>	Police (plus the customs)	<i>Bundeskrimi-nalamt</i>	Good cooperation	Standard form sent electronically	Continuous	Yes
<b>Belgium</b>	Police (plus other law enforcement agencies, prosecution authorities, courts and immigration services)	Federal Police (Directorate for Fighting OC) & Ministry of Justice (Policy Dept)	Varies from organisation to organisation	Template, interviews, quant/qual reports, mainly sent electronically	Continuous	Yes
<b>Denmark</b>	Operational support units of the national police & police districts, regional support centres, SOCA (plus tax authorities, FIUs and aliens departments within police, insurance companies and bank associations)	Serious Organised Crime Agency (SOCA)	Full cooperation	Report sent electronically	Continuous	Yes
<b>Finland</b>	Regional and local police units, customs and frontier guard	National Bureau of Investigation,	Good cooperation	Databases, written reports, meetings and	Continuous	Yes

Comparing data sources on organized crime across the EU.  
A first step towards an EU statistical apparatus

	authorities	Criminal Intelligence Division, OC Section & PCFG [police, customs, and frontier guards] management group of the highest chiefs		interviews sent using different media (including electronic ones)		
<b>France</b>	National law enforcement agencies, Economic Crime Inspection Service, Fiscal Information and Investigation Services, Financial Investigation Services, Financial Investigation Units, Immigration Services, Anti Drugs Agencies, customs	<i>Direction Centrale de la Police Judiciaire</i> (International Affairs)	Good cooperation	Reports; during the process of writing the annual report for Europol OC patterns are deduced from these reports from the local police departments	Annual	-
<b>Germany</b>	Police forces of the 16 federal states ( <i>Landeskriminalamter</i> ), Customs Investigations Office ( <i>Zollkriminalamt</i> ), Directorate of the Federal Border Police ( <i>Bundesgrenzschutzdirektion</i> ), Federal Criminal Police Office ( <i>Bundeskriminalamt</i> ) (plus prosecution authorities and intelligence agencies)	<i>Bundeskriminalamt</i> (Federal Criminal Police Office)	Positive cooperation	Uniform electronic data-collection screening system in Microsoft Excel format	Annual	Yes
<b>Greece</b>	Police, Ministry of Commercial Navy, special forces for money laundering and trafficking, customs, courts, coast guards, Committee on art. 8 law 2331/1995	Police	Full cooperation	Protocol for data and information exchange; data sent by e-mail, fax, mail and phone	Annual	Rarely
<b>Ireland</b>	<i>An Garda Siochana</i> , Revenue Commissioners, Criminal Assets Bureau, Intelligence Agencies and customs	National Criminal Intelligence Unit (NCIU)	Good cooperation	Paper format, even if the process of data sharing is currently being upgraded to an electronic system	Continuous	Yes
<b>Italy</b>	Police forces ( <i>Carabinieri, Polizia di Stato e Guardia di</i>	<i>Servizio Analisi Criminale</i>	Good cooperation	165 model and SDI: electronically	165 model: monthly	Yes

	<i>Finanza</i> ), Antimafia Investigation Department (DIA - <i>Direzione Investigativa Antimafia</i> ), Central Department for Antidrug Services (DCSA - <i>Direzione Centrale per i Servizi Antidroga</i> ), <i>Servizio Analisi Criminale</i> (SAC), prosecution authorities, Intelligence Agencies, FIUs	(SAC – within the Ministry of Interior, Department of Public Security, Central Directorate of Criminal Police)		MACRO: by e-mail, fax, phone, as well as in form oral transmission during the meetings of <i>Gruppo di Lavoro Interforze</i>	SDI: continuous	
<b>Luxembourg</b>	The six regional police forces and the different departments of the <i>Service de Police Judiciaire</i>	<i>Police Grand-Ducal</i>	Good cooperation	A specific template is completed manually; additional info is gathered in police reports and by interviews	Annual	-
<b>Portugal</b>	<i>Polícia Judiciária, Polícia de Segurança Pública, Guarda Nacional Republicana, Brigada Fiscal, Inspeção-Geral de Jogos, Inspeção-Geral das Actividades Económicas, Alfândegas, Direções Distritais de Finanças, Serviço de Estrangeiros e Fronteiras</i>	<i>Polícia Judiciária</i>	Good cooperation	Electronic report based on more than 500 window input form	Continuous	Yes

Table 3 suggests the following comments on the main organisations collecting data on organised crime (“collecting organisations”) in the 15 EU Member States and their relationship with bodies (“coordinating bodies”) bringing together the data collated by each collecting organisation:

*Collecting organisations and coordinating bodies: police forces, at the local/regional and central level, are respectively the main collecting organisations and coordinating bodies in the Member States, while other authorities contribute to the collection of data, in their specific field of activity*

In all 15 Member States the main organisations collecting data on organised crime are local or regional police forces, while the coordinating body is a specific office set up within the national police.

This simple organisational structure is enriched in the majority of the Member States, on the side of the collecting organisations, by other authorities, such as customs, financial intelligence units, immigration services, etc. These contribute to the collection of data on criminal groups, in their specific field of activity. The participation of other authorities in the data collection, however, may have a negative side effect in terms of the reliability of some of the basic crime statistics figures because of an often reported lack of integration between police statistics and those collated by other agencies, as well as of different registration and reporting practices and criteria.

*Collecting organisations and coordinating bodies: the extent to which OC impacts on businesses is 'hidden'*

Scarcely reported by the national experts who cooperated in the EUSTOC Study is the collection of data on organised crime by business entities. This has not to be interpreted as a lack of data collection in the private sector, but rather as a consequence of the lack of awareness of its extent by respondents. It is reasonable to believe that business entities collect a variety of data on the OC events committed against them and of their harm, but do not share them with the public sector.

*Level of cooperation between coordinating bodies and collecting organisations: good in the majority of Member States*

As for the level of cooperation between coordinating bodies and collecting agencies, this is good in the vast majority of the Member States, i.e. in twelve out of fifteen countries.

Among the factors that have been reported as promoting this cooperation are the following:

- ☛ *linking OC data collection to a reporting activity which is necessary for the criminal process (e.g. for starting prosecution, as in Austria);*
- ☛ *the sense of belonging to the same institutions (i.e. police);*
- ☛ *the information/assistance that the collecting organisations receive from the coordinating body, either in terms of easy access to the national OC database or feedback (this will be further developed below).*

Among the factors that, on the other hand, represent an obstacle to full cooperation between collecting agencies with the coordinating body, the following have been remarked upon:

- *police forces, especially those not receiving information and assistance in return from the coordinating body, may not see the added value of collecting these data, which represents considerable additional work for them, and therefore tend not to cooperate (e.g. Luxembourg);*
- *technical or organisational problems in entering the data;*
- *a gap between national police priorities and local police priorities, that do not see the need for collecting data on OC from a local perspective and therefore allocate their resources to other projects.*

*Tools and media employed by coordinating bodies to bring together data on OC collated by collecting organisations: a variety of tools and media, with a prevalence of standardised tools (templates/questionnaires/input forms) and electronic media:*

The tools employed by the coordinating body to bring together data on organised crime collated by collecting organisations include standard templates/questionnaires/input forms normally filled out electronically. The information is usually sent electronically, though fax and paper are still used in some instances.

Apart from the standardised tools mentioned above, less uniform instruments such as interviews, meetings and phone conversations are also employed. In these cases the media used take the form of oral transmission of data.

*Time intervals at which the transmission of data on OC to coordinating body/ies takes place: continuous data transmission in the majority of the Member States:*

There is a continuous flow of information from the collecting agencies to the coordinating body in nine of the fifteen Member States. In the remaining Member States (France, Germany, Greece, Luxembourg, Spain and the Netherlands) data transmission takes place annually.

*Feedback from coordinating bodies to collecting organisations: provided in the majority of the Member States:*

As already mentioned above, when dealing with the level of cooperation between coordinating bodies and collecting organisations, feedback from the former to the latter is one of the factors that enhances the cooperation between the peripheral and central levels. This is because collecting agencies receive something in return for their collaboration, something which may be

extremely useful in solving ongoing investigations or discovering new cases. They therefore become aware of the added value of a national OC data collection system and contribute to it more actively.

Considering the importance of well established feedback practices, it is therefore promising to note that feedback is provided in nine Member States.

Feedback takes different forms. A first and basic feedback mechanism is the sending of the report analysing the information provided (normally the national contribution to the EU Organised Crime Situation Report), or other general analyses, from the coordinating body to the collecting agencies. A more relevant form of feedback takes place when the central authority helps the local agencies in their law enforcement by informing them of a link between different cases or between OC groups or members in several provinces.

Of course, the extent to which information is passed back to local police forces depends upon the information and whether feedback would add value to the investigation. If the information was operational and current, the feedback would normally be immediate. If the information was strategic, the feedback would be less urgent.

In two Member States, namely Greece and the United Kingdom, feedback is provided only rarely. In the United Kingdom, in particular, information would rarely be fed back to the original source of the intelligence for protecting the individual, as well as the integrity of any future case.

### **3. Conclusion**

The above comparison has shown, on the one hand, a large number of asymmetries hampering approximation and comparability of MS data sources on organised crime; on the other hand, it has made it possible to identify some best practices in the collection of data on organised crime across the EU. On the basis of this review, this final section suggests further actions that could be taken at EU level to further harmonise OC data sources. These include the following:

*Inviting Member States to adopt Enfpopol 35 as the operational definition to collect data on OC, and to uniformly interpret it.*

As the uniform collection of data on organised crime is hampered in the Member States both by the lack of adoption of the Enfpopol definition by one third of the MSs, and by its heterogeneous application even in those

countries formally adhering to it, action should be taken at the EU level to promote the adoption of Enfopol 35 as the operational definition to collect data on OC by the Member States still not adopting it, and its uniform interpretation by those countries already using it.

*Inviting MSs with an offence-based system to adopt an offender-based system, whether exclusively or cumulatively.*

Most MSs have offence-based systems, which are typically reactive since they ‘react’ to an offence already committed. Offender-based systems, on the other hand, are proactive and make possible the collection of intelligence information that could enable the prevention of organised criminal events; also, they potentially provide a more reliable picture of organised crime because the information they collect is based on the monitoring of organised criminal members, rather than on the employment of often artificial techniques to identify OC related crimes among all crimes. Action should be taken at the EU level to invite Member States with an offence-based system to adopt an offender-based system – either exclusively or together with an offence-based system.

*Inviting MSs to set up specific data sources for OC or at least specific sections for it within ordinary crime data sources.*

As the existence of specific data sources for organised crime or at least specific sections for it within ordinary crime data sources – which are present in eight out fifteen Member States – is the necessary starting point for a detailed and highly specific understanding of the organised crime phenomenon, action should be taken at the EU level to set up specific data sources for organised crime or at least specific sections for it within ordinary crime data sources in those countries which do not yet have them.

*Inviting MSs to use common modalities to measure the same variable on OC groups/members and promoting the harmonisation of data collection techniques to the widest possible extent.*

Though there is a large number of variables on organised criminal groups and members on which information is collected by the vast majority of Member States, a full harmonisation and comparability of the related information is hampered by the use of different modalities to measure the same variable and different data collection techniques. Action should be

taken to invite Member States to use common modalities to measure the same variable. Also, action should be taken to promote the harmonisation of data collection techniques, as far as this is compatible with differences in legal/police systems.<sup>4</sup>

*Inviting Member States to collect information on those variables on OC groups/members that are crucial to understand the financial basis of OC and its level of penetration and corruption of the legal economy.*

Only in a limited number of countries are variables crucial to the understanding of the level of penetration and corruption of the legal economy by organised crime and its financial basis (e.g. connections to companies, political/judicial manipulation or penetration of enforcement agencies; employment of skilled workers; financial aspects of the groups) taken into account. Action should be taken at the EU level to invite Member States to collect information on variables related to the level of penetration and corruption of the legal economy by organised crime and its financial basis.

*Inviting Member States to collect information on at least a selection of common variables related to OC activities.*

There is no predetermined set of variables on organised criminal activities common to all Member States. Action should be taken at the EU level to invite Member States to collect information on at least a set of common variables related to organised criminal activities. This could be done according to the following criteria: a) adopting an all-offences approach, rather than predetermining some typologies of OC-related offences; b) finding an agreement with all Member States on a list of key variables related to each activity on which data should be collected by all of them according to common modalities.

*Inviting Member States to integrate national police data sources on OC and those managed by other public agencies.*

Apart from local or regional police forces, that are the main collecting organisations in all Member States, other authorities (customs, finance

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<sup>4</sup> While it would be unrealistic to charge the EU with the task of harmonising different legal and police systems and timing of the collection, there is room for harmonisation with reference to the different levels of detail reached by the MSs on the same variable, where the EU could suggest a common level of detail, for example on the basis of similar standardised forms.

intelligence units, etc.) normally contribute to the collection of data on criminal groups. There is often, however, a lack of integration between police data sources and those managed by other public agencies. Action should be taken at the EU level to invite Member States to better integrate police data sources on organised crime and those managed by other agencies. This should promote the development of a complete and reliable picture of OC as much as possible.

*Inviting Member States to integrate public and private data sources on OC.*

Apart from public authorities, business entities do collect a variety of data on the OC events committed against them and of the harm caused, but do not share them with the public sector. So, everywhere there is a lack of integration of public data sources on organised crime and private ones. Action should be taken at the EU level to invite Member States to better integrate public and private data sources on organised crime. This would promote the development of a complete and reliable picture of OC as much as possible.

*Inviting Member States to systematically require coordinating bodies to provide collecting organisations with feedback.*

Feedback from coordinating bodies to collecting organisations, which is now provided in nine Member States, enhances the cooperation between local and central level. This is because collecting agencies receive something in return for their collaboration, something which may be extremely useful in solving ongoing investigations or discovering new cases. They therefore become aware of the added value of a national OC data collection system and contribute to it more actively. Action should be taken at the EU level to invite Member States to systematically require their coordinating bodies to provide collecting organisations with feedback.

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# Some reflections on researching financial and economic crime

*Miroslav Scheinost<sup>1</sup>*

## **Introduction**

Researching financial and economic crime can be such a tough task that, to some extent, it might even be considered a kind of intellectual challenge. The problems facing the researcher are manifold, theoretically as well as empirically. Mostly the concepts one has to work with are anything but clear, while doing research often times also entails overcoming a large number of practical, methodological and organisational obstacles. The subject of interest itself, i.e. financial and economic crime encompasses a broad variety of criminal conduct that damages –directly or sometimes indirectly– citizens, public funds and the state. Economic crime can be committed by ‘traditional’ underworld figures as well as by prominent actors in the economic and financial ‘upperworld’. What is typical for this kind of crime is to find it flourishing in the grey zone where the dividing lines between legal, illicit and criminal conduct are unclear. Thus it is pertinent to ask, what kind of problems stands in the way of the obstinate researcher who wants to obtain insight into such a complicated phenomenon?

## **Definition**

In the case of empirical research the researcher must, first of all, define the object of interest. This task may not be as easy as it seems. A definition should clearly delimit the relevant object of interest by identifying the distinctive features that can be operationalised in relation to empirical research. However, we must face up the fact that empirical research into financial and economic crime is still only developing and existing definitions of it are hardly helpful for the purpose of delineating precisely the cluster of diverse phenomena in question. Of course in theory, the criminologist has access to the knowledge accumulated by his or her forerunners and colleagues but

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<sup>1</sup> Director of the Czech Institute of Criminology and Social Prevention.

what is usually elicited from this accumulated knowledge on economic crime is a mere variety of possible approaches. As there is no yardstick to enable the researcher to decide which approach is best, he must literally find his own way to delimit and study the economic crime phenomenon.

In the Council of Europe Recommendation No. R(81) 1981, the attempt to define economic crime as a specific phenomenon was abandoned. Instead, the recommendation only offered a list of offences that should be understood to encompass economic crime. This approach is similar to the very first attempt of the UN to define organised crime, contained in the draft of the UN Convention against Transnational Organised Crime in 1999. In that draft organised crime was defined by means of an enumeration of specific criminal activities. But this approach did not prove satisfactory: depending on circumstances and preferences such a list can be extended (Van Duyne en Van Dijk, 2006). The same applies to the definition of economic crime. Economic crime, like organised crime, is a very broad concept, covering a huge diversity of phenomena. In addition, these phenomena develop and vary depending upon the circumstances and conditions in society, the economy, markets, legislation etc. Therefore it develops and changing too so that any list of examples can never be comprehensive and final. Defining economic crime by an enumeration of offences therefore seems unsatisfactory. Its basic problem is that it presents the concrete forms of economic crime but it does not specify its substance. Consequently, researchers working in different periods and countries may use different enumerations and this is likely to impede the comparison of results.

An alternative approach is to base a definition on the applicable articles of the Criminal Code of the country one is studying. This means using the same approach that underlies criminal statistics, which are based on police and judicial data concerning the number of known offences as defined by the relevant articles of criminal code.

This approach is at first sight attractive because the researcher describes the extent and nature of economic crime according to the data of the relevant criminal code, which can be easily followed and handled. The language of the researcher and that of the law correspond: the communication between researcher or criminologist and law enforcement officers or lawyers becomes also easier and the possibility of misunderstanding is reduced.

Nevertheless, the usefulness of this approach is soon overshadowed by its disadvantages. Firstly, the aims of criminology go beyond the narrow boundaries of penal law: the researcher should involve in his object of interest components, factors and phenomena that are not covered by the positive law but are nevertheless related to the research problem. Secondly, such an approach soon leads to difficulties when we want to compare results from

different countries due to differences in legislation. It is possible to say that economic crime is typically carried out by means of fraud and embezzlement. But in different national criminal codes these offences can be differently formulated. For example, the Dutch criminal code has no clause covering diverse forms of 'fraud', which is rather a non-legal container concept, while the German code has a clause concerning 'Betrug'. The structure of the Czech criminal code seems to be very convenient because it includes a special section referring to 'economic crimes'. But in fact this section is insufficiently comprehensive, because articles in other sections of the Czech criminal code cover not only what are evidently common property crimes, but economic crimes as well. The articles concerning 'fraud', 'embezzlement' and the 'legalisation of the proceeds of crime', for example, fall under the section 'property crimes'. At the same time they cover many activities that apparently may be characterised as economic crime. Similarly, the section 'economic crime' does not include bribery and corruption because these are considered crimes against public order, which are accommodated in a separate section in the Code. The same applies to damaging the environment and damaging public health by contaminated food, offences that are included in the section reserved for "generally dangerous crime".

Thus, to take into account (speaking of the Czech situation) only the section of the Criminal Code entitled 'Economic crime' entails the exclusion of some substantial forms of economic crime while it includes some articles in the section 'Property Crimes'. Consequently nowadays, criminologists will have to categorize these crimes in other clusters if required for the purpose of a thematic study. Similar problems may arise in other jurisdictions. It seems that this 'legal positivist approach' is more fruitful for comparative legal research and analysis. Criminological research on economic crime should—in my opinion—rather offer some qualitative knowledge for such a comparative analysis rather than side with legal definitions.

The problem of the (in)comparability of data may exist not only between but also within a single jurisdiction. For example, Czech police statistics distinguish between 'fraud' of our Criminal Code, 'economic frauds' and 'property frauds'. As a result, these data are not consistent or comparable with the judicial statistics because these do not make this distinction.

Of course, also differences between national penal codes impede the comparison of research findings based on national legal definitions. As is generally known, this is a common impediment for comparative research, but the consequences seem even more striking in the case of economic crime.

Thus, we may assume that defining economic crime either by an enumeration of activities or by an enumeration of offences in accordance with respective Criminal Codes does not correspond to the requirements of criminological research. Though a definition by limited enumeration may

very well provide for a clear-cut decision rule, it does not always satisfy our criminological objective to obtain insight into the binding or distinguishing features of the listed crimes. In the end we would like to understand why forms of crime are included or excluded from the definition. A criminological definition, therefore, requires us to seek for a common denominator on a substantive level, which may teach us something about the denoted phenomenon rather than about the definition itself. Actually, enumerations of activities amount not to a definition but rather to an attempt to avoid the problems of defining the substance of economic crime. Therefore, to define economic (and subsequently financial) crime by structural and qualitative attributes rather than by enumeration seems to be highly preferable for criminological research purposes.

This of course does not ease the situation. There are various definitions of economic crime and probably only in exceptional circumstances will the researcher be able to use one of them directly. More often he has to collate components from other definitions for his concrete topic and situation/environment of research. This implies that his own definition merely suits his research objectives without pretension of creating a general, let alone a final solution of the definition problem (however tempting it is). What this definition must pretend is to correspond with the accumulated knowledge and needs of broad empirical research.

To illustrate this approach, for the purposes of research carried out by the Institute of Criminology and Social Prevention we coined a specific definition of 'economic crime', tailored to meet the demands of this research. Economic crime was defined as 'the intentional unlawful economic activity that brings financial or other profit at the expense of a concrete economic entity (the state, private company, fund, entrepreneur etc.)'. The component 'unlawful' refers to the illegal nature of the conduct: a legal code is violated. The component 'intentional' means that the conduct in question is not accidental but calculated and purposeful. The component 'economic activity' limits the scope of the definition to the sphere of economy (i.e. to the framework of economic relations and bonds) and implies that the means used are economic tools. In most cases this means that perpetrators of economic crime are familiar with the economic environment in which they operate and are able to use these tools (Scheinost 2004:8-9). Using this definition we are able to differentiate for example between 'economic fraud' in which both the fraudster and the victim are regular players in the arena of economic interaction (e.g. in the case of fraud between an entrepreneur and a bank) and 'plain' fraud which is typically perpetrated in the setting of the private sphere of citizens.

Of course, there are many other components that may be included in this definition. For example, the violation of trust, the misuse of trust, formal power or influence, or false pretensions to comply with laws in force etc. However, whether such components are included in the definition should be determined by the research question, though the violation of trust seems to be an inherent feature of fraud.

The basic idea underlying the definition stipulated by the Institute of Criminology and Social Prevention, was the great similarity between economic crime as a form of criminal behaviour and its legal counterpart: economic behaviour by law abiding entrepreneurs. In this respect economic crime is unlike most crimes, such as violent crime, sexually motivated crime, property crime. The economic criminal uses the very same tools and even uses the same language as his non-criminal equivalent. The same concerns law enforcement and even the law itself. Criminal behaviour and the damage caused by it are expressed in a terminology typical of business and the economy: costs, profits, losses, business operations etc. It is possible – with a slight exaggeration – to attach to these corresponding meanings also the same economic interest, i.e. the desire to maximise profits. At this point the interests of the legal and illegal economy of course collide – the protection of the legal economy against illegal attacks requires an effort to reduce the profits of the opponent side as strongly as possible.

One of the Czech authors tried to formulate this specific feature of economic crime in the following way: ‘Economic offences, even if they damage individual rights, are nearly always profit-motivated, latent attacks against collective rights, against the economic system as a whole or against some of its institutions like market organisation, interests of consumers, foreign trade regulations, the economic activity of plants, financial system regulations and partly also against the environment. Simply put, economic offences are offences committed within the economic sphere against the economic sphere.’ (Nemec 1995:106, 107).

As a special subgroup of economic crime we defined financial crime as an intentional unlawful activity against property committed in connection with financial and investment institutions and the financial markets. It attacks the financial entities, i.e. financial institutions (banks, savings co-operatives and savings banks, credit co-operatives, insurance companies), the collective investment organisations (investment companies, investment funds) and the system of public budgets, namely their revenues (through tax and customs frauds, the non-payment of obligatory allowances) and expenses (subsidy and grant frauds) (Scheinost and Baloun, 2003). Of course, citizens as investing individuals are often also affected but the attack is usually carried out through some financial market institution.

Thus, our definitions of economic and financial crime stem from the features of the environment (i.e. legal economic system), of the objects attacked and the offenders, and from the nature of the tools and techniques used. This approach is not of course the only possible one. We may create and use another definition, for example using more or less similar components as intention, pretence, law breaking, operation in a legal economic environment, illegal advantage etc.

## **Selecting a topic**

Having a qualitative definition, the criminologist must accept the fact that the criminological definition does not necessarily correspond exactly to the wording of the law. Despite this possibility the component 'unlawful activity' has to be operationalised according to the specific penal clauses. The analysis of the acquired data and especially data from the statistics must of course be carried out with respect to the definition with which those data have been gathered.

When the phrase 'unlawful activity' has been operationalised, the researcher may proceed to the next step. Generally, it is nearly impossible to carry out research on complex economic crime as if it were a single phenomenon: a selection must be made from the diverse manifestations, depending on the research question.

Let us put aside those instances in which the criminologist is asked to do research for some institution that itself determines the research topic. More often he is confronted with the necessity of making a selection from a variety of options on how to address the problem of economic crime. The question arises as to what criteria should be used to make this selection. Of course, the matter of personal interest sometimes plays an important role, but in general: what forms of economic and financial crime are worth examining? It is typically an evaluative, not a methodological question. It is up to the researcher to decide the aspects to which to give precedence subject only to the requirement that he provides a proper justification for his decision. There are other approaches: for example, one can decide to start from the statistics and to examine those forms of economic crime (offences) which are most widespread in a country, region or period. The basis for this approach is objective to the extent that the statistics are objective. It is also possible to examine the most dangerous or harmful types of economic crime, but then the question of how to measure dangerousness or harmfulness must be answered. An obvious answer would be to measure the damage caused. However, the damage is always multifaceted: one can measure the amount of

illegal income in addition to economic losses including those arising from future lost opportunities; the diminution of trust among economic subjects or the loss of public confidence in market or financial institutions. This approach will gradually relinquish quasi-objective criteria (if we abandon the criterion of the amount of stolen money expressed in the statistics) and will call for a preliminary broader socio-economic analysis that overreaches the boundaries of criminology.

It is possible also to choose to study the typical forms of economic crime. Intuitively we are usually able to identify the forms of economic crime typical and most important for a given society and period (as e.g. tunnelling or frauds connected with the process of privatisation of former state property in post-socialist countries, including the Czech Republic). But it is necessary to answer the question of whether these are really typical and by what criteria. Are they typical because of their connection with the specific socio-economic situation or because of their widespread occurrence? In the latter case we turn back to the statistics. It is also necessary to avoid the mistake that some forms are considered as typical because they are the ones most frequently mentioned in the media and in public or political discussions (e.g. corruption).

Planning our research projects we face these and similar questions urged upon us by the variety, nature and dimensions of economic crime. And, paradoxically, we need to carry out at the very beginning some general overview of economic crime and acquire some basic knowledge about this phenomenon in order to determine what is important in the first place, and subsequently what is accessible and to formulate criteria for selection.

## **Broader context of economic crime**

If we want to answer the questions raised in the previous section we have to be aware of the need to study this phenomenon not in isolation but within the broader context of social, political, economic, historical etc. circumstances. These are the frames of reference that influence the perpetration and character of economic crime. We can understand financial and economic crime only if it is projected against these backgrounds. Having insufficient knowledge of these backgrounds, we may more or less describe the forms and types of economic crime but we can hardly understand its causes and sources fully.

Knowledge of the system of social values and norms is essential for understanding the scope and character of economic crime in a given country. For example, the smuggling of alcohol was a quite 'respectable' profession in Norway for decades (Johansen, 2005). Its sometimes paradoxical dependence

on official –without doubt well-meant– policy can be illustrated by the fact that during the 1920s some of the alcohol smugglers and illegal distillers gave anonymous financial support to temperance groups, which defended the Prohibition in Norway (Johansen, 2005). The ability to avoid payment of taxes or at least to pay taxes at the lowest possible level is considered to be more a manifestation of entrepreneurial smartness or at most to be a ‘cavalier tort’, and not only in the Czech Republic.

Understanding the type of legal and moral ‘conscience’ established by the state is absolutely essential for understanding economic crime. Under the socialist regime in the former Czechoslovakia all property (except personal belongings) was owned by the state. It was regarded as so-called ‘property in socialist ownership’ and it had a greater legal protection (including penal law) than personal belongings (in the sense that the punishment for stealing state property was more severe). Nevertheless, in the estimation of public opinion, it was not considered a serious crime, rather a minor offence to ‘pocket’ something from this state property and consequently such behaviour was rather tolerated by the public. Of course, it was not ‘economic crime’ according to our definition, because it took place in the framework of the quite different social and economic system but it is possible to find in this tolerance some of the roots of the behaviour of certain people during the privatisation process of previous state property in the period of transformation.

This perspective that involves the broader scope of historical, social and economical circumstances is important for researching economic crime in general, particularly in societies in transition. Within these societies the values, norms and customs characteristic of the previous period have interacted with the emerging norms and values of the free market economy. Toleration of theft of state property together with disrespect for the private property that has been nourished for so many decades, encountered the appetite to get rich quickly, to achieve speedy success (expressed in money and social status) and exploit favourable opportunities. The speed of the transition process and ability of the entrepreneur to make headway in the new conditions was regarded more highly than strict observance of the law.

Norms, values and preferences have operated in the unstable organisational and institutional framework characterised by profound changes of ownership, of the structure of economic entities and of the whole system of economic relations and corresponding legislation. These conditions were in some sense unique and without doubt influenced the extent and forms of economic crime. For example, it was very easy to acquire bank loans on the basis of shallow entrepreneurial projects knowing that on the one hand, the quality of these projects would not be closely scrutinised and on the other

hand, that the state would not allow key banks to go bankrupt. It was tempting to take advantage of the fact that the courts could not crosscheck the decisions of the privatisation committee that played the key role in the privatisation process. It is a typical example of the need to have knowledge of the broader context of the given period and the relevant circumstances. Here we meet social, institutional and economic surroundings furthering various forms of economic crime, which are beyond the boundaries of penal law. Nevertheless, for a proper interpretation, knowledge of these surroundings is essential. In addition, to obtain a full understanding it may be necessary to study not only the economic crimes themselves plus their social etc. context, but also to focus on the conduct of all economic subjects. That conduct does not need to be directly unlawful but it may be at least unethical in the sense of misusing existing opportunities by going at the edge of the law and sometimes beyond it knowing that the law enforcement agencies do not take much interest to prosecute such transgressions.

Though this 'pioneer period' of transition is over, these examples underline that the criminologist must examine economic crime as a phenomenon firmly embedded in the broader context of social and economic structure and considerably influenced by social consciousness. It is possible to add one remark: on the one hand, the Czech situation was favourable the rapid advancement of dynamic enterprising people and the public opinion largely tolerated the behaviour at the edge of the law. On the other hand the newly emerged entrepreneurial stratum carries a certain stigma of having obtained their status and property by dubious means and suffers from the certain discredit in public opinion. The 'class bias' described by Sutherland is here reversed somewhat.

To carry out research into economic crime thus means to examine not only the crimes themselves as defined by penal code, but also the furthering social and economic landscape, though this cannot be a part of the charge. However, these conducive circumstances, or rather, the unscrupulously taking advantage of them, may be of relevance for sentencing decision. (This rarely happens.) The criminologist is in this case largely dependent on sociological, economical, political and historical studies. It is up to him to use his 'criminological imagination' to pick up the relevant factors and to find the connections between them (see Mills, 1961). This style of research, transcending the limits of penal law, is not an easy undertaking but is required if the researcher wishes not only to describe the surface of economic crime but also its nature, aetiology and implications.

## **Empirical data**

In making research decision on the concept, orientation and extent, it is also necessary to take into account the availability of empirical data which impacts on the methodology and the selection of research topics. It may happen that the researcher has to drop a research project because of a lack of hard data, as is often the case with research on money laundering. But even if there are some data, it means statistical data and samples of court cases, it is a general problem that these are only the known and perhaps not representative cases of economic crime.

Lars Korsell pointed out that in speaking about economic crime we in fact speak only about selected cases – selected by the capacity of law enforcement agencies and of the police. Many cases of economic crime do not have a clear victim; the victims could be anonymous. In addition, there is sometimes a lack of will to investigate and prosecute them. Some economic and financial institutions are not willing to report that they have been a victim of economic crime, especially if they have been attacked by insiders. Political and economic interests or fear of potential scandal resulting in reputation damage may also play a role in the decision not to report. Law enforcement authorities are likely to process only a proportion of economic crimes: a great number of simple and less serious cases, and a very small number of particularly serious cases that attract public attention. The remainder, lying between these extremes remains largely undetected (Korsell, 2005) or are not pursued.

As a result, the most frequently reported forms of economic crime are usually represented by a large number of petty – and uninteresting – offences. This category of economic crime is relatively easy to research. It contrasts with the category of ‘big’ and more interesting cases broadly widely reported in the media, with huge financial damage and a profound impact on the public opinion.

Unequal access to empirical material also has implications for the methodology: it is possible to draw a representative sample from the large set of ‘common’ cases and analyse them statistically, while the ‘big’ cases are usually too few to constitute an adequate sample. They can be approached as case studies and projected against a broader framework: institutions; legislation; opportunities and basic social and moral attitudes. Some cases of tunnelling the investment funds and savings co-operatives in the CR or cases as Banco Ambrosiano or ENRON in the Western world may serve as an example (Baloun and Scheinost, 2002). The criminologist who studies them may derive benefit not only from court and police files but also from the freely available open sources (in the press etc.) that usually contain wide coverage of

them. However, the researcher should be aware of the limited reliability of this source of information and should be especially careful not to confuse his role of scientist with that of 'investigative journalist'.

If criminological research takes the known and prosecuted cases as its research population, it will deal with a sample of economic crime cases selected by other persons who have to carry out a different institutional task. This implies that it is not the researcher but the law enforcement institutions that determines the limits of research efforts. This is characteristic of financial and economic crime research and it shares this impediment with research into other crimes, such as domestic violence or sexual abuse. Of course, other approaches may overcome these constraints by using alternative methodologies. With regard to many types of crime we have now more insight into the dark figures due to victim surveys. However, in the areas of financial and economic criminality such surveys are still rare. One international survey should be mentioned: the investigation of American companies, German companies and the branches of American companies in Germany in relation to the impact of business ethics on crime prevention in companies. Among other things, it was discovered that about one third of companies had been the targets of crime during the two years prior to the survey and that two thirds of the offenders involved had been insiders . . . . (Bussman, 2005).

## **Methodology**

The research methods selected will depend on the content and character of the research question the research methods have to be selected. The research project carried out by the Institute of Criminology and Social Prevention has a generally descriptive character trying to map the shape and extent of economic crime in the Czech Republic as a society following the initial 'radical' phase of transition.

With regard to this aim, in order to acquire insight into the broader context and background, it was necessary to start with the study of materials that could provide an overview of economic, social and legislative developments after 1989. The next step was the study of accessible materials and the reports of economic, regulatory and financial institutions and the analysis of relevant legislation. It was necessary to analyse not only the development of penal law, but also the development and impact of other laws and acts that regulated the economic operations, transactions and relations (commercial law, banking law, bankruptcy law etc.).

Because of the character of the research and its objectives, it was necessary to work with statistical data especially derived from the police and judiciary. As has been discussed in the previous section, these sources of information reveal only a part of the economic crime situation. No victim survey which would have provided information about the latent part of economic crime was available. The police statistics offered a more informative picture of economic crime that had been detected, thanks to the police practice of distinguishing between 'economic' fraud or 'common' fraud (offences covered by a single section of the Penal Code, while judicial statistics gave information about the nature of the sentences imposed and more generally about sentencing policy with regard to economic crime.

We worked also by sampling concrete cases. This was done in two ways: one sample was created on the basis of court statistics. A complete set of cases sentenced by the courts in a two-year period served as a basis. Then the articles of the criminal code were selected and nearly all the regional and selected district courts were asked to provide the designated number of files from cases sentenced according to these articles, thereby giving priority to the more serious cases. In this way we obtained and analysed 115 files in total. This sample may –of course with some reservation– be considered as 'quasi-representative'. (Real representative sample would have required a random sampling.)

Files were analysed according to a predetermined research design. The legal definition of the offence, the duration of the criminal proceedings, the problems of evidence, the *modus operandi*, amount of damage, the character of the objects attacked, the features of the offenders and the sentences imposed were monitored.

The second method consisted of a more detailed case analysis of the limited sample of about 20 cases for which the availability of the court files was decisive.

In addition, an expert inquiry, by means of a questionnaire administered to members of the judiciary and the police force was carried out. The questionnaires were sent to judges, state prosecutors and police officers. In the case of the prosecutors and police officers, the questionnaire was given to those who served in special sections or task forces dealing with economic and financial crime. They were asked about their practical knowledge and experience of detecting and prosecuting economic crime. In addition, the researchers also carried out face-to-face interviews with a limited number of other experts (e.g. from tax offices, banks etc.). This inquiry brought interesting results but using this method we must be aware that we are working with soft data, i.e. with the objective summary of subjective experience, meanings and opinions.

Secondary analysis of open sources such as the press, the internet etc. was also carried out. This is an important, but still only ancillary source of information.

The methods applied were adequate given the nature and aim of the research, i.e. to describe the nature and extent of economic crime in the CR. The results pointed to some very interesting findings with respect to offenders, modus operandi etc., but their verification would require more detailed research and another methods. For example, with respect to offenders, it would be necessary to carry out personal interviews, to examine their careers, their social background and criminal careers, to apply **psychological tests etc.**

**To sum** up, researching economic crime implies a thoughtful preparation of concepts and unambiguous definitions of the objects of interest; it needs to place the phenomenon of economic crime in its broader social context, and to evaluate evaluate critically the accessibility, validity and reliability of data and the choice of methods for the research. It goes without saying that these principles are not at all new, but to fulfil them is, in the case of research on economic crime, a complicated and also very urgent task.

### **Economic crime – organised or organising?**

An intriguing aspect is the interrelation between economic/financial crime and organised crime (being aware that when we try to define such a fuzzy term as ‘organised crime’ we face an even more complicated problem than when we to try define economic crime).

It is regularly found that economic crime is usually committed in a qualified and well-organised way but organised in the sense of an effective organisation of the activities rather than in the sense of the existence of a criminal organisation as a pre-requisite. Perpetrators of economic crime may act individually, may misuse legal institutions either from the outside or from inside. Often being in managerial positions they can also misuse the staff of legal institutions without being forced to create organised criminal groups or associations. Economic crime and financial crime as well, does not necessitate the existence of an organised criminal entity, a structured and hierarchical group established in order to commit crime.

On the other hand, we often find that the perpetrators of economic crime act in concert and that they are interconnected in relatively loose networks on the basis of mutual advantage, collaboration or corruption. These can hardly be defined as clearly structured and hierarchical groups. This form of

crime should be defined rather as the ‘organisation of crime’ rather than as organised crime. This means that the focus is on the organisation of activities rather than on the organisation of offenders, i.e. on the process, not on the subject (see Van Duyne et al., 2001).

Apart from the kind of organisation, there may be found some other qualitative differences between economic and organised crime even if they evidently can merge one into the other.

### **Organised crime**

It is not the objective of this essay to give any definition of organised crime, but as a starting point for further consideration it is possible to present some approaches how to delineate this phenomenon. According to the Katzenbach Committee (Fijnaut, 1990), organised crime is characterised by economic features: it is a criminal corporation (this term itself implies an economic orientation) that supplies illegal goods and services outside the control state mechanisms. The contemporary definitions of Finckenauer, Kenney and Abadinsky are consistent in defining organised crime by several concurrent criteria that may be divided into three categories: *general characteristics* (its non-ideological character and orientation to profit by providing illegal goods and services); the *characteristics of its ‘entrepreneurial activity’* (a division of labour, continual activity, planning, hierarchy, discipline, efforts to achieve a monopoly); the *associated characteristics* that following from the illegal character of its activity (conspiracy, corruption and violence). Maltz adds one significant feature, not usually included in organised-crime definitions: by virtue of their demand for goods and services provided by organised crime, customers take part the criminal activity and de facto enables it. Iannis speaks of the triangle of conditions that enable the functioning of organised crime. This triangle consists of three simultaneously operating factors: the criminal subject (the organisation that provides illegal goods and services), the public (in the role of customer) and the part of the public administration that tolerates and covers up these relations for its own profit (see Fijnaut, 1990).

Based on these concepts of American authors, organised crime appears to be an activity developed on an economic basis and operating as a complement of the market, which meets a public demand for illegal goods and services. The prevalent part of features of organised crime therefore principally corresponds with the features of legal corporations; the criminal features result from the fact that organised crime activities take place in the illegal market sector.

American criminologists utilise the lengthy experience of a society with functional market relations. Criminologists from the former socialist countries

point out that organised crime can develop not only as a complement of a functional market by providing goods and services in the illegal sector of demand but even under the conditions of a non-existing market when normal market relations are stifled and legitimate goods and services are hardly available outside the shadow economy. Andres Anvelt from Estonia (Anvelt, 2001) or Arpad Eördögh from Hungary (Eördögh, 2001) draw attention to the attribute of organised crime consisting of the interconnection of professional criminals with non-professional accomplices and to the preference of so-called 'victimless crime'. This is analogous to Maltz' concept of complicity of victims as customers or the role of public as defined by Iannis.

The above-mentioned criminological concepts try to characterise organised crime as a specific category of criminal activity and clearly encompass the area of phenomena that could be defined as organised crime. On the other hand, international legal documents such as the UN Convention against Transnational Organised Crime or the EU Joint Action from 1998 more or less reject definitions of organised crime that see it as a phenomenon embedded in a certain social context, and try instead to define only the subject, i.e. the criminal association or organisation and the membership or partnership in its activities. As a consequence of this approach the formulation does not concern 'what is going on', i.e. the nature of the activities, but only 'who commits it' ('it' being defined very generally as 'serious crime').

It was argued that economic crime does not inevitably need the existence of a discernable organised group as a pre-requisite. Therefore it seems that the approach mentioned above excludes a substantial part of economic crime from the concept of organised crime due to the definition of organised crime. But this is not the case. According to the definitions of the UN and the EU it is possible to regard all serious crimes committed for material profit by a group as organised crime provided that the group comprises at least three members and demonstrates some continuity and some internal division of labour.

Within this conceptualisation it would be possible to view a considerable part of economic crime (including so-called white-collar crime) as organised crime merely if there were several offenders acting in concert for a more-or-less extended time span. The law enforcement authorities have probably welcomed this conception probably because it allows the greater latitude in applying their investigative powers, thereby enables a more efficient fight against a broader spectrum of serious forms of crime for profit and more extensive international collaboration. But from a criminological point of view this extensive concept of organised crime is disputable. Organised crime, which is a formal concept that should be defined by qualitative attributes,

loses coherence in this broad conceptualisation, covering as it does all the forms of serious crime involving some collaborating offenders irrespective of the qualitative attributes of the criminal activity.

### **Organised and economic crime – common denominator and differences**

The common denominator of economic and organised crime may be found in the behavioural concept of organising crime (crime that organises its activities in meaningful, effective and purposeful ways).

The interest in maximising returns on invested efforts and means while – minimising expenditures and risks of losses is general and natural. The simplest way to achieve this goal consists in collaboration with others on the basis of a certain division of labour and functional differentiation. In the law-abiding society, this effort is the basic reason for organising any enterprise or business, for co-ordination of the specific activities in order to reach the maximum level of profit. The same incentives represent the key to understanding organisations in the criminal world (Vold and Bernard, 1986). Even crime organises itself in the sense of the continuation and organisation of activities and the co-operation of offenders, if needed to achieve the maximum return on effort expended.

Of course, it is accompanied by the organisation of operations that are not necessary for law-abiding activities, i.e. operations that serve to protect the perpetrator from detection and punishment. These disguising activities require additional costs but these higher costs are more than sufficiently compensated by the higher profitability of criminal activities and also by the fact that criminals do not deliver a part of the profit to the state in the form of taxes and other contributions that burden legal enterprises.

This characteristic applies to what is commonly denoted as ‘traditional’ organised crime as well as to economic crime. The qualitative difference can be derived from their function in relation to economics and the market.

It is beyond dispute that organised crime follows economic rules. It is incorporated into market structures, into the structure of demand and supply, its operations are often consensual with the wishes of the customers and it impinges heavily upon the legal economic relations. The intersection with the legal economy consists not only in money laundering or investing the proceeds of crime in the legal economy. It consists above all in meeting either the demand for goods and services that are not available through the legal market channels, or the demand for legal goods and services is met insufficiently, or the offered good is cheaper at prices reduced because they

are either produced illegally or acquired in illegal ways (e.g. by fraud or theft).

In this way organised crime complements the structure of supply and demand in society. In other words: the illegal supply that reflects demand becomes organised. It represents a complement of legal markets in that it offers illegal commodities or compensates for the malfunctioning of the legal market, or satisfies the demand for cheaper goods and services. It means that organised crime profits from a symbiosis with customers. In this sense the term 'crime-enterprise' is quite adequate (Van Duyne et al., 2001).

This acceptance of goods and services by a part of the public is a key reason why organised crime is so firmly embedded in a society. The problems involved in fighting it therefore stem not only from the disguises of organised crime practices and its penetration of official structures but also and particularly from acceptance of what it offers. And there are many goods and services illegally offered and gratefully accepted. People living in countries stricken by poverty or war, who seek a better and safer life other countries (which build the administrative barriers against their entry) welcome the organisation of illegal transport, as a sought-after and precious service. Similarly the demand for good cars at accessible, i.e. lower prices, fans the trafficking of stolen vehicles. Into this category we may also place entrepreneurs who seek cheap and easily manipulated labour force, about consumers of drugs, and buyers of stolen fine art objects etc.

Based on this distinctive feature of organised crime it is possible to draw the dividing line between organised crime and economic crime. Organised crime operates as a complement of the legal economy and primarily targets customers, while economic crime attacks and damages the legal market subjects directly and frequently has no customers, targeting directly victims directly, whether such victims are citizens, corporations or the state. The typical modus operandi of economic crime is fraud or embezzlement in contrast to organised crime, which, after all, offers something to the client on the basis of his/her interest. If the perpetrator of economic crime, e.g. the investment fraudster, offers anything, it is not real goods but 'dream-gold' (Van Duyne et al., 2004). Of course, organised criminals may offer quite 'undesired' services, e.g. as they do when they demand payment for so-called protection, but it is still some kind of service: cynically put, at least they offer protection against other racketeers. On the other hand, economic crime may deliver cheaper goods due to defrauding the public purse. For example, through excise, VAT and import and export fraud. It may supply labour illegally: see the practices of the Dutch *koppelbaas* (Van Duyne, 2004). There we find a certain 'borderland' between economic and 'organised crime' (if there is a real distinction). As soon fraud is deployed in order to supply cheap goods and services, we find greedy buyers among the public as well as in

trade and industry. The distinction is wiped out: 'organised crime' can slip into economic crime.

We may also say that organised crime complements the legal economy from the 'outside' (because the goods and services are prohibited or delivered in illegal ways), while economic crime attacks from 'inside' of the legal economy. Of course, organised crime damages legal economies as well, but usually indirectly. The interests of legal economic subjects are damaged more by unfair competition, by comparative advantages based on the cheaper supply of attractive goods, on illegal methods of supply, on non-payment of taxes and contributions, on the accumulation of illegally gained and easily disposed of capital. Legal economic subjects are therefore handicapped as compared with organised crime just because they abide by the regulations governing trade.

This essential characteristic of most forms of organised crime stems also from another of its important features, i.e. its preference for victimless crime. Simply put, traditional crime –violent, property and to some extent economic crime– has as a target a victim who is directly damaged and not offered with anything, while the target of organised crime is a client who is always offered by something and who is for some reason interested in getting it. This does not imply that the client/customer necessarily stands in a relationship of equality with the organised criminal offender/supplier; as we have mentioned organised crime may force customers to accept undesired services, such as racketeering. Nevertheless, the existence of supply and demand and the active role of customers remains one of the distinguishing characteristics of organised crime as compared to economic crime (Scheinost, 2004).

That is not to say that organised crime does not produce victims as well. Nevertheless, they are produced as a 'by-product'. The object is victimised either by racketeering (demanding for payment for undesired services), or by the illegal acquisition of goods through fraud or theft. Sometimes the victims may be the commodities that are traded (as is the case of trafficking in human beings). Alternatively victims may arise in the context of collateral activities (as in the terrorising or liquidation of witnesses, of law enforcement officials etc.), as a result of conflicts within the criminal world, and finally in relation to the state (through the non-payment of taxes and fees, and the infringement of various regulations where the victim is the state itself).

This distinction may be regarded as academic by practitioners. But in conducting research into economic crime it is worth to distinguishing its role in relation to the legal economy and markets from that of the phenomenon usually labelled as organised crime. Economic crime is often organising crime but it still has some specific and differential features.

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# **Economic crime and legal competence in the EU**

*Brendan Quirke<sup>1</sup>*

## **Introduction**

This paper will focus on a particular aspect of economic crime, namely fraud against the budget of the European Union. The European Budget attracts both the organised fraudster who may be an intrinsic part of, or closely connected to, organised criminality, or entrepreneurs who resort to fraud as a means of supporting a failing enterprise or helping a company or organisation in financial difficulties.

An important point to note at the outset is that in the area of expenditure, Member States carry out 80% of the budget outlay, both in the Common Agricultural Policy and the Structural Funds. This puts an enormous amount of onus on Member States to expend the same amount of effort on countering fraud against the Union's financial interests as they would against their own financial interests. There is a long held suspicion in Brussels that Member States fight fraud against their own national budgets with more alacrity than fraud against the European budget.<sup>2</sup> It could be that Member states regard fraud as part of the membership fee of belonging to this exclusive club. In cost benefit terms, it is a relatively minor cost, which is more than outweighed by the economic and political benefits of membership. If this is the case then the fight against fraud is hampered from the very start. This is despite the fact that national taxpayers contribute to this budget and it is their money, which is being stolen.

Under Article 280 of the Treaty on European Union, Member States are required to take EU fraud as seriously as fraud against their own budgets and are required to coordinate their action aimed at protecting the financial interests of the Union against fraud and to organise with the help of the European Commission, close and regular cooperation between the competent departments of their administrations.

The true extent of fraud has been considered by a number of authors such as Sherlock & Harding (1991), Passas & Nelkin (1993), White (1995 & 1998), Sieber (1997 & 1998) who all comment on the lack of reliable information. Ruimschotel (1994) makes the observation that policymakers

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<sup>1</sup> The author is senior lecturer at Liverpool John Moores University.

<sup>2</sup> Interview with OLAF Official 2005.

and politicians are likely to have mixed feelings about the possibility of knowing more about the real extent of fraud. If figures revealed by ‘dark number’ research are higher than the existing figures, it could look that there has been a boom in fraud. Also, there is a bigger ‘target’ figure to claw back for the taxpayer. This could show how efficient or otherwise a legal system is in terms of recovering defrauded funds. This last point is recognised by OLAF officials.<sup>3</sup>

The question now can be asked as to who has legal competence to investigate and prosecute these types of fraud?

### **The European Fraud Prevention Office (OLAF)**

OLAF (The European Fraud Prevention Office), is the lead transnational institution in the fight against EU fraud. OLAF came into being as a result of a recommendation from the then European Commission President, Jacques Santer, in 1998. This recommendation was prompted by a critical report from the European Court of Auditors on the performance of UCLAF – the European Commission’s Anti-Fraud unit and the predecessor to OLAF. The Court of Auditors report whilst commending UCLAF for the good work it had achieved, did make some serious criticisms of the way it handled intelligence, managed case files and maintained security. Levy (1996), did make the point that giving UCLAF ‘hands-on’ powers, could prove counter-productive for the point of view of partnership with Member States – duplication of effort, lack of detailed procedural knowledge and so on. These criticisms were bolstered by a report from the European Parliament (the Bosch Report), which called for an independent fraud prevention office. Damning evidence had been gathered of the complete inability of the Commission to adequately perform its duties which led to the employment of external contractors which were subject to hardly any financial or management control, inevitably resulting in fraud (Vervaele 1999, p. 333).

The Commission’s proposal was for an anti-fraud office that would be based outside of the Commission and would have complete independence from it. It was presented to the Vienna European Council in December 1998. In response to the reactions of the European Parliament and the Council, an amended proposal for a Regulation: ‘concerning investigations conducted by the Fraud Prevention Office’, was adopted by the Commission in March 1999. The new body took over certain functions that had previously been exercised by UCLAF. The proposal did not involve the

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<sup>3</sup> Interview with OLAF Officials 2005.

creation of any new powers for the Commission. Nor did it involve the creation of a body with its own legal personality, although the Office was given, in theory at least, operational independence and was also given its own budget.

The mission of OLAF is to protect the financial interests of the European Union and to fight fraud, corruption and other illegal activity having financial consequences for the Union or its funds. OLAF carries out investigations into allegations of fraud and other illegality both within the Union's institutions (internal investigations) and within individual Member States (external investigations). It passes on its findings to the institution in question or to the national prosecution authority of the Member State, in question, or to both as the case may be. OLAF has no power to prosecute (House of Lords 2004).

## **The powers of OLAF**

Much of OLAF's powers are based upon a decision adopted in July 1998 on the conduct of its predecessor UCLAF's enquiries, by the European Commission. This decision, as noted by the Committee of Experts (1999b) who were appointed by the European Parliament to conduct an enquiry into fraud and corruption within the Commission after the resignation of the Santer Commission in 1999, is essentially concerned with regulating the conduct of inquiries within the Commission and/or the mutual obligations of UCLAF and other Commission services in relation to investigations.

The principal powers and competences of OLAF are as follows:

- OLAF is empowered to carry out administrative enquiries, without notice, within all the institutions and other bodies of the European Union. Inquiries may involve members and staff of the institutions;
- All institutions and other bodies are placed under a corresponding obligation fully to co-operate in OLAF enquiries and to communicate to OLAF any information concerning possible fraud.

In terms of how it exercised these powers, OLAF has been criticised as a result of what is known as the Eurostat case. Here, there were irregularities, which took place in the European Statistical Office involving the payment of receipts from the sale of Eurostat publications into a suspect bank account. OLAF has been criticised for the amount of time taken by it to investigate the case and the Commission's lack of knowledge of the alleged irregularities that were under investigation. In response to these criticisms, the Commission proposed a number of amendments to Regulation 1073/99,

which is one of the Regulations governing OLAF. The Commission's proposals have five objectives:

- to strengthen OLAF's operational efficiency;
- to improve the information flow between OLAF and EU institutions and bodies;
- to ensure fully the rights of the individuals under investigation;
- to enhance the role of the Supervisory Committee.

In order to achieve these objectives, the proposed Regulation:

- prevents EU institutions and bodies from conducting their own internal administrative investigations on matters under investigation by OLAF (amended Article 1(3));
- clarifies OLAF's powers to conduct external investigations (amended Article 3(2));
- enables OLAF in the conduct of external investigations to have direct access to information held by institutions, bodies, offices and agencies relevant to those investigations (amended Article 3(3));
- requires OLAF, on undertaking an investigation involving a member of an EU institution, immediately to inform the EU institution of the investigation (new Article 6 (5a));
- establishes procedures to ensure the fundamental rights ("procedural guarantees") of individuals being investigated (new Article 7a);
- strengthens the role of the Supervisory Committee by increasing its membership from five to seven (one of whom would monitor the observance by OLAF of the rights of individuals) and entrusting it with the task of delivering opinions concerning procedural guarantees (amended Article 11) (House of Lords 2004).

These proposals have been subjected to a number of observations and criticisms.

## **OLAF's requirement to inform institutions under investigation**

Professor Levi and Dr Dorn in their evidence to the House of Lords European Committee, argued that the requirement to inform the institution that it was under investigation could well lead to the investigation being compromised (House of Lords 2004). This could lead to the investigation being blocked and obstructed and of course evidence could be covered up or even destroyed. Levi and Dorn (2004) argue that: 'The Commission will argue that it (and other Institutions) need to know at the earliest opportunity that the integrity of an individual and project may be compromised, so that it can take remedial steps. Yet those steps are precisely what would undermine the secrecy needed to initiate cases, investigate and gain evidence of wrong-doing' (House of Lords 2004, p. 6). Raymond Kendall of OLAF's Supervisory Board, took the view that rules could not be made about an issue like this: it should be at the discretion of the investigator. It appears that the Commission is not prepared to give OLAF full discretion to decide whether or not to inform the Commission (House of Lords 2004). This compromises the independence of OLAF and is ill-advised. OLAF when it was established, was in theory given full operational independence, even though it remained part of the Commission. This has been badly dented by the proposals advanced by the Commission. OLAF will have 'one arm tied behind its back', in the fight against fraud.

## **Powers of inspection**

There were concerns expressed by the UK Government that the amendments proposed in Articles 3 (2) and 3 might have the effect of extending the investigative powers of OLAF. They proposed to seek assurances that Article 3 does not imply that the ability and right of national agencies to conduct investigations within a Member State could be impaired by OLAF wielding their powers under the Article. The House of Lords agreed with this view and stressed the importance of both OLAF and national agencies being able to work in harmony without frustrating the efforts of each other (House of Lords 2004). This is an important point, because liaison between agencies investigating the same case is crucial as evidence gathering could be compromised if national rules and regulations are not followed. Also there could be duplication of effort and resources and there could also be credibility problems if representatives from different agencies visit the same locations, question the same people and asking the

same questions. This is illustrated by the competition which existed between the then anti-fraud office of the Commission - UCLAF and another Commission department DGXX - the Financial Control Directorate, in the late 1990s and the harm that was done to the investigation of fraud within the Commission itself. Rivalry and competition ensued, resources and effort was duplicated, files were 'lost' - fragmentation occurred. If this can happen within the Commission, then the scope for fragmentation is all the greater with a European Union of twenty five members and all the different agencies inherent in such an organisation.

Given the inherent risks outlined above, the question can be asked: should OLAF be involved in external investigative work? Stefanou & Xanthaki (2005) emphasise the investigative function of OLAF and observe that the results from OLAF investigations can be used in criminal proceedings and can serve as the preparatory phase for prosecutions in national courts. In order to promote and carry out this function at the national level, OLAF has sought to establish co-operation agreements with national investigative bodies such as with police bodies and also in the framework of the OLAF Anti-Fraud Communication network for exchange of information on EU-related fraud. According to Stefanou & Xanthaki (2005), the main objective of OLAF's involvement in the investigations, which take place at the national level, is to increase their effectiveness and efficiency and to enhance the level of protection of the EU's financial interests. They observe that this is achieved by:

- involvement of OLAF in the investigation;
- provision by OLAF of training and methodological support;
- OLAF's contribution in promoting co-operation between various investigative and legal authorities in different Member States. This is extremely important as EU fraud often has a transnational dimension and can fall under the jurisdiction of two or more Member States.

OLAF has a European wide view, which no national agency could have. It collects data on irregularities with a value of more than € 4,000 and liaises with national agencies across twenty five member states. Its staff have a wide range of expertise from police backgrounds, judicial, audit and accountancy, agricultural inspection, customs and so on.

Yet, OLAF's involvement in external investigations has been questioned. The UK House of Lords takes the view that OLAF's external investigative work has been limited, yet they offer no evidence to support this particular assertion. They do quote from a 2003 Report by OLAF's Supervisory

Committee which makes the point that OLAF's intervention tends to occur long after the event and that there have been problems with national courts accepting evidence collected by OLAF. 'National courts have wanted evidence to be collected in accordance with their own national procedures' (House of Lords 2004, p. 8). This has led to the suggestion made by Professor Levi and Dr. Dorn in their evidence to the House of Lords European Committee, that external investigations should be carried by the Commission through its Directorates-General working with Member States. They argue that if OLAF were to give up external cases (except those having an internal aspect – relevant to the EU institutions), then all of OLAF's resources could be brought to bear against internal fraud and corruption.

There is a clear logic to this, yet in order to achieve this aim, it would be necessary to re-establish anti-fraud units in relevant DGs (they were taken out of DGs and combined with UCLAF in the 1990s). Might this not lead to a duplication of resources? Also, many external cases could have internal dimensions or could force internal investigations which OLAF would undertake anyway.

A variation on the above proposal would be to rely on Member States to carry out investigations on their territories leaving OLAF free to concentrate on purely internal cases. Stefanou and Xanthaki (2005) believe that following the principle of subsidiarity, Member States have primary responsibility for external investigations and should take responsibility for opening cases. The fact is that 80% of expenditure occurs at Member State level. Therefore fraud is likely to be more prevalent at Member State level, so inevitably Member State agencies are going to be heavily involved in investigation. Yet, as many frauds do have a cross-border dimension, it would not be possible for Member State agencies to have the European wide view which OLAF has, and the ability to facilitate co-operation and co-ordination across national boundaries.

## **Independence of OLAF**

Other issues to be considered include: the independence of OLAF, which inevitably impacts upon its operational capability. OLAF – despite the concerns expressed about its predecessor UCLAF – is still like UCLAF, part of the Commission. The greater part of its work is still attributed to the Commission. Its Director is appointed by the Council and Parliament, but from a shortlist, which is drawn up by the Commission. This therefore, gives the Commission a great deal of potential influence over: 'who gets the job'.

Where is the oversight to ensure that the shortlist has been drawn fairly? Which agency has this role? The position does not appear to be very clear.

The Committee of Experts (1999b), took the view that it was useful for OLAF to be 'inside' the Commission, both for the purpose of its enquiries as well as for the contribution it could make to the shaping of legislation where there is a fraud interest or dimension. The fact that OLAF is still part of the Commission gives it an opportunity to play a part in 'fraud proofing' legislation at the early draft stages. However, where OLAF investigates allegations of fraud inside the Commission – so called 'internal investigations' – it is surely a case of the Commission investigating itself. This cannot be right. It has the potential to compromise independence. If OLAF had been placed outside the Commission, then it could still have had an "arms-length" input into the process of formulating legislation, through some kind of advisory committee for example.

It is true to say that there has been a genuine attempt to secure and strengthen the independence of OLAF by giving it a separate budget apart from that of the Commission as a whole and by trying to ensure that the appointment of a Director is achieved without undue influence by any of the interested parties such as the Commission, Parliament or the Council of Ministers. This has been undermined to some extent by allowing the Commission to draw up the shortlist of suitable candidates. There has been an attempt to establish legal guarantees to safeguard OLAF's independence which can be found in Articles 11 and 12 of Regulation (EC) No. 1073/99. These declare the independence of the Director and establish a Supervisory Committee, which endeavours to oversee OLAF's investigations without interfering in them.

Notwithstanding these attempts to safeguard OLAF's independence, its current hybrid status where it is part of the Commission yet independent of it, does mean as Stefanou & Xanthaki (2005) recognise that its activities are still subject to evaluation by the Commission. It is unable to report to the European Parliament on its own legal grounds but does so as part of the executive (the Commission), which implies that its independence could be seen to be compromised.

Pujas (2003) believes that OLAF's legitimacy is regularly questioned by national and European institutions because of its semi-autonomous state and the lack of guarantees regarding the objectivity and transparency of its investigations.

Another area where OLAF's independence could be seen to be compromised and which bears directly on its ability to investigate fraud is in the area of staff recruitment. Given the diversity of functions which OLAF is required to perform its recruitment can pose a difficult problem. Indeed, its

investigations can be administrative, disciplinary, financial, tax and customs based. A balance must be struck between the different categories of investigators such as those who deal with EAGGF frauds, frauds against the structural funds, frauds upon income such as own resources and functions which are 'up-stream' of investigations such as intelligence or administration. In order to recruit staff to meet all these diverse needs, then this could be quite difficult. The preoccupation with nationality balance in recruitment and maintenance of the staff establishment can potentially mean that good staff are lost and less able staff are appointed. With each enlargement of the European Union, priority is given to nationals from new member states in the recruitment process. Given that the Union has very recently expanded from fifteen to twenty five members, then this is likely to have a huge impact on recruitment and selection. New staff, by definition, lack experience in cross-border work, and also perhaps lack detailed knowledge of complex programme areas such as the Common Agricultural Policy and Structural Funds.

The European Court of Auditors in their recent report evaluating the performance of OLAF (Court of Auditors 2005) made this very point. The Court found that over 55% of staff in categories A & B over 130 posts were employed on temporary contracts. Most of these temporary contracts will come to an end between 2007 and 2009 when the staff concerned will have to leave the Office (Court of Auditors 2005). There is a high risk that all this accumulated knowledge and experience will disappear within a short period when this is combined with recruitment of staff from new Member States, who will face a steep learning curve. In that case the potential for disruption to quite complex investigations is all too apparent. There is a need for OLAF to be given more freedom for manoeuvre in its recruitment and selection procedures so that it can provide its investigators with more stable employment and career opportunities which will impact upon the quality of its investigative function. There is the potential for significant harm to be done to OLAF's reputation by having high staff turnover and a significant proportion of staff being inexperienced. These are self-inflicted wounds and need to be addressed.

## **Role of Eurojust and Europol**

The role of Eurojust according to the constitutional treaty is to 'support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States, or requiring a prosecution on common bases, on the basis of

operations conducted and information supplied by the Member States' authorities and by Europol' (Article III-273 (1)). Eurojust is made up of national prosecutors and by magistrates or police officers from each Member State and its objective is to facilitate co-operation between the national prosecuting authorities and to improve the co-ordination of criminal investigations and information exchange. Eurojust operates within the third pillar of the European Union. This is reflected in its membership which consists of one national member seconded from each Member State. Eurojust is directly accountable to the Council of Ministers to which it reports on a regular basis. The Commission has no influence on Eurojust's operations and decisions. In a formal sense, yet it does propose its budget and in 2004, did not meet Eurojust's request for an increased budget of € 11,5 million – the Commission reduced it to € 9,3 million euros (House of Lords 2004, p. 14). This of course could well have impacted on Eurojust's operations.

It would appear that there is ample opportunity for OLAF and Eurojust to co-operate. OLAF on the investigation side, where it conducts administrative investigations and Eurojust providing the link with national prosecutors. However, there have been difficulties. Eurojust in its evidence to the House of Lords believed that OLAF saw it as a competitor. There were instances of OLAF liaising directly with national judicial authorities and not informing Eurojust and also setting up a Magistrates Unit within OLAF in competition with Eurojust (House of Lords 2004). In defence of OLAF it can be said that its Magistrates Unit is totally dedicated to fighting EU fraud whereas for Eurojust, fraud is just another issue and may not rank as highly as terrorism and organised crime.<sup>4</sup> There was a feeling of resentment – OLAF considered Eurojust responsible for there not being a European Prosecutor on fraud (House of Lords 2004, p. 27). Eurojust took the view that OLAF believed it had no role to play in fraud investigation unless other serious crimes were linked to EU fraud, such as using money fraudulently obtained from the European Budget to help fund drug trafficking or arms dealing for example. This view of Eurojust cannot be readily dismissed as paranoia. OLAF officials believe that its own Magistrates Unit is more than capable of liaising with national judicial authorities without the assistance of Eurojust.<sup>5</sup> Such 'territoriality' is not conducive to fighting fraud effectively and could inevitably lead to duplication and waste of resources. The two bodies have now signed a Memorandum of Understanding which specifies in which they undertake to cooperate in areas of mutual concern/benefit.

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<sup>4</sup> Interview with OLAF Officials 2005.

<sup>5</sup> Interview with OLAF Officials 2005.

There is potential here to develop the relationship and also to give OLAF some judicial authority which it has not had so far (Sefanou & Xanthaki 2005). Eurojust believes that it is ideally placed to co-operate with OLAF in addressing its concerns that its investigations are not followed up by prosecutions in Member States (House of Lords 2004).

In terms of Europol, its role in the fight against EU fraud has not really been developed. In its 2004 report, there is barely a mention of the role it believes it can play. The report does mention OLAF and the agreement between both parties, but does not include any practical examples of co-operation between the two bodies (Europol 2004). OLAF takes the view that Europol is far more interested in Customs issues than wider EU Fraud matters<sup>6</sup> In the late 1990s there was a view in the Commission that ‘Europol is not really interested in fraud. It is more interested in drugs and terrorism’.<sup>7</sup> Europol does not have the investigative powers that OLAF has, it is more of an intelligence gathering organisation. Its powers are not those of OLAF. Yet its role in intelligence gathering and police cooperation would strengthen OLAF’s investigative function if the two bodies could liaise closely

## **Impact of the expansion of the EU on the fight against fraud**

The fight against fraud has been dogged by the fragmented response from fifteen member states. Now that EU membership has increased to twenty five, this problem can only be exacerbated. For example, community institutions will have to cope with ten new legal systems – this is not likely to improve the current situation. Efforts have been made to prepare the then ten candidate countries for their responsibilities in the fight against fraud. The newly acceded countries have received financial aid – about three billion euros per year between 2000 and 2004 and before accession the candidate countries were required to ‘create an efficient anti-fraud protection system with respect to funds provided in the framework of the Accession Partnership’ (Murawska 2004, p. 3). The accessing countries were obliged to comply their legal systems with the *acquis communautaire* as part of their preparation for accession. EC Regulations such as the Convention on the Protection of the European Communities Financial Interests and Regulation 2185/96 which covers on the spot checks and inspections and Regulation No. 1073/1999 concerning investigations conducted by OLAF.

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<sup>6</sup> Interview with OLAF Officials 2005.

<sup>7</sup> Interview with UCLAF Official 1998.

OLAF has sought to reinforce its support to Acceding and Candidate countries in their institutional preparation towards combating fraud against the financial interests of an enlarged European Union. It has sought to ensure good administrative co-operation and to encourage and support the capacity of anti-fraud institutions to prevent and detect fraud and irregularities. By early 2003 twelve countries had nominated a central (AFCOS) anti-fraud co-ordination structure to act as co-ordinator for the implementation of legislative, administrative and operational preparation (European Commission 2003). Particular attention has been given to training public prosecutors who will take on responsibility for anti-fraud work and to technical training in the use of the anti-fraud Information System (AFIS).

Murawska (2004) outlines an example of early co-operation between Community and national institutions in the then candidate countries – this was a project called: ‘OLAF Poland’. It was a special anti-fraud coordinating service established in 2001 and financed by the PHARE programme.<sup>8</sup> The result of these investigations was recovery of PHARE funds, review of national procedures, as well as an opening of criminal proceedings by the Polish Prosecutor’s Office against former Polish officials.

Despite these efforts, difficulties still remain. New Member States are being asked to bring their anti-fraud structures up to the level and standard of established EU members within a very short period of time. Their structures are not as developed as those in the existing member states. They are not as economically developed as existing members and may not have sufficient financial resources to employ to fund anti-fraud institutions and structures. The level and pace of economic development may create incentives to engage in fraud and irregularities.

Therefore, an enlarged EU can only increase the amount of fragmentation which already exists. Without a coherent legal space and a fraud squad that has the power to cross borders, question suspects, seize documents, search premises and present evidence according to standardised rules and procedures, then the fight against fraud will be hampered by legal lacunae which the determined fraudster can exploit. Tupman (1996) believes that citizens of the EU will have to come to accept such institutions if the threat posed by organised criminality is to be tackled effectively.

Van Duyne (1996) illustrates the threats posed by organised economic criminals against the budget of the European Union. He details an example involving organised meat frauds which indicated the existence of ‘Europe-wide co-operative crime enterprises’ (Van Duyne 1996, p. 358). Van Duyne

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<sup>8</sup> PHARE Programme consists of three components: development of anti-fraud structures, communication links and anti-fraud databases and transfer of operational know-how.

(1996) describes how fraudsters in Poland (in the days before Poland became a member of the EU), bought cattle which would be exported ‘on paper’ to North Africa from Spanish ports. In reality, the export documents had been falsely stamped in Spain, while the cattle had been sold in Germany, the Netherlands, Belgium, France and Spain. A high degree of organisation was required in order to effect this scam as the Polish cattle had to be ‘changed’ into EU cattle in order that import duties could be avoided. This meant that new false health certificates, new earmarks for the cattle and false invoices were obtained to show that the animals had been bought on the EU internal market. Subsequently, the cattle had to be brought to their destinations and as van Duyne (1996), observes, this implies a meticulously detailed organisation – the animals had to be fed and housed en route etc.

Parallel to this, as van Duyne (1996) observes, export documents had to be arranged- the fifth page of the transit documents had to be sent back from the customs house where the goods left the EU to customs house where they entered the EU in this instance from Spain to Germany or the Netherlands. To organise all this there had to be a sophisticated process of co-ordination and also some kind of monitoring system to check that things were going to plan at every stage in the process. Eventually this meat reached the legitimate meat industry but as van Duyne (1996) comments, the way in which it did was never revealed. This example serves to illustrate that organised economic crime looks for opportunities to exploit and the European Budget is not immune from their attentions. Criminals will undertake their own form of risk analysis and it appears that the potential rewards far outweigh the risks of being detected and prosecuted. When this is coupled with the official line from Brussels that organised criminals are not particularly interested in the EU Budget<sup>9</sup> then this ‘official complacency is particularly disturbing.

### **Lack of a coherent legal framework**

One of the most fundamental problems facing the European Union’s central authorities and its member states, is having to fight fraud across twenty five different legal systems within the union itself as well as across many more lying outside its boundaries. This is so, because fraudsters do not just base themselves within the European Union. The whole legal process is bedevilled with difficulties and differences in procedure as well as tradition and jurisprudence. ‘Applicable penalties vary substantially, with Member States only obligated to ensure that penalties have a deterrent effect’

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<sup>9</sup> Interview with OLAF Officials 2005.

(Warner, 2003, p. 255). But that ‘deterrent effect’ may only exist on paper. An obvious difference between legal systems is that which lies between the accusatorial system and the inquisitorial system. However, systems which superficially look quite similar can mask significant variations: as is the case with many of the inquisitorial systems operating on mainland Europe. Law enforcement bodies on the whole, have to comply with procedure and go through ‘the proper channels’, whereas criminals face no such difficulties. They operate in ‘real time’ and exploit differences in procedure, protocol, and consequent time delays to their advantage. The fact that the single market has removed commercial borders and physical border controls, but left legal frontiers intact has provided ‘safe havens’ for criminals. Passas & Nelkin (1993) reveal how the courts in Italy, one in the North and one in the South, had great difficulty in co-operating with each other in a case involving European Union funds. This case involved the fictitious production of several hundred million litres of peaches, tomato concentrate and peeled tomatoes. False documents and invoices were presented to authorities in Southern Italy and payments out of EU funds to the order of several billion Italian lira were made. Passas & Nelkin (1993) detail how there were officially stamped invoices and receipts yet some of the firms listed as being involved were bankrupt and had never engaged in the recorded dealings. The major focus of the investigation was the relationship between the defendants based in Turin and their ‘factory of paper’ and a company called Naples Ltd which was legitimate but had made use of the Turin’s group services in terms of using false documents to commit VAT frauds and also to fraudulently receive EU subsidies. During the investigation, ‘representatives’ from Naples Ltd interfered with witnesses and exerted pressure and used threats in an effort to change the witnesses’ testimony. Passas & Nelkin (1993), describe that although the defendants were based in Turin, the most serious offences had taken place in Naples. The Naples judicial authorities wanted the case to be heard there and co-operation between them and the Turin judge investigating the case was less than harmonious. Letters from the Turin judge to the Naples authorities requesting information went unanswered. Eventually, the most serious offences involving EU funds were sent to Naples to be tried and the other (lesser) offences were tried in the North. This suggests that fragmentation can also occur within national jurisdictions as well as transnational ones. If that is the case in one jurisdiction, one can imagine the many hindrances between countries.

The response to the lack of a coherent legal framework has been on an ad hoc basis. There was an attempt to draft a legal code – the Corpus Juris proposals which attempted to construct a unified body of rules to deal with crimes against the European Budget. The proposals included the

establishment of the post of European Public Prosecutor. There was strong opposition, in particular from the British Government, which regarded the proposals as a surrender of national sovereignty. Yet, the investigation into the proposals undertaken by the UK House of Lords European Select Committee recognised that substantial difficulties exist in terms of prosecuting frauds on EU funds in national courts. National criminal laws are essentially territorial in scope; few Member States have laws specially directed at prosecuting such frauds (House of Lords, 1999, para. 25). Given such difficulties, then there can be little surprise that more drastic or radical proposals for legal harmonisation have been considered. The *Corpus Juris* proposals were however seen as too radical and different.

The response that has been made so far to the lack of a coherent legal framework was given impetus by the Tampere European Council of October 1999 which enshrined the principle of mutual recognition as the ‘cornerstone’ of judicial cooperation. There have been attempts to establish common definitions for a range of offences including fraud. There have been attempts to co-ordinate judicial proceedings – the creation of Eurojust is an example of this. The European Arrest Warrant, which establishes a procedure based on automatic recognition of judicial orders for arrest made in another Member State, thus replacing the present extradition arrangements, is another example. In dealing with fraudsters who seek to try to exploit differences in legal systems, then there is obvious potential here to speed up the judicial process. It is not obvious from OLAF reports as to how much use has been made of this instrument.

There has also been a proposal made by the Commission in its Green paper on criminal law protection of the financial interests of the Community to establish the post of European Public Prosecutor. This would be an independent judicial authority empowered to conduct investigations and prosecutions anywhere in the European Union into offences against the Union’s financial interests. The House of Lords makes the point that sensing the strong reactions to these proposals, the Commission stressed that trial and judgement would remain in the hands of the national courts (House of Lords 2004).

The Constitutional Treaty envisaged the EPP being established from Eurojust, which could then be transformed into a prosecution body. In its evidence to the House of Lords, OLAF believed that it could be envisaged that it could have criminal investigative powers to assist the European Public Prosecutor. This could then of course bring OLAF’s relationship with Europol into question. The House of Lords wondered whether the two bodies could be merged – the EPP would be in control of the merged body.

These proposals are still undermined by the lack of a unified legal space. If the law is to have the support of the citizen, it has to be seen to be fair.

There would still be scope in national courts for offences to be treated differently and different punishments to be handed out. If a centralised body is to have legal competence to fight fraud against the budget, then this needs to be underpinned by a legal code. The Corpus Juris was a step forward in terms of adopting a more effective and consistent approach to tackling EU fraud.

## Conclusions

The main conclusion that can be drawn from this discussion is that the fight against fraud is hampered by the degree of fragmentation which exists. Fragmentation exists at different levels. On one level there is the degree of legal fragmentation. There is no one legal code or system which exists to protect the European Budget. At present there are twenty five separate legal systems. Law enforcement methods differ from country to country. There are difficulties in obtaining evidence in one jurisdiction and trying to present it before the courts in another jurisdiction. Criminals take advantage of the existing legal loopholes and some may base themselves outside of the European Union, which complicates the situation even further. The expansion of the Union has made a difficult situation somewhat worse.

A second level where fragmentation exists is in the approach to investigation and control. There are multiple actors involved in the monitoring and investigation of fraud across twenty five Member States: to co-ordinate the activities of these agencies, which face territorial, linguistic, legal and cultural barriers is a mammoth task. OLAF, the European Fraud Prevention Agency has faced problems in trying to co-ordinate its activities with a sister agency Eurojust. The difficult relationship between the two bodies does not bode well for a more widespread co-ordination with multiple Member state agencies.

There is no one agency which 'owns' fraud. OLAF, may be the lead agency, but is highly dependent on Member State agencies and is also hampered by having a large number of staff employed on temporary contracts which can lead to a lack of continuity and new staff facing a steep learning curve in the middle of complex investigations.

Until there is a coherent legal code which supports the activities of a fraud squad which has the powers of surveillance, arrest and interrogation across the European Union, then the policing of the European Union and its budget will be less than effective.

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# **Fighting money laundering in Bosnia and Herzegovina**

## **Controlling criminals' sloppiness or the private sector's diligence?**

*Almir Maljević<sup>1</sup>*

### **New phantoms and tasks for new institutions**

It is almost redundant to say that Bosnia and Herzegovina, with all its political and socio-economical problems at the end of the twentieth century, including the 1992-1995 war, non-harmonised legislation, lack of proper judicial and police co-operation and very 'opened' borders, used to be, and probably still is, one of the most fertile territories for criminal entrepreneurs in Europe (Maljevic, 2005:277-278). In addition to local factors, some additional regional and global factors (Nikolic-Ristanovic, 2004) stimulated the Balkan to become a centre for various forms of illegal trafficking. The spectrum of trafficking encompasses legal goods such as cigarettes (Hajdinjak, 2002), food and high-taxed goods; illegal goods, ranging from drugs (EUOCR, 2004; EUOCR, 2005), arms (EUOCR, 2005), stolen cars (Karup-Drusko, 2001) to humans, pre-dominantly women (Obradovic, 2004). All of these criminal activities are highly lucrative and literally produce huge quantities of (paper) money in need of laundering. Only in this way are the criminal revenues of any use to the criminals, thereafter available either for reinvestment in the furtherance of their criminal activities or for investment in (semi-)legitimate businesses. As a result, another criminal phenomenon, fairly new to Bosnia and Herzegovina, emerged: money laundering. While some authors see money laundering as a rather simple concept (Levi, 2001), others (Pieth, 1998) see it primarily as a very vague one. Whichever view one adopts, it can not be overlooked that money laundering has triggered some serious debates around the world in the last few decades.

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<sup>1</sup> Almir Maljević is Senior lecturer of Criminal Law at the Faculty of Criminal Justice Sciences of the University of Sarajevo, Bosnia and Herzegovina. The author wishes to thank Dr. Marianne Wade from the Max-Planck Institute for Foreign and International Criminal Law (Freiburg i. B.) for proof reading this article.

As far as the Bosnian and Herzegovina situation is concerned, although the extent of the money laundering phenomenon in the country remains unknown, some daring estimations have been presented, adding up to a staggering amount of 3 billion convertible marks<sup>2</sup> laundered yearly (Report, 2005:46).<sup>3</sup> Criminal entrepreneurs are limited in their means to launder the dirty money, if only due to their lack of creativity or lack of pressure from the authorities. The most commonly used methods to launder money is through fictitious firms by inflating their income or turnover in their tax forms. Another well trusted method is borrowing the own crime-money back from an off-shore phantom firm.

In Bosnia and Herzegovina the term ‘fictitious firm’ covers three categories (Berbić, 2005:6–8) of legal entities that are established or used for the purpose of laundering money by means of tax evasions and fraud:

- ☛ The classic fictitious firm – ‘business’ subjects that are not registered in accordance with existing legal procedures in Bosnia and Herzegovina, which have no license to function as such, no identification number and, in fact, do not exist at all in a legal sense;
- ☛ Unavailable firms – legal entities that are registered in accordance with legal procedures prescribed in Bosnia and Herzegovina, have a legal license to operate, have an identification number, but they do not report financial nor any other transaction that would indicate that the legal entity is engaged in any business-like activity. These firms do operate in reality, but they never report their incomes and all the money they make finds its way into the white, grey or black economy. These firms are hard to fight because they are registered by means of falsified personal identity cards, or by real personal identity cards of a person deceased at the moment of registration, or a drug addict as a straw man, etc.;
- ☛ Parallel firms – firms that cunningly falsify the valid documentation of an existing legitimate firm, use its name and get involved in criminal activities. They usually operate for a very short time, launder huge sums of money and stop their activities before law enforcement agencies realise that they ever existed.

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<sup>2</sup> 1 convertible mark (KM) = 1.9558 EUR.

<sup>3</sup> This amount should be treated with great caution as the quoted report does not adequately specify its information source. For a more critical approach to estimates relating to the amounts of money laundered yearly around the world, see van Duyne, 1998, and van Duyne, 2005. For the latest information about the amount of money suspected to be connected to money laundering activities in Bosnia and Herzegovina see *supra* 3.4.3.

Against this background, one should bear in mind that till the beginning of the 21<sup>st</sup> century, anti-money laundering legislation in Bosnia and Herzegovina was not harmonised<sup>4</sup> and no state institutions with police or prosecutorial powers existed on the state level.<sup>5</sup> Against this background one can realize that this phenomenon posed a serious threat to the financial system of Bosnia and Herzegovina. In the light of Bosnia and Herzegovina's strong desire to join European integration processes as quickly as possible, the money laundering situation required immediate reaction from the authorities. The anti-money laundering legislation framework was rapidly reformed and some new institutions were charged with combating this new phenomenon.

## **Bosnia and Herzegovina's international anti-money laundering obligations**

Although a UN member only since 1992, Bosnia and Herzegovina, as one of the former Socialist Federal Republics, was part of the former Yugoslavia until 1992 and, hence, obliged by the UN drug related conventions of '61, '72 and '88<sup>6</sup> even before it became an autonomous member of the UN. Apart from these conventions, Bosnia and Herzegovina ratified the UN transnational organised crime convention and its two protocols (smuggling of migrants and trafficking in human beings)<sup>7</sup> in 2002 and the UN convention against financing terrorism<sup>8</sup> in 2003.

As far as the European context is concerned, Bosnia and Herzegovina gained membership in the Council of Europe in 2002, and has ratified all major conventions related to the criminal justice system, including the Criminal Law Convention on Corruption (ETS No. 173), the Civil Law Convention on Corruption (ETS No. 174) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141).<sup>9</sup> In relation to the EU, the state is currently about to start the very first round of negotiations for accession. Apart from that although not

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<sup>4</sup> Three separate anti-money laundering laws existed in the two state entities (Federation of Bosnia and Herzegovina (FBiH) and Republic of Serbs (RS)) and its one district (Brčko District of Bosnia and Herzegovina (BDBH)) respectively.

<sup>5</sup> The State Border Service (SBS) was established only in the course of 2001–2002 (Law on State Border Service, *Official Gazette of Bosnia and Herzegovina*, No. 19/2001) and the State Investigation and Protection Agency (SIPA) was established in the course of 2004 (Law on State Investigation and Protection Agency, *Official Gazette of Bosnia and Herzegovina*, No. 27/2004).

<sup>6</sup> These UN conventions were ratified by Bosnia and Herzegovina in succession in 1993.

<sup>7</sup> *Official Gazette of Bosnia and Herzegovina*, No. 3/02.

<sup>8</sup> *Official Gazette of Bosnia and Herzegovina*, No. 3/03.

<sup>9</sup> Hereafter referred to as the Laundering convention.

yet a member state, Bosnia and Herzegovina has been striving to implement EU standards in its criminal justice system, primarily because it wishes to have the best possible starting position for negotiations. Therefore, the criminal justice related EU *acquis* was taken into account and more or less incorporated into national legislation in the course of the latest reforms of the state's legal system.

All these international conventions and other legal instruments called for significant changes in the legal and institutional anti-money laundering framework of Bosnia and Herzegovina. These changes will be presented here.

## **The legal and institutional framework to combat money laundering in Bosnia and Herzegovina**

The anti-money laundering framework of Bosnia and Herzegovina is (very) extensive. It encompasses a whole range of laws regulating the activities of numerous institutions<sup>10</sup> on all administrative (organizational) state levels: police, taxation offices, banks, prosecutors' offices etc. However, for the purpose of this article, attention will be paid to the latest reforms of provisions related to the criminalisation of money laundering and the codes aiming at the prevention of money laundering and the financing of terrorism.

## **Criminalisation of money laundering in Bosnia and Herzegovina**

### *Substantive criminal law*

Surprisingly (or perhaps not!) the criminal offence of money laundering did not exist in (the criminal code of) Bosnia and Herzegovina until 2003, the year in which the Criminal Code of Bosnia and Herzegovina<sup>11</sup> was introduced. Later on, during a process of further criminal legislation harmonisation of the lower administrative units (Federation of Bosnia and Herzegovina, Republic of Serbs and Brčko District of Bosnia and

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<sup>10</sup> E.g. the most important ones on the state level: SIPA, SBS, State prosecutor's office, Office for indirect taxation, Central bank; on the entity level: Federal tax office, Federal ministry of interior, Federal prosecutor's office, 10 Cantonal tax offices, 10 Cantonal ministries of interior and 10 Cantonal prosecutor's offices in FBiH; Tax office, Ministry of interior, Centres of public safety and Prosecutor's office in RS; Tax office, Office for revenues, Police and Public prosecutor's office in BDBH.

<sup>11</sup> *Official Gazette of Bosnia and Herzegovina*, No. 3/03., 32/03., 37/03., 54/04., 61/04. and 30/05.

Herzegovina), money laundering was criminalised as a separate offence in all respective criminal codes.<sup>12</sup>

All criminal codes in Bosnia and Herzegovina penalise the laundering of any amount of proceeds of any criminal offence. It should be noted here that a prosecutor does not have to prove that a predicate offence was committed in order to initiate criminal proceedings for money laundering. Even more so, criminal proceedings do not even have to be initiated for the predicate offence (e.g. in case a perpetrator of the predicate offence is not known or is dead etc.) (Evropska komisija/Vijeće Evrope, 2005:689).

Whilst the offence of money laundering is defined almost identically at the level of BiH, FBH and BDBH, the RS decided to enact some very specific anti-money laundering provisions. These deviations are primarily the result of the RS's omission to criminalise activities of criminal organisations and their members as a separate offence. Apart from the standard wording used to describe money laundering activities, contained in article 6 of the Laundering convention, the criminal code of RS has an additional section by which it penalises money laundering only if it is committed by a group of people who joined with the intention of committing such criminal offences.<sup>13</sup>

Yet, the wording used to define money laundering as an illegal activity, in the Law on the Prevention of Money Laundering<sup>14</sup> (hereafter referred to as the AML Law) is almost exactly the same as the one used in article 6 of the Laundering convention.<sup>15</sup> The only difference is that, according to the AML, money laundering occurs regardless of whether a perpetrator knew<sup>16</sup> if the

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<sup>12</sup> Money laundering is defined as a criminal offence in article 209 of the Criminal Code of Bosnia and Herzegovina, article 272 of the Criminal Code of Federation of Bosnia and Herzegovina, article 280 of the Criminal Code of Republic of Serbs and article 265 of the Criminal Code of the Brčko District of Bosnia and Herzegovina.

<sup>13</sup> Article 280.4. of the Criminal Code of RS.

<sup>14</sup> Law on the Prevention of Money Laundering, *Official Gazette of Bosnia and Herzegovina*, No. 29/04.

<sup>15</sup> Article 2.1. of the Law on the Prevention of Money Laundering: "Money laundering" means: The conversion or transfer of property, when such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such activity to evade the legal consequences of his or her action; The concealing or disguising of the true nature, source location, disposition, movement, rights with respect to, or ownership of property, when such property is derived from criminal activity or from an act of participation in such activity; The acquisition, possession or use of property derived from criminal activity or from an act of participation in such activity; or participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the actions mentioned above.

<sup>16</sup> Money laundering is a criminal offence in Bosnia and Herzegovina even if committed negligently. See Article 209.3. of the Criminal Code of BiH, Article 272.3. of the Criminal code of FBiH, Article 280.5. of the Criminal code of RS and Article 265.3. of the Criminal code of BDBH.

property he is laundering originates from criminal acts. This wide scope can be explained by the fact that the AML law on the prevention of money laundering is not defining a criminal offence but a *ratio materiae* for the activities of the institutions charged with combating money laundering, hence the elements related to *mens rea* of a perpetrator are not relevant here.

Another novelty relevant for combating money laundering in Bosnia and Herzegovina also introduced by the latest criminal law reform is the possibility to hold legal persons criminally responsible and to charge and punish these. As of 2003, legal persons will be considered as a perpetrator of a criminal offence if this offence was committed in the name of, because of or for the benefit of the legal person. In addition, it has to be proved that either the content of the criminal offence arises due to the conclusion, order or permission of the managerial or supervisory bodies of the legal person; or the legal person's managerial or supervisory bodies influenced the individual perpetrator(s) or enabled him/them to perpetrate the criminal offence; or the legal person disposes of illegally obtained property gained or uses objects acquired through the commission of the criminal offence; or legal person's managerial or supervisory bodies failed to provide for appropriate supervision of the legality of work of the employees of that legal person.<sup>17</sup> If criminal liability of a legal person is established it can be punished by a fine, the seizure of property and/or the dissolution of the legal person.<sup>18</sup>

All criminal codes in BiH define that no one can keep a gain, an advantage or a benefit that was acquired through a commission of an offence.<sup>19</sup> This entails that, in order for the proceeds to be confiscated, a prosecutor is supposed to collect evidence and prove that the property or gain is proceeds from a criminal offence. However, with the exception of the Criminal Code of RS, all criminal codes introduced an additional provision<sup>20</sup> by which a court can confiscate the proceeds in separate proceedings if there is (only) probable cause to assume that the proceeds resulted from a criminal offence and if the owner or possessor (these terms are much wider in scope than the term "accused") is not able to provide evidence concerning the legitimate origin of the assets. Hence, the *onus probandi* of the origin of the property is transferred to the person who owns or possesses the property. No

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<sup>17</sup> See Article 122. of the Criminal Code of BiH, Article 128. of the Criminal Code of FBiH, Article 127. of the Criminal Code of RS and Article 128. of the Criminal Code of BDBH.

<sup>18</sup> According to Article 125.2. of the Criminal Code of BiH, liability of the legal person shall not exclude the criminal liability of individual perpetrators or responsible persons within the legal person for the perpetrated criminal offence.

<sup>19</sup> See Article 110. of the Criminal Code of BiH, Article 114. of the Criminal Code of FBiH, Article 94. of the Criminal Code of RS and Article 114. of the Criminal Code of BDBH.

<sup>20</sup> See Article 110.3. of the Criminal Code of BiH, Article 114.3. of the Criminal Code of FBiH and Article 114.3. of the Criminal Code of BDBH.

matter how reasonable this provision may seem in relation to combating money laundering, it has to be noted that none of the codes of criminal procedure define the procedure for the confiscation of proceeds, but require only a probable cause that these proceeds are generated by criminal acts. Therefore, it is very doubtful whether judges, formally bound by the principle of legality, will apply this provision at all.

### ***Procedural provisions***

As for the procedural aspects of combating money laundering, following the example of other states determined to combat crime entrepreneurs and their illegal activities, Bosnia and Herzegovina introduced some new investigative powers for certain categories of criminal offences.<sup>21</sup> These powers are:

- ☛ surveillance and technical recording of telecommunication;
- ☛ access to computer systems and computerized data processing;
- ☛ observation and technical surveillance of premises;
- ☛ observation and technical surveillance of individuals and objects;
- ☛ use of undercover investigators and informants;
- ☛ simulated purchase of certain objects and simulated bribery;
- ☛ supervised transport and delivery of the objects of a criminal offence.

Although introduced in 2003, these powerful investigative measures are still not being applied to the extent expected.<sup>22</sup> Reasons for this can be found in the fact that Bosnia and Herzegovina is a very small country and that it is very hard to develop specialised programmes, e.g. for undercover investigators, as well as a post-retirement protection programme for retired undercover agents. Likewise, it is very difficult to organise simulated purchases as police forces simply do not have enough money for such actions. Some of the state-

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<sup>21</sup> These criminal offences are: criminal offences against the integrity of Bosnia and Herzegovina; criminal offences against humanity and values protected by international law; criminal offences of terrorism; criminal offences for which, pursuant to the law, a prison sentence of a minimum of three (3) years or more may be pronounced. Money laundering falls within the fourth category of listed offences as the sentence of 3 years of imprisonment can be pronounced for all forms of the offence, including also negligent laundering. See Article 117. of the Criminal Procedure Code of BiH, Article 131. of the Criminal Procedure Code of FBiH, Article 227. of the Criminal Procedure Code of RS and Article 117. of the Criminal Procedure Code of BDBH.

<sup>22</sup> Information obtained by means of an interview with one of chief investigators working in one of the state police agencies.

of-the-art investigative powers require special equipment that is not available to all police units; those units that do have the equipment are still lacking the skills and expertise required for the successful application of these new technologies.

### **Privatisation of anti-money laundering activities**

As mentioned before, by the very end of 2004, when the Law on the Prevention of Money Laundering (and Financing Terrorist Activities<sup>23</sup>) was introduced, numerous institutions were in charge of conducting anti-money laundering activities across the country. Due to the lack of a proper co-operation between different administrative units of the country, their activities were frequently not synchronised. Hence, if there were any results at all, these were insignificant, despite the fact that the introduction of the AML Law widely extended the number of institutions involved in anti-money laundering activities. Being highly aware of the fact that money laundering as a criminal activity requires some sort of direct contact with any of the institutions professionally dealing with either money or other valuable goods or assets, the AML Law extended the network of institutions responsible for anti-money laundering activities into the private sector. Conforming to international money laundering directives,<sup>24</sup> the list of private sector institutions is quite extensive indeed and, amongst others includes: banks, post offices, investment and mutual pension companies and funds, stock exchanges and institutions or persons performing similar activities, insurance and reinsurance companies, casinos and similar gambling institutions, lawyers, accountants, auditors, privatization agencies, travel agencies, real estate agencies, public notaries, legal and natural persons

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<sup>23</sup> Although the official title of the law does not involve the “financing terrorist activities” part, whenever the law defines roles, responsibilities and co-operation of various institutions in their combat against money laundering it defines that it is all related to financing terrorist activities as well.

<sup>24</sup> DIRECTIVE 2005/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, *Official Journal of the European Union* L 309, 25.11.2005, p. 15 (the so-called third directive); DIRECTIVE 2001/97/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, *Official Journal of the European Union* L 344, 28.12.2001, p. 76 (the so called second directive); and Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, *Official Journal of the European Union* L 166, 28.6.1991, p. 77 (the so called first directive).

performing the activities of receiving, distributing, selling or purchasing or managing money or property of third persons, etc.<sup>25</sup>

In addition to that, the AML Law set the anti-money laundering sectors' activities on a completely different level in terms of intra-national and international cooperation. Under the new AML regulatory framework all the institutions mentioned above are obliged to act with 'due diligence' and according to the well known 'know your customer' principles (e.g. Levi, 2001). These principles basically require the financial service providers to collect information on both their clients and their clients' transactions and to preserve these data for a period of at least 10 years during which these data can be consulted within the context of criminal financial investigation.<sup>26</sup> Although the institutions do collect the information mentioned in their everyday activities anyway, the AML Law obliges them to do so in relation to certain clients and certain transactions in a two-fold manner:<sup>27</sup>

- by prescribing the minimum amount of money transferred at once or in connected transactions (30.000 KM or ca. 15.000 €) which triggers this obligation; Casinos and other gambling institutions have to identify their customer if s/he makes a transaction of 5.000 KM and insurance companies and natural and legal persons brokering in the sale of life insurance policies, shall identify the client in relation to life insurances for which individual or several instalments of the premium, that are to be paid in the period of 1 year, amount to 2.000 KM or more or the payment of the single premium is 5.000 KM or more;
- by prescribing the obligation of collecting such information for all suspicious transactions and/or suspicious clients.

Apart from collecting the relevant information, private sector institutions are obliged to keep records of such information and have to report all 'suspicious' transactions immediately<sup>28</sup>, i.e. as soon as suspicion arises and before the transaction is completed.<sup>29</sup> What constitutes a 'suspicious' transaction in relation to various forms of financial transactions is defined by bye-laws defined by the Ministry of Security of BiH.<sup>30</sup>

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<sup>25</sup> See Article 3. of the AML Law.

<sup>26</sup> See Article 6. and Article 31.1. of the AML Law.

<sup>27</sup> See Article 7. of the AML Law.

<sup>28</sup> See Article 13. and 14. of the AML Law.

<sup>29</sup> Suspicious transactions should be reported immediately and (single or connected) transactions amounting over 30.000 KM should not be reported later than within 3 days.

<sup>30</sup> The most important bye-law is the Book of Rules on data, information, documents, methods of identification and minimum other indicators necessary for the efficient implementation of the AML Law provisions, *Official gazette of BiH*, No. 17/05.

In order to fulfil these obligations the institutions have to appoint a person in charge of reporting the relevant information.<sup>31</sup> Also they have to organise anti-money laundering training for their employees and must establish internal controls for the purpose of checking whether the institution and its personnel are acting in accordance with the obligations prescribed by the AML Law.<sup>32</sup>

In conclusion to this brief presentation of the ‘privatisation’ of anti-money laundering activities, it should be said that by complying with the AM Law the private sector is becoming heavily involved in the fight against crime, which, traditionally, is the role of the state and its public bodies. However, all obligations defined by the AM Law must be performed at the cost of private institutions themselves.<sup>33</sup> Although a very smart and comfortable solution from the state’s point of view, it gives us reasonable ground to be very suspicious about the private sector’s willingness to comply with these important duties.

### **The role of the Financial Intelligence Department (FID)**

Due to the fact that the network of institutions charged with combating money laundering needs to be co-ordinated somehow, as well as to the fact that all the information these institutions collect needs to be processed, the AM Law defined that all these activities will be performed by the Financial Intelligence Department (FID) of the SIPA, a police agency<sup>34</sup> organisationally situated within the Ministry of Security of Bosnia and Herzegovina.<sup>35</sup> By doing so, Bosnia and Herzegovina has created a framework which is in accordance with the international standards, such as those set up by the FATF or EGMONT group, whose AML recommendations more or less require countries the establishment of an FIU.

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<sup>31</sup> This obligation does not apply to institutions with less than four employees.

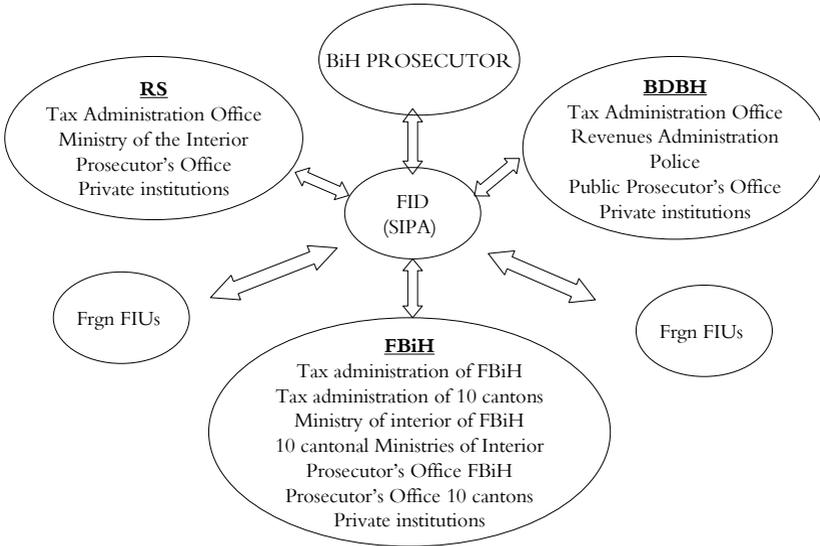
<sup>32</sup> See Article 15. of the AM Law.

<sup>33</sup> For more detailed discussion of the respective costs that the private sector faces in order to fulfil this obligation see van Duyne et al., 2003:112-119.

<sup>34</sup> For a brief overview of different models (police/administrative/judicial) of FIUs see Mitsilegas, 2003:155-170.

<sup>35</sup> Other Departments of SIPA are: The Criminal Investigative Department; Very Important Persons and Facility Protection Department; the Witness Protection Department; the Special Support Unit and the Internal Control Department.

**Figure 1. The network of anti-money laundering institutions**



The FID's activities related to preventing and combating money laundering and financing terrorist activities can be summarised as follows:

- ☛ it receives and collects data relating to money laundering and the financing of terrorist activities from all other public or private institutions, analyses the data and forwards the relevant data to the competent prosecutor;
- ☛ it conducts investigations for the purpose of detecting money laundering and financing terrorist activities;
- ☛ it is the body in charge of international exchange of data related to money laundering and financing of terrorist activities. It establishes and maintains co-operation with foreign public or private bodies, agencies or institutions, implying that it requests the information relevant for money laundering cases in Bosnia and Herzegovina and sends the information from Bosnia and Herzegovina, upon a foreign body's, agency's or institution's request for the purpose of criminal investigations or prevention of money laundering in a respective country;
- ☛ it provides so-called financial intelligence support for prosecutors; and

- it participates in the anti-money laundering training of private sector's employees, suggest amendments to anti-money laundering legislation, etc.<sup>36</sup>

Another very important FID duty is the supervision of the implementation of AM Law provisions by all parties involved in combating money laundering.<sup>37</sup> Namely, the AM Law prescribes that the FID shall monitor the implementation of the legal provisions by gathering and comparing data, information and the documentation received on the basis of the provisions of that law. If, at any stage, the FID discovers a violation of the provisions of the law, it is entitled to:

- demand that the institution under obligation stops the violation, provided that the consequences of the violation can be eliminated subsequently;
- propose to the supervising bodies<sup>38</sup> the use of the appropriate control measure within the boundaries of their competencies;
- request the competent authority to initiate minor offence proceedings.<sup>39</sup>

It is obvious from this overview that the FID is the central agency in the country and that it should function as the focal point for the collection of all information related to money laundering. As such, it plays one of the most important roles in the fight against money laundering in Bosnia and Herzegovina. The FID is recognised as a partner in the regional and international fight against money laundering and financing terrorist activities. The fact that the FID was accepted as a full member of the EGMONT group after only a few months of its existence indicates that it formally fulfils all operational, functional and legal requirements imposed by the EGMONT standards for admission.<sup>40</sup>

However, as is often the case, reality does not fully reflect the formal institutional potential of the FID. To what extent does the FID actually use

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<sup>36</sup> See Articles 16.-24. of the AM Law and Article 13. of the Law on State Investigation and Protection Agency.

<sup>37</sup> Article 37 of the AM Law.

<sup>38</sup> It is interesting to note that the AM Law does not define which institutions are considered to be supervising bodies!

<sup>39</sup> That is to say proceedings for violations of law that do not amount to a criminal offence.

<sup>40</sup> The FID became a full member of the EGMONT group on June 29th 2005 at the meeting of all 94 directors of FIUs that were full members of the EGMONT group at the time. Not a single director voted against BiH's FIU membership in the EGMONT group. For more on EGMONT group see [www.egmontgroup.org](http://www.egmontgroup.org).

its powers and what are the results of its anti-money laundering activities? The following sections will provide some insight into the FID's activities in the first period of its existence.

## **FID's anti-money laundering activities in the course of 2005**

The aim of this contribution is to present as much information as possible about the actual implementation of the AML Law provisions by both private sector institutions and the FID from the FID's point of view. To this end, the data that will be presented here was obtained by means of two semi-structured interviews with the Head of the FID conducted in September 2005 and March 2006 respectively.<sup>41</sup> Although, the data would have been more comprehensive had some private institutions' representatives been interviewed as well it was decided not to do so because of at least two reasons: firstly, with the resources available, it was neither possible to draw a representative sample of the private sector institutions that are under obligation, nor was it possible to interview an equal number from each institution involved in co-operation with the FID; and secondly, the aim of this contribution was to screen the implementation of the AML provisions from the FID's point of view.

### ***Collection and analysis of money laundering related information***

The collection and analysis of the information relevant to money laundering as the core function of the FID's work will be examined with two questions in mind:

- from which institutions and with what frequency did the FID receive non-requested information over a 12 months period;<sup>42</sup>
- from which institutions and with what frequency did the FID request information over a 12 months period?

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<sup>41</sup> Each interview lasted one hour.

<sup>42</sup> Due to the fact that the FID became operational at the very end of 2004, the period of 12 months referred to in this contribution is the period between 1.1.2005 and 31.12.2005.

**Table 1. Information received from institutions under obligation**

	<b>Institutions</b>	<b>N of reports</b>	<b>%</b>
1.	Banks	108.651	99,36
2.	Stock markets	426	0,39
3.	Indirect taxation administration	268	0,24
4.	Car dealers	10	0,01
	<b>TOTAL</b>	<b>109.355</b>	<b>100</b>

Source: Interview with the Head of the FID

The interview with the Head of the FID, conducted in 2006, provided some indication of the scope of the reports the FID has been dealing in the time span from 1.1.2005 until 31.12.2005. Table 1 shows the number of reports made to the FID from various private and public institutions. Several aspects are noteworthy. Firstly, of all private institutions obliged to provide the information to the FID, only institutions from three sectors have actually submitted reports: banks, stock markets, and car dealers. Secondly, the numbers presented in Table 1 suggest that the amount of information the FID receives daily (approximately 299 reports) as the result of implementation of the AML Law might seem quite impressive. Still, only less than 0,01% of all these reports are related to so called suspicious transactions. The rest are information about cash transactions exceeding the limit of 30.000 KM (15.340 EUR) (around 55%) and so-called ‘connected transactions’ exceeding the reporting limit (around 45%). These data suggest that the private sector is predominantly focused on providing the information exceeding the reporting threshold and is paying almost no attention to suspicious clients and suspicious transactions. Yet, the FID conducted an investigation of the banks on three occasions only (see 3.4.2. *infra*).

The fact that banks are the predominant source of information does not come as a surprise as most transactions are expected to be handled by banks.<sup>43</sup> However, it is striking to note that other institutions obliged to provide information to the FID are not willing to report. It is not clear why this is so. One reason may be that some private sector institutions are unable to report due to the lack of resources. On the other hand, institutions might have enough personnel but simply did not appoint anyone to do the reporting. Other institutions might claim (or feign) not to have anything to report at all. In such a situation of non-reporting one would expect the anti-money laundering unit to take on a slightly proactive role and ask the institutions under obligation to provide the information. And yet again, the FID

<sup>43</sup> Van Duyne and Miranda show a slightly different trend in relation to banks’ reporting. See van Duyne/Miranda, 1999:252.

supervised only those institutions that were reporting, rather than those that did not.

As for the information obtained on the FID's initiative, insurance companies were the only private sector institutions which were contacted in addition to banks and stock exchanges.

The question remains whether this limited approach is the result of a conscious decision of the anti-money laundering community in Bosnia and Herzegovina, or whether its negligence caused by the misconception that the banks are handling almost all financial transactions in the country, that money launderers are using almost exclusively banks for laundering dirty money, or is simply the result of a lack of personnel.<sup>44</sup>

### ***Supervision of the private sector's diligence***

Another question related to the compliance of the private sector with the obligations defined by the AML Law, is whether and which private institutions appointed a person in charge of forwarding the information to the FID and complying with other AML Law obligations. Having the previously presented focus on banks in mind, it does not come as a surprise that only banks complied with this obligation by appointing a total of 34 authorised persons, 21 deputies and an impressive 'small army' of 140 operators in banks. Although it is expected that the majority of financial transactions are to be handled via banks, it should be noted that most money still circulates in cash and that the list of institutions under obligation, as defined in article 3, includes many service providing firms who deal with cash on a regular basis. Empirical data from other countries and knowledge of the modus operandi of money launderers in general emphasizes the importance of monitoring cash transactions as far as possible. Therefore, if Bosnia and Herzegovina is to fight money laundering properly, the rest of the private sector must also comply with the reporting obligations and, on the other hand, the FID must take a more proactive role in making the inert private sector to do so.

Considering the fact that only banks complied with the obligation to appoint a person in charge of AML compliance, one would expect the FID to have supervised at least some, but not all, of the institutions under obligation with regard to compliance. It may be that in some cases the institution does comply but omitted to report accordingly. In many other cases, however, no staff has been tasked at all, sometimes as a result of the lack

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<sup>44</sup> The academic community in Bosnia and Herzegovina speculates that the FID, in the course of the very first year of its existence, operated with only 1/3 of planned personnel resources. The FID is constantly recruiting staff and it is expected to be fully operative within the next two years, provided it retains the current pace of recruitment.

of knowledge and sometimes as a deliberate choice. Probably a number of institutions is intentionally avoiding appointing a person in charge as part of circumventing the reporting obligation. In this respect the FID's own focus is somewhat selective. Only banks were supervised on three occasions and all three inspections resulted in minor offences being reported.<sup>45</sup>

### ***Investigation and prosecution of money laundering cases***

As expected, the latest legislative changes, as well as the newly established institutional framework yielded some results in terms of initiated investigations of money laundering cases. According to the data provided by the FID, in the course of 2005, there were a total of 33 investigations for money laundering offences, as defined by the Criminal Code of BiH, in which the FID actively participated. Only 6 of those ended with an indictment and only one of these resulted in a conviction. However small these numbers may seem at the moment, it should not be forgotten that the FID became operational only at the very beginning of 2005 and that more significant results, in terms of investigations, prosecutions and convictions, are to be expected.

The total sum of money suspected to be laundered in all cases prosecuted in Bosnia and Herzegovina in the course of 2005 amounts to slightly more than 110 million KM, of which just over 11 million KM is suspected to originate from tax evasion. This may, of course, only be the tip of the iceberg. If we multiply the suspected sum by 10, giving in, for argument's sake, to the myth that only 10 percent of all crimes are detected, the amount of money laundered in the country would not be higher than just above 1 billion KM which is still far from estimations mentioned in the introduction of this contribution. During the same observation period, a total of 100 financial transactions, amounting to more than 2 million KM, were blocked by the FID.

As for the number of persons caught in the net of FID's activities, a total of 192 individuals were identified in the analysis of the reports received by the private sector. The information contained showed that there was sufficient evidence to support a reasonable suspicion that some persons were involved in money laundering activities: 27,2 % of the identified persons (or 52 persons) were reported to a prosecutor's office and a criminal investigation was initiated. The investigations yielded further criminal evidence against

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<sup>45</sup> Although all institutions are obliged to participate in the creation of a list of indicators of suspicious transactions (see the Article 15.2. of the AM Law), only banks (26 of banks) and one banking agency implemented the obligation and delivered the list to the FID.

13,5% (or 26 persons) of the suspects, who were kept in custody to facilitate a more thorough investigation.

### ***International cooperation***

As for international cooperation, the analysis of information on the extent and success of cooperation with other countries' FIUs yielded some interesting results. The information obtained is divided depending on the role of the FID as the active (requesting) or passive (receiving) partner in cooperation.

Table 3 shows to which countries the FID sent a request for information or assistance and how often it received an answer. Table 4, in contrast, shows which countries addressed the FID with a request for information or assistance and how often the FID responded to it.

**Table 3. Information/assistance required from other countries (foreign FIUs)**

<b>Country</b>	<b>How often?</b>	<b>Answer/assistance received?</b>
Slovenia	4	4
Croatia	1	1
Serbia	1	1
Bolivia C. America	1	0
Greece	1	0
France	1	1
Turkey	2	2
<b>Total</b>	<b>11</b>	<b>9 (81,8%)</b>

*Source: Interview with the Head of the FID*

**Table 4. Information/assistance provided to other countries (foreign FIUs)**

Country	How often?	Information/assistance provided?
Slovenia	5	5
Croatia	6	6
Hungary	1	1
Serbia	3	3
Montenegro	1	1
Germany	3	3
United Arab Emirates	1	1
Lithuania	1	1
Turkey	1	1
Bulgaria	1	0
South Africa	1	0
<b>Total</b>	<b>24</b>	<b>22 (91,66%)</b>

Source: Interview with the Head of the FID

Although not particularly informative, the tables above provide some noteworthy information, however allowing only tentative statements due to the low frequencies. Firstly, it is obvious that the FID is modestly more efficient in providing assistance than foreign FIUs are. This slightly higher percentage of efficiency in providing assistance can be explained by the fact that the AML Law gives the FID extensive powers to access information and to share that information with other anti-money laundering agencies.<sup>46</sup>

If the assumption that the FID seeks assistance for those money laundering cases that are under the jurisdiction of Bosnia and Herzegovina is correct, than it is interesting to note that, with the exception of Bolivia and France, the alleged money laundering schemes, that happen to be discovered in Bosnia and Herzegovina are also connected with the schemes from other South Eastern European (SEE) countries. On the other hand, money laundering schemes taking place in Bosnia and Herzegovina are not only of particular interest for SEE countries but also for countries from other continents. Therefore, it is encouraging to note that the FID is becoming a partner in anti-money laundering cooperation around the world.

<sup>46</sup> This was pointed out by the Head of the FID. He also pointed out that the FID has recently sent a request for information to all EGMONT group members through the EGMONT direct communication channels and received instantly an answer from ca. 50 countries that the legislation of the respective countries does not allow such information to be provided. At the same time, the FID would have no limitations to provide such information at all.

## **Conclusions**

Several conclusions can be drawn from the preceding elaborations. Firstly, the AML legal framework is on main points in accordance with the standards set up by the FATF recommendations, EU Directives and the requirements of the EGMONT group. These concern primarily: the definition of money laundering as a criminal offence, investigative powers at the disposal of law enforcement agencies in general, as well as to the specific, and very extensive, investigative powers of the FID. Secondly, the institutional anti-money laundering framework, although potentially including a barely countable number of institutions is sufficiently centralised to be effective thanks to the creation of the FID.

Recent developments in AML regulation, primarily reflected in the FID becoming a member of the EGMONT group within six months of it becoming operational, justify the conclusion that Bosnia and Herzegovina should no longer be seen as a country of primary concern when it comes to money laundering due to its insufficient legal and institutional framework.<sup>47</sup> Instead, Bosnia and Herzegovina should be acknowledged as a potential equal partner in combating money laundering in the Balkan region and in Europe, as well as in the rest of the world.

However, although the current legal and institutional framework seems to be up to the international standards, one can not ignore the implementation problems, some of which have not passed unnoticed. Whilst banks are the most important partners of the FID in the fight against money laundering, other private sector institutions such as real estate agencies, gambling houses, various monetary funds, post offices, currency exchange offices seem to largely ignore the anti-money laundering regime established in Bosnia and Herzegovina. At the same time, the FID's supervisory powers over the private sector do not seem to have a broad reach. Hence questions such as why most of the institutions under obligation do not comply with their obligations, or why those that do comply are focusing, almost exclusively, on mandatory disclosure, remain without satisfactory answers.

The results on legal and institutional reforms of the anti-money laundering sector presented in this contribution support the impression that Bosnia and Herzegovina has at least acceptable means of bringing money launderers under control. However, bringing criminals under control cannot be achieved by the mere existence of laws but rather by the implementation of the laws by all designated private and public anti money laundering institutions in the country. Unfortunately, most of the results related to the

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<sup>47</sup> BiHs FID is currently listed as the 16th on the list of 101 members of the EGMONT group with the date of it assuming membership status as June 29th 2005.

practical implementation of the laws presented here, show that neither do the majority of private institutions comply with their obligations as defined by the AML Law nor does the FID comply with its obligation to supervise private sector compliance with the AML Law provisions. Therefore, it seems that Bosnia and Herzegovina should be paying more attention to private sector diligence. Otherwise, the 'dirty money' will continue to find its way to a 'cleaner' manifestation.

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# **The future of organised crime: Dealing with uncertainty**

*Norbert Wagner, Martin Boberg, Uwe Beckmann, Thomas Schulte<sup>1</sup>*

## **A threat-based analysis of future trends in organised crime**

In a changing world decisions have constantly to be made based on assumptions about future developments. If one does not want to rely on pure luck, good decisions will be the product of two factors: (1) how founded and up-to-date the knowledge is with which one extrapolates from the past into the future, and (2) how imaginative one is in envisioning the future in order to be prepared for all possible turns of events. In this chapter a methodology will be presented which attempts to improve future-oriented and knowledge-based decision-making in the area of combating organised crime.

Over the past five years the police in Nordrhein-Westfalen, Germany, have implemented a complex program for the collection and analysis of organised-crime related data with the aim of establishing an early warning system. The system consists of three modules: (1) an annual standardized situation report (“Lagebild Organisierte Kriminalität”) which provides a retrospective view on the development of organised crime (Landeskriminalamt Nordrhein-Westfalen, 2006); (2) a bi-annual assessment of organised crime for which up-to-date-information from regional intelligence analysis units is collected; and (3) a threat-based analysis on organised crime which is conducted about every four years. The chapter will focus on this last component of the overall system.<sup>2</sup>

Methods on how to improve coping with the fast-moving developments in organised crime have long been discussed within the German law enforcement community (Meywirth, 1999). There are many good reasons for such a pro-active focus. Organised crime is recognized as a harmful social phenomenon while at the same time countermeasures are costly. Early interventions would yield cost benefits and could be expected to have a deterrent effect. However, the first attempts undertaken to anticipate the future development of organised crime did not produce any satisfactory results. The factors that needed to be taken into consideration appeared to be too diverse, the interrelations too contradictory and confusing and their

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<sup>1</sup> The authors are senior officers at the central detective agency (Landeskriminalamt) of the Nordrhein-Westfalen police (Germany).

<sup>2</sup> This chapter is written for the general public. A more detailed version for police-departments and policy-makers is also available.

measurability too obscure to be grasped by any particular methodology, not to mention the fact that many of the forces that come into play seem to be such that they cannot be influenced at all. The dilemma is obvious. On the one hand, there is the need to take possible crime developments into account for the sake of an effective and efficient use of limited resources. On the other hand, the object of interest by its very nature does not lend itself readily to close scrutiny. The Kantian saying, that the need to decide reaches further than the ability to understand, applies particularly well in this context (Landeskriminalamt Nordrhein-Westfalen, 2004a; Wagner, Boberg & Beckmann, 2005).

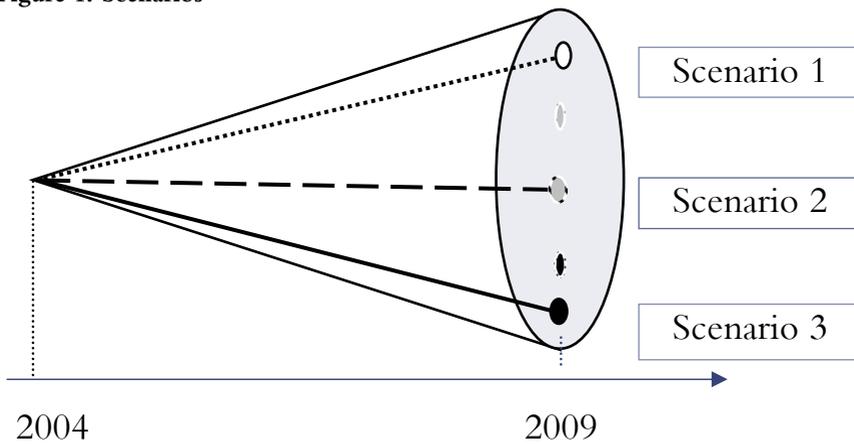
Accordingly, scepticism regarding the feasibility of a future-oriented approach in the analysis of organised crime has been wide-spread (see e.g. Forstenhäusler, 2002: 38; Rogge, 2005: 142-143). Still, the need for improvement of the existing methodologies has remained pressing. Assessing crime on the basis of quantitative data, namely those contained in the annual crime-reports, or on the basis of expert interviews has proven to be insufficient (von Lampe, 2004a; 2004b). The data represent only the offences known to police so that the validity of these surveys is always debatable. Moreover, long term trends and fundamental conditions in society, technology, politics, the economy and culture that likely have an impact on the crime situation have been ignored in crime assessments altogether.

What is needed, speaking in abstract terms, is a qualified overview of all factors that can be expected to influence organised crime in the next few years, and to transform the necessarily imprecise view of the future into concise recommendations for actual police work (see Black et al., 2000; Vander Beken & Defruytier, 2004).

### **Why scenarios – Thinking in stock**

One methodology that is capable of taking the complexity and dynamics of developmental processes into consideration –including the interdependencies linking the various inherent factors– is the so-called scenario technique. The objective of this way of thinking is not to attain certainty about future events. The scenario technique does not provide a crystal ball with which to look into the future. Rather, scenarios are a learning tool. They help to describe possible ‘futures’ for which suitable strategies have to be designed. Underlying the scenario approach is not a mechanistic world view of linear progress but an evolutionary model of complex systems (Figure 1).

**Figure 1: Scenarios**



Scenarios are the product of highly structured expert communication processes which ideally take place in a series of thematic workshops, expert surveys, and scientific research.

In order to implement the scenario technique in the analysis of organised crime, the Nordrhein-Westfalen police contracted the Daimler Chrysler Society and Technology Research Group (Berlin) for external scientific and methodological support. At that time, the research group already had several years of experience in developing scenarios in other areas.

In addition to the logistical assistance, the building of organised-crime scenarios required the involvement of numerous experts from different backgrounds in order to avoid an arbitrary and one-sided perspective which is often at the bottom of strategic misjudgement. In the end, 20 experts were assembled, including police officers from different departments, public administrators, tax investigators, military personnel and academics. The core task of the entire scenario-building was to integrate their views. This was achieved in the course of four two-day workshops held within a four months period in 2004.

The initial question presented to the participants at the first workshop was about the factors possibly having an impact on organised crime in the state of Nordrhein-Westfalen over the following five years until 2009. The discussion led to a list of 23 different social, political and economic aspects. This is in line with the assumption underlying the scenario technique that the development of any complex system can adequately be described with approximately 20 factors. These factors are divided into two groups: descriptors and premises. Descriptors are those factors whose development in the near future may follow different directions, whereas premises are those factors that are believed to be predictable over a five-year period. In the discussion the group of experts identified 13 descriptors (Table 1) and 10 premises (Table 2). The next step required the 23 factors to be concisely

defined and described in their current state. This was done in a 200-page volume (Landeskriminalamt Nordrhein-Westfalen, 2004b). For every factor, experts had to draw on their specific expertise to outline possible future trends and to rate the probability of each potential development. This procedure ensures that every participant has a detailed and complete overview of the identified descriptors and premises. It should be noted at this point that the identified factors can be of relevance for other areas of crime, such as common crime and terrorism, as well. It was therefore decided to print the volume and to make it available for interested parties outside the circle of scenario participants.

**Table 1: Descriptors**

<b>N</b>	<b>Factor</b>	<b>Trends</b>	<b>Probabilities</b>
1	Technological deficits within the police	Increasing On the same level	70% 30%
2	Mobility of offenders	Strongly increasing Slowly increasing On the same level	60% 25% 15%
3	Migration	Immigration increasing Immigration stagnates Immigration decreases	40% 50% 10%
4	Criminal Justice System	Fundamental modernization Gradual modernization Stagnation	5% 45% 55%
5	Harmonization of legal system in the EU	Gradual harmonization Stagnation	50% 50%
6	Size of EU	Expansion on schedule Expansion to 25 MS	40% 60%
7	Public budgets	Deficit <5% Deficit >5%	50% 50%
8	Structural reform in NRW economy	Successful Gradual, but neutralizing Stagnation	30% 50% 20%
9	Critical infrastructures (public transport, communication)	Harm Threat Safety	30% 50% 20%
10	Consumer income	Strong growth Moderate growth Stagnation	30% 50% 20%
11	Unemployment	Increase Stagnation Decrease	40% 40% 20%
12	Economic stability	Increase Stagnation Decrease	25% 25% 50%
13	Retreat of the state from public services	Status quo Moderate privatization Lean state	30% 60% 10%

**Table 2: Premises**

<b>N</b>	<b>Factor</b>	<b>Trends</b>
1	Social polarization	Increasing
2	Integration of migrants	Decreasing
3	Ghettoization	Spreading
4	Infrastructure	Maintaining quality and expanding
5	Political influence on police tasks	Increasing
6	Worldwide money flow	Increasing
7	Legitimacy of legal system	Decreasing
8	Threat of Islamistic terrorism	Increasing
9	Opportunities for offenders	Increasing in range and number
10	Communication technology	Increasing efficiency, decreasing costs

### **From today to tomorrow – the development of scenarios**

Scenario-thinking depends on the consideration of interrelations and interdependencies. This can be achieved with the help of a so-called “Cross Impact Matrix”. In the second workshop, the experts were asked to discuss the influences that exist between the 23 factors with the primary emphasis being placed on the links between the descriptors in various potential manifestations. The discussion resulted in a vast amount of data that were analysed using a specially designed computer program in search of consistent patterns in the assumed links of influence. The analysis produced 35 scenarios of which three scenarios suitable for further examination were selected. The selection followed no substantial criteria. Rather, scenario thinking sets two formal criteria: (1) every scenario must be consistent and free of contradictions, which is ensured through the use of the “Cross Impact Matrix”; and (2) the scenarios selected for further examination must be distinct. The emphasis is on ‘extremes’.

At the third workshop the selected scenarios were developed into three “scenario worlds”. The aim behind this endeavour is to illustrate the web of links between the various influential factors beyond the mere listing of scenario components. For this purpose a catchy headline for each scenario was chosen (“neck and neck”, “light and darkness”, “ap-OC-alyptse”), all information pertaining to a particular scenario were described in graphical form, in written descriptions and, finally, were combined in a “scenario story”. Each scenario story attempts to narrate in a realistic and consistent way how the identified crime related factors (economy, unemployment, structural change) develop within a specific framework of prospects for the future beginning from the status quo. Starting with the status quo avoids the design of science-fiction-worlds, strengthens the plausibility of the different scenarios and makes it easier for the larger audience to envision the anticipated trends.

The fourth and last workshop, finally, dealt with the consequences of each scenario. The objective was to arrive at scenario-specific response models and at general strategies for combating organised crime in Nordrhein-Westfalen.

The following section presents the descriptions of the three scenarios as they had been envisioned by the workshop participants in 2004 for the year 2009.

### **Scenario “Neck and Neck”**

The most optimistic turn of events is envisioned in the “neck and neck” scenario. It rests on the assumption that there will be continuous economic growth in Germany translating into rising consumer income and a consolidation of federal and state budgets. Following this projection, in the year 2009 unemployment will be significantly lower than in 2004. The Ruhr region, formerly a centre of coal mining and heavy industries, will successfully be transformed into an economic region based on “new technologies” and the service sector. The withdrawal of government from public services has come to a halt so that relevant parts of the welfare state will continue to exist. Privatization has placed some tasks in the hands of private business, but only in so far as costs could be reduced without reducing the quality of service. Critical infrastructures (energy, communication, traffic) – despite the threat of Islamic terrorism – can be considered safe.

### **Figure 2: Illustration of the “neck and neck” scenario**

With regard to organised crime, opportunities for offenders have increased. At the same time, investments in police equipment in previous years have ensured that lags in technology of the police have not worsened, while technological innovation will remain a continuous challenge for police in the future.

The European Union remains on the level of 25 member states. A further expansion is not on the agenda. National legislation has been harmonized. Overall, the criminal justice system has been improved in a way that it can effectively respond to the increasing mobility and technological capacities of offenders.

The optimistic outlook reflected in the “neck and neck” scenario is contrasted by some premises that in the view of the participating experts underlie all three scenarios. One of these premises is the growing cleavage between rich and poor, which is expected to have a negative effect on the general legitimacy of the legal system and specifically on the willingness of migrants to integrate into the host society. The diminishing willingness to adopt German language and culture is expected to contribute to the emergence of so-called ghetto areas.

Threats from Islamic fundamentalist terrorism are also expected to increase. The same applies to new opportunities for criminal offences, especially regarding the increased volume of international monetary transactions.

But there are also some positive developments considered as given by the workshop participants. This applies to the modernization of infrastructures (road traffic, public transport, data communication). It is also thought as a given that the political interest in law enforcement will increase as well as media attention on problems of internal security.

The optimistic outlook of “neck and neck” scenario is primarily based on assumptions about how the economy will develop. The quality of countermeasures against organised crime, in contrast, is believed to only stay on the level of 2004 without any substantial improvement. The greatest challenges are seen in the area of social development where only economic influences are expected to take a positive effect.

### **Scenario “light and darkness”**

The second scenario, “light and darkness”, is less optimistic than the “neck and neck” scenario. In the world of “light and darkness” in the year 2009, life in Nordrhein-Westfalen is marked by a clear polarization within society. As in the “neck and neck” scenario, the economy will grow, but slower and with limited positive effects. Europe will also remain a “Europe of 25”, but the harmonization of legal systems is stagnating. Although all democratic parties recognize the need for modernising the German legal system, they are deadlocked over what concrete steps to take.

**Figure 3: Illustration of the “light and darkness” scenario**

The social groups that profit from economic growth are much more confined than in the “neck and neck” scenario, unemployment is on the increase, especially as a result of the transfer of jobs to cheap labour countries. As a consequence, persons with low levels of education and training, migrants with insufficient language skills and long-time unemployed are continuously excluded from the labour market.

On the other hand, immigration laws are amended to cope with the “over-aging” of the German Society to allow large numbers of foreigners into the country whose integration proves increasingly difficult. Ghetto-like living quarters develop and social instability increases to the extent marginalization processes are not buffered by economic growth. Liberal and growth-oriented policies reduce tax revenues and subsequently do not leave much room for welfare programs.

Police and private security businesses share the field of internal security in the face of increasing threats to critical infrastructure, especially stemming from Islamic terrorism. Law enforcement has to cope with growing deficits in technology while technological progress provides new methods and opportunities for committing crimes, for example in the area of communication networks. Internal security itself gains growing importance as a local factor for private investments and as a basic condition for economic growth. As a result, demands on the effectiveness of police will become more pressing.

The “light and darkness” scenario, by combining positive and negative developments, is placed between the “neck and neck” scenario and the “ap-OC-alypse” scenario.

**Figure 4: Illustration of the “ap-OC-alyse” scenario  
Scenario “ap-OC-alyse”**

While the “neck and neck” scenario represents the most positive future anticipated by the workshop participants, the “ap-OC-alyse” scenario represents the worst case for combating organised crime. In this “world” strong negative trends in the social development cannot be counterbalanced by a growing economy.

In 2009, economic stability further deteriorates while structural reforms and income levels stagnate. Unemployment is on the increase, so is the budget deficit. Tax havens, the globalised economy and the worldwide flow of money enable businesses to avoid taxation in Germany. In this situation there is no leeway for maintaining the social welfare system. Instead, the government is forced to withdraw from more and more public services.

Ghettoization leads to a destabilization of society. A change in trend is not visible as necessary reforms in economic and social policy are blocked by petty politicking. In the face of growing economic and social disintegration the legitimacy of the entire political and legal system suffers. Migration occurs without a framework of integrative measures and therefore produces a high conflict potential.

The unification of Europe progresses with 28 EU member states by 2009. Turkey and countries of the western Balkans are about to join the European Union. Large portions of society believe that the negative developments in Germany have been brought about by the EU enlargement, resulting in a loss of trust in EU institutions and principles.

The harmonization of the legal systems makes some progress. Advances are also made on the level of the German criminal justice system. However, the criminal courts are overburdened with an increasing case load. This leads

to a very pragmatic way of sentencing offenders, with “deals” on reduced sentences becoming the rule rather than the exception.

Police work is hampered by technological shortcomings, especially in the area of computer and plastic card crime. Organised crime offenders operate more and more internationally as a consequence of EU enlargement, the fully-developed German infrastructure of road, railroad and air traffic, knowledge about the differences of police systems with regional authority, and better ways of inter-offender communication. These developments take place as financial constraints directly impact on the number of organised crime specialists and their equipment.

These projections do not leave much room for optimism. Negative economic trends combine with a deterioration of social cohesion to produce a situation favourable for the expansion of organised crime and detrimental to an effectively functioning criminal justice system.

### **Consequences – strategic projects**

Scenarios must not be an end in themselves. The scenario-building organised by the Nordrhein-Westfalen police always focused on the formulation of action plans in response to possible future developments. The key question has been: What could be done in 2004 to be prepared for what successfully combating organised crime requires in the year 2009?

Answers to this question were sought through the use of SWAT (Strengths, Weaknesses, Opportunities, Threats) analysis. The challenge was to come up with strategies to build up existing strengths, eliminate weaknesses, exploit opportunities and neutralize risks in combating organised crime.

Overall, the discussion led to a total of 19 measures to be adopted in response to one or more scenario. Some proposals for action applied to all three scenarios. In this chapter, because of the confidential nature of the matter, the 19 countermeasures cannot be discussed in any detail. To illustrate the discussion, however, one of the recommended responses can be described here.

In the scenario “neck and neck” one recommendation was the intensification of scientific research on ghettoization; for the “light and darkness” scenario the development of strategic, preventive concepts of intervention were advocated; and in the “ap-OC-alyptse” scenario the strengthening of cooperation with other fields outside of police work (like science) was seen as a necessary response.

Following the formulation of scenario-specific recommendations, these were exchanged between the three scenario-groups in order to examine to what extent measures would be adequate for other scenarios as well. This resulted in a summary and ranking of the most important action plans which fit into all three “futures”. These devices were considered “future robust”

because they make sense under all foreseeable turns of events. With regard to the issue of ghettos, the future robust recommendation was finally defined as follows: “Intensification of criminalistic and criminological research in the field of organised crime with a focus on ghettoization.”

All nine future robust recommendations were clarified and translated into projects. Regarding the ghetto problem, a summary of existing research was drawn up and analyzed, as well as of the state of the art of preventive concepts and ways of detecting emerging ghettos. The outcome out of this review was that there is hardly any European and absolutely no German research on the influences ghettos and their informal networks may have on the development of organised crime. Thus, a logical next step would be the initiation of scientific research on ghettoization and organised crime which could provide the basis for better preventing and combating organised crime.

## **A tentative conclusion**

Scenario thinking in the opinion of the project group involved in the scenario building on organised crime is a proven instrument for analyzing the future and for developing strategic recommendations.

Working out alternative scenarios and recommendations based on these possible ‘futures’ by nature has to accept a level of uncertainty regarding the process, the quality of the outcome and the acceptance of the results. The level of uncertainty, however, can be reduced by ensuring an elaborated and rigidly structured communication process in combination with an interdisciplinary team of participants. This approach is costly, and it requires the time and involvement of a large group of persons. The results of the analysis have to justify the expenditure. Therefore, a regular evaluation of scenario projects is as important as the further development of prognostic tools.

Developing precise knowledge about the future was not the objective of this project – no one knows what the future may bring. But as the saying goes: “It is better to be vaguely right, than to be precisely wrong”. The analysis of current trends within the framework of the scenario approach enables us to get a deeper understanding of the possibilities and also the restrictions in our thinking about the future of crime. Against the background of the alternative scenarios the strategic recommendations that have been drawn from the analysis can claim to be reliable and robust.

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# Organised crime and corruption: The case of the Sicilian mafia

*James L. Newell<sup>1</sup>*

## Introduction

The purpose of this paper is to ask why, and under what conditions, states and their representatives become complicit in the activities of organised crime as popularly understood. Our thesis is that the latter cannot exist without considerable assistance on the part of agencies of the state (see McIntosh, 1975). This is so, we believe, not just in the obvious sense that organised crime is likely to be more deeply rooted where the state's counter measures are weak or ineffective. Rather what we want to suggest is that such criminal phenomena require for their existence the positive and active collaboration of a minimum number of strategically placed actors within the machinery of state.

Our focus, we have said, is on organised crime 'as popularly understood'. I conjecture that such popular understandings are for the most part drawn from images broadcast by the mass media of communications. As Paoli (2000a:94, my translation) has pointed out, these 'often allude to powerful and mysterious criminal organisations whose origins and composition are variously Italian, Russian, Turkish or Albanian'. Therefore, popular understandings are assumed to see organised crime as the activity of large, powerful organisations having a complex internal division of labour, even though these representations may not normally be articulated in terms quite as precise.

Whatever the precise nature of popular understandings, it has long been recognised, in academic circles, that organisation is a matter of degree. Therefore, there is no easy and uncontroversial way to distinguish, for analytic purposes, between 'organised crime', on the one hand, and criminal activity not belonging to this category, on the other. As Donald R. Cressey (1972:12) put it: 'There is some degree of organization even in a group of two middle-class girls who, on the way home from school, drift into Woolworths and shoplift some lipsticks'. As a result, the term is easily abused

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<sup>1</sup> The author is Professor of Politics at the University of Salford.

for propaganda purposes. Politicians can justify applying it, without qualification, to some given context (such as drugs markets) even though they may be aware that the connotations of the term for the public(s) they are addressing utterly fail to justify such usage. For example, organised crime groups operating in drugs markets, are by all accounts almost all small, ephemeral and unsophisticated (Van Duyne and Levi, 2005).

From this, it does not follow that nothing that fits popular understandings of the term ‘organised crime’ has ever existed. This is an empirical question, and indeed I shall suggest that at least one criminal phenomenon – the Sicilian mafia – seems to fit such popular understandings in a large number, if not all, respects. If this is so, then, since the connivance of agencies of the Italian state has frequently been emphasised as a salient aspect of the mafia phenomenon (Della Porta and Vannucci, 1994; Santino, 1994), its analysis should help to throw light on the problem I started with: that is, why, and how such connivance takes place. The underlying assumption is the thesis that the assistance of the state is a necessary condition for the existence of organisations of this type.

### **State, trust and organised crime**

The justification for exploring connivance between states and organised crime stems from the fact that the links between the two serve to undermine the very principles on which liberal democracy builds its case to be superior to other forms of government. Such links imply that large numbers of its agents are busy wielding power in an *unaccountable* and *arbitrary* fashion while the state as a whole demands citizens’ loyalty by claiming to exercise power in an accountable way, according to norms of due process. This undermines the trust and confidence of citizens in public institutions, which weakens them. This diminishes their capacity in fact to provide the guarantees that citizens legitimately demand. By thus confirming empirically that citizens are correct to mistrust the capacity of public institutions to protect them, it legitimises the search for alternative, illegal, means of obtaining security. In other words, it ensures that illegality feeds upon itself (Gambetta, 1993).

This outcome is one that is neither abstract nor hypothetical, but concrete and real. The example of organised crime I have chosen to work with is one that has been described as ‘a state within a state’, whose control of territory allows it to ‘tax’ commercial activity both legal and illegal. It has been estimated that up to eighty percent of legal enterprises in the city of Palermo routinely pay protection money to the mafia (Re, 2005). The not surprising consequence of power such as this is considerably to depress the prospects for

economic growth and development. If the mafia's power varies from area to area, it appears that in those areas where it is strong, it has been capable – in a region that has persistently lagged behind the remainder of the country in any case – virtually to eliminate economic growth altogether.<sup>2</sup> The extent of mafia infiltration of the institutions of local government is such that between 1991 and May 2005, no fewer than 135 town councils (of which all but one were in the south) were dissolved because of suspected infiltration of this type (Maresa and Serpone, 2005). What it means to live in such localities, 'where the free exercise of even the most elementary civil rights is infringed on a daily basis' (Maresa and Serpone, 2005) can only be guessed at.

## **Organised crime and the state**

In a recent article on the illegal trade in drugs, Letizia Paoli (2003:20) argues that 'the great majority of drugs deals, even those involving large quantities of drugs, are carried out by numerous, relatively small, and often ephemeral enterprises'. The reasons for this are not circumstantial, but rather can be understood through a process of theoretical reasoning deriving from the constraints of illegality itself. That is, product illegality – or, more accurately, the illegality of the transactions involved – makes it impossible to have recourse to the state for the enforcement of contracts. The knowledge that this is so creates a strong incentive for market actors to swindle and cheat each other. The mistrust that results is self-reinforcing in that it induces each party to engage in precisely those behaviours that confirm for the other party that s/he was correct to be mistrustful in the first place. In turn, the absence of trust makes large-scale organisation difficult if not impossible. It means that enterprises cannot retain large numbers of employees, or integrate upstream or downstream, as all these things increase the number of points of potential information leak, thus increasing the chances of arrest and confiscation of assets (see Van Duyne et al., 2003). It means that enterprises cannot get access to capital for expansion as they can offer no credible guarantees to creditors concerning the security of their capital. (Large consignments of contraband can be delivered on credit, but interceptions have to be proven (Van Duyne, 2000).

Since in such cases the small scale of activities is a direct, almost logical, consequence of their illegality, we should expect to find that other illegal

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<sup>2</sup> Between 1991 and 1995, for example, while Gross Domestic Product for the economy as a whole rose by 5 percent, the corresponding growth for Sicily was just 0.5 percent, thus helping to increase the already very large economic gap between northern and southern Italy (Marletta, 2006).

activities – such as the cigarette black market in Germany, studied by von Lampe (2003) – also have this characteristic. Von Lampe analysed a variety of data on offenders known to have been involved in the smuggling and distribution of untaxed cigarettes in Germany between 1990 and 1997. His conclusion (2003:59) was that ‘the cigarette black market in Germany seems to be characterised by low-density networks comprising small, simply structured enterprises and individual entrepreneurs, who perform relatively simple tasks’. This conclusion is the more striking for the fact that the cases he chose for analysis were apparently deliberately selected so as to reflect the most complex of the groups that had come to the attention of the authorities.<sup>3</sup> Probing the matter further, we can point to the following commonalities between the groups studied by Paoli and by von Lampe:

- ☛ small numbers: in referring to the size of groups involved in the production and distribution of illicit substances in Italy, Germany and Russia, Paoli’s report mentions figures none of which exceeds six; von Lampe’s report refers to an analysis of groups involved in the procurement and distribution of untaxed cigarettes whose size varied between two and eight members;
- ☛ ephemeral existence: ‘In Germany as well as in Italy and in Russia, many drugs enterprises are ‘crews’: loose associations of people, which form, split and come together again as each opportunity arises’ (Paoli, 2003:22). In the cigarette black market, ‘... ‘criminal labourers’ tend to be hired only for one specific task or, ... only for a limited period of time... patterns of cooperation among participants... do not tend to be embedded in criminal subcultures...’ (von Lampe, 2003:59–60). This is different when the organisation is formed by members of an extended family, or if the smuggling organisation keeps the whole line of trade line in its own hands, as Van Duyne (1996) observes for the case of the wholesale transport of hash transport;
- ☛ lack of sophistication: both reports point to an absence of hierarchy and of complex divisions of labour within the groups studied.<sup>4</sup>

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<sup>3</sup> Nevertheless, this does not exclude bigger organisations when the size of shipments increases, as was demonstrated by Van Duyne (1996; 2003). The nature and size of the organisation usually reflects the nature of the core business. In cases of contraband traffic, smaller organisations do have a safety advantage.

<sup>4</sup> One should, however, bear in mind that in both reports the phenomena referred to are smuggling operations, which require more cunning than sophistication: see the comparison between the Dutch ‘Koppelbaas’ (illegal labour intermediary) and illegal cartel conspirators in Van Duyne’s contribution to this volume.

This (mixed) evidence conflicts with what is implied when journalists and others outside the academic community use the term ‘organised crime’ in connection with markets of the kind discussed above. When they use the term they imply – contrary to most empirical findings – that the groups involved

- are large,
- have a ‘permanent’ existence, independent of their members and
- have a sophisticated internal division of labour.

If such groups are more than a figment of the imaginations of media personnel (wanting to sell newspapers, TV programmes and films), of law-enforcement officers (wanting more resources) and/or of governments (aware that citizens worried by ‘organised crime’ (and ‘terrorism’) tend to be less critical than otherwise of the actions of their rulers), then the existence of groups with these characteristics is necessarily due to their success in overcoming the constraints – if the theory built on the constraints of illegality is correct. And since the latter ultimately stems from the fact that criminal activity by definition takes place in opposition to the state and its personnel, logically, overcoming the constraints of illegality can only be achieved by means of the acquisition of de facto immunity through the corruption of public officials. Empirically, corruption, and what might in rough terms be acceptably referred to as ‘organised crime’, do appear to go hand in hand. For example, Haller (2000), argues that, in America, though criminal enterprises are often of brief duration and small dimensions, one of the principal factors that explains the collaboration that sometimes takes place between criminal entrepreneurs is the systematic corruption which often allows the authorities to bring order to the illegal activities going on in a given area.<sup>5</sup>

However, as Reuter (2000:68–72) and others have noted, successful corruption of state personnel is by no means easy to achieve. Reuter’s argument is that on the one hand, both the authorities and the illegal entrepreneur have an incentive to reach a corrupt agreement. By allowing the entrepreneur to attain a monopoly position in the market concerned, such an agreement raises the income of both corrupt authorities and entrepreneur alike. On the other hand, where more than one law enforcement agency has

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<sup>5</sup> One can, of course, also reason differently: crime-entrepreneurs only bribe if their undertakings make this necessary. Smugglers passing permeable borders usually do not have to bribe, even with large shipments. Protection entrepreneurs, often more visible and identifiable may have to enter a corrupt agreement with the upperworld. See Van Duyne (1997) where he differentiates between executive level corruption, corrupt law enforcement interaction and corrupt strategic interaction.

jurisdiction in the area concerned, corrupting any one of them cannot buy the certainty of immunity from prosecution, but only reduces its likelihood. It may lead entrepreneurs who do not bribe to report the corrupt agreement to one of the other agencies. It might, if corruption is successful in allowing the entrepreneur to emerge as a monopolist, arouse the suspicions of other agencies.

But we might raise other, arguably more fundamental questions. First of all, Reuter seems not to notice that corrupt exchanges themselves constitute an illegal market and that therefore all the obstacles in the way of the efficient and effective functioning of such markets must apply here too. In particular, the inability of the parties to rely on the state to underwrite the corrupt agreement and therefore their inability, all else being equal, to trust one another to maintain their side of the bargain must ensure that such bargains remain rare. Second, if the self-generating mechanism built into corruption (della Porta and Vannucci, 1994) makes it reasonable to think that such problems are likely to be less serious the more widespread corruption is already, this leaves unanswered the question of how it gets going in the first place. In particular, if the argument is that large, durable and complex criminal organisations owe their existence to initially small organisations successfully making corrupt overtures, we might suppose that the likelihood of success of such overtures will be severely limited by the organisations' small size to begin with. Precisely because of their small size, and especially if the jurisdictions of law enforcement agencies are complex, these organisations will not have the resources required to bribe enough officials on a sufficiently regular basis to obtain the consistent immunity from prosecution that will allow them to expand. Third, it is rarely the case that the parties to a corrupt transaction can achieve their objectives through that transaction alone; rather, corrupt exchanges almost always require the creation of complex networks (Della Porta and Vannucci, 1994). If the mafia, for example, channels votes to a politician in exchange for the latter's assistance in securing immunity from prosecution, the politician will more than likely have to intervene in the judicial process by bribing public prosecutors, judges and others involved in processing given cases through the judicial system. The latter in their turn might have to bribe still other judicial officials bearing in mind that, if these become suspicious that cases are not being dealt with properly, they will be tempted to blow the whistle unless their silence can be bought too.

Together, the three points set out in the previous paragraph point to two startling conclusions. First, if, as suggested by one-time US Chief Justice, Earl Warren, it can be taken as a 'rule of thumb' that corruption is the basis of organised crime (cited by Cressey, 1972) then, since it itself constitutes an illegal market, corruption cannot on its own explain the existence of *organised*

crime. It merely shifts the necessary focus of explanation back one place. For all the constraints of illegality that apply to the crime entrepreneur's principal activity must necessarily also apply to his corrupt exchanges. Second, 'organised crime' underpinned by corruption can only exist because the corrupt networks involved are sufficiently extensive and stable as to provide the degree of freedom from the interference of law-enforcement agencies necessary to allow the crime organisation(s) relatively undisturbed continuity. In short, 'organised crime' as understood in popular parlance can only exist to the extent that it is aided and abetted by the systematic complicity of large numbers of strategically placed agents of the state. Therefore, accounting for organised crime requires explaining why and how such complicity takes place.

## **Cosa Nostra**

To address this issue, then, we shall take the example of the Sicilian mafia, which, until recently, occupied a special place in the public imagination, often being thought of as the most 'developed' or 'sophisticated' example of organised crime available. Prime facie, there would appear to be a strong case for this view. In the first place, the organisation is large (law enforcement sources suggest a membership of about 5,000 in addition to a far larger number of collaborators),<sup>6</sup> *enduring (it was already mentioned in the mid 19<sup>th</sup> century), and it has a sophisticated internal division of labour. As a result of the evidence provided by mafiosi who have turned state's evidence, it is known that the Sicilian mafia is a single, unified structure having a specific name – Cosa Nostra – as well as organs of government regulating its internal life and relations between its constituent groups, or 'families'). In the second place, it is 'more than a criminal gang willing to use violence . . . more than criminal activity that happens to be organised' (Anderson, 1995:33). Rather, it can be conceived of as exercising monopoly power and the ability to enforce agreements through the exercise or threat of violence, by which it enjoys, in the areas where it is present, unofficial jurisdiction over other activities both legal and illegal. By contrast, many other criminal entities to which journalists often apply the term 'mafia' (such as the so-called Russian, Turkish or Chinese mafia) are ones about which too little evidence is available to be certain that they are structured in a way similar to Cosa Nostra. Evidence drawn from local crime groups belonging to the ethnic categories in question points away from the idea that they are part of larger organisations (Paoli, 2000a: 104).*

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<sup>6</sup> 20,000 is a figure that appears to be rather frequently mentioned.

Prior to the 1980s, scholars often argued that popular, mass media-based conceptions of the Sicilian mafia were false. As far back as 1889, the Italian ethnographer, Giuseppe Pitrè famously wrote:

*Mafia is neither a sect nor an association, it has no regulations or statutes. The mafioso is not a thief or a criminal ... Mafia is the awareness of one's own being, an exaggerated notion of one's own individual strength ... The mafioso is someone who always wants to give and receive respect. If someone offends him, he does not turn to the Law (quoted by Dicke, 2004:90).*

This was a view echoed after the Second World War until the 1980s by social scientists for whom the term could be applied to modes of behaviour and sub-cultural traits but for whom 'the mafia' conceived of as an enduring organisation did not exist (Paoli, 2000a:88). With the information that has come to light since then, it is possible to concur with the view of John Dickie (2004:9) who has argued that if '[c]ountless films and novels have helped lend a sinister glamour to the mafia', '[i]t would be both pious and untrue to say that the mafia presented in fiction is simply false – it is stylized'.

More than this, the available evidence suggests that the mafia shares at least some of its most essential characteristics with certain other criminal groups operating in southern Italy (notably the N'drangheta in Calabria and the Camorra in Naples) – implying that the term itself might fruitfully be used in a generic sense to refer to a particular type of organised crime of which it, Cosa Nostra, is just one example. Such an assumption is implicitly made by Article 416 bis of the Italian penal code which establishes the offence of being a member of 'a [criminal] association of a mafia type', the latter being defined as one where

*those who belong to it make use of the power of intimidation of the obligations of membership, and of the state of subjugation and of the conspiracy of silence that derives from it, to commit crimes; to acquire, directly or indirectly, the management or control of economic activities, franchises, licences, contracts and public services; or to realise profits or unfair advantages for themselves or others or else with the purpose of obstructing the free exercise of the [right to] vote or of procuring votes for themselves or others at elections (my translation).<sup>7</sup>*

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<sup>7</sup> L'associazione è di tipo mafioso quando coloro che ne fanno parte si avvalgono della forza di intimidazione del vincolo associativo e della condizione di assoggettamento e di omertà che ne deriva per commettere delitti, per acquisire in modo diretto o indiretto la gestione o comunque il controllo di attività economiche, di concessioni, di autorizzazioni, appalti e servizi pubblici o per realizzare profitti o vantaggi ingiusti per sé o per altri ovvero al fine

Meanwhile, Annelise Anderson (1995) refers to the concept of ‘a mafia’ – arguing that one of its defining characteristics is the performance of governmental functions ‘in that sphere where the legal judicial sphere refuses to exercise power’ (1995:34) – the clear implication being that the concept is one whose range of application extends beyond a single organisation. Indeed, this is a position which is presupposed by common parlance when the term is applied beyond the sphere of criminal activity alone to refer, colloquially, to any secret arrangements and agreements designed to regulate, within an organisation or market, activities in ways that deviate from those prescribed by official rules, to the advantage of the group operating the secret arrangements and agreements.

Cosa Nostra has all of the distinguishing characteristics of a mafia described in the previous paragraph. In the first place, it is a secret organisation. If secrecy serves to protect it from the state’s law enforcement measures, then secrecy is in its turn underpinned by strict rules concerning the recruitment and behaviour of ‘men of honour’. Recruitment is by invitation extended only to those for whom there is sufficient evidence of their reliability. Novices are required to go through rites of initiation through which they swear life-long loyalty to the organisation. Men of honour are required, on pain of death, not to reveal their membership or the affairs of Cosa Nostra to anyone outside it. Within the organisation, information is shared among members on a strictly ‘need-to-know’ basis, its circulation being thereby reduced to the indispensable minimum. Because of this, and because the organisation is not a rational-legal bureaucracy (so that the struggle for power within it is constant), paranoia among members is acute (Dickie, 2004:6). If this contains an implicit threat to the organisation’s integrity, then there are rules and norms of behaviour that serve to contain mistrust. Of these, the most heavily sanctioned is the one that obliges members when speaking about Cosa Nostra’s affairs never to lie to each other. At the same time, loquacity is frowned upon: the man of honour must refrain from asking too many questions in case it is taken as a sign of undue curiosity and arouses the suspicion of his interlocutor. Men of honour may not introduce themselves as such, to other members, on their own initiative because to do so deprives both of the certainty that the person with whom they are speaking is in fact what they say they are. Rather, such introductions require the intervention of a third member who knows both of them as ‘men of honour’ and can thus provide each with the necessary assurances. According to ex-mafioso Contorno it is sufficient in such circumstances for

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di impedire od ostacolare il libero esercizio del voto o di procurare voti a sé o ad altri in occasione di consultazioni elettorali.

presentations to be made by means of the phrase ‘Chistu è a stissa cosa’ (‘This is the same thing’) for the person so informed to have the certainty that the person being presented to him is in fact a member of Cosa Nostra.<sup>8</sup>

It is the paradoxical combination of acute paranoia and norms of behaviour that allay but do not entirely eliminate mistrust, that give Cosa Nostra a robustness that few other criminal organisations seem able to match. On the one hand, paranoia enjoins extreme caution; on the other hand, strict norms of behaviour have created sufficient certainty to allow the development of a stable pattern of internal organisation with a complex structure of roles and a highly formal division of labour. The latter is based, first of all, on the ‘family’, the organisation’s most basic unit, one that is defined on a territorial basis insofar as it is recognised, by other families within Cosa Nostra, as having jurisdiction for a given geographical area, usually, a town, city or part thereof from which it derives its name. The activities of family members, known as ‘men of honour’ or ‘soldiers’ are co-ordinated, for every ten of them, by a ‘capodecina’, and governed by an elected family head, sometimes known as a ‘rappresentante’.<sup>9</sup> The activities of the various families are co-ordinated by the ‘commission’ or ‘cupola’, a body whose territorial jurisdiction corresponds roughly with the province and which consists of the ‘capi-mandamento’, that is, the representatives of three or more territorially contiguous families. According to the revelations of Tomaso Buscetta, the man of honour who turned state’s witness in the early 1980s, the commission for Palermo (where nearly half of the 100 families in Sicily have their territory) dominates Cosa Nostra.<sup>10</sup> But he also suggested that, as a consequence of the ambitions of the Corleone mafia to acquire internal hegemony, there had emerged an inter-provincial body with the role of managing the affairs of several provinces.

Each family seeks to acquire a monopoly in terms of the unlawful exercise of jurisdiction over economic life within its territory. That is, through the threat of violence it seeks to regulate and to ‘tax’ economic activities both legal and illegal. ‘This allows it to reap most of the rents from... illegal

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<sup>8</sup> ‘Cosa Nostra: le regole della mafia siciliana’, [http://digilander.libero.it/inmemoria/cosa\\_nostra.htm](http://digilander.libero.it/inmemoria/cosa_nostra.htm).

<sup>9</sup> If elections appear for the most part to be a formality, such that their ‘guarantee’ function is fundamentally undermined, then the centrality of violence and the threat of violence in the life of Cosa Nostra prevent the emergence and consolidation of alternative mechanisms for the peaceful transfer of power. At the same time, the fact that violence is a resource potentially available to all perpetuates the presupposition that members of a family are equal. Consequently, though its principles are constantly violated, democracy has not been formally abandoned within the organisation (Paoli, 2000b:45-9).

<sup>10</sup> See, for example, the information offered at <http://www.capitanoultimo.it/d/antimafiadoc3.htm>

transactions without running the full cost and risk involved in the direct management of the businesses' (Fiorentini and Peltzman, 1995:2). This comes down to a quasi-rule making or governing role through which it settles disputes and underwrites illegal transactions. It is able to do this, since perpetrators of the latter are unable to seek the protection of the agencies of law enforcement. They must instead rely on the mafia, which is thereby able to sell, privately, the protection that would otherwise be provided publicly, by the state (Gambetta, 1992). In the case of legal activities, Cosa Nostra is able to rely on the general 'conspiracy of silence' or 'omertà' that reigns in the areas where it is perceived to be strong. What counts are public perceptions: by means of a self-fulfilling prophecy, the belief that the organisation has widespread influence and that approaches to the police may therefore lead to reprisals thereby strengthens the organisation, giving substance to the fear from which it draws its strength in the first place.

Traditionally, the areas of Cosa Nostra's greatest strength have been thought of as the three westernmost provinces in Sicily: Palermo, Trapani and Agrigento (Figure 1). Relatively recent data, however, suggest that some redistribution has taken place and that provinces such as Ragusa, Enna and Messina, once thought to be relatively free of mafia influence, may have overtaken the traditional strongholds (Table 1). Of course the data has to be treated with caution. For the reasons set out in the previous paragraph one might expect mafia influence actually to be at its greatest in precisely those provinces where the numbers of accusations of mafia involvement are at their lowest. Similarly with mafia-related murders: in a sense, a killing indicates that there has been a failure in the exercise of power, while the figures, higher or lower, may reflect variations in the efficiency of law enforcement rather than mafia power as such. What does seem clear is that if we are entitled to attribute at least some degree of construct validity to the figures, then the mafia's strength is pretty much confined to Sicily. This in turn suggests that the more colourful images depicting Cosa Nostra as some sort of multi-national corporation are almost certainly false (Paoli, 2000b). Table 1 suggests that, leaving aside other places, it is hardly present in the remainder of Italy.

Figure 1 Sicily and its provinces



Source: <http://dieli.net/PhotoAlbumPage/graphics/PA05/polMapTH.gif>

Table 1 Numbers of persons reported to the authorities for membership of criminal associations of the mafia type (1996-98) and mafia-related killings (1998)

Province	Nos of persons reported for membership of mafia-type association per 100,000 inhabitants, 1996-98	Nos of mafia-related killings per 100,000 inhabitants, 1998
Trapani	7.7	2.3
Palermo	8.7	4.0
Messina	12.0	2.9
Agrigento	3.1	6.3
Caltanissetta	41.5	10.6
Enna	52.8	10.9
Catania	44.2	16.4
Ragusa	87.4	3.3
Siracusa	15.5	0.0
Sicily	24.7	6.9
Italy	5.0	3.6

Source: Censis (Centro Studi Investimenti Sociali [Centre for Social Studies and Policies]), 'L'analisi dei dati statistici: una mafia meno visibile ma più pervasiva', [http://www.svileg.censis.it/inizia/catania99/c99\\_02.htm](http://www.svileg.censis.it/inizia/catania99/c99_02.htm)

Multi-national corporations are of course enterprises having organisation-wide goals to the achievement of which the activities of all of their members are oriented. A number of features of Cosa Nostra, however, point away

from the idea that it is able to function as an enterprise in this sense. First, as an organisation whose unitary nature comes from the fact that it is made up of a number of structurally homologous units (the families) each of which is recognised by all of the others as forming part of the same association, it is held together by what Durkheim (1933) called ‘mechanical solidarity’. That implies the awareness of likeness and similarity, common rituals and routines. Enterprises, by contrast, are entities whose unitary nature comes from the differentiation and specialisation of units within them, and that are therefore held together by ‘organic solidarity’ or the awareness of all units of their dependence on each of the other units. If this interdependence makes profit-maximisation possible, in the case of structural segmentation and mechanical solidarity, the lack of differentiation makes the emergence of, and mobilisation for the achievement of, organisation-wide goals much more problematic.

Second, structural segmentation diminishes the prospects for the emergence and consolidation of organisation-wide goals still further by undermining the authority of centralised structures of command and co-ordination. Until the 1950s, such structures did not exist in Cosa Nostra but then emerged as a means of meeting the families’ common interest in avoiding the attention of the authorities. Thus it was that the Palermo commission was entrusted with the task of pacifying inter-family disputes and given sole authority to sanction the assassination of journalists, politicians and representatives of the state. But both it and the analogous regional commission set up in the 1970s suffered in the execution of their tasks from the fact of being collegial bodies and of having no independent staff of their own through which to enforce their decisions. From the early 1980s, it looked as though some kind of effective centralised command structure might emerge with the efforts of the ‘Corleonesi’.

This alliance of families built around the Corleone family and its leader Totò Riina, strove to gain control of these bodies as a means of establishing their own hegemony within the organisation. But though they were successful for a time, they were never able to institutionalise their power. On the one hand, the arbitrary quality of their exercise of power was by its very nature unable to find any legitimacy and therefore self-defeating. On the other hand, as a radical departure from the principle of symmetrical equality embodied in a segmented structure that had stood the test of time, the new regime was never able to overcome the perception that it represented an illegitimate deviation from the natural order of things (Paoli, 2000b:75).

Third, at the level of the individual family, the possibilities for coordinated action of the entrepreneurial kind are weakened by the contradictions inherent in the nature of the contract that the member stipulates with the family to which he belongs. On the one hand, coordinated action requires

binding norms of behaviour that make possible the exercise of leadership. From a certain point of view this is considerably facilitated by the ‘status contract’ that is formalised at the outset of membership of the organisation. The contract sustains the social authority of the family head and therefore his ability to direct the activities of the entire group by stipulating between member and group ‘a life-long pact that requires the acceptance of a new social status where one must “subordinate all previous allegiances to the Mafia”’. Under such arrangements, ‘there is a process of fraternisation –new members are made brothers of the “family” and are “bound to share a regime of generalised reciprocity.”’ (Standing, 2003) such that the organisation takes priority over everything else: obedience to its rules and its leaders is expected to be unconditional and unquestioning. On the other hand, however, generalised reciprocity does two things. First, by engendering loyalty it strengthens the possibilities for agreements of a more specific, instrumental kind among members. But the more significant such instrumental relations become, the more they undermine the principles of solidarity and equality underlying generalised reciprocity. Second, generalised reciprocity allows the brutal exploitation of followers by leaders making it possible for the former to use the latter for their personal ends without the latter being able to question anything. By thus inducing a heavy dose of scepticism and pragmatism in the attitudes and behaviour of ordinary members, generalised reciprocity in effect sows the seeds of its own destruction (Paoli, 2000b, ch. 2).<sup>11</sup>

For these three reasons, then, the image of Cosa Nostra as some sort of underworld trans-national corporation must be dismissed as being at variance with the facts. For about a decade, in the 1970s and 1980s, Cosa Nostra members were, it is true, heavily involved in the international drugs trade from which they made very large sums of money. But, precisely for the reasons given in the preceding paragraphs, such involvement was the involvement of small groups on time-limited projects knowledge of which would be shared with very few other members of the organisation. Rarely did this involve coordinated activity by an entire family, much less the

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<sup>11</sup> The testimony of mafia informer Gaspare Mutolo illustrates well how exploitation facilitated by norms of unquestioning obedience has at times been so ruthless as eventually to undermine loyalty altogether, provoking defection: ‘When I joined Cosa Nostra and I found myself killing people, I calmly thought that there had to be a reason for killing someone. Later, as time passed, I understood that things were going too far, but still for me it was normal to accept it. I felt that my conscience was clear because perhaps I thought: “I’m being ordered to kill someone and I have to do it because I can’t refuse”. The change, the second thoughts were due above all to all these people, killed without reason, to whom I felt very close; one can feel close even to animals, and therefore even more so to friends. But the most terrible thing for me was when they started killing women and even children’ (CPM, 1993: 1224, my translation).

organisation as a whole (Paoli, 2000b). Moreover, Cosa Nostra members have never been able to become anything like significant players in any international market because the organisation, by its very nature, has a limited pool of potential members from which it can recruit. Since the pool is essentially confined to those who are already part of the mafia subculture, the organisation's ability to acquire the specialised knowledge and contacts that would be required to enable it to acquire a position of power in international illegal markets is severely limited (Paoli, 2000a). Surveying the European drug markets Van Duyne and Levi (2005) fail to find evidence of mafia domination either.

Insofar as it is possible to talk about the organisation's specific 'goals' or 'purposes', then, one is forced to the recognition that these are varied, and change over time. For example, personal enrichment seems to have become a significant ambition for Cosa Nostra members only from the 1950s as a result of the large-scale economic, social and cultural changes, which from that period overtook Italy as a whole. As a consequence, social position and status became closely tied to money and the possession of wealth (Paoli, 2000b). Means of acquiring money have been both illegal and legal. Frequently the proceeds of illegal activities are invested in legal, mafia-controlled, enterprises. Cosa Nostra, it seems, has always drawn its members from persons active in a wide variety of perfectly legal occupations and there is no expectation that on joining members cease to carry on these occupations. If there have been specific, enduring goals driving membership of the organisation, then they have been mutual assistance (Paoli, 2000b), the exercise of jurisdiction over the areas where it is present, and the acquisition of social power. As mafia informer, Francesco Marino Mannoia explained:

Many people think that one joins Cosa Nostra for the money. This is only partially true. Do you know why I became a man of honour? Because previously in Palermo I was a Mr Nobody. After that, wherever I went, heads would be lowered. And this, as far as I was concerned, was something to which it was impossible to attach a price (quoted by Paoli, 2000b:208).

The significance of the social power of Cosa Nostra is an issue we shall consider in some detail as part of the analysis to which we now turn, that is, the part played by representatives of the state in ensuring the organisation's integrity and survival.

## **Cosa Nostra and the state**

We have already seen that, logically, large criminal organisations are only able to survive and prosper as such with the active collaboration of representatives of the state, by means of which they acquire *de facto* immunity. Emblematic of such collaboration in the case of Cosa Nostra is the story of informer Gaspare Mutolo. Though on the run in the 1970s, he was able to continue living in his usual district of residence and to send his children to the local school, registering them under their real name (CPM, 1993: 60). The conditions that must be fulfilled in order for immunity of this kind to be possible are, we think, four-fold:

1. the criminal organisation must exist in the first place, that is, all the conditions necessary for such organisations' initial emergence – especially, weakness of the state – must be met;
2. the state must need to call on the criminal organisation for services that it is not wholly capable of providing on its own;
3. the organisation must have a minimum level of popular legitimacy in the areas where it is present;
4. the state must be at least minimally democratic rather than authoritarian or totalitarian. We will make clear as we proceed why we think each of these is a necessary condition.

### **Weakness of the state and the emergence of the mafia**

The circumstances that gave birth to Cosa Nostra already reveal much of why the organisation has traditionally been able to rely on the connivance of the authorities. The details of precisely when and how it emerged in the aftermath of Italian unification in 1860 are not known. The political and social conditions that facilitated its emergence are known. These have to do with the characteristics of the state on the one hand and of Sicilian society on the other (Pezzino, 1994:9). When the unification of Italy was achieved, the state that came to be created found it extremely difficult, in Sicily (and much of the South in general), to acquire the characteristic that defines the modern state, namely, the exercise of a monopoly on the legitimate use of violence. There were at least three interlinked sets of factors responsible for this. First, poor road and rail networks placed geographical obstacles in the way of efficient administration. Second, the partial and incomplete abolition of feudalism in 1812 led to the persistence of centres of power in perpetual competition, as agents of social control, with the state. Third, the Italian state, after 1860, was, from the perspective of ordinary Sicilians, an alien imposition. The process of unification was far less the reflection of popular

pressure from below, than it was the reflection of the geopolitical ambitions of the rulers of Piedmont, and nationalist enthusiasms could hardly be expected to engage the energies of a population most of which was illiterate and had no right to vote (Newell, 2000:46). The measures the new state was obliged to take – from the extension of military service to the introduction of new taxes – in an effort to establish its authority brought new and unwelcome impositions. Unification brought economic difficulties insofar as it entailed the abolition of internal tariff barriers leaving southern manufacturers unable to compete with more efficient northern producers. There thus developed a vicious circle with public hostility undermining the state's ability to guarantee public security, while the state's inability in this respect fed public hostility.

This situation helped to fuel both the 'demand for' and the 'supply of' an organisation with the characteristics of Cosa Nostra. It meant, on the demand side, that the search was on for alternative means of providing public order and authority, with landowners wanting protection for their property, entrepreneurs the underwriting and enforcement of commercial contracts, the poor a means of defending themselves against exploitation and attacks from above (Hobsbawm, 1966:66-7). The mafia, as it were, offered something for everyone. On the supply side, the situation described above helped to sustain, among the population, attachment to precisely that 'code of honour' of which the mafia was the quintessential expression. Its main imperatives were and are: (1) to be aware of one's rights; (2) to assert and defend them in all circumstances; (3) to do so through recourse to one's own, independent, resources including if necessary those of violence, but (4) to do so to the complete exclusion of any involvement with the public authorities whatsoever. It was, and is, a code of behaviour that, as Hobsbawm (1966:56) has pointed out, develops wherever efficient systems of public authority are absent, or wherever the authorities are considered to be wholly or partly hostile (for example in prisons or among the lowest social strata) or indifferent to the things that really matter (for example in schools).

### **The state's need of criminal services**

All other things being equal, we would expect a state faced with challenges to its authority of the kind posed by Cosa Nostra throughout its long history to react with decisive measures of repression. Otherwise, in the extreme case, the very existence of the state itself is placed in jeopardy, for a mafia is a very particular type of criminal organisation. It represents not just a social nuisance, like petty crime, for whose repression the authorities are obliged to

accept responsibility. Rather, it acts as a potential focus for citizens' loyalties that is opposed to and incompatible with any possibility of loyalty to the state. By posing as an alternative source of the legitimate exercise of force it implicitly challenges the state's claim to a monopoly in this area, thus striking the state's public authority at its very foundation.

But precisely because the Italian state has traditionally enjoyed such low levels of popular legitimacy in Sicily, it has most often been unable to take the decisive action required: the police and carabinieri have for long been perceived in many areas of the south with hostility and suspicion and often find it difficult to gain public cooperation. Paradoxically, therefore, the state found itself up against the second of the above-mentioned conditions for complicity. That is, it found that it needed the mafia to help it carry out those functions associated with the maintenance of social order that it was unable fully to do on its own, and that it was easier to seek 'peaceful coexistence' with the organisation rather than its complete elimination. After all, though its members commit crimes, it rarely, if ever, does so as an organisation, in the name of the organisation as a whole. It is probably for this reason that until 1982, membership of the mafia was not in and of itself illegal. And though, when it comes to its own affairs, the mafia demands implacable hostility to, and refusal to cooperate with, the public authorities by members and citizens alike, it rarely engages in full confrontation with the institutions of government, nor has it ever called publicly for citizens to disobey the law (Paoli, 2000b:254). Indeed, the reverse is in most ordinary circumstances the case. In the interests of maintaining peaceful coexistence and a degree of immunity, Cosa Nostra is very careful to keep its actions within bounds. For it is aware that however much complicity it may achieve with the authorities, the latter have to repress violence and excesses that go beyond a certain point, on pain of their own public authority and thus existence being irrevocably threatened.

In the period between 1945 and the early 1990s, the state found itself obliged to rely on the mafia to help it carry out a social-order function of a very specific kind. That is, it found that because of the fear in ruling circles of the apparent threat posed by the Italian Communist Party (PCI), it was obliged to rely on and make use of the mafia's ability to influence, if not control, the votes of citizens in the areas where it was strong. Indeed, the PCI attracted between a third and a quarter of the votes and was the largest communist party in the West. The size and influence of the party was such that there were at least three specific reasons for turning a blind eye to mafia influence in elections.

First, the fact that the PCI was linked to a power block rivalling the geopolitical camp to which Italy belonged, gave rise to what De Felice (1989)

has defined as a situation of ‘dual loyalty’ (doppia lealtà): to the 1948 Constitution on the one hand and the Atlantic Alliance on the other. ‘As long as there was a possibility of the PCI legally coming to power, the two loyalties remained fundamentally incompatible, and provided the rationale for unconstitutional actions on the part of elements of the political class and state bureaucracy’ (Bull and Newell, 2005:99).

Second, fear of the PCI did more than merely justify illegal actions. It also provided experience of them inasmuch as it gave rise to an anti-communist underworld populated by affiliates of the Italian and American intelligence communities whose members were trained in information gathering, sabotage, communications and the hiding of arms caches (Bull and Newell, 2005:99).

Third, the PCI’s electoral strength, and therefore the potential cost of excluding it permanently from any kind of decision-making influence whatsoever, gave rise to a tradition of consensual decision-making in Parliament, allowing the Communists to participate in legislation without ever being formally included in governing majorities. In other words, the party’s strength ensured that coming to terms, through bargaining and compromise, with potentially hostile external forces became a routine and accepted part of decision-making in state and government circles in Italy.

## **A minimum of popular support in the region**

Naturally, the authorities would not have needed to come to terms with the mafia at all had it not enjoyed a degree of legitimacy and influence in the communities where it was present – and this is the third condition that must be fulfilled if mafia organisations are to acquire immunity from the state. The mafia has traditionally enjoyed a degree of popular support not only because it has provided services – protection and the enforcement of contracts – but also because it has reflected, in its own codes of behaviour, precepts of ‘honour’ extant in the wider society. This has given it a degree of popular authority such as to enable it to claim jurisdiction and to ‘tax’ commercial activities in its areas in a more or less routine manner. Such authority has enabled, in many instances, acquiescence to shade imperceptibly into collaboration – as the testimony of ex-mafioso Mutolo made clear:

When the entrepreneur then gets in touch and pays, he sometimes benefits too: first, because a friendship develops between the person who goes to collect the monthly payment, and the entrepreneur, who is thus able to see that the local mafioso is a normal person who

behaves that way for the money; and secondly because he has the guarantee that if something is stolen from him, those in mafia circles will make it their business to see that he gets back what has been stolen – or if someone cheats him, that there is available a whole circuit to force payment. Then again, there are business opportunities: for example, suppose that you are the owner of a firm that produces ashtrays and you sell, for example, a thousand, and I propose the setting up of a company that can sell ten thousand. You'll do your calculations and appreciate that the proposition is attractive; and then it will be up to me, through the districts of Palermo, to force shops to stock that type of ashtray. So it is not the case that the entrepreneur only loses: sometimes he gains. With the development of such a relationship, naturally, when a lady or a man comes to me and says, 'Listen, my son is about to get married and needs a job', I take the matter up among these factories and I find work for him. It's not a problem: one speaks to the owner and says: 'Take on one, two, three or however many there are'. It may be that the factory owner needs a couple of weeks or a month to dismiss someone else or to create the post but it is always possible to find a way to do it (CPM, 1993:1223, my translation).

### **The state must be at least minimally democratic**

Finally, it is difficult to think that criminal organisations like the mafia will be able to rely on any kind of collaboration on the part of the state where the regime in question is not at least minimally democratic. That is, such criminal organisations will probably get short shrift where the regime is authoritarian or totalitarian. The reason is that, while democratic governments base their claims to legitimacy primarily on procedural grounds (that is, they claim authority for their measures first and foremost on the grounds that the latter have been taken in accordance with norms of 'due process'), authoritarian and even more so totalitarian governments base their claims to legitimacy primarily on substantive grounds (that is, they claim authority for their measures first and foremost on the grounds that the latter correspond with what they consider best for the country). Authoritarian and totalitarian governments therefore find it especially difficult to tolerate power centres independent of the state. Indeed, the existence of such centres implicitly challenges such governments' presumption to have privileged knowledge of what is right and wrong for the country and is therefore threatening to them to a much greater degree than it is to democratic ones.

The action taken by the Fascist regime against the mafia appears to confirm this suggestion. Legend has it that it all began when, on an official visit to Sicily in May 1924, Mussolini found himself in the presence of the mayor of Piana dei Greci, the mafioso Don Francesco Cuccia, who, gesturing disparagingly towards the prime minister's bodyguards, asked: 'What do you need all those cops for? You are with me, you are under my protection' (Dickie, 2004:182). Whether this incident actually occurred or not, what is clear is that from the beginning Fascism found it difficult to put down roots in Sicily and the rest of the South. Yet as a movement based on the principles of integration, national unity and centralisation, its credibility and chances of remaining in power appeared to be bound up with how successful it would be in getting to grips with the South's difficulties and inserting the region firmly into national structures. At the same time, however, since it had taken power as a fundamentally conservative force, its scope for action was severely limited (Duggan, 1992:3). Effective action against the South's problems would have required attacking precisely those (legal) vested interests on whose support Fascism relied in order to remain in power. Under these circumstances a war against the mafia had a rationale that went beyond the generic one suggested in the previous paragraph: in the absence of many other politically feasible measures, it could be presented as the first step on the road to southern economic and social reform. In choosing for the task Cesare Mori, Prefect of Palermo, the regime chose a man whose moral rectitude and devotion to inflexible but rigidly impartial application of the law could reasonably be expected to make a not insignificant contribution to restoring the authority of the state in Sicily.

Things turned out somewhat differently. Mori was above all a man of action convinced that the mafia was the product of the weakness of the state. His vast round-ups would demonstrate, he thought, that things had changed: they would re-establish public confidence in the authorities and thus break the conspiracy of silence on which the mafia relied for its existence. Instead his actions led to an arbitrary and excessive use of force, including the use of hostage taking. The weakness of the state grew not, as Mori imagined, from a lack of determination in the use of force, but quite the opposite. That is, the state was weak in Sicily because, as an alien, arbitrary and repressive force, it was unable to win popular respect. Consequently, while Fascism was able to repress the mafia, it never succeeded in eliminating it.<sup>12</sup> This, however, does not undermine the basic point: that criminal organisations of the mafia type

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<sup>12</sup> In fact Mori's zeal led to such excesses that it soon became apparent that his anti-mafia campaign might bring far more costs to the Fascist regime than benefits. Thus it was that, in June 1929, 'Cesare Mori received a brief telegram from the Duce to tell him that his job was finished' (Dickie, 2004:190), the official line, during the 1930s, becoming simply that the problem had been resolved and that the mafia had been defeated.

are more likely to be able to rely on the support of the state in democracies than in authoritarian or totalitarian regimes.

### **The actors and mechanisms of immunity**

So far, then, we have seen, first, that criminal organisations of a mafia type can only exist if they have the active cooperation or at the very least the tolerance of agencies of the state; second, that there are four conditions that much be fulfilled for such cooperation or tolerance to obtain. Where this is the case, the organisation in question enjoys *de facto* immunity from prosecution (even though the immunity is not unconditional). The question remains: how is such immunity secured?

An apparently important channel through which it is secured in the case of Cosa Nostra is one that involves elected politicians – with whom the resources of violence and electoral support are exchanged for their intervention with the judicial authorities. Della Porta and Vannucci (1994: 382-7) point out that by making others aware of their contacts with the mafia, politicians acquire a reputation for being dangerous, which can help them advance their political fortunes in a wide variety of ways. The reputation for being dangerous itself discourages reports to the judicial authorities. Second, the mafia can help politicians by delivering votes to them. It appears to be able to do this, notwithstanding the secrecy of the ballot, in at least three ways: first, simply by the giving of ‘advice’. This works because, as W.I. Thomas (1923), famously pointed out, ‘a situation defined as real is real in its consequences’. In other words, it is enough for electors to believe that the mafia can know how they vote, and that it is able and willing to take reprisals, for the desired behaviour to be forthcoming and for the mafia thus to be able, in effect, to control the vote. Second, until the change of electoral law in 1993, parliamentary elections took place on the basis of the open list system of proportional representation whereby the voter could express up to four preferences among his or her chosen party’s list of candidates. Preferences could be expressed by writing on the ballot paper either the names of the preferred candidates or the numbers assigned to them. By telling voters what combination of names and/or numbers to write on their ballot papers, the mafia could, if not completely destroy the secrecy of the ballot, gauge how closely voters in its districts adhered to its instructions. Third, by obtaining one blank ballot paper, the mafia is apparently able to perpetrate electoral fraud. This works as follows: the mafioso fills in the ballot paper and gives it to a voter as s/he enters the polling station. Once inside, the voter obtains his or her ballot paper, but instead of using this paper, s/he

deposits in the ballot box the paper given to him or her by the mafioso, giving the mafioso his or her own blank paper as s/he leaves the polling station. The mafioso then fills in that paper, giving it to the next voter – and so the process continues. Writing in 1994, Umberto Santino (1994:131) noted that journalists' estimates had placed at four million the number of votes controlled in various ways by organised crime in Italy.

In return for the resources of violence and electoral support, the politician intercedes on Cosa Nostra's behalf, with the agencies of law enforcement. What gives such intercession the possibility of being successful are first, the power of public prosecutors, and second, the exposure of Italian judicial institutions to political pressures (Newell, 2005:170-3). Public prosecutors are powerful figures for a number of reasons that include: (1) their power, in practice, to initiate investigations not only at the request of outside bodies, but also on their own initiative in relation to crimes they think may have been committed; (2) (what some see as) a less-than-perfect separation between the role of judge and prosecutor in the Italian legal system;<sup>13</sup> (3) the scope for discretion given by the large number of laws on the statute book and the vagueness with which some criminal offences are defined.

These powers have traditionally made prosecutors the targets of politicians keen to have friends in the judiciary in order to avoid themselves becoming the object of investigations. And there are a number of 'points of access' at which politicians can seek, through informal relationships of connivance, to influence the work of prosecutors as cases are investigated and prepared for trial. First, the work of public prosecutors' offices is directed by judges of the Court of Appeal or the Court of Cassation whose responsibility it is, among other things, to assign cases to the prosecutors working under them. Directors of prosecutors' offices have the power to remove individual prosecutors from specific cases on grounds of 'grave impediment' or 'significant reasons of service'. Likewise, when cases are ready to be brought to trial, decisions have to be made about the individual judges to whom to assign them. Each court, and its associated public prosecutor's office, has jurisdiction over a defined

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<sup>13</sup> The complaint that there is a less-than-perfect separation between the role of judge and prosecutor in the Italian legal system arises from the fact that judges and prosecutors belong to the same professional body meaning that individual members of the judiciary can perform both functions. The initial phases of Italian criminal procedure consist of the collection and analysis of evidence by examining judges who must decide whether there are sufficient grounds to warrant proceeding to a trial. During such phases, judge and prosecutor are, it is claimed, materially joined in the person of the examining judge. At the trial phase, though judge and prosecutor are not literally joined (since the examining judge may not also form part of the bench at the trial) they are arguably one and the same for all practical purposes since the main body of evidence on which the court bases its decision is the written evidence emerging from the initial phases, and as members of the same body, examining judges and trial judges usually work at very close quarters.

geographical area, except that the Court of Cassation can move trials from a given jurisdiction ‘when security or public safety or the freedom of decision-making of the persons involved are prejudiced by serious local circumstances such as to disturb the trial and not otherwise eliminable’ (article 45 of the Code of Criminal Procedure, quoted by Pizzorusso, 1990:144). Second, Italian judicial institutions are exposed to political pressures for a number of reasons that include the fact that elections to the judiciary’s governing body, the Consiglio Superiore della Magistratura (the High Council of the Judiciary, CSM), have given rise to the existence of four organised factions which, though not formally associated with the political parties, have traditionally allowed politicians, through the factions closest to them ideologically, to influence a range of CSM decisions including the choice of the heads of judicial offices.

In exchange for acceding to their pressures, politicians are in a position to offer judicial officers favours in return – as exemplified by the case of Claudio Vitalone, and seven-times prime minister Giulio Andreotti, who was formally charged (though later acquitted) of mafia involvement in 1993:

According to the boss of the Roman Christian Democrats Vittorio Sbardella, the career of Claudio Vitalone, ex-magistrate, senator and Christian Democrat minister closely associated with Andreotti, resulted from a transaction between the two men: ‘Since Vitalone had no electoral or political support of his own he got Andreotti’s support by performing miracles in order to get him politically advantageous results by judicial means. What I mean is you can do something which will gain the appreciation of a politician either by judicial favours for their friends and supporters or, on the other hand, damaging political personalities who might damage your friend judicially’ (Della Porta, 1998:10).

As the testimony of mafia defectors bears witness (Della Porta and Vannucci, 1994:381-7), politicians who accept mafia-proffered favours find that they then become, in effect, ‘at the service’ of the organisation. This is because the resources of violence politicians make use of are potentially turned against them so that any perceived refusal to ‘maintain their side of the bargain’ may prove fatal. What makes such a prospect so powerful as a means of calling forth the desired actions on the part of the politician is the high degree of likelihood of its coming to pass: the mafia’s power rests fundamentally on its reputation, meaning that attempts to cheat it have a significance that go beyond the single transaction in question and threaten the power of the entire organisation. Reprisals are the price the mafia must pay in order to keep its

reputation intact. This in turn means that mafia-influenced politicians, while not fully integrated into the organisation, in effect become 'men of honour' for all practical purposes and that while, from one perspective, Cosa Nostra is an organisation that is outside and against the state, from another perspective it must be seen as being within, and part of the state (Santino, 1994:127).

## **Conclusion**

The foregoing description does not exhaust the mechanisms through which the mafia obtains immunity, much less does it exhaust the ones through which it secures the collaboration of the public authorities in pursuit of its substantive activities. A description of these additional mechanisms would include mention of the way in which Cosa Nostra succeeds in placing its own members in elected and non-elected public offices, its use of corruption, and how it is able to rely on freemasonry to provide suitable locales within which to establish multiple, on-going relationships with public officials of various kinds (Della Porta and Vannucci, 1994:411). There may be others. Our impression is that the nature of mafia-state interactions remains an under-researched area.

I have argued that accounting for the existence of large, enduring and complex crime organisations like the mafia requires explaining how, through their interactions with the state, they are aided and abetted by the public authorities. Doing so has the significant methodological advantage that it conforms to the philosophical precept according to which to 'explain' a phenomenon is to describe the underlying structures or mechanisms by which it is linked to the causes presumed to be responsible for it (Keat and Urry, 1975). However, it might be argued that such an exercise, which we have attempted here, leaves unanswered the very question with which we started: how are such transactions possible at all? That is, one can argue, as we have done, that the problem of trust associated with illegal activities implies that accounting for the existence of organisations like Cosa Nostra requires one to do more than suggest that they obtain immunity through corruption. And one can then proceed to describe in detail the (illegal) mechanisms, and transactions with public officials, through which the organisation obtains its immunity. However, even if one does this, one is forced to recognise that because these transactions and mechanisms are themselves illegal, they have a problem of trust associated with them too. Hence the suggestion that we remain with the very question with which we started. The situation is, we would argue, analogous to rational choice theories of voting, which cannot remain consistently rational and explain why individuals bother to vote at all

bearing in mind that the probability that the individual's vote will influence the outcome is extremely small and almost certainly outweighed by the costs of casting a vote. So the fact that the question remains, despite the fact that an organisation such as Cosa Nostra empirically exists, is in our view revealing of the limitations of 'rational' or 'economic' as opposed to 'sociological' accounts of organised crime of the kind we have offered here.

As we have seen, in the case of Cosa Nostra, the problem of trust is at least partially overcome by the organisation's own rigid internal rules, the degree of tolerance on which it can rely in the areas where it is present and the resources of violence at its command. But citing these factors only apparently solves the methodological problem as it abandons the basic assumption of rationality to focus on norms, values and sociological variables and begs the question of how it all got started.

In this paper I have suggested that the fulfilment of four conditions has enabled the Sicilian mafia to enjoy the degree of immunity required in order to enable it to exist: a weak state; the latter's reliance on the mafia for the fulfilment of social control functions it has been unable to fulfil entirely on its own; the degree of legitimacy enjoyed by the mafia in the wider society; the democratic qualities of the regime. Further research will be needed in order to establish whether our suggestion has applicability to similar organisations in other contexts.

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# The organisation of business crime

*Petrus C. van Duyne*<sup>1</sup>

## Hidden in the shadow of a fear image

Three offenders, well-dressed gentlemen from three countries, met regularly but stealthily in Switzerland at prearranged places no one knew about. They arrived at different times with different forms of transport. They were not allowed to use fixed telephone lines or a faxes, but could only use their pre-paid mobile phone. Moreover, in the towns where they met they were also not allowed to use credit cards, take money from cash dispensers or perform any other transaction, that might leave traces. For that reason the Swiss trustee (Treuhand), who was in charge of preparing and guiding these secret meetings, paid the hotel bills in cash with no names mentioned. This Treuhand functioned as caretaker, secretary and host, but had no other dealings with the businesses of the three gentlemen. He knew the trade figures, which would be discussed. He saw to it that the participants received these just a day before the relevant meeting, and that they were not taken home. After each meeting all documentary evidence was destroyed.

Who were these gentlemen and in what kind of business were they involved? Were they weapons dealers, cocaine traffickers, discussing the market opportunities and prices of their commodity; money launderers weighing the currency figures before pumping the dirty money of organised crime into the clean pipelines of the international financial system? They had none of these sinister characteristics. They were leading managers representing three major chemicals internationals: the Dutch chemical corporation *AKZO*, the German *Peroxid Chemical* and the French *Atochem*, which together controlled 85 percent of the European market of organic peroxides. For 30 years they formed a cartel until personal relationships soured and AKZO stepped out of the cartel. As any other common underworld villain, it ratted on its fellow 'criminals', for which the European Commission rewarded it with leniency.<sup>2</sup>

Though this cartel and others like the Dutch building cartel during the 1990s and the beginning of the 2000s in the Netherlands revealed equally

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<sup>1</sup> The author is professor of empirical penal science at Tilburg University.

<sup>2</sup> Because AKZO reported the cartel itself to the authorities, its fine of € 240 million was remitted. (Akzo Nobel en het peroxide-kartel, *NRC-Handelblad*, 5 February 2005.)

strong degrees of criminal organisational cohesion, these forms of organising crime have been ignored by those involved in the so-called ‘organised crime’ debate. This may be considered strange. Did not Sutherland (1961), the revered and much quoted author, label economic crime as ‘organised crime’? Despite this, there are hardly any indications of an ‘organised business crime’ awareness in the debate around the ‘organised crime’ issue. Since the 1950s, all kinds of ‘organised crime perpetrators’ have been put forward in this debate, dominated for some time by US organised crime models: (American) Italians first, followed by many other ethnic groups and/or the ‘usual’ lower-class suspects (Woodiwiss, 2003; Lampe, 1999). We also find a shift of attention from what was initially called ‘syndicate crime’, to networks and entrepreneurial crime (Levi, 2002) and more emphasis on the illegal-legal connection. Nevertheless, this shift of attention and broadening of focus has halted right at the corner of the lanes where the managers of peroxide cartel or their fellow managers have their humble villas. As far as Europe is concerned, the pretentious volume on ‘Organised crime in Europe’ edited by Fijnaut and Paoli (2004) aims to cover *all* aspects of organised crime, but still fails to devote a single line on business crime. (Basically it is just a voluminous ‘usual’ textbook focussed on the ‘usual suspects’, the ‘usual phenomenon’ and the ‘usual criminal policy’.) Has Sutherland’s statement, ‘white collar crime is organised crime’ been enshrined as ‘classic’ and considered just a relic for occasional reference?

Looking at the history of the European crime policy over the last two decades, one can observe that a fear of ‘organised crime’ has been dominant (at present overshadowed by the fear of ‘terrorism’). Before the emergence of this fear, during the early 1980s, economic crime (often under the label of ‘white collar crime’) received due attention, albeit more in literature and political debate than in actual law enforcement (Bequai, 1979; Leigh, 1980; Tiedemann, 1980). Though there was no evidence about the extent of the problem or that this criminal phenomenon was effectively tackled<sup>3</sup>, it was soon overshadowed by the much more intense fear of ‘organised crime’. If fraud received attention, it was because ‘organised criminals’ were supposed to have ‘stepped in’.<sup>4</sup> Even if not explicitly worded, this phrase implies the perception of a dangerous involvement of lower class hoodlums in ‘white

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<sup>3</sup> In some fraud areas there were (temporary) notable successes, for example concerning ‘black labour’ fraud and related fraudulent subcontracting (see Van Duyne and Houtzager, 2005).

<sup>4</sup> See Bequai (1979, p. 129): “Organised crime is serious problem of epic proportions and has permeated . . . every facet of our society”.

collar crime' businesses, turning this sort of crime into *real* 'organised crime'. It represents a perfect way of confusing acts and actors.<sup>5</sup>

In a climate of the usual 'verbal prioritising' large-scale commercial and tax fraud continued unabated. Changes in the VAT regime in the EU fanned large scale VAT scams (Aronowitz, et al., 1996; Van Duyne, 1993, 1999), while fraudulent subcontracting and 'black labour' fraud re-emerged again with the increased mobility of the European labour force (Van Duyne and Houtzager, 2005). Greedy managers were and are and were equally prepared to put their hands in the corporate till while 'cooking the books' for years.<sup>6</sup> The ensuing scandals got proper media attention, but not as 'organised crime', let alone that it was accompanied by a public fear management with statements like 'corporate crime is on the march' or similar anxiety-inducing phrases, which were commonly applied to 'real' organised crime.

Even if Sutherland is at present just an enshrined 'classic', there may be indications of a change in attitude towards his stand. The '2004 organised crime assessment' of the Council of Europe (2004) for the first time extended its attention explicitly to forms of economic crime, to reinforce it in 2005. Is the mind-set changing at the level of law-enforcement too? In the Netherlands 'distinguished gentlemen', like conspirators in a cross-border tax fraud and laundering scheme, and the main organisers in the building cartel were convicted for 'participating in a criminal organisation'. Is this an indication that organised business crime is coming out of the shadow of the fearsome 'organised crime' and will it also be surrounded by all the 'official' threat imagery and lingo thus far reserved for the 'others' (ethnic minorities, lower class crime-entrepreneurs, Italians and Russians) that captured the attention of policy makers, law-enforcement officers and scholars for so long?

Though a revival of the attention to business crime has helped to redresses one-sidedness, it should not lead to a new competing 'organised crime' discourse. Instead, empirical questions about the organisation of crime will have to be raised: how do criminals (irrespective of the colour of their collar) organise their criminal activities for profit, given the nature of the commodities traded and their position in the market? These are the same questions, which should have been raised in the 'organised crime' debate and the related assessments in the first place. Given the less-than-meagre outcome of the 'organised crime' assessments, I will not rehearse that debate.<sup>7</sup> Instead I

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<sup>5</sup> Ethnic minorities got also their proper role and place as drug traffickers in the organised crime landscape.

<sup>6</sup> ENRON and Worldcom have their predecessors of equal scale: see Tiedemann (1977, p. 52) on fraud involving corporate capital.

<sup>7</sup> There is not much innovation in the research findings: Kinzig and Luczak (2004) remarked that the findings of Kerner (1973) are more or less confirmed by the present research. In a similar vein the debate about the network 'theory' has dragged on for decades.

will look at the organisational conduct of criminal entrepreneurs in the illegal markets for tax reduced commodities and at illegal market regulation. Of particular interest are the ways these entrepreneurs blend into the economic landscape and the complexity of their managerial activities.

## **Organising crime for profit and doing business**

‘Crime doesn’t pay’ is an old adage, which many feel is belied by successful ‘organised criminals’ who are supposed to lead profitable or even powerful criminal organisations. This image of success induces fear and maybe a bit of envy and admiration as well. But how easy is the road to criminal success? Underlying this image of success we find a number of guiding managing principles and impediments, which make the *systematically* illegal profit seeking a much harder undertaking than the ‘true crime’ stories want us to believe. Of course, the adjective ‘systematic’ sets a first delineation: we are not dealing with one-off profitable schemes but with on-going entrepreneurial money making activities by supposedly ‘maximally flexible’ crime-entrepreneurs. Such a characterisation has little contents if we do not address the material conditions and constraints within which these entrepreneurs have to deploy their craft. There are two main general conditions:

- the nature of the commodities and services (some prohibited, some licit but they are traded on an illegal market);
- and the illegality of the activities.

These sound like simple truisms, but they entail a wide spectrum of derivative conditions, particularly in their interaction. Naturally, the illegality determines the entrepreneurial risks in terms of law enforcement intervention: loss by interception, and loss of freedom and wealth. It also determines the exposure to dishonest fellow crime-entrepreneurs: it is difficult to report the theft of one’s consignment of dope or the embezzlement of a shipment of ‘tax free’ petrol or cigarettes. In addition to this dishonesty, fellow criminals may become police informants. In general, the criminal trader operating in a basically hostile environment has an information risk (‘leak’) problem (Van Duyne, 2000).

The criminal trader has a dilemma in finding the right balance between information concealment and information dissemination. Concealing too much information about who he is and what he has to offer limits the scale of his business. Disseminating too much information puts him in danger of the

law and jealous fellow criminals. This influences his freedom of decision-making:

- the criminal trader cannot act like licit traders in a supply and demand market: he cannot advertise and compete openly. This implies that he usually operates in a *demand*-led market, particularly if the trade concerns *illegal* goods;
- he has often a recruitment problem as far as the recruitment of reliable staff is concerned. He cannot advertise in the papers or through the yellow pages for 'the best criminal';
- he has a serious problem in using information carriers, ranging from hand written notes to modern forms of electronic communication and information storage equipment;
- these risks pale into insignificance compared to the most serious information risk: the *human information carrier*, ranging from unintended leaks because of bragging and conspicuous behaviour, jealous competitors, revengeful ex-wives, sacked accountants who become informants, to the undercover agents (Van Duyne et al., 2001).

There are exceptions to these impediments, depending on the nature of the market. But in general, growing from an incidental criminal money maker into a continuous criminal trader implies successfully coping with these impediments.

However, the risks are not evenly spread over all the crime-markets and do not manifest themselves in similar ways. They depend on the nature of the market, commodity, customer and victim. For example:

- the prohibited substances markets, mainly psychotropic substances, do not know *victim*-related risks as long as the transactions are carried out satisfactorily, leaving traders and customers satisfied. The risks are determined by law-enforcement priorities and mutual criminal irregularities provoking (violent) counter-reactions;
- the '*fraud*' market, whether it concerns prejudicing the public funds or fellow businessmen, generates victims who will take civil or fiscal action and/or report matters to the police. In whatever form, they produce information and evidence, which (in theory only) makes fraud a riskier undertaking than drug dealing;
- the *human services* market, comprising (a) human smuggling and (b) human trafficking, also has a victim and non-victim related nature. If carried out successfully, the *smuggled* person has no reasons to report the

delivered service to the police. However, the *trafficked* person is a potentially evidence-producing victim and therefore an inherent risk for the crime-entrepreneur.

It goes without saying that setting up and continuing a crime-enterprise requires adapting risk management to the nature of the commodity, the social aspects of the market and the law enforcement threat. In other words, the nature of the organisation (if any) follows from the requirements of continuous criminal transactions (Smith, 1994).

Does the criminal trader (and the scholar) at this stage enter the realm of ‘organised crime’? And if that were the case, what would it explain? Do we observe another form of criminal entrepreneurial conduct? If that is not the case and if the ‘organised crime’ concept is a politically and judicially ill-defined construction (Kinzig and Luczak, 2004), there is no scientific point in raising this question.

The ‘organised crime’ concept neither explains criminal conduct nor has any explanatory value. What matters is to follow, map and explain the variety of *organisational conduct* of criminal money makers. As stated before, this does not take place in a void. Though this is a commonplace, we have to give it proper contents by outlining the distinctive features of the environment that impact on behaviour.

I avoid the debate about ‘where to start: from the environment or the individual?’, by starting from the existential fact that human life and most of an individual’s subsequent activities start from the (perception of) the environment. This may also be the existential point of departure of our criminal trader. He is more likely to start with his given environment than to create a new one for himself, though while doing so he will be creating something as well. This applies particularly to his social abilities in shaping and exploiting his personal network and social opportunities (Morselli, 2005). In the environment he will find the social-cultural and commercial outlines and patterns of behaviour, apart from the commodities for the actual trading.

To be more concrete, let us look at two commercial environments: the licit economy of trade and industry and the underground economy of commodities which must remain concealed, either because they are prohibited or because they are traded outside legitimate channels.

- The entrepreneur selling licit commodities like ‘labour’ (i.e. working hours) or ‘VAT products’ through normal channels starts in a market with many regulations with which he has to comply, at least outwardly, in order to succeed in his planned disguise. His basic skill is ‘disguise management’: for example, setting up a licit front firm with all the

accompanying pretences, taking precautions by obscuring the paper trail of invoices and payments.

- Entrepreneurs trading either prohibited substances or (untaxed) goods outside permitted channels (licenses, taxes) have as their concern how to hide the contraband itself, either for transport, storage or selling. This requires almost literally ‘underground’ operations with as little upper-world interaction as possible. Nevertheless a need for the upperworld facilities may arise, like licit front firms for transport logistics. Such a facility is also used by fraudsters, but the objectives are different: for the fraudster it is a tool to *make* money, for the underground entrepreneur it is a tool to *hide* an operation involving contraband.

This entails different skills and know-how regarding techniques as well as social skills for fostering human and social capital, which makes it difficult to make generalising statements over diverse categories of crime-entrepreneurs. An illegal cigarette wholesaler importing shipments of millions of cigarettes at time using regular sea freight is difficult to compare with a wholesale ecstasy exporter who can use couriers with bags full of pills (Huskens and Vuijst, 2002) or a fraudster operating a cross-border ‘black labour’ scam. Putting them under the same denominator of ‘organised crime’ obscures more than it clarifies: what matters is explaining what choices are being made in organising and executing transport procedures. This question is not about ‘deeper’ insights into personalities, emotions and cognition, but about the interaction of ‘criminal decision makers’ and their environment. Personality aspects are certainly important, but to my knowledge the present state of research and the available data do not allow much more than pure speculations (Bovenkerk, 2000).

If the nature of the commodity, the structure of the market and the related risk avoidance aspects are so important, I will discuss and compare three crime-business types from this behavioural angle:

- organising crime-business in an underground market with a licit commodity: the illegal cigarette market;
- organising crime-business in an upperworld market: labour and illegal subcontracting;
- the illegal organisation of licit market relations: cartel building in the Dutch construction industry.

The question is: given the commodity and the surrounding entrepreneurial landscape, how do the criminal actors organise their activities to obtain their profit-making objectives while keeping the law at bay?

## **Organising the underground market of cigarettes**

Following the never ending and fruitless ‘war on drugs’ (Van Duyne and Levi, 2005) the authorities have started a war against another unhealthy habit: smoking tobacco. This unhealthy habit has not been criminalised (yet), but by raising the excises on this commodity (apart from other smoker-unfriendly measures), the authorities aim to deter people from smoking. Many consumers have reacted by giving up their habit, but sufficient consumers persevere: one can observe the ‘nicotine pariahs’ standing outside office buildings, and on windy street corners ‘enjoying’ their habit. It is not very surprising then that many of these officially rebuffed consumers have no qualms in reducing their financial burdens by buying ‘tax reduced’ cigarettes and subsequently becoming willing targets of traders prepared to supply the coveted goods ‘tax reduced’.<sup>8</sup> As has happened regularly in the past, the authorities’ measures in applying the indirect tax to influence consumer conduct, have created the basis of an illegal market. The ensuing question is: how do criminal traders take advantage of these conditions to develop a profitable crime-trade, which implies regularity or a system? To achieve some system to benefit from the existing demand, the supply side has to be organised, as will be described in the next section.

### **The supply side organisation**

Empirical research on the organisation of the illegal supply of cigarettes is scarce: in recent years only Von Lampe (2002; 2003; 2005) and Van Duyne (2003) have looked into the ways crime-entrepreneurs operate in this market. They describe a number of trading layers and patterns, nationally as well as internationally, which reflect the ways market participants capitalise on the opportunities of the environment in which they are socially embedded.

### **Reacting and expanding bottom up**

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<sup>8</sup> There is some duplicity in the authorities’ attitude: fighting bad habits like smoking and drinking, while raking in the extra tax revenues. It is not unlike the Renaissance Pope Julius II who condemned sexual sins but still taxed the Roman whores to finance the building of St. Peter’s basilica.

Taking advantage of artificial price differences due to diverging tax regimes is not an astonishing conduct, whether by professional traders or consumers. In this regard cigarette smuggling is just an example of the centuries-old state-citizen price interaction contributing to the rise of a black market. This implies that traders in general and the cigarette smugglers in particular, find themselves in a familiar entrepreneurial landscape with trusted trading patterns and techniques. This does not imply that there is no need to adapt to new market circumstances, the most important being the *size* and the social acceptability of the demand market.

The demand side of the cigarette market is understandably broad: the commodity is not prohibited or associated with social marginalisation. Buying contraband cigarettes is not considered criminal: at most naughty or even defiant towards the authorities. Nevertheless, it is not considered chic, rather a bit grubby and mean. This was born out by the findings in the Netherlands as well as in Germany (Von Lampe, 2005). The underground cigarette market was not territorially or socially evenly spread, but it thrives most in the working-class areas of the Dutch urban regions and the poorer German Länder in northeast Germany. Though there is no nation-wide market, it is nevertheless quite sizeable providing ample outlets for numerous retailers who range from street vendors particularly in East Berlin (Von Lampe, 2002) to well organised backdoor shops with sometimes hundreds of customers.

It is interesting to observe the growth of 'criminal organisations': from selling a few boxes by quiet family men as an extra income, to full-time neighbourhood shops. These small one-man enterprises grew into virtual parallel black cigarette shops without even saturating the local market, as demonstrated by two (partially) disabled persons in a larger provincial town (Van Duyne, 2003, p. 294). Each started by occasionally selling a few cartons to family and friends who resold part of the product to other friends and asked for more. In the end they provided a part of the town with the most popular brands of cigarettes. The market proved big enough to operate without any competition, the sellers supplying each other if one of them ran out of stock. They expanded rationally, hiring some aids and organised secret storage capacity as their tenement was too small to store the bulky contraband. Keeping track of the buying and selling and 'knowing their customers' tastes resulted in primitive 'paper work', which proved fatal because it created evidence. Like their fellow retailers, they never got beyond simple codes like 'red' for Marlboro or 'hump' for Camel. Otherwise these enterprises can be characterised as rationally led, thriving organisations and as professional as they needed to be: a dense network of customers, a commensurate supply and no need for 'upperworld requirements'.

Organising such crime-business 'bottom-up' could also be observed on the supply-side (though this was not neatly separated from the retail business:

sometimes suppliers also retailed). With an odd exception, many traders involved were well known in the underground economy concerning ‘low tax’, stolen or counterfeit goods, though there were no records of connections with the drug market. The smuggled cigarettes they obtained from Poles or Belgians (who got them from Poles too), were a welcome new commercial opportunity for which they did not need to learn new skills. The undertakings were organised within network relationships involving voluntary partnerships or cooperatives, roughly along the lines as described by Von Lampe (2003). This is not to deny the existence of leading personalities within these networks who gave orders or arranged other persons in their networks to execute certain tasks. Though these undertakings could formally be qualified as ‘organised crime’, the German and Dutch file descriptions of the entrepreneurial conduct involved allows no higher ranking than spontaneously grown ‘cooperatives’ taking advantage of an ample supply and an insatiable market. No wonder they expanded so quickly.

### **Mimicry and the upperworld**

Mimicry is a biological survival act of many species: taking over colours and shape of the environment in order to not to be detected by predators. Understandably it is also an act of survival typical of crime-entrepreneurs, which becomes the more required the more shipments increase in size and official transport requirements have to be met. Naturally this applies to cross-border movements of the contraband.

‘Criminal’ mimicry is not the same as interacting or developing a kind of symbiosis with the legitimate business community. In its perfect form the crime-enterprise blends unnoticed into the commercial landscape, which is not always easy. Indeed, the findings of the Dutch research demonstrate that the act of criminal mimicry requires some knowledge of the routines and facilities of the upperworld trade. The bungled ways in which some pretended smugglers handled the clearance of customs documents actually reveal a painful learning process of ‘trial and error’, frequently ending in the interception of the cargo and the arrest of the organiser.<sup>9</sup> If they were lucky the forms or the procedures were corrected by the shipping agent, which was of course a lesson for the next time. However, there was also the risk that the shipping agent warned the customs authorities about the unusual clumsiness of his customer.

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<sup>9</sup> It proved not always possible to arrest the persons involved. The principal may have succeeded to remain unknown or only an unknowing driver may have been arrested. Sometimes the drivers should have known that the assignment was fishy: ‘call number X if you are in trouble’.

Of course, we are only informed of the cases of failed mimicry, for example because of: incorrect bills of lading; implausible routing and destinations; the value of the cargo having no economic relation to the costs of the transport; or simply being caught in a routine check. In three large cases such mimicry proved to offer an effective protection even after detection: though the cases eventually came to light, in only one case were some of the shipments intercepted. In that case the defects of the mimicry were compensated for by the connivance of the firms receiving the cheap cover goods in which they occasionally found a box of cigarettes.

### **The upperworld plays along?**

Granted, the form of connivance as indicated in the previous section demonstrates that the line between mimicry and conscious upperworld involvement is thin. Conniving at the ‘not-so-criminal’ handling of untaxed goods can develop into direct involvement. Though there are many rumours about this accessory involvement, the research brought only three clear examples to light. These concerned a legitimate cigarette intermediary playing along; a vegetable importer; and a number of transport companies. In addition, there were two ‘grey zone’ cases of ‘lack of due diligence’: flower exporters accepting ‘street market stuff’ to fill the half empty return freight and British peat dust importers accepting the cargo in which contraband cigarettes were found.<sup>10</sup>

Leaving aside ‘morality’ as a potential (but hypothetical) explanatory factor, there are good financial reasons for legitimate transport firms not to become involved: the firms have to stand surety for the correct handling of the cargos and are liable to pay the full fiscal damage in case the documents are not cleared. On the side of the smuggling community there are also few incentives to involve the upperworld. The general picture is rather that the traders remain socially and commercially within their confines of their own social networks. The cross-border wholesalers established their own (front) firms for transport and export or abused legitimate (sometimes one-man) firms by having them transport contraband unknowingly or counterfeited the letter headings. On the level of wholesale procurement the crime-entrepreneurs and the licit companies must meet, but the documentary evidence about criminal upperworld involvement is thus far too fragmentary to draw firm conclusions (Von Lampe, 2002, example 3, p. 53).

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<sup>10</sup> Beare (2002) points to another complicity: the wilfully increased export to markets, which can hardly absorb the increase, but from which the merchandise is likely to be smuggled back. The European Commission likewise suspects the cigarette industry of involvement in the illegal market. Thus far much smoke but no ‘smoking gun’ has been found.

## Organising labour in illegal subcontracting

If cigarettes are taxed for the ‘common good’ to deter unhealthy conduct, so is labour as a ‘commodity’ also taxed but for other purposes. Not to deter people but to maintain the public fund for the benefit of the same labourer to sustain him in times of unemployment, illness and old age. As is the case with other commodities on which a fiscal ‘price wedge’ has been superimposed, this price wedge is abused in the labour market too: by individual workers, by employers and by those who organise the connection of supply and demand. Does this lead to a crime-market analogue to the underground cigarette market described in the previous section? Despite the shared illegality, the analogue is deceptive. The reason is quite banal: labourers looking for high net income are not cigarettes and licit employers looking for low labour costs are not ‘black market’ consumers. The criminal market relations and the related organisation of crime are very different.

An intermediary who matches this demand for high net income to the demand for low labour costs can have a useful ‘coupling’ function. In the Netherlands the crime-entrepreneur who organises this coupling is therefore called ‘*koppelbaas*’ (literally ‘coupling boss’). The criminal organisation of ‘coupling’ has to deal with two alternative market situations. On the one hand, a double consensual relationship with workers and conniving employers and on the other hand, employers who are totally unaware and keen not to be held financially liable. In addition, the *koppelbazen* have to cope with the various law enforcement agencies: the Insurance Boards and the fiscal police.<sup>11</sup> This requires a smart anticipation of the different risks involved.

The *koppelbaas* is situated in a much more mobile market than the underground crime-entrepreneur trading prohibited or untaxed merchandise. He has no illegal suppliers with hidden contraband (Mateman and Renooy, 2001). Instead, he must attract free ‘job shoppers’ who must be sorted according to the skills required by various employers: for example, highly skilled bricklayers or plasterers in the construction industry and unskilled labour for agriculture. He is of course not alone: he is surrounded by thousands of registered licit ‘temp’ agencies handling the majority of temporary workers (Zuidam and Grijpstra, 2004). Naturally, the *koppelbaas* has a competitive advantage: he is cheaper for the employers, the net salary is

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<sup>11</sup> *Koppelbazen* is the plural of *koppelbaas*. The phenomenon itself is called *koppelbazerij*.

higher and he is often the only economic refuge for many illegal aliens desperately looking for work in the informal economy.

### **The mimicry of subcontracting**

The *koppelbaas* is most frequently denoted as a 'subcontractor'. Actually this is a misleading term as he is a subcontractor on paper only. As remarked before, the *koppelbaas* has no other commodity than the labourers whose working hours he sells. Officially he can only operate if he is a *licensed* labour agency complying with all of the costly fiscal and labour regulations, which he intends to evade. In order to deceive the labour and tax inspection officer the illegal supply of labour is disguised as subcontracting a certain part of the work for a sum equal to the estimated number of hours. Hence, if the *koppelbaas* delivers plasterers he and the principal make a rough calculation of the surface they can plaster in a week. That surface is subsequently 'subcontracted' for a sum equal to the amount of the number of labourers times their salary for that week + VAT (which disappears in the *koppelbaas*' pocket). Predictably, after a while the *koppelbaas* is spotted administratively and the fiscal inspectors and the Industrial Insurance Board file a claim for the amount of the unpaid employers' social insurance contributions and the unpaid taxes. Predictably a cunning *koppelbaas* has already taken precautions in the form of a straw man director while the firm is stripped of all its assets. The firm goes bankrupt and the *koppelbaas* is already busy with the same employers in the name of another firm, which is also destined to go bust. It is the well known juggling with 'bust firms' that can also be observed with VAT fraudsters (Van Duyne, 1997). In the past, the *koppelbaas* did not only thrive because of legal loopholes. He also benefited from the connivance of satisfied principals who were assured of scarce skilled craftsmen at a 'reasonable' price: a perfect upperworld-underworld symbiosis.

In the Netherlands this was the situation until the beginning of the 1980s. Then (after six years of bickering between the labour unions and employers' associations) the law on Chain Liability came into force: in the 'chain' of (sub)contracting each higher 'link' can be made liable for unpaid taxes lower in the chain. This claim can move up to the highest link in the chain: the principal.

This liability severed the cosy symbiosis and together with other 'liability laws' helped to push back the 'threat' of the *koppelbaas* (Berghuis et al., 1985). But did he disappear? He survived, or rather, the market conditions for illegal subcontracting soon re-established themselves, but by that time the public attention had shifted to the proclaimed menace of 'organised crime'. As remarked in the introductory section, in the shadow of the 'organised-crime' fear organised business crime could simmer as a low priority issue.

After the recession of the late 1980s and early 1990s, the establishment of the EU internal market, which increased the labour mobility, changes the nature of the (illegal) labour market (Höhnekopp, 1997). In manual labour intensive industries demand has intensified and supply has diversified, particularly in terms of cross-border mobility. This cross-border mobility does not only apply to the itinerant labour force but also to the *koppelbazen* themselves. They can establish legal persons and deploy their activities in other countries of the EU too. In addition, in the Netherlands the licence regime concerning temporary employment agencies was relaxed in July 1998, creating more space for entrepreneurial initiative. How did the *koppelbazen* react to this changed entrepreneurial landscape? The research carried out by Tilburg University (Van Duyne and Houtzager, 2005) provides some intriguing insight into the opportunities of this licit and illicit interaction.

### **The upperworld ‘creates’ its underworld**

Referring to the ‘organised crime’ imagery according to which *the* ‘organised crime’ is depicted as penetrating ‘upwards’ the upperworld (Levi, 1997), the Tilburg findings are remarkable. In the construction industry and in the European inland carrying trade there was everything but ‘penetration’. Rather, the initiative for the organisation of crime came from some major licit entrepreneurs who created their own *koppelbazen*.<sup>12</sup> They could only accomplish this feat because the social-economic conditions of the local *koppelbazerij* were still present, all liability laws notwithstanding. In terms of the usual ‘organised crime’ saying, this raises the question as to who is the ‘organised criminal’? The licit entrepreneur organising his own *koppelbaas* or the *koppelbaas*? What happened?

In Limburg, the southern province of the Netherlands bordering Germany and Belgium, *koppelbazerij*, has always been more than a criminal commercial phenomenon. In many communities it is deeply entrenched, going from father to son, which applies to the *koppelbaas* as well as to the labourers. Within this social entrepreneurial climate there is also interaction with the building industry within which profitable constructions sprang up. The most important were the outsourcing of the staff and the outsourcing of the paperwork concerning the labourers according to modern management principles. However, this was not an outsourcing to firms selected after a

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<sup>12</sup> The phenomenon of licit firms establishing a legal person for shady or criminal purposes is of course not unique: Bear (2002) discussed the case of RJ Reynolds Canada setting up a business in the US specifically for the purpose of providing smugglers with cigarettes for the Canadian black market. See also Ruggiero’s (1997) discussion of the use of illegal labour by the British food industry.

price/quality comparison. Instead, building firms helped or established the front firms that would be headed by the *koppelbazen* of their choice. Subsequently they dismissed their staff who would pass over to the *koppelbaas* firm but under the cover of false invoices the same staff would be hired back again. For the production of false invoices concerning salaries (taxes and social security) the *koppelbaas* received a ‘head fee’.

This demand-supply relationship differs considerably from the old days when the *koppelbaas* together with his crew had to find construction sites and principals and secure contracts. Now the licit demand side, instead of waiting for offers, took action and (partly) reshaped the criminal phenomenon. Apparently they did not just put their thumbs in soft wax: the *koppelbazen* – and the dismissed and (re)hired staff – knew, acted and reacted accordingly in a trusted social-economic surrounding. The *koppelbazen* have their own ‘social and economic capital’: trusted labourers in local communities and building firms in Belgium and Germany for the exchange of staff and invoices.

### Europe on the move

In the section above I noted already that the *koppelbaas* has a local base but at the same time is also operating cross-border, either because of better opportunities and/or to cover his paper trails. Also, many workers in the European Union and beyond have been on the move, long before the legendary ‘Polish plumber’ (factually and imaginarily) appeared on the horizon of ‘old’ Europe (Hönekopp, 1997; Esope project, 2004). The same can be observed of firms that are also looking for opportunities in other EU countries. In order to facilitate this EU-mobility while maintaining the national system of employers’ social insurance contributions the EU introduced a system for posting employees abroad. Briefly summarised, a firm can post its workers abroad under its own social insurance regime if certain conditions are met. The posting employer must have his main activity in the country from which he posts his workers and the latter must already be insured in the posting country to which he is supposed to return. If the conditions are met the worker can get a ‘E-101 certificate’. This should prevent a shift to countries with a lower level of social insurance contribution while a higher rate should actually be applied. Predictably abuse soon emerged.<sup>13</sup>

Abusing the E-101 regime is most profitable when the posting *and* posted countries are both cheated: the posting country must be unaware that the

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<sup>13</sup> EC-directive, 1408/71 and EC-directive 859/2003, which allows also third-country workers to be posted in EU-member states.

workers who have an E-101 certificate are continuously abroad while the receiving country is prevented from applying its (higher) insurance rate. The maximum profit is made if additionally no or too little insurance is paid in the posting country as happened regularly by establishing a chain of front firms in the posting countries. For example, a Dutch building firm with proper contacts in the UK employed about 400 persons in Germany with a turnover of about € 1 million while its staff in the UK amounted to only three with a turnover of just €15,000.

The E-101 abuse can also be accompanied by social dumping from low wage countries in Central Europe again with multi-country ramifications of internationally operating *koppelbazen*. For example, Poles were 'posted' from the Netherlands to Belgium for rock-bottom prices (to the delight of the 'unaware' Antwerp shipyards). After detection the organisers shifted their firms and staff to Germany and Luxembourg and continued unabated.

In addition to this flexible cross-border and multi-country *koppelbazelij*, the phenomenon of 'making your own *koppelbaas*' could also be observed, this time in the field of European inland shipping. One small licit firm discovered that it could reduce its labour costs by establishing a new firm in Luxembourg (a post-box company), dismissing its staff and hiring it back again as 'posted workers' from this front firm. Subsequently it started to provide the same service to numerous other shipping companies, which resulted (on paper) in inland fleets floating without crew. This led to an investigation of the whole sector.<sup>14</sup>

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<sup>14</sup> At present this fraudulent method has been made more difficult due to an agreement of the 'Rhine states', which stipulates that social law of the country where the owner of the ship is registered will be applied to the employees, irrespective of their nationality.

## Turkish *koppelbazen* join the market

Ethnic minorities like the Turks are usually not associated with economic crime. If there is an association with crime it concerns drugs. The industrious Turks in the Hague minority district falsified this prejudice by entering the criminal labour market too. The conditions were favourable. The liberalisation of the temporary employment business made the setting up of a 'temp office' relatively cheap while the labour market in the horticultural sector was tight. As labour providers the Turks had the additional advantage of having access to numerous unemployed compatriots residing legally and illegally in the neighbourhood.<sup>15</sup>

From the mid 1990s onwards the Turkish *koppelbazerij* unfolded broadly and rapidly. It is interesting to observe differences with the manifestations of the *koppelbazerij* in the construction sector carried out by indigenous Dutch entrepreneurs. In the first place, the 'create your own *koppelbaas*' phenomenon was not observed in the interaction between the Turkish entrepreneurs and the Dutch principals. In the second place, most the operations of Turkish *koppelbaas* enterprises were amazingly unsophisticated. They establish almost no limited liability firms inclusive with straw men, let alone designing opaque cross-border constructions. Instead, they established one-man firms or limited partnerships in which each partner would be personally liable for the debts of the firm. Though the files do not contain statements on this issue, they may have felt safe within their 'extended family' enterprise in which brothers, uncles or other relatives had (outwardly at least) unclearly defined roles. If they deliberately planned this way (which we do not know), they were correct: an extended family business is as difficult to penetrate and unravel as a maze of front firms. And recovering the crime-money is likewise difficult: the crime-entrepreneurs did not buy property in the Netherlands, lived in humble tenements etc. Perhaps part of the money was repatriated to Turkey.

Not all Turkish *koppelbaas* firms could be managed in the usually robust family way: firms providing 80 to 800 workers to numerous horticultural firms around The Hague did not only have to cope with a complicated daily logistic but also with a complex salary administration. To this end they resorted to another 'corner' of the market: compliant administrative offices, which ironed out inconsistencies in the paper work. Naturally the other corners of the market were the market gardeners and horticulturists. Though they could also be held liable if they could not prove due diligence in relation

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<sup>15</sup> The denotation 'Turkish' is used for the ease of writing only, as many 'Turkish' entrepreneurs or workers were actually Kurdish, while many illegal workers were ethnic Turks from Bulgaria.

to the labour providers, many took their chances. However, one group of market gardeners, accountants of a very respectable firm, an administrative office (producing whatever false invoice or document for whoever needed some) and the *koppelbaas* himself who was clearly in need of expert advice to maintain the smooth running of his very large enterprise, formed a ‘combine’. This conspiracy allowed this *koppelbaas* to rise above his compatriots, though the role of the licit partners was not comparable to the phenomenon of ‘creating one’s own *koppelbaas*’.<sup>16</sup>

Like the Dutch *koppelbazen* in Limburg, the Turkish *koppelbazen* were well embedded in their social environment, though not always without tension or predatory deceit. Many poor people were abused to lend their social-fiscal number, others got paid for this service. Front firms to produce false invoices were established in the names of psychiatric patients, tramps or even non-existent persons, but also in the name of relatives who were compensated for this service. The criminal background of the Turkish *koppelbazen* was often violence and property crime, but *not* drug trafficking. Is this background the reason for their more robust risk management compared to the Dutch *koppelbazen*? It sounds plausible, though without deeper, social and psychological study (for which there are no data) it remains a matter of speculation.

How should we project the *koppelbaas* as an organiser of crime? Acting as *koppelbaas* is not a leisurely job but a real full-time human-organising matter. It is real work with many workers for impatient contractors, while new projects have to be brought in continuously (the task of the ‘pit-seeker’), unless one has regular (and complicit) customers. Meanwhile, the workers may have to be transferred from the firm, which just had gone bankrupt to a new corporation, which will equally be busted in the near future. Also this requires the organisation of people in the form of straw men. At the same time, the appearance of legality must be maintained to soothe suspicious contractors who are afraid of being held liable, unless one is created by a principal. In addition, the movements of the fiscal police, Insurance Boards and Social Service have to be watched in order to destroy incriminating evidence (like invoices and payrolls) in time. Being a *koppelbaas* with all its underworld ramifications is tantamount to continuously organising crime indeed. If we compare cigarette smuggling with being a *koppelbaas*, the cigarette business looks almost like low-organised leisure-time occupation.

The European labour market ‘on the move’ provides a fascinating scenery of a licit market with a licit commodity illegally coping with a large price

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<sup>16</sup> It is interesting to observe that the participants in this combine were convicted for ‘participating in a criminal organisation’. The firms that created their own *koppelbaas* were only prosecuted for fraud.

wedge on labour as a commodity. Organising law breaking to reduce that price wedge appears to be undertaken by licit entrepreneurs and ‘veteran’ *koppelbazen* alike. To achieve this they establish real and licit enterprises, obliterating the distinction between ‘upperworld’ and ‘underworld’.

## **The illicit organisation of licit markets**

This chapter started with a description of the behaviour of the actors involved in one of the biggest illegal cartels in European history. In the description of the cigarette market and the labour market I approached the criminal phenomenon from the behavioural perspective of what law breakers must do to make a criminal profit. Operating in the underground cigarette market proved to be quite different from operating in a licit market providing illicitly the licit ‘labour commodity’. However, the essence of both markets is: illegally trading a commodity. Now we enter the white planes of licit markets and equally licit entrepreneurs punctually paying their last dime of taxes but nevertheless organising law breaking. Their law breaking involves organising licit markets by forming a cartel.

What is wrong, or even criminal about cartel building? In essence cartels are little more than agreements between actors in industrial sectors about prices and volumes of production, either at the same production level (horizontal) or between links in a chain of production (vertical). Such agreements have existed for centuries, to the benefit of many. The guilds in pre-industrial towns were closely supervised communal cartels, protecting entrepreneurs and consumers alike: it was a time of ‘fair’ wages and ‘fair’ prices to the benefit of many in a frugal society. However, with the rise of early capitalism one of the first deviations from this conception of fairness was also noted. For example, the European copper monopoly of the South German banker family Fugger, which in 1522 led to broad protests and even an official investigation (Dillard, 1967).

The last century witnessed swings in the valuation of the cartel phenomenon. After the depression of the 1930s cartels were valued as a protection against cut-throat competition. In some countries like the Netherlands cartels were officially encouraged or even regulated by commercial laws. Violations against legal cartels did occur but were treated mildly as was (and is) usual with economic sinners. Meanwhile, within the free and open European internal market the pendulum of valuation swung back again. Cartels were considered as an impediment to free and fair industrial and commercial competitive relations. They are seen as self-serving, leading to lower quality and higher prices while slowing down innovation.

Prohibited by articles 85 and 86 of the EEC Treaty, the regulations still had many loopholes (Tiedemann, 1977). Consequently, in the early 1990s, 'Brussels' formulated new cartel norms, which were accepted reluctantly, certainly by the Dutch authorities. Violations against these regulations were included in the Law on Economic Offences. However, in 1998, while the international cartel enforcement received increased internal attention (Evernet et al., 2001), in the Netherlands violation of the same rules were *de-criminalized* by being converted into mere *administrative* misdemeanours. The reasons for this change, mentioned in the explanatory memorandum can be summarised in two phrases: 'low normative loading' and the 'complexity' of cases in relation to the meagre expertise of the Public Prosecution Office.

How did trade and industry deal with these regulations having a 'low normative loading'? They violated them massively. After all, it was 'illegal but not criminal', a quite traditional phrase in economic crime (Conklin, 1977). However, also non-criminal illegality has to be organised too in order to keep the regulators at bay. At this point the criminal story of the construction industry begins.

### **Dividing the contract cake**

The secret cartel formed in the Dutch building industry came to light in November 2001 when a whistleblower went public. During a talk show he revealed a nationwide cartel in the building industry. The public and political outcry, particularly after it appeared that the Public Prosecution Office had refused to react after receiving information from this whistleblower, led to a Parliamentary inquiry. The Building Industry Committee reported its finding in 2002.

Not only did the whistleblower complain about a widespread abuse in general terms. Actually, he substantiated his accusation by showing copies of the so-called 'shadow administration' of the building firms, containing the records of the secret deals. This demonstrated the flaw in the system: conspiring to break the law systematically can of course best be kept secret by not recording anything, as the conspirators in the peroxide cartel realised. However, in this cartel there were only three parties. But in the construction industry there are hundreds of participants eager to share the pie of coveted contracts. Hence, cartel arrangements between many parties soon became too unwieldy for verbal agreements. Given its illegal nature, some protection was needed against failing human memory if not outright cheating (Levenstein and Suslov, 2004). This resulted in a systematic documentation of the dealings in the building cartel. What did the 'shadow administration' reveal?

The shadow administration revealed a complicated system of ‘clearing’ agreements about who got what contract at what price and who were to be compensated. For example, the city of Amsterdam tenders a contract for the construction of a bridge. It is allowed to invite a limited number of contractors, say five: A, B, C, D and E. The contracting authority has set a budget of € 5 million and announces an ‘information day’. At that meeting the contracting authority clarifies details of the tender and the five contractors can ask questions. After ten days the contractors must have submitted their price estimates in closed envelopes.

The day before submitting their offers the five contractors meet secretly. *A* is eager to get the contract and proposes that in future tenders he will concede contracts to the value of 25% of the € 5 million of this contract to each of them. This amounts to a market division based on a *turnover* list. At the end of the year each will have had the same turnover. If the fellow contractors do not agree, another round is required. Each writes down his price on a piece of paper and they agree that the lowest bid will win. The submitted notes show the following prices: *A*, € 4,7 million; *B*, € 5 million; *C*, € 4,9 million; *D*, € 5 million and *E*, € 4,8 million.<sup>17</sup> All are at or somewhat below the town council budget and *A* can get the contract. However, before they let him submit his offer, they decide to increase the offers with € 250.000 each, so that *A* is still under the tender sum. Therefore, in the perception of the conspirators the city is not harmed if it grants *A* the contract, though the building price is higher than it would have been without their secret deal.

However, the crux of the deal is not granting *A* a windfall of € 250.000 but to divide this surplus among all participants who net € 50.000 each. Greedy and badly organised criminals would immediately cash that money, but better organised gentlemen act with more precaution and restraint. Paying in ‘real time’ real money not properly covered by invoices (or false ones) would be risky. In addition, in future tender procedures they would repeat the same scheme with another winner and a new division of spoils. Hence, the mutual claims or rights are tallied until a final clearance at the end of the year (Inquiry Committee Building Industry, 2002).

### **Organising the mimicry and slipping into crime**

The example of five friendly ‘competitors’ is of course too simple. In the case of the building-industry cartel about 600 firms were involved. This entails a very complex clearance with the risk of creating documentary evidence, which must be avoided (Marshall et al., 2003). It goes without saying that the

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<sup>17</sup> The notation of the numbers is continental European.

registration of mutual claims was kept out of the books, resulting in what is called the ‘shadow administration’ and which the constructors euphemistically called ‘extra-accountable’. An additional concern was ensure to have as much as possible mutual claims that cancelled each other. In that case no surpluses would have to be paid and no related documents would be needed. That implies that in the regular accounting of the corporations no fraudulent invoices etc. would had to be inserted to mask hidden payments or income. There would be none of them.

An ideal world is simple. However, the complicated cartel system proved not to be an ideal world. A complete balancing of mutual claims without unsettled debts and claims proved will-nigh impossible to achieve. In order to keep the settling of claims and debts orderly and prevent disagreements and disintegration the organisation had to go beyond the hand written system and professionalise the dishonesty. They set up a number of separate professional accountancy units, called ‘regional settlement funds’ to sort out the details of the annual puzzle.

Despite this professionalized deceit not all the claims would balance and the debtors and creditors had to settle their accounts by exchanging goods or money. Some preferred to shift their claims to the following year in which case they would start with old ‘building rights’, others needed a settlement now. What alternatives did they have and where did they ‘slip into crime’?

- ☛ a neutral way of settling was in kind and without paper work, such as delivering building materials or labourers to the amount of the debt;
- ☛ the materials were delivered with an invoice, but at a discount or price increased by the amount of the debt or claim;
- ☛ invoices were made for non-existent goods or services;
- ☛ cash payments were made.

The last method is rarely used by the major firms in the sector because of the connected paper trails: withdrawals or unaccounted inflows of large sums leave traces. For smaller firms it may be practical to have a ‘black till’ for paying labourers under the counter though. The third method is outright fraud. The first two methods do not technically qualify as fraud because either there are no invoices or the parties are under the civil law allowed to agree on a lower or higher price.

### **Organising a criminal make-believe world**

Is the issuing of phoney invoices the only offence, that makes these gentlemen criminal? What the cartel conspirators did amounted to more than making a few secret agreements, some clever claim settlements and issuing a few false documents. What they did was creating a professional system of deceit resulting in a make-believe world, an economic *dance masqué* of pretended ‘open competition’ to which a very high public price tag of hundreds of millions euros was attached. However, the builders were not the only participants in this organised criminal *dance masqué*: local authorities danced along happily, pretending not to know; accountants issued yearly audit certificates to the cartel firms. The Public Prosecution Office did not join the party but considered the dance not criminal at all and the Dutch Competition Authority was busy with price agreements between hairdressers and window-cleaners. However, there was more than organised ‘dishonesty’ in civil law terms:

- contracting authorities which were unaware of the illegal price agreements were systematically deceived;
- some were not deceived, but corrupted: pleasure trips, valuables, private house renovations and libidinous incentives were no exception;
- these expenses were not kept out of the books, but had to be invoiced as deductible business costs: as ‘contract procurement’ and ‘representation costs’, in which case the brothel manager was requested to invoice the satisfaction of the fleshly lusts as a ‘business dinner’;
- the deceptive agreements not only harmed the authorities, they were also used to keep outsiders off the reserved ‘dance floor’ of the colluding constructors, for example by denying the delivery asphalt;
- the system encouraged the submission of fake offers because firms who had no intention of fulfilling a contract also took part in the bidding: by doing so they established a ‘building right’ for later rounds. They cheated by simply taking over the figure of their neighbouring constructor;
- to smooth and facilitate all these offences separate professional accountancy support firms were established.

What was not ‘make-believe’ were the prices: the Parliamentary Committee estimated that the conspiring firms drove up the building prices by approximately 8,8%.

To summarise: the preludes to the *dance masqué* were the secret consultations; the professional maintenance of order and discipline resulted in

a real but secret organisation with an outcome that was anything but make-believe: tangible constructions for too much and real money. There is also a human moral: the organised criminal *dance masqué* would never have been unmasked if one of the leading conspirators had not made the classical managerial ‘human factor’ mistake of dismissing his accountant without compensation. If you organise crime, beware of people.

### **Projecting the organisation of crime against an old debate**

In the previous sections I have reviewed three criminal market sectors with differing legitimate commodities as entrepreneurial landscapes. The criminal traders have been depicted as responding to various market conditions, which naturally constrained and shaped their organisation of crime. That is not a revelation: if they had not heeded the signs and warnings of their entrepreneurial environment they would not have entered this narrative in the first place. (Nevertheless, they did so, but imperfectly, otherwise they would not have figured in this story either.) Even if this is banal, the quintessence is the behavioural differentiation virtually imposed by the constraints of their commercial environment.

The illegal cigarette trade is to all intents and purposes a smuggling business, whether or not the commodity itself is legitimate. In its appearance it is very much like the cannabis trade, with the exception of the penal risks, which are much lower than for cannabis traffic. Otherwise, both commodities are bulky for which reason wholesale trade requires an extensive transport logistic and storage capacity. Given the insatiable demand (for cannabis and cigarettes alike) and the broad human distribution capacity, the cross-border transport logistics are the real bottleneck. At this point this underground trade ‘rubs’ against the upperworld. This concerns particularly the customs clearance and to a lesser degree the transport sector. This makes the organisation of the cigarette market in essence a one-directional *supply* organisation.

Otherwise the illegal cigarette trade is just a specimen of an underground market, thriving best if it remains almost literally ‘under’. The finding that real brand cigarettes are increasingly being replaced by counterfeit cigarettes amplifies this underground feature. It is interesting to find that despite being an underground market, there appear to be only few and incidental connections with the drug market. The general picture of the cigarette crime-entrepreneurs is: networks of somewhat older (30 years +) family men, usually without criminal records.

The illegal labour market is anything but one-directional and certainly also not one-dimensional, like 'getting a commodity unnoticed from A to B'. As a matter of fact it is not a homogeneous crime-market at all. We find 'respectable' but criminal upperworld organisers creating their own *koppelbaas* alongside Turkish adventurer entrepreneurs taking advantage of their economic *niche* in their neighbourhood. The 'commodity' usually consists of Europe wide mobile workers who must be organised toward the demand side in the upperworld.

In contrast to the cigarette market, the supply side does not pose a risk, but the demand side does so in the form of the principals. As the latter can be held liable for unpaid taxes and insurance contribution in the chain of subcontracting, they have an opposite interest which conflicts with the desire to get cheap labour. In addition, his administration may be a rich source of criminal evidence of the dealings of the *koppelbaas*. Therefore, the vulnerability at the demand side requires a proper and continuous organisation of the paper work mimicry, which can take various forms. Apart from a conspiracy with the principal, the paper work must be of good quality and/or tax liabilities must be evaded. Alternatively the risks may be moved cross-border to delay discovery or to disappear altogether leaving the well-known empty front firm with the straw man behind.

Organising an illegal cartel does not have these constraints. There is no illegal commodity and the cartel's dealings can be maintained within the applicable paper work routine. If the cartel agreements remain within certain market parameters or budget lines, there is little information comes out into the open. Even a systematic and complicated cartel like the one in the construction industry, comprising 600 participants, was able to continue undetected for years. What determines the risk of detection in this scheme is bad 'human resource management', the banality of human discontent. In the building industry cartel a disgruntled accountant, in the peroxide cartel soured personal relationships between the leading managers contributed to the exposure.

How should we relate these various ways of organising crime for profit to the 'organised crime' debate? We can apply one of the many organised crime definitions and determine whether they fit the cases described in this article. Well, formally they all fit. Given the heterogeneity of the entrepreneurial environment and the related variety of conduct, this conclusion is hardly meaningful. It neither explains nor clarifies the variations in the many ways actors organise crime.

The 'organised crime' typology of Naylor (2003) does not help us much either, as is the case with so many typologies. Can we assign these three forms of organising crime to the categories of: 'market based crime', 'predatory crime' or 'commercial crime', or to all three of them? And would that lead to

a meaningful classification? Looking at the components of Naylor's classification, they have elements of all three types. They are predatory, as well as commercial; certainly market-based, though that denotation loses its meaning if we realise its variety, ranging from simple underground marketing to illegally organising a licit market. I think we stumble again over a basic disregard of simple Aristotelean syllogistic logic. Put the whole reasoning in a classic syllogism: if 'organised crime' is the major, 'typology' is the minor, and if one of them contains flaws, we can never come to a valid conclusion. As there is much wrong with the organised crime concept (the major) I do not see how we can come to any valid conclusion, even if the minor were valid (which is questionable). Nevertheless the debate goes on. Indeed, there is not much understanding of classical logic in the organised crime debate.

Given this observation, should we resign ourselves to Levi's (2002) conclusion that the "term 'organised crime' has become so culturally and legally embedded that we cannot eliminate it despite its manifest serious defects to anyone who wished to think analytically"? This is a most enticing invitation to another 'organised crime'-related *dance masqué*, this time in a make-believe world of 'scientific' and political mask-like phrases.

Nevertheless, there is an element of truth in Levi's remark: it hardly makes sense to crusade against socially accepted phrases embedded in law enforcement and political jargon, in laws and conventions. This is rather the realm of the social-psychology of language: how does a community maintain a common parlance irrespective of its underlying reality? Instead, from a research perspective it would be better to take Levi's title '*The organisation of serious crimes*' literally as a starting point, but not after stripping it from its misleading little word 'serious'. People do not see 'serious' organised crime, but various forms of criminal risk prevention. From this angle we could subsequently take over Naylor's suggestion and do research on the (human) processes directed at organising illegal transactions to get rich.

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