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FACULTY OF LAW**

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## **JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW**

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## **Invitation**

Journal of Eastern-European Criminal law has been conceived as a forum open to all academic researchers from former communist countries, to professors, PhD students, but equally to judicial professionals and other members of professions concerned about the evolution of criminal legislation and the increasingly firm response to be given to the new forms under which the criminal phenomenon manifests itself.

The creation of a common area of freedom, security and justice, based on the principles of transparency and the rule of democracy calls for an open dialogue between theoreticians and practitioners of law in general, and of criminal and criminal procedure law, in particular.

The transition to a market economy, the globalization of economic phenomena, the free movement of capital, have generated, not only in the former communist countries, but in others as well, new types of economic crime.

Such a concept, of a rather criminological nature, presently takes on a variety of forms, starting from the traditional crimes against patrimony, to the more refined forms of tax evasion, counterfeiting, fraud against public funds, capital markets manipulation, and up to the super-sophisticated cyber-crime.

To this end, the Faculty of Law of the West University in Timisoara invites all the contributors to the Journal of Eastern-European Criminal Law to take part in a conference organized on October 12-18<sup>th</sup> 2015, whose theme shall be *Economic Crime*.

Economic Crime shall actually be the topic of the next issue of the Journal. For further information, please access the following e-mail address: [jeecl@e-uvt.ro](mailto:jeecl@e-uvt.ro).

**The board of editors**



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# The Constitutionality of Safeguards on Extended Confiscation

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## Abstract

*The extended confiscation has been recently enshrined in the Romanian criminal law. In the decisions delivered in this matter the Constitutional Court held that the norms of Criminal Code on extended confiscation are constitutional insofar they are not applied to acts committed and to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code. This study offers an analysis from a constitutional point of view of safeguard on extended confiscation, especially from constitutional rules point of view which regulate the principle of non-retroactivity of the law, except for the criminal law or the more favourable non-criminal law, the right to property, respectively the presumption of lawful acquirement of property and the standard of proof required in order to reverse this legal presumption, analysis founded also on the case law in this matter.*

**Keywords:** *extended confiscation, constitutional review, the principle of non-retroactivity of the law, except for the criminal law or the more favourable non-criminal law, the presumption of lawful acquirement of property, the right to property.*

## 1. Introduction

The extended confiscation has been recently enshrined in the Romanian criminal law<sup>1</sup>.

The different opinion expressed both on the regulation<sup>2</sup> and the implementation aspects, the rules governing the extended confiscation have been several times referred

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<sup>1</sup> By Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on Criminal Code, published in the Official Gazette of Romania, Part I, no. 258 of 19 April 2012.

<sup>2</sup> Some authors even claim the uselessness of the regulation (see M.A. Hotca – *Unconstitutionality and uselessness of provisions regulating on extended confiscation* – [www.juridice.ro](http://www.juridice.ro)), while other authors claim its usefulness starting from the peculiarities of the scope, aimed by the Framework Decision 2005/212/JHA of 24 February 2005 on *Confiscation of Crime-Related Proceeds, Instrumentalities and*

to the Constitutional Court, determining an approach which emphasizes the evolving nature on the interpretation of the constitutional rules, as well as the delivery of certain interpretative decisions which have circumscribed the reference text within the limits of the Basic Law.

This study offers an analysis from a constitutional point of view of safeguard on extended confiscation, especially from constitutional rules point of view which regulate the right to property, as well as the principle of non-retroactivity of the law, except for the criminal law or the more favourable non-criminal law.

## 2. Regulation on the concept of extended confiscation

### 2.1. History

In an historic approach, we consider as particularly relevant on the regulation of the concept of extended confiscation in Romania, the Constitutional Court's Decision no. 799/2011 on the bill regarding the revision of the Constitution of Romania<sup>3</sup>, namely its reasons on the presumption of lawful acquirement of property, governed by Article 44(8) in the Constitution. This decision has continued and developed a constant case-law of the Constitutional Court, pronounced in the exercise of its power of review on the initiative to revise the Constitution [Article 146 a) the second sentence of the Basic Law], review of laws before promulgation [Article 146 a) the first sentence], as well as the settlement of exceptions of unconstitutionality of laws and ordinances [Article 146 d)] by which it has ruled that the presumption of lawful acquirement of property is one of constitutional guarantees of the right to property.

Referring in this context only to constitutional review of initiatives to revise the Constitution, emphasizing the consistency of the Constitutional Court in order to ensure this guarantee, we shall highlight three decisions delivered by the Court in this matter.

Thus, by Decision no. 85/1996<sup>4</sup>, the Court held that *"the presumption of lawful acquirement of property is one of constitutional guarantees of the right to property, in accordance with the provisions of Article 41 (1) of the Constitutions [currently Article 44 (1)], which states that the right to property shall be guaranteed. This presumption is also based on the general principle that any legal act or deed is lawful until proven otherwise, requiring, as concerns the wealth of a person, that unlawful acquirement be proven. [...]"* referring to the debates that accompanied the adoption of the 1991 Constitution theses, the Court also held that *"The legal certainty of the right to property on the assets that make up one's wealth is [...] inextricably linked to the presumption of lawful acquirement of property. Therefore removal of this presumption is tantamount to a suppression of a constitutional guarantee of the right to property."*

By Decision no. 148/2003<sup>5</sup>, adjudicating on the proposed text to be introduced in the Constitution, a text that established the cases of application of the presumption in question, stating that it does not apply in case of *"property obtained from criminal conduct"*, the Court held that this wording implies that it is meant to reverse the burden of proof on lawful acquirement, being provided the unlawfulness of wealth acquired

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*Property* (see Fl. Streteanu, *Considerations on extended confiscation*, in *Studies of Criminal Law* no. 2/2012, page 11).

<sup>3</sup> Published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

<sup>4</sup> Official Gazette of Romania, Part I, no. 211 of 6 September 1996.

<sup>5</sup> Official Gazette of Romania, Part I, no. 317 of 16 April 2003.

from criminal conduct. As in the other decision, the Court found unconstitutional the proposal for revision that was aimed, in essence, at the same objective, namely removal of the presumption of lawful acquirement of wealth, because it is tantamount to a suppression of a constitutional guarantee of the right to property.

Decision no. 799/2011 resumed the grounds set forth in the aforementioned decisions, also declaring that *"in the absence of such presumption, the owner of property would be subject to continuing uncertainty because, whenever someone would invoke the unlawful acquirement of the property, the burden of proof lays not with the one who makes the allegation, but with the owner of the property."* Likewise, the Court underlined those held in Decision no. 85/1996 abovementioned or in Decision no. 453/2008<sup>6</sup>, in the meaning that the regulation of this presumption does not prevent the investigation of unlawful acquirement of wealth, but in this case the burden of proof lies with the person making such allegation. Insofar the interested party proves that some assets, part of the wealth of the entire wealth of a person was acquired unlawfully, those unlawful assets or wealth can be confiscated subject to the law. However, in addition to those stated above, the Court held that *"the regulation of this presumption does not prevent the delegated or primary legislature to adopt, pursuant to Article 148 of the Constitution – Integration into the European Union, regulations to enable full compliance with EU legislation in the fight against crime. Moreover, this objective was also considered by the initiator of the proposed revision, especially with regard to Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union no. L 68 of 15 March, which requires taking all measures necessary to comply with its provisions, particularly mitigating the reduction of the burden of proof regarding the source of goods held by a person convicted of a crime related to organized crime."*

Therefore, as a novelty among the initiative to revise the Constitution in 2003 and in 2011, it stands the adoption in the European Union of the Council Framework Decision 2005/212/JHA on confiscation of Crime-Related Proceeds, Instrumentalities and Property<sup>7</sup>. The adoption of this framework-decision was determined by the need for an instrument which, taking into account the best practices in Member States and with due regard to principles of law, would provide the possibility of introducing in criminal, civil or tax law, as the case may be, a reduction of the burden of proof regarding the source of goods held by a person convicted of a crime related to organized crime. The aim of the framework-decision is to ensure that all Member States have effective rules on confiscation of crime related proceeds, *inter alia*, in terms of burden of proof regarding the source of assets held by a person convicted of an offence relating organized crime; *„each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds."*<sup>8</sup>

<sup>6</sup> Official Gazette of Romania, Part I, no. 374 of 16 May 2008.

<sup>7</sup> Published in the Official Journal of the European Union L 68 of 15 March 2005, pages 49-51

<sup>8</sup> According to Article 3 of the abovementioned act, denominated *Extended powers of confiscation*: *"(1) Each Member State shall as a minimum adopt the necessary measures to enable it, under the circumstances referred to in paragraph 2, to confiscate, either wholly or in part, property belonging to a person convicted of an offence:*

*(a) committed within the framework of a criminal organisation, [...] provided that the offence according to the Framework Decisions referred to above,*

Keeping the reasons which characterize the presumption provided for in Article 44(8) in the Constitution as a guarantee of the right to property, Decision no. 799/2011 of the Constitutional Court also offers an answer to the Romanian legislature's concern, determined by the adoption of the Framework Decision abovementioned and the obligations undertaken by Romania as Member State of the European Union. One year after the Constitutional Court delivered the decision mentioned above, a safety measure on extended confiscation was introduced into Romanian law by Law no. 63/2012 amending and supplementing the Criminal Code of Romania and by Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 258 of 19 April 2012, being a law transposing the Council Framework Decision no. 2005/212/JHA of the European Union.

In terms of Article 118<sup>2</sup> of the 1969 Criminal Code, as amended, extended confiscation shall be ordered where the following conditions are cumulatively met: the offence shall be one of those referred to in Article 118 (1) of the 1969 Criminal Code; the penalty provided by law for the offence committed shall be a term of imprisonment of 5 years or more; the offence shall be likely to procure a material benefit for the defendant; the value of the property acquired by the sentenced person, during the 5 years before and, if necessary, after the time when the offence was committed, and until the date of issue of the document instituting the proceedings, clearly exceeds the income obtained lawfully by the respective person; the court is convinced that these goods result from perpetration of the same type of criminal offences as those provided for in Article 118<sup>2</sup> (1) of the 1969 Criminal Code, which means that lawfulness of goods has not been proved.

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*- regarding offences other than money laundering are punishable with criminal penalties of a maximum of at least between 5 and 10 years of imprisonment;*

*- regarding money laundering, are punishable with criminal penalties of a maximum of at least 4 years of imprisonment;*

*And the offence is of such nature that it can generate financial gain.*

*(2) Each Member State shall take the necessary measures to enable confiscation under this Article at least:*

*(a) where a national court based on specific fact is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively;*

*(b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively;*

*(c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of the convicted person.*

*(3) Each Member State may also consider adopting the necessary measures to enable it to confiscate, in accordance with the conditions set out in paragraphs 1 and 2, either wholly or in part, property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned – acting either alone or in conjunction with his closest relations – has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income.*

*(4) Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question."*

Currently, the concept of extended confiscation is regulated by Article 112<sup>1</sup> of the Criminal Code<sup>9</sup>. The new regulation takes over most of the provisions of Article 118<sup>2</sup> of the 1969 Criminal Code Codul, with a distinction in terms of penalty provided by law for committed crimes. The new one is more restrictive – 4 years or more, compared to the old rule when it was for 5 years or more.

## 2.2. Legal nature

According to Article 108 of Criminal Code, extended confiscation is a safety measure, along with obligation to undergo medical treatment, admission into a medical

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<sup>9</sup> „(1) Assets other than those referred to in Article 112 [A/N which regulates the special confiscation], are also subject to confiscation in case a person is convicted of any of the following offences, if such offence is likely to procure a material benefit and the penalty provided by law is a term of imprisonment of 4 years or more:

- a) offences on drug and precursor trafficking;
- b) offences on trafficking in and exploitation of vulnerable people;
- c) offences on the state border of Romania;
- d) money laundering offences;
- e) offences related to the laws preventing and fighting pornography;
- f) offences related to the legislation to combat terrorism;
- g) establishment of an organized crime group;
- h) offences against property;
- i) failure to observe the law on firearms, ammunition, nuclear materials and explosives;
- j) counterfeiting of currency, stamps or other valuables;

k) disclosure of economic secrets, unfair competition, violation of the stipulations on import or export operations, embezzlement, violations of the laws on imports and exports, as well of the laws on importing and exporting waste and residues;

l) gambling offences;

m) corruption offences, offences assimilated thereto, as well as offences against the financial interests of the European Union;

n) tax evasion offences;

o) offences related to customs regulations;

p) fraud committed through computer systems and electronic payment means;

q) trafficking in human-origin organs, tissues or cells.

(2) Extended confiscation is ordered if the following conditions are cumulatively met:

a) the value of assets acquired by a sentenced person within a time period of five years before and, if necessary, after the time of perpetrating the offence, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the sentenced person;

b) the court is convinced that the relevant assets originate from criminal activities such as those provided in par. (1).

(3) In enforcing the stipulations of par. (2), the value of the assets transferred by a convicted person or by one-third party to a family member or to a legal entity over which that convicted person has control shall also be considered.

(4) Sums of money may also constitute assets under this Article.”

(5) In determining the difference between the legitimate income and the value of the assets acquired, the value of the assets upon their acquisition and the expenses incurred by the convicted person and their family members shall be considered.

(6) If the assets to be seized are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(7) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated.

(8) Confiscation shall not exceed the value of assets acquired during the period referred to in par. (2) that are above a convicted person's lawfully obtained income.”

facility, prohibition to hold a certain office or to exercise a certain profession and special confiscation.

As concerns the legal regime of safeguards, they are criminal offences, in the sphere of legal categories, in accordance with Article 2 of Criminal Code as they can be applied only to persons who have committed crimes, even if the perpetrator is not punished under Article 107 (2) and (3) of Criminal Code. In this regard, the Constitutional Court held that the scope of their application is not determined by the exposure to danger revealed by that crime<sup>10</sup>.

As it has been noted, in terms of the particularities of the analyzed measure<sup>11</sup>, if for the other safety measures it is sufficient that the person has committed an offence under criminal law, for extended confiscation the person shall be convicted for the crime committed where the following conditions are cumulatively met: the offence shall be likely to procure a material benefit for the defendant, included in the limited enumeration provided for in Article 112<sup>1</sup> (a) and the law shall provide a term of imprisonment of 4 years or more for such crime. Likewise, extended confiscation is ordered if other two additional conditions are cumulatively met in relation to the sentenced person: the value of assets acquired during a certain period of time shall exceed a convicted person's lawfully obtained income, and the court shall be convinced that these assets result from perpetration of the same type of criminal offences as those provided by law.

### ***2.3. Extended confiscation, substantiation and justification***

In the decisions delivered in this matter<sup>12</sup>, the Constitutional Court held, "the impugned provisions come to establish the measure of extended confiscation in the event of conviction for perpetration of offences which have a serious nature, posing a relevant social danger and which perpetration allows the accumulation of goods, the value of which manifestly exceeds the lawfully obtained income, and the judge is convinced that these goods result from perpetration of the same type of criminal offences."

The Court also referred to the Communication from the Commission to the European Parliament and the Council, COM (2008)766 final, holding the following: "in the Communication from the Commission to the European Parliament and the Council, COM (2008) 766 final, it stated that in order to fight against organized crime activities, offenders must be deprived of the proceeds of crime. Organised crime groups build international networks of high dimension and achieve substantial profits from various criminal activities. A very effective way to combat organized crime is confiscation and recovery of assets held by offenders, mainly oriented towards profit. Confiscation prevents the use of offenders' assets as a source of funding for other criminal activities, removes the danger to compromise confidence in the financial systems and to corrupt legitimate society. Confiscation has a deterrent nature as it reinforces the principle that

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<sup>10</sup> Decision no.78 of 11 February 2014, published in the Official Gazette of Romania, Part I, no. 273 of 14 April 2014.

<sup>11</sup> Sebastian Rădulețu, in T. Toader and others, *The New Criminal Code, Comments on Articles*, Hamangiu Publishing House, Bucharest, 2014, pages 212.

<sup>12</sup> Decision no. 356 of 25 June 2014, published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014; Decision no. 11 of 15 January 2015, published in the Official Gazette of Romania, Part I, no. 102 of 9 February 2015.

“crime does not pay”. This could help to eliminate negative patterns given by offenders to local communities. In some cases, confiscation measures for the proceeds of crime allow tracking the decision-makers within criminal organizations, which are rarely investigated and prosecuted. Thus, in the case of serious offences with high effects and consequences both nationally and transnationally, the Court notes the occurrence of a concept/principle according to which crimes should not result in profit/income – “Crimes does not pay”. Likewise, the doctrine held that the confiscation measure of property is nothing more than a criminal policy option and a means of repression and rehabilitation of those who commit such crimes. Such manifestation specific to organized crime should be included in this category. This confiscation falls into the category of *sceleris sceleris* and *productum fructum* and covers financial gains resulted from criminal activities.”

A similar reasoning of certain similar measures can also be found in the case-law of other constitutional courts. Thus, ruling on the provisions of the Criminal Procedure Code of the Republic of Moldova on extended confiscation, the Constitutional Court of Moldova has recently held that the recovery of assets held by offenders is an effective way of combating organized crime and prevents the use of offenders’ wealth as a source of funding for other criminal activities<sup>13</sup>. Similarly, the Constitutional Court of South Africa<sup>14</sup> held that the main purpose of confiscation is not punishing the offender, but rather ensuring that offenders do not enjoy the fruits / benefits resulted from the committed crime<sup>15</sup>.

### 3. The safety measure of extended confiscation in compliance with the presumption of lawful acquirement of property, enshrined in Article 44 (8) of the Constitution

Having examined the provisions which introduced the safety measure of extended confiscation, in relation to Article 44 (8) the second sentence of the Constituion on the presumption of lawful acquirement of property, the Court has firstly examined the invoked constitutional principle, the presumption of lawful acquirement of property and the standard of proof required to reverse this presumption.

#### ***3.1. Presumption of lawful acquirement of property is not an absolute presumption***

The Court’s approach found in its recent case-law gives expression to an evolutionary interpretation of constitutional concepts and rules, being also in connection with

<sup>13</sup> Referral no.60a of 03.12.2014 on the constitutionality review of the provisions of Articles III (3), (4), (12) and IV (1) and (2) of Law no. 326 of 23 December 2013 amending and supplementing certain laws, <http://www.constcourt.md/>.

<sup>14</sup> In South Africa, there are three categories of assets which may be subject to confiscation under criminal cases: the one which represents the direct result of the criminal activity (e.g., stolen assets), the indirect benefits of the criminal activity (e.g., assets acquired with money obtained from drug trafficking), and assets of lawful acquirement which represent the value of direct or indirect benefits of a person convicted, resulted from any criminal activity which courts find related to the crime for which the person is convicted (assets presumed to have been unlawfully acquired) – Prevention of Organized Crime Act no. 121 of 1998, <http://www.acts.co.za/prevention-of-organised-crime-act-1998/>.

<sup>15</sup> Case S v Shaic and Others, 2008, available at <http://www.saflii.org/za/cases/ZACC/2007/19.html>.

the current developments at the level of relevant international courts in the light of Article 20 of the Constitution.

The Court invoked the theory of "living law concept; *diritto vivente*", widely accepted and implemented both at the level of Constitutional Courts and of the European Court of Human Rights (for example: Judgment of 7 July 1989 delivered in the Case *Soering v. The United Kingdom* - "The Convention is a living instrument which must be interpreted in the light of present-day conditions"; Judgment of 29 April 2002 delivered in the Case *Pretty v. The United Kingdom* - "The Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. ".)

Likewise, the Court invoked in its case-law, embodied by Decision no. 1533/2011<sup>16</sup>, that "the fundamental rights enshrined in the Constitution have not an abstract existence, but they are exercised in connection and conjunction with the other constitutional provisions. Such functional interdependence determines both the framework where these rights are exercised and their specific material content ". Thus, constitutional provisions must be interpreted and applied in accordance with the other constitutional provision so as to promote internal consistency and harmony between its various provisions. Likewise, the provisions of the Constitution must be systematically interpreted by taking into account their scope, without turning any of them into an absolute one, until the removal of others equally important.<sup>17</sup>

In doing so, the Court held that the determination of the content of the presumption of lawful acquirement of property must be achieved in the light of the criteria defined by the Court. In this regard, the Court distinguished in the Basic Law two categories of rights:

- absolute rights (e.g. the right to life and the right to physical and mental integrity), which cannot be restricted in any circumstances by State authorities;
- and relative rights whose exercise can be restricted under certain conditions.

As concerns the right to property, the Court held that, by definition, in terms of content and scope of attributes, such right is not unlimited, but it is configured by the provisions of law, which set limits to the its exercise and which constitute the result of the combination between holder's individual interest and the collective or general interests<sup>18</sup>. Equally, the presumption of lawful acquirement of property represents one of the constitutional guarantees of the right to property. This presumption is grounded also on the general principle according to which all legal acts or actions are lawful until the contrary is proven, requiring, as concerns the wealth of a person, that unlawful acquirement be proven<sup>19</sup>. Consequently, as the right to property is not an absolute right because it may take certain limitations, it cannot be claimed that a guarantee of such right may have an absolute nature. To claim the contrary leads to a situation where the primary right becomes absolute by applying the presumption, although it may be subject to certain limitations, under some circumstances.

<sup>16</sup> Published in the Official Gazette of Romania, Part I, no. 905 of 20 December 2011.

<sup>17</sup> See also Decision no. 586 of 20 December 2004, published in the Official Gazette of Romania, Part I, no. 155 of 22 February 2005.

<sup>18</sup> Decision no. 492 of 21 November 2013, published in the Official Gazette of Romania, Part I, no. 54 of 22 January 2014.

<sup>19</sup> Decision no. 453 of 16 April 2008, published in the Official Gazette of Romania, Part I, no. 374 of 16 May 2008.



Therefore, in the context of establishing that the presumption of lawful acquirement of property is not an absolute presumption, the relative nature of such presumption does not result in a reversal of the burden of proof and the principle of *actori incumbit probatio* remains fully applicable.

### **3.2. Standard of proof. The use of presumptions within confiscation proceedings**

In relation to those held, the Constitutional Court further established the standard of proof required in order to reverse a legal relative presumption. Thus, the Court noted that, in terms of their proving power, legal presumptions may be relative (*iuris tantum*) and absolute (*iuris et de iure*). Relative presumptions do not establish absolute truths, removed from any possibility of discussion, correction or refutation, and, therefore, they can be combated by contrary proof. Through the non-admission of the possibility of their defeat, absolute presumptions create the image of absolute truths, immutable, acquired once and for all, and imposed on all by force of legislative utterances.

As for the extended confiscation, in order to establish the standard of proof, the Constitutional Court held that it shall not be assumed that the presumption of lawful acquirement of property can be reversed only by proof or by proving that the assets concerned results from the commission of offences. Should this be the approach, extended confiscation would be deprived of any reason to exist, because, if it is to prove each criminal act from which certain assets result, we will reach the author's conviction for these acts, and therefore the special confiscation of property thus obtained. Consequently, the measure of extended confiscation will be of no use. Therefore, a relative legal presumption may be reversed not only by proof, but also by simple presumptions.

Furthermore, the Court held that the use of presumption within confiscation proceedings is also recognized by the Strasbourg Court, but it must be accompanied by certain guarantees, which are intended to protect the rights of the defence. The European Court of Human Rights ruled that each legal system recognises the presumptions of fact or of law. As a matter of principle, the Convention clearly does not prohibit such presumption. However, the right of the applicants to respect for their property presupposes the existence of an effective judicial guarantee<sup>20</sup>.

Thus, in the European case-law<sup>21</sup>, it emerges the need for the following guarantees:

- assessment must be made by a court within judicial proceedings which include public hearing;
- defendant should have access to the file / to communication in advance of the arguments of the prosecution body;
- the persons concerned must have the possibility to adduce evidence, to raise objections and to present the evidence they deemed necessary (whether documentary or oral evidence);
- presumptions on which prosecution body relies shall not be absolute, so that they can be reversed by the defendant.

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<sup>20</sup> Decision of 5 July 2001, delivered in Case *Arcuri v. Italy*.

<sup>21</sup> Judgment of 23 September 2008, delivered in Case *Grayson and Barnham v. The United Kingdom*, paragraph 45; Judgment of 5 July 2001, delivered in Case *Phillips v. The United Kingdom*, paragraphs 42 and 43; Decision of 5 July 2001, delivered in Case *Arcuri v. Italy*; Decision of 27 June 2002, delivered in Case *Butler v. The United Kingdom*.

The European Court ruled that the practical application of various national provisions allowing extended confiscation complies with the concept of fair trial, with the presumption of innocence, with the protection of property and includes confiscation within criminal penalties referred to in Article 7 of the Convention<sup>22</sup>.

Having examined the legal framework in the matter, the Court ascertained that that the provisions on extended confiscation, introduced into Romanian law by Law no. 63/2012, provide the guarantees deemed relevant in the case-law of the European Court. Thus, extended confiscation is ordered by a court on the basis of its own certainty that the property subject to confiscation originates from criminal activities, a certainty reached after undergoing public judicial proceedings in which the persons concerned have had access to the file and to the arguments of the prosecution body, as well as the opportunity to adduce evidence and to present the evidence they deemed necessary<sup>23</sup>.

For the aforementioned reasons, the Court ascertained that the impugned legal provisions are in compliance with the provisions of Article 44 (8) of the Basic Law.

#### 4. Regulation on extended confiscation interpreted in compliance with the constitutional provisions of Article 15(2), enshrining the principle of non-retroactivity of law

##### ***4.1. Only the norms of substantive (substantially) criminal law may be subject to constitutional regulation on the retroactivity of criminal or more favourable non-criminal law, and not at all those of procedural criminal law. Delimitation of substantive criminal law rules of those of procedural criminal law***

To respond to the challenge according to which the provisions subject to constitutional review allow retroactive application of the measure of extended confiscation, in breach of Article 15 (2) of the Constitution, as long as it applies to assets acquired up to 5 years before the entry into force of Law no. 63 / 2012, the Court firstly indicated the scope of this constitutional text in criminal matters.

The Court recalled that by Decision no. 78/2014<sup>24</sup> it ruled that: „ only the norms of substantive criminal law may be subject to the constitutional regulation enshrined by Article 15(2) on the retroactivity of criminal law or more favourable contravention and not at all those of procedural criminal law which shall be immediately implemented. The set of legal norms covered by the criminal law establishes the acts which are considered offences, the sanction which is to be adapted (enforced) as for the committed offence, the conditions under which the persons who commit offences may be held criminally responsible by the State, as well as the conditions under which the sentences are to be carried out and the measures which may be taken in case of committing criminal acts.

<sup>22</sup> Judgment of 23 September 2008, delivered in Case Grayson and Barnham v. The United Kingdom, paragraph 45; Judgment of 5 July 2001, delivered in Case Phillips v. The United Kingdom, paragraphs 42 and 43; Judgment of 1 March 2007, delivered in Case Geerings v. The Netherlands, paragraph 44, as well as Judgment of 10 May 2012, delivered in Case Sud Fondi - S.R.L. and others v. Italy, paragraph 52; for an extended comment see also M. Armaşu, *Extended confiscation. Comparative analysis between the current regulation and the amendments required by Directive 2014/42/UE, from the point of view of the European Convention for Human Rights*, in Forum of Judges ( issue 2/2014).

<sup>23</sup> An analysis and similar conclusions can also be found in Decision no. 4 of 23 February 2011 delivered by the Constitutional Court of Albania– full version of the decision, in English, is available in CODICES database of the Venice Commission, <http://www.codices.coe.int> - ALB-2012-1-001.

<sup>24</sup> Published in the Official Gazette of Romania, Part I, no. 273 of 14 April 2014.

*Criminal law* means a substantially or substantive rule of law with a legal content itself, namely a rule which establishes conducts, acts, actions of the subjects in a legal relationship, while the expression on the procedural law represents the category of the legal norms which comprise procedures, methods or means by which the substantially rules of law are enforced.”

Referring to the delimitation criteria of the criminal law norms of those of criminal procedure, the Court found, for example by Decision no. 1.470/2011<sup>25</sup>, that “including these norms in the Criminal Code or in the Criminal Procedure Code is not a criterion in order to distinguish them.” Consequently, what prevails in establishing this nature consists in the regulatory nature, in the aim and in the result to which the norm concerned leads.

Having taken into account the criterion of regulatory nature of the norm, the Court ascertained that Article 118<sup>2</sup> (2) a) of 1969 Criminal Code is a norm on special confiscation which could fall within norms of substantive law and not within those of criminal procedure, as Article 2 of 1969 Criminal Code indicates that criminal law also provides measures which may be taken if offences are committed. However, the safety measure of extended confiscation is one of them. Equally, regarding the removal of an unsafe situation and the prevention of committing the acts laid down in criminal law, not even the criterion of the result to which the norm leads can be removed. Consequently, the Court concluded that the safety measure of extended measure is a norm of substantive criminal law.

#### ***4.2. The provisions on extended confiscation cannot be retroactive in relation to confiscation of assets acquired before their entry into force, even if the crimes for which conviction is ordered were committed after that date***

Once it was established the meaning abovementioned, the Court held that the principle of retroactivity of law finds its justification and aims to ensure stability and security of legal relationship. Therefore, only a foreseeable norm can clearly determine the conduct of the subjects of law, the recipients of the law. It is precisely for this reason that the doctrine held that a law, once adopted, takes and must take legal effects only for future. This for the simple reason that the law addresses to the subjects of law and the deviant attitudes shall be allowed or forbidden and, of course, sanctioned. It is absurd that a subject of law may be made responsible for behaviors and a conduct that he might have had before the entry into force of a law regulating such conduct. The subject of law could not foresee what the legislature would govern, and his behavior is normal and natural if conducted within the legal order in force.

Thus, the Court ascertained that the impugned legal norm cannot be retroactive in relation to confiscation of assets acquired before its entry into force, even if the crimes for which conviction is ordered were committed after that date. If extended confiscation applied to assets acquired before the entry into force of Law no.63/2012, the principle of non-retroactivity of law enshrined in Article 15 (2) of the Constitution would be violated.

In conclusion, the Court upheld the exception of unconstitutionality and ascertained that, “the provisions of Article 118<sup>2</sup> 2 (a) of the 1969 Criminal Code are constitutional insofar extended confiscation does not apply in relation to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian

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<sup>25</sup> Published in the Official Gazette of Romania, Part I, no. 853 of 2 December 2011.

Criminal Code and Law no. 286/2009 on the Criminal Code”<sup>26</sup>. Likewise, the Constitutional Court ascertained the constitutionality of the provisions of Article 112<sup>1</sup> 2) a) of the Criminal Code insofar extended confiscation does not apply in relation to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code.<sup>27</sup>

In order to deliver the latter solution, the Court held that “the provisions of Article 112<sup>1</sup> (2) a) of the Criminal Code contain a legal solution identical to that contained in Article 118<sup>2</sup> (2) a) of the 1969 Criminal Code, both texts being inserted into the legislation abovementioned by Law no.63/2012. Having taken into account that the object of this exception is identical to that of the exception of unconstitutionality of the provisions of Article 118<sup>2</sup> (2) a) of the 1969 Criminal Code, the norm on extended confiscation provided for in Article 112<sup>1</sup> (2) a) of the Criminal Code shall not exceed the time limit of the entry into force of Law no. 63/2012, as it shall not be ordered on the assets acquired by the sentenced person before the abovementioned date, being the main solution held in Decision no. 356 of 25 June 2014, analyzed above”. Therefore, the Court found that “the provisions of Article 112<sup>1</sup> (2) a) of the Criminal Code shall not exceed the time limit on the assets acquired before the entry into force of Law no. 63/2012, even if the offences for which the conviction is ordered were committed after that date; the contrary solution would violate the principle of non-retroactivity of law enshrined in Article 15 (2) of the Constitution”.

## 5. Conclusions

Having concluded on the analysed case-law, it should be noted the Constitutional Court’s option to deliver such interpretative decisions in this matter and in relation to the analysed criticisms aiming at not creating a void law which could have had damaging consequences. Thus, the impugned texts stay in the normative order and the unconstitutional interpretation in terms of Article 15(2) of the Constitution shall be removed. As a results, the norms of Criminal Code on extended confiscation are constitutional insofar they are not applied to acts committed and to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code.

As for the particularly complex issues raised by the respect and guarantee of the right to property, taking into account the constitutional issues in relation to which the Constitutional Court has delivered decisions until now, with reference to extended confiscation, we consider it necessary to mention those identified by the Venice Commission final, in one of its opinions<sup>28</sup>, by which it underlined the importance of a precise law in relation to evidence, which must be complied with by the authorities in order to carry out the confiscation of assets, in order to prevent that such confiscation constitutes an unjustified interference in the exercise of the right to property. This precision is a source of uniformity, ensures the legal certainty and foreseeability while

<sup>26</sup> Decision no.356 of 25 June 2014, published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014.

<sup>27</sup> Decision no.11 of 15 January 2015, published in the Official Gazette of Romania, Part I, no. 102 of 9 February 2015.

<sup>28</sup> Venice Commission – „*Avis interimare sur le projet de loi relative a la confiscation en faveur de l etat des biens acquis illegalement de la Bulgarie*” – adopted by the Commission in the 82nd plenary session, Venice, 12-13 March 2010; the report may be seen on the website [www.venice.coe.int](http://www.venice.coe.int).

ensuring that provisions governing the confiscation proceedings starts from the legislature power and not from the judiciary one, being an indispensable aspect especially in countries affected by corruption.

We also consider the context and the commitment of Member States to implement the laws, regulations and administrative provisions necessary to comply until 4 October 2016<sup>29</sup> with Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and committed crimes in the European Union, and the legislative changes which are to be adopted in this regard in Romania.

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<sup>29</sup> See Official Journal of the European Union L 127 of 29 April 2014.

# Organized Crime in Hungary

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## Abstract

*The organized crime perpetration is much more serious threat to the society than an individual crime. More offenders on one hand means more concentration of power which from an objective view increases the chance of the successful crime perpetration and on the other hand the presence of accomplices and the knowledge of their possible intervention when needed increases the offender's determination.*

*There are different methods to define the scale of the quantity of the organized crime, even though due to the conspiracy it is difficult to get a clear and concrete number of the committed crimes resulted from organized crime.*

*Before the transition in the countries, which belonged to the soviet sphere of interest, it was a perceptible phenomenon if a new type of crime commitment appeared in one country then within a short time it was spread in the other countries too*

*Fighting against the organized criminal entities is only possible with organized law enforcement resorts*

**Keywords:** *organized crime, crime groups, participation in criminal organization, plea bargaining.*

## 1. The definition of organized crime

Organized crime is an increasing threat to the society we live in and wish to preserve.

In the history of crime we could observe that there were always existing crime groups<sup>1</sup> (e. g. outlaw bandits) but their organization and perpetration method was not as highly sufficient as it is nowadays.

The organized crime perpetration is much more serious threat to the society than an individual crime.<sup>2</sup> More offenders on one hand means more concentration of power which from an objective view increases the chance of the successful crime perpetration

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<sup>1</sup> Tóth, M.: *A szervezett bűnözés néhány történeti és gyakorlati kérdése, [Few historical and practical question regarding organized crime]* Collega 1998/3, p. 9.

<sup>2</sup> Briggs, Gavin: *Organised Crime Groups: A Transnational Security Threat to the Region North of Australia.* Strategic Analysis Paper 27 January 2010. pp. 1-2.

and on the other hand the presence of accomplices and the knowledge of their possible intervention when needed increases the offender's determination.

The organized perpetration opens a new dimension for the actual perpetrator in the way that when he commits a crime he feels the entire weight and power of the organization behind him and on the other hand it inhibits him to turn against the organization.<sup>3</sup>

Organized crime was defined<sup>4</sup> in several ways in the last few decades however we do not have a comprehensive general definition which can be valid for every crime group.<sup>5</sup> The reason for this that organized crime groups can be very varied in different continents, cultures and from time to time it can change its face even within one area. Due to these facts it is not possible to give a comprehensive and general definition for organized crime.<sup>6</sup>

Organized crime links two concepts. One is an **organization** to meet the highest needs of the people which is the only form for several legal and noble operation.<sup>7</sup> The other is the **sin** which is not creative but a destructive operation against virtues.<sup>8</sup>

Under László Korinek<sup>9</sup> the expression of organized crime is a theoretical construction in the sense that it does not exist anywhere in a pure and perfect form.

However, despite the unsuccessful attempts for a general definition we can name the common criteria for organized crime which can be found in every crime groups.

The most important criteria for organized crime are the followings<sup>10</sup>:

- Under the operative legal regulation it intends to meet **forbidden needs** (e.g. consumption of drugs).
- It intends to **maximize the profit** with lowest risks and the quickest way (e.g. prostitution).
- It is typical that within the crime group there is a **specialization** in the execution of different tasks. (e.g. some specializes in car theft, other in stealing artifacts, and another in selling stolen goods).
- The organized offender does this for a living, it is his "**profession**"<sup>11</sup>. They do not intend to operate in legal ways to maintain themselves.

<sup>3</sup> Bócz, E.: *A szervezett bűnözés néhány problémájáról, [Few problems regarding organized crime]* Belügyi Szemle, 2001/11. p. 5.

<sup>4</sup> Albanese, J. S.: *North American Organised Crime*. Global Crime Vol. 6, No. 1, February 2004. pp. 9-10.

<sup>5</sup> Berta, K.: *A szervezett bűnözés [The organized crime]* In: *Kriminológia – Szakkriminológia*, szerk.: Gönczöl Katalin – Kerezi Klára – Korinek László – Lévay Miklós, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2006, p. 423.

<sup>6</sup> Finszter, G. – Irk, F.: *Gazdasági-társadalmi változások, a bűnözés új kihívásai, (Szervezett bűnözés Kelet-Közép-Európában, az Európai Unió peremén) [economic and social changes, the new challenges of crime (Organized crime in Middle and Eastern Europe, in the edge of the European Union)]* In: *Kriminológiai Tanulmányok XXXVIII.*, Országos Kriminológiai Intézet, Budapest, 2001. p. 25.

<sup>7</sup> Zaluar, A.: *Violence in Rio de Janeiro: styles of leisure, drug use, and trafficking*. International Social Science Journal Volume 53, Issue 169, September 2001, pp. 369-378.

<sup>8</sup> Finszter, G. – Irk, F.: *op. cit.* p. 42.

<sup>9</sup> Korinek, L.: *A szervezett bűnözés lényegi elemei [The essential parts of organized crime]* In: *Harmadik Magyar Jogászggyűlés, Balatonfüred 1996.május 17-19.*, Magyar Jogász egyesület, Budapest, 1996, p. 55.

<sup>10</sup> Korinek, L., *op. cit.*, pp. 55-56.

<sup>11</sup> Bócz, E.: *A szervezett bűnözésről és a bűnszervezet fogalmáról [About the definition of organized crime and crime organization]* In: Györgyi Kálmán ünnepi kötet, (Szerk.: Gellér B.),

- Presence of **violence** is constant in the operation of the criminal association. Violence is suitable for enforcement of different interests (*e.g.* The acquisition of control of clubs) and for so called discipline (*e.g.* threatening witness to not give a statement against the crime group) and for making example (*e.g.* cutting off the “traitor’s” hand or burying him alive).
- Simultaneous presence of **legal and illegal** business activities, (*e.g.* cover operating businesses). The well-known American gangster Al Capone operated laundry business.
- Organized crime has no borders, it is an **international** criminal enterprise. For example the Russian organized crime has interest in different countries as well, not just in Russia.

## 2. The field of operation of organized crime

Organized crime – according to Géza Finszter and Ferenc Irk typology – can be classified to two main groups: the conflict and the consensus.

The characteristics of the **conflict organized crime** is that the implementation conducts are trying to evade the legal market, deny the legal needs, and to loot the legally acquired assets. These types of crimes always have a direct victim (*e.g.* organized car theft, series of burglary).

The characteristics of the **consensus organized crime** is that they try to use the legal market to acknowledge their legal needs and to grow their income. The delicts have no direct victims, it is difficult to control them by the authorities and they cannot be prevented with traditional tools of prevention (*e.g.* they meet illegal need (illegal drug trafficking) running legal enterprises in illegal way (tax evasion)).<sup>12</sup>

There are different methods to define the scale of the quantity of the organized crime, even though due to the conspiracy it is difficult to get a clear and concrete number of the committed crimes resulted from organized crime.<sup>13</sup>

Earlier we emphasized that the main characteristics of the organized criminality is the constant change, renewal. Essentially the strict rules of the market defines that when, where, and what type of offence comes into focus and what type offence is neglected temporarily or permanently.<sup>14</sup> In this way we can observe a boom in human trafficking and stagnate in organized car theft.

The most important areas of the organized crime operation are the followings<sup>15</sup>:

- illegal drug trafficking, arms trafficking, gambling
- taking protection money
- counterfeiting
- illegal disposal of hazardous waste

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Bibliotheca Iuridica, az ELTE Állam-és Jogtudományi Karának tudományos kiadványai, Libri Amicorum 11., KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004. p. 81.

<sup>12</sup> Finszter, G. – Irk, F., *op. cit.*, pp. 42-43.

<sup>13</sup> Kertész, I.: *A szervezett bűnözés terjedelme [The scale of organized crime]* Magyar Tudomány, 2001/8, p. 909: Pl. rendőrségi információk összegzése és értékelés, áldozattá válási felmérések, gazdasági mutatók elemzése stb.

<sup>14</sup> Finszter, G. – Irk, F., *op. cit.*, p. 29.

<sup>15</sup> Korinek, L. *op. cit.* p. 57.



- excise fraud (tax, customs etc.).
- human trafficking
- kidnapping
- prostitution

### 3. The Hungarian organized crime's origin and characteristics

The roots of the organized crime have already appeared in the 1970's in Hungary<sup>16</sup>, but de facto only from the 80's can we talk about criminal organizations based on division of duties.<sup>17</sup>

The socialist system's rules of planned economic have gradually softened and lead to a so-called economic liberalization, which made it possible for the undertakings (at that time: private business work associations) to operate.

On one hand, due to the shortage economy there was one basic problem in the socialism, that the criminals could hardly spend their illegal incomes on luxury goods. On the other hand, there were no established channels for the legalization of the illegal incomes.

When the freer economic possibility has appeared, it has attracted the organized crime since the operation of the entertainer-industrial units and coffee bars have become the solution for the legalization of the illegal incomes. In those times illegal fruit and slot machines have spread in Hungary.<sup>18</sup>

The change of regime's years (1990-1995) provided the true rise for the organized crime, due to privatization, mineral oil trade and organized motor vehicle theft<sup>19</sup> earned billions for them.

Many factors helped the organized crime<sup>20</sup> to rise: the prolonged civil procedure and judicial enforcement (the collections), the surfeit of the real estate register (house mafia cases<sup>21</sup>), the prolonged court registration (phantom companies).

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<sup>16</sup> Wright, Alan: *Organized Crime in Hungary: The Transition from State to Civil Society*. Transnational Organized Crime Vol.3, No.1, Spring 1997. p.49 "Organized crime has developed through three stages in Hungary. The first signs were evident in the 1970s when the police successfully identified and acted against several groups involved in criminal activities organized on the basis of blood relationship (where the leader was the head of the family)."

<sup>17</sup> Katona, G.: *Szervezett bűnözés Magyarországon*, [Organized crime in Hungary] BM Kiadó, Budapest, 2000, pp. 8-9.

<sup>18</sup> Hignett, K.: *Organised Crime in East Central Europe: The Czech Republic, Hungary and Poland*. Global Crime Vol. 6, No. 1, February 2004. pp. 71-72.

<sup>19</sup> Katona, G., *op. cit.*, pp. 22-25.

<sup>20</sup> Council of Europe: Report on the Organized Crime Situation in Council of Europe Member States – 1999. European Committee on Crime Problems Group of specialist on criminal law and criminological aspects of organised crime. Strasbourg, December 2000. p.17. "Hungary enumerates 76 existing and active organised crime groups with altogether 1982 individuals suspected to be involved, or an average of 26 persons per group. Nearly one-half (34groups) have between 5 and 10 members, and 28 groups have between 11 and 30 members. Six massive groups are observed, with 100-300 members each, the largest ones operating in the Budapest metropolitan area."

<sup>21</sup> Nagy, L.T.: *A lakásmaffia-bűncselekmények empirikus vizsgálata*, [empirical research of house mafia cases] In: *Kriminológiai tanulmányok* 41., (szerk.: Irk F.), Országos Kriminológiai Intézet, Budapest, 2004, p. 169-170.

The so-called “house mafia” crimes played a significant part in the Hungarian organized crime. For the most part, people in a difficult situation were the targets of these property frauds.<sup>22</sup>

The misuse of properties cannot be considered as a Hungarian criminal curio, since similar crimes appeared in every post-socialist countries as well, and even in several western countries (*e.g.* in Germany).

Before the transition in the countries, which belonged to the soviet sphere of interest, it was a perceptible phenomenon if a new type of crime<sup>23</sup> commitment appeared in one country then within a short time it was spread in the other countries too (*e.g.*: the new way of the housebreaking with cylinder breakage was domesticated by Poland).<sup>24</sup>

There were two main reasons for this: one is the criminal export and import between the socialist countries and the other was the similarities in the former soviet countries housing policies.

At the time of the change of regime (1989-90) it was known among the criminal professional associations in Russia there were such operating criminal organizations which committed extended series of frauds with the aid of attorneys, real estate agents and the bribed employees of the authorities. They used extremely brutal methods to obtain the owner’s or tenant’s rights, they were willing to even kill people for it.

The house mafia tried to find people in difficult situation at local government’s social departments, charity and medical institutions, in the purpose of becoming their tenant, or based on friendship they moved in and they often forced the plaintiffs to sign sales contracts.

#### 4. The fight against organized crime

The situation of the fight against organized crime could be explained with Imre Kertész’s words: organized crime, disorganized law enforcement.<sup>25</sup> We can choose from a wide range of resorts when it comes to the fight against the organized crime.

Among the criminal law and criminal procedure’s resorts the witness protection and plea bargain are worth to be mentioned.<sup>26</sup> During the criminal procedure it is important to protect witnesses since it can be feared that criminals will take a revenge on them.

The essence of the plea bargaining is that the prosecution won’t bring a charge against the criminal, who has important information about the organized crime entity, for the minor crimes (*e.g.* theft) in case the criminal is willing to testify or provide information about the committed major crimes (such as homicide) by the organized criminal organization.

<sup>22</sup> Póczik, Sz.: Lakásmaffia jellegű bűncselekmények [house mafia like crimes] – Társadalomtörténeti és kriminológiai áttekintés a rendszerváltást követő időszak egyik jellegzetese szervezett bűnelkövetési formájáról, IN: Társadalmi összefogással a lakásmaffia ellen – Tanulmányok, dokumentumok 2002-2006, (Szerk.: Póczik Szilveszter-Dunavölgyi Szilveszter), MBK Füzetek 16, Biztonságos Magyarorszáért Közalapítvány, Budapest, 2006, p. 39.

<sup>23</sup> See Nagy, Z.A.: *Az informatikai bűncselekmények* [The Informatics Crimes]: Magyar Tudomány 2001.8. pp. 947-949.

<sup>24</sup> Katona, G., *op. cit.*, p 9.

<sup>25</sup> Kertész, I: A bűn európai útjain, [On the european road of sin] *Belügyi Szemle*, 1999/9, p. 54.

<sup>26</sup> Korinek, L., *op. cit.*, p. 58.

Among the law enforcement's resorts the undercover operation, secret investigation and international criminal cooperation are the most crowned with success.

The undercover agent pretend to be a criminal, who can commit some type of crimes except the major ones (*e.g.* homicide) for the purpose of the law enforcement.

There are two main forms of influential international criminal police cooperation: Europol<sup>27</sup> and Interpol. Europol is an inter-governmental law enforcement agency, which analyzes<sup>28</sup> the criminal records from the member states,<sup>29</sup> while the Interpol is an international law enforcement agency with investigation authority.

As potential organization resorts the following could be like setting special police, prosecution units such as National Investigation Agency's Organized Crime Service.

Despite the efforts from the legislative power to step up against criminality we have to admit that only criminal law itself is not enough for combatting organized crime.<sup>30</sup> In the interest of this purpose, the Hungarian legislator has created the legal provision of „the participation in criminal organization” [Criminal Code Section 321] as a *sui generis* crime<sup>31</sup>, which is a rare exception owing to the difficulty to prove it during the criminal procedure and convict someone for it at the court.<sup>32</sup>

In conclusion, fighting against the organized criminal entities is only possible with organized law enforcement resorts.<sup>33</sup>

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<sup>27</sup> Hadas, L.: A szervezett bűnözés gazdasági veszélyei, Fejlesztés és Finanszírozás, [The economic risks of organized crime, Development and financing] 2004/2, p. 71.

<sup>28</sup> Eördögh, Á.: Az Európai Unióval folytatott rendőri együttműködés és szervezett bűnözés elleni fellépés, [combatting organized crime with the EU] Belügyi Szemle, 2000/3, p. 101.

<sup>29</sup> Salgó, L.: Az Europol a szervezett bűnözés és a terrorizmus ellen, [Europol against organized crime and terrorism] Belügyi Szemle, 2007/4 p. 7.

<sup>30</sup> Varga, Z.: A szervezett bűnözésről, JOGOK, [About organized crime] 2006.április., p. 21.

<sup>31</sup> Act of 2012 on the Criminal Code - Participation in a Criminal Organization “Section 321 (1) Any person who instigates, suggests or offers, or joins or collaborates to engage in criminal activities in the framework of a criminal organization, or who provides the means intended to be used for such activities, or supports the activities of the criminal organization in any other manner is guilty of felony punishable by imprisonment between one to five years. (2) Any person who confesses the criminal act to the authorities first hand and unveils the circumstances of commission shall not be prosecuted on the grounds of participation in a criminal organization.”

<sup>32</sup> Györgyi, K.: A szervezett bűnözés és a pénzmosás elleni fellépés jogi lehetőségei a Magyar Köztársaságban, [combatting organized crime and money laundering in the Hungarian Republic] Közjegyzők Közlönye, 2000/1, p. 4.

<sup>33</sup> Bencze, J.: „Szervezet ellen csak szervezettel lehet felvenni a harcot”, [Only organization can combat organization] belügyi Szemle, 2001/11, p. 46.

# Legislative Actions of Estonia to Combat Organized Crime

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## Abstract:

*From 2002 belonging to a criminal organization or leading one is punishable in Estonia. While making relevant changes to Estonian Penal Code, Estonian legislator took into account requirements of the United Nations Convention against Transnational Organized Crime. The Estonian courts have been applying respective law for over ten years now and have encountered several difficulties. For instance, the notion of 'criminal organization' still is debatable as in practice it should be distinguished from ordinary groups that gather occasionally to commit crimes. In addition, the problems related to the principle of ne bis in idem may arise in case the authorities have failed to investigate a crime of belonging to a criminal organization or leading one and crimes that a person has committed while belonging to the organization in the same criminal procedure. This article introduces these problems as well as gives an overview of historical development and current status of Estonian criminal law in the area of combating organized crime.*

**Keywords:** *organized crime, membership of criminal organization, leadership of criminal organization, formation of criminal organization, Estonia, criminal law, legal regulation, development of national legislation, development of national court practice*

## 1. Introduction

After Estonia regained its independence on the 20<sup>th</sup> of August 1991, the Estonian legislator had a difficult task to modernize Estonian legislation. The Criminal Code, which was already in force during the Soviet era, was amended with the aim to reconcile it with the democratic principles, but it took over 10 years for the legislator to elaborate modern Penal Code. On the 1<sup>st</sup> of September 2002 it finally came into force,<sup>1</sup> with its Articles 255 and 256 providing punishment for forming and belonging to a criminal organization. One of the reasons these Articles were added to the Penal Code was that Estonia ratified the United Nations Convention against Transnational Organized Crime<sup>2</sup> (so-called Palermo Convention) on the 4<sup>th</sup> of December 2002. This article will give an overview of the content of these Articles, development of related court practice and practical problems that have raised in the course of implementing these Articles.

It should be noted that in Estonia forming and belonging to a criminal organization are crimes that do not have considerable statistical importance. They both belong to the offences against public peace which have formed 6-8% of crimes registered in Estonia

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<sup>1</sup> Estonian Penal Code is available in English at: <https://www.riigiteataja.ee/en/>.

<sup>2</sup> Available in English at: <http://www.unodc.org/unodc/treaties/CTOC/>.

yearly for the last 10 years. In the last years the following number of crimes related to forming and belonging to a criminal organization were registered: 2009 – 9, 2010 – 12, 2011 – 26, 2012 – 21, 2013 – 35, and 2015 – 25. This means that they form around 1% of offences against public peace (2014 – 1.3%, 2015 – 1.1%) and around 0.07-0.08% of whole criminal activity (2013 – 0.08%, 2014 – 0.07%). Almost all crimes related to forming and belonging to a criminal organization are committed in the capital of Estonia, Tallinn, and in northeast region of Estonia. Although statistically not common, Articles 255 and 256 have significant legislative importance in Estonia's fight against organized crime and serve a purpose of fulfilling Estonia's international obligations.

## 2. Historical development of Estonian legislation in the area of organized crime

### 2.1. Legislation concerning organized crime during the Soviet era

During the Soviet era the notion of organized crime was unknown in substantive criminal law. However, in literature crimes committed by groups were mentioned, although these groups were described as small and temporary. When it came to the specific types of crimes, *e.g.*, misappropriation of the state's property, it was nevertheless admitted that the groups might be bigger and of more permanent nature. The classification of criminals mentioned so-called obdurate criminals and particularly dangerous recidivists.<sup>3</sup> H. J. Schneider's textbook on criminology that was published in 1987 and translated to Russian in 1994 analyzed the phenomenon of organized crime. In the book the author describes the characteristics of it and its roots. He explains that according to Marxist view, the source for organized crime is capitalistic structure of society.<sup>4</sup>

In the Soviet literature it was discussed that the main characteristic of criminal activity committed by groups is a relationship between the group members based on common beliefs that are against the social values of Soviet Union. Individual illegal intentions and need for cooperation are in a conflict and form a reason for inconstancy and perspectiveless of criminal groups. Mostly, there are only few members in the group, for instance in 52% of the groups that are engaged with stealing state's property have only two members, and only 25% thieves have specific 'duties' in the course of committing crimes. Also, illegal transactions and collective decisions were mentioned as a specific type of crimes committed by groups, although liability of legal persons itself was still unknown back then.<sup>5</sup> Despite of the fact that Soviet criminology did not recognize organized crime as a phenomenon and only mentioned criminal activity performed by groups, some material factors in criminal law indicate that in reality criminal activity was organized in quite a high level. In addition to nowadays widely used traditional institutes as joint principal offenders<sup>6</sup> and accomplices<sup>7</sup> (Criminal Code

<sup>3</sup> Криминология. Москва: Юридическая литература 1988, pp. 77 and 101.

<sup>4</sup> Г.И. Шнайдер. Криминология. Москва: Прогресс 1994, pp. 48-53.

<sup>5</sup> В. Кудрявцев. Правовое поведение: норма и патология. Москва: Наука 1982, pp.207-212.

<sup>6</sup> According to Article 21 (2) second sentence of Estonian Penal Code an offence is deemed to be a joint offence if an act committed by several persons jointly and in agreement comprises the necessary elements of an offence. Joint principal offenders form a group.

<sup>7</sup> In Estonian criminal law accomplices are abettors and aiders. According to Article 22 (2) of Estonian Penal Code an abettor is a person who intentionally induces another person to commit an intentional unlawful act. According to Article 22 (3) of Estonian Penal Code an aider is a person who

of Estonian Soviet Socialist Republic, Article 17), soviet criminal law also knew the notion of organized group (Article 38 (2)). In addition, crimes against state like conspiracy to seize power (Article 62 (1)), organized activity towards crime against the state (Article 70) and gangsterism (Article 75) were enacted in the Special Part of the Criminal Code of Estonian Soviet Socialist Republic. In addition to traditional accomplices as abettors and aiders, the criminal law also knew an organizer of the crime (Article 17 (4)).

Therefore, the Soviet criminal law had a lot in common with contemporary criminal law when it comes to the organized crime and the notion of criminal organization. For instance, the gang was considered to be permanent monolithic group formed by at least two armed members, who have permanently corporated with the aim to attack individuals or institutions. The difference between so-called casual group and the gang was the nature of relationship between the members – it was permanent and deeper than common agreement on committing a joint crime. In addition, gangs had organizational structure and labor distribution between its members. Therefore, the member of the gang was responsible for all crimes committed by the gang irrespective of his participation in a certain crime.<sup>8</sup> Organized group had similar features, although its members were not armed and its aim was not to attack someone. Therefore, the gang was a certain type of organized group.<sup>9</sup> Estonian legal literature even used notion ‘criminal organization’ to cover organized groups, conspiracy and gangs.<sup>10</sup>

## ***2.2. Legislation concerning organized crime after re-independence of Estonia***

As it was already mentioned, in 2002 the notion of criminal organization was introduced to Estonian criminal law. According to Article 255 (1) of the Penal Code membership in a permanent organization consisting of three or more persons who share a distribution of tasks, which activities are directed at the commission of criminal offences in the first degree or illegal affecting of official power was punishable by three to twelve years’ imprisonment. In 2007 the wording was changed as it was added that this organization must have been created for the purpose of proprietary gain. The circle of criminal activities was widened as it was declared that the activities of the members must be directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree. These changes were done with the aim to rise conformity with the Palermo Convention and EU legislation. It was explained that due to the amendments Articles 255 and 256 no more cover organizations formed for political aims as this activity could be punished by various articles provided for in the Penal Code (*e.g.*, Articles 235 and 237<sup>1</sup>). In relation to widening the circle of criminal activities it was mentioned that as according to the Palermo Convention criminal organization is an organization which is formed with the aim to commit crimes that are punishable with the maximum term of imprisonment of at least four years and as in Estonian Penal Code

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intentionally provides physical, material or moral assistance to an intentional unlawful act of another person.

<sup>8</sup> I. Rebane. Eesti NSV kriminaalkoodeks. Kommenteeritud väljaanne. (Criminal Code of Estonian Soviet Socialist Republic. Commented Edition.). Tallinn: Eesti Raamat 1980, Article 75 commentaries 1a, 2; Комментарий к Уголовному Кодексу РСФСР. Москва: Юридическая литература 1985, Article 77 commentary 4.

<sup>9</sup> Eesti NSV KrKK (Note 8) Article 38 commentary 9b.

<sup>10</sup> *Ibid*, Article 17 commentary 9c.

these crimes barely exist, it is reasonable to lower the condition to the crimes with the maximum term of imprisonment of at least three years.<sup>11</sup> The Article 256 (1) of the Penal Code, which remains unchanged from 2002, enacts punishment by five to fifteen years' imprisonment for forming or leading of or recruiting members to a criminal organization.

In 2007 it was added to Article 255 that it is punishable for a legal person to belong to a criminal organization (the same change was made to Article 256 of the Penal Code). In Estonia a specific crime committed by a legal person is punishable only if the law determines it. Therefore, before 2007, a legal person could not be punished for membership in criminal organization. The legislator considered it to be a gap as the Palermo Convention seeks responsibility of legal persons for belonging to a criminal organization, and made abovementioned change to the law in force. A legal person may belong to the criminal organization in two ways: through its body, a member of its body, or by its senior official or competent representative or through the fact that the organization is itself in fact criminal.<sup>12</sup> The punishment for Articles 255 or 256 for the legal person is pecuniary, which may be according to Article 44 (8) of the Penal Code up to 6,000,000 euros.

### 3. Law on organized crime in action

#### 3.1. Changes in legislation in 2015

On 1<sup>st</sup> of January 2015 two remarkable changes were made to Article 255 (1) of the Penal Code.

First, the condition that the organization must have been created for the purpose of proprietary gain was removed again. Now the wording of Article 255 (1) is: 'Membership in a permanent organization consisting of three or more persons who share a distribution of tasks, which activities are directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree, is punishable by three to twelve years' imprisonment.' It was explained that dangerousness of an illegal organization does not depend on whether it is formed for proprietary gain or for any other illegal purpose. For instance, the organization that is formed with the aim of racial discrimination or committing violent crimes is as dangerous as the one that is formed for proprietary gain.<sup>13</sup> What makes the amendment interesting is the fact that the legislator does not explain the possible inconformity with Palermo Convention, a main reason why proprietary gain was brought into Article 255 in 2007.

The second change was most comprehensive and principal. So far not only was the membership in criminal organization punishable, but there were specific crimes in the Code, in case it was an aggravating circumstance to be committed by members of

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<sup>11</sup> J. Sootak, P. Pikamäe. *Karistusseadustik. Kommenteeritud väljaanne. 2. väljaanne*, (Penal Code. Commented Edition. 2nd Edition.) Tallinn: Juura 2009, Article 255 commentaries 3.5.1. and 3.6.1.

<sup>12</sup> *Ibid*, Article 255 commentary 7.

<sup>13</sup> Seletuskiri karistusseadustiku ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu juurde, 554 SE (Explanatory Memorandum to the Act to Amend Penal Code and Other Relevant Legal Acts, 554 SE. Available, but only in Estonian at:

<http://www.riigikogu.ee/?op=ems&page=eelnou&eid=78433b29-8b2f-4281-a582-0efb9631e2ad&>

criminal organization. For instance, robbery was punishable by two to ten years' imprisonment, but in case committed by the members of criminal organization by three to fifteen years' imprisonment (Article 200 (2) 7 of the Code). Another example was drug trafficking. It was punishable by one to ten years' imprisonment, but in case committed by the members of criminal organization by six to twenty years' imprisonment (Article 184 (2<sup>1</sup>) 2 of the Code).

Although at first sight this regulation seemed to be well functioning, it had considerable shortcomings. First, the crime committed by the members of criminal organization as an aggravating circumstance was random and therefore arbitrary in the Penal Code. For instance, murder, human trafficking or illicit traffic committed by the members of criminal organization was not aggravating circumstance, but the burglary was (Article 199 (3) of the Code). At the same time the membership in criminal organization was an aggravating circumstance for some crimes that did not meet even the maximum sentence criterion of the Palermo Convention (*i.e.* four years of imprisonments): for instance incitement of hatred which is not a crime but misdemeanor, embezzlement for which maximum sentence of one year of imprisonment is provided and acquisition, storage or marketing of property received through commission of offence for which also maximum sentence of one year of imprisonment is provided. This caused a lot of questions for the courts.<sup>14</sup> In case a person committed a murder as a member of the criminal organization, he was convicted for a murder (Article 114 of the Code) and for belonging to the criminal organization (Article 255 of the Code). But in case a person was convicted for committing a robbery as a member to the criminal organization, the courts had no clear standpoint whether to convict him only for robbery committed by a member of criminal organization (Article 200 (2) 7 of the Code) or for a robbery committed by a member of criminal organization (Article 200 (2) 7 of the Code) and for belonging to the criminal organization (Article 255 of the Code). The main argument against the second solution was that then a person will be basically punished for the same act (his membership in a criminal organization) twice with which a principle of *ne bis in idem* is violated. From the 1<sup>st</sup> of January 2015 the situation is clear as person is convicted for a robbery without aggravating circumstances (Article 200 (1) of the Code) and for belonging to the criminal organization (Article 255 of the Code) and no conflict with *ne bis in idem* arises. It is also important to notice that the Supreme Court of Estonia has established that acquittal of a person in specific crime (e.g., in drug trafficking) does not automatically result in acquittal in belonging to the criminal organization. A person may be convicted for the latter even if he has not committed any other crime while being a member of the criminal organization.<sup>15</sup>

The fact that belonging to the criminal organization was an aggravating circumstance for a number of crimes brought unfair solutions in sentencing. For instance, let us observe a case in which Jan, Yevgeny, Dmitri, Daniel, Peter, Piotr, David and Boris belong to a criminal organization which focuses on committing number of crimes. Peter and Piotr steal cars which David sells to Russia. Jan and Yevgeny deal with drug trafficking – they buy drugs from abroad and sell them in Estonia. Dmitri and Daniel have a task to

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<sup>14</sup> J. Sootak. Muudatused ja täiendused karistusõiguse üldosas. Läbivad muudatused eriosa sätete kohaldamiseks. (Amendments and Supplementations to the General Part of the Penal Power. Recurrent Amendments to Implementation of the Provisions of the Special Part.) *Juridica* 2014, No. 8, pp. 590-591.

<sup>15</sup> Judgment of the Criminal Chamber of the Supreme Court of Estonia, 15<sup>th</sup> of December 2014, court case no. 3-1-1-65-14, p. 21.



legitimize organization's money – they deal with money laundering. Boris is a new member and therefore have not committed any crimes, although has dealt with practical issues, e.g., arranged meetings of the members (i.e. has committed a crime of belonging to the organization). In case the Prosecutor's Office is successful in bringing the case to the court and the court convicts these persons the sentences would have been before the 1<sup>st</sup> of January 2015 as follows.

1. Boris – belonging to the criminal organization according to Article 255 of the Code 3-12 years, in average 7.5 years imprisonment.

2. Peter and Prior – stealing while belonging to the criminal organization according to Article 199 (3) of the Code 2-10 years, in average 6 years imprisonment.

3. David – selling stolen goods while belonging to the criminal organization according to Article 202 (2) 1 of the Code pecuniary punishment or imprisonment up to 3 years, in average pecuniary punishment.

4. Jan and Yevgeny – drug trafficking while belonging to the criminal organization according to Article 184 (2<sup>1</sup>) 2 of the Code 6-20 years or life time imprisonment, in average 13 years imprisonment.

5. Dmitri and Daniel – money laundering committed by the member of criminal organization according to Article 394 (2) 4 of the Code 2-10 years, in average 6 years imprisonment.

As it can be seen, punishments vary dramatically, and not in compliance with what the members of the group have committed. For instance, David who has been active in selling stolen goods receives pecuniary punishment as Boris, who has not committed any additional crimes imprisonment. It has to be mentioned that Boris, a new member of the organization receives almost the most severe sentence from all members – only Jan and Yevgeny are punished with longer sentence than he.<sup>16</sup> From the 1<sup>st</sup> of January 2015 that kind of injustice cannot arise as all members are punished according to Article 255 of the Code with 3-12 years imprisonment and those who have committed additional crimes are punished respectively.

### ***3.2. The nature of crimes provided for in Articles 255 and 256 of the Penal Code***

Contemporary literature of criminology recognizes the phenomenon of organized crime, although its characteristics are still debatable. For instance, some argue that it is a permanent association of three or more people which aims at proprietary gain and has, e.g., hierarchical structure and cross-border nature.<sup>17</sup> If the activities of a criminal organization are targeted towards gaining economic and political power, it is called mafia.<sup>18</sup>

In the context of Estonian law the criminal organization has number of features already mentioned above:

1. It has to have at least three members, including its leader.<sup>19</sup>
2. It has to be permanent.

<sup>16</sup> K. Heide. Kuritegelikke ühendusi puudutavate kuritegude sanktsioonide omavaheline ebakõla. (Discord of Criminal Offence Sanctions Concerning Criminal Organisation). *Juridica* 2013, No. 10, pp 756-757.

<sup>17</sup> Nt G. Kaiser. *Kriminologie*. 10. Aufl. Heidelberg: Müller 1997, p. 188.

<sup>18</sup> C. Falcone, M. Padovani. *Inside Mafia*. 3. Aufl. München: Herbig 1992, p. 34.

<sup>19</sup> Judgment of the Criminal Chamber of the Supreme Court of Estonia, 18<sup>th</sup> of January 2010, court case no. 3-1-1-57-09, p. 13.1.

3. There must be a distribution of tasks between the members.

4. Its activities have to be directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree.

The definition differs a bit from the definition of organized criminal group described in Article 2 (a) of the Palermo Convention, according to which it is a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit. Pursuant to Article 2 (b) serious crime is a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. As it could be seen, Estonian definition of criminal organization is slightly broader as no aim to financial or other material benefit has to be established. In addition, the activities of the organization have to be targeted towards committing offences for which the maximum term of imprisonment of at least three years, not at least four years as in Palermo Convention, is prescribed.

Articles 255 and 256 themselves aim at protecting public safety: every member of the society has a right to safely live in the society and expect the same situation to last in future.<sup>20</sup> These articles also protect public peace, which is threatened barely by the existence of criminal organization and by criminal potential it has. Estonian legal order defines public peace as the basis for co-existence, which exists independently from the public power and has a goal to guarantee safety of the society members. Therefore, it is also said that public peace involves public safety, public order and execution of public authority.<sup>21</sup> It has to be stressed that Articles 255 and 256 are individual criminal offences. As even mere existence of a criminal organization threatens public safety and peace, its members could be punished according to Article 255 or 256 even if the organization has not yet started to realize its criminal objectives.<sup>22</sup> But when it has, the prosecutor could prove the existence of criminal organization by indicating what kind of crimes its members have committed.<sup>23</sup> In addition, the member of the criminal organization could be convicted according to Article 255 or 256 even if he himself has not committed any certain crime while belonging to the criminal organization.

Above-mentioned principles determine the nature of Article 255. It is a continuous offence, which means that it is an offence that starts with a person becoming a member of the organization and ends when a person loses the status of a member.<sup>24</sup> Article 256 prevails Article 256, *i.e.* if a person has formed or led an organization or has recruited members to the organization and is also a member of that organization, he will be punished only according to Article 256.<sup>25</sup> Nevertheless, it could also happen that a person who has formed the organization does not become its member, in case he is

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<sup>20</sup> A. Schönke, H. Schröder. *Strafgesetzbuch. Kommentar*. 28. Aufl. München: Beck 2010, Article 125 column no. 2.

<sup>21</sup> J. Sootak, P. Pikamäe (Note 11), Chapter 16 introductory commentary 1.2.

<sup>22</sup> StGB-Schönke/Schröder (Note 20) Article 129 column no. 1. Supported by the court practice of Estonian Supreme Court: court case no. 3-1-1-57-09 (Note 19), p. 13.5.

<sup>23</sup> Judgment of the Criminal Chamber of the Supreme Court of Estonia, 21<sup>st</sup> of January 2013, court case no. 3-1-1-132-12, p. 10.

<sup>24</sup> *Ibid*, p. 10.

<sup>25</sup> Court case no. 3-1-1-57-09 (Note 19), p. 14.

obviously punished only according to Article 256. It should be mentioned that a criminal organization could also be formed from an organization that was initially perfectly legal.<sup>26</sup> Leading an organization does not have to be permanent. It also does not have to be executed by only one person; there could also be co-leaders. In that case, they are all punished according to Article 256.<sup>27</sup> When it comes to recruiting members to the organization, there seems to be some confusion which the court practice has still not eliminated. Some claim that considering the potential punishment prescribed by Article 256 recruiting is possible only by the members of the organization, but some think that in order to recruit members one does not have to be a member himself.<sup>28</sup>

When it comes to Article 255 three features of the criminal organization should be explained here in detail: who are its members; what does it mean that it has permanent nature, and what kind of structure does it have to have. In addition, it should also be explained how to determine that the activities of the organization are directed at the commission of criminal offences.

A person is a member of a criminal organization if he is subject to the will of the organization and he contributes to achieving the goals of the organization.<sup>29</sup> In order to become a member, there does not have to be any formal ceremony. Neither does there have to be a formal list of active members. Therefore, the membership is a planned permanent or at least long-term active participation in the activities of the organization even if in reality it may be confined with a sole act (e.g., due to arrest of a person). Usually the mere fact that person's name is in a list of members (if that kind of list exists) but he remains otherwise passive does not mean that he is a member of criminal organization in the meaning of Article 255. But if a person is an active member, his actions themselves do not have to be criminal, e.g., he could also give legal advice to the organization, keep accounts etc.<sup>30</sup>

The permanent nature of the organization means that due to its structure it has a potential to operate for a longer period of time. The members of the organization (including its leader) themselves are replicable without considerable difficulties.<sup>31</sup> For instance, a group, which has gathered spontaneously with an aim to resist the police, cannot be considered a criminal organization. The characteristics of a criminal organization are distribution of tasks, strict chain of command and discipline, and a certain amount of care for its members.<sup>32</sup> Nevertheless, Estonian courts have also accepted that there might be some criminal organizations with more democratic and loose style of leading. At the same time gangs are not criminal organizations. Gangs are groups that commit homogenous crimes (e.g., burglaries) and exist mainly because of its leader. In gangs personal relations are much more important than in criminal organizations.<sup>33</sup>

The activities of the organization are directed at the commission of criminal offences if persons who determine the will of an organization have decided so and the

<sup>26</sup> J. Sootak, P. Pikamäe (Note 11), Article 256 commentary 3.1.

<sup>27</sup> *Ibid*, Article 256 commentary 3.2.

<sup>28</sup> *Ibid*, Article 256 commentary 3.3.

<sup>29</sup> StGB-Schönke/Schröder (Note 20) Article 129 column no. 13.

<sup>30</sup> J. Sootak, P. Pikamäe (Note 11), Article 255 commentary 3.7. Supported by the court practice of Estonian Supreme Court: court case no. 3-1-1-57-09 (Note 19), p. 13.1.

<sup>31</sup> Court case no. 3-1-1-57-09 (Note 19), pp. 13.2 and 13.3.

<sup>32</sup> J. Sootak, P. Pikamäe (Note 11), Article 255 commentary 3.

<sup>33</sup> H.-D. Schwind. *Kriminologie: Eine praxisorientierte Einführung mit Beispielen*. 10 Aufl, Heidelberg: Kriminalistik 2000, Article 29 commentary 7.

structure of an organization supports achieving this goal.<sup>34</sup> Nevertheless, as it was explained above, in order to convict the members according to Article 255 or 256 it is not necessary that the organization (or its members to be more exact) have already committed some criminal offences or have been actively preparing to commit these offences. Committing criminal offences does not have to be main goal of the organization: it might also be, e.g., material benefit, overthrowing a government etc. Yet, its goals have to influence its structure. For instance, a company that organizes arson of its competitor's property in order to achieve leading position in the market is not a criminal organization. But it may become criminal if the leaders of the company establish a special unit in the company with the aim to solve similar situations similarly in future.<sup>35</sup> Due to the nature of criminal organization it is also possible that it aims at committing one, but continuous crime (e.g., human trafficking), but it has to be kept in mind that by its nature it still have to be permanent.<sup>36</sup>

#### 4. Practical questions concerning application of the law in the area of organized crime

Although at first sight Articles 255 and 256 seem to be clearly defined, Estonian courts have encountered several difficulties with applying them in practice. First, there is confusion about how to distinguish criminal organizations from so-called common groups (i.e. two or more people committing some crimes together occasionally). Second, some issues related to the principle of *ne bis in idem* have also arisen.

In Estonia committing a crime in a group is an aggravating circumstance, but belonging to a group is not criminalized itself unlike belonging to a criminal organization. A criminal organization is also a group, but a group might not be a criminal organization. First, two or more people belong to a group. In order to call a group a criminal organization, it has to have at least three members. Second, as it could be seen above, the group has to meet some qualitative criteria in order to be considered a criminal organization.

As it was mentioned above Criminal Code of Estonian Soviet Socialist Republic knew the notion of organizer of the crime – according to Article 17 (4) of the Code it was a person who organized a crime or was leading execution of it. He had much active role than an abettor or an aider as he was a connecting link between the participants and he guided them towards a common criminal goal.<sup>37</sup> Due to that he was not considered to be a member of a group but an independent figure. From Estonian Penal Code, which came into force in 2002, organizer of the crime was excluded because Estonian legislator wanted to abandon Soviet past. Nevertheless, it seems that there is still a need to distinguish organizer from aiders, abettors and group members due to the remarkable role he has in planning and execution of a crime. Because of the limitations of the law Estonian court practice has so far considered the organizers to be just members of a group and punished them accordingly no matter how active they have been.<sup>38</sup> In any

<sup>34</sup> StGB-Schönke/Schröder (Note 20), Article 129 kamm 7.

<sup>35</sup> J. Sootak, P. Pikamäe (Note 11), Article 255 commentary 3.6.

<sup>36</sup> Rulings of the Criminal Chamber of the Supreme Court of Estonia, 19<sup>th</sup> of December 2013, court cases no. 3-1-1-127-13, p. 7; 3-1-1-125-13, p. 7.

<sup>37</sup> Eesti NSV KrKK (Note 8) Article 17 commentary 12.

<sup>38</sup> Judgment of the Criminal Chamber of the Supreme Court of Estonia, 14<sup>th</sup> of March 2003, court case no. 3-1-1-20-03, p. 14; 18<sup>th</sup> January 2005, court case no. 3-1-1-97-04; 3-1-1-57-09 (Note 19),

case, the court practice still has to draw the line between an organizer being just a member of a group, him being a founder or leader of a criminal organization (which is punishable according to Article 256 of the Estonian Penal Code) and him being a member of a criminal organization without leader qualities (which is punishable according to Article 255 of the Estonian Penal Code). If he is not only a leader or a member of a criminal organization but also commits crimes, he is punished according to Article 255 or 256 of the Code and for whatever crime he has committed as it was discussed above. The problems with *ne bis in idem* arise if investigation of his crimes is not united in one criminal procedure (see below).

One has to be very careful with distinguishing groups from criminal organization and members of the groups from formers, leaders and members of criminal organization as the sanctions for Articles 255 and 256 are very severe. In Estonia some judges and defense counsels think that the prosecutors and some courts are too eager to consider almost every group of three or more criminals to be a criminal organization: this is not in accordance with the nature of Articles 255 and 256, and with the Palermo Convention. While deciding whether a certain group was a criminal organization, the courts should explicitly focus on the four features a criminal organization has according to Estonian law (and in the Palermo Convention). The permanent nature, hierarchical structure, distribution of tasks, the fact that the members are replaceable without difficulties, and independent will of an organization are the main keywords for a criminal organization. The courts should analyze these characteristics as a whole and keep in mind that not every group with an indication to some kind of structure is automatically a criminal organization. If that would be so, Articles 255 and 256 would lose their purpose. It could be concluded that Estonian courts are still struggling with developing adequate court practice in this area and many more leading cases from the Supreme Court of Estonia are expected before the features of a criminal organization in the meaning of Articles 255 and 256 become clear.

When it comes to the principle of *ne bis in idem*, the Estonian Supreme Court has already launched its leading case in 2010, although one can assume that it will not be the last in this area. In the case N.K. was convicted by lower courts according to Article 256 for forming a criminal organization that dealt with drug trafficking and for leading it from January 2005 to the 2<sup>nd</sup> of March 2006. According to the indictment he not only gave tasks to the members of the organization and funded the organization, but also recruited its members. The case itself would have been easy as the organization itself clearly was a criminal organization if N.K. would not have been previously convicted for drug trafficking during the same time period. In that case he was accused of being a member of a group that dealt with drug trafficking, and according to the indictment his role was to organize trafficking itself by giving tasks to the group members. The defense counsel immediately claimed that convicting N.K. according to Article 256 in a latter procedure would be a violation of the principle of *ne bis in idem*. Lower courts did not agree with this standpoint and therefore the same argument was raised before the Estonian Supreme Court.

According to Article 23 (3) of the Constitution of Republic of Estonia<sup>39</sup> no one may be prosecuted or sentenced for a second time for an act in respect of which he has been

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pp. 19.2–20. The same standpoint could be found in Estonian legal theory: J. Sootak, P. Pikamäe (Note 11), Article 21 commentary 6; also J. Sootak, Karistusõigus. Üldosa. (Penal Law. General Part.) Tallinn: Juura 2010, Chapter 12 columns no. 159-161.

<sup>39</sup> Constitution of Republic of Estonia is available in English at: <https://www.riigiteataja.ee/en/>.

the subject of a final conviction or acquittal pursuant to the law. The same principle comes from Article 4 of the Seventh Protocol of the European Convention on Human Rights and Fundamental Freedoms.<sup>40</sup> There seemed to be several approaches to what constitutes the same offence in practice of the European Court of Human Rights until 2009.<sup>41</sup> However, in *Sergey Zolotukhin v. Russia* the Court held that it should be 'understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same.'<sup>42</sup> The Estonian Supreme Court followed the same approach and compared the facts described in two charges against N.K.

The Supreme Court of Estonia concluded violation of the principle of *ne bis in idem*, but only in certain crime episodes. Namely, in both indictments the activities of N.K. were described by the commands he gave to the group members. Some of these activities did not match but some of them did. For example, in both indictments it was written that N.K. instructed H.L. and D.M. to acquire, possess, traffic and mediate drugs. Therefore, convicting him for these acts twice would violate the principle of *ne bis in idem*. Nevertheless, the conclusion of the Supreme Court of Estonia did not change anything for N.K. because most of the episodes described in new indictment did not match the previous one. Therefore, he was still convicted according to Article 256 of the Code.

It is considered that the Supreme Court of Estonia did not try to grasp the bigger picture of the case and looked for the easiest (but not the most correct) solution. Therefore, there are several arguments against the judgment of the Court. Future will show if these arguments will be used in court practice, and if they will be, what will be the results.

First, there is an approach expressed by one of the Justices of the Supreme Court of Estonia<sup>43</sup> according to which convicting a person for certain crime and afterwards according to Article 255 or 256 of the Code is never a violation of the principle of *ne bis in idem* as belonging to a criminal organization or leading one is not equal to committing certain crimes. Therefore, while a person is accused according to Article 255 or 256, he is not automatically accused for sole crimes he has committed while belonging to the organization or leading it. The latter is a whole new dimension compared to individual crimes and exist separately from these crimes. The similar approach has been used by German Federal High Court of Justice on the 8<sup>th</sup> of January 1981 when the Court held that it is not a violation of the principle of *ne bis in idem* when a person is convicted for murders committed while belonging to a criminal organization after he has been convicted for belonging to the same organization.<sup>44</sup>

The second and completely opposite opinion stresses the fact that crimes described in Articles 255 and 256 of the Code are continuous, starting with a person becoming a member or a leader of the organization and ending with a person losing his status. The status of a person is defined by the activities he performs as a member or as a leader. If these activities are criminal, his status will be defined by these crimes. Therefore, if he is

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<sup>40</sup> Convention for the Protection of Human Rights and Fundamental Freedoms. Available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>41</sup> C. Buckley et al. Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights. 3rd ed. Oxford: Oxford University Press 2014, p. 972.

<sup>42</sup> *Sergey Zolotukhin v. Russia*. Application No. 14939/03. 10 February 2009, p. 82.

<sup>43</sup> His concurring opinion to the judgment no. 3-1-1-57-09 only available in Estonian.

<sup>44</sup> BverfGE 56, 22. Available at: <http://www.servat.unibe.ch/dfr/bv056022.html>

convicted for being a member or a leader of an organization, he is also convicted for the certain crimes he has performed no matter if these crimes have been described in the indictment or not.<sup>45</sup> This argument may not be strong when a person is first convicted according to Article 255 or 256 and afterwards it is found out that he has committed some specific crimes during the same time period, but it acquires much more credibility when the situation is *vice versa* like it was in N.K.'s case. It could be argued that if individual crimes are discovered, described in indictment as group crimes and the accused persons are convicted for these crimes, the Prosecutor's Office should not get a second chance to redefine the group as a criminal organization and to ask for another conviction. One of the main purposes of *ne bis in idem* is to guarantee that once the case is decided, law enforcement authorities have no opportunity to change their mind arbitrarily. Therefore, whenever the Prosecutor's Office faces the case in which crimes were committed by the group, it should immediately verify if this group could also be considered to be a criminal organization. If it fails to do so the principle of finality should prevail.

## 5. Conclusions

As it could be seen above, although Estonian legislator has given legislative tools for Estonian authorities to fight against organized crime, applying relevant law is not as easy as it seems at first sight. Of course, Estonian court practice is quite young in this area – only a bit more than 10 years old, and there are several important standpoints the Supreme Court has already taken which is very good indicator. Nevertheless, the developments have shown that many questions has to be still answered and maybe even some corrections made before the clear guidance on how to understand notion 'criminal organization' is given to the lower courts and other relevant institutions. In addition, although the Prosecutor's Office usually accuses the leaders and members of the criminal organization for both being a leader or a member and committing specific crimes in one criminal procedure, it can happen that the charges are presented in different proceedings in different time periods. Then a possible violation of *ne bis in idem* arises. The Estonian Supreme Court has once tried to look solutions for this problem, but its findings are highly debatable and therefore further guidance is expected. Nevertheless, it could be concluded that Estonian legislation is moving towards the goals the United Nations Convention against Transnational Organized Crime has set as since 2002 belonging to a criminal organization and leading such organization is punishable by criminal law.

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<sup>45</sup> A. Soo. Kuritegeliku ühenduse mõiste. *Ne bis in idem* põhimõte. Riigikohtu kriminaal-kolleegiumi otsus asjas 3-1-1-57-09. (The Concept 'Criminal Organisation'. The Principle of *Ne Bis In Idem*. Judgment of the Criminal Chamber of the Supreme Court in Case 3-1-1-57-09.) *Juridica* 2010, No. 2, p 152.

# Special Evidentiary Actions in the Function of Combating Organized Crime in Serbia

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## **Abstract:**

*The effectiveness of preventing and combating organized crime, as well as the efficiency of criminal procedure, depends on many objective and subjective factors, but it is certain that their performance is much influenced by the previous criminal proceedings. In previous criminal proceedings authorized criminal procedural subjects, the public prosecutor and the police above all, take the law provided actions aimed at detecting and proving criminal offenses. However, the traditional evidence collection are not effective when it comes to combating organized crime, so that is why it is necessary for state to use modern technological and scientific advances to adequately confront it. So, the subject of this study are special evidentiary actions in the Republic of Serbia, which may be applicable in certain cases, above all, when it comes to organized crime offenses. So, we will first give a brief overview of the concept of organized crime, both in international and in national legal framework of the Republic of Serbia, and then we will analyze the special evidentiary action by the Code of Criminal Procedure of the Republic of Serbia: Secret surveillance of communications, secretly monitoring and recording, simulated activities, computer data search, controlled delivery and the undercover agent. Special attention will be paid to the issue of the distribution of responsibilities in terms of who can do a particular special evidentiary action, analysis of legal standards and conditions for their determination, with special emphasis on their probative value in the criminal proceedings.*

**Keywords:** *special evidentiary actions, organized crime, the Code of Criminal Procedure, the public prosecutor, the court, the police.*

## **1. General review on the concept of organized crime**

Since the theme of this work is focused on the efficiency of special evidentiary actions in combating organized crime, it is quite logical and scientifically justified to present a brief overview of the essential contents of organized crime.

In relation to the definition of organized crime, it is important to point out that on the national and international level there is still no universal definition of the term, but also there are many definitions of the concept of organized crime. There are different approaches of authors in defining the concept of organized crime, some of them argue the essential elements of concept of organized crime, while others try to make one



general formulation. According to one of the definitions<sup>1</sup> the content of the concept of organized crime including the following elements:

- organization and cooperation of more offenders;
- use of violence and corruption to facilitate the exercise of their activities;
- concealment of criminal activities through legitimate business activity and corporations;
- the main objective of the organization is to obtain profits;
- transnational character is because such activity is carried out on the territory of several countries.

The following definition provides the following elements as necessary for organised crime to exist:

- criminal organization as an association of several persons;
- the secret character of criminal organizations;
- written or unwritten rules of a criminal organization including a description of the conditions in which it works and the rights and duties of its members;
- goals of criminal organizations (profit-making, monetary gain, achieve power);
- commission of criminal offenses;
- hierarchical structure of criminal organizations;
- illegal activities are carried out in a professional manner;
- members of criminal organizations are professionals;
- privacy of criminal organizations;
- monopolistic tendencies of criminal organizations;
- non-ideological character of criminal organizations;
- the use of violence;
- corruption operations;
- international organized crime operations;
- acceptance of a variety of technological innovations.

Organized crime involves the inclusion of several interconnected persons with a hierarchical organization whose main goal is getting rich and gain power, which is why it includes the illegal but also legitimate businesses that make significant profits with less risk that criminal activity be discovered, with what criminal organizations seeking to neutralize any form of competition in order to maintain a monopoly in certain segments of criminal activity, not hesitating bribery also.<sup>2</sup>

In order to facilitate the realization of international cooperation in combating organized crime, Interpol has twice offered a definition of organized crime. The first definition, which was presented in 1988 at the First International Symposium on organized crime was met with disapproval of some countries, so it is followed by a new definition of Interpol, according to which organized crime is any group that has the structure of the corporation, whose primary goal is to exercise illegal activities obtain money and which is held on intimidation and corruption.<sup>3</sup>

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<sup>1</sup> Savona, E., Adamoli, S., & Zoffi, P: *Organized Crime Across the Borders: Preliminary Results*, HEUNI papers no. 6, The European Institute for Crime Prevention and Control, affiliated with the United Nations, 1995, Helsinki, Finland, p. 5.

<sup>2</sup> Abadinsky, H: *Organized Crime*, Boston, 2000, p. 21.

<sup>3</sup> Bakesley, C: *The Criminal Justice Systems Facing the Challenge of organized crime*, RIDP/IRPL, no. 3, 1996, p. 585.

Regardless of present certain differences among the authors in defining organized crime, there is a general agreement of most of the authors in relation to the four basic elements of organized crime:

- permanent organization,
- organization which works rationally for profit,
- use of force or threat,
- the need for corruption to preserve immunity from the application of law.<sup>4</sup>

Organized crime must have mechanism of self-protection, because it guarantees criminal activity and its survival, so that is why it use methods of violence and intimidation, or why it establishes criminal links with government bodies, political parties, financial and economic systems, where the most frequently used is corruption. The role of the state and its organs, political parties and other important subjects is not negligible in relation to the operation and protection of organized crime and there are different understandings with respect to the necessity of protecting organized crime by establishing such connections. In any case, a criminal organization that has established appropriate relationship with the state has a certain degree of protection and as such is recognized in respect of those criminal organizations that do not have such protection.

At this point, we will mention a brief but fairly precise definition of organized crime, according to which this type of crime is property crime, and is characterized by the existence of a criminal organization that performs continuous economic activity, use the violence and corruption of office holders.<sup>5</sup>

In any case, for the purpose of this work is fully acceptable definition of organized crime that presupposes the existence of a criminal organization if it has more than two members, with the goal of permanent commission of criminal offenses in order to achieve material gain, and the corresponding influence, provided that this criminal organization, in order to survive, it is necessary to use violence or other means of intimidation or to establish appropriate linkages to national, political, economic and financial subjects, with corruption, blackmail, extortion or other.... These are precisely the ways that allow the survival of organized crime, according to the present social conditions, character, organization and areas of criminal activity. All other terms and conditions outline the nature and specifics of organized crime, completing its content, but they are not of significant influence for its existence.<sup>6</sup>

Bearing in mind this diversity in terms of defining of organized crime, it was necessary to take certain actions at the international level in order to define organized crime in a universal, generally acceptable way. Also, in order to deal with the organized crime and to harmonize the activities of state and create legal mechanisms for the international fight against organized crime, the United Nations has brought the Convention against Transnational Organised Crime <sup>7</sup> with its two additional Protocols: "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women

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<sup>4</sup> Albanese, J. S: *The Causes of Organized Crime: Do Criminals Organize Around Opportunities for Crime or do Criminal Opportunities Create New Offenders?*, Journal of Contemporary Criminal Justice, 16(4), 2000, p. 411.

<sup>5</sup> Ignjatović, Đ., Škulić, M: *Organised crime*, Faculty of law of the University of Belgrade, 2012, p. 28.

<sup>6</sup> Bošković, M., Vučković, V., & Bošković, D: *Basics of Criminology, Faculty of Business Management, Bar*, 2007, p. 326.

<sup>7</sup> The Convention was adopted in 2000 in Palermo, and the Republic of Serbia had ratified in 2001 (Official Gazette of the FRY - International Agreements ", no. 6/01, p. 20-39).

and Children”, and “The Protocol against the Smuggling of Migrants by Land, Sea and Air”.

From the point of theme of this work is important to emphasize that the Convention defines an organized criminal group as a group consisting of at least three persons, existing for a period of time and acting together with the aim of committing one or more serious crimes or other offenses, in order to gaining financial or material benefit. Serious crime is characterized as a criminal offense punishable by imprisonment of four years or more (art. 2, para. 1, n. a, b of the Convention).

Given the fact that the Republic of Serbia ratified the mentioned Convention, we can conclude that in the context of national legislation it fully taken above definition of organized crime. The definition of organized crime in the Republic of Serbia is located in two laws: the Law on organization and jurisdiction of state authorities in fighting organized crime, corruption and other very serious crimes (art. 3) and the Criminal Procedure Code.<sup>8</sup> (art. 2, para. 1, t. 33-34 ). In both of these laws definition is entirely taken from the Convention so at this point we will not repeat it, and in this way the Serbian legislation is fully in line with the ratified Convention.

## 2. Special evidence collection in Criminal Procedure Code of the Republic of Serbia - general considerations

Special evidentiary actions are in chapter VII in CPC of Serbia, entitled “The evidences”, art. 161-187. Use of special evidentiary actions may occur in the entire previous procedure, except for the provisions concerning the examination of the undercover agent as a witness. It is very important to say is that the results of such actions taken can be used as evidence in criminal proceedings if the action is taken in accordance with the provisions of the CPC. Otherwise, court decision can not be based on the gathered evidence. CPC of the Republic of Serbia provides six special evidentiary actions: surveillance of communications, secret surveillance and record, simulated activities, computer data search, controlled delivery and undercover agent.

In the UN Convention against Transnational Organised Crime, special evidentiary actions are called “special investigative techniques” and provides their application if its permitted by the basic principles of the domestic legal system of the signatory countries, in the framework of the possibilities of each country and under the conditions laid down in its legislation. Each state, where it considers it appropriate, will use special investigative techniques such as electronic surveillance or other forms of surveillance and undercover operations by the competent authorities in its territory for the purposes of efficient detection of criminal acts of organized crime.

In the approval and implementation of special evidentiary actions certain powers has the public prosecutor, the judge for preliminary proceedings and police, provided that if the special evidentiary actions are carried out in accordance with the provisions of the CPC, collected evidence and materials can be used as evidence in criminal proceedings. In this context it is important to draw attention to the resolution which was adopted in 1999 at the XVI Congress of the International Association of Criminal Law and according to which the material obtained by using special investigative techniques can be used as evidence in criminal proceedings only on condition that these techniques are undertaken by applying the principles of legality, subsidiarity,

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<sup>8</sup> „Službeni glasnik of the Republic of Serbia“, br. 72/11, 101/11, 121/12, 32/13, 45/13 i 55/14.

proportionality and judicial control.<sup>9</sup> Special evidentiary actions have a legally defined time limit in which they have to be implemented, provided that, at the request of the prosecutor, can be extended in accordance with the law specified period. Sensitivity of special evidentiary actions and other special funds for the fight against organized crime are identified in the fact that they can easily get to their misuse and conflict with universal rules of fundamental human rights and freedoms of citizens who are today's introduced in constitutions of many democratic states as the value of the highest character. For adequate national legislation, when it comes to special evidentiary actions, it is necessary to mention Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the individual's right to private and family life, respect for home and correspondence. Therefore, it is very important law of the European Court of Human Rights, which argues that the entitlement, provided art. 8 of the Convention, must be weighed against the restrictions imposed to protect other members of society. Otherwise, if there was a violation of privacy, the defendant may request that such evidence be excluded from the files because it is illegal evidence.<sup>10</sup>

There are a number of common characteristics for all special evidentiary actions. First, the special evidentiary actions may be determined by a person for whom there are grounds for suspicion of committing a criminal offense for which the Code prescribes that may determine special evidentiary action, and that is not otherwise possible to collect evidence for prosecution or to their collection would be very difficult (Art. 161, p. 1). Exceptionally, special evidentiary actions may be ordered against a person for whom there are reasonable grounds to prepare some of the offenses for which the Code prescribes that can be determined by a special evidentiary action, if the circumstances indicate that the otherwise criminal act would not be detected, prevented or proved or it would cause disproportionate difficulties or a great danger. Finally, under consideration of the conditions that must be met in order to determine some of the special evidentiary actions, it is necessary to say that in deciding on the definition and duration of special evidentiary it must be measured whether the same result could be achieved in a way that is less restrictive to the rights of citizens.

Bearing in mind the above, we can see that the special evidentiary actions equally important in the field of prevention and in the field of combating organized crime. In the field of prevention of organized crime are important because they can be ordered against a person for whom there are reasonable grounds to believe that that person prepare any of the criminal acts of organized crime and is therefore possible to prevent it, and to prevent commission, while in the field of combating it is significant because it can be determined when there are grounds for suspicion that a person has committed a criminal act of organized crime and in this way you act repressively.

A further common feature relates to criminal offenses in respect of which the special evidentiary procedures can be used. First, the special evidentiary action can be determined for the offenses in jurisdiction of the public prosecutor of special

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<sup>9</sup> De La Cuesta, J.L. (ed.), Resolutions of the Congresses of the International Association of Penal Law, XVIth International Congress of Penal Law (Budapest, 5-11 September 1999), *Topic: The Criminal Justice System Facing the Challenge of Organized Crime*, p. 10. <http://www.penal.org/pdf/ReA-IDP2007/RICPL%201999.pdf> dostupno dana 10.06.2008. godine.

<sup>10</sup> Bošković, A: *Police actions in the previous criminal proceedings*, Institute for Criminological and Sociological Research, 2015, p. 151-152.

jurisdiction, ie. The Prosecutor's Office for Organized Crime and War Crimes Prosecutor, and for a series of other criminal acts that are enumerated in the CPC.<sup>11</sup>

Further, the material collected using special evidence procedure must be used in a specific legal deadline, ie. if the public prosecutor does not initiate criminal proceedings within six months from the day when he met with such materials or if it declares that it will not be used in the process, and that the suspect will not face proceedings, the preliminary hearing judge will issue a decision to destruct the material collected. The requirement that the material collected in this way has probative value and that a judicial decision can be based on it, is that the implementation of special evidentiary actions were not taken contrary to the procedural provisions

When it comes to the issue of the so-called. "accidental discovery", the Code provides that if the undertaking of special evidentiary actions collected material about the offense or the offender that was not covered by the decision on the determination of special evidentiary actions such material can be used in the procedure only if it relates to an offense for which the Code provides special evidentiary actions (art. 164).

Finally, the application of special evidentiary actions requires confidentiality procedures so that all information on the proposals, decision-making and implementation of special evidentiary actions are considered as confidential information and all persons who has that informations are obliged to keep them as secret.

### 3. Secret surveillance of communications

Secret surveillance of communications is a special evidentiary action consisting in monitoring and recording of communication that is done through telephone or other technical devices or electronic surveillance or other address of the suspect and the seizure of letters and other parcels (art. 166). Može se primetiti da tajni nadzor komunikacija obuhvata tri aspekta. It can be noticed that in the secret surveillance of communications there are three aspects. First, it refers to the monitoring and recording of communication that is done through telephone or other technical devices and that usually means tapping ordinary telephone calls, but it can apply to any other means of communication: mobile phones, payphones, fax, email, radio, etc., but you can't apply to an communications of the accused and his counsel. Second, the secret surveillance of communications involves monitoring of electronic or other address. That legalized actions of authorities in practice, since the monitoring of electronic address is already done and it's used as evidence in the proceedings for some time. This probably refers to passively intercept communications, although this is not specified by law. It is not clear what is meant when it comes to "other address", but it is possible that the legislator has put into law this general norm trying to ensure the permanent tardiness of legislation comparing to technological changes, and so avoid possible legal gaps (*lacuna iuris*) so that may occur in practice.<sup>12</sup> And third, this action involves the seizure of letters and other consignments.

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<sup>11</sup> In addition to cases of organized crime, special evidentiary actions can be defined for the offenses of aggravated murder, kidnapping, robbery, extortion, counterfeiting money, illicit production and trafficking of narcotic drugs and other crimes enumerated in Art. 162 of the CPC.

<sup>12</sup> Radisavljević, M., Četković, P: *Special evidentiary actions in the prosecutorial investigation in Serbia*, Prosecutorial investigation – regional criminal procedure legislation and experience in its application, Mission of OEBS in Serbia, Belgrade, 2014, p. 173.

When we analyse these provisions it may be noted that the Serbian legislator does not provide monitoring and recording other conversations than just conversations conducted by telephone or other technical devices. In fact, it excluded the possibility of monitoring and recording of direct verbal conversation, *i.e.* conversations that are not carried out by telephone or other technical devices. In this way there is no legal basis for recording room acoustics or sounds made vehicles of the suspect. That is possible only with undercover agent and that will be discussed later. We believe that such a legal solution is not the best because these facilities are one where unauthorized trafficking in narcotic drugs are happening in, where the perpetrators of crimes and their accomplices have meetings, or where they are preparing new crimes.

Secret surveillance of communications shall be determined under the fulfillment of the general conditions common to all the special evidentiary actions, what was already been discussed. However, the CPC stipulates that the measures of secret surveillance of communications can be determined for some other crimes, for which otherwise can not be determined any other special evidentiary action. Specifically, it is about cybercrime criminal acts. and it's sure that, considering the specific characteristic of these offenses, measures of secret surveillance of communications are fully adequate.<sup>13</sup>

The important question is, who is competent to order this special evidentiary action? The Serbian legislator explicitly states that the surveillance communication is ordered by a judge for preliminary proceedings after the reasoned request of the prosecutor. So there is no possibility that in case of emergency, or a risk of delay this measure is ordered by public prosecutor. Such a legal solution is fully in line with the European Court of Human Rights<sup>14</sup> so it can be concluded that it is necessary that a final decision on the application of secret surveillance of communications is in the hands of the court.<sup>15</sup>

Furthermore, the secret surveillance of communications may last three months, and if there is need for further evidence gathering it can be extended for another three months. Exceptionally, for offenses in jurisdiction of Prosecutor's Office for Organized Crime and War Crimes Prosecutor's special evidentiary action may be extended twice in a period of three months. It actually means that the action of secret surveillance of communications in proceedings for offenses for which is competent prosecutor's office of special jurisdiction can last up to a year.

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<sup>13</sup> These are the following criminal offenses: unauthorized use of copyright works or subject matter of related rights (Art. 199 CC), damage to computer data and programs (art. 298, para. 3 CC), computer sabotage (Art. 299 CC), computer fraud (Article. 301, para. 3 CC) and unauthorized access to a protected computer, computer network and electronic data processing (Art. 302 CC).

<sup>14</sup> Some decisions ECHR are accepted as reference in this matter. In particular, we have verdicts *Malone vs UK* (where it was determined that collecting information on telephone numbers dialed, time and length of calls fall under the concept of communication), and *Copland vs UK* (which specifies that the notion of privacy and correspondence includes not only telephone communication, but also e-mail and Internet use), but also in verdict *Kruslin vs France* (which is of importance for the prevention or postfestum supervisory role of the court in cases of surveillance and recording of communications) – quoted from Ivanovic, Z., Banović, B: *Analysis of legal regulation of communications and the European Court of Human Rights*, Security, LIII(1), 2011, page 104-105.

<sup>15</sup> In Germany and Italy there is a legal possibility that in cases of urgency secret surveillance of communications, orders public prosecutor, but it is essential that such a decision is brought in a very short time (48 hours or three days) certificate by the competent judge - read: Boskovic, A: *The actions of the police in the previous criminal proceedings and their probative value*, Institute for Criminological and Sociological Research, 2015, p. 160-161.

Secret surveillance of communications is executed by authorized police officers, Security Information Agency (SIA) or Military Security Agency (MSA), and the postal, telegraph and other organisations registered for transmission of information are required to allow it. This duty of organizations registered for the transmission of information is very important because the police do not have authority to enter the apartments to prepare the specific technical requirements for interception and recording. The the monitoring and recording is performed in mail and similar companies using the technique that already exist there.<sup>16</sup>

At this point it should be noted that there is a legal possibility that if during the secret surveillance of communications suspect start using another phone number or address, police, SIA and MSA can independently expand the surveillance and communication to that phone number or address. This expansion of secret surveillance is conducted without a formal decision, but it is conditional and time-limited, because the formal expansion of secret surveillance of communications can only occur after approval of the court, and at the initiative of the public prosecutor.<sup>17</sup> In this sense, it is essential that the police, SIA and MSA immediately notify the public prosecutor who immediately submit a proposal to judge for preliminary proceedings for approval of the expansion of secret surveillance of communications. The preliminary proceedings judge decides within 48 hours of receipt of the proposal. If the proposal is accepted, there is a subsequent expansion of secret surveillance of communications, and if its rejected - all collected materials obtained in this way is destroyed and can not be used later in the Criminal Procedure Code (art. 169).

Finally, at the end of the secret surveillance of communication, the police, SIA and MSA submitting to the judge for preliminary proceedings recordings of communications, letters and other items and the special report containing: start and end of surveillance, details of the official who carried out the monitoring, a description of technical facilities which are applied, and the number of available information on persons covered by the supervision and evaluation of the appropriateness and application of the results of controls (Art. 170, p. 1). The preliminary proceedings judge will carefully open letters and other parcels trying not to damage stamps, and to save the seals and addresses, and after that he makes report. All material obtained by the implementation of secret surveillance of communications shall be forwarded to the public prosecutor who will determine that the recordings obtained using technical means fully or partially be copied and described.

#### 4. Secretly monitoring and recording

Secretly monitoring and recording of the suspect shall be determined under the fulfillment of the general conditions common to all the special evidentiary action and can be done for two reasons: first - in order to detect contact or communication of the suspect in public places and places where access is limited or on the premises, except in the apartment, but only if it is probable that the suspect will be present there or if it is certain that he will use certain transport, etc. - in order to establish the identity of the person or locating persons or things (art. 171, Para. 1 and 2). Secretly monitor and record of the suspect is usually reflected in the acoustic surveillance of the rooms, cars

<sup>16</sup> Bošković, A. *Ibid*, p. 159.

<sup>17</sup> Ignjatović, Đ., Škulić, M. *Ibid*, p. 367.

and a man, in a secret photography, visual monitoring of the facilities, the secret recording with classical and digital cameras, video cameras, tape machines and similar devices (*i.e.*, photo and TV- documenting). This primarily refers to the conversations that take place live, for example, on the street, the square, the public assembly, but without the use of special technical devices, but with tape-and optical recording.

The difference compared to the secret surveillance of communications is reflected in the fact that at the secret surveillance of communications its about communications made with some technical device, while the secret monitoring and recording emphasis on visual observation and monitoring of the person, and the second element of this special evidentiary actions is control of the communication *in vivo*.<sup>18</sup>

The importance of secretly monitoring coverage and technical recording of persons and objects is that, in addition to the repressive, it can achieve a certain preventive effect. By using this special evidentiary action you may prevent the execution of another criminal act, and it can also lead to data that shows certain preferences, habits and manners of certain persons, identify the persons they comes in contact with and form of those relationships, as well as other facts relevant to the prevention of certain criminal activities. It is therefore essential that the monitoring, or the person who is monitored as well as the items of importance for criminal proceedings record with the appropriate technical devices, depending on the objective possibilities.

In view of the before mentioned legal formulation, the question arises whether "recording" in the context of the special evidentiary action involves only the video, or sound recordings also. On the one hand, there is an argument that says that the term "record" includes both video / photo capture, and tone. On the other hand, supporting the fact that this particular action does not include sound recording, according to the argument that the purpose of secret surveillance and recording is detection of suspects communication and contacts in public places or places with limited access or on the premises, except in the apartment, and determining the identity of the person or locating persons or things, so from that goal it comes that it only includes video/photo recording.<sup>19</sup> Also questionable is the fact that the legislator does not talk about secret surveillance and recording of communications of the suspect, but only secretly monitor and record the suspect to detect communications, which suggests that the coverage of the shooting suspect as a physical phenomenon.

In this way, the legislator has not defined the application of these special evidentiary action because it is not explicitly stated that secretly monitor and record covers and communications suspect. On the occasion of this practice is of the view that the application of these special evidentiary actions can record and suspect communications with other persons so what will come in and set the technical recording devices in appropriate facilities, places or means of transport, but once again it should be emphasized that these special evidentiary action can not be carried out in the apartment.

In terms of jurisdiction to determine the special evidentiary action applies the same rule as for the secret surveillance of communications, which means that orders the judge for preliminary proceedings at the reasoned request of the prosecutor, and such court order must contain certain elements required by the CPC. Also, in terms of the duration of the special evidentiary action applies the same rule as for the secret surveillance of communications, meaning that the procedures for organized crime offenses secret

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<sup>18</sup> Radisavljević, M., Četković, P. *Ibid*, p. 178.

<sup>19</sup> Ignjatovic, Đ., Škulić M. *Ibid*, p. 371-372.



surveillance and recording may take longer than a year. Finally, to secretly monitor and record the suspect executed by authorized police officers of the Security Information Agency or Military Security Agency. About implementation of surveillance or recording shall be made daily reports that along with the collected recordings submitted to the judge for preliminary proceedings and the public prosecutor at their request (Art. 173, p. 1). Upon completion of the secret monitoring and recording of the suspect, the judge for preliminary proceedings are shipped all collected recordings, as well as a special report which is identical as for the application of measures of secret surveillance of communications. Also, a judge for preliminary proceedings with the received video is identical as for the application of special evidentiary actions secret surveillance of communications.

## 5. Simulated affairs

Simulated affairs represent a special evidentiary action which may be ordered when filled general legal requirement common to all the special evidentiary actions. The conclusion of simulated tasks involves two categories of activities of authorized entities. First - includes simulated purchase, sale or providing business services, and secondly - simulated giving or receiving bribes (these are two separate activities). Measure simulated purchase, sale or provision of business services its full application in detecting and providing evidence in criminal acts in the field of smuggling and illicit trade in various kinds of prohibited and valuable goods. It is certainly the activity of organized crime, while the rate simulated giving or receiving bribes successfully be used in clarifying and proving corruption criminal offenses - criminal activities which also often performs organized crime.<sup>20</sup>

Using simulated buying and selling items or providing a business service based on uncompromised operational relationship (associate) or at work undercover investigator in a some criminal organization. In certain situations and at certain activities of organized crime, most often in smuggling and illegal trade, they find the "buyer" in consultation with the police. They do this in order to samples of certain types of goods or smaller quantities of goods sold without disclosure by the police, who usually play the role of the customer. In this way the collaborator or undercover investigator generate greater confidence in the criminal organization, and enables the police to detect and prove criminal acts of organized criminal activity, and when it estimates that there are most favorable conditions for cutting and catching the offender and the confiscation of smuggled goods or goods intended for illegal trade.<sup>21</sup> In any case, when assessing favorable conditions should take into account not only the type and quantity of smuggled goods, but also the number of offenders in the criminal chain, as well as their status and hierarchy in a criminal organization.

When it comes to simulated sales can always ask the question where the person required to make a simulated sale to obtain a specific item sells. For example, if you need to perform simulated drug dealing, where the police will get the drug. Although all temporarily confiscated drugs, including one that is based on court judgments targeted for destruction, are held in the premises of the Ministry of Interior, the question arises

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<sup>20</sup> Bošković, A. *Ibid*, p. 164-165.

<sup>21</sup> Boskovic, M: *Organized crime and corruption*, High School of Interior, Banja Luka, 2004, p. 133rd

whether this drug is used to implement these actions.<sup>22</sup> Therefore, much more likely to apply simulated buying than simulated sales, because in simulated sales, in addition to the issue that is reflected in how to obtain the object of sale, there is the problem of destiny so "sold" items. Namely, if the "sale" of drugs, and in this case does not come immediately to arrest, it is highly likely that this drug will be used by the suspects, whether they themselves use, whether it is put away in traffic.

In connection with this special evidentiary action it should be noted that the characteristic simulated can have only those actions whose consequences can fake a, such as illegal criminal cases. In the case of incrimination of serious bodily injury, murder or rape, simulated not possible. In establishing criminal contact that aims to reach an agreement for the execution, and the execution criminal act in a simulated conditions, naturally comes to the impact of one side over the other, and their interaction. When it comes to member services, should not contain elements of instigation to crime. At the same time, it necessarily implies making proposals for the implementation of a specific task or action, place and time they are taken, and other commonly By way of elements, so that some form of guidance, or routing, in this case inevitable.<sup>23</sup>

In terms of competence for determining simulated affairs applies the same rule as in the previous special evidentiary actions. This means that orders the judge for preliminary proceedings at the reasoned request of the prosecutor, and such court order must contain certain prescribed items Code of Criminal Procedure (CCP). Also, in terms of the duration of the special evidentiary action applies the same rule, which means that the procedures for organized crime offenses simulated affairs can not last longer than a year.

As with secret surveillance of communications and secret monitoring and recording suspect rule that a court order executed by authorized police officers, Security Information Agency (SIA) or Military Security Agency (MSA). However, when it comes to simulated affairs and also provides for an additional provision which provides that, if required by the specific circumstances of the case, a court order may be performed by another authorized person. In this sense, "under other authorized person should understand the authorized person from another local authority, institution or enterprise, but it is not excluded that it be authorized person from the foreign authorities, institutions or enterprise."<sup>24</sup> When it comes to simulated bribery sure that the "other authorized person" in this case could be the person who is required to give bribes, ie. passive subject of corruption, which is valued in each specific case. It is significant to note that another person authorized in each case suggests the police, Security Information Agency (SIA) or Military Security Agency (MSA), and determines judge for preliminary procedure, although this is not expressly provided for by law.

Finally, regarding the application of simulated operations in the Republic of Serbia is important to emphasize two more specifics. First - the authorized person who concludes simulated business is not crime for the action undertaken by the Code of

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<sup>22</sup> Dundović, D: *Special Collection of Evidence: simulated sale and purchase of objects and simulated bribery and simulated bribe-taking*, Police and Security, 20 (2), 2011, p. 175th

<sup>23</sup> Marinkovic, D: *Combating organized crime - special investigative methods*, Prometheus, Novi Sad, 2010, p. 390.

<sup>24</sup> Ilic, Mr. P, Beljanski, S., shirts, M., Trešnjev, *A Commentary of the Criminal Procedure: According to the Code of 2011, as amended on 1 October 2013*, Official Gazette, Belgrade, 2013, p. 431-432.

Criminal Procedure intended as an act of this crime (art. 176, para. 2). And second - is prohibited and punishable to the authorized person encourages another person to commit a criminal act (art. 176, para. 3). This practically means that during simulated purchase, sale or provision of business services, ie simulated giving or receiving bribes authorized person must not "offer" execution of work because this would be a provocation to commit a criminal act.

## 6. Computer data search

Computer data search is of great importance in many developed countries, especially in connection with a prominent computerization of personal and other data, and great opportunities that these data are provided in connection with the collection of evidence. As far as the legal basis for the implementation of these actions, computer search data may be ordered when filled with general legal requirement common to all the special evidentiary action which has already been discussed.

The essence of this special evidentiary actions is reflected in the computer search already processed personal and other data and their comparison with the data related to the suspect and the criminal act. Here, above all, to the personal and other information of citizens collected for different purposes by many public services and state agencies and that organizations, and health, education, various funds, insurance companies and others.<sup>25</sup> Its significance is precisely that it allows the search and collection of personal and other data and information which can be related to criminal activity. This creates the conditions for the application of the method of elimination of certain individuals from the circle of suspects or determine the circle of suspects after their automatic connection and comparisons with data relating to the person who has committed a criminal offense.

Computer data search closer can be divided into positive and negative raster search. Negative raster search contribute to the elimination of certain individuals from the circle of suspects automated searches by police, administrative and other records. On the other hand, the positive raster search involves determining the circle of suspects on the basis of certain characteristics, facts or skills that are observed in the unknown perpetrator of a crime (eg. In the driver escape from the scene of a traffic accident where the not well-known brand and type of vehicle - indicating drivers of such vehicles as potential perpetrators).<sup>26</sup>

In terms of jurisdiction to determine a computer search data applies the same rule as in the previous special evidentiary actions, which means that orders the judge for preliminary proceedings at the reasoned request of the prosecutor, and such court order must contain certain elements required by the Code of Criminal Procedure. However, the duration of the special evidentiary action rule is that it can last for three months, and the necessity of collecting further evidence can be extremely extended more than twice in a period of three months. It actually means that the action of computer data search can last up to nine months, unlike other special evidentiary actions which were previously discussed.

A court order executed by authorized police officers, Security Information Agency, Military Security Agency, customs, tax or other services or other State agency or legal

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<sup>25</sup> Bošković, A. *Ibid*, p. 167<sup>th</sup>.

<sup>26</sup> Milosevic, M. Kesic, T: *Police in the Criminal Procedure Code*, Police Academy, Belgrade, 2009, p. 186.

person under the law with public powers (Art. 180, p. 1). Upon completion of computer data search by the police, Security Information Agency, Military Security Agency or other authorized state authority or a legal entity shall submit to the judge for preliminary proceedings report must contain the elements prescribed by the Code of Criminal Procedure, and the judge for preliminary proceedings will deliver material and report to the public prosecutor.

## 7. Controlled delivery

Controlled delivery is a specific special evidentiary action which deviates from the principle of legality of criminal prosecution because they do not initiate criminal proceedings even though there are grounds for suspicion that a criminal offense. The essence of these special evidentiary actions is reflected in the fact that the controlled delivery allows, with the knowledge and under the supervision of the competent authorities, illegal or suspicious shipments have been delivered within the territory of the Republic of Serbia or to enter, cross or leave the territory of the Republic of Serbia. In this way it allows illegal or suspicious shipments out, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities for the purpose of investigation and identification of persons involved in the committing an offense.<sup>27</sup> This measure can be implemented in the territory of one or more countries. In its implementation in the territory of the Republic of Serbia must participate members of the police and customs authorities, especially when the consignment is to be controlled comes from another country, and is unknown to its delivery.

Controlled delivery may be ordered when it is filled with general statutory requirement common to all the special evidentiary action, and its purpose is to collect evidence for a trial and detecting suspects. Unlike the previously mentioned special evidentiary actions, controlled delivery does not order the preliminary proceedings judge, but the State Public Prosecutor and other public prosecutors of special jurisdiction - Prosecutor for Organized Crime and War Crimes Prosecutor. So, when it comes to controlled delivery, the decision on the order on its implementation is in the hands of the public prosecutor, not the court.

The main objective of this special evidentiary action is to identify and confiscate the greater the amount of various goods, no matter what kind of shipments and in order to reveal the organizers, heads of criminal activity, as well as the executors in as many. By monitoring and controlling the delivery attempt is made to discover the actors who occupy high positions in the hierarchy of the criminal organization and this action "combined with other methods of secret surveillance (secret optical, video and physical surveillance), which allows it to be fully registered criminal activity and collect evidence important for criminal proceedings."<sup>28</sup> Therefore, this measure is commonly used for the detection and identification of significant activities of organized crime, such as criminal offenses in connection with the smuggling of drugs, weapons, ammunition, explosive substances, money, cultural goods, cigarettes, technical goods, as well as other valuable commodities.

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<sup>27</sup> Bošković, A. *Ibid*, p. 155<sup>th</sup>.

<sup>28</sup> Boskovic, G. *Organised crime*, Police Academy, Belgrade, 2011, p. 242<sup>nd</sup>.

Controlled delivery conducted by the police and other state authorities designated by the competent public prosecutor and implemented with the approval of the competent authorities of the states concerned and on the basis of reciprocity, in accordance with the ratified international agreements regulating in more detail its contents. It is important to emphasize that for each delivery has to be a special approval of the public prosecutor, which means that the police can not permit the public prosecutor which is given to one used for the delivery of another shipment. In case of delivery, which should exceed the border of two or more countries, then the implementation of these measures include the competent authorities of these countries, Interpol, if necessary, and other international bodies.

The control of illegal transport in practice can be achieved in different ways, depending on the vehicle which is transported implemented and factual possibilities for its supervision in each case. So be suspicious or illegal shipment can be monitored by an undercover investigator (undercover agents) incorporated into a criminal group dealing with illegal transportation or informants that police authorities communicated its direction and people who implement it. However, the supervision and control of shipments may take even from a distance, using modern technical devices for optical inspection, observation or positioning, such as composite system of GPS, GIS and telecommunications devices.

In terms of duration of controlled delivery, it may be noted that the law does not determine its duration, but it prescribes that the Republic Public Prosecutor shall issue written approval for each particular delivery. However, it is expressly stipulated that the execution of a controlled delivery, the police or other state authority shall submit the report to the public prosecutor who, among other things, must contain data about the time beginning and end of controlled delivery, which certainly is the correct legal solution.

## 8. Undercover investigator

Engagement of an undercover investigator based on the experience of some foreign countries and indicates that it is a special action that is used to collect relevant information that may have evidentiary significance in combating organized and other crime more difficult. This action is in the Republic of Serbia later date unlike some countries which applied a longer time period and introduced amendments to the Code of Criminal Procedure (CCP) in 2002. The essence of engagement undercover investigator is that to collect and provide appropriate evidence against suspected members of the group or organization that has infiltrated and that, if necessary, testify about it in court.

As far as the legal basis for engagement of undercover agent, it should be noted that there are certain peculiarities in relation to other special evidentiary actions. First, the possibility of engagement an undercover investigator exists only in criminal acts under the authority of the Prosecutor's Office for Organized Crime and War Crimes Prosecutor, not the other crimes enumerated in the Code as is the case with other evidence actions. Also, the undercover agent can be employed only under the fulfillment of yet another additional condition, namely that the use of other special evidentiary actions can not collect evidence for prosecution or if their collection would be very difficult. So, engagement undercover investigator has a subsidiary character in relation to other

special evidentiary actions.<sup>29</sup> Only if it is established that the use of other special evidentiary actions can not collect evidence for prosecution or if their collection would be very difficult, takes into account implementation and engagement of undercover agent.

Order on the engagement of an undercover investigator made by a court or a judge for preliminary proceedings at the reasoned request of the prosecutor. This court order has certain mandatory and optional elements required by the CCP. By analyzing the individual elements commands special attention should be given to an optional element which means that the command on the engagement of an undercover investigator can be determined that the undercover investigator can use technical means for photographing or tone, optical or electronic recording. From these provisions, it is clear that the undercover investigator can record conversations which he attends and who designed it, but the question remains whether the undercover agent be in a certain apartment or room set up adequate bugs and record conversations which he did not attend. We believe that to approve this includes wiretap conversations of others.<sup>30</sup> Therefore, the question arises whether such an order in itself sublimates and command to enter a apartment and other rooms to set up listening devices, or would like to enter the apartment was in need of special court order. At this point we should recall the provisions of the Code, according to which secretly monitor and record the suspect possible in public places and places where access is limited or in the premises, but not in the apartment (Art. 171). With this in mind, the answer to this question becomes even more complex, but we think that in such a situation was possible to provide a separate court order to permit the entry of the flat and other premises and set up listening devices because it would be the only way to fully comply with the provisions of Art. 40 of the Constitution of the Republic of Serbia which prescribes the inviolability of residence. In any case, the most appropriate would be clearly and explicitly stated in the Code if it is possible, and if so under what conditions, to an undercover agent uses tone, optical or electronic record in the apartment, in situations where the entrance to the apartment is conditioned by an order of the court.

The involvement of the undercover investigator can last as long as necessary to collect evidence, but no longer than one year. However, at the justified request of the prosecutor the preliminary proceedings judge may extend this special evidentiary action for another six months. This means that the engagement of the undercover investigator can take a maximum of one and a half days, provided that the engagement of interruption as soon as the reasons for its application.

Only the determination of the undercover investigator follow certain characteristics that stem from the very nature of these special evidentiary action which is in many ways specific in relation to others. First, an undercover investigator of the minister responsible for internal affairs, director of the Security Information Agency or Military Security Agency or a person authorized by them. In the practical conduct of an undercover investigator will usually determine a person a minister or director of security services powers, and it is mainly the immediate superior of an undercover investigator. Furthermore, the undercover agent is always determined under a pseudonym or code. Significantly, the undercover agent as a rule an authorized official of the Interior, Security Information Agency or Military Security Agency, except if

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<sup>29</sup> Bošković, A. *Ibid*, p. 171<sup>st</sup>.

<sup>30</sup> See: Marinkovic, D. *Ibid*, p. 441-442.

required by the specific circumstances of the case, the undercover agent may be another person, even a foreign citizen. Also, to protect the identity of the undercover investigator, the authority may edit data in databases and issue identity documents with changed data are secret data (Art. 185).

At this point, we will indicate the two specificities of the undercover investigator in the Republic of Serbia. The first specificity is reflected in the fact that it is forbidden and punishable to an undercover agent in the commission of the offense (art. 185, para. 4). It is one of the circumstances under which the undercover agent differs from the Institute "agents provocateurs" who exist in many comparative jurisdictions, primarily in the United States. This practically means that the undercover agent was allowed to answer a criminal if overstepped his authority and abetted another person to commit the offense.<sup>31</sup> Be sure that on the occasion of such possible actions of the undercover investigator can occur multitude of issues, one of which is how to proceed if the undercover agent a criminal offense to thereby prevent the disclosure of his identity or role and did nothing to prevent certain criminal act in order not to reveal his role. These situations should be dealt with in accordance with the general rules of criminal law relating to supreme emergency.<sup>32</sup>

Another specificity that characterizes this special evidentiary action is reflected in the fact that the undercover investigator may be exceptionally examined in criminal proceedings as a witness, and only under a code or a pseudonym. Only testing will be done so that the parties and counsel not disclose the identity of an undercover investigator. Undercover investigator is summoned through elders who immediately before testing his statement before the court confirms the identity of an undercover investigator and yourself information about the identity of an undercover investigator to be examined as a witness representing classified information. Also, court decisions can not be based exclusively or to a decisive extent on the testimony of an undercover investigator (Art. 187). In the context of the previously outlined considerations should be noted that in Serbia there is no possibility of anonymous testimony, unless it comes to the above case, when examined as a witness to an undercover agent.

## 9. Conclusion

In countering contemporary forms of crime, especially organized crime activities, it is clear that the prosecutor, the police and other authorities can achieve greater efficiency and more complete success if they use only the classic, traditional criminal investigation methods, given that organized crime is very successful in its criminal activity uses modern scientific achievements in natural sciences and engineering. It is therefore necessary to enable the competent authorities through adequate legal provisions to use certain scientific achievements in combating organized and other serious forms of crime, taking into account that no violation of the freedoms and rights of citizens. In this respect, the European Court of Human Rights has approved the use of such new methods, just as he had in mind the fact that democratic societies are threatened by the constant threat of highly sophisticated forms of espionage and

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<sup>31</sup> Under the incitement to committing an offense in this context is considered incitement in terms of criminal law, *i.e.* it can be any action to intentionally causes or reinforces the decision of another person to commit the offense.

<sup>32</sup> Details about this: Škulić M: Criminal act undercover investigator done as a last resort, *Legal Life*, 54 (9), 2005, p. 661-690.

terrorism, whereby each country has to manifest a willingness to carry out covert surveillance subversive elements in its territory. Therefore Court must acknowledge that the existence of powers to the legislative secrets surveillance, under specific conditions necessary to a democratic society and to because interests National Security and crime prevention.

In this regard, the Republic of Serbia Criminal Procedure Code provides for six special evidentiary actions that are largely consistent with international standards. There are a number of issues and concerns, especially when it comes to secret surveillance of communications and secretly monitor and record suspect that Serbian legislator in subsequent novels CCP needed to harmonize and precisely defined. The reason for the legal norms that restrict the basic constitutional rights of citizens, such as the secrecy of letters and other means of communication or the inviolability of the home, must be clear, precise and unambiguous, ie. everyone must advance be clearly aware of the specific actions to be taken to him if he violates the relevant legal regulations.

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# Organized Crime in Action: Trafficking of Human Cells, Tissues and Embryos in Romania\*

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## Abstract:

*In the context of impetuous debates on bioethical issues arising from biomedical and genetics research lines, the lack or inadequacy of national legislation to scientific research in the field of biogenetics facilitates the activity of organized crime.*

*Organised crime detects new sources of income that can be obtained the easy way by harvesting surcharge of human cells, tissues or organs, by trafficking of human embryos, by selling such products to interested persons which can use them at their own will, for medical curative, research or industrial purposes. In Romania there have been developed true recruiting networks of "donors" under the cover of the apparent legal specialized clinics in the country's major cities. Three of them have already been discovered and dismantled by Romanian judicial authorities's efforts. In this context, close international cooperation is needed in order to enable the identification of the modus operandi and the ramifications of criminal organizations. The Romanian state's judicial policy adjustment should be complemented by a review of legislative penal policy leading to the adoption of a strict prohibitive legislation regarding the traffic of oocytes and embryos and the medical techniques to provide them.*

**Keywords:** *organized crime, organized criminal group, embryo, oocyte, trafficking of human cells and tissues.*

## 1. Introductory aspects

Trade in human eggs or surrogate motherhood became a widespread international phenomenon with serious repercussions in national and international area, in a relatively short period of time, thus creating real collection and distribution networks. We even can identify a direction in mobilizing the individuals involved in such practices, in "donor" - "beneficiary" relation; the "donor" comes mainly from Eastern Europe or Asian countries (India, Pakistan, China), while the "beneficiary" comes from Western European countries or the US, the legislation in later countries being extremely restrictive on biomedical procedures while the costs are extremely high. In this relationship, the critical place is held by "intermediaries", organized criminal groups and clinics that facilitate the exchange, obtaining in this way large sums of money.

In countries where the sale of eggs is prohibited under the national law, hormones may be administered in the country of female donors, then moving to another country for their collection. Oocytes produced by in vitro fertilization are harvested here too.

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Sometimes introducing the embryo in the woman's uterus also takes place here. Aggressive techniques to stimulate ovulation, repeated harvesting of large number of ovules, multiple attempts to implant in the uterus for the fertilized oocyte or embryo have led to many serious health problems of women undergoing these medical practices. Health effects for women occur in both short- (massive hemorrhage, allergic reactions, etc.) and long term (infertility, various cancers), being both extremely serious.

Transnational trade in surrogate motherhood is another form of trafficking in genetic material, that typically involves several people:

a) surrogate mothers (carriers) can only offer their body / uterus / eggs to the beneficiaries; they come from poor countries, have financial difficulties and obtain money in this way. They can cross several countries: in a state they are being artificially inseminated and in another state they may be sent to carry their pregnancy.

b) donors of genetic material (eggs, sperm) can be members of the beneficiary couple or even third parties which may be obtain, in turn for their „donation”, a financial reward. In this case, the third parties come obviously from other European states or Asia.

c) beneficiaries of the child that is born by the surrogate mother are paying this services and usually come from another state (Western European state or even United States).

Leaving aside the discussion about the violations of the human rights and about the violation of bioethics principles governing the biomedical and genetic practices and particularly in vitro fertilization, the described phenomenon has increased in the past recent years being almost impossible to control.

Within it, harvesting and distribution networks developed by organized criminal groups are built on pillars with legal appearance - creating in vitro fertilization clinics, medical counseling centers - and require specialized personnel: doctors and geneticists have so the chance to obtain untaxed gains and to achieve unauthorized medical research.

Both donors and beneficiaries are, in our opinion, victims of this phenomenon, their involvement in those proceedings having either a pecuniary motivation (the so-called donors, surrogate mothers), or a psychological and social motivation (beneficiaries).

## 2. Organized crime and its features

Organized crime, in its way of structuring, flexibility and great infiltration capacity in vital areas of politics and economics, through its rapid internationalization, through its unconditional appeal to violence, corruption and extortion, is a direct and urgent threat, and could be qualified as a defiance to global society.<sup>1</sup>

The United Nations Framework Convention on Struggle Against Organized Crime defines the concept of organized crime as: the activities of a group of three or more persons with hierarchical links or personal relationships that enable their leaders to make profits or control territories or markets by internal or external violence, intimidation or corruption, both in the purpose of support criminal activity and to infiltrate the legitimate economy.

Organized crime has been characterized as the preserve or attribute of privileged individuals, placed on top of the social and political pyramid, using their influence,

<sup>1</sup> Petre Buneci ș.a., *Sociologie juridică și devianță specială*, Ed. Fundației Române de Măine, București 2001, p.142.

position, wealth and their political and economic power in order to commit unlawful acts which remain undiscovered by the police and justice, business from which they obtained huge profits, evading tax state control.<sup>2</sup>

Unlike the actions of individuals who occasionally associate to commit illegal acts, a criminal organization is a premeditated association designed to the smallest details regarding the role and mode of action of those who constitute it. The specific features of criminal organizations, from a traditional and even conservative approach are: a) hierarchical structure; b) hermetic and conspirativity; c) flexibility and penetration; d) the transnational character; e) profit orientation; f) use of force; g) the existence of a code of conduct.

In some recent analyzes of the organized crime phenomenon<sup>3</sup> has been shown that the only one dimension that is specific to organized crime in the current context is its complexity, being almost impossible to propose a comprehensive definition of the phenomenon. Secondly, the transnational feature tends to become a self-contained element after 1990, at the end of the Cold War.<sup>4</sup>

Formal definitions of transnational organized crime that are set out in various international documents treat the transnational character not as an ontological feature of organized crime, but as a specific manner of its actions. Art. 2 of the Palermo Convention defines organized criminal group as a structured group of three or more persons, existing for a certain period and acting in concert with the aim of committing one or more serious crimes or offenses under the Convention, to directly or indirectly obtain a financial or other material benefit. According to art. 3, an offense is transnational in its nature if: a) it is committed in more than one State; b) is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another State; c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or d) is committed in one State but has substantial effects in another State.

OCTA<sup>5</sup>, published by Europol in 2007 distinguishes between three types of criminal groups: a) organized indigenous criminal groups based in the EU (leaders and their goods come from the EU); b) non-indigenous groups or not founded in EU (leaders and their goods do not come from the European Union); c) groups that include both organized groups of second generation (organized groups are groups derived from a non EU country that have established in the EU) and traditional indigenous groups that exploit the international dimension.<sup>6</sup>

The same document shows that modern organized criminal group has a defined transnational nature, many of its criminal typologies being evolved forms of smuggling. Smuggled goods are goods that can not be procured from the legal market.<sup>7</sup> A niche for such action is created, ingenuity and professionalism of the leaders of criminal groups consisting in identifying these niches and developing the distribution networks.

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<sup>2</sup> E.H.Sutherland, *White Collar Crime: The Uncut Version*, Yale University Press, 1983, Business & Economics, p. 253.

<sup>3</sup> Francesca Longo, *Discoursing organized crime. Towards a two-level analysis*, in Felia Allum, Francesca Longo, Daniela Irrera, Panos A. Kostakos (editors), *Defining and Defying Organized Crime. Discourse, perceptions and reality*, Part I, Routledge advances in international relations and global politics, Routledge, New York, 2010, p. 15.

<sup>4</sup> *Idem*, p. 21.

<sup>5</sup> EU Organized Crime Threat Assessment 2007; [www.europol.europa.eu](http://www.europol.europa.eu).

<sup>6</sup> OCTA 2007, p. 9, 14-16.

<sup>7</sup> *Idem*, p. 21.

The doctrine<sup>8</sup> also found two models of existence and action of organized criminal groups whose presentation is relevant to this study:

- the corporate model, traditional, in which entities acting as criminal groups are highly centralized with a certain hierarchical structure;
- the network model, flexible, fluid and adaptable, which can quickly regroup in case of its removal by the authorities. Organized criminal group consists of a network of sub-groups capable of rapid regrouping, whose existence is not based on lasting relationships between their members like in case of the corporate model. Unlike traditional organized structural model, group members do not have to prove their dedication to sacrifice their lives. Depending on the opportunities arose, they are free to seek other partners to maximize profits. The bond between the members of the criminal group in this model is the desire for profit.

### 3. New areas of interest for organized crime

The unprecedented development of reproductive technologies in conjunction with other legal, social, financial and psychological elements (lack of regulation or insufficient regulation of the field in a state, the increased degree of population infertility, the couples' desire to procreate, prohibitive costs of going through in vitro fertilization procedures, the excessive bureaucracy on a person's eligibility to qualify for such procedures) have opened the door to illegal practices carried out in an organized framework. Organized criminal groups which have a strong specialized professional character, that act in the field of assisted human reproduction. These networks were harvesting human reproductive cells that are fertilized in vitro and then implanted in the recipient's or surrogate mother's body. There is an appearance of legal medical activities, thanks to the loopholes or weak expression of the legislature. In these network-type organized groups are involved people with medical education background (from researchers to doctors, nurses and support staff) who constitute the "core group", essential for its niche activity.

Interestingly, none of the documents published by Europol (OCTA 2007, SOCTA 2013 IOCTA 2014) does not analyze this new field of action of organized crime. Obviously a presentation by the Council of all areas of action of organized crime would be impossible given the complexity of the phenomenon. However, until now, there is no analysis of Europol on trafficking in human cells and reproductive material, although the phenomenon has accelerated in the last 5 years.

### 4. Models of actions of organized crime in Romania in human cell trafficking, human tissues or surrogate motherhood. Three famous cases

In the context of insufficient regulation of medical techniques and the lack of legal limits in these areas, Romania has faced three highly publicized cases in both the national international media, involving in vitro fertilization clinics, foreign and Romanian businessmen and doctors, constituted in organized criminal groups. Thus, three in vitro fertilization clinics were accused of trafficking in oocytes, doctors recruiting Romanian or Roma nationality women. Their reproductive cells were taken

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<sup>8</sup> Tom Obokata, *Transnational Organized Crime in International Law*, Hart Publishing, Oxford and Portland Oregon, USA, 2010, p. 14-17.

in exchange for money. The oocytes were then used to treat some foreign patients, who suffer from infertility and who paid for the treatments. Unlawful gains achieved by members of harvesting and distribution network were huge.

*a) The MED NEW LIFE Case<sup>9</sup>*

In 2003, an Israeli businessman – Raz Hochman - has opened an in vitro fertilization clinic, named "Med New Life" in Bucharest. The business has operated without problems until 2009. Then, a donor of oocytes filed a criminal complaint after her condition worsened due to a hormone treatment to extract oocytes. The woman refused to be treated by doctors from the clinic, remaining without ovaries after an operation performed at another hospital. Although the case was reported to Directorate for Investigating Organized Crime and Terrorism (*in Romanian DDCOT*) in 2009, Israeli businessman (head of the traffic network of oocytes) was arrested only in 2013, and his clinic closed at the time.

The investigations carried out following the original complaint in 2009, revealed the whole network of donors - young women - who were cashing up to 600 euros for each harvest oocytes. Embryos were sent to Israel, without seeking the opinion of the National Transplant Agency. Israeli or other ethnic patients were paying a fee that could reach 3500 Euro to benefit from implantation of fertilized eggs or embryos. The financial mechanism created, allowed the distribution of money paid by the recipients to the donors and to the clinic for its medical services.

Prosecutors revealed that Raz Hochman, along with other defendants, "(...) in order to obtain necessary genetic material to achieve in vitro fertilization procedures, benefiting from the material basis to carry out the assisted reproduction techniques (medical equipment, medication etc.), directly or through intermediaries, recruited, by various means, females who have agreed to follow procedures that involved the extraction of oocytes; the genetic material obtained under these circumstances was used to provide embryo transfers for the benefit of distressed females who couldn't procreate naturally and that in return were paying substantial amounts of money(...)." <sup>10</sup>

It is worth mentioning that, following the network model mentioned by us during the analysis of the concept of organized crime, RAZ Hochman and two other defendants in the case, had initially worked in the Sabyc Clinic until 1998. From that point they were separated from HARRY MIRONESCU (convicted in the Sabyc Case) establishing MED NEW LIFE Medical Center in Bucharest.

The association of the organized criminal group members and their aggregation in the NEW MED LIFE Medical Center was a natural continuation of previous work carried out at Sabyc Clinic and was conducted in the context of not punishable at the time acts. The group's work was supported by the large number of people in difficulty to naturally procreate identified in Romania, but also by the many requests of some Israeli couples, while the achievement of such procedures in Israel meet difficulties due to traditionalist / religious reasons.

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<sup>9</sup> Regarding this case: <http://www.ordineazilei.ro/actualitate/social/sanatare/p/cazul-raz-hochman-facere-ilegala-sau-razbunare>; <http://www.9am.ro/stiri-revista-presei/2005-04-19/filiera-israeliana-a-pus-monopol-pe-traficul-cu-ovulele-romancelor.html>; <http://www.cuvantul-ortodox.ro/recomandari/2014/07/24/fabricile-de-bebelusi-reportaj-digi-24-video-despre-traficul-de-ovule-din-romania-realizat-in-clinicile-de-fertilizare-acreditate-de-agentia-de-transplant-care-sunt-cauzele-scaderii-natalita/>; <http://www.b1.ro/tag/clinica-med-new-life-115987.html>. (accessed 1.04.2015).

<sup>10</sup> <http://www.focus-energetic.ro/un-om-de-afaceri-israelian-vrea-sa-dea-statul-roman-in-judecata-la-cedo-17738.html>. (accessed 1.04.2015).

Prosecutors showed that, in order to disguise the illegal component of the medical work performed by specialists in the Romanian clinic and in order to justify the regular presence of Israeli doctors in Romania, a cooperation agreement between Med New Life Medical Center and HAROFEF ASSAF Hospital from Israel was drawn up. In order to justify the Israeli doctors' work in Romania, considering the fact that they had no right to medical practice in Romania, Raz Hochman came up with the formula of the qualification / over-specialization of the clinic staff, that was only formal employed, without really meeting the legal demands to achieve proceedings involved in cellular microbiology. The Israeli doctors' role was only to figure with their name and their qualification in the organization chart, while specialized Romanian staff performed the procedures which required a high degree of complexity.

The prosecutors also argued that, since the spring of 2009, the members of the organized criminal group have acknowledged the legal research conducted by the judicial organs in a similar case – the so called "Sabyc" Case). After that, their classic mode of action consisting of recruitment of donors was changed to some extent adapted to the new situation, meaning that the persons concerned to follow ovarian stimulation procedure in exchange of money or other benefits were contacted by one of members of the organized criminal group, who put them in direct connection to the persons concerned to benefit from harvested oocytes in order to proceed to further realization of embryo transfer.

The network has been expanded and organized also in Moldova where they had taken steps to obtain permits required to open an in vitro fertilization clinic, under a similar name, New Med Life, with the involvement of Moldovan politicians and their relatives<sup>11</sup>. Interestingly, these efforts were made after the scandal broke out in Romania, in 2009.

In 2013 Raz Hochman was arrested on charges of trafficking of eggs and of constituting an organized criminal group and his in vitro fertilization clinic was closed. Currently, the businessman is banned from leaving the country and his case is pending at the Bucharest Tribunal.

Raz Hochman was indicted for initiation, establishment of organized criminal group, membership or support for such a group and trafficking in human cells (art. 158 para 1 of Law 95/2006) in a continued form. The file is still pending Bucharest Tribunal (judgment at first instance)<sup>12</sup>.

*b) The ATHENA Case<sup>13</sup>*

In May 2014, searches took place at a famous clinic in Timisoara. Another scandal, which involved an in vitro fertilization clinic, has outraged public opinion, dissatisfied already with the lack of a suitable legislation for in vitro fertilization. Konstantin Giatras, a Greek businessman, owner of the "Athena" Clinic in Timisoara, and part of his medical team, were detained.

<sup>11</sup> <http://www.zdg.md/editia-print/investigatii/de-ce-ministrul-sanatatii-protejeaza-monopolul>.

<sup>12</sup> File nr. 27222/3/2013 pending Bucharest Tribunal; <http://lege5.ro/Dosar/ge2tknjtgyztgxzt/27222-3-2013-tribunalul-bucuresti>.

<sup>13</sup> A se vedea: <http://www.tion.ro/medicii-de-la-clinica-privata-athena-acuzati-de-prelevare-ile-gala-de-ovule/1422379>; <http://debanat.ro/2014/05/un-nou-scandal-la-spitalul-athena-medici-acuzati-de-traffic-de-ovule/>; <http://www.mediafax.ro/social/dosarul-traficului-de-ovule-managerul-spitalului-athena-din-timisoara-arestat-la-domiciliu-sefa-de-laborator-cercetata-sub-control-judiciar-12665858>.

The businessman of Greek origin Giatras Konstatin opened in 2010, an in vitro fertilization clinic in Timisoara, a city where he graduated the university. He was extremely well known in the Western part of Romania, had connections in the political class and received the approval of the Foreign Affairs Ministry of Romania and Greece to become Consul of Greece in Romania.

Konstantinos Giatras constituted a criminal group in which the Roma clan chiefs from Banat Region were involved, mainly dealing with oocytes traffic, but also illegally providing other medical procedures in the field of in vitro fertilization. Young Roma women were recruited and directed to the fertilization clinic where they received 300 euros in exchange for harvesting their oocytes. The network also attracted other 13 girls for surrogate motherhood.

According to a release issued by the Directorate for Investigation of Organized Crime and Terrorism (DIICOT), the criminal group was organized on two levels: a) organizing illegal transplantation of human cells used for in vitro fertilization with parent carrier and b) organization illegal activities transplant human cells used for in vitro fertilization with eggs taken from various women recruited by hospital employees who were paid money for the procurement of oocytes; these oocytes which were later used in in vitro fertilization procedures for other women. These medical procedures were carried out without the approval of the National Transplant Agency or of the Minister of Health. People involved were directed by medical personnel at various notaries (currently being identified only two), which drew up notarised statements stating that oocyte donors or surrogate mothers were compelled to donate or to carry a pregnancy without any financial claim, and, as it concerns the surrogacy, at the end of the pregnancy they offer the child to the beneficiary couple, without any other claims. The recipient couples signed notarised statements stating that they agree with in vitro fertilization, with embryo transfer and that they recognize the child as their natural. So far 12 cases of surrogate motherhood have been identified (women from Romania, Hungary, Slovakia) being interviewed seven of them, and have been also identified the couples involved in in vitro fertilization procedures with them. Two of the seven surrogate mothers have given birth to one child, that has been immediately handed over to his biological parents. The recipient couples are both Romanian citizens and also citizens of Hungary, Norway and Greece.<sup>14</sup>

The defendant Konstantinos Giatras was not yet sent to trial, he is only subject to preventive measures, being still under prosecution<sup>15</sup>.

### c) *The SABYC Case*<sup>16</sup>

If medical units held by Hochman and Giatras operated legally on the basis of accreditations issued by the National Transplant Agency, in the Case of Sabyc Clinic closed in 2009, following DIOCT investigation for the egg trafficking, the story is different.

<sup>14</sup> <http://www.diicot.ro/index.php/arhiva/1132-comunicat-de-pres-a-30-05-2014>.

<sup>15</sup> <http://lege5.ro/CautaDosare#PartyName=Giatras%20Konstantinos>.

<sup>16</sup> A se vedea <http://www.ziare.com/stiri/inchisoare/decizie-definitiva-in-dosarul-sabyc-primul-caz-de-traffic-de-ovule-umane-din-romania-1328915>; <http://www.europafm.ro/stiri/interne/condamnari-definitive-in-cazul-trafficului-de-ovule-de-la-clinica-sabyc~n78791/>; <http://www.stiri.com.ro/stire-76841/condamnari-definitive-in-dosarul-sabyc-primul-caz-de-traffic-de-ovule-umane-din-romania.html#.VRwBrvysWAK>.



The owner of Sabyc Clinic, Harry Mironescu, his son Yair Miron and Israeli doctors Ziska Natan Lewit and Genia Ziskind were finally convicted by the Romanian High Court of Cassation and Justice to three years of imprisonment for illegal eggs trafficking. Sentencing decision was taken after nearly five years of trials. Other defendants in the case, including the former director of the National Transplant Agency received lesser penalties, with suspension.<sup>17</sup>

DIICOT prosecutors<sup>18</sup> showed in the indictment that Harry Mironescu was the leader of an organized criminal group who acted at the Sabyc clinic in Bucharest. He coordinated: the medical procedures, fraudulently introducing of genetic material in the country, the tracking of donors, the registration of medicines used in those procedures, the possibility to recruit from abroad, the rewarding of the donors and recruiters. Natan Lewit has been indicted on charges that he exercised without having this right medical profession in Romania, that he recruited foreign couples who wanted to benefit from assisted reproduction techniques, he supervised the development of hormone stimulation treatment participating directly in examination of donors and patients, he proceeded punctures for extracting oocytes, retrieved and handed them over to another doctor in order to prepare cultures needed for the embryo transfer.

All listed procedures were conducted repeatedly and in some cases the genetic material was fraudulently introduced, being later used in instructional techniques needed for the embryo cultures effectively. Egg donors were rewarded with money from the clinic. Also Sabyc clinic was not accredited to carry out the artificial reproduction techniques.

Sabyc Clinic was established under an agreement between Romania and Israel, signed in 1968, during the Communist period, as research center under the Ministry of Education and Research authority. For 10 years (1999 -2009) the clinic functioned without a legal accreditation, under the eyes of Romanian authorities, in the heart of Bucharest – Romanian capital. Oocyte donors recruited were aged 18-30 years (students, unemployed or other women in financial difficulty) and received up to 400 euro per donation. The oocytes were then fertilized and sent to recipients from Israel who paid up to 3,500 euro for treatment.

The network has worked so well that its ramifications developed almost naturally, in 10 years donors ended up to recruit each other without the need for any intermediation from the members of the organized criminal group.

Only in 2009 the Sabyc Clinic achieved accreditation from the National Transplant Agency, but only a few months was closed to the facts established by the judiciary. In addition, the way on how this accreditation was obtained is subject to another criminal investigation by National Directorate for Anticorruption for alleged corruption.

In this case, the College of Physicians withdrew physicians and medical staff the right to medical practice due to their criminal conviction.

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<sup>17</sup> On the decision of the Tribunal [http://portal.just.ro/3/SitePages/Dosar.aspx?id\\_dosar=30000000314949&id\\_inst=3](http://portal.just.ro/3/SitePages/Dosar.aspx?id_dosar=30000000314949&id_inst=3); On the decision of the Appeal Court [http://portal.just.ro/2/SitePages/Dosar.aspx?id\\_dosar=30000000314949&id\\_inst=2](http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=30000000314949&id_inst=2) (accessed 1.04.2015).

<sup>18</sup> <http://www.diicot.ro/index.php/arhiva/283-comunicat-de-pres-a-24022010-283>; <http://www.diicot.ro/index.php/arhiva/288-comunicat-de-pres-a-05032010-288>;

<http://www.diicot.ro/index.php/arhiva/219-comunicat-de-pres-a-29072009-219> (accessed 1.04.2015).

## 5. Factors favoring the development of networks of organized crime in the trafficking of cells, tissues, human embryos or surrogate motherhood

Unprecedented activity of organized crime networks, particularly their rapid development, as well as the huge sums of money to obtain are effects of a sum of factors that may be identified in particular in Eastern European countries and especially in Romania: the lack of legislation, indolence of the local authorities, the lack of funds and the corruption of the political class.

### *a) Lack of legislation*

Romania has no legislation in order to properly control and combat trafficking of human eggs and embryos. The first rules applicable in Romania which pointed out to the issue of obtaining and handling human embryos, were provided by Law no. 95/2006 on healthcare reform. This act regulates the activity of procurement and transplantation of organs, tissues and cells for therapeutic purposes (Title VI of the Act), but does not refer expressly to embryos that can not be assigned either to the concept of organ nor to that of cell or tissue, because the embryo is a human being in development, an agglomeration of cells and tissues having its own life. Because the legislator does not refer expressly to the concept of embryo, we conclude that the law as a whole, and therefore its incrimination rules do not apply to human embryos, which do not enjoy any legal protection neither criminal nor extra-criminal!

In 2005, the Romanian legislator tried to adopt a law on reproductive health and medically assisted human reproduction, covering those situations faced by practitioners in reproductive medicine and unregulated before. The reasons for the project were diverse: legal vacuum, the need to combat decline of the population, the need of legislative alignment with the standards applying in other European countries.<sup>19</sup> Despite its multiple positive reactions, by Decision no. 418 of 18th of July 2005, the Constitutional Court of Romania declared unconstitutional the majority of the provisions from Law on reproductive health and medically assisted human reproduction<sup>20</sup>.

Later, after seven years, the draft law no. 63/2012 on medically assisted human reproduction with third party donor was submitted to Parliament<sup>21</sup> but the text of the draft regulation was referring to the situation of persons involved in such a procedure without a precise regulation of the legal situation of the human products resulting from the techniques of harvesting and in vitro fertilization. Therefore the legal situation of the human embryo is not regulated; the draft only refers to human gametes, leaving aside proceedings like stem cells harvesting or embryonic divisions<sup>22</sup>.

In this context of the lack of sectoral regulations, DIICOT's efforts to control and disable organized crime networks acting in the oocytes and embryos trafficking seems a battle with the windmills.

### *b) Lack of involvement of the authorities in programs to support the infertile population*

In Romania, egg trafficking escaped totally under control of the authorities, virtual environment abounding of women claiming thousands of euro in exchange for

<sup>19</sup> <http://www.senat.ro/legis/PDF%5C2013%5C13L453EM.pdf>.

<sup>20</sup> Published in Monitorul Oficial nr. 664 from 26th of July 2005.

<sup>21</sup> [http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?cam=2&idp=12651](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=12651).

<sup>22</sup> <http://www.cdep.ro/proiecte/2012/000/60/3/se99.pdf>.

"donation" of their reproductive cells. This black market works successfully because people suffering from infertility are forced, by circumstances, to find themselves a donor. National Agency for Transplant publicly recognizes its helplessness saying that if an individual wants to donate oocytes, a state authority cannot intervene. By its deficiency, the Romanian favors the trafficking eggs, embryos and surrogate motherhood.

Ministry of Health, under which authority operates our National Transplant Agency tried in 2011 to take the initiative to control the phenomenon and launched the Program for in vitro fertilization and embryo transfer<sup>23</sup>, under which it granted an aid of 1,500 euros for each couple wanted to undergo such a treatment. At that time Romania was the only country in European Union that didn't fund IVF procedures. From June 2011 to 31<sup>st</sup> of December 2012 1440 medical applications were approved. In the same period 1,126 procedures were performed. As a result of the procedures performed 300 children were born<sup>24</sup>. In 2013, the Health Ministry stopped funding IVF program, having other funding priorities<sup>25</sup>. At 27<sup>th</sup> of september 2014 Health Minister Nicolae Bănicioiu announced a resumption of the program starting with 2015<sup>26</sup>.

### *c) Lack of money*

The budget for IVF and embryo transfer program started in 2011<sup>27</sup> was 4 million lei (905,817 euros), the Ministry of Health financially supporting one IVF procedure per couple, in two stages:

- 4920 Lei (1,114 euros) after the fertilization procedure (oocyte harvest by follicular puncture; harvesting and processing sperm; oocyte insemination, embryo transfer).

- 1,230 lei (278.5 euros) after confirming the completion of IVF / ET with a pregnancy, followed by birth.

The list of clinics agreed upon by the Ministry of Health in the program consisted of only six such entities.

On 25<sup>th</sup> of March 2015, the Romanian Government adopted the Resolution no. 206 on approving national health programs for 2015 and 2016<sup>28</sup> which includes the Program for in vitro fertilization and embryo transfer as part of the Program on Transplantation of organs, tissues and cells. Order no. 185 / 30.03.2015 issued by the National Health Insurance House<sup>29</sup> and its Annexes<sup>30</sup> approved technical rules to achieve national curative health programs for the years 2015 and 2016 and establish the date for the IVF program implementation on 1<sup>st</sup> of April 2015. This was a cumbersome procedure which resulted in postponing the moment at which those interested can benefit from these procedures, to the middle of 2015, considering also the bureaucracy required to approval of the application. Although the budget has been doubled for all programs for in vitro fertilization and embryo transfer, funds are

<sup>23</sup> <http://www.medicinareproductiva.ro/program-national-fertilizare.php>;  
<http://www.medicinareproductiva.ro/comunicat.pdf>.

<sup>24</sup> Statistic data provided by the site <http://www.ms.ro/?pag=203>.

<sup>25</sup> <http://observator.ro/reluarea-programului-de-fertilizare-in-vitro-in-2015-salutata-de-asociatia-sos-infertilitatea-277975.html> (accessed 1.04.2015).

<sup>26</sup> <http://www.ziare.com/articole/banicioiu+anunt+program+fertilizare+2015> (accessed 1.04.2015).

<sup>27</sup> <http://www.ms.ro/?pag=62&id=9050&pg=1>.

<sup>28</sup> Published in Monitorul Oficial nr. 208 from 30<sup>th</sup> of March 2015.

<sup>29</sup> Published in Monitorul Oficial nr. 219 from 1<sup>st</sup> of April 2015.

<sup>30</sup> Published in Monitorul Oficial nr. 219bis from 1<sup>st</sup> of April 2015.

insufficient given the high number of applications, a single insemination conditioning funding and the failure rate of over 65%.

*d) Corruption among politicians and civil servants involved in providing authorizations and licenses for conducting medical procedures in assisted human reproduction*

The proliferation of criminal activity of those three criminal groups mentioned above was favored by the illegal recruiting of officials from the National Transplant Agency, the only entity in Romania which was responsible for accreditation and certification of clinics and medical personnel for the work in the field of assisted human reproductive technologies and handling of human tissues and cells. The DIICOT prosecutors showed that two public servants, the Managing Director of the National Transplant Agency, respectively, the regional Bucharest coordinator of the National Transplant Agency have committed offenses of forgery of official documents in order to facilitate Sabyc Clinic to obtain the licence in 2009. Obviously the two civil servants were "motivated" properly otherwise they would not have committed such illegal acts, prosecutors carrying out investigations in that case, from the date of the false documents.<sup>31</sup>

Besides the use of corruption is a defining feature of organized criminal groups for the expansion stage of their business.<sup>32</sup> Furthermore, using corruption at the highest level was revealed by Europol in 2006<sup>33</sup> and 2007 OCTA documents which showed that second-generation criminal groups that we made earlier speech, have an increased capacity to corrupt, and this feature was identified as a serious threat.<sup>34</sup>

## 6. Instead of closing

The activity of organized criminal groups is blooming in a new and controversial area, socially, religiously and filosofic. Not aligning the legislation to the requirements of the Oviedo Convention and the alarming state of research into the genetic and artificial reproductive field, the lack of involvement of the Romanian authorities in support of the population in order to subsidize medical procedures for in vitro fertilization are other factors favoring the proliferation of organized crime in this area. Organised criminal groups have detected this niche market, exploiting it assiduously in order to obtain huge sources of income.

Organised crime in the area of trafficking of human cells, tissues, embryos and surrogate maternity is the most advanced form of organized crime, properly integrated within political, economic and social institutions of the contemporary society, which makes it almost impossible to identify as a criminal organization.<sup>35</sup>

<sup>31</sup> <http://www.diicot.ro/index.php/arhiva/283-comunicat-de-presa-24022010-283>.

<sup>32</sup> There have been identified four phases of action of the organized criminal groups: 1. the identification and determination of the business phase; 2. the expanding of business phase; 3. The strengthening of business phase; 4. the location of business phase. Corruption is a technique used in the expansion phase of the business, alone or along with other techniques, such as violence. On this issue: Geoff Dean, Ivar Fashing, Petter Gottschalk, *Organized Crime. Policing Illegal Business. Entrepreneurialism*, Oxford University Press 2010, p. 76.

<sup>33</sup> [www.europol.europa.eu](http://www.europol.europa.eu).

<sup>34</sup> OCTA 2007, p. 12; [www.europol.europa.eu](http://www.europol.europa.eu).

<sup>35</sup> Edwin H. Stier, Peter R. Richards, *Strategic Decision Making in Organized Crime Control: The Need for a Broadened Perspective*, National Institute of Justice Symposium Proceedings: Major Issues

Criminalitatea organizată în domeniul traficului de celule, țesuturi umane, embrioni sau maternitate surogat este forma cea mai avansată de criminalitate organizată, foarte bine integrată în cadrul instituțiilor politice, economice și sociale ale societății actuale, ce face aproape imposibilă identificarea sa ca organizație criminală.<sup>36</sup> Organized criminal groups operate as networks with a strong transnational feature, being almost impossible to combat due to weak national legislation.

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<sup>36</sup> Edwin H. Stier, Peter R. Richards, *Strategic Decision Making in Organized Crime Control: The Need for a Broadened Perspective*, National Institute of Justice Symposium Proceedings: Major Issues in Organized Crime Control, in Margaret E. Beare (editor), *Transnational Organized Crime*, Ashgate, UK, 2013, p. 65.

# Fight Against Organized Crime in Light of Witness Protection

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## **Abstract:**

*The most efficient means of the fight against organized crime are witness protection provisions. Witnesses have key importance in eliminating criminal organizations as the court can use their declarations as an evidence. The testimony of the witness can base enforcing investigation, furthermore the criminal impeachment of the perpetrators. The aim of this study is to show the means of witness protection, which allows us to fight against criminal organizations effectively.*

**Keywords:** *organized crime, witness protection, gathering information, threat, influence.*

## **1. Introduction**

Several decades ago organized crime was identified as the 'Maffia', a secretly organized association, as it mainly denoted Sicilian and American groups. In Hungary, alignments characterized by being organised appeared in the 1970s, and their main field of activity was burglary.

Defining the concept of organized crime is quite difficult, so someone researching this topic is in for a hard task. Fight against organized crime can be approached from the side of criminology, criminalistics and penal law.

The concept of criminal organization has gone through several amendments in Hungary, the latest amendment happened in the Act CXXI of 2001, 19. §. (5).<sup>1</sup> The legislator increased criminal consequences during fighting against organized crime, that someone who committed a deliberate crime punishable by a term of imprisonment of 5 or more years and in a criminal organization, the maximum term of punishment doubles but cannot exceed 20 years.

The act has also redefined the concept of criminal organization, that: *a group consisting of 3 or more people, organized for a longer period, operating coordinated, and aims to commit a crime punishable by a term of imprisonment of 5 or more years.*

The Act C of 2012 on Penal Law (hereinafter as Btk.), in paragraph 263/C § punishes even participation in a criminal organization:

Participation in a criminal organization

*263/C. § (1) Whoever calls for committing a crime in a criminal organization, proposes, undertakes, agrees on joint perpetration, or in order to help committing the crime assures the necessary circumstances or the circumstances which makes it easier, or supports the activity of the criminal organization in other ways commits a crime and may be punished by a term of imprisonment up to 5 years.*

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<sup>1</sup> Endre Bócz: A szervezett bűnözésről és a bűnszervezet fogalmáról (The concept of organized crime and criminal organizations), Magyar Rendészet 2008/4. szám, pages 5-18., pages 19-21.

(2) *Whoever reports the crime and reveals the circumstances of the perpetration before it comes to the knowledge of the authority, must not be punished for participation in a criminal organization*

The Act has introduced further tightenings, such as:

- the shortest term of fixed-term imprisonment in case of perpetration in a criminal organization is 20 years,
- cannot be entitled to conditional release who committed the crime in a criminal organization,
- cannot be exempted of the scope of permanent disqualification from pursuing a profession, who committed the crime in a criminal organization, and because of indignity they were permanently disqualified from pursuing their profession,
- in the field of seizure of assets.

In recent decades it has been proved that without witness protection we cannot take a stand efficiently against national and international crime during the investigation. Witness protection orders developed gradually during the recent 20 years.

Substantive law and procedure law regulations helping the set of means of witness protection<sup>2</sup>:

- calling for perjury<sup>3</sup> (Btk. 276. §)
- refusing testimony unduly<sup>4</sup> (Btk. 277. §)
- forcing in an official procedure<sup>5</sup> (Btk. 278. §)
- influencing a witness with bribery<sup>6</sup> (Btk. 295. §)

The most serious measure is enrolling in the protection programme, it is important to enroll the witness in the programme during the fight against organized crime, in which a new identity can be assured for the enrolled person.

According to paragraph (1) of the Be. 97. § those can be heard as witnesses who can be aware of the fact to be proved. Anybody can come into consideration as a witness who can have any relevant information in connection with a past event. During hearing the witness, the investigation authority analyze and evaluate the testimony, then they can make a conclusion whether the interrogated person had information about the fact to be proved or not.

In case of witnesses, an authorised person of trust can also be protected. During the protection, the protection of the witness's life, physical integrity or personal freedom is the most important. The witness shall enjoy the protection before, during and also after the interrogation.

Furthermore, it is an important aim that the witness gives a testimony without intimidation and fulfils his obligations. Often witnesses do not give a testimony because

<sup>2</sup> Mihály Tóth: *Bűnszövetség, Bűnszervezet (Criminal conspiracy, Criminal organization)* 2009., pages 106-108.

<sup>3</sup> The witness who, before the authority, gives a false testimony concerning the essential circumstances of a case, or conceals the truth, shall commit a perjury.

<sup>4</sup> Whoever endeavours to force anybody for perjury, shall be punished with a maximum period of three years imprisonment in case of committing it in a criminal case, and shall be punished with a maximum period of two years imprisonment in case of committing it in a civil affair.

<sup>5</sup> The witness who unduly denies to give a testimony in a criminal case at the court, after being warned about the consequences, may be punished with imprisonment for a minor offence.

<sup>6</sup> Whoever gives or promises an advantage to anyone or regarding them to someone else, in order not to exercise their statutory rights during the court procedure, court of arbitration procedure or authority procedure, or not to fulfill their duties, may be punished with a maximum period of three years imprisonment.

they are afraid of the possible consequences, or they change or withdraw their previous testimony due to intimidation, and they deliberately undertake the consequences of perjury.

Witness protection persists after initiating a criminal procedure, of which content is changing, for example until the end of a procedural step, until scrapping of documents, or until the end of the witness's life. When analysing the means of witness protection, I will indicate when the witness is entitled to protection.

The witness is mainly influenced by the involved in the procedure (defendant) or their relatives and relations when giving a testimony, or they endeavour to influence the witness.

According to the Magyar Értelmező Kéziszótár (The Hungarian Concise Dictionary)' influence has a distracting impact in some (unfavourable) direction. Someone can be influenced if his will, resolution and feelings can be easily influenced.<sup>7</sup>

During the criminal procedure, influence appears at the demonstration and at the interrogation, so from the investigation to the second instance trial:

- at the interrogation the lawyer acting on behalf of the witness may be present, but must not influence the testimony,
- the accused can be held in pre-trial detention if there are grounds for suspecting that, in case of leaving the accused at large, he would hinder, endanger the demonstration or make it difficult,
- after being taken into pre-trial detention, if the accused endeavours to hinder the procedure with the help of his contact with his defender, the defender may be excluded from the procedure,
- restraining may be ordered if (in case of conditions provided for in the act) the accused would thwart/baffle, endanger the demonstration or make it difficult,
- before submitting the indictment, the investigation judge shall interrogate the witness under the age of fourteen for the motion of the public prosecutor, if there are grounds for suspecting that interrogating him at the trial would harmfully influence their development,
- during interrogating the especially protected witness, the investigation judge has to reveal the circumstances that may influence the credibility of the witness' testimony.

## 2. The Means of Witness Protection in the Investigation

During gathering information, different data sources are available, such as, for example, material, personal and combined ones. The personal source (hereinafter as witness) can be present at the scene of the crime, in its more distant surroundings (for example the indirect witness), who may have any information about the perpetrators and the participants of the action. (The indirect witness tells about facts told by others, so did not experience the events directly.)

The personal source may become a witness if they are aware of the fact to be proved. A person being aware of the fact to be proved becomes a witness if they are summoned by the proceeding authority, or instead of summons they are allowed to give a written testimony, furthermore if the investigation judge declares the witness to be especially protected.<sup>8</sup>

<sup>7</sup> Magyar Értelmező Kéziszótár (*Hungarian Concise Dictionary*), második, átdolgozott kiadás, Budapest, 2003. page 98.

<sup>8</sup> József Bellegi: *Büntetőeljárás jog- Kommentár a gyakorlat számára I. (Commentary of the Criminal Procedure law for practice I.)*, 2014, page 486.



According to the Criminal Procedure Law (hereinafter as Be.), those can be heard as witnesses who may be aware of the fact to be proved, which is an assumption, and most of the time it is discovered only at the interrogation whether the person has any information about the relevant past action, furthermore about the action, condition, event relevant to the object of the reconnaissance and demonstration. The summoned witness must give a testimony unless otherwise provided in the act.

In most cases, the member of an authority contacts with the person being aware of the information during the data collection for the first time, which is the first station of the psychological contact, in this way we can find out whether the data source has any information about the crime and (or) the perpetrator. Furthermore, the opinion, view and stance of the data provider become available. If signs appear that the data provider tries to give an evasive answer to the questions, the reasons must also be examined.

Creating data collecting situation depends on several factors, such as for what reasons the information is needed, whether it is enough, or whether it is for reconnaissance or demonstration. Furthermore, the data collector's knowledge about the data provider's personality or cooperation willingness greatly influences creating the situation.

During the inquiry, information can be also obtained in a concealed way, with which the detection aim can be realized, but also it excludes using the obtained data as an evidence, as obtaining the information happened without concealing the real aim, and the data provider's communication does not meet the requirements of procedural law.<sup>9</sup>

Before preparing for data collection, the investigation authority may make a plan if it is necessary and may consider based on the following criteria:

- the information is enough for reconnaissance and based on it the authority can go on (set up versions, control, or take investigative measures),
- or obtains means of evidence in a different way.

During data collection, in most cases the investigation authority asks for providing data in connection with the concrete crime, but it may happen that the person who has worthwhile information about the perpetrators cannot help the work of the authority with their declaration. Furthermore, it may also happen that the data provider provides worthwhile information but declares that not willing to take part in the procedure as a witness, or if they are summoned to appear, they will not tell the truth or will refuse to give a testimony, regardless that at the beginning of the interrogation the data provider is warned that:

- they must tell the truth to the best of their knowledge and conscience,
- false witness and refusing giving a testimony are violations of the law.

If the data provider would not like to take part in the criminal procedure, different reasons may arise:

- the witness does not want to spend their time with giving a testimony as they have to appear before the investigation authority even several times,
- would not like the perpetrator to get to know their name and address because they are afraid of the perpetrator's revenge and anger,
- grievance already happened (the data provider was threatened).<sup>10</sup>

<sup>9</sup> János Lakatos: *Krimináltaktika I. (Criminal tactics I.)*, 2001, page 76.

<sup>10</sup> Point 7 paragraph (1) of the Btk. 459. § defines the concept of threat: unless otherwise stated, prospecting a serious disadvantage, which is suitable for arising serious fear in the threatened, or the attack affects physical indemnity.

If the investigator is convinced that the person under data collection has worthwhile information but gives negative answers, they have to examine why the person is not willing to cooperate. If it is because of their fear of the perpetrator, then the data provider must be informed about witness protection provisions. So witness protection appears even before hearing the witness, during data collection. If the investigator informs the data source about the lower level of protection (for example about managing data in confidence), it might be appropriate, and depending on this the data provider is willing to cooperate and give a testimony.

If during the procedure the witness changes or withdraws their former testimony because they are afraid of the perpetrator or the perpetrator's accomplices and considers their own life, physical integrity or the protection of their personal freedom more important, they must be informed about witness protection opportunities depending on the situations, which may contribute to the data provider's cooperation and also to maintain his testimony.

It is the member of the proceeding authority whose task is to find the opportunity that the data provider complies with the obligation of giving a testimony, so the information given by the witness may become means of proof in the form of a witness interrogation record. Data in the record may lead to investigation measures with which the investigation authority can have further means of proof.

According to the Be. 95. §, the witness shall be protected in order to save their life, physical integrity and personal freedom, in order to comply with the obligation to give a testimony, and in order to give the testimony without threat.

Means of witness protection serve the protection of the witness (their life, physical integrity or personal freedom). The witness is entitled to protection even before the interrogation, which is conditional to the harm or to the possible harm, in addition, danger must be in connection with testimony obligations or with its compliance. The witness is entitled to protection at any phase of the criminal procedure, but in other procedures, let them be offence or civil procedures, witness protection provisions are not applied. If during the procedure it is stated that crime did not happen, only offence or disciplinary action, then the acts referring to the procedure are governing, and not the witness protection provisions in criminal procedures.<sup>11</sup>

### ***2.1. Managing the Witness' Personal Data in Confidence***

According to the 104/2010. (VI.10.) AB decision of the Constitutional Court, the paragraph (1) 96. § of the Be. is unconstitutional, so it was annulled. The Constitutional Court noted: in the criminal procedure it is the witness' informational self-determination – within the witness protection system – to request that their data should be managed in confidence according to the witness' rights to the protection of personal data provided for by paragraph (1), 59. § of the Constitution. There is no constitutional reason or aim why the investigation authority, the prosecutor or the court have to be entitled – examining the objectivity of the witness' threat and considering its executability – to refuse the application.<sup>12</sup>

On the basis of paragraph (1) of the Be. 96.§., it may be ordered by the office or at the request of the witness or the lawyer acting on behalf of the witness, that the

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<sup>11</sup> István Kónya: *Büntetőeljárás jog- Kommentár a gyakorlat számára I. (Commentary of the Criminal Procedure law for practice I.)* 2014., page 528.

<sup>12</sup> 104/2010. (VI.10.) Alkotmánybírósági Határozat (Constitutional Court Decision)

personal data – except the name - should be managed separately, in confidence. In exceptionally justified cases, managing the witness' name in confidence may have also been provided.

The following provision replaced the unconstitutional paragraph (1) of the Be. 96. §.:

' (1) The court, the prosecutor and the investigation authority may order, or at the request of the witness or the lawyer acting on behalf of the witness, shall order to manage the witness' personal data [85. § (2)] separated among the documents and in confidence, except the data the witness does not request to manage in confidence. In this case only the competent court, prosecutor and investigation authority may view the witness' data managed in confidence.'

At present the court, the prosecutor and the investigation authority may order, while at the request of the witness or the lawyer acting on behalf of the witness, the authority shall order and not 'may order' to manage personal data in confidence. So the investigation authority must order to manage personal data in confidence if the witness requests it and its discretion of the authority terminates.<sup>13</sup>

In the decision of the Constitutional Court it can be read that managing data in confidence is the first step of the witness protection system. The data of the witness may be known only by the investigation authority, the prosecutor and the court but the witness is obliged to appear and comply with giving a testimony if they do not have immunity. The authority persons of criminal calling to account are not hindered by immunity in order to check the witness' identity and to consider their credibility. Considering the right of the person subject to criminal procedure, to the fair procedure and to protection, it is essential that managing the witness' data in confidence shall not limit the justice of fundamental procedural rights of the defendant and the defender. The witness, the defendant and the defender shall meet at the trial, the defendant and his defender may hear the witness' testimony, they may ask questions from the witness directly, they may comment on the testimony, only the witness' name, address and job remain unknown to them. Neither the right to the fair procedure nor the right to defence may entitle the defendant or the defender to get to know the witness' personal data.<sup>14</sup>

The Constitutional Court emphasised that the witness, the defendant and the defender shall meet at the trial, the defendant may hear the witness' testimony, so if the testimonies of the witness and the accused contradict each other, confrontation may take place. Managing the witness' data in confidence is not a ground for refusal when confronting, but a consideration whether the witness' protection requires ignoring confrontation.<sup>15</sup>

If the victim has a civil claim, they act as a private party, the rules of managing data in confidence shall not apply after finishing the evidence procedure, as they declare that they do not require managing the data of all the persons in confidence.<sup>16</sup>

The decision on the civil claim must contain at least the name of the private party, but not necessarily their other data, because the accused may be forced to pay the

<sup>13</sup> 104/2010. (VI.10.) Alkotmánybírósági Határozat (Constitutional Court Decision)

<sup>14</sup> 104/2010. (VI.10.) Alkotmánybírósági Határozat (Constitutional Court Decision).

<sup>15</sup> 104/2010. (VI.10.) Alkotmánybírósági Határozat (Constitutional Court Decision).

<sup>16</sup> Ervin Belovics, *Büntető eljárásjog (Criminal Procedure)*, 2013., page 136.

established amount of compensation to a certain account, so the accused will not know the other data of the private party, except their name.<sup>17</sup>

The provisions of criminal procedural law providing for managing data in confidence may be regarded the slightest degree of protection. From the side of the authority (court, prosecution, investigation authority), nevertheless, it is an opportunity to order to manage the witness' data in confidence at the request of the witness or the lawyer, except those data which were not requested to manage in confidence. Data managed in confidence are managed separated from the documents, which may be viewed by the competent court, the prosecutor and the investigation authority. Terminating the management of data in confidence may happen only with the agreement of the witness.

The record, the name of the witness and also the closed envelope containing their further personal data must have the same serial number. One copy of the record signed by the witness must be placed into an envelope, the unsigned copies of the record must be placed among the documents of the investigation.

At the investigation measures, where the witness is involved, it must be assured that the witness' data are not known.

The record and the closed envelope must be certified with the official seal of the investigation authority and also by the signature of the interrogator. After finishing the investigation, the name and the job title of the person who accessed to the data managed in confidence, and the time of access must be enclosed to the documents.

The previous documents must be copied with covering the witness' personal data, and the copies must be placed among the documents. The original documents and the personal data must be managed together in confidence.

If the witness' personal data are already known by the participants of the criminal procedure and the interest in managing data in confidence cannot be enforced, the application must be rejected.<sup>18</sup>

## **2.2. Specially Protected Witness**

The Supreme Court order of Bf. V. 2. 468/2000/7. emphasizes the following:

*In recent years the institution of witness protection became one of the main questions of the European countries' judicial system. Influencing witnesses or trying to influence them were observed even earlier in certain criminal procedures. In the 1990s in Hungary the appearance of organised crime and a change in the quality and structure of crimes were detected. Therefore the regulation of witness protection was needed. In criminal cases with high significance, the physical protection of witnesses having essential information on the case must be assured, as it may happen that the person who fulfills their obligation as a witness and cooperates with the judicial system, risks their life. Therefore developing and applying means and legal institutions which assure the witness's physical and legal protection was necessary.*

*Between 1994 and 1998 and in 1999 Hungarian criminal procedure tried to do its best to create witness protection with its regulation in three steps, with the right to fair*

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<sup>17</sup> Soós László: *Büntetőeljárás jog- Kommentár a gyakorlat számára I. (Commentary of the Criminal Procedure law for practice I.)*, 2014., page 534.

<sup>18</sup> 23/2003. (VI. 24.) BM-IM együttes rendelet a belügyminiszter irányítása alá tartozó nyomozó hatóságok nyomozásának részletes szabályairól és a nyomozási cselekmények jegyzőkönyv helyett más módon való rögzítésének szabályairól. (23/2003. (VI. 24.) Minintry of the Interior and Ministry of Justice)

procedure and the requirements of European legislative harmonization in mind. Act LXXVIII of 1998 was enacted on 1st March 1999 and amended the Act I of 1973.

Criminal procedure indicates testimony at the first place among means of evidence. The testimony of the specially protected witness is a documentary evidence, an extract of the record made by the appointed judge, which contains the relevant data concerning the case, but may not give any information on the data provider. Sentence practice should create the new balance according to the current procedural rules between the witness' rights, the interests of jurisdiction, the rights of defence and the principle of fair procedure.

On 18th May 1999 the Supreme Court at its session dealt with the theoretical and practical questions of applying the new legal institution, and published its guideline in the 9th issue of *Bírószági Határozatok* (Court Decisions), 1999. It points out that, concluding from the principle of the freedom of demonstration, the probative force of the specially protected witness' damning testimony may not be lower than the one of the witness interrogated at the trial. Considering the recommendation of the European Committee, however, a judgement of guilt may not be based exclusively –or mainly– on a specially protected witness' testimony. The probative force of the specially protected witness' testimony and its significance must be evaluated together with all the other direct and indirect evidences and in their relations.

The Supreme Court also gave a guideline for case law, and according to that, the judge may also know about the hearing of the specially protected witness and about the identity of the witness because, otherwise, - either *ex officio* or at a motion- summoning the protected witness to the trial in the form of completing evidence derails the witness's anonymity and defence.<sup>19</sup>

The 8. B. 1131/1997/74. verdict of the Pest County Court mentions that introducing the institution of the specially protected witness was necessary because of:

- the change in the inner structure of criminality,
- the extreme aggressivity of certain classes of perpetrators,
- the rise in organized crime.

Furthermore, according to the judgement the institution serves the witness' increased protection. A crack may appear in one important basic principle, the principle of immediacy but also in the principle of publicity, as the witness must not be heard in person at the trial, and the witness' identity is not known by the defendant, defender or even by the judge. However, the act builds in a guarantee with regard to the credibility of the witness' testimony, and the legality of obtaining the testimony. The content and formal requirements of the documentary evidence (the extract of the record) completely match the real person(s)' testimonies written in the record so it may be used as an evidence without any worry. Regarding the probative force of the specially protected witness' testimony: the same requirements stand for it as the veracity of the witness' testimony who gives a testimony at the trial in person. They may only serve as an evidence if another evidence or other evidences do not argue their content and regarding the facts to be proved, they have a logically fitting content.

It the procedure three specially protected witness' testimony shall serve as an evidence. The protected witnesses' testimonies, as (documentary) evidences, and also the probative force of the content of the testimonies may have been established comparing them with other evidences.<sup>20</sup>

<sup>19</sup> Legfelsőbb Bíróság (The Supreme Court) Bf. V. 2.468/200/7. számú végzése. pp. 8-11.

<sup>20</sup> Pest Megyei Bíróság (Pest County Court) 8. B. 1131/1997/74. Ítélete, pp. 1-51.

Organized criminal groups do not hesitate to threaten the witness or using physical force. The problem often emerges that investigating these crimes and proving them at the court is almost impossible without the witnesses' participation, it is helped then by the opportunity of declaring the witness specially protected. During the criminal procedure, the witness shall remain anonymous, may not be summoned to trial, may not be heard, questions may not be asked them directly, and may not be confronted.<sup>21</sup>

According to the 97. § of the Be. the witness may be declared as specially protected if:

- their testimony refers to essential circumstances of a highly significant case,
- their testimony may not be replaced by other evidences,
- their identity, place of residence and the fact that the prosecutor and the investigation authority would like to interrogate them are not known by the defendant and defender,
- the life, physical integrity or freedom of the witness or their relatives would be in serious danger in case of disclosing their identity.

If the evidence in the witness' interrogation record may be proved with a physical or documentary evidence, it is not practical to interrogate the witness, and declaring the witness specially protected can be ignored. If there are two witnesses who have information on the same fact but the conditions of the special protection are no longer met for one of them because the witness' identity or place of residence are known by the accused, in that case the known person must be interrogated but defence must be assured in a certain form as they are exposed to threat.<sup>22</sup>

The witness may not be declared specially protected in the judicial procedure, it is possible only until submitting the indictment. If the witness' identity is known by the defendant and the defender, the witness may not be declared specially protected, but their personal protection or applying the protection programme may be used.<sup>23</sup>

If disclosing the witness's identity threatened the witness or their relatives, the witness would have been declared specially protected on the basis of the Be. 97. § d.).<sup>24</sup>

On motion of the prosecutor the investigation judge will decide on declaring the witness specially protected.

At the specially protected witness' interrogation, besides the investigation judge, the recorder, the interpreter and:

- the attorney,
- the lawyer acting on the witness' behalf may be present.

<sup>21</sup> Zoltán Varga: A tanú a büntetőeljárásban (A witness in criminal proceedings), Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest 2009, pp. 101-115.

<sup>22</sup> László Soós: Büntetőeljárás jog- Kommentár a gyakorlat számára I. (Commentary of the Criminal Procedure law for practice I.), 2014., page 542.

<sup>23</sup> László Soós: Büntetőeljárás jog- Kommentár a gyakorlat számára I. (Commentary of the Criminal Procedure law for practice I.), 2014., p. 543.

<sup>24</sup> The notion of threat is defined by point 7.) of the Btk. 459.§.: unless otherwise stated, prospecting a serious disadvantage, which is suitable for arising serious fear in the threatened. Declaration of special protection may also be applied in case of relatives. The notion of relative is defined by point 14.) of the Btk. 459.§.:

- a) lineal relatives and their spouse or cohabitant,
- b) the adoptive and the foster parent (the cohabiting step-parent is also included), the adopted and the foster child (the cohabiting step-child is also included),
- c) the sibling and the sibling's spouse or cohabitant,
- d) the spouse, the cohabitant,
- e) the spouse's or the cohabitant's lineal relative and sibling.

The investigation judge has to reveal and check if necessary:

- the witness' trustworthiness,
- the reliability of the witness' knowledge,
- the circumstances influencing the credibility of the testimony.

The obtained data must be written in the record about the interrogation. An extract must be made from the record which must contain the following data:

- the investigation judge's name,
- the prosecutor's name,
- the fact that the witness is declared specially protected,
- the specially protected witness' testimony.

On motion the investigation judge may order to record the witness' interrogation with a video or audio recorder, or with other devices, if the interrogation of the specially protected witness or witness whose data are managed in confidence is recorded, the provisions of the Be. 213. § (4) must be applied concerning managing data in confidence.

In case of the specially protected witness, not only personal data must be managed in confidence but all the data and facts which help to identify the witness, so those data should be deleted even in case of distortion. In case of the specially protected witness, recording the testimony is unnecessary as the law does not allow to play it and use it at the trial, except the court terminates the special protection.<sup>25</sup>

As a taking of evidence, the investigation judge may interrogate the specially protected witness, the witness in life danger, or the witness under fourteen, and the prosecutor is entitled to propose it. At the session the investigation judge shall make a decision on the motion of taking evidence, and the judge shall uphold or refuse the motion.<sup>26</sup>

The decision on special protection shall be managed in confidence by the investigation judge and they must not give it to either the prosecutor or the judge. The extract of the testimony shall contain only the investigation judge's name, the prosecutor's name, the fact of the special protection and the witness' testimony. The extract shall be managed separately from other documents by the prosecutor until submitting the indictment. Besides the prosecutor, the investigation authority may get to know the extract until submitting the indictment. Declaring the witness specially protected may happen not only at the session but also before that, so the declaration of the protection and the interrogation may be separated. The interrogation record and also the decision on the declaration must be managed separately and confidentially.<sup>27</sup>

On the basis of the detailed rules of those investigation authorities' investigation that belong to the management of the minister of the interior, and on the basis of the paragraph 26. § of the 23/2003. (VI. 24.) BM-IM (Ministry of the Interior and Ministry of Justice) joint regulation about the rules recording investigation measures in another way instead of a record, the investigation authority shall immediately present the indictment of declaring the witness specially protected the prosecutor if its requirements exist according to the data available. The means of evidence must also be obtained on the basis of the indictment too, despite the attorney has submitted a motion,

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<sup>25</sup> Zoltán Varga: *A tanú a büntetőeljárásban (A witness in criminal proceedings)*, 2009., pp 132-133.

<sup>26</sup> Mészár Róza, *Büntetőeljárás jog- Kommentár a gyakorlat számára II. (Commentary of the Criminal Procedure law for practice II.)*, 2014., p. 1019.

<sup>27</sup> Mészár Róza, *Büntetőeljárás jog- Kommentár a gyakorlat számára II. (Commentary of the Criminal Procedure law for practice II.)*, 2014., pp. 1020-1022.

and a special attention must be paid not to hurt or endanger the witness' or their relatives' legitimate interests.

According to paragraph (3) of the Be. 207. §, it is the investigation judge's task to interrogate, on the motion of the prosecutor, the specially protected witness or the witness whose life is in direct danger, before submitting the indictment. The witness and the lawyer acting on behalf of the witness may initiate a motion of interrogating the witness at the attorney. If during the trial preparation or during the trial the court orders it, the investigation judge shall interrogate the specially protected witness again. The prosecutor shall enclose the record-extract of the specially protected witness' testimony to the documents which serve as the base of the indictment if they wish to use the specially protected witness' testimony as an evidence in the court procedure, and shall inform the defendant and the defender on the opportunity viewing it according to paragraph (4) of the Be. 219.§. If enclosure happens after knowing the documents of the investigation, the defendant and the defender must be assured to get to know the enclosed document.

During the trial preparation, the president of the Judicial Council, simultaneously with delivering the indictment, shall tell the defendant and the defender that they may have a look at the record-extract of the specially protected witness' testimony and they may propose to terminate the declaration of special protection.<sup>28</sup> If the attorney would like to use the specially protected witness' testimony as a means of evidence, the president of the Judicial Council shall obtain the record on the interrogation of the specially protected witness and the decision on declaring the witness specially protected from the investigation judge. Only the members of the court may view the record and the decision on declaring the witness specially protected, and a copy may not be made.<sup>29</sup>

Asking questions from the specially protected witness may be proposed by:

- the defendant,
- the defender,
- the prosecutor,

furthermore the president of the Judicial Council. If a question is asked, the court shall order the investigation judge, simultaneously with sending the record back on the interrogation of the specially protected witness and the decision on declaring the witness specially protected, shall order to interrogate the specially protected witness again on the asked questions.<sup>30</sup>

The court shall terminate the declaration of the special protection if the accused or the defender names the specially protected witness or identifies the witness in another undoubted way. In that case general rules are applicable for summoning and interrogating the witness. The president of the council shall apply other means of witness protection if he considers it necessary or if it is proposed.<sup>31</sup>

When supplementing evidence, on the basis of paragraph 3 of the Be. 305. §, the prosecutor, the defendant and the defender may propose asking further questions from the specially protected witness, compared to the result of taking evidence. The court may also ask questions from the specially protected witness. The specially protected

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<sup>28</sup> 1998. évi XIX. törvény 263.§ (3) (Act XIX of 1998 on Criminal Proceedings Criminal).

<sup>29</sup> 1998. évi XIX. törvény 268.§ (3) (Act XIX of 1998 on Criminal Proceedings Criminal).

<sup>30</sup> 1998. évi XIX. törvény 263.§ (4) (Act XIX of 1998 on Criminal Proceedings Criminal).

<sup>31</sup> 1998. évi XIX. törvény 263.§ (8) (Act XIX of 1998 on Criminal Proceedings Criminal).



witness must not be interrogated at the trial, questions must not be asked directly from them, and must not take part in confrontation.

### **2.3. The Personal Protection of Those Involved in the Criminal Procedure**

The president of the Judicial Council, the prosecutor and the investigation authority may initiate in especially justified cases:

- defendant,
- defender,
- victim,
- other parties involved,
- the representative of other parties involved,
- witness,
- expert,
- consultant,
- interpreter,
- authorised person of trust,
- having regard to any of the above listed, someone else has personal protection (e.g. friend, colleague).

In addition, the authorised person of trust is entitled to be protected.

Establishing the crime of violence against a person or a crime causing collective danger *res judica* is not a condition for initiating or ordering personal protection.<sup>32</sup>

Means of witness protection regulated on the basis of the Be. only apply to the witness determined in the criminal procedure. The scope in relation to persons of the

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<sup>32</sup> On the basis of point 26 of the Büntető Törvénykönyv (Penal Code) 459.§., violent crimes against individuals are:

- a) genocide [paragraph (1) 142. §], crime against humanity [paragraph (1) 143. §], apartheid [paragraph (1)-(3) 144. §],
- b) violence against the military ambassador (148. §), violence against protected persons [paragraphs (1)-(2) and (4) 149. §], other war crimes (158. §),
- c) murder (first-degree) [paragraph (1)-(3) and (5) 160. §], manslaughter (second-degree murder) (161.), assault [paragraphs (3)-(6) and (8) 164. §],
- d) kidnapping [paragraphs (1)-(4) 190. §], trafficking in human beings [paragraphs (1)-(6) 192. §], forced labour (193. §), violation of personal freedom, (194. §), forcing (195. §),
- e) sexual forcing (196. §), sexual violence [paragraphs (1)-(4) 197. §],
- f) violating the freedom of conscience and religion (215. §), hate crime [paragraphs (2)-(3) 216. §], violating the right to freedom of association and of assembly, and the right to participation in an election meeting (217. §)
- g) violent change of the constitutional order [paragraph (1) 254. §], a rebellion [paragraphs (1)-(2) 256. §],
- h) physical violence in an official procedure [paragraphs (1)-(2) 301.§.], physical violence in a public person's procedure [paragraphs (2)-(2) 302.§.], forced interrogation [paragraphs (1)-(2) 303.§.], unlawful detention (304. §),
- i) physical violence against officials [paragraphs (1)-(3) and (5) 310. §.], physical violence against a public person (311. §), physical violence against the supporter of an official or of a public person (312. §), physical violence against the internationally protected person [paragraph (1) 313. §.],
- j) terrorist act [paragraphs (1)-(2) 314. §.], seizure of vehicle [paragraphs (1)-(2) 320. §.],
- k) robbery [paragraphs (1)-(4) 365. §.], bribery (367. §), vigilantism [paragraphs (1)-(2) 368. §.],
- l) aggravated riot [paragraphs (2)-(6) 442. §.] and violence against the hierarchical superior or the service personnel [445. §].

witness protection programme and of the personal protection is different. Personal protection shall include the defendant, the defender, the victim, other parties involved, the representative of the victim and the other parties involved, the witness, the expert, the consultant, the interpreter, the authorised person of trust, the court, the prosecutor, the members of the investigation authority and the penitentiaries, furthermore, with regard to any of the above listed, another person, and the probation officer. On the other hand, the protection programme shall include the defendant, the victim, the witness and their relatives, furthermore another person being in a threatened situation with regard to the affected person.<sup>33</sup>

#### ***2.4. Provisions Concerning Persons Involved in the Witness Protection Programme***

The defendant, the victim and the witness may be involved in the witness protection programme. The participant must be summoned or notified via the protection authority, or other official documents must be delivered by the protection authority. During the criminal procedure, the persons involved shall tell their original data but shall give the address of the protection authority as a permanent address or a place of residence. A copy of the documents involving the data of the protected person, or any information in connection with the person may only be given if the authority protecting the person allows it. The witness and the defendant may deny the testimony concerning information which may conclude their new identity, their new address or place of residence.<sup>34</sup>

The highest level of measures serving the witness' protection is the participation in the witness protection programme. On 12th November 2001 the Parliament enacted the Act LXXXV of 2001 on the Protection Programme (hereinafte as: Tvdt.) of the participants in criminal procedure and the helpers of justice. The act aimed to provide protection to the persons involved in the criminal procedure, the persons helping justice, furthermore to persons in close relation to them. Further aim was that the person in a threatened situation would help the fight against criminality (especially first-degree crimes<sup>35</sup>, first of all organized crimes), and effectively realize the interests of justice.

Tvdt. makes the Protection Programme: *the protection of the witness, the victim, the defendant involved in the criminal procedure and their relatives, furthermore another person in a threatened situation with regard to the affected person whose protection may not be assured within the frame of organized personal protection,*

*a) which is done by the police – within the framework of civil legal relationship – according to the contract with the person in threatened situation, and*

*b) during which applying special measures (16. §), and - in order to help the social integration of the affected person- providing mental, social, economic, human and legal assistance are needed.*

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<sup>33</sup> László Soós: *Büntetőeljárás jog- Kommentár a gyakorlat számára I.(Commentary of the Criminal Procedure law for practice I.)*, 2014, p. 545.

<sup>34</sup> 1998. évi XIX. törvény 98/A. (Act XIX of 1998 on Criminal Proceedings Criminal).

<sup>35</sup> On the basis of the provisions of the Tvdt., a first-degree crime is: especially the crime where the features of organized crime or international crime can be recognized, or of which object is related to terrorism, blackmail, money laundering, drug or weapon trafficking, prostitution, pedophilia, and related to crimes against life and physical integrity committed in connection with the above mentioned crimes.

The Service may apply the following special precautions:

- a) moving the affected person to a secure place with changing their address, place of residence, and transporting the detainees involved in the Programme to another penitentiary (moving and transporting between penitentiaries);
- b) using personal protection;
- c) ordering data quarantine in registers, and signalling on requests in connection with the registered data (signalling data quarantine and data requests);
- d) change of name;
- e) change of identity;
- f) participation in international cooperation.

### ***2.5. Further Procedural Rights and Tactical Opportunities of Witness Protection:***

- the witness shall give an evidence in writing,
- ignoring confrontation,
- during showing for recognition,
- ordering preventive custody for the protection of the witness,<sup>36</sup>
- excluding the defender,
- restraining order,<sup>37</sup>
- interrogating the witness via a closed telecommunications network,<sup>38</sup>
- ignoring notification at certain investigation measures,<sup>39</sup>
- ignoring notification in case of a delegated or a requested judge,<sup>40</sup>
- closed trial for the interest of the witness,<sup>41</sup>
- prohibition of questions suitable for influencing the witness,<sup>42</sup>
- sending the defendant out of the courtroom,<sup>43</sup>
- the presence of a lawyer at the witness' interrogation,<sup>44</sup>

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<sup>36</sup> It is only allowed if there are substantial grounds for believing, that in case of leaving them at large, especially with influencing or intimidating the witness, they would hinder the evidence or would make it difficult.

<sup>37</sup> It may be ordered if ordering the defendant's preventive custody is not needed but – especially considering the relation between the defendant and the victim – there are substantial grounds for believing that leaving them in their residential area, with influencing the violated witness, would hinder the evidence, would make it difficult or would endanger it.

<sup>38</sup> During the interrogation, the witness physically is not in the court room but in another room.

<sup>39</sup> Notifying the suspect, the defender, the defendant and the defendant's supporter about the investigation measure may be exceptionally omitted if it is reasonable because of the urgency of the investigation measure. Furthermore, notifying may be omitted if the witness's data managed in confidence became known by the defendant, the defender, the victim and the victim's supporter.

<sup>40</sup> Notifying the accused, the defender and the defendant must be omitted if the witness' data managed in confidence became known by the above listed as a consequence of their appearance.

<sup>41</sup> The court may exclude the whole public from the whole trial or from part of the trial with a reasoned decision: because of an ethical reason, in order to protect the minor involved in the procedure, in order to protect the persons or the witness involved in the procedure, or in order to protect classified data.

<sup>42</sup> If the question is suitable for influencing the accused, or the question involves the answer, or it does not refer to the case, or it was asked by an unauthorized person, or it hurts the prestige of the trial, or it aims at the same fact again, the president of the Council shall forbid to answer the question.

<sup>43</sup> If the presence of the defendant would disturb the witness during the interrogation.

<sup>44</sup> At the witness' interrogation the defender acting on behalf of the witness may be present, who may inform the witness on their rights and obligations, but must not do any other actions.

- ignoring notification,<sup>45</sup>
- substituting the victim,<sup>46</sup>
- the special witness protection provision of the military criminal procedure,<sup>47</sup>
- and it is worth mentioning the telephone-witness programme representing anonymity.

During the written testimony, on the basis of paragraph (5)-(6) of the Be. 85. §, the court, the prosecutor and the investigation authority may allow the witness to give a testimony in writing, after the oral interrogation or instead of that.

In case of the written testimony, the witness shall write down and sign their testimony in manuscript by them, or shall electronically sign the testimony made in the form of an electronic document, or the testimony written down in other ways shall be attested by a judge or a notary.

If the witness gives a testimony in writing without an oral interrogation or after the oral interrogation, from the written testimony it must be clear that the witness gave the testimony knowing the burdens of giving a testimony and the consequences of perjury. The witness must be warned about it and also about the consequences of perjury simultaneously with allowing the written testimony.

Further most important protection opportunity is ignoring confrontation, and its base is that a person under fourteen may only be confronted if it does not fill them with fear. The investigation judge shall interrogate the witness under fourteen before submitting the indictment, if there are grounds for suspecting that interrogating the minor at the trial would adversely affect the minor's development, except if at the time of the trial the minor completed the age of fourteen and the interrogation at the trial is especially justified.

If, because of the victim's fear, the victim does not wish to participate in the confrontation, it may not be considered a procedural offence affecting the cogency of the judgement.<sup>48</sup>

Witness protection provision is that, for the request of a foreign citizen, at the foreigner's interrogation the consular officer of the foreign state may be present.

In case of interrogating the foreigner witness being in refugee status, the presence of the consul may have dangerous, as the consul may get to know the witness' place of residence, personal circumstances, therefore notifying the consul is compulsory only at the request of the foreign citizen.<sup>49</sup>

During the investigation against organized crime, often for the interest of the witness, different tactical steps must be performed during the identification parade<sup>50</sup>:

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<sup>45</sup> If it is reasoned by the urgency of the investigation measure, and the witness' data managed in confidence became known by the defendant, the defender, the victim and the victim's supporter.

<sup>46</sup> The Act XXIV of 1994 on the police allows, within the framework of secret information collection not connected to the judge's permission, a policeman to substitute the victim – in order to protect their life and physical integrity – if there are no other opportunities to prevent, hinder, or reconnoitre a crime, or to catch or identify the perpetrator.

<sup>47</sup> Where special grounds exist for doing so, the witness doing their military service may ask for commanding or transferring them to another duty station.

<sup>48</sup> Bírósági Határozat 1999.544. (Court Decision).

<sup>49</sup> László Láng: Büntetőeljárás jog- Kommentár a gyakorlat számára II. (Commentary of the Criminal Procedure law for practice I.), 2014, page 900.

<sup>50</sup> The court, the prosecution and the investigation authority shall order and hold an identification parade if it is needed in order to recognize a person or an object.

- undercover identification parade,<sup>51</sup>
- hidden identification parade,<sup>52</sup>
- identification parade via storage device.<sup>53</sup>

The defender may be excluded from the procedure,<sup>54</sup> but the legislator prescribes the ability to prove the defender's actions, which must be stated on facts and data. The defendant's correspondence is regulated by the 16/2014. (XII. 19.) IM (Ministry of Justice) provision on the detailed rules of implementing imprisonment, custody, preventive custody and custody instead of fine, based on that correspondence may happen randomly. So on one hand, a datum which can be proved may occur in connection with the accused's correspondence, or during the investigation the authority becomes aware of some information which may exclude the defender from the procedure.<sup>55</sup>

Collecting the means of evidence contributes to the success of the investigation, it is important that the witness shall fulfill the requirements of giving a testimony, therefore if it has grounds for suspecting that the defendant would hinder, make it difficult or endanger the evidence with influencing or threatening the witness, then the conditions of preventive custody are reasonable.

„The expression of has grounds for suspecting refers to such a future happening or action which can be foreseen and predicted, can be imagined, can be expected, can be suspected from the current circumstances and facts, so it is possible.”<sup>56</sup>

The basis of prolonging the preventive custody of the accused is that the person involved in the procedure tries to send out a letter to their relatives which contains information intending to hinder the procedure or make it difficult.<sup>57</sup>

Keeping preventive custody for more than a year is reasonable if information on threatening the victims and (or) witnesses – by the accused – arises and therefore the evidence procedure shall be in danger (e.g.: in one case the victim witness indicated in several applications that he was threatened, he is afraid of the accused persons, so the possibility of making the procedure difficult may not be excluded, and considering those facts, the reasons for preventive custody written in points b), c) and d), paragraph (2) of the Be. 129. §, are still applying, so keeping the restraining measure is legal).<sup>58</sup>

On the basis of the act, there is a place to arrest the defendant in a procedure on a crime which shall be punishable with terms of imprisonment and when it has grounds for suspecting that in case of leaving the defendant at large, especially by influencing or

<sup>51</sup> The subject of the identification parade is disguised from the person to be identified, which means that the recognizer cannot be noticed (behind a detective mirror), or they can be noticed (proper clothes, accessories, wig, glasses, mask ...) but cannot be recognized.

<sup>52</sup> The person to be identified (e.g. the suspect) does not know that an identification parade is going on.

<sup>53</sup> Most of the time, photos (about the object to be identified and about indifferent objects) are displayed for the person to be identified.

<sup>54</sup> If the defendant, after being taken into preventive custody, endeavours to hinder the procedure with keeping the contact with their defender, or with influencing or intimidating the witness, the court may exclude the defender from the procedure.

<sup>55</sup> Ágnes Czine: *Büntetőeljárás jog- Kommentár a gyakorlat számára II. (Commentary of the Criminal Procedure law for practice II.)*, 2014, pages 717-718.

<sup>56</sup> Ágnes Czine: *Büntetőeljárás jog- Kommentár a gyakorlat számára II. (Commentary of the Criminal Procedure law for practice II.)*, 2014, page 600.

<sup>57</sup> Bírósági Határozat 2000.390. (Court Decision).

<sup>58</sup> Bírósági Határozat 2006.280. (Court Decision).

threatening the witnesses, would hinder the evidence, would make it difficult or would endanger that.

The provision represents the witness' interests, so that the witness shall fulfill their statutory duties without being threatened, and shall tell about the experienced relevant past events honestly.

### 3. Conclusion

The risk of threatening the witness is increasing in certain fields, such as organized criminality.

The listed criminal procedural provisions and tactical aspects have contributed to the data provider shall cooperate as a witness during the procedure. The witness' testimony is essential in terms of reconnaissance and evidence, as the declaration may be used as an evidence and may help taking further measures.

The knowledge of the measures listed in my study is important in terms of obtaining evidences, but it is needed that the investigation authority shall inform the data provider on the protection opportunities. The knowledge of the means of witness protection is essential even at the beginning of the investigation, even during data collection, and not only when starting the interrogation.

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# Organized Crime in the United States and its Modern Challenges

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## **Abstract:**

*The expansion of international crime, especially organized crime, is a perpetual scourge that affects most of the world states and concerns the international public opinion.*

*Organized crime is the most serious form of criminality that mankind has ever been confronted with, mainly due to its transnational dimensions and seemingly flawless functioning.*

*A debate on organized crime should address the existence of a worrying sociological phenomenon, besides, of course, the legal phenomenon.*

*The present study aims at presenting the most important legal instruments that the U.S. have settled at the level of federal legislation, in order to suppress organized crime, as a possible source of inspiration for European lawmakers.*

*One of the most important U.S. federal laws on organized crime is the Racketeer Influenced and Corrupt Organizations Act (abbreviated as RICO), which provides for extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization. It was enacted as a distinct section of the Organized Crime Control Act of 1970. While its original use in the 1970s was to prosecute the Mafia, as well as other persons who were actively involved in organized crime, its later application has been more widespread.*

*Beginning with 1972, 33 U.S. States adopted state-level RICO laws in order to be able to prosecute similar criminal conduct.*

*Effective multilateral control of organized crime is achievable through the development of harmonized international legislation and coordination projects, complementary international law enforcement capacity, and similar sanctioning mechanisms, designed to improve the state and private sector crime control capacity worldwide.*

**Keywords:** *organized crime in the US; the Omnibus Crime Control and Safe Streets Act (1968); the Organized Crime Control Act (1970); the RICO Act; enterprise; pattern of racketeering; the UN Convention against Transnational Organized Crime and the Protocols Thereto (New York, 2004).*

## **1. Introduction**

The issue of organized crime is not new, but the scope, scale and spread of the phenomenon is now unprecedented.

Presently, just like in its tumultuous past, full of Al Capone myths, organized crime threatens the national security, economy and other interests of the United States. Particularly in the past several decades, organized crime has been evolving and taking on an increasingly *transnational nature*. With more open borders and the expansion of

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the Internet, organized crime threatens the United States not only from within the borders, but beyond.

Organized crime extends far beyond the Italian mafia, encompassing Russian, Asian, Balkan, Middle Eastern, and even African syndicates (groups). Even though organized crime has not received as much recent media or congressional attention as have other national concerns, such as the threat of terrorism, organized crime groups have not ceased their illicit activities.

Following the terrorist attacks of September 11, 2001, national priorities and federal resources in the U.S. have shifted from more traditional crime fighting, including that of organized crime, towards counter-terrorism and counter-intelligence. Subsequently, there has been a decrease in the federal law enforcement resources dedicated to organized crime matters and a decrease in the number of federal organized crime cases opened<sup>1</sup>.

To this decrease of interest in organized crime there has added yet another core problem: there is no unified, consensus, clear definition of either organized crime or transnational organized crime (this occurs not only in the U.S., but also at the level of the E.U. criminal legislation).

However, it is possible to delineate three broad, overlapping *conceptions* on transnational organized crime (in short, TOC) prevailing in penal policy analysis and theoretical discussion.

First, one conception characterizes organized crime as “a set of *activities* which may be undertaken by any person or entity, whether economic or political, private or public. These activities ultimately generate a shadow socioeconomic system, supplying illicit goods and services to meet latent demand”<sup>2</sup>.

In this conception, transnational organized crime encompasses a broad, but specific set of illicit transnational transactions, regardless of the actors conducting them.

A second conception on organized crime, often derived out of an analysis of U.S. and Italian experiences with the mafia, suggests it is more useful to conceive organized crime as “a set of *hierarchically-organized entities*, conducting diverse commercial activities unified by their underlying business model, the protection racket”<sup>3</sup>. This approach focuses on specific membership-based business groups (syndicates), which may even be characterized as “illicit firms”, conceptually distinct from government and politics, and essentially concerned with conducting criminal activities. In this conception, transnational organized crime is simply any such entity engaged in this transnationally-organized criminal activity.

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<sup>1</sup> Kristin M. Finklea: *Organized Crime in the US: Trends and Issues for Congress*, study available at <http://fas.org/sgp/crs/misc/R40525.pdf>.

<sup>2</sup> Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society,” *International Organization* 44, no. 4 (1990):479-526; R.Thomas Naylor, “From Cold War to Crime War: The Search for a New National Security Threat,” *Transnational Organized Crime* 1, no.4 (1995): 37-56; Monica Serrano, “Transnational Organized Crime and International Security: Business as Usual?,” in Mats Berdal and Monica Serrano, eds., *Transnational Organized Crime and International Security: Business as Usual?* (London: Lynne Rienner, 2002) *apud* James Cockayne: *Transnational Organized Crime: Multilateral Responses to a Rising Threat*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008168](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008168).

<sup>3</sup> Louise Shelley: *Unraveling the New Criminal Nexus*, *Georgetown Journal of International Affairs* 6, no. 1/ 2005; T. Schelling: “What is the Business of Organized Crime?” in T. Schelling, *Choice and Consequence*, Cambridge: Harvard University Press, 1984.

Third, a final conception on transnational organized crime is agnostic as to whether organized crime is properly understood as an activity or entity, instead suggesting that international concern with organized crime should be triggered whenever organized crime has *transnational effects*.

These conceptions are not entirely incompatible, and all three possible definitions may on occasion be found in one analysis.

## 2. Transnational organized crime

The key international instrument for controlling transnational organized crime, the *UN Convention against Transnational Organized Crime and the Protocols Thereto* (adopted at New York, in 2004<sup>4</sup>), offers a definition of transnational organized crime which tips its hat to all three conceptions presented before. In articles 2 and 3, said Convention defines transnational organized crime as comprising those offenses which, to paraphrase, involve a structured group of three or more people with the shared aim to commit either a Convention provided offense (including money-laundering, corruption and obstruction of justice) or any other offense punishable by four years' deprivation of liberty or more; where those crimes are committed with a view to material gain; and where those crimes have transnational effects, are committed transnationally, or are committed by a transnational group. Accordingly, once a group meets the first two conditions of the test, it can meet the third condition of the test either on the basis of being a transnational entity; or on the basis that its activities are transnational; or on the basis that the effects of the activity are transnational. In 2005, the United States ratified the Convention as well as the companion Protocols on trafficking in persons and smuggling of migrants.

The above-mentioned conceptions are, as I have outlined, silhouette definitions that prevail mostly in penal policy analysis and theoretical discussion. That is why a look at a statutory definition of organized crime in the U.S. federal laws would be more appropriate for the purposes of the present study.

One mention needs to be made before any statutory definition is quoted: there is one key-feature to all organized crime activity, irrespective of its domain of activity or *modus operandi* and that is the primary interest in obtaining money. Organized crime groups profit from illegal enterprises, as well as from infiltrating into legitimate businesses. They may attempt to corrupt public officials in order to escape investigation, prosecution, or punishment. But notably, the main goal of organized crime groups is to make money; these groups are profit-driven rather than ideology-driven (an essential distinction between organized crime and terrorist groups).

Apparently, there is no clear current statutory definition of organized crime. The *Omnibus Crime Control and Safe Streets Act of 1968*<sup>5</sup>, as amended (P.L. 90-351), defined organized crime as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking (i.e. usury), narcotics, labor racketeering, and other unlawful activities of members of such organizations".

This definition described organized crime in terms of the illegal activities rather than in terms of what constitutes a criminal organization. As such, this definition of

<sup>4</sup> Available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

<sup>5</sup> Available at: [https://transition.fcc.gov/Bureaus/OSEC/library/legislative\\_histories/1615.pdf](https://transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1615.pdf).

organized crime could have encompassed the activities of not only organized crime groups, but of terrorist groups and corrupt businesses as well. Consequently, the definition was repealed in the *Justice System Improvement Act* of 1979 (P.L. 96-157), leaving the United States with no statutory definition of organized crime.

In the *Organized Crime Control Act* of 1970 (P.L. 91-452), and more specifically within Title IX— *the Racketeer Influenced and Corrupt Organizations Act* (commonly known as RICO), organized crime is described in terms of an “enterprise” and a “pattern of racketeering activity.”

Although RICO provides a definition for an “enterprise,” it does not describe the attributes of a criminal enterprise that distinguish it from a legal enterprise. In addition, this definition describes organized crime more in terms of the illegal activities than in terms of the criminal organization.

*The Organized Crime Control Act* of 1970 (P.L. 91-452) strengthened the ability of the federal government to combat and prosecute criminal organizations. It provided for Special Grand Juries to investigate multi-jurisdictional organized crime; these grand juries are able to produce reports outlining public corruption and organized crime conditions in their respective districts. Said Act also allowed for witnesses to organized crime to be granted immunity from prosecution in exchange for testimony. Further, it authorized security for government witnesses or potential witnesses in organized crime cases. This measure laid the groundwork for the Witness Security Program (the WITSEC). The WITSEC program allows for the protection and relocation of witnesses and their families, whose lives may be in danger as a result of their testimony in organized and other major crime cases.

Title IX of the *Organized Crime Control Act* of 1970 created the *Racketeer Influenced and Corrupt Organizations Act* (RICO). Within the U.S. federal law RICO has been perceived as the single most important piece of organized crime legislation enacted. RICO allows for the prosecution of anyone who participates or conspires to participate in a criminal enterprise (organization) through at least two acts of “racketeering activity” within a 10-year period of time. The predicate offenses for racketeering include various state and federal crimes listed in the U.S. Federal Code.

Since its enactment, RICO has been one of the dominant legal instruments used in organized crime prosecutions. The RICO statute itself is *sui generis*. It consists of eight sections, one of which, Section 1961, cites as predicate statutes, fifty-two other federal statutes, five generic references to federal labor and securities laws, and nine state offenses of murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotics and obscenity.

Concretely, the Act specifically prohibits any person from:

- using income received from a pattern of racketeering activity or through collection of an unlawful debt to acquire an interest in an enterprise affecting interstate commerce;
- acquiring or maintaining through a pattern of racketeering activity or through collection of an unlawful debt an interest in an enterprise affecting interstate commerce;
- conducting or participating through a pattern of racketeering, racketeering activity or collection of an unlawful debt, the affairs of an enterprise affecting interstate commerce;
- conspiring to participate in any of these activities (18 U.S. Code, 1962 (a) [1988]).

Criminal sanctions for violations of the statute are frequently more punitive than sanctions that could be imposed for violations of the incorporated offenses. Any interest

acquired by the defendant through RICO violations is subject to forfeiture (confiscation) under RICO. Furthermore, under RICO, courts of law can enter restraining orders before conviction, in order to prevent transfer of potentially forfeitable property. The Government can also pursue a wide range of civil actions under RICO, including: divestiture, dissolution, reorganization, and treble damages (*i.e.* recovery of three times the amount of actual financial losses) to parties injured.

The key elements generally required for an indictment under RICO are that the defendant, by committing two or more acts constituting a “pattern of racketeering activity” directly or indirectly maintains an interest in or participates in an “enterprise”. RICO complaints must allege that each predicate act (*i.e.* individual offense) is a “racketeering activity” as delineated by the RICO statute. Under RICO, the commission of at least two predicate acts is necessary to constitute a “pattern”.

Although it has been “the law” in prosecuting organized crime acts, RICO was criticized for introducing fresh but vague legal concepts such as “enterprise” or “pattern of racketeering” without specifically defining them. Chief Justice Rehnquist was reportedly concerned about the number of RICO cases on the federal docket. Judge David B. Sentelle, of the United States Court of Appeals for the District of Columbia, gave a luncheon address entitled “RICO: The Monster that Ate Jurisprudence” and equated RICO’s creator with Dr. Frankenstein. Even other four justices of the Supreme Court expressed doubts about the clarity of the term “pattern of racketeering”<sup>6</sup>.

This lack of definitions led to a case-by-case interpretation to clarify statutory concepts, so that the tests and interpretations that evolved were inconsistent among different jurisdictions. However, state case-law demonstrates that increased use of RICO by local prosecutors began to make inroads into areas of illicit businesses that before were virtually impenetrable<sup>7</sup>. The prosecutors explained that they resorted to RICO because these statutes provided for versatile sanctions to a wide variety of offenses and that such sanctions were not available under other laws. A survey conducted among state prosecutors led to the conclusion that the major part of criminal cases (27%) where RICO laws were applied were represented by drug cases in which the primary offense was trafficking/distribution. Gambling offenses accounted for 16% of the activity prosecuted by using RICO statutes. 10% of the cases involved prosecution of fencing/provision of illegal goods, especially rings of automobile “chop-shops”. For the remaining percentage of cases RICO was used to prosecute diverse fraud acts: consumer fraud (the largest part), investment fraud and bank fraud<sup>8</sup>.

Following the passage of RICO, the U.S. Congress has enacted legislation regarding asset forfeiture (confiscation) and money laundering, both of which have increased the federal government’s ability to combat organized crime. The asset forfeiture and money laundering statutes have provided a useful means for the federal government to further attack the financial structure and goods of organized crime groups<sup>9</sup>.

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<sup>6</sup> Paul E. Coffey: “Selection, Approval and Analysis of Federal RICO Prosecutions”, *Notre Dame Law Review*, vol. 65, issue 5 Symposium, *Law and the Continuing Enterprise: Perspectives on RICO*, May 2014, article available at: <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2174&context=ndlr>.

<sup>7</sup> Van Houten, P., Murphy, R.T., and Johnson, R.: “Sixth Survey of White Collar Crime: RICO”, *American Law Review*, 28 (3), 2009, pp. 637-677.

<sup>8</sup> Donald J. Rebovich, Kenneth R. Coyle, and John C. Schaaf: *Local prosecution of Organized Crime: the Use of State RICO Statutes*, a statistics analysis available at <https://www.ncjrs.gov/pdffiles1/Digitization/143502NCJRS.pdf>.

<sup>9</sup> Forfeiture comes in two forms: civil and criminal. Both result in the confiscation of property derived from or used in criminal activities. Criminal forfeiture is confiscation accomplished as part of

Although RICO included provisions for asset forfeiture, the *Comprehensive Crime Control Act* of 1984 (P.L. 98-473) expanded upon these provisions. Specifically, Title II of Chapter III, the *Comprehensive Forfeiture Act* of 1984, amended RICO by specifying that proceeds (both tangible and intangible) obtained directly or indirectly from racketeering activity were subject to forfeiture.

The rules for civil forfeiture proceedings were later revised in the *Civil Asset Forfeiture Reform Act* of 2000 (P.L. 106-185), improving the federal government's ability to prosecute organized crime cases. Money laundering, the primary method of concealing the illicit proceeds from organized crime activities or placing them back into further illegal activity, was established as a federal criminal offense in the *Money Laundering Control Act of 1986* (P.L. 99-570). This Act also established criminal and civil penalties for money laundering, as well as procedures for forfeiting the illicit funds. It appears that these laws have all provided effective legal instruments, as the Department of Justice and the Federal Bureau of Investigation have indicated that the three most prominent tools relied upon when investigating and prosecuting organized crime are RICO, money laundering, and asset forfeiture statutes<sup>10</sup>.

It is important to state that in the U.S. combating organized crime is not a task handled by one federal agency or just one department.

Many agencies have had their share of contribution in tackling the threats posed by organized crime. The Department of Justice, specifically the U.S. Attorney General's Organized Crime Council, is responsible for creating internal organized crime policy<sup>11</sup>. The council is chaired by the Deputy Attorney General and has representatives from the Federal Bureau of Investigation (FBI); the U.S. Drug Enforcement Agency (DEA); the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the U.S. Immigration and Customs Enforcement (ICE); the U.S. Secret Service; the Internal Revenue Service (IRS); the U.S. Postal Inspection Service; Diplomatic Security; and the U.S. Department of Labor, Office of the Inspector General.

Although many federal and state departments and agencies are engaged in fighting organized crime, the primary agency involved in combating organized crime remains the FBI.

The Transnational Criminal Enterprise Section in the Criminal Enterprise Branch of the Criminal Investigative Division is responsible for investigating organized crime. This Organized Crime Section is divided into three principal units investigating (1) La Cosa Nostra, Italian organized crime, and racketeering; (2) Eurasian/Middle Eastern organized crime; and (3) Asian and African criminal enterprises.

### 3. Enterprise Theory of Investigation (ETI)

As a key analytical instrument, the FBI uses the Enterprise Theory of Investigation (in short, ETI) to investigate organized crime. ETI involves two steps: (1) identifying a criminal organization and the criminal activities of this organization and (2) identifying

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the prosecution of the property owner. Civil forfeiture is accomplished through a civil proceeding ordinarily brought against the property involved in the illicit activity.

<sup>10</sup> Kristin M. Finklea: *op. cit.*, p. 11.

<sup>11</sup> See the Department of Justice, Organized Crime and Racketeering Section website at <http://www.usdoj.gov/criminal/links/ocrs.html>.

the financial assets of the criminal organization for possible forfeiture (confiscation)<sup>12</sup>. This investigative technique complements in fact the RICO statutes, by that both ETI and RICO are aimed at dismantling criminal organizations. Furthermore, ETI identifies financial assets that may be subject to forfeiture under civil RICO statutes. This aspect of ETI is directed at combating money laundering and thus the financial lifeline of organized crime.

The U.S. Department of Justice Organized Crime Council, chaired by the Deputy U.S. Attorney General, has identified *eight strategic threats* to the United States posed by international organized crime. The term “international organized crime” includes not only those organized crime groups operating outside the borders of the United States, but within the U.S. borders as well. The Council noted that international organized criminals may penetrate the energy and other strategic sectors of the economy; provide logistical and other support to terrorists, foreign intelligence services, and governments; smuggle/traffic people and contraband goods into the United States; exploit the United States and international financial system to move illicit funds; use cyberspace to target U.S. victims and infrastructure; manipulate securities exchanges and perpetrate sophisticated frauds; corrupt public officials in the United States and abroad; and use violence or the threat of violence as a basis for power.

Specifically, the Organized Crime Council indicated to the U.S. Congress that laws and regulations on organized crime should be expanded, updated, or amended as to grant the government the abilities to investigate and prosecute organized criminals that affect American society from outside U.S. borders. This suggests that federal law enforcement currently may not have the extraterritorial jurisdiction or the most effective instruments to combat the evolving organized crime threats to the United States.

The factors which allow criminal organizations to remain immune from efforts to crumble their illegitimate empires can be grouped into three broad categories: (A) obstacles to successful prosecution inherent in the size and highly developed structure of criminal organizations; (B) obstacles derived from the organization's influence in local government agencies charged with law enforcement responsibilities; (C) obstacles attributable to public apathy<sup>13</sup>.

The study will further on focus on a few representative federal offenses that are commonly committed by organized crime groups in the U.S.

One such specific offense is *money laundering*. Accordingly, laundering of monetary instruments (18 U.S. Code § 1956. )<sup>14</sup> states that: “(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity — (A) (i) with the intent to

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<sup>12</sup> Remarks by Chris Swecker, Acting Executive Assistant Director Law Enforcement Services, Federal Bureau of Investigation in U.S. Congress, House Committee on Homeland Security, Subcommittee on Management, Integration, and Oversight, *9/11 Reform Act: Examining the Implementation of the Human Smuggling and Trafficking Center*, 109<sup>th</sup> Cong., 2nd sess., March 8, 2006.

<sup>13</sup> Earl Jr. Johnson: “Organized Crime: Challenge to the American Legal System”, *Journal of Criminal Law and Criminology*, vol.53, issue 4, 1962, available at: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5118&context=jclc>.

<sup>14</sup> The text of the offense can be checked at: [http://www.ffiec.gov/bsa\\_aml\\_infobase/documents/regulations/ml\\_control\\_1986.pdf](http://www.ffiec.gov/bsa_aml_infobase/documents/regulations/ml_control_1986.pdf).

promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or (B) knowing that the transaction is designed in whole or in part— (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, *shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.*

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States— (A) with the intent to promote the carrying on of specified unlawful activity; or (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part— (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, *shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both.* For the purpose of the offense describe in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent— (A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or (C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, *shall be fined under this title or imprisoned for not more than 20 years, or both.* For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

Penalties - (1) In general. Whoever conducts or attempts to conduct a transaction described in subsection (a) (1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of— (A) the value of the property, funds, or monetary instruments involved in the transaction; or (B) \$10,000".

To summarize, money laundering involves concealing the nature, location, source, ownership, or control of proceeds from an illegal activity or placing them back into further illegal activity.

The fraudulently obtained proceeds are laundered through a variety of methods to become "clean money." With the expansion of the Internet and increased globalization,

the methods of money laundering continue to become increasingly complex and difficult to detect. The Financial Crimes Enforcement Network, under the Department of the Treasury, indicates that the routes for money laundering include banks, check cashers, money transmitters, businesses, and casinos. Money launderers use methods such as complex wire transfers, shell companies, and currency smuggling to hide their dirty money.

Money laundering became a federal crime in the *Money Laundering Control Act* of 1986 (P.L. 99-570). It came to the Congress's attention that organized criminals were camouflaging their proceeds, and the Congress strengthened the federal criminal statutes to better combat criminal organizations. Recently, the scope of the money laundering statute has come under examination.

Until more recently, the statute prohibited financial transactions of proceeds from illicit activities, but it did not define what constitutes "proceeds." The U.S. Supreme Court ruled in *United States v. Santos* (June, 2<sup>nd</sup>, 2008)<sup>15</sup> that in the money laundering statute, the term "proceeds" refers to *profits* rather than gross receipts (income).

Legislation enacted in the 111<sup>th</sup> Congress has since amended the money laundering statute. The *Fraud Enforcement and Recovery Act* of 2009, or FERA (P.L. 111-21), clarifies both the money laundering and international money laundering statutes. Namely, it indicates that "proceeds" includes *gross receipts of illegal activities*. Some experts have argued that expanding the predicate offenses for international money laundering could diversify the means that the federal government is able to rely upon when investigating and prosecuting organized crime that is increasingly crossing international lines. However, recently enacted legislation has not addressed these predicate offenses.

Another representative organized crime offense is *cigarette trafficking*, codified at 15 U.S. Code § 375-378.

Law enforcement agencies have noted that criminal syndicates' participation in the trafficking of contraband cigarettes poses a significant threat to American society. A number of different organized crime groups are involved in cigarette trafficking. This illicit activity indirectly threatens the American economy and American communities. Cigarette smuggling leads to lost tax revenue. Businesses, in turn, compensate by raising taxes for the consumer, ultimately placing the increased economic burden on the consumer. Excessive economic burdens on the consumer are of particular concern now because of the current economic recession. Consequently, revenues that would assist in funding government programs are being illegally redistributed because of organized crime activities. Congress has repeatedly debated legislation to revise the *Jenkins Act*<sup>16</sup>

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<sup>15</sup> In an illegal lottery run by respondent Santos, runners took commissions from the bets they gathered, and some of the rest of the money was paid as salary to respondent Diaz and other collectors and to the winning gamblers. Based on these payments to runners, collectors, and winners, Santos was convicted of, *inter alia*, violating the federal money-laundering statute, 18 U. S. C. §1956, which prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity. The case is available at: <https://www.law.cornell.edu/supct/html/06-1005.ZS.html>.

<sup>16</sup> The Jenkins Act requires anyone that sells and ships cigarettes (to anyone except a licensed distributor) across a state line to provide monthly reports of these sales to the buyers' state tobacco tax administrators.



to enhance reporting requirements for the sale of cigarettes and smokeless tobacco products as well as legislation to provide stronger penalties for smuggling such products.

A third representative U.S. organized crime offense is *counterfeiting* and the related offenses. They are codified at 18 U.S. Code Chapter 25, § 470-514 on Counterfeiting and Forgery.

There is evidence that organized criminals are becoming increasingly involved in the production and distribution of counterfeit and pirated goods. In Los Angeles County alone, Russian, Asian, and Lebanese organized crime groups are among those that have been involved in intellectual property rights crimes<sup>17</sup>. Industries targeted are broad, including the music and motion picture industries, clothing companies, luxury goods manufacturers, and the tobacco industry. The federal government has taken several steps so far in fighting against these crimes. In March 2004, the Department of Justice created an Intellectual Property Task Force to combat the increase in intellectual property piracy and counterfeiting by organized crime groups. Also, the Office of the United States Trade Representative (briefly, the USTR) has indicated that an Anti-Counterfeiting Trade Agreement (or ACTA) is being concluded with other countries, including Australia, Canada, EU, Japan, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United Arab Emirates.

According to the USTR, one benefit of the ACTA is that it will help combat the piracy and counterfeiting that is an “easy source of revenue for organized crime”<sup>18</sup>.

Counterfeit currency is another example of a domain in which many organized crime groups are involved. Asian organized crime groups in Los Angeles and New Jersey have been linked to the production of the so-called “supernotes,” or fake \$50 and \$100 bills. This can not only lead to a loss in actual money (for those paid in the counterfeit currency), but it can damage the value of the U.S. dollar. Some experts and policy analysts<sup>19</sup> have suggested that one possible legislative option to help counter the involvement of organized crime in piracy and counterfeiting may be to expand the organized crime and money laundering statutes to include large-scale piracy and counterfeiting tied to other criminal activities.

#### 4. Conclusions

These are but a few outlines of the many facets of U.S. organized crime and its contemporary challenges. While having no empty claims to cover a topic such as organized crime comprehensively, the present study has aimed at presenting the most important federal law instruments (from both a substantive and procedural perspective) used by the U.S. law enforcement authorities in order to combat the phenomenon subject to analysis.

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<sup>17</sup> Intellectual property rights (IPR) include copyrights, trademarks, trade secrets, and patents.

<sup>18</sup> Office of the United States Trade Representative, *Anti-Counterfeiting Trade Agreement (ACTA)*, August 4, 2008, [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2008/asset\\_upload\\_file\\_760\\_15084.pdf?ht=](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2008/asset_upload_file_760_15084.pdf?ht=).

<sup>19</sup> Gregory F. Treverton, Carl Matthies and Karla J. Cunningham *et al.*, *Film Piracy, Organized Crime, and Terrorism*, RAND Corporation, Safety and Justice Program and the Global Risk and Security Center, 2009, [http://www.rand.org/pubs/monographs/2009/RAND\\_MG742.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf).

There is no doubt that organized crime in the U.S. poses a significant and growing threat to national and international security, with dire implications for general safety, public health, democratic institutions, and economic stability across the globe. Not only are organized criminal networks expanding, but they also are diversifying their activities, resulting in the convergence of threats that were once distinct and today have explosive and destabilizing effects. The U.S. federal laws enacted in order to fight against and suppress organized crime will hopefully serve as a source of inspiration for European national legislators, who strive, in their turn, to find the best legal solutions to a problem that seems more intricate and pervasive than ever, i.e. transnational organized crime.

# Shall the Offender or the Participant in the Predicate Offense Be Held Criminally Liable if He/She Performs the Laundering of the Proceeds from the Committed Offense?

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## Abstract:

*Money launderer is the name used in several specialty works in order to designate the person who commits the offense subsequent to the offense which the criminal proceeds originate from.*

*The following question often emerges within the doctrine and the case law: May the offender or the participant in the predicate offense be a launderer of the proceeds originating from the committed offense?*

*There can be two answers to this question. We will hereby present several points of view and we will try to express our opinion on this legal matter.*

**Keywords:** *money launderer; money laundering, predicate offense (delinquens principale), subsequent offense (delinquens subsequens).*

## 1. Introduction

The expression of *money laundering* is not very old, its occurrence being related to the famous gangster Al Capone<sup>1</sup>, who in 1920, in times of prohibition<sup>2</sup> and crisis, invaded Chicago with laundries used in order to camouflage the criminal origin (from alcohol smuggling, human trafficking, arms trafficking, etc.) of his money and to appear that all the return registered in the accounting was legal<sup>3</sup>.

In fact, the criminal origin money was recorded in the accounting and declared as income originating from the performance of economic activities, although only one part of the declared income was gain following the services rendered to the people.

One of the first employments within a public document of the expression of *money laundering* dates from 1973 and it is awarded to The Guardian newspaper, which used it during *Watergate scandal*<sup>4</sup>.

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<sup>1</sup> In 1920-1933, the gangsters such as famous Al Capone or Bugs Moran opened laundries where they „mixed” (recorded in the accounting) black money earned following the commission of an offense with the money earned from clothes washing and cleaning, therefore succeeding in introducing within the legal circuit very large amounts of dirty money (M. Mutu, *Spălarea banilor – aspecte juridico-penale, teză de doctorat, (Money laundering – legal and criminal matters) PhD thesis, Chişinău, 2005, p. 19*). In 1931, Al Capone was convicted for tax evasion and prostitution.

<sup>2</sup> USA prohibition occurred between 1920 and 1933, when the sale, manufacturing, consumption and transport of alcohol and alcoholic drinks were prohibited.

<sup>3</sup> M. Mutu, *op. cit.*, p. 9.

<sup>4</sup> The former American president, Richard Nixon was involved in this scandal. He subsequently resigned due to several allegations (money laundering included). According to The Guardian, the Committee for the reelection of President Richard Nixon ordered the transfer of certain funds in

The integration of the financial system and the optimization of the communication technologies encouraged the disappearance of the territorial barriers, therefore those interested in carrying out activities on the laundering of dirty moneys acquired new tools, such as the fictitious moving of the economic office in *offshore* areas or the use of the internet for remote bank transfers<sup>5</sup>. Beyond the undeniable social and economic benefits, the globalization brought major benefits to the organized criminal groups specialized in money laundering activities<sup>6</sup>.

Nowadays, the **whitening** of the proceeds earned following the commission of offenses is a very harmful practice for each and every state, but it can be devastating for young democracy countries, such as Romania, due to the affect it may destroy the basis of the market economy<sup>7</sup>. The laundering of black money – illegally earned – is a strong barrier for the identification of its illicit origin.

Due to its extension and forms, the importance of the prevention and control of money laundering is the priority of any legislation, due to the fact that, by means of this offense the **fuel** necessary for the existence and operation of the organized crime and for terrorism financing is produced.

Following the **whitening** (laundering) of the money, by any means having this scope, criminal origin money can become dirty again by means of financing the primary offenses (for example, drugs trafficking, human trafficking, tax evasion etc.). As the doctrine provided, „we can speak about a vicious circle of money laundering or about the effect of the snowball which picks up more and more snow as it rolls along, becoming larger”<sup>8</sup>.

The dimensions of the recycling process of criminal origin proceeds are difficult to establish due to the fact there is no reliable data to enable their measurement. According to economist James Henry, the richest people in the world had at the end of 2010 at least 21,000 billion dollars in tax havens, namely the gross domestic product of United States and Japan together<sup>9</sup>.

*De lege lata*, the actions of money laundering are deemed offenses and are provided for by Law no. 656/2002. According to art. 29 of Law no. 656/2002:

banks of din Mexico, and these funds were subsequently transferred to a company of Miami (see J. Robinson, Laundryman, Ed. Pocket Books; 2nd edition, 1998).

<sup>5</sup> See C. Adochiței, I. Adochiței, *Spălarea banilor*, Revista de Drept Penal (Money laundering, Criminal law journal) no. 1/2003, p. 97.

<sup>6</sup> For a work discussing this matter, see J. Robinson, *The Merger - How Organized Crime is Taking Over The World*, Ed. McClelland & Stewart, 2000.

<sup>7</sup> US Federal Bureau of Investigation defines money laundering as a process (a series of connected actions for a well defined purpose) whereby the existence, source and use of the illegal income is hidden, by pursuing the creation of a legal appearance and the avoiding of the discovery and punishing of the offenders, as well as the confiscation of the assets or the taxation of the income. For the scopes of money laundering, see P. Ciobanu, *Prevenirea și combaterea infracțiunii de spălare a banilor*, Revista română de drept al afacerilor (Prevention and control of money laundering, Romanian Journal of Business Law) no. 6/2003, Bucharest, Rosetti Publishing House, p. 45.

<sup>8</sup> S. Nițu, *Protecția penală a sistemului financiar-bancar împotriva infracțiunii de spălare a banilor, rezumat teză de doctorat (Criminal protection of financial and banking system against money laundering offense, PhD. thesis abstract)*, 2010, p. 7 ([www.univnt.ro](http://www.univnt.ro)).

<sup>9</sup> See article Tax havens: Super-rich 'hiding' at least \$21tn, published by BBC (<http://www.bbc.co.uk/news/business>). James Henry stated that private property held offshore is a huge black hole in the global economy, and the good news is the that the world located a huge financial wealth which can be used in order to solve some of the most pressing global issues.

„The following shall be deemed money laundering offense and shall be punished by imprisonment for a term between 3 to 10 years:

a) the exchange or transfer of proceeds, knowing that they originate from crime, for the purpose of concealing or disguising the illicit origin of these proceeds or for the purpose to help the person who committed the offense the proceeds originate from to evade prosecution, trial or imprisonment;

b) the concealment or disguise of the true nature of the source, location, disposition, movement or ownership of the proceeds or of the rights over the proceeds, by knowing that the proceeds originate from the commission of offenses;

c) the acquisition, possession or use of proceeds, „by knowing that the proceeds originate from the commission of offenses”.

## 2. Is money laundering a qualified subject offense?

**The active subject** of money laundering offense (**money launderer**) is not expressly qualified in the indictment rule.

In many cases the persons performing dirty money laundering activities are deemed to carry out a professionally criminalized activity, as a job, therefore, at least in these cases, those persons could be called **money launderers**, without the risk the expression being deemed a wrong expression. The expression is also employed in official documents or normative acts. For example, the expression is employed in Directive 2001/97/EC, paragraph 14 of the Preamble<sup>10</sup>. Furthermore, the expression of money launderer is frequently used in the foreign literature. For example, Jeffrey Robinson wrote a paper entitled *Laundryman*<sup>11</sup>.

In our opinion, the offender or the co-offender who committed the predicate offense, the accomplice or instigator to the commission of the predicate offense (*delictum principale* – the dirty money originates from) cannot be the active subject of the money laundering offense (*delictum subsequens*).

In what concerns the offender who commits the predicate offense, in respect of the circumstance of having the capacity of active subject of the first offense, we can say that it became the holder of the proceeds by committing the main offense<sup>12</sup>. The accomplice and instigator, as secondary parties of a joint enterprise, should have the same legal *fate* as the offender and the co-offender who committed the offense the proceeds originate from.

Furthermore, we consider that the *ne bis in idem* adage according to which a person can be prosecuted only once for the same offense, would have been violated. Furthermore, there are certain modalities of the material elements, especially those provided for by art. 29 par. (1) letter c), which are basically involved in the predicate offense. For example, the thief holding the stolen asset.

<sup>10</sup> According to the text, among the money launderers there is the increase tendency of performing non-financial activities. This ascertainment is confirmed by the GAFI activity on the money laundering techniques and typologies.

<sup>11</sup> J. Robinson, *Laundryman*, Ed. Pocket Books; 2nd edition, 1998.

<sup>12</sup> *Ibidem*. See M. Mutu, *op. cit.*, p. 117. For example, the law of Liechtenstein provides that the proceeds can be laundered only by the person who did not take part in the predicate offense. The person who committed the predicate offense can be held liable only for this offense, and not for other subsequent actions on the proceeds gained following the commission of the predicate offense. For a similar opinion, see D. Ciuncan, A. Niculiță, *Subiectul activ al infracțiunii de spălare a banilor (The active subject of money laundering offense)*, R.D.P. no. 2/2006, p. 107-108.

In what concerns the potential violation of the *ne bis in idem* principle, by means of Decision no. 73/2011, the Constitutional Court noted the following: „the criticized legal provisions were subject to the constitutional control from the point of view of a similar criticism. Therefore, on the occasion of the pronouncing of Decision no. 299 of March 23<sup>rd</sup>, 2010, published in the Official Journal of Romania, Part I, no. 295 of May 6<sup>th</sup>, 2010, and Decision no. 889 of October 16<sup>th</sup>, 2007, published in the Official Journal of Romania, Part I, no. 771 of November 14<sup>th</sup>, 2007, the Court noted that "the criticism according to which art. 23 par. (1) (currently art. 29 – n.n. M.A.H.) of Law no. 656/2002, would prejudice the provisions of art. 4 paragraph 1 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which lays down *non bis in idem* principle cannot be noted, due to the fact that, in order for this principle of criminal procedural law to become applicable, the person in question must have been convicted, acquitted, or the cessation of the criminal proceedings against the respective persons must have been ordered for the offense on which the person is again prosecuted or sentenced. In case of multiple offenses, the offender shall be applied a main penalty, under the observance of the provisions of art. 4 paragraph 1 of Protocol no. 7 to the Convention"<sup>13</sup>.

The reasons of the Constitutional Court are appropriate in respect of the criminal procedural law, namely if we strictly discuss in terms of the formal incidence of *ne bis in idem* principle. However, in what concerns money laundering offense we cannot rely on the procedural possibilities of the above mentioned rule, but on the substantive criminal law according to which **nobody can be held criminally liable twice for the same offense**.

The doctrine provided the following: „*the ne bis in idem principle is violated by means of the possibility of the effective prosecution of those who have committed the offense the dirty money originates from and the money laundering offense in the normative version provided for by art. 29 par. 1 letter c) of Law no. 656/2002 when the money laundering offender acquires the proceeds following the commission of offenses, if the acquisition of proceeds is not followed by a subsequent action for the purpose of disguising the illegal origin of the proceeds*"<sup>14</sup>.

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<sup>13</sup> Under the same decision, the constitutional court noted that: „In what concerns the provisions of art. 23 par. (5) (currently art. 29 – n.n. M.A.H.) of Law no. 656/2002, criticized in terms of lack of predictability, it is ascertained that they establish objective criteria for the assessment of the criminal type of the offenses committed in relation to the proceeds or the amounts originating from an offense. Furthermore, the doctrine of the European Court of Human Rights ruled that the legal regulation must be sufficiently accessible and predictable so that to enable the citizen to own information on the legal regulations applicable in a given case and to be able to reasonably foresee the consequences that may arise. Therefore, under Resolution of August 25<sup>th</sup>, 1998, pronounced in case Hertel against Switzerland, The European Court of Human Rights noted that the predictability of the law does not need to be accompanied by absolute certainties. The certainty, even if desirable, is sometimes accompanied by excessive rigidity or the law must be able to adapt to changes. There are many laws which, by the nature of the things, use more or less uncertain formula of which interpretation depends on the jurisprudence, as in case of the Romanian judge. Under Resolution of November 25<sup>th</sup>, 1996, pronounced in case Wingrove against Great Britain, the European Court of Human Rights decided that the relevant domestic law which includes both the written and the unwritten law, must be formulated with sufficient accuracy so that to enable the interested persons who can resort, if necessary, to the expert advice, to reasonably foresee, under the circumstances of the case, the consequences that may result from a determined act. Therefore, a law which assigns the power of appraisal (as the case of the authorities called to apply the law) does not violate this requirement”.

<sup>14</sup> C. Bogdan, *Infrațiunea de spălare a banilor. Autonomie. Subiect active (Money laundering offense. Autonomy. Active subjects)*, www.juridice.ro.

Neither the American law (USA) punishes the person who committed the predicate offense (§1957) and, according to a part of the doctrine, neither the German law incriminates the offense of the person who committed or caused the commission of the predicate offense, except the accomplice, who can be punished if it is punished more severely for the predicate offense<sup>15</sup>.

The French judicial practice (on January 14<sup>th</sup>, 2004) issued a decision whereby the Court of Cassation considered that the offender who committed the predicate offense may also be an active subject of the money laundering offense<sup>16</sup>. In the case which led to the aforementioned decision, a natural person convicted for clandestine labor and tax fraud, who was prosecuted for the offense of participation in the disguising of the proceeds, was also convicted for the abroad clandestine transfer of the proceeds<sup>17</sup>. This decision was criticized by the French doctrine<sup>18</sup>.

In the Russian Federation, according to the decision of the Supreme Court of the Russian Federation, the predicate offense and the money laundering offense are deemed multiple offenses<sup>19</sup>.

In an opinion recently expressed, it is noted the following *„the possibility of the effective prosecution of those who have committed the offense the dirty money originates from and the money laundering offense must be assessed depending on the case, under the observance of the rule on the strict construction of the law”*<sup>20</sup>. The same author showed that: *„The legislator itself outlines the impossibility of the effective prosecution of those who have committed the money laundering offense and the offense the proceeds originate from in the normative version provided for by art. 29 par. 1 letter a) 2<sup>nd</sup> thesis of Law no. 656/2002 (exempli gratia, the transfer in order to help the person who committed the predicate offense)”*<sup>21</sup>.

Within the national doctrine, there are authors who believe that the active subject of the predicate offense can also be the active subject of the offense provided for by art. 29 of Law no. 656/2002. In the reasoning of this point of view, it is shown that the expression *„knowing that the proceeds originate from crime can be construed in relation to the mental position of the person committing the predicate offense, meaning that it is necessary that the person is not wrong on the criminal nature of the committed offense, because, on the contrary, the unlawfulness of money laundering offense and of the predicate offense would be removed”*<sup>22</sup>.

As in the doctrine, in the jurisprudence, there are different points of view regarding the active subject of the money laundering offense.

<sup>15</sup> M. Mutu, *op. cit.*, p. 33.

<sup>16</sup> W. Jeandidier, *Droit pénal des affaires, Précis*, Dalloz, 2003, no. 21.

<sup>17</sup> See: L'arrêt de la Cour de Cassation de la France du 14 janvier 2004. Chambre criminelle, Recueil Dalloz, 2004, nr. 19, p. 1377; *Le blanchiment de soi-même. Droit pénal* (éditions du Juris-Classeur), April 2004, p. 10, apud M. Mutu, *op. cit.*, p. 118.

<sup>18</sup> See: C. Chantal, *L'auteur de l'infraction principale et le blanchiment*, Recueil Dalloz, 2004, nr. 19, p. 1377-1381; M. Haritin, *La répression du blanchiment d'argent*, Revue de Droit Bancaire et Financier, 2002, no. 6 (novembre/décembre), p. 362-365; V. Malabat, *Droit pénal spécial*, Dalloz, 2003, apud C. Bogdan, R.D.P. no. 4/2006, p. 128.

<sup>19</sup> M. Mutu, *op. cit.*, p. 44; C. Bogdan, *op. cit.*, p. 129.

<sup>20</sup> C. Bogdan, *op. cit.*, p. 506.

<sup>21</sup> C. Bogdan, *Infrațiunea de spălare a banilor. Autonomie. Subiect active (Money laundering offense. Autonomy. Active subjects)*, www.juridice.ro.

<sup>22</sup> P. Munteanu, *op. cit.*, p. 44. See the note of prof. G. Antoniu la D. Ciuncan, A. Niculiță, *op. cit.*, p. 108.

Therefore, by means of Decision no. 147/2011, the High Court of Cassation and Justice noted the following „*The subsequent nature of the money laundering offense emerges from the fact that the offense results from another offense, which is the predicate offense. Therefore, the active subject of the two offenses cannot be the same person*”<sup>23</sup>.

Instead, under Decision no. 836/2013, the Supreme Court noted that „*the money laundering offense may be attributed to any person and the active subject of the offense is not qualified, this capacity being held by any natural person who meets the general conditions of the active subject of the offense, and therefore, the participant in the predicate offense cannot be the active subject of the offense (...)*”.

*The expression „knowing that the proceeds originate from crime can be construed in relation to the mental position of the person committing the predicate offense, meaning that it is necessary that the person is not wrong on the criminal nature of the committed offense.*

*The lack of the explicit intervention of the legislator in order to establish that the person who committed the offense the proceeds originate from is excluded from the category of the persons who may be subject of the money laundering offense proves that the legislator believed that any person may hold this capacity (the High Court of Cassation and Justice also ruled in respect of the aforementioned reasoning, under criminal decision no. 5966/2003)”<sup>24</sup>.*

We believe that the arguments in favor of the opinion according to which the offender and the participant in the predicate offense cannot be the active subjects of the money laundering offense are stronger than those made in support of the contrary opinion.

In our opinion, the expression **knowing that the proceeds originate from crime** is used by the legislator, firstly, **in order to exclude** from the category of the active

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<sup>23</sup> www.scj.ro. See T. Neamț, Sentința penală nr. 31/2011 (Criminal judgment no. 31/2011). In the reasoning of this resolution, the following is noted: „The active subject of money laundering offense is always different from the active subject of the offense the money or assets originate from, as shown from the review of the content of the law.

The European Convention on laundering, search, seizure and confiscation of the proceeds from crime deems as money laundering offense the acquisition, possession or use of property knowing at the time of the receipt that such property was proceeds from crime (art.6 letter c). It can be noted the intention of the Romanian legislator to take over almost entirely the provisions of the European Convention, being clearly noted the distinction between the money laundering offender and the person involved in the commission of the offense the proceeds originate from.

The convention distinguishes between the predicate offense the proceeds originate from and the money laundering offense, and the money laundering offender must presume that the property is proceeds of the predicate offense.

Therefore it must be a distinct offender who knows the illegal origin of the proceeds in the absence of which there could not be the money laundering offense. The expression “*knowing that the proceeds originate from crime*” is used by the legislator in order to exclude from the category of the active subjects the persons involved in the commission of offenses the proceeds subject to money laundering originate from. If this expression had been used in order to include in the category of active subjects the persons who committed the predicate offense, the expression would have been unnecessary, due to the fact the person who committed the offense the proceeds originate from knows that the respective act is an offense” (Details: <http://legeaz.net/spete-penal/infractiunea-de-spalare-a-banilor-31-2011>).

<sup>24</sup> www.scj.ro. See Ș. Tudor, Spălarea banilor. Practică judiciară adnotată (Money laundering, Annotated judicial practice), Hamangiu Publishing House, Bucharest, 2013, p. 40 (see also the notes of the cases) in order to review a case where the issue on the capacity of active subject of the money laundering offense.



subjects **the persons involved in the commission of offenses the proceeds subject to money laundering originate from**. If we believed that this expression is used in order to include in the category of active subjects the persons who committed the predicate offense, the expression would be unnecessary, due to the fact the person who committed the offense the proceeds originate from knows that the respective act is an offense.

If the person does not know that the respective act is an offense, the person cannot be an active subject of the predicate offense, in which case the person may acquire the capacity of active subject of the money laundering offense if it subsequently becomes aware of and at the time of the offense it knows that the proceeds originate from an offense.

Another argument in support of our opinion is that the **concealment or disguise** are essentially **intentional activities**, therefore the note on the knowledge of the origin of the proceeds was not necessary due to the fact that the legislator's intention is to disguise the criminal origin of the proceeds. The concealment or disguise of the (criminal) origin of the proceeds implies the fact that the person is aware of it. In the absence of the knowledge (intention), we cannot discuss about concealment or disguise, therefore the note is again unnecessary.

Any way, the note on the knowledge in respect to the origin of the proceeds was not necessary, due to the fact that, according to art. 19 par. (2) of the Criminal Code, there is guilt when the acts that resides in an action are committed with intent.

Furthermore, the legislator uses a similar language in case of the offense of concealment and nobody claimed that the person who committed the offense the concealed proceeds originate from may be an active subject of the offense of concealment. Furthermore, the recent jurisprudence claimed that the person who participated as accomplice in the offense the proceeds originate from cannot be deemed fence<sup>25</sup>.

Therefore, we believe that the scope of the expression *knowing that the proceeds originate from crime* is to exclude from the area of the active subjects the persons who committed the offense the laundered assets originate from.

The reasoning of the draft bill on the enforcement of the new Criminal Code cannot be an argument in supporting the opinion contrary to the one claimed by us, due to the fact that the definitive version of the law (see Law no. 187/2012) did not keep the form proposed by the authors of the draft bill (the note that in case of letter c the offender cannot be the offender or the participant who is involved in the commission of the predicate offense)<sup>26</sup>.

The money laundering offence **may subsist, even if the person who committed the predicate offense is not held criminally liable**, if it is ascertained that the predicate offense meets the conditions of an offense. For example, a case which excludes the criminal liability or the execution of the criminal penalties is deemed to be incident.

### 3. Conclusions

By taking into account the aforementioned arguments, we reinforce our opinion according to which *de lege lata* the offender, co-offender, accomplice or instigator to the commission of the offense the laundered proceeds originate from cannot have the

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<sup>25</sup> I.C.C.J., S.U., dec. nr. 2/2008.

<sup>26</sup> For the reasoning supporting the contrary opinion, see A.A. Dumitrache, op. cit., p. 251.

capacity of active subjects of the money laundering offense, due to the fact that it would be drawn the unjustifiable conclusion that this offense may be committed by any person holding proceeds originating from other offenses. For example, thief, robber etc. Furthermore, the scope of the offense of concealment or the abetment in crime would be limited or excluded.

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# Remand in Corruption Cases – a Possible Raft of the Medusa?

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## **Abstract:**

*Lately, in Romania, ever more deeds which might be classified as “big corruption”, namely those involving important state officials, politicians or even judges, are committed under the constitution of organized criminal groups. Most case files regarding such matters are based on accusations made by persons in remand. The present essay aims to draw attention towards the need to interpret such denunciations with great prudence, given the particular situation in which the persons concerned find themselves.*

**Keywords:** *denunciations, corruption cases, persons in remand.*

## **1. Introduction**

In my visits at the Louvre, each and every time, there were two paintings which I could not miss. The first one is, obviously, Leonardo da Vinci's *The Mona Lisa*, and the second is *The Raft of the Medusa*, a creation which belongs to the French painter Théodore Géricault. Besides the painting itself, which is impressive, what fascinated me was the fact that whenever I found myself in front of it, inevitably, my mind was trying to recompose the real event which had led to the creation of the painting. It is the kind of painting which “pushes” oneself inside the story, without the slightest possibility of showing any resistance. I shall briefly recall the events which had inspired the French painter.

Following the Vienna Congress (1815) and the restoration of the French monarchy, England returned to France its former colony, Senegal. In 1816, a French ship “La Méduse” left the port of Rochefort towards the former African colony, to retrieve it. The ship, a pearl of the French fleet, found at the forefront of a convoy which included three other ships, carried about 400 people. Besides the sailors, on board there were officials, soldiers, settlers; the new governor himself, appointed by Louis XVIII, was also on board. Valuables and important documents were also being transported with the same vessel.

In total contrast to the symbolic nature of the journey and the important human values and materials transported, the command of the ship was committed, based on political criteria, to Count who had not sailed for decades. Because of the captain's incompetence and immeasurable pride, which made him disregard the advice of the experienced sailors on board, the ship senselessly ran aground on a sandbank off Mauritania. After trying in vain to restore the ship afloat, the captain, along with the senior officers and the important passengers left the vessel, occupying the lifeboats. Since these boats were insufficient for everyone on board, 150 passengers were crammed unto a makeshift raft, chopped from the timber ship (the Raft of the Medusa). With a view to their survival, those 150 people received a few boxes of bread crumbs and 15 barrels of wine. The raft was to be towed by the lifeboats but, one by one, the

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moorings which tied the raft to the boats were broken, and it was abandoned at sea, without the possibility of being self-propelled. The drift lasted for 13 days. Throughout this time, the limited living space (part of the raft was underwater), the lack of food, water, and, at first, the surplus of wine, have all led to behaviours of unimaginable savagery: some passengers were simply thrown into the water, whilst others were killed, massacred and, eventually, eaten by the strongest.

The acts of cannibalism were the highlight of this sad story. Only 15 people were found alive by another French ship sent in their search. Of these, five died before being transported to shore. Basically, 10 out of 150 people survived. Some of them were charged with acts of cannibalism in a trial in which several were indicted, including the captain of the ship, together with the senior officers who, abandoning the ship and its passengers, had violated the Sailors' Code of Honour. Beyond the trial, the event created a huge scandal at the time since it brought to light issues dealing with human, political and social nature. Besides Géricault's painting, created between 1818 and 1819, and first exhibited at the 1819 Paris Salon, so quite shortly after the event, over time, Medusa's tragic story has inspired numerous books, films and even scientific studies.

## 2. Remand in Corruption Cases

Two criminological studies have questioned the state of emergency as a justifying act concerning the acts committed on the "Raft of the Medusa"<sup>1</sup>. Beyond the questionable technical and legal component, especially from the perspective of the definition of the state of emergency, the studies explore the psychological, moral and criminological component of the situation. Basically, the idea is that in extreme situations, when people feel threatened by major hazards, their behaviour can become uncontrollable, even aberrant.

The Raft of the Medusa, the painting, the story of the shipwreck and the two criminological studies (read more than twenty years ago!), have all recently come to my mind in the overall context generated by all the cases of remand in custody which were ordered lately in cases of corruption, and by the controversial procedure of the denunciation, used ever so often in such cases. Although it might seem exaggerated, I believe that, in other ratios and for other reasons, obviously, for some people, the state of remand can become a "Raft of the Medusa".

The prison environment is extremely hostile, in general, to anyone. It is known that for those people who come into contact with custody for the first time, the period of "accommodation" is long and extremely difficult. The more the remanded person had a comfortable situation in their daily life, the more unbearable would be the detention. The psychological shock caused by incarceration may be felt more or less strongly, depending on each and every personality, but there is such a shock for everyone. To the shock of the detention itself, in the case of the remand one should add the normal pressure of the ongoing investigation or investigations and, obviously, the spectre of a possible sentence. All these "ingredients" make up a "cocktail" which is extremely dangerous from the point of view of the judicial truth.

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<sup>1</sup> See in this respect: H. Schadewaldt *L'odyssée du "Radeau de la Méduse"*. Un exemple classique de "l'état de nécessité", *Revue internationale de criminologie et de police technique*, vol. XXIII, 1969, n° 2, pp. 119-134, and J. Graven, *L'état de nécessité justificatif des naufragés. A propos du "Radeau de la Méduse"*, *Revue internationale de criminologie et de police technique*, vol. XXIII, 1969, n° 2, pp. 135-146.

Let us take as a working hypothesis the situation of a person who has committed several corruption offences, who knows s/he is guilty, and their acts have been proven without any doubt. By hypothesis, such person does not have extremely high moral scruples (since s/he committed crimes of corruption). The question is: can such a person, remanded in custody, and taking into account all the “ingredients” described above, provide the judicial authorities with false information, more concretely can s/he bring false accusations against other people for the sake of improving their own situation? The answer is: definitely yes, it is possible.

The answer to the previous question gives rise to another question: what effect could such a denunciation have (“slandorous” denunciation, as called by the old Penal Code)? One possible answer would be: no effect whatsoever; in a criminal case, the evidence cannot be reduced to a simple (single) denunciation. Although it is a denunciation, not a testimony, what works here, or at least it should work, is the old Latin adage: *testis unus, testis nullus*.

Another possible answer would be: it depends from case to case. The formulated principle does not have a legislative consecration in our procedural system and therefore it needs to be put into perspective. There is, at least theoretically, the possibility that such a denunciation, a slanderous one, be read in conjunction with indirect pieces of evidence which do not point at the guilt of the falsely accused, but which throw some doubt on them. Let us assume, however, that the judge, alert and in good faith, will not accept such corroboration and, in the absence of a direct and conclusive piece of evidence, they will consider that the act has not been proved.

But what if we multiplied the assumption from which we departed? Let us suppose that there is, in the same case (or another), a second person in exactly the same situation as the first informer. Could such a person, faced with the first denunciation, confirm its “reality”? The answer is, this time too, definitely yes, it is possible. In such a situation, a false denunciation, doubled by another false denunciation, could produce effects in that it could provide enough material evidence for retaining someone’s guilt. In the case of complex files, with dozens of people investigated, the probability of having two or more false denunciations is, obviously, considerably increased. Although, apparently, the conjugation of the proposed hypotheses seems highly unlikely, it is however possible. Therefore, the idea that a false denunciation cannot take effect is, in principle, wrong.

I do not discuss here the instance of forcing someone, in one way or another, to make such denunciations, which is, in itself, a criminal activity. Surely in such a situation the risks that the false denunciations might lead to an unjust conviction would be much higher. Perhaps such a situation also deserves careful consideration, especially in light of the guarantees offered by law in order to prevent such abuses, but this is not the place to analyze it.

### 3. Conclusion

In the working hypothesis, we started from the premise of an investigation conducted by a professional, acting in good faith, and I want to point out that even in such situations the denunciations made by persons remanded in custody imply major hazards and should be analyzed with great care by the judges, irrespective of the step in the criminal proceedings.

The thought that people tangled in their own crimes, found in the anguish of the cell and under the spectrum of punishment might crush other people’s destinies should scare us. And if anyone imagines that such despicable things cannot happen, they should consider that even more atrocious “horrors” happened; they should think of “The Raft of the Medusa”...

# Disorganized Crime\*

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## **Abstract:**

*The organized crime literature is vast, consisting of thousands of titles, expanding daily. Apart from that, many authors are not very explicit in the manner they use concepts, assuming that “we all understand what we mean when we talk about organized crime”. Therefore, after the predecessors’ attempts to create some order in the conceptual chaos surrounding the study of organized crime, one author has managed to draw attention to a long forgotten issue.*

*This study is about the pioneer work of Peter Reuters and his approach to understanding organized crime starting from the economic forces that shaped out the illegal markets, an environment where organized crime flourished.*

*This approach calls for an interdisciplinary analysis of a complex phenomenon, a method which is not customary to current academic debates.*

**Keywords:** *organized crime; disorganized crime; illegal markets; economic approach; profit-driven enterprise.*

## 1. Introduction

In the context of the fight against organized crime, a title such as the given one may stir contrary reactions. This was actually the effect generated by a book bearing this title.<sup>1</sup> The author’s intention was not to induce perplexity but to raise awareness on the difference between the commonplaces on organized crime and reality.

It may be surprising that such an approach belongs to a non-jurist. The author, an economist as a profession, has opened a different perspective on the analysis on organized crime, seriously questioning the capacity of legal discourse to pretend itself the only one authorized to debate this phenomenon.

Although the author’s study was published more than 30 years ago, his perspective seems to have a still unconsumed potential. A proof of this is that the academic debate has not until today reached a consensus as to the concept of organized crime. In their turn, legal experts, legislators and law professors came in and put forward various definitions, starting with an approach which did not focus on the economic analysis of the phenomenon.

## 2. The definition of Disorganized crime

In fact, Peter Reuters proposes another starting point.

The commonplace definition in the area of organized crime starts from the idea, long stated but never backed up by evidence, according to which organized crime is

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<sup>1</sup> Peter Reuters: *Disorganized Crime. The Economics of the Visible Hand*, Massachusetts Institute of Technology Press, Cambridge, 1983.

essentially profit-driven. This means that a central component of the concept of “organized crime” is related to money and the economic processes that generate income.

The author made us understand the comprehension of organized crime should start, not from the criminal organization towards its criminal agenda, but the other way round, from the mechanism and dynamics of profits towards the structuring of a criminal group. Such approach is based on the analysis of the environment of the underworld. Dismantling the underworld implies for the most part the study of illegal markets. Essentially, the author sustains that a separation should be made between illegal markets and organized crime and the study of illegal market should lead of a better understanding of organized crime.

Criminals do not inhabit a social and physical world that is different from the rest of society. Nonetheless it is true that those regularly involved in illegal activities form a subculture that is distinct from the society that it is embedded in. Illegal markets are dominated, as any other market, by economic forces, meaning that the best approach to the former is but an economic one. Legal experts seem to be less privileged in this competition, as long as they ignore the economic perspective.

### 3. What are illegal markets?

Basically they are a type of market very similar to a legitimate one, parallel with the former, where the offer meets the demand in case of products and services that are not available on the legal market. All that the morals, the social consensus or the current political whim of the lawmaker prohibit does not merely vanish, but just goes down into the underground. The prohibited products and services market satisfies an endemic demand that never lowers beneath a certain level. There have always been consumers of vice, whether we refer to prostitution, drugs, weapons, infantile pornography, gambling, stolen goods, etc. All these unlawful activities are associated with huge profit, its increase being due to the fact that these are unavailable goods somewhere else and their price is monopoly determined. Prohibition of a good has an impact on the manner in which its production and distribution are organized and the mode of transaction chosen.

Consequently, the control over the places where large amount of money are generated is supposed to be the privileged playground of organized crime. Hence the idea that organized crime is intertwined with illegal markets. A study of organized crime leads to a study of illegal markets, and similarly, a concern with organized crime is an argument for systematic campaigns against illegal markets. The inference is that policies towards organized crime have to be focused on the involvement of the organized crime in illegal markets.

Furthermore, underlining the principles on the organization of illegal markets should lead to a better understanding of organized crime and dealing severely with illegal markets should be a means for reducing the powers of organized crime.

According to Peter Reuters, the belief that illegal markets are centrally controlled remains at the heart of official doctrine and policy. Historically, at least in the U.S., organized crime exerts its control through three main illegal activities: bookmaking, numbers and loansharking. In the economy of organized crime there is a primacy of illegal gambling, which is reputedly the backbone of organized crime.

F.B.I. often repeated assertion of the Mafia dominated illegal markets and this domination was the central feature of the Mafia's economic and political power. The orthodoxy found both in the public belief and in the official statements is that illegal markets are typically dominated by a single powerful group whose power rests on controlling the corrupt officials and commanding the overwhelming violence. The Mafia suppressed competition in major illegal markets, using either direct intimidation or control of corrupt law enforcement.

The use of violence for economic purposes is a distinctive feature of illegal markets arising from two consequences of product illegality:

- The victim of violence is disadvantaged in seeking police protection.
- Participants in illegal markets lack recourse to state-provided facilities for settlement of disputes. The mafia families that have a dominant reputation (in terms of their supposed capacity of carrying out violent threats) in the illegal economies of major cities in America arose through gang wars during the Prohibition era.

As far as bookmaking<sup>2</sup> is concerned, there is no evidence to support the notion that corruption is a tool for control of bookmaking business by some group within the market. No group is able to use police to harass the competitors. Bookmaking enterprises are small, compared both to the firms in the legitimate economy and to the market as a whole. By conventional economic criteria bookmaking market might be reasonably described as competitive. Instead the fact that the Mafia has a substantial presence in the bookmaking business, it does not appear to have acquired any degree of control over the conduct of the business.

The same goes for the numbers' random-turning-wheel (lottery)<sup>3</sup>. The difference is that numbers is a mass market, characterized by large numbers of customers making little "purchases" with little seasonal variation in the intensity of demand or product demanded. Bookmakers serve a relatively small number of customers, each of whom purchases a great deal of the service.

The declining significance of illegal gambling in the activities of organized crime may be the result of two simultaneous shifts: the growth in the availability of competing legal services and the decline of local police autonomy. Corruption of local police no longer provided the comprehensive protection that it did in previous eras.

Loansharking<sup>4</sup> was the second most important activity of organized crime.

In modern times loansharking has not been a major focus for police law enforcement activity. Few investigations target loansharks. Law enforcement officials believe that the use of violence and intimidation are essential and critical operating features for a successful loanshark. It is perceived as totally predatory in intent, employing usurious interest rates and unscrupulous methods to strip borrowers of all their assets and to gain control of their businesses.

There is evidence inconsistent with the assertion that organized crime controls loansharking business. People who have no organized crime connections have sustained long-term and profitable loansharking operations in many segments of the market. Further, it is quite probable that intimidation and threat are not a central part of the collective procedure for many loansharks. Instead, the possible loss of access to the lender for future loans may be the most important incentive for the borrower to make

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<sup>2</sup> Peter Reuter, *op. cit.*, pp. 14-44.

<sup>3</sup> Peter Reuter, *op. cit.*, pp. 45-84.

<sup>4</sup> Peter Reuter, *op. cit.*, pp. 85-108.



reasonably expeditious repayment. Finally it is clear that few loansharks have any interest in obtaining control of their customers' business. The dominant concern is prompt payment of interest and eventual recovery of principal.

These preliminary conclusions and the orthodoxy regarding loansharking are clearly in conflict. One reason for the discrepancy in conclusions is that the view of the police is profoundly affected by the manner in which the loansharking investigations begin. The majority of them are initiated only when a customer of a loanshark makes a formal complaint. Most complaints will come forward only when loansharks are prepared to resort to physical violence.

Of concern is not the interest rate charged but the implied method of the standard collection procedure of the debts. The changes in the financial laws alone were insufficient to eliminate the practice of loansharking, however. The need for a discrete loan for illicit purposes provided one continuing source for undocumented loans.

Success leads not to an increased number of loans, but rather to an increased seizure of loans. This is easily explicable in terms of rising concern with the prospect of arrest as lender's capital and income increase. If the loanshark does not increase the size of his loans, he can lend more money only by increasing the number of his customers. Further, he can increase the number only by lending to people he knows less about. The probability of one of his customers being an informant may rise sharply.

Loansharks create a distribution system comparable in essence to those that exist in the heroin or cocaine trade. Within that system the loansharks with greater capital lend to others with less. The character of the borrower helps determine the interest rate charged. Many loansharks have shown great reluctance to make use of violence or to have recourse to explicit threats. Violence is, in most cases, a very late stage of the collective process. Harassment is the most common first stage.

There are two reasons due to which loansharking is considered to be a more serious social problem than simply its role to be the source of income for criminal entrepreneurs. One is the use of violence in collection. The other is the assumption that loans are used by organized crime to take over legitimate businesses. First, it is considered that no one can become a loanshark without receiving permission from and paying tribute to the Mafia. Borrowers are simply less likely to attempt to defraud the lender if he is able to provide evidence of association with a group with strong reputation for violence. The probability that a borrower will make a maximum repayment effort is closely related to the fear that the lender is capable of arousing in him. A Mafia member will arouse the maximum fear and thus will generate the greatest effort to seek out the sources of funds to repay the loan.

The roles of both violence and intimidation are much smaller than the official accounts would suggest. The ties between the borrower and the lender in many segments of the market are sufficiently close that there is little need for recourse to violence and even to threats. Those who borrow from a loanshark know that they are likely to have future need for similar loans and it is not a minor matter to secure such loans at short notice. This alone may be enough to lead most borrowers to reasonably prompt repayment.

Changing the perspective to a certain extent, the question of interest is how illegality changes the organization of a market. Significant operational consequences of product illegality for participants in the trade are as follows:

- a) Contracts are not enforceable in the court of law
- b) The assets of the illegal operations may be seized at any time that law enforcement agencies identify the operations and the associated assets
- c) All participants are subject to the risk of arrest and imprisonment.

The threat of police intervention, either to seize assets or to imprison participants, and the lack of court-enforceable contracts is likely to lead to the formation of small, localized enterprises that are not vertically integrated and relatively ephemeral as to their existence. There are a few such situations need to be discussed.

In order to assure protection against seizing and / or arresting there is a need to control the flow of information about the participation in the illegal activity. Each participant must structure his activities, particularly those involving other participants, so as to assure that the risk of exposure about participation is kept to a minimum. Employees present a major threat to the entrepreneur, having the most detailed knowledge concerning his participation, *i.e.* they are effective witnesses about past dealings and informants for the police about the future dealings. The entrepreneur needs to structure the relationship with them so as to reduce the amount of information available concerning his participation and to ensure that they have minimum incentive to inform the police against him. Money and fear are the dominant strategic variables for ensuring loyal performance. Illegal enterprises seem to be quite unintegrated, because of lack of stability of enterprises and relationships in the illegal market.

Final customers are a significant threat to the illegal entrepreneur. They are many in number, have small loyalty to the enterprise and take few precautions against police surveillance. The customer is the starting point of most investigations against illegal enterprises. The entrepreneur may use two strategies to affect the customer-based threats to the enterprise. He can seek to fragment the dealings away from the rest of the enterprise. Such dispersion is costly and will grow with the scale of the enterprise, thus reducing the potential advantage cost of a larger illegal activity. On the other hand, the entrepreneur can try to use his reputation to intimidate the customers to ensure their reluctance to provide information to the police and their acting cautiously in dealings with the enterprise. A significant consequence of the entrepreneur's necessary caution in dealings with final customers is the loss of enterprise specific reputation. Simply, an illegal enterprise cannot effectively advertise in order to create loyalty in its customers. Advertising provides information to law enforcement agencies therefore it is repudiated.

The second situation is where the illegal enterprise cannot present audited books. Minimizing the extent of the recordkeeping is aiming to reduce the evidence available to law enforcement and is impossible to obtain usable verification by a reputable third party. Auditing firms would risk their entire reputational asset if they audited the record of illegal enterprises. Another consequence of the fact that there are no audible available books is the fact that a borrower with positive information about his performance cannot credibly communicate it to the lender. Those entrepreneurs who have small likelihood of arrest and are good managers cannot provide evidence to convince lenders about this. The lenders may assign all borrowers to a class risk for lack of such information. The better ones are unwilling to pay the class risk rate (higher) and decide not to borrow. Without smoothly working capital markets, the growth must be internally financed. The enterprise can grow only by financing that growth out of profits, which turns out to be a problem in most cases.

Another case refers to the fact that the lender cannot obtain collateral (guarantees) without withdrawing it from the use of the borrower. The lender cannot maintain effective control of the asset while leaving it with the borrower for its continued use. The lender cannot effectively monitor the disposition of the collateral without being involved in the management of the enterprise. The loan is to the individual entrepreneur

and not to the enterprise. This is the consequence of the fact that the enterprise has no certain existence independent of the entrepreneur. His death or incarceration will deprive the creditor of the ability to collect the loan. All this suggests that illegal activities lack the durability possessed by legal entities. The departure of the entrepreneur is likely to lead to the fact that the enterprise itself may be regarded by the market actors as terminated. This will affect the investment behaviour of the entrepreneur since he will be able to reap returns from investments in illegal enterprise only during the period he anticipates being in charge of it.

An additional restriction derives from that the illegal enterprise is expected to be only local in scope and not to include branches in remote locations. Perhaps the most significant reason is the difficulty of monitoring distant agent performance. Another factor inhibiting the growth of an illegal enterprise with more than metropolitan scope is the hazard associated with the transportation (expose agents to forfeiture by putting them together with a large amount of prohibited goods) and communication (telephones are notoriously insecure) to distant locations.

Generally speaking, the literature identifies in case of legal markets the incentive for conglomeration as the failure of external capital markets to allocate funds efficiently among enterprises. Given the failure of external capital markets for illegal enterprises, there would seem to be a considerable motivation for the growth of illegal markets conglomerates. Conglomeration would increase the exposure of illegal entrepreneur to informants and law enforcement efforts. Pure conglomeration, diversification into unrelated product lines, seems not to occur in the illegal market.

#### 4. Conclusions

For this reasons, illegal markets tend to be populated with localized, fragmented, ephemeral, undiversified enterprises. It is assumed that illegal markets are not characterized by monopoly control. The market may be oligopolistic or perfectly competitive. The orthodoxy is weakly based. Evidence shows that illegal markets are not monopolized or centrally controlled, *i.e.* there is no cartel domination.

The combination of localized, unitary law enforcement and two particular markets (liquor during Prohibition and gambling) led to centrally controlled illegal markets that were highly significant to organized crime. The mistake was to assume that there were general characteristics of organized crime rather than a particular historical experience. Statements made before the commission of investigators, about the significance of illegal gambling and the role of the mafia in it, have been treated as timeless truths rather than descriptions of social realities that are the product of particular influences in time and place.

Mafia may be a paper tiger. Instead of talking about the existence of hierarchy-based and well-organized crime groups that form the cliché image of organized crime, it would be more appropriate to talk about disorganized groups that carry out their activities in the underworld. A vast network of such groups is what remains after a realistic analysis of organized crime from an economic perspective.

Peter Reuter's approach demonstrates that there is a certain incompatibility between the forces that dominate the economic mechanisms of the market and the ability of some groups to come together into entities able to monopolistically control the illegal market.

This is an issue upon which legal experts will still have to reflect.

# Organized Crime in the Set of Serial Crimes and the Necessity of Crime Analysis

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## Abstract:

*Action against organized criminal groups for any investigating authority in states does not mean an easy task. On one hand the distribution of tasks can be challenging, on the other hand, to conspiratorial under hypothecation hierarchical relationship is characterized by the perpetrators of circles.*

*In my study, I would like to raise attention to the series of organized manner and for the importance of crime analysis. In addition to this I would like to clarify the related concepts, analysis methods and techniques and get insight to the needs of sin.*

*Of course I had this discussion topic framework published by limiting itself, which for this reason can not fire the goal of the extensive detail.*

*The offending line in each case is characterized by more or less the degree of organization. The presence of organized crime result in serious damages to the subjective sense of security of the society.*

**Keywords:** *organized crime, crime analysis, series crimes.*

## 1. Opening

The offense had organized forms of explosive issues in the past. Moreover, our present is characterized by prostitution, drugs and motor vehicular crimes, just to mention a few

The commission is based on the sharing of roles, which in itself makes the operation well organized and more efficient, because everyone can do whatever is the best in during the well planned implementation. However, activity remains at the same level and is not absolutely necessary for someone who is doing a same importance activity level like many others and for activities on the upper level. This way they are independent and no reliability needed for others. Different workflow coordination and controlling shows a similarity mark which is well-kept for example in a legally operating long profitable company. The difference between illegal or violent actions, or in the hierarchy can be only measured in loyalty. Occasionally, so that the "criminal head" is not known to the "executing soldiers" and the level „managers”. The principle wants to know as little as possible, which will gain importance when during the interrogation the achme, you can not even tell the offender is eligible dependent, though they'd have the skill involved in it.

One of the main characteristics of organized crime circles series is to commit crime regularly. Maintaining a steady income to make the organization to function is indispensable, but also manifests itself in continues expansion.

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It is necessary for the implementation of the detection and investigation of the highest degree of professionalism, proceed to the investigating authorities, because only in this way may be possible to complete a series of committing the detection of crime series interrupt and the proof is needed, and the purchase of used legality of detention of evidence.

Malfunctions of the dual approach statistics, crime has elucidated when similar types of crimes are attempting to merge, reducing inefficient detection indicators.

It is natural that when a series of crime is detected, similar crime committers will be the focus of the investigation.

The series of crime must be able to recognize the characteristics of committing the conclusions.

Series of offense are generally characterized by an open investigation and the operative investigation going on in parallel.

Investigator and the operational case-owner keep in regular contact with each other and exchange information during the investigation.

The operational investigations generated information obtained directly use the open investigation, but in accordance with the rules of conspiracy, may provide guidance so that may direct your attention to the right direction.

## 2. Serial crimes

One very important area for the fight between the delinquency and the criminal investigation is the recognition and locate subject of series crimes. Improving detection indicators, reduction of losses, increase recoveries require offensive explore from the law enforcement organizations.

On the serial crime, such as forensic concept - taking into account the experience of the past few years - we have heard more and more frequently in everyday life and meet it in the investigative work.

- The concept of serial committal: „It is an analogous, malicious act repeated offenses, which combines the motivation and the general purpose unit, as well as the close inter-relationship.”<sup>1</sup>

- Subjective: The person who performing the various investigation / solve activities, investigative, analytical, scout, who is involved in the investigation.

- Object: The information, news, and all the data that we need to analyse in our work.

- Goal: To make more effective the investigation of serial actions, recognize them, intermit them, order to explore and impeach the perpetrators circles.

- Result: The work carried out through versions, from the likely to the certainty of exploration objective truth.

- Theoretical base: Through the analysis, evaluation process is characterized by the theoretical basis of purpose limitation. The available data is analyzed on the basis of part-whole relationship made the right conclusions from the information fact occasion.

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• Endre Barta: A sorozat betörések felderítésének, bizonyításának elmélete és gyakorlata / Endre Barta: Briefing and verification of serial burglary's theory and practise (Rejtjel publisher 2001.)

### 3. The necessity of analysis and evaluation, its techniques, methods in crime analysis

- The concept of crime analysis: "A systematic, targeted and coordinated activities of crime analysis is the relationship between the criminal and other potentially relevant data that is criminally relevant information to identified, describe and evaluated."<sup>2</sup>

- Goal: "the possible organization of law enforcement work in the most orderly, meaningful information extraction and data set collected from various sources on the basis of preparation of these decisions."<sup>3</sup>

The first step in crime analysis is upon receipt of the first investigative documents, when the investigator of the case reads these documents, study them and sort them.

The first impression and thoughts of the case will give assistance to set up the alpha version of the case.

- The analysis and evaluation of a serial committing will be of significance when confronted with the investigating authorities that have proliferated in the jurisdiction of the similarity index signs of offending. In this case, we can conclude with the offending organization, the identity of the offenders.

- The authority will draw a previous offender mapping for conclusion, due to the targeted group have or did not have the opportunity to commit the crime. For example: they are not in prison for their former crimes.

- Though the analysis of the specific case or investigation is clearly necessary to analyse and evaluate the data and information which were collected before.

During the exploration, the series of acts carried out to determine the nature of the crime analysis and evaluation work permits that were previously implemented - possible links between crimes remained undetected and explore, and the other to become the same offense as potential offenders.

Analysis-evaluation and analysis of crime is in a strong connection. Collected information during the analysis is the most important because it will help us to investigate the case and to make the right decisions.

It is important to note that the currently available methods and equipment, computer programs, crime analysis is not a substitute for professional intuitive.

The analysis and evaluation work is the most effective when the investigator, who has knowledge of the case work on the case. So that it can be realized that the available data only includes in the case in terms of the relevant information and can be separated from the work of his colleagues.

The only element of the incoming information, non rejected the initial phase of the investigation, because if it gives appearance of insignificance, subsequently weighted to get a role in the future.

After any of the offenses committed during the investigation launched its graphical illustration of significantly facilitate transparency and establish the nature of the series, as well as the development of a variety of assumptions. Currently available software such as Netsaru Relationship Diagram is said to be relatively easy to visualize a

<sup>2</sup> 13/2001. (X. 2.) ORFK utasítás a Magyar Köztársaság Rendőrsége Bűnelemzési Szabályzatának kiadásáról (II. fejezet, 1 cím 5.) / 13/2001. (X.2.) National Police of the Republic of Hungary manualanalysis of expenditure Rules ( Chapter II, Title 5, 1 ).

<sup>3</sup> 13/2001. (X. 2.) ORFK utasítás a Magyar Köztársaság Rendőrsége Bűnelemzési Szabályzatának kiadásáról (II. fejezet, 1 cím 6.) / 13/2001 (X.2.) National Police of the Republic of Hungary manualanalysis of expenditure Rules ( Chapter II, Title 1, 6 ).

criminal offense, whether in space or time, or even the "actors" in respect. Every detail of a committed crime can be easily demonstrated.

The charting techniques, tools and methods:

- Overview table (a table in excel recorded all data relating to the offense, so the location, the time, the data of victims, their modus operandi, damages designation, etc.).
- Relationship Diagram (best way to be prepared by the TIAR system diagram that explains how, in the context of the particular person that what matters, who was related to, what type of vehicle used, and what was the status of the process)
- Time graph (the date of the crimes committed are recorded in chronological order)
- Event Figure (modus operandi, for each offense record)
- Plot Figure (Display the completed crime, which should be made in expanding the relationship diagram)
- Map chart (often there is a need to customize the column, or other diagrams in place, such as display related data can be combined to a specific geographic area. Excellent opportunities can be seen with EuroOffice chart Map Maker program, which could and by uploading the correct data can be represented graphically related to the crime data)
- Flow Chart (a flow chart is a chart that lets you set up the versions, and related tasks can be displayed graphically)

If all the vital information of the investigation / exploration can be displayed and shown in chronological order it will give us a great help in the further exploration of the case.

Expediency on comparative table:

- The place of offense
- The time of the offense
- The way the offense
- The means of committing
- The scope of offense
- The amount and nature of the damage
- The range of personal and tangible proofs
- Information on the victim/victims
- Information on offenders
- On-site movement of the offender/offenders, job sharing

Preparation of the above table - for an extensive serial organization crime - it may take a relatively long time, but in the interests of effective detection is extremely useful as a whole can be seen, which are the tasks that are yet to be implemented. In many cases, the same "case-owner" should be in the hands of more and sometimes even offending investigation.

As the general expectations of each investigation is needed to produce work in progress, so the only case where the concentration of said table processing can be of assistance again.

Preparation of the table is in itself a form of analysis and evaluation work, which is the initial phase of the crime analysis.

#### **Operational crime analysis**

„The operational crime analysis give information to set the short-term, often daily realization purposes.”<sup>4</sup>

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<sup>4</sup> Kunos Imre r. ezredes, Bűnelemzés (tananyag a bűnelemző tanfolyam hallgatóinak számára) Budapest. 1997. (kézirat) / Imre Kunos r. Colonel, Crime Analysis ( sin analyst for students of course) Budapest, 1997. (manuscript).

The purpose is to produce productive status with gain worthwhile datas which vital from the manner in dispute to get the recon goals.

The methods of operational crime analysis:

- crime data
- details of the case
- analysis of the criminal information generated during data acquisition.

The forms of operational crime analysis:

- case analysis
- comparative case analysis
- perpetrators of group analysis
- specific profile analysis
- investigations analysis.

- **Case analysis:** The facts in acts of cognition and processes that determine the offense.

„The result of the analysis time, space, events, activities, personal contact set is obtained, which provides an opportunity to get to know the historical facts, exploring the contradictions in the news from different sources.”<sup>5</sup>

During case examination the available information can be used freely.

During the analysis we will try to do the following:

- pictorially displaying all available information,
- the relationship between the datas should recorded,
- clarify the contradictions,
- provide assistance in the preparation of certain investigative actions (eg.: interrogations),
  - expose flaws in the investigation,
  - picture of the current status of the investigation.

To get all the details of a more complex case, it should be represented pictorially. We should be able to set up a timeline to outline each participant involved in the case of the plot.

- **Comparative case-study:** comparative analysis of the characteristics of a series of cases involving their natural habits, using the following analytical methods:

- Comparison of human and material means of proof,
- Comparison of expert opinions,
- Implementation of process analysis.

This form of analysis (analysis of the offenses set forth specific identification of units) is looking for an answer to those that can be implemented in some events, which are the same culprit or culprits have been committed, and so a series of fit. Establishment of the serial nature and testing of the serial significance of crimes is that the perpetrator/penetrators and plot/plots can help to detect more possibilities if the examination of cases are widely performed rather than focusing our attention to other cases too.

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<sup>5</sup> Kunos Imre r. ezredes, Bűnelemzés (tananyag a bűnelemző tanfolyam hallgatóinak számára) Budapest. 1997. (kézirat) / Imre Kunos r. Colonel, Crime Analysis ( sin analyst curriculum for students of course) Budapest 1997. (manuscript).



The data that were studied widely carries more information about the committers. When the crime serie is detected or just the feature of it suspected a comparative case-study should be done immediately.

- Finding out yet undetected crimes committed by the already known offenders
- The data preparation for the implementation of procedural acts.

Comparative case-study designed to be a recognizable relationship between the crime data from the same culprit/culprits.

During the analysis we can get lots of data that are essential for a properly prepared investigative acts (questioning, house searches) implementation and provide any information to capture previously unknown offender.

- **Group analysis of perpetrators:**

The connection diagram is a precondition for the creation, its essential part of it.

According to the information available to us, a diagram can be drawn between the members of the group and the crime during the analysis of a group a connection.

Goals:

- determine whoever is located in what management level.

accordingly, who are the targeted, who are likely to be successfully used device (such as phone tapping, GPS tracking).

- another objective is to determine who might be the criminal group known as the "weak links" (human intelligence to promote in order to search for collaborators).

- map the organization's financial situation (or intelligence) in goods and cash-flow, the winding-up order (asset recovery).

- define the scope of the information available, as well as those which are necessary to obtain.

Preparation of the discovery to promote relationship diagram (drawing) often - even months - under protracted complex activity. Highly used in the preparation of the TIAR base. For all this it is important to keep, and more detailed, accurate information on uploading.

- **Specific profile analysis:** during this we will get a hypothetical picture of the scene which includes the followings: sought clues, lesions and stolen items, as well as the reconstruction of the movement of offenders on the spot, the perpetrators of human inferred.

These may be physical characteristics, such as the perpetrators of stamina, body height, but may also refer to the offender's mental properties, such as qualifications, or certain anatomical tickets.

In Hungary profile analysis practically integrated into the framework of a computer program based on a very large database, into which are recorded in general and specific features of the previously detected offenses, which are likely on the basis of information on the perpetrators.

In most cases, only the documents of the investigation are available for the specific profile analysers in any event, so it is essential that all of the information during the site visit, the utmost thoroughness and attention to detail to be recorded.

- **Investigation analysis:** Essentially, an analyst with assistance checks carried out, with the aim of identifying it, whether we have done everything possible to be successful in the investigation of crime detection.

This form of analysis is effective to use in the following cases:

- completion of an analysis, a new direction or impetus for the investigation is faltering.

- information obtained from the fact that the specific devices (such as phone tapping) take any new data that can advance the investigation, or it will be completed, because the result is not expected.
- during the investigation if any errors, bad lines are set, or the shortcomings revealed in their chain of logic built.
- the analysis of that investigation concluded that it begins when you are correctly defined the goals to be achieved and the related tasks, and gives an answer that does not need to set up new releases, or other precautions.

#### 4. Relationship between the forms of analysis, the databases and assets of operational purposes of crime analysis

The forms of crime analysis listed below may not be clearly separated from each other. The interoperability between them is the related methods. The strategic use of operational crime analysis findings is not possible without case analysis, specific profile analysis or comparative analysis performed.

The databases and assets of the operational purposes of crime analysis wins judgements by their useage. For e.g.: ANALYST'S NOTEBOOK, VIDOCQ, Polgyon, TOPIC and the KARVALY system. In this study, I will describe the first three, taking into consideration their useage and the availabilities.

#### 5. Analyst's notebook (ANB)

The ANB was developed for software analysing. The programmes of the ANB is used by the EU's secret police forces, but it is also used in Swiss as a risk-analyzing programme in the banking sector.

It is said to be the world's most developed crime analysis programme and can be found in every county plice headquarters. During the useage of the software it can be used to create time graphs, connection graphs and flow graphs which is essential when there is a lot of informatiom available during the investigation of a case, and it is hard to keep in mind every important thing.

The ANB provides a visually rich data-driven analytical environment, but also data storage, analysis tools, charting and distribution options are provided for the analysts.

Main traits of ANB:

- Rich charting and analysis environment
- Dedicated chart data and management
- Fully-ordered data covering search and detection module system
- Integrated data management module
- Advanced data communication simplified

It was successfully used in Hungary during: The Mór case, the pawnshop robbery series, homicide, drug and bomb detection of cases, as well as the multi-county car hacking affairs investigation, as well as in the evaluation of local organized crime.

Advantage of the programme:

- a huge database is available.

Disadvantage of it:

- if we want to have a huge database, we have to enter the dates (although it is a disadvantage of all kind of programmes like this)

## 6. Vidocq system:<sup>6</sup>

The programme is well-known as the development of the Dutch Police Department. It relies a lot on Spanish and American studies.

It supports the processing of huge amount of data and information and their assessments and analysis.

„It support the police strategy, which will focus on the perpetrators of the lateral direction of getting information, besides it focuses on understanding the close behavior of the crime committers.”<sup>7</sup>

Each data and information is processable in the system, taking into account the fact that the most valuable information from the data is supplied by collaborators. In addition, the use of various tools and methods acquired from the secret police departments. Continuous analysis and evaluation work enables accurate identification of criminals.

## 7. Polygon system

Currently, it is based on a police system which deals with operational detection of (secret information collection) the direct link (interactive) system.

Main traits:

- information processing – according to form and content.
- storage of individuals, documents, data and grouping in highlighting the issues that establish stored subsystems.
- receiving and evaluation of traditional and electronic documents.
- if supports the whole data processing of the crime analysis differently apart from the similar programmes
- informations obtained by it in the course of the secret information collection efficiently processable, contexts can be revealed with the occasion of operative explorations made in the country's distant counties even.
- capable of graphically represent the selected image (target, victim or other status) relations of persons, those related to data (objects) assigning such as phone numbers, vehicles, homes.

From the perspective of the crime serial examining the comparative case analysis emphasized. In case of the specific crime investigation units we are looking for an answer to that space and time to show a distinct identity perpetrators of acts of signs and is it based on a series to be adapted.

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<sup>6</sup> Named after the French Eugène-François Vidocq (1775. július 23. –1857. május 11.) legendary underworld figure, and later the French Sûreté Nationale plainclothesdetective agency founder leader. She also that they are privileged who had been forced onto the real theft and was sentenced in legitimate business are often use. Vidocq's first attributed to the use of a number of law enforcement (technical) process, such as: Production of gypsum – footprint, management of personnel files, the use of indoor investigators, or the ballistics testing. Anthropometric methods are still used by the French police.

[https://www.google.hu/?gfe\\_rd=cr&ei=R64rVeisMLGt8wfjQID4Bw&gws\\_rd=ssl#q=eugene+francois+vidocq](https://www.google.hu/?gfe_rd=cr&ei=R64rVeisMLGt8wfjQID4Bw&gws_rd=ssl#q=eugene+francois+vidocq)

<sup>7</sup> Bűnelemzés tananyag és példatár a bűnelemző tanfolyam hallgatóinak számára – Bp. 1997 – Kunos Imre r. ezredes / *Crime and curriculum analysis of examples of crime analyst for the students of course* – Bp. 1997 – Imre Kunos r. Colonel.

Based on the current practice of the most commonly used methods of analysis:

- use of computer analysis software (eg.: Polygon)
- Excel
- manual analysis techniques and logical methods.

## 8. Detection of opportunities of the serial nature

### **Spot inspection**

A series of crime - as a concept -, 2012 C of the Criminal Code Act currently in force, as well as on the Criminal Procedure Act XIX of 1998. law is not determined. The definition of serial of crime originated from criminalistic source. The Criminal Code relates to the conditions for committing serial, but they are known as the provisions on recidivist and the mode of committing the criminal organization, as well as committing to a commercial scale is determined.

Successful completion of the investigation and the evidence is essential for the priority actions within the spot inspection. The deal is a professional spot inspection likewise the implementation of the outcome of an investigation fuse but serve also to provide a means for recording the evidence.

It is important to note that spot inspection has a great importance to the serial nature to be traceable.

### **Analysing call list**

Whether we are talking about an open investigation or confidential information, the analysis of the call list has a great importance. The mostly prominent use of method is the field of mobile dealerships.

The criminal investigation of the serial nature of determining - after the spot inspection data - information obtainable from most of the marketing organization committed to the kind of pitfalls perpetrators site

## 9. Process of crime analysis

The crime analysis is not a distinct activity in itself, but a must-see action for law enforcement. The data gathering during the investigation, information processing is an important part of the analysis process. The analysis is a set of stored improperly execution so unsystematic information without the data is extracted from them so we can optimally utilize.

The spatially and temporally distinct information and those derived from multiple sources is especially true. The analytical work effectively can happen, if available, of the crime, modus operandie, the perpetrators page of the database and the knowledge of the investigative activities carried out to organize and analyze information and data. That is the collection of information is carried out in a series of guided activities which will be used to achieve a pre-set goal. It is essential that the data are generated in the course of analyst activity is inserted into the existing database. The commander of the investigation has to determine what is necessary to achieve and what methods of analysis direction, and the results are sent to that channel. The results of the analysis largely depends on the expertise of the person performing the analysis as well.

During the crime analysis there are always recorded goals, methods, forms and presentation requirements specified things that are aligned. They generally recurrent, such as strategic analysis.

Experience has shown that the operational crime analysis is particularly important is continuity in the event of a large amount of documents and information set - which meet during investigations against organized crime - not only greatly facilitate our work, but also makes it faster and thus more effective as well it.

Processing of data collected during the collection of information is virtually a scheduled, periodic process that is regularly present itself and returns, until the investigation reaches the destination. The objective is no other than the successful conduct of the prosecution with the result that offenders must be held accountable.

This recurring regular process in itself consists of the following major components:

- targeting (determination of the tasks)
- data collection
- analysis of collected data
- planned evaluation of the collected and analyzed data
- implementation on the basis of the evaluation results presentation
- decision-making

Tasks listed above and in particular organized crime group series of offenses establishing and leading for a successful crime analysis work tasks are the following:

- **targeting (determination of the tasks)**

Facilitating the success of effective law enforcement, productive analysis of the exact and precise, lies with the created specific terms of reference. The methods, techniques, or the field of data analysis involved in the function of the applied targeting.

The effectiveness of strategic analysis therefore requires the target achievement in the time which is available for the designation, as the data and the affected area should be involved in the process. It is also important to clarify how the results should be presented.

It is not enough to determine what image shows the area of competence of organized criminal groups, image viewer, but we also need to know what kind of time and which crimes are trained specifically relates to the discovery.

Determine the nature of the series is only possible if the target is available and accurate knowledge in order to achieve specific stake out.

- **data collection**

The action takes place in the course of which are already available and the process of updating the collection, recording documented form. The analysis was carried out by performing detection, descriptive, fixing activity in which the elements origin, date, case, and the person may enter up sky in terms of location can be identified. During this activity, the case-relevant information collection effort is important.

Source of information can be open or secret, including:

- a variety of computer-based databases,
- recovered generated during the investigation file,
- reports from cooperating with the police persons
- distribution data base stations for telecom operators,
- subject to judicial authorization granted by the secret collection of information,
- extracted from various statistical databases,
- and the news media also reported

A properly prepared for analysis, we can design proposals for the direction of the data collection stage, location, and method regarding the process. However the availability not yet used to identify information sources and provides an opportunity to exploit.

- **analysis of collected data**

Subtasks beginning the analysis of the information available when tested in source credibility check. Necessary to examine the strategic crime analysis in order to achieve the designated goal of sufficient quantity and quality of data availability. Subsequently possible filtering of information, and classification. In operational crime analysis perform the same tasks, but targeted and specific.

In order to explore the organization of the operational crime analysis series of computer records, databases are the basis for the analysis.

This enables you to:

- history research,
- exploration of similarities, similarities
- clarification of the data
- evaluate the relationship

- **planned evaluation of the collected and analyzed data**

The main body of the analytical work, when we are in possession of the data, matching that particular investigation will lead to effective procedure. May be the conclusion that the time and space as a separate crime of committing a group denote a series of activities.

The evaluation of the implementation of:

- the tasking,
- aspect definition,
- survey of the affected area assessment (staffing and organization of round)
- development of the assessment of the situation,
- hypothetical conclusions,
- suggestions for further work

The proper goal-oriented and insightful assessment carried out effective option to make the correct predictions.

- **Implementation on the basis of the evaluation results presentation**

The part of the evaluation process when the report as a crime analyst evaluation report on the findings of the analysis which is based on the target, the method used on the device. Database for identifying the basis for evaluation and the total analysis of the situation. Contains our conclusions a range of controlled and uncontrolled data. This is followed by the conclusions of the draw to propose to the verification tasks to be performed.

Annexes to the crime analyst progress report might include charts, tables, graphs as well.

## 10. Completion

The discussion topic that you want to provide insight into the organization and into committing a series like in the importance of crime analysis. I wanted to briefly describe the crime analysis mode dials, the techniques, the subject of discussion by the framework published by limiting itself, which, as indicated in the introduction, for this reason, you can not fire the goal of the extensive detail.

Carried out by organized criminal acts groups are present in our everyday lives and are characterized by the sequential nature of the offending. The planned activities of law enforcement agencies require coordinated work because of the hierarchical structured organizations mechanism as an auto wrecking machine which is acting in the public's sense of security and destruct the social structure.

The presence of organized crime groups unacceptable and requires all state authorities for collaboration with law enforcement agencies and non-governmental organizations from both partner organizations.

I wanted to draw attention to the difficulty of detection, highlighting that effective action is able to produce if the special liquidation tasks realizing an effective and relevant analytical work precedes and accompanies.

The successful detection in order to achieve the objective of the essential difference kinds of records and adequate knowledge repositories and legal necessity should be obtained from use of data.

The information gained from the analytical work, such as the cell: (cell information) represent a priority but not replace the data available from the side of human realization sources.

In Hungary the series is characterized by an increasing number of offending the organization a multi-level enforcement and the construction hierarchy implemented hypothecation basis.

The dangers inherent in the use of mobile phones are recognized organized crime groups. Therefore the contacts will be replaced by an increasing number of personal meetings which performs the specific action as significantly reduced. Thereby minimizing the risk of being caught when holding the phone. The crime has been committed deliberately leave their homes or traveling for the location of the offense is much further away friends, relatives, relatives of their cell phone as a basis for later may become necessary alibis.

Where the law of open investigation, after the identification of the criminal group in each case is appropriate to initiate a secret collection of information as the efficiency and speed taking into account a lot more power and device used.

My hope is to express my respect to the discussion of the topic goals. I tried to strive for an optimal and clearly readable level.

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# Brief Considerations on the Human Trafficking and Trafficking Minors Delimitation - Forms of Organized Crime

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## **Abstract:**

*The forms of organized crime are numerous, and the attempts of states to provide the means necessary to eradicate this phenomenon requires international cooperation of States in developing uniform regulations. The main objective of transnational and local groups involved in such activities is to obtain financial benefits. Trafficking in persons can be a form of organized crime, and its regulation in the Romanian legislation by Law no. 278/2001 and subsequent special part of the 2009 Criminal Code took account of international recommendations and regulations.*

*This article seeks to analyze and capture the changes made by the new Criminal Code in relation to criminal offenses of trafficking in persons, trafficking in minors and their relation to the crime of proxenetism.*

**Keywords:** *Trafficking in persons, Minors Trafficking, Organized Crime, pandering, financial benefits, exploitation.*

## **1. Introductory notions regarding the regulation in Trafficking in persons and offenses Minors trafficking**

Organized crime is a complex phenomenon which in order to eradicate requires equally complex means of control. Obtaining financial funds by groups of people from committing such offenses presents a gravity that requires the intervention of criminal law. When these crimes affect other people's attributes and present elements of foreign origin, the common efforts of States are required to end these dangerous phenomena.

In this respect, the Romanian Parliament passed the Law no. 565/2002 ratifying the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, additional to the United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of immigrants on land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000<sup>1</sup>, and Law no. 300/2006 ratifying the Council of Europe Convention on Action against Trafficking in Human Beings<sup>2</sup>. Aligning the Romanian legislation to the European legislation is an important step in the fight against human trafficking.

Coordinating the efforts of states to prevent and combat trafficking in persons imposed a uniform rule in this matter, especially given the circumstances in which these

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<sup>1</sup> Published in the Official Monitor no. 813 of 8 November 2002.

<sup>2</sup> Published in the Official Monitor no. 622 of 19 July 2006.



offenses are transnational in nature and involve a transnational group therefore justifies increased protection for victims of these crimes.

The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime defined specific terms which will be considered in the national recriminations of the signatory states. In this regard, the following meanings of the terms<sup>3</sup> have been established:

a) the term trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation by prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;

b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph a) of this article shall be irrelevant where any of the means set forth in subparagraph a) have been used;

c) the recruitment, transportation, transfer, harboring or receipt of a child for exploitation shall be considered trafficking in persons even if they do not attend to any of the means set forth in subparagraph a) of this article;

d) the term child means any person under the age of 18.

Aligning the Romanian legislation to the European legislation is a necessity and an important step in the fight against human trafficking. Noticing the danger of the offenses of trafficked in persons, indifferent of what was the purpose of trafficking - ordering to forced labor or ordering to the provision of sexual services - led the Romanian legislator to criminalize these acts by Law no. 678/2001 on preventing and combating trafficking in persons<sup>4</sup>. Law no. 678/2001 was the main criminal regulation in trafficking matter and contained, in addition to rules in criminalizing acts that constitute offenses and procedural issues related to judicial proceedings, the protection and assistance of victims of trafficking, international cooperation.

Undoubtedly, the magnitude and frequency the phenomenon of trafficking in persons had taken, as well as transnational character this criminal phenomenon often takes have justified the adoption of this normative act that took into account international regulations in the scope of a better coordination and international cooperation.

Therefore, the Law no. 678/2001, the crime of trafficking in persons<sup>5</sup> has acquired a distinctive regulation, taking into account the situations that may lead to aggravating the offense and require harsher sanctions.

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<sup>3</sup> Under the provisions of art. 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>4</sup> Published in the Official Monitor no. 783 of 11 December 2001.

<sup>5</sup> Under the provisions of art. 12 of Law no. 678/2001: "(1) The crime of trafficking the recruitment, transportation, transfer, harboring or receipt of persons by means of threat, violence or other forms of coercion, abduction, fraud or deception, abuse of authority or taking advantage of the person's inability to defend themselves or express their will or by offering, giving, accepting or receiving of payments or benefits to achieve the consent of a person having control over another

On the other hand, the specific situation of victims, the resulting situation of vulnerability or moral dependency or their material dependency required a distinction in the matter of incrimination of such acts. Therefore, taking into account international provisions requiring that in the case of children, the recruitment, transportation, transfer, harboring or receipt of a child for exploitation shall be considered trafficking in persons even if the perpetrator does not use any of the means provided to trafficking in adult persons, the Romanian legislator separately incriminated and more severely sanctioned child trafficking<sup>6</sup>.

The 2009 Criminal Code complies with the definition and general structure of offenses of trafficking in persons and trafficking of minors in Law no. 678/2001, changes in the content of these crimes aiming to eliminate interpretations that could lead to an uneven practice in the matter and also to simplify the text of the law by waiving certain aggravating circumstances provided in the old regulations.

Amendments to the 2009 Criminal Code in this matter demonstrates, once again, the attention and concern of the legislator to ensure the legal and efficient frame to suppress trafficking in persons.

## 2. The criminalization of human trafficking and child trafficking in the 2009 Criminal Code and the innovations in the field.

The offenses of trafficking in persons and trafficking in minors were taken from the special law and included in the special part of the 2009 Criminal Code Title I - Crimes against the person, Chapter VII - Trafficking and exploitation of vulnerable persons

It is no coincidence that the Romanian legislator in 2009 took this option. Trafficking in persons, whether of adults, whether of minors are crimes against the person, concerning their freedom and have in common with other crimes covered in the chapter where the particular situation of victims, that vulnerability, addiction, and purpose of the perpetrator, that of exploiting, from offense to obtain some economic benefit.

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person for the purpose of exploitation of that person, and is punishable by imprisonment from 3 to 10 years and removal of rights. (2) Trafficking committed in one of the following circumstances: a) two or more persons together; b) caused the victim serious harm to bodily integrity or health; c) by a public official in the performance of duties is an offense punishable by imprisonment from 5 years to 15 years and removal of certain rights. (3) If the act resulted in the death or suicide of the victim, the penalty is imprisonment from 15 to 25 years and removal of certain rights. "

<sup>6</sup> Under the provisions of art. 13 of Law no. 678/2001: "(1) The recruitment, transportation, transfer, harboring or receipt of a child, in order to exploit it, constitutes the offense of trafficking in minors and is punishable by imprisonment from five years to 15 years and removal of rights. (2) If the act in para. (1) is committed by means of threat, violence or other forms of coercion, abduction, fraud or deception, abuse of authority or taking advantage of the minor's inability to defend or to express their will or by offering, giving, accepting or receiving of payments or benefits to achieve the consent of a person having authority over the minor, the penalty is imprisonment from 7 to 18 years and prohibition of certain rights. (3) If the deeds provided in par. (1) and (2) are committed under the terms of art. 12 para. (2) or a family member, the punishment is imprisonment from 7 to 18 years and deprivation of rights in cases under par. (1), and imprisonment from 10 years to 20 years and deprivation of certain rights in cases under par. (2). (4) If the acts referred to in this Article resulted in the death or suicide of the victim, the penalty is imprisonment from 15 years to 25 years and removal of certain rights. "

As shown in the specialized literature<sup>7</sup> on legal object, although the crime of trafficking in persons concerns the liberty of a person, it differs from illegal deprivation of liberty or other crimes against freedom, as it constitutes a crime of means to achieve a certain end result of exploiting the victim.

This explains the option of the legislator of grouping in this new chapter entitled "Trafficking and exploitation of vulnerable people", taking into account the social value aggrieved common criminal group provided here, the crimes of traffic in persons and trafficking in minors with crimes such as slavery, submission to forced or compulsory labor, pandering, exploitation of begging, using a minor for purposes of begging, using the services of an exploited person.

The Romanian legislator applied the principle of uniform regulations in the special crimes, crimes grouping crimes by the criterion of the social value which they affect and the result is easy to see, the marginal name of the facts covered in this chapter are suggestive and giving sufficient information on common elements these facts.

Regarding the crime of trafficking in persons<sup>8</sup>, the 2009 Criminal Code defines it as: (1) The recruitment, transportation, transfer, harboring or receipt of a person for the purpose of exploitation, committed:

- a) through coercion, abduction, deception or abuse of authority;
- b) taking advantage of the impossibility to defend or express their will or particularly vulnerable status of that person;
- c) by offering, giving, accepting or receiving money or other benefits in exchange for the consent of a person having authority over that person. "

What emerges from a first comparative analysis of the two measures is that in the constitutive content there are no substantial changes, the only complement in the new regulation, taking into account the situation of the typical action material element is achieved by taking advantage of the impossibility of defending or to express the will or particularly vulnerable status of that person.

The completion was more than necessary because, on one hand, where crime group where trafficking in persons is found is referred to vulnerable people and, on the other hand, in terms of dangerousness process used by the perpetrator equivalence exists between where this act by coercion, abduction, deception or abuse of authority and takes advantage of the situation when unable to defend themselves or express their will or particularly vulnerable status of that person.

Thus, the material element of the crime of trafficking is realised by one or more of the actions alternately provided in the legal text (recruitment, transportation, transfer, harboring or receipt of persons) to be committed by one of the ways certain specified also, alternatively, in incrimination rule (by coercion, abduction, deception or abuse of authority or taking advantage of the impossibility to defend or express their will or particularly vulnerable status of that person, or by offering, giving, accepting or receiving money or other benefits in exchange for the consent of a person having authority over that person).

In the situation in which several actions are performed in regard to the material element, the crime remains unique. Thus, in judicial practice<sup>9</sup> it was decided that the

<sup>7</sup> T. Toader, M.I. Michinici, R. Răducanu, A. Crișu-Ciocântă, S. Rădulețu, M. Dunea, *The New Penal Code. Comments on the articles*, Ed. Hamangiu, Bucharest, 2014, p. 363.

<sup>8</sup> Provided by art. 210 of the 2009 Criminal Code.

<sup>9</sup> High Court of Cassation and Justice, Criminal Section, Decision no. N. 2020/2005 in N. Cristus, *Trafficking in persons, proxenetism, organized crime. Court Practice*, Ed. Hamangiu, Bucharest, 2006, p. 39.

defendant act to recruit a person in the purpose of prostitution followed by obtaining a passport and transportation to another country under the pretext of legal work and then seizing the victim in a hotel room, forcing her to prostitute meets the crime of trafficking in persons, the material element being realized in several ways: the recruitment, transportation and accommodation. The multitude of actions made by the defendant and the diversity of the means employed by him (deception, coercion) will take into account the judicial individualisation of the punishment.

Another constituent element necessary for the existence of the offense refers to the purpose pursued by the perpetrator, which must be the exploitation of the victim. As for the term "exploitation" of a person in criminal law<sup>10</sup> it has been stated that the exploitation of persons means:

- a) submission to the execution of a work or performance of tasks forcibly;
- b) keeping in a state of slavery or other similar deprivation of freedom or servitude;
- c) forced into prostitution, pornographic manifestations in the production and dissemination of pornographic materials or other forms of sexual exploitation;
- d) forced into prostitution;
- e) removal of organs, tissues or cells of human origin, unlawfully.

For the existence of the crime of trafficking it is sufficient to prove that the perpetrator has pursued this goal, the exploitation of the victim in any of the ways mentioned above, it is not necessary to achieve that purpose. If the perpetrator managed to reach the goal, the offense of trafficking will be retained in real competition with the offense constitutes exploitation (if the crime of slavery, servitude to forced or compulsory labor, prostitution, exploitation of begging)<sup>11</sup>.

Even if the trafficking is committed by coercion of the victim it is no question of overlapping criminal offenses committed with the aggravated<sup>12</sup> form of pandering -that the determination of the commencement or continuation of prostitution was made under constraint. If the crime of trafficking, coercion should be used to achieve any material element of the offense of ways - recruitment, transportation, transfer, harboring or receipt of the victim. Unlike in the case of variant aggravated pandering, coercion should be used to determine the commencement or continuation of prostitution.

Regarding the ways of aggravated form of trafficking in persons, the 2009 Criminal Code gave the criminalization of ways in which the offense is committed by two or more persons together, which caused the victim serious harm to bodily integrity or health, or if resulting in the death or suicide of the victim. The only circumstance that attracts aggravation of punishment is the crime of a public officer in the performance of their duties. In this situation, the aggravation of the crime arises from the special quality of the active subject - that of public official - and the offense in the performance of duties which adds protection service of his activity by public officers- as a social value protected in subsidiary by criminalization of the act.

If the act results in serious consequences previously covered one of the worse forms (injury, death of the person), the crime of trafficking in persons will enter the contest, as appropriate, with the crime of bodily harm or offense of battery injury causing death.

<sup>10</sup> According to the provisions of art. 182 Penal Code.

<sup>11</sup> Dobrinioiu V., N. Neagu, *Criminal Law. Special Part*, Ed. Universul Juridic, Bucharest, 2014, p. 120.

<sup>12</sup> Provided by the provisions of art. 213 para. 2 Penal Code.

As regards the waiver of aggravating circumstances of the offense of two or more people the option legislature is explained by the fact that the same was applied for other offenses showed this fact as a special circumstance of aggravation, some of them offenses against personal liberty (*eg.*, the crime of illegal deprivation of liberty). For a uniform rule, the legislature has waived this provision, considering that worsening penalty is justified only if the offense committed by three or more people together in this situation operating general application circumstance<sup>13</sup>.

If the offense of trafficking if three or more persons act together and in a coordinated manner in order to obtain material benefit from trafficking in persons, we are in the presence of an organized criminal group<sup>14</sup>. In this situation represents an offense<sup>15</sup> any initiation or constitution of an organized criminal group, or joining or supporting in any way such a group and commit trafficking following the establishment of this group will enter the contest with the special law offense.

The legislator has criminalized separately when the victim is a minor trafficking. The recruitment, transportation, transfer, harboring or receipt of a child, its exploitation is an offense of trafficking in minors<sup>16</sup>.

The first point that emerges is that, in terms of marginal name data traffic offenses, to highlight the difference between the two, the legislator should make explicit reference to the quality of passive subject of the crime provided by art. 210 Criminal Code. Stating that it is an adult and thus delimiting legally correct terminology and the two offenses.

A second observation is obvious that criminalize there whenever, exploitation, held recruitment, transportation, transfer, harboring or receipt of a child, regardless of the means used by the perpetrator. Use one of the means expressly provided by art. 210 para. One prints a more serious offense, attracting applying the aggravating circumstance provided for by art. 211 para. 2 Criminal Code.

If the legislature considered it serious and criminal act of criminality requires that traffic a person - adult or minor - the purpose of exploitation symmetrically same conclusion should apply the same solution and our services that take advantage of an exploited person. Therefore, if a person uses the services of an exploited person, knowing that it is a victim of trafficking or juvenile shall be for a distinct criminal offense the use of services regulated by an exploited person<sup>17</sup>. The phenomenon of trafficking require particular attention so that all the consequences that can be prevented and combated generate. As shown in the literature<sup>18</sup> that offer those who traffic people incur criminal liability, as must happen in our seeking and benefiting from the exploitation of another person, because the demand attracts offer.

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<sup>13</sup> According to the provisions of art. 7 para 1 of the Law no. 39/2003 .

<sup>14</sup> Under the provisions of art. 2 letter a) of Law no. 39/2003 on preventing and combating organized crime by organized group means "structured group of three or more persons, existing for a period and act in a coordinated manner in order to commit one or more serious crimes to obtain direct or indirectly, a financial or other material benefit; not organized criminal group group formed occasionally in order to immediately committing one or more crimes and which has no continuity or a structure or roles for its members in the group. "

<sup>15</sup> According to the provisions of art. 7 para. 1 of the Law no. 39/2003.

<sup>16</sup> Provided by the provisions of art. 211 Penal Code.

<sup>17</sup> Provided by the provisions of art. 216 Penal Code.

<sup>18</sup> Sumanaru, *Prevention and combating of Trafficking in persons*, Journal of Eastern-European Criminal Law no. 1/2014, Ed. Universul Juridic, p. 142.

### 3. Conclusions

After analyzing criminal regulations relating to trafficking in persons can be seen that although only in 2001 were laid and criminal offending facets of this phenomenon, by Law no. 678/2001, however, Romanian law has attempted to align with international regulations and recommendations.

It required a uniform rule, whereas those facts that contained extraneous elements have a much better chance of success if it is based on international cooperation and coordination of efforts of states in the fight against crime.

The new Penal Code has tried to ensure clarity of criminality, to eliminate imperfections of formulating, so as to reduce uneven practice solutions. From a legal standpoint, there are means to prevent and combat this phenomenon, but these means requires a correct and efficient application.

# Powers Vested with the Public Prosecutor in Criminal Proceedings at the First Instance Court Pursuant to the Effective Laws of Ukraine

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## **Abstract:**

*The present article contains research on legal status of the public prosecutor in criminal proceedings at the first instance court pursuant to the Code of Criminal Procedure of Ukraine. In particular, the author has analysed the scope of fundamental powers vested with the public prosecutor in criminal proceedings at the first instance court, specifically: supporting the charges brought by the public prosecution before the court, changing charges, bringing supplemental charges, initiating proceedings against a legal entity and refusal to support the charges brought by the public prosecution.*

**Keywords:** *Code of Criminal Procedure of Ukraine, public prosecutor, court proceedings, prosecution on behalf of the state, bill of indictment.*

## **1. Introduction**

An important step towards harmonization of the Ukrainian laws pursuant to the international norms and standards consisted in approval in 2012 of a new Code of Criminal Procedure of Ukraine; the norms of such new Code implement fundamental ideas and values in the field of securing human rights and freedoms, fix the principles of supremacy of the law and are aimed at renovation of a democratic state. In this Code the law-maker joined the positive Ukrainian experience together with the experience of European countries and countries of Anglo-Saxon legal family; the law-maker also proposed such model of criminal proceedings which complies, to the maximum extent, with the international standards in the field of criminal proceedings, practice of the European Court of Human Rights and regulations of the Constitution of Ukraine. Due to the above, the provisions set out in the Code of Criminal Procedure of Ukraine were highly appreciated by the international organizations and experts, who emphasized their compliance with the existing standards and progressiveness of contents thereof, even in comparison with similar codes of numerous European countries. Nowadays, Ukraine faces the most complicated stage of reforms in the criminal justice: from legislative initiatives towards implementation of elaborated ideas. The aforesaid challenging activities require consolidation of efforts by all relevant bodies, conducting numerous specialized scientific researches as well as active support and understanding on the part of the public.

The Code of Criminal Procedure of Ukraine contains numerous novelties that changed not only the relevant law-enforcement practice of courts, prosecutor's office and pre-trial bodies, but also theoretical fundamentals of such activities.

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As to the implemented innovations, it should be pointed out that the following innovations are of the essence: those pertaining to the public prosecutor's status in the court proceedings and his powers in the court proceedings conducted at the first instance court, specifically: powers regarding supporting the charges brought by the prosecution on behalf of the state, changing the charges already brought or bringing supplemental ones, initiating proceedings against a legal entity and refusal to support the charges brought by the public prosecution.

## 2. The public prosecutor's supporting the charges brought by the prosecution on behalf of the state before court

The public prosecutor's supporting the charges brought by the prosecution on behalf of the state before the court, is one of the constitutional fundamentals for administration of justice in Ukraine (section 5 (part 3) of Article 129 of the Constitution of Ukraine)<sup>1</sup> and, concurrently, is a duty in criminal proceedings, carried out by the public prosecutor as a core participant of prosecution in court proceedings (section 2 of Article 121 of the Constitution, part 2 of Article 36 of the Code of Criminal Procedure of Ukraine<sup>2</sup>). Such duty is also fixed by Article 22 of the Law of Ukraine "On the Public Prosecution Service", whereby the public prosecutor shall support the charges brought by the prosecution on behalf of the state in criminal proceedings by exercising the rights, and performing the duties, stipulated by the Code of Criminal Procedure of Ukraine.<sup>3</sup>

The participants in the process pertaining to supporting the charges brought by the prosecution on behalf of the state are listed here below: Prosecutor General of Ukraine; First Deputy Prosecutor General of Ukraine; Deputy Prosecutor General of Ukraine; Deputy Prosecutor General of Ukraine – Chief Military Procurator; Deputy Prosecutor General of Ukraine – Head of the Specialized Anti-Corruption Prosecutor's Office; head of the department of the Office of the Prosecutor General of Ukraine; deputy head of the department of the Office of the Prosecutor General of Ukraine; head of the regional public prosecutor's office; first deputy head of the regional public prosecutor's office; deputy head of the regional public prosecutor's office; deputy head of the department of the regional public prosecutor's office; public prosecutor of the regional public prosecutor's office; head of the local public prosecutor's office; first deputy head of the local public prosecutor's office; deputy head of the local public prosecutor's office; head of the department of the local public prosecutor's office; deputy head of the department of the local public prosecutor's office; public prosecutor of the local public prosecutor's office.

The public prosecutor's participation in all criminal proceedings is mandatory, except for the instances stipulated by the Code of Criminal Procedure of Ukraine. In particular, such instances include: 1) criminal proceedings initiated by a private person,

<sup>1</sup> Constitution of Ukraine: Verkhovna Rada of Ukraine, Law dated 28.06.1996. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 1996, № 30.

<sup>2</sup> Code of Criminal Procedure of Ukraine: Verkhovna Rada of Ukraine, Law dated 13.04.2012. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2013, № 9-10, № 11-12, № 13.

<sup>3</sup> On the Public Prosecution Service: Verkhovna Rada of Ukraine, Law dated 14.10.2014. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2015, № 2-3.



wherein a victim and his/her attorney act as prosecution (part 4 of Article 26, Section 4 (part 3) of Article 56, Article 477 of the Code of Criminal Procedure of Ukraine) and 2) the public prosecutor's refusal to support the charges brought by the public prosecution on behalf of the state (part I of Article 264 of the Code of Criminal Procedure of Ukraine) (if the public prosecutor refuses to support the charges, then the right to support the charges brought by the public prosecution, shall pass to the victim. The proceedings wherein the victim agreed to support the charges brought by the prosecution before court shall acquire the status of the proceedings initiated by a private person and shall be conducted in accordance with the procedure applicable for charges brought by a private person).

Pursuant to the procedural laws of Ukraine, supporting the charges brought by the prosecution on behalf of the state shall mean carrying out procedural activities by the public prosecutor, aimed at producing enough evidence for the court in order to support the charges, which leads to holding the person who committed the criminal offence, liable under the criminal laws. The charges to be brought by the prosecution on behalf of the state shall be set out by the investigator in the bill of indictment. In turn, the public prosecutor shall have the right either to approve the bill of indictment, or if he fails to agree with the bill of indictment prepared by the investigator, then the public prosecutor shall compile a new bill of indictment pursuant to part 1 of Article 291 of the Code of Criminal Procedure of Ukraine.

Acting as the prosecutor on behalf of the state, participating in adversary criminal proceedings, the public prosecutor shall apply during such proceedings all available procedural means for proving the accused party's guilt. The public prosecutor must take an active part in establishing the circumstances of criminal offence and their examination on the basis of relevant evidence, be objective and unbiased in assessing the same according to the criteria of relevance, admissibility and credibility.<sup>4</sup> Being a party engaged in the process of tendering an averment, the public prosecutor shall have the right to provide evidence to court, participate in examination of such evidence, submit arguments in favour of the evidence provided by him, counter arguments provided by the defense, file pleas seeking new evidence in the case, and make assessment of the collected evidence etc.

When supporting the charges brought by the prosecution on behalf of the state before court, the public prosecutor shall enjoy procedural autonomy and independence. No party shall be allowed to interfere with the public prosecutor's activities, including the public prosecutor of a higher rank and even the official who assigned for the public prosecutor such duty of supporting the charges brought by the prosecution on behalf of the state in specific criminal proceedings. The public prosecutor shall elect his own position in the proceedings brought before the court, based on his own belief and shall be free in making his own conclusions and motions before the court in connection with assessment of the evidence, provability of charges, nature of the offence, and application of specific punishment with respect to the defendant, etc. The public prosecutor, along with other participants of the criminal proceedings shall be subordinate only to the judge presiding in the proceedings.

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<sup>4</sup> On organization of the public prosecutors in criminal proceedings: Order of the Prosecutor General, dated 19.12.2012.

### 3. Powers vested with the public prosecutor in connection with changing the charges during criminal proceedings at the first instance court

The Code of Criminal Procedure of Ukraine in its Article 337 “Determination of scope of trial” determines that “a trial is conducted only with respect to the person against whom charges were brought and only within the scope of charges brought pursuant to the bill of indictment, except for the instances stipulated by the Code of Criminal Procedure”.

Correspondingly, the court is not entitled: to conduct a trial with respect to any other persons, no matter whether they are involved in the current proceedings, via examination and assessment of evidence of their guilt or lack thereof in commitment of the crime inculcated to the criminal defendant or commitment of another crime; to make the proceedings-related decisions with respect to any other persons, whereby the persons whose criminal proceedings were closed for any reasons or were severed into other proceedings, are included into the current proceedings. Based on results of examination, the court is not entitled to change charges, at its own initiative, and pursuant to such changed charges to deliver a judgment which would worsen the criminal defendant’s position and against which such criminal defendant did not defend in court.

The Code of Criminal Procedure of Ukraine vests the right to change the scope of trial in criminal proceedings, with the prosecutor. Thus, pursuant to Article 338 of the Code: for the purpose of changing legal qualification and (or) volume of charges, the public prosecutor is entitled to change charges towards both less and more severe ones. According to the Code, establishment of new factual circumstances relating to the criminal offence of which a person is accused and the prosecutor’s convincement in the necessity to change charges upon examination of evidence in court serves as grounds for change of charges by the public prosecutor in court.

The laws provide the public prosecutor with the possibility to change (during examination) the charges brought against the person within the event of crime inculcated to such person in connection with all constituent elements of such crime: 1) event of crime, its objective aspects (in terms of nature of criminal act, its stage, partnership in crime, time, place, method, circumstances and environment, nature and volume of criminal consequences; 2) as to subjective aspects of crime (in terms of forms of guilt, motives, goal, evil intents, etc.); 3) as to legally important elements of the subject of crime (in terms of age, degree of legal capacity, special (ad hoc) elements of subject; 4) as to elements of the object of crime (elements of legal entities or individuals injured as a result of commitment of crime, rights, freedoms, interests and other benefits of the victim, elements of target of crime).

A prosecutor’s plea seeking change of charges may be filed at any stage of the trial up to the stage when judges withdraw to the conference room. A number of changes that may be introduced by the public prosecutor on behalf of the state are not limited by the effective laws.

If the public prosecutor arrives at the conclusion that charges need to be changed, he shall compile the bill of indictment, in which such changed charges are stated and grounds behind such decision made by the public prosecutor are set out. Such new bill of indictment containing changed charges shall be filed by the public prosecutor (save the Prosecutor General of Ukraine) with the public prosecutor of a higher rank. If the

public prosecutor of a higher rank fails to approve the bill of indictment containing changed charges, he shall deny the participation of the public prosecutor who initiated such changes, and shall be able to independently participate in such proceedings in the capacity of the public prosecutor, or shall assign another public prosecutor to participate in the aforesaid proceedings.

In order to safeguard the accused party's rights, the court shall explain to the accused party that it is to defend in court against new charges and shall postpone the respective trial for no less than 7 days so that the accused party and its attorney could prepare for defense against new charges. This period of time may be either shortened, or prolonged subject to the plea from the defense party. The compiled bill of indictment whereby the charges were changed, shall thereupon determine the scope of trial in criminal proceedings.

If the bill of indictment containing the changed charges includes the issue of application of the law of Ukraine regarding criminal liability for less severe offence or reduction of volume of charges, then the injured party shall be vested with the right to press the charges in their initial volume. If the complainant decides to exercise such right, during the prolonged trial she/he shall be defending from both charges and court shall deliver a judgment based on all established circumstances and their verification on the basis of respective evidence.

Only when the public prosecutor failed to exercise its right to change charges during court trial or failed to change the same in accordance with the facts established during court trial court (in the instances when there are factual and (or) legal grounds for change changes, established during the trial) may change charges at its own initiative. The court may, for the purpose of delivering a fair judgment and protecting human rights and fundamental freedoms, independently go beyond the scope of the charges set out in indictment, though the court is able only to change legal qualification of the criminal proceedings if such action leads to improvement of the position of the person against whom criminal proceedings are initiated (Article 337 of the Code of Criminal Procedure of Ukraine). Thus, the court is deprived of the possibility to undertake any actions with respect to charges. In its judgment, court may amend the charges only towards mitigation (to apply the law regarding a less severe crime, to exclude qualifying circumstances, one or two episodes of criminal activities having joint qualification with other criminal episodes, etc.).

#### **4. The public prosecutor's bringing supplemental charges in criminal proceedings at the first instance court and initiating proceedings against a legal entity**

As to the institute of bringing supplemental charges, it constitutes a novelty for the criminal procedure of Ukraine. Bringing supplemental charges does not constitute a change in the initial charges, nor does it mean consolidation of criminal proceedings. It is a separate independent institute of criminal proceedings in Ukraine. The grounds for bringing supplemental charges by the public prosecutor mean that during a court trial the public prosecutor receives certain information (applications from the interested parties; notifications from the investigative bodies, mass media organs; testimony from the persons who were interrogated during the court trial; other data received by the court or by the pre-trial investigation bodies) on possible commitment by the defendant

of another criminal offence, with respect to which no charges were brought. Such supplemental charges should be closely linked with the initial ones and severed trials in connection with such charges are deemed as impossible due to objective reasons.

Upon receipt of such information, the public prosecutor must comply with the requirement stipulated by the Code of Criminal Procedure of Ukraine, governing the procedure whereby the public prosecutor shall seek approval of supplemental charges which may be brought, by the head of the public prosecutor's office in which the public prosecutor is holding his office. Thereupon, the public prosecutor shall have the right to file with court a plea seeking bringing supplemental charges during the same proceedings which were initiated as a result of initial charges.

In case of satisfaction of the prosecutor's plea regarding bringing supplemental charges, the court shall be obliged to postpone a trial for a period of time required for preparation for defense from supplemental charges and for compliance by the public prosecutor with all procedural requirements stipulated by the effective laws; however, a trial may be postponed for no more than 14 days. If the new bill of indictment appears to be complicated, the defendant's attorney may file its plea with the court, seeking prolongation of the period of time required for preparation for defense against new charges.

Within a time limit set by the court and provided that the sufficient evidence is available, the public prosecutor shall prepare a written notice of suspicion in commitment of criminal offence and serve it on the defendant within one day. Date and time of the notice of suspicion, legal qualification of the criminal offence with reference to the specific article (part thereof) of the law of Ukraine regarding criminal liability shall be forthwith entered by the public prosecutor into the Unified Register of Pre-Trial Investigations.

Upon acknowledgment of the collected evidence as sufficient for bringing supplemental charges and preparation of the new bill of indictment, the public prosecutor shall notify the defendant, the defendant's attorney and lawful representative, injured party, the injured party's attorney and lawful representative, civil claimant, the civil claimant's attorney and lawful representative, civil defendant and the civil defendant's attorney, of the procedure for opening materials to the parties and provision of access thereto.

Once the parties complete their review of the materials, the access to which was opened for them, and review of additional materials received prior to, or during, the court proceedings, that they provided to each other, the public prosecutor shall compile a new bill of indictment containing supplemental charges, along with the initial ones, and file the same with the court.

Upon completion of preparation for defense against the supplemental charges, within a time limit determined by the court, the court proceedings shall commence with the status hearing, during which the presiding judge shall establish the parties' opinions regarding possibility to appoint hearings in the case. The necessity of subsequent examination of the evidence which had been examined by the court prior to the date when the supplemental charges were brought, may be implemented only if the court acknowledges such necessity or on the basis of the parties' respective pleas.

It should be emphasized that the newly introduced institute of bringing supplemental charges during court proceedings, constitutes, to a certain extent, an implicit form of supplementary investigation which was known yet at the time of the 1960

Soviet Code of Criminal Procedure<sup>5</sup> of (it was in full force and effect until the year of 2012). The aforesaid institute is particularly dangerous for both the person and system of administration of justice. It is due to the fact that such Code provided for two concurrent prosecution processes against the person: one process was associated with the criminal proceedings initiated by the public prosecutor as a result of his filing a bill of indictment with the court; and the second criminal proceedings were conducted officially (with entering respective data into the Unified Register of Pre-Trial Investigations), though absolutely secretly from such person, by collecting evidence against the person (mainly, as a result of carrying out confidential investigative actions) and without serving a notice of suspicion against such person. The provisions of the Code of Criminal Procedure allowed such processes; moreover, they were allowed on lawful grounds for the following reasons: once the data are entered into the Unified State Register of Pre-Trial Investigations and notice of suspicion is served on the person, the period of investigation is unlimited; given denial of the category of “criminal case” at the pre-trial stage and availability of the under-table practice for collection of evidence for the public prosecutor, it is possible to have any secret evidential base whatsoever against anyone. Therefore, it is obvious that such institute must be reformed as the institute violating the rights and freedoms vested with the individual.

In order to implement the Action Plan for liberalization by the European Union of visa regime for Ukraine, in 2013 the Supreme Council of Ukraine (Verkhovna Rada) passed the Law “On introduction of amendments into certain legislative acts of Ukraine to implement the Action Plan for liberalization by the European Union of visa regime for Ukraine, in connection with responsibility of legal entities”<sup>6</sup>. On the basis of the aforesaid Law, the amendments were introduced into the Criminal Code<sup>7</sup> and Code of Criminal Procedure of Ukraine. Such amendments determined a specific list of crimes, the commitment of which may lead to application of sanctions under the criminal laws with respect to the legal entity’s authorized representative; such amendments also determined certain procedures to be applicable when the proceedings are initiated against a legal entity concurrently with the proceedings against the individuals who committed a criminal offence on behalf, or in the interests, of such legal entity.

Pursuant to such amendments, the public prosecutor was granted the right (provided that the results of criminal proceedings conducted in the court show sufficient grounds for application of the criminal law sanctions against the legal entity) to file with the court a substantiated plea seeking initiation of proceedings against the legal entity. The procedures applicable with respect to initiation of such proceedings are similar to those governing the process of bringing supplemental charges during proceedings in court.

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<sup>5</sup> Code of Criminal Procedure of Ukraine: Verkhovna Rada of Ukraine, Law dated 28.12.1960. Bulletin of the Verkhovna Rada of Ukrainian SSR (official gazette), 1961, № 2.

<sup>6</sup> On introduction of amendments into certain legislative acts of Ukraine to implement the Action Plan for liberalization by the European Union of visa regime for Ukraine: Verkhovna Rada of Ukraine, Law dated 23.05.2013. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2014, № 12.

<sup>7</sup> Criminal Code of Ukraine: Verkhovna Rada of Ukraine, Law dated 05.04.2001. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2001, № 25-26.

## 5. Implementation by the public prosecutor of the powers regarding refusal to support the charges brought by the prosecution on behalf of the state in court

The public prosecutor who is participating in the court hearings as the public prosecutor on behalf of the state must be confident in the defendant's guilt. Otherwise, he/she is not capable of performing his/her duty vested pursuant to the procedural laws.

The procedural laws of Ukraine provide for the following: if based on the results of court hearings the public prosecutor arrives at the conclusion that the charges brought against the person fail to be proved, such public prosecutor shall refrain from supporting the charges brought by the prosecution on behalf of the state (Article 340 of the Code of Criminal Procedure of Ukraine). In such case, the prosecutor's refusal to support the official prosecution is a duty of the prosecutor, rather than his/her right.

The public prosecutor's refusal to support the charges brought by the prosecution on behalf of the state is, in fact, the public prosecutor's declaration, his/her appealing to the court, whereby the public prosecutor objects, in part or in full, against the availability of substantiated charges and explains the inability to support them; in fact, the public prosecutor ceases, in full or in part, the continuity of prosecution activities against such person.

In case of the prosecutor's refusal to support the official prosecution in court, the chairman shall explain to the complainant his/her right to support the charges in court. If the complainant refuses to exercise his/her right to support the charges in court, the criminal proceedings shall be closed by the court.

If the complainant expresses his/her consent to support the charges in court, the chairman shall provide a certain period of time for the complainant, necessary for preparation for the trial. The complainant, who agreed to support the charges in court, shall exercise all rights vested with the prosecution party during a court trial. Though the law contains the word combination "all rights vested with the prosecution party", the complainant is not vested by the law with the right to enter into a plea-bargaining arrangement in criminal proceedings; the law also deprives the complainant of the possibility to change charges during court trial in criminal proceedings and to bring supplemental charges.

Based on the respective charges, criminal proceedings acquire the status of private ones and are to take place under the private charges procedure.

## 6. Conclusions

Research into the nature of fundamental powers vested with the public prosecutor in connection with criminal proceedings at the first instance court pursuant to the effective laws of Ukraine, enabled to establish the following facts: adoption of new Code of Criminal Procedure of Ukraine resulted in material amendment of the public prosecutor's status in the proceedings and his/her powers for ensuring real (rather than the declared one) equality of opportunities for parties in the criminal proceedings, fair balance between the interests of the state and those of the person who is to be held

liable under the criminal laws. Certain provisions of the Code of Criminal Procedure of Ukraine, in particular, those relating to the public prosecutor's powers to bring supplemental charges against the person during criminal proceedings at the first instance court, are perceived as capable of violating the rights and freedoms of the individual and citizen. Nevertheless, one should appreciate general intentions behind such new regulations of the Code of Criminal Procedure of Ukraine: securing the guarantees of human rights, affording the individual with opportunities to protect his/her rights, freedoms and interests in the criminal proceedings.

# Brief Analysis of the Fine Penalty Settlement in the New Romanian Penal Code

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## **Abstract:**

*In this study, the author briefly sets out the manner in which the new Romanian Penal Code, in force since 1 February 2014, regulates the institution of the principal penalty of fine.*

*In a constant comparison to the corresponding provisions of the previously Criminal Code it is shown the specific of the fine under the new legislation, which now consists of day-fine institution after the model of some evolved systems of comparative criminal law.*

*By analyzing how the fine will be determined, the author concludes that the new regulation allows a better proportionate sentencing, operating with two elements that individually are determined in concreto: the number of day-fines and, respectively, the amount of a day-fine.*

*Another new element of the Romanian penal law, also inspired from comparative law, consists of the fine penalty accompanying imprisonment, established subsequently the identification that the agent has acted to obtain a patrimony benefit. The study exposes the ratio that grounded the new settlement and checks how the sanction is established and executed when the initial penalty is imprisonment or a fine.*

*Further on, the analysis focuses on the hypothesis of replacing the fine with imprisonment as a result of bad faith of the sentenced person who does not pay for it, although he has available financial resources. Welcoming the newly introduced provisions in the Code, the author draws the attention of the reader on unresolved situations under the previous legislation, when the convicted person is not of bad faith, but does not pay the fine because it is not affordable. Currently, in such a case, the fine will be replaced by a number of days of community service work, subject to the convict's agreement in this respect. Otherwise, the fine will be replaced with imprisonment, just like in the case of bad faith.*

*Finally, one last section, tangent to the topic of the fine penalty, addresses the replacement of unpaid community service with imprisonment for committing a new crime or failure to perform work in conditions set by the court.*

**Keywords:** *new Penal Code; the Penal Code in 1969; days-fine; fine that accompanies imprisonment; community service work; replacing fine with imprisonment; replacing fine penalty with unpaid community work.*

## **I. Definition and elements of novelty**

**1.** In art. 61, the Penal Code starts by defining the fine penalty, showing that it consists in *the amount of money that the offender is required to pay to the State* and

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establishing its relatively fixed nature, in which now – even more than in the regulation of the previous Code – the judge has the exclusive role, the most important one<sup>1</sup>.

The way of actual payment of the fine is set in Law no. 253/2013 regarding the execution of penalties, educational measures and other non-custodial measures ordered by the court in criminal proceedings<sup>2</sup>, to which we will refer briefly to the end of our study.

2. Moving to the definition of fine penalty, the novelty of utmost importance is the introduction of the days-fine system for calculating the fine to be paid<sup>3</sup>.

The system governed by art. 61 Penal Code uses two essential elements for determining the fine, namely:

a) *number of days-fine*, expressing the gravity of the offense committed and the dangerousness of the offender, reason for which the number is determined by the general criteria of penalty individualization, respectively

b) *the value of a day-fine*, which is the amount of money corresponding to a day-fine to be determined, according to the amendments introduced by Law no. 187/2012 for the implementation of the Penal Code<sup>4</sup>, taking into account the financial situation of the convict and his legal obligations towards his dependents.

Once established, the number of days is multiplied by the value of a day-fine, and the result is the amount that the convict is obliged to pay as a fine.

The proposed mechanism of determining the amount ensures better individualization of the sentence actually imposed both in terms of proportionality, expressed in number of days-fine and effectiveness by determining the value of a day-fine view of the financial situation of the convict.

## II. Proportionate sentencing. Number of days-fine. General limits. Special limits. Establishment

3. According to art. 61 paragraph (2) final thesis Penal Code., the number of days-fine is between 10 days and 400 days.

These are *general limits* on the days-fine, important to be properly identified because - just like the prison sentence – they can never be overcome. Thus, regardless of the number of circumstances or causes of mitigation or aggravation it cannot be set a number of days-fine less than 10 days or greater than 400 days<sup>5</sup>.

<sup>1</sup> Regarding the relatively nature of the fine penalty, according to the previous regulation, see Șt. Daneș, V. Papadopol, *Individualizarea judiciară a pedepselor (Proportionate Sentencing)*, Ed. Juridică, Bucharest, 2004, p. 82.

<sup>2</sup> Published in the Official Gazette no. 513 August 14, 2013.

<sup>3</sup> As stated in the Explanatory Note, this fine penalty enforcement system is found in the criminal codes of Germany (§ 40), Spain (art. 50), France (art. 131-5), Portugal (art. 47) Switzerland (art. 34, in force since January 1<sup>st</sup>, 2007), Sweden (ch. 25, section 1), Finland (Chap. 2, Section 4) and was taken over by Law no. 301/2004 on the Criminal Code, published in the Official Gazette no. 575 of June 29, 2004 (repealed before the entry into force).

<sup>4</sup> Published in the Official Gazette no. 757 of November 12, 2012.

<sup>5</sup> On this aspect, in the doctrine has been shown that the causes system of deterioration of the Code allows, in the most severe cases, the reach of general maximum, without, however, exceeding it. However, it is believed that “it does not mean that by a special law might not provide a special maximum of days-fine exceeding the general maximum, although we appreciate that it is not advisable” - see, B.N. Bulai *Comentariu (Review)*, in G. Antoniu (coord.), *Explicații preliminare ale*

4. Thus, regarding the number of days-fine, the *special limits* thereof are provided by art. 61 para. (4) Penal Code, as follows:

a) between 60 and 180 days-fine, when the law provides for the offense committed only a penalty fine;

b) between 120 and 240 days-fine, when the law provides penalty fine alternating with imprisonment of up to 2 years; respectively

c) between 180 and 300 days-fine, when the law provides penalty fine alternating with imprisonment of more than 2 years.

As noted, in the report of special limits regulation the number of days that can be established, the legislature kept broadly, the algorithm provided by art. 63 Penal Code 1969 with the sole difference that in cases where the fine is not unique penalty, the landmark element is not imprisonment for one year, but - now - imprisonment of up to 2 years. The change is not just a formality, but thus was tried the referencing to the special maximum of the prison sentence, as he was amended in the special part and specific criminal laws, in consequence „new logic of penalty”<sup>6</sup>.

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*noului Cod penal (Preliminary Explanations of the new Criminal Code)*, vol. II, Ed. Universul Juridic, Bucharest, 2011, p. 37.

In our opinion, a general maximum exceeding by a special law is not only advisable, but should not be allowed, contradicting the logic of the system proposed by the legislature. To the extent, however, such a special rule would take effect at some point in the future (probably in our system), we believe that, directly under the Criminal Code, the penalty should be limited to a maximum of 400 days, being unable to conceive - in the current legislation - a number of days-fine exceeding this “barrier”.

Moreover, such a situation was met under the rule of the previous Criminal Code, but the Constitutional Court lost the opportunity to settle the matter in terms of the logic of penalty system as a whole, considering that are not violated constitutional rules. In this regard, we show that according to art. 276 letter c) of Law no. 573/2004 on the capital market (published in the Official Gazette no. 571 of June 29, 2004), the fine is established “between half and the full amount of the transaction made with the commission of the acts referred to in art. 245-248 (...)”. The text was repealed by G.D. no. 32/2012 regarding undertakings for collective investment in transferable securities and investment management firms and amending and supplementing the Law no. 297/2005 on the capital market (published in the Official Gazette. No. 435 of June 20, 2012), but the Constitutional Court was apprised previously with exception of unconstitutionality of several provisions of the law, *inter alia*, and provisions of art. 276 paragraph letter c). By a vote of 6: 3, the Constitutional Court rejected the criticism concerning breach of legality and proportionality of the penalty (in the case before the exception was invoked, a defendant was liable to a fine of 806 times the maximum general of the Criminal Code in force at that time), considering that “the fact that by the method of determining the criminal fine, the limits established in the general rule of the Criminal Code are exceeded (...), is not likely to print criticized text of unconstitutionality nature, since no constitutional provision does not forbid it” (C.Const., Decision no. 53/2012, published in the Official Gazette no. 234 of June 6, 2012). In a separate opinion, it is stated that “(...) the legislative solution in the law on capital market, on fine penalty, is unconstitutional because the fine is not determined and may exceed the general limits of the Criminal Code”. In reasoning, the judges emphasizes, rightly, that “if specific limits may be exceeded in case of retaining the aggravating circumstances, *the general limits cannot be exceeded under any circumstances, thus ensuring unity of criminal law, the measures necessary for preventing and combating crime and citizens' equality before the law (sn)*. Contrary to these general limits, by criminalizing the law on capital market, the special limits of fines are indefinite because it can be applied between half and total transaction value achieved by committing all the facts. C:\Users\Bobo\_B4D\My Documents\Documents and Settings\users\intact 3.0\cache\Legislatie\temp 198270” We believe that to ensure proportionality between the seriousness of the offense and the penalty imposed cannot be exceeded the limits of the main penalty (...)”.

<sup>6</sup> For details, see, V. Cioclei, *Aspecte privind noua logică a pedepselor în noul Proiect de Cod penal (Aspects of the new logic of penalties in the new Penal Code Project)*, Criminal Law Notebooks,

Specifically, the number of days-fine will set between the limits so determined (if we are not in the presence of mitigating circumstances or causes, or aggravation of sentence), the court using in this respect the general criteria of proportionate sentencing laid down in art. 74 para. (1) Penal Code, namely: the circumstances and how the crime was committed and the means used; the hazard status created for protected value; the nature and severity of outcome or other consequences of the offense; offense reason and purpose; nature and frequency of offenses that constitute criminal history of the offender; conduct after committing the crime and during the criminal trial; level of education, age, state of health, family and social situation.

Individualization criteria which the legislator makes available to the court are more numerous and more diversified, so that in practice no difficulties should arise in relation to the establishment *in concreto* of the number of days-fine, this especially under the conditions and according to the Penal Code of 1969, when also the general criteria for proportionate sentencing were considered for setting the fine between special limits.<sup>7</sup>

### III. The value of a day-fine

5. According to art. 61 paragraph (2) the appropriate amount of a day-fine is between 10 lei and 500 lei. For actually determining the amount of the day, the next paragraph states that the court will take into account the financial situation of the convict, and legal obligations of the convicted towards its dependents.

The criterion for the financial situation of the convict and its legal obligations was introduced by Law no. 187/2012, in an attempt to create a fairer system in fixing the amount, depending on income disparities of the person (active) and the expenses that it has and that can be easily identified (passive). The reference, however, to the notion of „convicted” is, however, unfortunate as it would suggest that only in a conviction these criteria will be important - is obviously wrong, because the court will individualize the penalty, including setting it in relation to introduced new criteria for a solution to postpone the penalty, in which case we cannot speak of a *convicted* person. We believe that the use of phrases like „guilty person” would be more accurate and will be considered, *de lege ferenda*, at the proximal changes to the criminal law that will have to take into account all the shortcomings and errors in the Code already identified in the literature and in legal practice.

If in the report setting the number of days-fine we were confident that there will be no difficulties in judicial practice, in the report setting the day-fine value, we are more skeptical. We believe that the legislator would have to develop either in the Code or in secondary legislation how the court will determine the exact financial situation of the person responsible, and how will identify its legal obligations. Furthermore, we believe it would have been more indicated to be detailed a number of additional criteria - besides financial situation and the legal obligations of the convicted - depending which the court individualizes the amount of a single-day fine. For example, § 40 of the German

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no. 3/2009, p. 59. The author shows that one of the main objectives of the Code was “(...) *the need for resettlement in normal limits the sanctioning treatment*, even if, from this point of view, there is a much different approach to the current (formerly, n.n.) regulation, approach that enables us to talk about a *new logic of penalties*”.

<sup>7</sup> In this respect, see, D. Popescu, *Comentariu (Review)*, in T. Vasiliu (coord.), *Codul penal. Comentat și adnotat. Partea general (Criminal code, Reviewed and annotated, General part)*, Ed. Științifică, Bucharest, 1972, p. 409.

Penal Code which refers to the personal financial situation of the convict for determining the amount of a day-fine, add that the court will start from the net income of the convict or might normally have (calculated per day), there can be taken into account properties' value of the convict.

Finally, both in *demonstrating financial situation and legal obligations*, we believe that the defendant will submit, most often documents, that will be considered by the court. But if the defendant pleads not guilty, it is obvious that such an approach will lead to the undermining his defense strategy so that it is more than likely that it will not submit such documents. On the other hand, to the extent that the court of its own motion is seeking such documents or evidence may lead to an ante-pronouncement, leading to a slippery slope of a challenge.

The easiest solution would be - we believe - that the file contain this information from the prosecution stage (whether by indictment or the court is notified that there is a plea bargain agreement) and possibly the session prosecutor ask the court, in order to update, the issue of addresses thus obtaining this information again.

6. In the report of the actual method of obtaining information in relation to the financial situation, we believe that we can send to the provisions of art. 23 paragraph (4) of Law no. 253/2013, incidents in the non-execution procedure of fine. There is stated that for establishing grounds that led to the non-execution of the fine, the court will request data on the financial situation of the convict from local public administration authority from his residence and, if it deems necessary, from the employer or from the tax authorities of the National Agency for fiscal Administration, as well as from other public authorities or institutions that should have information on the person's financial situation.

The information obtained in this way, for example, from the employer could be corroborated also in relation to the criterion of dependents of the person - for example, it might be noted a garnishment on account to pay alimony for a child of a marriage dissolved and so on.

Finally, once determined the amount of a day-fine, it will invariably be the same for the whole number of days-fine previously established. Thus, the court is not allowed to establish different rates, the mechanism of proportionate sentencing being in fact a multiplication by two factors: a number of days (**A**) x an amount per day (**B**).

7. Summarizing the above and in the previous section, we imagine the following example: a person commits an offense of theft, punishable under art. 228 Penal Code with imprisonment from 6 months to 3 years or a fine, and the court is inclined towards the fine penalty.

In this case, the court will first determine the number of days-fine. Being a fine provided alternatively by imprisonment exceeding two years, the special limits for day-fine will be 180 or 300. Within these limits, based on general criteria of individuation, the court will determine the number of days-fine, for example 250.

Subsequently, the court determines the appropriate amount of a day-fine between 10 and 500 lei, given the financial situation of the convict and its obligations. Suppose that the court sets a rate of 50 lei for a day-fine.

Finally, to determine the amount that the convict will have to pay, the court multiplies the corresponding amount of a day-fine with the number of days-fine set. In our example, the amount will be  $50 \times 250 = 7,500$  lei.

#### IV. The possibility of increasing special limits in order to obtain a patrimony benefit

8. According to art. 61 paragraph (5) Penal Code, if by the offense was intended to obtain a patrimony benefit, and the law provides for that offense only the fine penalty or if the court is actually inclined to fine penalty, then the special limits of the fine may be increased by one third.

Since the analysis, *in extenso*, of the hypothesis in which the offense is to achieve a patrimony benefit will follow in Section VI (fine accompanying imprisonment) at this time we will only make some remarks strictly on the operating mode in case of fine penalty.

We emphasize that the increase is always optional for the court and can operate only after grounded identification of the circumstance of the offense to pursue a patrimony benefit. We also believe that the court will choose to increase the limits only if it considers that the initial special limits are not sufficient to fair individualize of number of days-fine - in other words, the initial special maximum seems insufficient. The increase will apply only to the number of days-fine, and not to the limits of the amount of a day-fine that will remain the same as regulated by art. 61 paragraph (2) Penal Code, namely between 10 and 500 lei. Also, the increase is variable, the law did not requiring a specific number of days-fine as increase.

We anticipate that in our court practice, the number of days-fine will be determined in a single step without being broken down the number of days specified for the offense itself and the number of days set in consideration of patrimony pursued. Moreover, according to the previous Penal Code, such a practice was common in most cases of aggravation (aggravating circumstances, continued form, post-enforceable relapse), where the law or the enforcement system did not require the automatic highlighting of the increase.

From the perspective of a day-fine amount, it will be determined under common law, *i.e.*, according to art. 61 paragraph (2) Penal Code, taking into account the financial situation of the person and the legal obligations it have towards its dependents.

Finally, the fine thus established, including possible increase for pursuing patrimony benefit (which anyway will likely not be identified separately in the number of day-fines content), it has the character of a single sentence (in fact, we believe that no court will identify for itself how many days set for the offense itself and how many for pursuing patrimony benefit), which is why on the execution and any other consequences, there will be no difference of regime, being applicable the common law.

9. As example, let's resume the hypothesis of offense by theft provided by art. 228 Penal Code and punishable with imprisonment from 6 months to 3 years or with a fine. In this case, the court is inclined towards fine penalty, in which case the number of days-fine will be 180 or 300. Noting that the crime was clearly committed to obtaining a patrimony benefit, the court may increase the minimum and the maximum of the number of days-fine [determined in accordance with art. 61 paragraph (4) c) Penal Code] by a third. Thus, the days-fine number proportionate sentencing will finally take place not between 180 and 300 days-fine, but between 240 and 400 days-fine. It is noted that such maximum limit reached general do not exceeds the maximum of 400 days provided in art. 61 paragraph (2) final thesis Penal Code.

## V. Penalty fine execution

**10.** According to art. 22 of Law no. 253/2013, the person sentenced to the fine is ordered to pay the fine in full within 3 months from a final conviction. If the convicted person is unable to pay the fine in full in due time under paragraph (1), the execution judge, upon request, will order rescheduling payment of the fine in monthly installments over a period not exceeding two years.

If he will order monthly installment, the completion will include: the fine, the number of monthly installments for amounts that are spread equally and payment deadline.

## VI. Fine accompanying imprisonment

### 1. Preliminaries. History. Source of inspiration

**11.** Besides the main novelty in the field, consisting of day-fine system, another element of novelty lies in the so-called fine institution that accompanies imprisonment regulated in art. 62 Penal Code.

Please note that although the legal text refers only to the possibility of applying fine cumulative with imprisonment when by the offense was intended to obtain a patrimony benefit, in this review we will analyze, all together, also the possibility for the court to raise special limits of the fine penalty because of the same patrimony benefit pursue, regulated by the art. 61 paragraph (5) Penal Code. Furthermore, in the review from the section IV, we draw attention only on the way of determining the penalty, anticipating the presentation of other issues in this section.

**12.** Used to the provisions of the Penal Code of 1969, such a power conferred to the judge to apply cumulatively the two ways of punishment, in the case of the hypothesis corresponding to art. 62 Penal Code, it seems a premiere for the Romanian lawyer.

The reality, however, is another one: the Penal Code of 1969 removed the penalty fine system cumulative with imprisonment<sup>8</sup>. Thus, the Penal Code of 1936 provides additional penalty fine, which could be applied cumulatively in addition to the main penalty of imprisonment, according to art. 25 paragraph (1) pt. 5 of the Code<sup>9</sup>. In fact, the drafters of the new Code showed that “the possibility of being fined with the penalty of imprisonment for the same offense is not a first for our criminal law, being found in the Penal Code of 1936 [art. 25 point 5 and art. 52 paragraph (1)]”<sup>10</sup>. The inspiration for the current regulation is represented by the German Penal Code provisions (§ 41), the institution being also established under French law (art. 131-2, 131-5 Penal Code) Dutch [Art. 9 paragraph (3) Penal Code] Italian [art. 24 paragraph (2)] and Swiss (art. 50).

<sup>8</sup> For details, D. Popescu, *op. cit.*, p. 409.

<sup>9</sup> For further information, see J. Grigoraș, *Individualizarea pedepsei (Proportionate Sentencing)*, Ed. Științifică, Bucharest, 1969, p. 71. Also, see I. Ionescu-Dolj, *Notă (Note)*, in C.G. Rătescu and others, *Codul penal „Regele Carol II” Adnotat*, vol. I, *Partea generală, (Penal Code „King Carol the II<sup>nd</sup>, Annotated, General part)*, Ed. Librăriei SOCEC & Co., SA Bucharest, 1937, p. 80; V. Dongoroz, *Drept penal (Criminal law)*, Asociația Română de Științe Penale (Romanian Association of Criminal Sciences), Bucharest, 2000, p. 500.

<sup>10</sup> Explanatory Note (<http://www.just.ro>).

## 2. The reason of said institution. The scope of offenses

13. In the explanatory note to the Code, it was shown that the reason behind the introduction of this regulation is explained by the need to establish effective criminal coercive measures that would not impose life imprisonment increase.

In this regard, we note that, in post-December of 1989, crime has grown as a result of the considerable increase in the number of crimes against property or those likely to bring patrimony benefits to offenders, and towards this reality so far, in the plan of penal policy, it was considered appropriate and sufficient the significant increase of imprisonment for these offenses. The effect was not as expected, as shown in the same explanatory note, even the contrary, we emphasize, for which we make reference to the National Administration of the Penitentiary reports available online<sup>11</sup>.

Returning, once the conclusion reached, beyond any criticism and arguments in the press, that the obsolete method of the increase to absurd limit of penalties for offenses against property does not attain its purpose, it had to rethink the whole strategy. Thus, amid significant decrease of imprisonment limits for offenses against property, to ensure „necessary and effective legal means to prevent and sanction such crimes (...), it opted for the solution of introducing the possibility of applying and a coercive of patrimony nature, where the court considers that such a sanction is required and contribute to a better proportionate sentencing of punishment”<sup>12</sup>.

14. Analyzing the scope of offenses for which it could have such a fine penalty, in literature has shown that „the law provides that the penalty of fine to be imposed in addition to imprisonment, not only for crimes which by their nature involve tracking a patrimony benefit, but also for other offenses (for example, extortion, deprivation of liberty, disclosure of professional secrecy)”<sup>13</sup>.

The author quoted shows, however, further, that „this institution should be used mainly for offenses which by their nature do not involve producing a financial loss”<sup>14</sup>.

We mention that we understand the logic of arguments, the author suggesting that the agent will practically be twice penalized, considering its purpose: so it should be capitalized as a component of the offense, but also it will give value to establish the new type of fine. However, after some reflection, we will not share our opinion. In this regard, we refer to the above provisions quoted from the explanatory note, where is clear shown the legislator purpose that this institution to be applied especially on crimes against property, passing through the fact that sometimes pursue to obtain a patrimony benefit is recovered as a constituent of such crimes - theft is the easiest example to visualize. With all the seemingly unfair nature of a double sanction, we believe that this was exactly the intention of the legislator, in an attempt to stem the tide of crime against

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<sup>11</sup> Without presenting statistics or figures, we emphasize that the overwhelming majority of offenders that are currently enforced in prisons in Romania are convicted for crimes against property, crime of theft (with its qualified forms including) standing out clearly.

<sup>12</sup> Explanatory Note (<http://www.just.ro>). See also V. Cioclei, *op. cit.*, p. 59 and next.

<sup>13</sup> M. Udroi, *Drept penal. Partea generală. Noul Cod penal (Criminal Law. General Part. The New Penal Code)*, Ed. C.H. Beck, Bucharest, 2014, p. 186-187. Without expressly stating it, and another author - I. Chiş, *op. cit.*, p. 403 - exemplifies also with the assumptions that are committed offenses other than those against property - witness making a false statement to obtain a material benefit (in the context of the crime of perjury) or perpetrator using a forged document to obtain an inheritance (in respect of the offense of forgery).

<sup>14</sup> M. Udroi, *op. cit.*, p. 187.

property: once the reality of the past 20 years (starting in 1992 and especially in 1996) demonstrated to us that increasing penalties indefinitely does not produce any deterrent effects, maybe the “patrimony” sanction, cumulative to the deprivation of liberty will have another effect. In fact, at the risk of being accused of cynicism, the offender „obsessed” of patrimony, his economic sanction will have a stronger effect than the risk of custodial sentences more consistent (which anyway under the previously Code were a mere illusion, the courts being more concerned with „inventing” mitigating circumstances to low judicial sentences under special minimum and not to apply penalties toward the maximum extremely generous<sup>15</sup>).

### 3. *Setting out the fine*

15. As shown, according to art. 61 paragraph (5) Penal Code, where for the offense, which aimed to obtain a patrimony benefit, the law provides only the fine penalty, or the fine penalty or is provided alternatively with imprisonment, but the court chooses the fine, and the special limits thereof may be increased by a third.

If, however, the law provides for crime committed only the imprisonment, or imprisonment alternatively with fine penalty, but the court chooses the prison sentence, the court could apply in addition to imprisonment, when deemed necessary, also fine penalty that will accompany thus the imprisonment. Again, it is noted that the increase is optional.

16. According to art. 62 paragraph (2) Penal Code, the special limits of the day-fine provided by the art. 61 paragraph (4) letters b) and c) of the Penal Code [reference is made only to cases of letters b) and c) because in these cases the special limits of the fine shall be determined according to the imprisonment] is determined according to the length of prison sentence set by the court, unable to be reduced or increased on account of apprehension of attenuation causes or worsening of sentence. In determining the appropriate amount of a day-fine, will be take into account the value of patrimony obtained or pursued.

As it can be seen, if the fine is accompanying imprisonment, the fine proportionate sentencing follows two steps: *first*, for the number of days-fine and *secondly* for a day-fine amount.

17. In terms of *number of days-fine*, the special limits will be determined by the duration of imprisonment already established and not by the special maximum provided by law for the crime committed, as is the case of common law criminal fine. Moreover, the special limits thus obtained cannot be reduced or increased as a result of circumstances or causes of mitigation or aggravation, as usually happens. The explanation is that special limits are determined by reference to imprisonment established, or any causes or circumstances of aggravation or mitigation were used

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<sup>15</sup> As example, despite the impressed record of the defendant H.M., which demonstrate a specialization in committing crimes of theft in means of transport across Cluj-Napoca, the trial court imposed a sentence of only six months in prison, while the text of the law required a minimum of 3 years at the time [Cluj-Napoca Court, criminal Division, Sentence no. 999/2013 (unpublished). The sentence became final by rejecting as groundless the appeal promoted by the Couthouse - see, C.A. Cluj, criminal chamber and for cases involving minors and family, Decision no. 1562/2013 (unpublished)].



already in the process of proportionate sentencing (determination) of prison sentence, which was individualized between special limits reduced to 1/3.

For example, imagine that a robbery was committed according to art. 229 paragraph (1) Penal Code, for which the law provides imprisonment from one to 5 years, and the court imposed a prison sentence of one year and six months. In this case, special limits of the fine will be determined by reference to the actual punishment of one year and six months, according to art. 61 paragraph (4) letter b) Penal Code (referring to imprisonment not exceeding 2 years), thus being between 120 and 240 days-fine, not by reference to the special maximum of 5 years, which would lead to the establishment of day-fine special limits according to art. 61 paragraph (4) letter c) Penal Code (referring to prison penalty more than 2 years).

Suppose now that the penalty of 1 year and 6 months imprisonment was established by the court following the arrest of mitigating circumstances – thus, the imprisonment was not individualized between one and five years, but between 8 months and 3 years and 4 months. Therefore, has already been taken into account the mitigating effect when established the imprisonment, and by reference to the penalty (individualized between limits reduced as a result of mitigation), it is explained why the legislator has expressly stated that the number of day-fine thus obtained can still be reduced (in this case), because otherwise they would capitalize twice the mitigating effect.

**18.** From the perspective of a day-fine amount, it will not be determined by reference to the defendant's financial situation and legal obligations that he has, but by taking into account the value of obtained or pursued patrimony, considering the special case of setting the fine in whose presence we are<sup>16</sup>. The legislator is elliptical because it is not specified an algorithm for calculating the amount and are not indicated nor the additional criteria beyond reporting the value of patrimony obtained or pursued<sup>17</sup>. Or, patrimony benefit is not easy to quantify with any certainty, nor where there is a patrimony benefit actually obtained, much less if the only benefit was pursued without being obtained (the attempt, for example). It thus remains at the discretion of the court determining the precise amount that will have to take into account the reason of introducing the institution, this having the role to involve an economic constraint, as additional to the main penalty that continues to be the prison. We mention that in this context we use the term "main penalty" not in the sense naturalized in criminal law in relation to the classification of the sentence, but with meaning in everyday language. Thus, the court will have to remember that the real punishment is here, however, the prison and the fine set as extra only accompanies the imprisonment, contributing to good proportionate sentencing of punishment required.

#### **4. Execution of penalty**

**19.** We saw in the previous commentary that where an offense is committed which aimed to obtain a patrimony benefit, and the law provides fine penalty or penalty fine is provided only alternatively with imprisonment, but the court chooses the fine, the fine

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<sup>16</sup> In this regard, B.N. Bulai, *op. cit.*, p. 39.

<sup>17</sup> In the sense that the courts will refer most probably to all the general criteria laid down for determining the amount of a day-fine, namely, financial situation and legal obligations to dependents, see, S. Rădulețu, *Comentariu (Review)*, in T. Toader (coord.), *Noul Cod penal. Comentarii pe articole (The new Criminal Code. Comments on articles)*, Ed. Hamangiu, Bucharest, 2014, p. 142.

thus obtained follows the execution regime of common law. The solution is natural, because in this case we are in the presence of a fine that accompanies imprisonment, but only in the presence of increase limits of the number of days-fine taking into account its motive or distinct purpose.

In this case, when the fine appears distinct in addition to imprisonment, the solution is maintained partly because it is much easier to read the “increase” of penalty (fine) in addition to imprisonment, incident following the particular purpose pursued (patrimony benefit).

Thus, to the extent that is ordered the execution of prison sentence, the execution of fine in these conditions will follow the established common law of fine penalty. To the extent that conditional sentence is decided according Article 83 paragraph (3) Penal Code, the legislator chose to do a “common body” between the two sentences, stating that automatically will be delayed the enforcement and penalty fine. The solution is natural, because legally the court could not issue a decision for postponement and for the same offense to utter a sentence and to be able to execute the penalty of fine. However, in case of suspension of sentence under supervision, according to art. 91 paragraph (2) Penal Code, when imprisonment is accompanied by fine penalty (applied according to Art. 62), the fine is executed even if enforcement of prison sentence was suspended under supervision. In such circumstances, it is even more visible the reason institution of the fine that accompanies imprisonment penalty, which now exceeds judicial proportionate sentencing of the punishment, and already passes the stage of legal proportionate sentencing of its enforcement. Thus, even if the court finds that the defendant can redeem without effective enforcement of the sentence, the legislator imposes mandatory payment of the fine laid down under article 62 Penal Code, in order to “punish” economical the person who broke the crime field to obtain such benefits.

## VII. Replacing the fine with imprisonment

### *1. Drawbacks of the regulation of the Penal Code of 1969*

**20.** According to art. 63<sup>1</sup> Penal Code of 1969, in case of theft in bad faith by the convict to pay the fine, the fine was replaced by imprisonment. It was possible, however, only if the offense for which the conviction was ordered, provided the fine penalty alternating with imprisonment. Therefore, if the offense was punishable by law only by a fine or when penalty fine was reached, as an effect of mitigating circumstances, under art. 76 letter e) second thesis of Penal Code 1969, the replacement may not work.

In such a situation, it could possibly try the convict enforcement.

In the same context, were encountered situations where theft could not prove the bad faith to pay the fine, therefore again not being able to have a replacement. Moreover, in this case, also the enforcement was virtually doomed to failure, because failure to demonstrate bad faith arises also from the fact that the convicted person does not have income or assets to enable payment. Finally, there is the hypothesis that undoubtedly the convicted was really in good faith, but cannot execute the fine penalty, not having liquidities. In these last two cases presented, the person finally reached does not to bear any constraint as a result of the crime<sup>18</sup>, solutions that departed from legislator will, reflected in art. 63<sup>1</sup> Penal Code<sup>19</sup> of 1969.

<sup>18</sup> See also the Explanatory Memorandum (<http://www.just.ro>).

<sup>19</sup> In fact, let's not forget that the provisions of the art. 63<sup>1</sup> were subsequently introduced in the Criminal Code in 1969. Thus, initially could not conceive that there is a person employed „in a

**21.** Under current rules, as we shall see, the drawbacks outlined above are avoided – in the case of the convicted of bad faith under the provisions of art. 63 Penal Code, and in the case of the convicted of good faith, according to art. 64 Penal Code.

## **2. The conditions to operate the replacement**

**22.** According to art. 63 Penal Code, if the convicted person, in bad faith, is not paying the fine punishment, in whole or in part, the number of days-fine non-executed is replaced by a corresponding number of days of imprisonment.

The novelty elements consist, *first of all*, in the fact that replacing is operating now in mandatory way, once the conditions are accomplished. *Secondly*, considering how the penalty fine is individualized in relation to the set number of days-fine, they will be valued at replacement.

As shown in the literature on this last point, the new regulation preclude the possibility of the courthouse to individualize the imprisonment with which is replaced the fine<sup>20</sup>, the text of the law requiring a clear algorithm of correlation between the number of days-fine and days of imprisonment.

The conditions to operate the replacement are, cumulatively, the followings:

*a) the person has been sentenced to a fine penalty.*

As noted in previous comments, it will be an amount in a certain quantum, which was determined by multiplying the number of days-fine with an amount determined per day.

*b) the person to evade in bad faith from paying the fine.*

The phrase „in bad faith” means a situation where the convicted person has the financial means to pay the fine imposed, but under attributable reasons he do not pay the amount due to the state budget. If the person has no means, it cannot be replaced the fine penalty with imprisonment. We will show in the next section possible solutions in this situation.

The legislator provided in art. 22-23 paragraph (4) of Law no. 253/2013, procedure to follow in establishing the reasons which have led to failure to pay the fine: thus, the judge entitled with enforcement, noting that the sentenced person has not paid the fine, in whole or in part, within the period prescribed by law, notifies the court. This is to establish the reasons that led to the non-performance of fine penalty, shall request data on the financial situation of the convict from local government from his residence and, if it deems necessary, the employer or fiscal bodies within the National Agency for Fiscal Administration, as well as other public authorities or institutions which hold information about financial situation of the convict.

**23.** If the court finds as bad faith the failure to pay the fine, it will proceed to replace the fine with imprisonment<sup>21</sup>.

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socialist state” can achieve an income from which it can pay its fine, reason for which was not considered necessary such a provision [that is, furthermore, in the Criminal Code of 1936, in art. 54 paragraph (5)] – for details, see, D. Popescu, *op. cit.*, p. 409.

<sup>20</sup> M. Udriou, *op. cit.*, p. 189.

<sup>21</sup> We mention that - in the version of project of adopted Code in the Commission - fine replacement became possible only if the convicted person cannot be enforced, the Helicon being similar legislation in art. 36 paragraph (1) Swiss Criminal Code (in force as of January 1, 2007) and art. 49 of the Portuguese Criminal Code - see art. 63 of the Preliminary, Criminal Law Notebooks, no. 2-3 / 2007, p. 269. In our opinion, the current version of the Code is more fortunately – the

The replacement will be made by a simple algorithm: thus, *if the fine was not paid at all*, the court will identify the number of days-fine established by the trial court, following that one day-fine to be replaced with one day in prison; *insofar as the fine was paid in part* (remember that it may be paid in the rates, by exception), we believe that the court will divide the unpaid amount to the quantum of a day-fine. The number obtained will be rounded to a whole number (calculating in favor of the convict), and this number of days-fine will be replaced with an equal number of days in prison.

24. The penalty thus obtained will be mandatory enforced in penitentiary under common law. In this regard, we note that the decision no. 50 of June 4, 2007 maintains its actuality in the interest of law sections of the High Court of Cassation and Justice <sup>22</sup>. Thus, based on the provisions of art. 63<sup>1</sup> of the Penal Code of 1969, the Supreme Court determined that the replacement of the fine with imprisonment, a penalty to be determined by the court, can only take place by effective enforcement. In other words, with mandatory power on the future, to put an end to an inconsistent practice of our courts, which, in some cases, after replacing fine with prison, they suspended the enforcement.

### ***3. The case of fine that accompanies imprisonment. Case of fine imposed under a plurality of offenses***

25. Finally, we mention that the replacement operates also for the unpaid fine that accompanied imprisonment, imposed under art. 62 Penal Code. In this case, imprisonment thus obtained (by the same “conversion algorithm”) is added to the initial prison sentence, the final penalty resulted having penalties having the legal regime of a single penalty (set for one offense).

Although the legal text of the Penal Code expressly refers only to fine penalty which accompanied the imprisonment, we believe that this will be the same solution also if the resulting punishment applied, in the structure of which we have both imprisonment and fine (for example, a sentence obtained as a result of the application of the sanction system of the offenses, one of the penalties set for a concurrent offense being imprisonment, and one or more other being the fine). The solution will be similar for the same reason, even if a relapse post-condemnatory, in which the second term would consist of fine penalty, which is not paid in bad faith.

## **VIII. Execution of fine by doing work in community service**

### ***1. The reason for introducing the institution***

26. As noted in the previous section, under the Penal Code of 1969, if the person was sentenced to fine of good faith - in other words, the person did not have the means

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criminal fine penalty is not aimed at increasing the state budget, but the financial penalty of the convict, applied as the main penalty the least serious. Or, once it is established that it is in bad faith (having financial liquidities) it means that the convicted person did not understand the consequences of a conviction handed down, so it is necessary to replace milder punishment initially applied.

<sup>22</sup> Published in the Official Gazette no. 775 of November 15, 2007. In the same regard, C. Voicu, A.S. Uzlaşu, R. Moroşanu, C. Ghigheci, *Noul Cod penal. Ghid de aplicare pentru practicieni (The New Penal Code. Application Guide for Practitioners)*, Ed. Hamangiu, Bucharest, 2014, p. 106; C. Mitrache, C. Mitrache, *Drept penal român. Partea generală (Romanian Criminal Law. General Part)*, Ed. Universul Juridic, Bucharest, 2014, p. 237.

to pay the amount required - could not replace the fine penalty with imprisonment. Finally, it came to be no afflictive consequence for the convicted on account of an offense.

This is the main reason for entering text of the law that is the subject of our analysis: thus, in the assumption described above, the court - with the prior consent of the convict - will replace days-fine with a corresponding number of days of work in community service.

On the edge of this innovation to the Penal Code, in the explanatory note is indicated, "thus regulated, the community work appears, in terms of legal nature as a substitute for penalty as fine for people of insolvent good faith who agree fine execution of the sentence in this way"<sup>23</sup>.

Until the full performance of community service obligation, it may cease when the convicted person pays the amount of money corresponding to the remaining days-fine served, or can be converted into imprisonment by replacing days-fine executed in days of imprisonment, if the person convicted or does not perform community service under the conditions set by the court or commits a new crime<sup>24</sup>.

## 2. Conditions

27. The conditions required to be met cumulatively, result from reading art. 64 Penal Code. Thus, it is necessary:

*a) to be a final conviction to the fine penalty.*

The penalty fine will consist of an amount in a certain quantum, which was determined by multiplying the number of days-fine fixed by the court with an amount determined per day by the same court.

*b) the fine penalty cannot be executed in whole or in part.*

Non-payment in part is on the assumption that its execution was agreed in the rates, and one or some of these installments have been paid.

*c) the reasons for failure not be non-attributable to the convicted person.*

In other words, we are assuming good faith - a person wishes the execution of penalty but lacks the financial means to enable it to make payment - has no income or has no assets etc.

*d) to exist the prior consent of the person convicted to perform community service work, except in cases where, due to health, the person cannot perform the work.*

The replacement is only possible insofar as the convicted has given prior consent to perform unpaid community work to comply with the regulations on the prohibition of forced labor. If he does not consent, art. 64 paragraph (5) Penal Code provides that the fine be replaced with imprisonment, according to art. 63 Penal Code as described in the section above. In this case, the replacement with fine penalty operates atypically, not because the person is in bad faith, but in view of its refusal to provide unpaid work, which thus cannot be ordered. In the absence of this provision - really rough <sup>25</sup> -

<sup>23</sup> Explanatory Note (<http://www.just.ro>).

<sup>24</sup> As noted in the explanatory note, the model of inspiration was taken from the comparative law - similar provisions contain art. 36 paragraph (3) letter c) Swiss Criminal Code, art. 53 Spanish Criminal Code, art. 48 Portuguese Criminal Code.

<sup>25</sup> Considering the provision „questionable”, see, B.N. Bulai, *op. cit.*, p. 42-43. The author shows that „the legislator assimilates the lack of consent of the convict to a fine penalty - that it could not be executed for reasons beyond him - to provide, instead of paying the fine, an unpaid community service work, with bad faith failure to enforce a fine penalty”.

no convict would agree with the provision of free labor, because anyway there could not be any negative consequences, even if there is the sentence. Or, let's not forget that it was precisely the reason of art. 64 Penal Code, namely, to correct the existing legal vacuum in this area, under the Penal Code of 1969.

**28.** Returning to the assumption of consent, we draw attention to the hypothesis that the health of the convict cannot allow such an activity. In this case, we believe that we must make a distinction depending on the specific situation: to the extent that it is a temporary impediment, the court shall order the replacement, following that the work be done effectively after recovery. Insofar as it is a permanent disability, the court shall order the replacement, because it makes no sense, it is obvious that the work cannot be done. The court cannot replace the fine with prison, because they are not met any conditions set by art. 63 Penal Code, regarding the existence of bad faith. Apparently, it seems that may arise a situation where criticism to former art. 63<sup>1</sup> Penal Code 1969 to maintain also on the new regulation. We express, however, confidence that unpaid work will be extremely varied, the range of institutions and companies that will be involved allowing virtually that even severely physically disabled person to carry out some type of activity.

**29.** Finally, once cumulatively met all these conditions, the court shall replace the fine penalty with provision of a community service work. The algorithm will be identical to that shown for the replacement of the fine with imprisonment (in case of failure both total and partial), to a day-fine corresponding a day of community service.

### ***3. The case of fine that accompanied the imprisonment***

**30.** According to art. 64 paragraph (2) Penal Code, if the fine replaced in accordance with paragraph (1) accompanied the imprisonment (according to Art. 62), the requirement of community service is executed after imprisonment.

Again, for the same reasons, we believe that the solution is applicable if the fine imposed is considering the sanctioning system from contest or post-condemnatory relapse.

### ***4. Termination of obligation to provide unpaid community service work***

**31.** Execution of community service stops naturally at the end of the set. Also, according to art. 64 paragraph (3) Penal Code, it can stop faster in terms of time, to the extent that it is paid the appropriate days-fine remaining unexecuted. For example: a person has committed a crime of threat, provided by art. 206 Penal Code, punishable by imprisonment between three months and one year, alternating with a fine. The court - according to art. 61 paragraph (4) b) Penal Code - set a number of 150 day-fine, with a rate of 20 lei per day, resulting in an amount of 3,000 lei. Noting the factual impossibility of settlement, the court ordered under art. 63 Penal Code, the replacement of the fine with a total of 150 days of community service work. After the execution of such 40 days, the convict receives, following an inheritance, a sum of money allowing it to pay the fine. In this situation, the unexecuted remaining days are 110, and the final amount will be 2,200 lei. Once submitted the receipt for payment, combined with evidence of working days actually provided, shall cease enforcement of community service work.

Finally, we believe that enforcement of labor supply will stop sooner also in the imagined above hypothesis on the occurrence of reasons not attributable to individuals convicted of permanent physic incapacity (or even psychiatric disorders) which can no longer allow the exercise of any activity.

### ***5. Replacing with prison the community service work***

32. The execution through community service work is replaced with the prison in the following cases:

*a) when the person does not perform unpaid work requirement under the conditions set by the court.*

In this case, according to art. 106 paragraph (2) of Law no. 252/2013, probation officer, ex officio or upon notification received from the institution determined as a place of execution, stating that the person does not perform the obligation of unpaid community service work under the conditions set by the court, will go to court for enforcement.

According to art. 561 paragraph (1) Code of Criminal Procedure, the competent court (court of enforcement, in this case) will replace the number of days-fine executed through community service work with an equal number of days in prison.

*b) when a person commits a new crime discovered before the full performance of community service obligation.*

In such a situation, the competent court shall be the court in the first instance judging the offense committed before the full performance of community service, according to art. 561 paragraph (1) Code of Criminal Procedure.

We note that to operate replacement are required to be cumulatively met several conditions:

*b<sub>1</sub>) committing a new crime.*

It is unclear from the wording of the law when it has to be committed the new offense - after final conviction to fine penalty or after final decision of replacement. In these circumstances, we believe that we will have to refer to the time the sentence becomes final.

We also note that the legislator always requires the replacement, no matter how serious is the offense, the form of guilt with which has been committed or punishment set for it. Surely, the solution required by law is more easily applied in judicial practice, because otherwise we do not see how it would be possible to establish punishment for offenses plurality (e.g., how is determined the punishment - without replacement - between a number of days-fine executed through community service work - which is not a punishment! - and imprisonment or fine?) or the way of proportionate sentencing of execution (e.g. whether it was conditional upon prison sentence, what would have happened with the new fine, which however could not be executed because the convict was not affordable? Also, if it were subject to the form of guilt for crimes, being optional for crimes of negligence, what would have happened if the court had ordered a custodial sentence for the new crime with enforcement?)

*b<sub>2</sub>) discovering new crime before serving his full obligation of work.*

To operate replacement, it is necessary that the offense is discovered before serving his full obligation of work, by discovery meaning simple information (*in rem*) about

committing an offense under criminal law (e.g. in case of an offense of murder, it will be considered discovered if the victim's body is found, even if there is no clue about the identity of the perpetrator). No matter when it will be pronounced a final judgment in relation to this new crime element - the landmark being its moment of detection.

If the offense is not discovered before serving his full unpaid work, it will not be able to operate replacement of work already performed. In this case, we believe that the new offense discovered will be in the state of multiple intermediate (remember that the first term was a fine penalty sentence, and the second offense was committed previous the sentence execution) with the original offense, following that the treatment be legally applied [to the extent that for the new offense will be determined the imprisonment, the full performance of the work will not produce any effect, because under common law system of penalties, the fine would be added entirely to prison - see art. 39 paragraph (1) letter d) Penal Code - or, in this case the fine would have been executed, so that we no longer have additions; instead, to the extent that for the new offense is established also the fine penalty, we believe that subsequently application of the system provided by art. 39 paragraph (1) letter c) will be deducted the fine actually executed through the provision of unpaid work, whether it is the heaviest punishment, or part of the increase of 1/3, according to art. 40 paragraph (3)].

**33.** Once cumulatively met the conditions, the court will replace the number of days-fine unexecuted by community service work at the date of the final judgment of conviction for a new offense with corresponding number of days of imprisonment. They will be added to the penalty for the new offense.

The way of replacement makes us to have some observations.

*First of all*, as expected, we see that the replacement of a corresponding number of days of imprisonment occurs regardless of type of punishment established for the new offense (even if for this it is determined the imprisonment).

*Secondly*, we notice that the sanctioning system applicable will always be the arithmetic aggregation, regardless of the form of multiple offenses.

However, from legal scrupulously, we wonder which could be the form of the plurality of crimes in this case? Certainly, the first response should be intermediate plurality, because the term consisted of a penalty fine, replaced by a number of day-fines unexecuted through community service work as a result of inability to enforce. However, we believe that the answer is not so easy.

Thus, let's imagine the following example: the offense committed is a beat or other violence aggravated - art. 193 paragraph (2) Penal Code, committed against a family member. By conjugate applying of art. 193 paragraph (1) and (2) of the Penal Code, based on art. 199 Penal Code, the Court - which turned to fine penalty - applies the fine penalty, individualizing a fine of 400 days-fine. Once noting that the convicted person cannot pay the fine, for reasons beyond him, the court orders its replacement by a corresponding number of days of community service work. After performing the work equivalent of 10 days, the convict commits an offense of murder. The court, applying the provisions of art. 64 paragraph (5) b) Penal Code, obtains for the first offense a penalty of 390 days, therefore more than a year, needed to give birth to the first term of post-condemnatory relapse.

Are we, in such a case, in the presence of post-condemnatory relapse and not intermediate plurality, as we were initially tempted to answer?

In our opinion, the answer is no. Plurality of offenses arises with the commission of the second offense, or at this moment there is no imprisonment penalty (which appears



only consecutively to replacement, an operation that takes place most probably by the same judgment by which the courthouse for second offense also pronounce conviction for the the latter offense). At the time of committing the second term of the plurality of crimes, there is only a sentencing judgment to fine penalty and a judgment replacing it with a corresponding number of days of community service work. The fine was not yet executed, being still the penalty to be executed, the unpaid work being in this situation, as it showed in the Explanatory Note, "a substitute form for penalty fine". Likewise are the provisions of art. 64 paragraph (4) Penal Code, which stipulates that the execution of community service ordered under paragraph (1) ceases by paying the corresponding fine for days-fine remaining unexecuted.

For all these reasons, we believe that in such circumstances we will always be (regardless of the number of days-prison that could be set for the term I) in the presence of the plurality of intermediate form.

# Facing Organized Crime - between the Need for Security and the Protection of the Human Rights\*

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## **Abstract:**

*The organized crime is nowadays one of the greatest threats to public safety both at the European and national level. Often, it manifests itself by committing the most serious crimes such as those against the European Union's financial interests, money laundering, trafficking of prohibited substances, trafficking of persons etc. The gravity of those acts requires a prompt response both to prevent and to combat such acts and to investigate or punish the guilty persons. This implies the adoption of specific measures, but they should not infringe the principle of proportionality in restriction of the fundamental rights. The EU's legislation, within Directive 2006/24 / EC and the Romanian legislation, within Law 82/2012 and the draft-law on cyber security, contain, in the name of public safety considerations, a lot of provisions which imply unjustified restrictions of the fundamental rights. The analysis that will be done in this study will focus on the identification of root causes, so that in the end to be able to propose solutions. Therefore, I consider that, in order to avoid such situations it is necessary for the states to play an active role within constitutional limits, to identify the main features of the organized crime, in order to distinguish this type of crime to the other ones less dangerous, to use at a terminological level in laws phrases and expressions clearly, that leaves no room for interpretation, and to focus the attention towards the protection of the fundamental rights and freedoms and not on developing sophisticated means of preventing, investigating and punishing such acts.*

**Keywords:** *rights and freedoms, proportionality, organized crime, security*

## **1. Introduction**

The relationship between the fundamental rights and freedoms, on the one hand, and criminal law, on the other hand, has always required special attention. This is because the criminal law often involves restriction of the fundamental rights for certain subject proceedings, threatened to different sanctions in case of breaking the law.<sup>1</sup> The extent of these restrictions is not precisely defined, but it is rather relative, from one case to another, and it must respect some rules seen as fundamental principles of any such measures.

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<sup>1</sup> See V. Pașca, *Excesul de reglementare penală și consecințele sale*, in *Anale UVT*, nr. 2/2010, pp. 27-33.

If, in general, the determination of a specific maximum limit allowed in the restriction of the fundamental rights is not an easy task, things get even more interesting in the case of the organized crime which, in general, are crimes with a strong social impact. No doubt that in this area there is a general tendency to resort to a kind of a more incisive action. This is because, on the one hand, the phenomenon of the organized crime has met a special scale in recent years, being a permanent threat to the whole world, and, secondly, because its means and ways of action are the most diverse. Under these new challenges, the success depends on the ability of the national and European authorities to prevent such acts and to be always one step ahead of criminals.

But this is not easy to achieve, especially without some "collateral damage" as the citizens who, in the name of public safety, must suffer some restrictions in the exercise of their rights.

Since organized crime networks have been a major source of funding and supporting global terrorism, a continuous fight against such organizations has begun. The evaluation standards of such measures in combating this global phenomenon supposed transition to a new stage. In the opening of the judicial year 2002, even the then President of the European Court of Human Rights said: *"Our perception of last year is colored by the tragic events of 11 September and their aftermath. Terrorism raises two fundamental issues which human rights law must address. Firstly, it strikes directly at democracy and the rule of law, the two central pillars of the European Convention on Human Rights. It must therefore be possible for democratic States governed by the rule of law to protect themselves effectively against terrorism; human rights law must be able to accommodate this need. The European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law. The second way in which terrorism challenges democracy and human rights law is by inciting States to take repressive measures, thereby insidiously undermining the foundations of democratic society. Our response to terrorism has accordingly to strike a balance between the need to take protective measures and the need to preserve those rights and freedoms without which there is no democracy"*.<sup>2</sup>

Faced with the organized crime, states are often in front of a very difficult mission because if an error occurs, the consequences can be dramatic, given precisely the dangerousness of such acts. In this way, the need to protect fundamental rights and freedoms of citizens in a community overlaps with the need to punish those responsible for acts of organized crime.

Providing an effective manner of balancing the two previously mentioned interests, primarily, involves an analysis of the principles behind those interests. No doubt that beyond such principles as that of legality, equality and non-discrimination, a special place in such a mechanism has the principle of proportionality. The so-called "proportionality test", extremely necessary and useful in assessing the maximum permitted level in restricting the fundamental rights, becomes a genuine guarantor of rights. The principle of proportionality is undoubtedly a general principle of law, and at the same time a constitutional principle, but transposed into the criminal sphere, it means taking into account the right balance between the offense committed and the penalty to be applied.

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<sup>2</sup> Speech given by Mr. Luzius Wildhaber, President of the European court of human rights, on the occasion of the opening of the judicial year, Strasbourg, 31 January 2002, disponibil pe: [http://www.echr.coe.int/Documents/Annual\\_report\\_2001\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2001_ENG.pdf).

The notion of punishment in this context is not restricted only to the final sanction imposed on a convicted, but covers equally to the criminalization of social behavior and procedural means through which, in one way or another, the prosecution process is settled. This is because according to the proportionality principle, a certain penalty applied concretely to the offender will never be considered proportionate if it violates the procedural rules. The phrase "the end justifies the means" is inconsistent with this principle, and, as I will show, below this incompatibility is preserved even in the matter of the most serious crimes.

Human rights are "individual subjective rights essential to the existence, dignity, freedom, equality, happiness and free development of the human being."<sup>3</sup> Protecting the rights of citizens requires equally protecting the rights of those who are the subject of a criminal investigation. Can we achieve this aim given the complexity of such crimes? In other words, can we protect ourselves, the many and honest in society and, at the same time, protect even those who try to harm us?

The answer would certainly be yes, but, beyond the suspect's rights to a fair trial and the right not to be deprived of liberty except under conditions provided by law, in the context of the subject of the present study it is also important to take into account the necessity of protection of other rights such as the right of free speech, the right to privacy and family life or the right not to be subjected to inhuman and degrading treatment, etc. These are inherent rights of every person, their protection against arbitrariness is a guarantee of the rule of law, and, whether the restriction of rights is sustainable in some conditions, the decrease of the legal rights and fundamental freedoms in the sense of reducing the volume of their content is not accepted.<sup>4</sup>

The method of analysis of the relationship between the fundamental rights and freedoms, the seriousness of the offense and the solutions to be adopted, should start from setting the reference item or items, those pillars of proportionality test and which, in fact, there are really relevant issues in a particular situation.<sup>5</sup>

In this context the discussion is based on the following certainties:

The organized crime offenses require special attention because of their seriousness in a society. The term "criminal organization" means that specially constituted group to commit certain offenses with the precise purpose of obtaining profit.<sup>6</sup> Since the means of committing those crimes grew considerably in the last decade no doubt that we need a proper response, but I appreciate that not every response.

The civil rights that are to be protected must be treated in the new European context, marked by intensifying the fight against organized crime. If, at the beginning of the European Union Community, objectives were achieved mainly through national laws which criminalize and punish certain actions, over time, as the crimes level grew, in European Union felt the need to create both the legislation and the institutions to ensure a better protection of the common fundamental values.

On the other hand, the human rights, starting with the oldest documents that were mentioned, namely the Universal Declaration of Human Rights of 1948, and continuing

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<sup>3</sup> See C. L. Popescu, *Protecția internațională a drepturilor omului. Surse, instituții, proceduri*, All Beck Publishing House, Bucharest, 2000, pp. 5.

<sup>4</sup> See D. Micu, *Garantarea drepturilor omului*, All Beck Publishing House, București, 1999, pp. 141.

<sup>5</sup> See P. Hulsroj, *The principle of proportionality*, Ed. Springer, Hornbaek, 2013, pp. IX.

<sup>6</sup> See Elisabeth Symeonidou-Kastanidou, *Towards a new definition of Organised Crime in the European Union*, în *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, pp. 96.

with all other treaties and conventions that followed, have not been made keeping in mind the peace and political stability. They rather were designed to allow Member States, in certain circumstances, particularly in wartime, to take certain decisions to be able to resolve the various crises and conflicts to come.<sup>7</sup>

Thus, in recent years, actions against the financial interests of the EU has begun to escalate, such as the organized crime, trafficking in arms, drugs, and other such acts that jeopardize the safety of the citizens at the Community level. In the face of this new challenge, both the European Union and the Member States must adopt an active attitude in protecting its citizens, firstly by imposing a set of measures at the legislative level, capable of preventing such acts.

The difficulties in implementation of such conducts are given by the fact that the European Union was not conceived as a European unitary state or a federal state, but rather as a union of countries that share several objectives, including the protection of the fundamental rights and freedoms.<sup>8</sup> Therefore, often, the transposition of the European decisions into the national law of the states was made differently and, certainly, besides the fact that this was an obstacle in the fight against such grave acts, sometimes it led to disproportionate decisions, which affected the common people.

In conclusion, global fear imposed by such acts must not lead to an excessive restriction of the fundamental rights, although, I would say that this is an important factor in assessing the proportionality of such measures. From the perspective of the discussion, in the present study, both the prevention solutions proposed and procedural safeguards concerning what it entails interest me, this spotlights especially the balancing, on the one hand, the seriousness of the actions targeted by the measures, on the other hand, and the need to protect fundamental rights and freedoms.

The identification of the main reasons why this area is so vulnerable helps us to propose better legislative solutions that will constitute a disproportionate restriction of the fundamental rights.

## 2. The causes of the disproportionate restriction of the fundamental rights in the relationship with the criminal offenses of the organized crime

Protecting the fundamental rights and freedoms of the citizens was the main aim of the European Community since its birth. The need to respect and defense them has become part of everyday speech, throwing in the European public space a number of definitions, concepts and mechanisms that were meant to pave the way towards achieving this primary objective.

In this way, the human rights received an important place in the system. Specifically, however, the need to ensure the rule of law, to impose certain behavior on citizens or to prevent and combat crime, led to an unjustified restriction of the rights of the persons who had no involvement in any offense, and all this was happening in the name of public safety.

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<sup>7</sup> See in this sens The Report of the Eminent Jurists Panel on Terrorism, counter-terrorism and Human Rights, Geneva, 2009.

<sup>8</sup> See G. Antoniu, *Legea penală română în condițiile post-aderării*, Criminal Law Review, nr. 2/2008, pp. 10.

The causes are multiple and they focus specifically on the erroneous perception that the Member States and the European community have had its own role. Addressing sensitive community problems, such as that of organized crime, strictly in terms of earnings, led to neglecting the importance of the means of the action used.

The perfunctory treatment of the particularities of the organized crime, in order to distinguish this type of crime to the usual ones, the use of ambiguous phrases and expressions, without being able to determine exactly who is addressed to and not focusing the attention on the protection of the rights and fundamental freedoms but on developing sophisticated as means of preventing, investigating and prosecuting them may constitute the other relevant sources. No doubt that the gravity of the acts committed determines the seriousness of the means of action used, but this should not be taken to extremes.

### ***2.1. Misunderstanding the active role in the protection of the fundamental rights***

To be total, the protection of the fundamental rights and freedoms implies both refraining from bringing an unjustified restriction on their exercise and creating a set of rules to prevent any interference from others in their field. This, undoubtedly, shows the existence of two types of obligations: negative obligations and positive obligations.

Detailed analysis of the European Convention on the Human Rights readily reveals that it contains a number of provisions mainly on what the states shall never do. These prohibitions are part of the so-called "negative obligation".

Essentially, this requires states to refrain from any act likely to unduly restrict fundamental rights and freedoms of its citizens. In this way it provides a set of criteria and benchmarks, in order to recourse, depending on the particular situation, to smaller limitation of the rights.

For example, if we consider art. 8 paragraph 1 of the Convention which set out the right to respect the private and family life, we see that, immediately, in paragraph 2, it presents the special conditions under which this right may be subject to restrictions.<sup>9</sup> The wording of the text begins with an assertion of banning the arbitrary restriction of this right. This means that the state can criminalize certain conduct which would constitute a restriction of the right provided in Article 8, only where it is strictly circumscribed to the conditions listed in paragraph 2, in other words, if it is justified on grounds of public interest.<sup>10</sup>

The situation is somewhat similar if we take into consideration Article 10 of the Convention in which the freedom of expression is protected, which in accordance with paragraph 2 of the same Article, may be restricted only if strictly necessary in a democratic society for public safety reasons.

Of course, we can find other examples,<sup>11</sup> but what is important to emphasize in the context of discussions related to the organized crime is that, in principle, the seriousness

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<sup>9</sup> Art. 8 par. 2 of The Convention on Human Rights: *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

<sup>10</sup> See A. Ashworth, *Positive obligation in criminal law*, Hart Publishing, Oxford and Portland, Oregon, 2013, pp. 196.

<sup>11</sup> See art. 2 or art. 5 of The Convention on Human Rights which are based on the same principles.

of such acts may impose a broader discretion on the restriction of certain rights, but in any form it can not lead to their removal. This is because one of the criteria of individualization is the nature and dangerousness of the offense.

I considered it appropriate to remind it in this research, because they are true assessment criteria on the conditions of any restrictions, whether by action or inaction, thus helping the development of effective criminal rules in the fight against crime organized.

As noted, however, protecting the fundamental rights and freedoms means not only refraining from undoing harm to them, but, at the same time, it requires active protection by adopting a set of measures to ensure prevention from such acts.

These tasks of the European Community and of the Member States have given rise to the so-called "positive obligation", under which, the states must not only stop to do harm but also to manifest an active role in the protection of the fundamental rights.<sup>12</sup>

The source of these obligations is considered mainly The Court's case-law<sup>13</sup>, although some reference about them can be detached even from the Convention text. In this respect, art. 1 states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". These provisions could be interpreted as a primary obligation of the states to take actions to provide effective protection of the rights.

At the same time, the need for security of the citizens is undoubtedly a need for effective prevention of the crimes, and this objective can be achieved by implementing a whole system for fighting organized crime. This is much more difficult to achieve and that is why it requires a careful choice of pathways and means of combating the organized crime.

These two types of obligations should not be viewed independently but rather as two interdependent elements in functioning joint action in the fight against the organized the crime groups.

Therefore, it is essential to identify the most effective measures leading towards this end with a minimized restriction of the fundamental rights. Determining this limit is the key element in the development of proportionate measures in terms of the restrictions that they impose.

The organized crime evolved in the last decade and that implies that the means of preventing and combating the phenomenon did not provide the expected results. The cross-border dimension in the context of the discussion of such facts cannot be neglected. So, if, at first, it primarily affected the State where there were the so-called organized crime groups, due to technological development, this has become a threat to international security very quickly. Facing this new challenge at the international level we have sought some legislative solutions and the very idea of the cooperation mechanisms to prevent, combat, investigate and punish them.

But often, because of the special characteristics of such facts, the final form of documents was not fully consistent with the principles and the reasons which prompted their adoption. In other words, although the preamble acts at the Community level or in the explanatory memorandum of the internal laws are constantly reiterated, the need to protect and respect the fundamental rights and freedoms are constantly reiterated, the

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<sup>12</sup> See Anthony Amatrudo și Leslie William Blake, *Human rights and the criminal justice system*, ed. Routledge, New York, 2015, pag. 21

<sup>13</sup> See Court decision from 4 may 2011 in case Kelly vs. U.K. available on <http://hudoc.echr.coe.int>.

paradoxical situation was reached that the act itself constitutes a threat to them. This was due to the promotion, on behalf of public safety, of excessive and disproportionate measures.

The real aim was to find ideal solutions through the balancing, on one hand, the need to resort to effective means of combating crime and, on the other hand, to protect the human rights.

As an expression of the fight against organized crime, and in order to ensure an effective prevention against such acts, and given the active role of the Union, Directive 2006/24/EC was adopted.<sup>14</sup> This concerned the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communication networks. Essentially, it contained a number of provisions regarding the type of data to be kept, the persons who have access to them during the storage, the time they are kept, etc.

What should be noted in terms of this study is that the main objective of its adoption, as it is clear from the provisions of art. 1, is to assist the prevention and combating of the serious crime, as defined by Member States.<sup>15</sup> No doubt, its target was also the organized crime offenses.

The question was whether these regulations and respect the privacy and family life<sup>16</sup>, the right to protection of personal data<sup>17</sup> and to what extent they do that and whether the interferences in the aim of these rights are proportionate to the aim pursued. Moreover, the Court of Justice of the European Union has been called upon to analyze the compliance of this Directive with EU law.

By its judgment from 8 April 2014<sup>18</sup>, the Court ruled that the provisions examined constitute a disproportionate interference in the sphere of the fundamental rights and, therefore, the whole directive was invalid.

Among other things, the Court held that although, unquestionably, its aim is to prevent the commission from very serious crimes, a general interest in the sense of its constant jurisprudence<sup>19</sup>, this does not mean that any restriction is permissible.

For this reason, it proceeded to a thorough verification of the conditions of the proportionality of the measures, leading to the conclusion that the total lack of limits, both on individuals and on the means of communication, a lack of objective criteria for limiting the people who have access to such data and the lack of transparency of proceedings makes from these measures an unwarranted restriction of rights.

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<sup>14</sup> Published in Official Journal of The European Union, Nr. L 105 from 13 April 2006.

<sup>15</sup> Art. 1 from The Directive 2006/24/CE *"This Directive aims to harmonize Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law"*.

<sup>16</sup> See art. 7 from The Charter of fundamental rights of the European Union.

<sup>17</sup> See art. 8 from The Charter of fundamental rights of the European Union.

<sup>18</sup> Judgement of The Court Of Justice of the European Union in Cases C-293/12 and C-594/12, available on <http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62012CJ0293&from=RO>.

<sup>19</sup> Judgement of The Court Of Justice of the European Union in Cases C-145/09 from 23 November 2010 available on <http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0145&lang1=en&type=TX&ancre>.



In Romania there were also a number of similar measures to that invalid directive and the intervention of the Constitutional Court was equally prompt. Thus, by Decision 440/2014, it was admitted the exception of unconstitutionality of Law no. 82/2012 on the retention of data generated or processed by providers of public communications networks and by Decision 17/2015, it was admitted the objection of the unconstitutionality of the law on cyber security.

If, in the case of the first one, the reaction of the Constitutional Court was expected, given the fact that the law under review was no more than a transposition into the national law of the provisions of Directive 2006/24 / EC, which as it was showed before was invalidated, the second one has been declared contrary to the Constitution because it limited the exercise of the rights that broke the rights balance that should exist between the individual and the community interests, and there were not sufficient safeguards to prevent abuses.

So, here are some examples that demonstrate without any doubt that misunderstanding the active role in protecting the fundamental rights, often can lead to the development of solutions at the legislative level to come into contradiction with the fundamental principles. At the same time, the excessive need for security can sometimes generate particularly serious consequences in terms of intrusion into the sphere of the rights.

Therefore, I consider that the correct understanding of the role of these positive obligations in protection should be linked with the negative obligations derived from the extensive case law of the Court. Thus, for example, the right to liberty and security provided in art. 5 of the Convention would effectively prohibit the arbitrary arrest, meaning that it is imperative that it be justified on the grounds of public order if there is reasonable suspicion that the person committed the act. But, this can only be achieved while the state provides, through the rules governing the criminal proceedings, the access to the file for the accused, the right to be informed about the accusation, and it ensures the possibility of recourse to an effective remedy against such measures etc.

Likewise, on the previous examples on respect for private life and correspondence, both the Luxembourg Court and the Constitutional Court have ruled that such measures are not disproportionate 'ab initio'. This was only following the failure of the Community and the state to double these assets with other measures meant to establish a set of safeguards against misusing of such means.

## ***2.2. Defining the concepts and offenses of the organized crime in a vague and ambiguous way***

The principle of legality also implies the obligation to lay down clear and concise provisions in order to determine, with certainty and without doubt, the conditions of its application and the persons to whom it is addressed.

Unfortunately, the matter of the organized crime does not contain such clear rules, but it rather uses a series of ill-defined concepts, which do nothing but generate confusion. In addition to this, the disparity of the international decision and their transposition into the national law of the Member States in different ways, are important obstacles to achieve its goals. Although, at first glance, these issues would seem to have little importance, as I will show below, they can create extremely negative consequences on individuals, paving the way for undue restriction of their rights and freedoms.

At the international level, more acts in the matter of the organized crime have been issued in the name of the so-called general Preventions.

Such an example is the Joint Action no. 733/1998<sup>20</sup> adopted by the Council, under Article K.3 of the Treaty on European Union, concerning the criminalization of participation in a criminal organization in the Member States of the European Union.

Within that, the criminal organization was defined as: *a structured association of more than two persons, established over time, acting in concert to commit offenses punishable by deprivation of liberty or the enforcement of a custodial freedom of maximum four years or a more serious penalty, whether such offenses are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.*<sup>21</sup>

At the same time, The United Nations Convention of 15 November 2000 in New York against the Transnational Organized Crime defined the organized criminal group as: *"a structured group of three or more persons, existing for a certain period and acting in concert with the aim of committing one or more serious crimes or offenses covered by this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."*<sup>22</sup>

Another document that was adopted was The European Framework Decision no. 2008/841/JHA<sup>23</sup> against the organized crime. It passed mainly along the same lines defining the criminal organization as *"a structured association, established over time, of more than two persons acting in concert to commit offenses punishable by deprivation of liberty or by application of a measure safety of imprisonment with a maximum of at least four years or a more serious penalty in order to obtain, directly or indirectly, a financial or other material benefit"*<sup>24</sup>

The analysis of these documents highlights the use of terms that are not clearly defined and it has an ambiguous meaning. So, for the existence of a criminal organization, an association "for a certain period of time" is required, but without specifying for how long or even some criteria that make it at least determinable. The significance of the concept of "structured group" or the "structured association" is also ambiguous, leading to the possible of inclusion in it even of some associations that actually do not involve a structured group of organized crime.

The repeated use of the phrase "each State shall take the necessary measures"<sup>25</sup> to combat the organized crime, may be another reason for adopting too restrictive solutions. Beyond the fact that this expression has appeared in the European acts because these decisions were an indirect source of criminal law<sup>26</sup> and the states had the obligation to transpose them into their national law within a certain period of time, however, it can create some confusion. So, what is the meaning of that term and what is the extent to which a particular measure will be deemed necessary. It is a matter of discretion of each state but it can lead to unnecessarily and exaggerated restrictive measures of the rights.

All these definitions are too vague and generic. For example, it is quite difficult, at present, to make a clear distinction between the organized criminal groups and the

<sup>20</sup> Published in the Official Journal of The European Union L351/1 din 21.12.1998.

<sup>21</sup> Art. 1 from the Joint Action no. 733/1998 adopted by the Council.

<sup>22</sup> Art. 1 from The United Nations Convention against Transnational Organized Crime.

<sup>23</sup> Published in Official Journal of The European Union, L 300 from 11 November 2008.

<sup>24</sup> Art. 1 par. 1 from Framework Decision no. 2008/841/JHA.

<sup>25</sup> See art. 2 from The Framework decision 2008/841/JHA.

<sup>26</sup> See F. Streteanu, *Tratat de drept penal. Partea generală*, vol. I, C.H.Beck Publishing House, București, 2008, pp. 119.

casual associations, as criminal organizations committing crimes do not see it as a means to achieve a goal but rather as a way to increase profits. At the same time, it is hard to qualify some occasional associations who commit petty theft as a criminal organization.

The non-use of a criterion on the consequences that such acts could produce or produce leads to the qualification as criminal organizations virtually any combination of three or more people, something that I do not consider it was the intention when drafting such acts.

Unfortunately the Romania legislation does not clarify all the problems identified at the European level. The Law 39/2003<sup>27</sup> on organized crime and the new criminal code in art. 367 contain, largely, the same provisions as the international documents.

For example, a very interesting problem, generated precisely by this ambiguity and vagueness of the law, was to state that, if in the new penal code has occurred or not, the decriminalization of the offense of initiation, membership or support of a group that is not a criminal organization according to the law.<sup>28</sup>

Some courts have interpreted this change as a decriminalization law<sup>29</sup>. Despite the fact that it was not a single decision, all the High Court of Cassation and Justice by Decision. 12/02 June 2014<sup>30</sup> stated that "the facts provided by art.323 of the previous Criminal Code and Art.8 of Law no. 39/2003, in the previous regulation to amendments by Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, can be found in the criminalization of art.367 of the Criminal Code, not being decriminalized."

Such discussions have not only theoretical but also a practical importance, given the consequences in the sphere of the fundamental rights involved in acts of the organized crime. Beyond the high limits of punishment of such crimes, it raises an issue of admissibility of special investigative means, involving a significant restriction of rights.

It is, therefore, preferable to adopt clear legislative solutions, even in the wording of the law defining the concepts and the introduction of a differentiation between organized groups constituted true criminal organizations and casual associations, often consisting of teenagers who have nothing in common with the real organized crime.

### ***2.3. Treating superficially the peculiarities of the organized crime and the general application of the measures of preventions***

As noted in the preceding paragraph, the use of ambiguous concepts and inconsistency of the regulation can lead to the adoption of some preventive measures involving a disproportionate restriction of the human rights.

If, at first, the organized crime represented a local threat, at the level of Member States,<sup>31</sup> focusing primarily on criminal offenses of violence against members in order to

<sup>27</sup> Published in The Official Journal Nr. 50 from 29 January 2003.

<sup>28</sup> By art. 126 of Law 187/2012 was amended the Law 39/2003 in that the art. 8 was repealed. Article 8 provides that: Initiating or setting up or joining or supporting any form of a group, to commit crimes, which is not a criminal organization under this law, shall be punished, where appropriate, according to art. 167 or 323 of the Criminal Code.

<sup>29</sup> See decision 43/A from 5 March 2014 of ICCJ available on <http://legeaz.net/spete-penal-iccj-2014/decizia-43-2014>.

<sup>30</sup> Published in The Official Journal nr. 507 din 08/07/2014.

<sup>31</sup> See F.D. Cășuneanu, *Măsuri de combatere a grupului criminalizat adoptate la nivelul Uniunii Europene*, in *Dreptul*, nr. 3/2012, pp. 196.

impose fear, after the enlargement of the European Union and the opening of the markets, they received a totally new role.

Thus, the criminal groups commit crimes against the financial interests of the states or the community, trying, in this way, an economical and political domination. Precisely because of these new features the remedies are required to be different. Often, both in literature and in the legal practice, it was considered to be defining elements of criminal organizations, the fact that they are composed of three or more persons acting in a coordinated way, for a certain period of time, having a well defined hierarchical structure and seek the profit.<sup>32</sup>

Perhaps in the past, these factors were sufficient to define the existence of an organized crime group, but nowadays, the real crime is defined in a completely different way. The above features can also be found within a specialized group to commit burglary. This is the real size of the organized crime phenomenon and can, nowadays, such acts justify the adoption by the Community of some prevention measures affecting the fundamental rights of all citizens?<sup>33</sup>

The answer is categorically NO. Firstly, the criminal organizations, although they may meet the conditions listed above are distinguished by their purpose. They have as their main objective to strengthen their influence they exert on the political level. In this way, they seek to grant an appearance of legality as they carry out operations by resorting to the well known technique of money laundering.

Dominating the political powers in a state, they get the economic power too, so, all the gains are the natural consequence of fulfilling the first objective. At the same time, the criminal group has an independent existence, different from its members, which gives them some stability and which makes them harder to destroy.<sup>34</sup>

Facing these new challenges, the need for security requires reliance on the complex means of action, namely the monitoring of the financial operations, ongoing monitoring of the suspects, the use of the undercover investigators in such organizations, the confiscation of the products, etc. All these shall lead to restrictions of the fundamental rights guaranteed in the Community.

Therefore, a clear delineation of these organized crime groups from other groups, which commit crimes, is needed, and, in this way, the application of the principle of proportionality has more chances of success.

The need for security has led not only to adopt special legislative solutions but also to create specialized bodies. For example, the Europol was created to ensure a better cooperation at the European level between the states, getting a better protection of people against the organized crime.<sup>35</sup> In this way it was allowed to the judicial bodies to conduct their control not only on the suspects but even on those they had contacted, even though the latter had no relation to the alleged facts.

Monitoring financial transactions through an obligation imposed to all the bodies involved in such transactions in accordance with Directive 60/2005<sup>36</sup> raises, again, a question of proportionality. Money laundering has been declared, since the Tampere

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<sup>32</sup> See A. Tiliciu, *Infrațiunea de constituiune a unui grup infracțional organizat prevăzută de articolul 367 din noul Cod penal*, in *Caiete de drept penal*, nr.2/2014, pp. 73-84.

<sup>33</sup> I mean for example, at Community level the Directive 24/2006 / EC or at national level the law regarding cyber security, both declared contrary to the fundamental principles.

<sup>34</sup> E. Symeonidou-Kastanidou, *op.cit.*, pp. 102.

<sup>35</sup> See the Preamble and Art. 2.1 of the Convention on Europol.

<sup>36</sup> Published in The Official Journal of European Union L309/15 din 25 noiembrie 2005.

European Council<sup>37</sup>, as the heart of organized crime and, that is why, drastic measures in all the Member States are required to be taken against such acts.

Confiscation of the proceeds of the criminal acts was considered a proportionate measure<sup>38</sup> by the ECHR.

The conclusion expressed above is that the new particularities of the criminal organizations must be found in nowadays society so that the prevention measures do not have a general application, but a particular one, only in the investigation of such acts. This means, concretely, the application of the principle of proportionality in this area.

### 3. The need for security can not impose any rights suppression

Article 15 of the European Convention on the Human Rights states that: "*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*"

In other words, the system established under the Convention, in principle, is not against taking more stringent measures in some exceptional circumstances. Therefore, it would be essential to clarify whether, indeed, the current global context is equivalent to one of state of war or if the organized crime is a public emergency threatening the life of the nation. This is because only such situations can generate exceptional measures. Apart from these, there are certain rights that can not be derogated.

No doubt that neither the seriousness of some acts of the organized crime nor the possible consequences of these, are not sufficient to allow the restriction of any rights.

I refer in particular to the right to a fair trial guaranteed in art.6 of the Convention and the right not to be subjected to an inhuman and degrading treatment, guaranteed by art. 3 of the Convention. Of course, it refers more from the perspective of persons subject to criminal investigations whose rights are required to be respected equally, whether it is acts of the organized crime or other.

As Lecomte du Nouy Pierre said: "There is no other way to human solidarity than the respect for human dignity"<sup>39</sup>. Therefore, in case vs. Gafgen vs. Germany <sup>40</sup>, it has been said that torture and inhuman treatment are prohibited even if the situation is at the limit. In other words, no derogation from art. 3 is allowed.

That negative obligation of the states referred to in art. 3 of the Convention acquires an absolute character and aims to prevent the use of techniques in the investigation of crimes that could constitute inhuman and degrading treatment. The Organized Crime can not be an exception from this rule.

<sup>37</sup> The European Council from Tempere took place in 2001.

<sup>38</sup> Paragraph 27.30 of the ECHR judgment of 22 January 1994 in Case vs. Raimondo Italy, available on [http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR\\_Serbia/ECTHR%20Judgements/English/RAIMONDO%20v%20ITALY%20-%20ECHR%20Judgment%20\\_English\\_.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR_Serbia/ECTHR%20Judgements/English/RAIMONDO%20v%20ITALY%20-%20ECHR%20Judgment%20_English_.pdf).

<sup>39</sup> Cited by Philippe Richard, *Droits des l'homme. Droits des peuples*, Ed. Chronique sociale, 1995, pp. 15.

<sup>40</sup> See The ECHR judgment of 3 June 2010 in Case vs. Gafgen Available in Germany, available on [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99015#{%22itemid%22:\[%22001-99015%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99015#{%22itemid%22:[%22001-99015%22]}).

Therefore, in this article 3 of the Convention we do not deal with the proportionality assessment, since no derogation is possible, but it is important to clarify whether or not an act constitutes inhuman or degrading treatment. Even if in practice it was difficult to determine whether a particular action has been such a prohibited treatment, the Court still found a violation of art. 3 in that the State failed to ensure optimal procedural framework.<sup>41</sup> In other words, it failed to fulfill its positive obligations arising from the Convention.

In addition, the state must ensure the punishment of those resorting to such techniques criminalizing torture and to carry out effective official investigation that could lead to punishing those responsible.

At the same time, the right to a fair trial is meant to ensure that the persons accused of crimes have the real opportunity to defend themselves, thus respecting the presumption of innocence. In this respect he is entitled to be informed as soon as possible about the charges against him, he has the right to an attorney, the right to consult the case file and propose evidence etc.

Even the most serious allegations can not suppress these inherent rights of any accused person. This is because the system imposed by the Convention is intended to guarantee the rights it contains but also this protection must be effective. Therefore, never can any breaches of the procedural rules in the criminal proceedings be overlooked, meaning just they are some breaches of the procedural rules in the criminal proceedings through a simulated show centered on the accused.

However, some aspects can be identified that may cause practical problems regarding the respect of the right to a fair trial. I mean the fact that often, to investigate acts of the organized crime, it takes recourse to a series of special techniques such as undercover investigators, witnesses with protected identity using, etc. They, no doubt, generate some problems for the defense.

Their use does not mean a violation of the right to a fair trial where the entire procedure provides sufficient guarantees and a real possibility for the accused to prove the contrary to those presented in the context of such evidence. In many occasions, to determine concretely to this Court was considering a balancing of the interests of the accused with that of other people whose rights are being protected.<sup>42</sup> The trial will be fair if the right to defense can be exercised according to law and the evidence on which the accused does not have access corroborated with other evidence that puts no definite question mark.

Also the question of violation of the right to a fair trial was put when confiscating the products derived from illegal acts. This is because the condemned is required to prove that those goods are not the product of a criminal activity but they were acquired lawfully. The Court stated that the principle does not preclude such an approach, provided that the accused had an effective opportunity to bring evidence in their acquisition licit purposes in a public proceeding with the assistance of a lawyer, etc.<sup>43</sup>

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<sup>41</sup> ECHR judgment of 18 December 1996 in Case *Aksoy v Turkey* available on <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58003#%22itemid%22:%22001-58003%22>}.  
<sup>42</sup> See ECHR judgment of 16 February 2000 in case of *Jasper v. United Kingdom* available on <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58495#%22itemid%22:%22001-58495%22>}}

<sup>43</sup> See ECHR judgment of 23 September 2008 in case of *Grayson and Barnham v. The United Kingdom*, available at <http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/>

See that the need for security must not be taken to the extreme limits there are rights which can not be derogated, except of course for war. While the Court tried on its endless jurisprudence on the right to a fair trial to include multiple implications of such a concept, a number of inconsistencies can be found, as it was shown by many critics in literature.<sup>44</sup>

#### 4. Conclusion

Even if we admit that the phenomenon of the organized crime has certain peculiarities and, thus, it requires special measures we still have to set certain limits within this area.

The need for security can not determine the acceptance of measures leading to the total suppression of the fundamental rights. Alternative means of combating the organized crime should be used with caution, in order not to affect both the criminals and the honest people.

It is, therefore, essential that these regulations include definitions of concepts and offenses in a clear way that leaves no room for ambiguity. The ambiguity of the laws is the first step towards using these facilities not to protect the individuals but for society subjugation, by the possibility for the state to interpret it according to their own interest.

The generalization of applied measures is not a solution and that is why the application of these measures should only be done in these types of crimes, so that innocent people not to be affected.

The main focus should be directed towards the protection of the fundamental rights and freedoms and not on developing more sophisticated means of prevention, investigation and punishment of such crimes. If this is the starting premise, there are chances that all these joint efforts at the international level lead towards success in fighting the organized crime.

In conclusion, just to achieve a balance between the individual rights and freedoms of the citizens and the need to prevent such serious and complex action, it is imperative to use the proportionality test not only with regard to the proposed solution but also linked to the whole mechanism leading to it.

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# Organized Crime and Similar Terminological Concepts. A Problem in Defining the Notion of Organized Crime

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## **Abstract:**

*One of the fundamental problems in defining the notion of organized crime is, that next to the public opinion, not even a part of the experts, do not make, in a sufficient way, a difference between the essence and the content of organized crime and to this similar phenomenon by taking in account the way these manifest or their shared elements. As such, confusion is being made between the organized crime notion and the terms of transnational organized crime, international crimes, "white collar" crimes, professional crimes, crimes of abuse of power, political crimes, etc. Even if it could be said that, these terms are in a way similar and that they have some common elements, we are referring to specific phenomenon and terms, that should not be confused.*

*The present study will present these criminogenic concepts and the resemblances and differences between these and the organized crime phenomena.*

**Keywords:** *organized crime, transnational organized crime, international crimes, cross-border crimes, "white collar" crimes, professional crimes, crimes of abuse of power, political crimes.*

## 1. Introduction

The first and most important step in understanding a social phenomenon, as such for organized crime as well is for its definition to be determined. Setting down the correct and complete notion is very important so that a stable base is being established as well as from other professional and theoretical considerations.

The fact that, on one hand, there is no clear, precise and complete definition and on the other hand the multitude of different approaches in defining the concept, can bring to discrepancies and misunderstandings regarding to the organized crime phenomenon's existence, patterns, amplitude and degree of social danger. This could negatively influence the adequate reaction and decisions of the law-making body bringing it to fail to take the necessary repressive actions against this criminogenic phenomenon.

Exactly defining the notion is crucial as for certain procedural mechanisms that regard the prevention, detection, proving and sanctioning the actual organized crime acts.

The importance of defining organized crime "is not important only from the theoretical character, but as well of great importance for the competent state's authorities for

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their practical actions”<sup>1</sup> signifying therewith the essential premise in order for this phenomenon to be rebutted. Defining organized crime is necessary for the elimination of different legal stereotypes of this phenomenon, as well as in order to be able to make a clear distinction between this and other similar phenomenon. Still, defining it is not easy at all, because it implies a very complex and adequate process, by applying multiple scientific method and principles. On the other hand this term is often wrongly perceived and very hard to define.

Even though, the problem of defining organized crime is being discussed for over decades by the doctrine and international studies and professional institutions, as well as by national legislations, resolutions and international declarations, today there no unanimously accepted definition but, on the contrary there are multiple different definitions on this matter.

When writing on this matter there are almost no authors, studies or analysis that, when dealing with this problem, try to give their own definition on organized crime. It could be said that “in defining organized crime there are as many different definitions and approaches as many authors dealing with it”<sup>2</sup>.

How difficult it is for a universal definition of this phenomenon to be given, it is maybe proven by the literature, very often, mentioned example on the *The Federal Organized Crime Control Act of 1970*<sup>3</sup>, that does not contain a definition on organized crime, even though *de facto* essential for this legal document, even though the notion is implemented within the title of the law.

There are many motives because of which there is no definition for this concept not to be universally accepted. Some of the difficulties met by the theoreticians, practitioners and law-makers concern for example: different theoretical approach modalities of the problem, the dynamism and complexity of organized crime, different social-economic, political and juridical systems form one state to another, “hyper-inflation” of the organized crime notion, different terminological concepts, etc.

Organized crime represents phenomenon that, because of its social, juridical, mass-media and other implications, does not leave anyone indifferent. “Expressions as, *mafia, underground, crime syndicate, gang, boss*, and others have become part of daily vocabulary of people all around the world, and the occultism, the enormous power and wealth that surrounds the organized crime actors have broth a contributions to the formation of the mystical aureole around it”<sup>4</sup>. Many books have been written, movies and TV series have been made on the legendary leaders of organized crime like Al Capone, Meyer Lansky or Lucky Luciano and, and almost every day there is news in mass-media on the crimes committed by the members of organised crime group.

On the other hand, this subject has been debated a lot within the scientific and professional opinion concluding with many theoretical papers, leading in such a way to the impression that this phenomenon has been, from the scientific point of view, completely analysed, researched and clarified. Even so, on a closer look, it can be

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<sup>1</sup> Milan Škulić, *Organizovani kriminalitet – pojam i krivičnoprocesni aspekti*, Beograd, Dosije, 2003, p. 26.

<sup>2</sup> Milo Bošković, Zdravko Skakavac, *Organizovani kriminalitet – Karakteristike i pojavni oblici*, Novi Sad, Fakultet za Pravne i Poslovne Studije i Prometej, 2009, p. 142.

<sup>3</sup> *The Federal Organized Crime Control Act of 1970*, Public Law 91-452, 84 Statute, October 15, 1970, <http://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg922-3.pdf>.

<sup>4</sup> Đorđe Ignjatović, *Organizovani kriminalitet – II deo – kriminološka analiza stanja u svetu*, Beograd, Policijska akademija, 1998, p. 3.

concluded that things are not really that simple, that many questions remain without explanations, that there are many confusing attitudes and evidently, this “story” will not end soon.

It cannot be contested that, organized crime is one of the most intriguing subjects and this is why, it became an “everyone knows everything about it”<sup>5</sup> phenomenon, but in reality there are just a few people that really understand its essence and signification.

As such all the above mentioned lead to one of the most significant problem for defining the organized crime concept. This is the product of, not only the public view, but as well a part of the specialized opinion, because of the false image of organized crime, wrongly identify the essence and content of this phenomenon and do not make a distinction between it and other similar criminal phenomenon with which it has similar basic elements.

Wrongly identifying *organized crime* with *transnational organized crime*, *international crimes*, *cross-border crimes*, “*white collar*” crimes, or *professional crimes* concepts, as well as the interference with *organized crime group*, *mafia*, *gang*, *criminal organization or association* as basic subjects of organized crime, is unfortunately very common within professional literature. Even though it can be asserted that, these are associated terms that certainly they have common elements that seem similar currently we are referring to totally different phenomenon and notions that shall not be confused. The exact delimitation of the above mentioned concepts towards organized crimes of a particular importance for the doctrine in general and especially for the universal and national juridical-criminal legislation.

## 2. Organized crime and similar terminological criminal concepts

### 2.1. Organized crime

Essentially, in our opinion, organized crime represents those activities carried out by a group, organised for a long period of time out of three or more persons, that have corruptive liaisons or of any other nature with state’s authorities and are predisposed to use violence and other ways of intimidation, having as final purpose to obtain profits and/or power by committing crimes for which the legislation provides punishment with prison of minimum four years, by the group members that have précised and clearly determined assignments.

For the necessities of this study as well for a better understanding in the theoretical analyses, respectively for an in practice easier identification of the phenomenon, the following mainly descriptive definition, will be suggested: organized crime represents those criminal activities of a certain gravity, undertaken by a group composed out of three or more persons, that are being committed in a constant, planned and conspired manner through different methods and means. Criminal associations have generally an internal well determined hierarchy, with a specialized structure and self-defence mechanisms. Organized crime is usually oriented in obtaining profit, their main purpose being a material gain at very high quotas, noting that sometimes its purpose is to obtain the power or other high social positions. In order for it to obtain the high profits, it tries to obtain absolute control over sever territories and internal and/or external markets of different products and services. In achieving these, it adapts to the concrete social-political and economic situation. Money laundering is being used in order to hide

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<sup>5</sup> See: Howard Abadinsky, *Organized crime*, First ed., Boston, Allyn and Bacon, INC, 1981, p. 7.

the existence, origin and nature of the illegally obtain resources assuring in such a way perfect conditions for the use of the money. It deals with illegal businesses, usually using of force, violence and intimidation, but is conducting legal businesses as well. It exponents are mingled within different state structures and authorities. It does not know borders and usually it holds an international character. It affects the country's economic, social and political life, through different illegal and forbidden methods and means. Corrupting state functionaries, judicial and political system officials and police structures is a permanent preoccupation of the organized crime.

## **2.2. Criminality and organized crime**

Criminality can be defined in different ways, depending on the point of view of which is being looked at.

In a vaster notion, criminality represents the totality of criminal acts and facts committed within a certain period of time on a certain determined territory, being considered as "a particular case of social deviation, that encompasses the totality of acts that defy the established legal norms and violate the written codes (law) or unwritten ones (customs, public opinion's expectations, etc.) representing illegal manifestations and transgressions of the normative model of a certain society."<sup>6</sup>

Criminality represents that criminal segment that encompasses illegal activities, for which penal sanctions are foreseen, committed by individuals alone or relatively arbitrarily associated, throughout different methods and means, aiming diverse purposes.

The ("conventional"<sup>7</sup>) definition of criminality does not show the real danger it creates for the social danger degree towards the state and economic, social and political relations. In comparison with the former, organized crime does in a way contain these elements, not envisaged by criminality in the "traditional", conventional sense.

The difference between criminality and organized crime can be explained as follows: "Organized Crime includes that part of criminality that contains normative crimes under the hypothesis that it envisages the necessary requirements requested by law for its existence."<sup>8</sup>

As a conclusion, organized crime represents only that segment of general criminality, namely, the most aggressive and dangerous one.

## **2.3. Corruption and organized crime**

As in the case of organized crime, corruption is part of those criminal phenomenon for which there is no agreement on its definition, notion and content. In the vaster context, under corruption can be understood "the abuse of public office for private gain"<sup>9</sup>. The Republic of Serbia Agency for Anti-corruption defines corruption as "the relation based on abusive use of political power, aka of its position, or social influence

<sup>6</sup> Florin Daniel Cășuneanu, *Criminalitatea organizată în legislațiile penale europene*, București, Universul Juridic, 2013, p. 9.

<sup>7</sup> Camil Tănăsescu, *Criminologie – Curs universitar*, București, Universul Juridic, 2012, p. 149.

<sup>8</sup> Mićo Bošković, *Transnacionalni organizovani kriminalitet – oblici ispoljavanja i metodi suprostavljanja*, Beograd, Policijska akademija, 2003, p. 4.

<sup>9</sup> Definition given by the World Bank, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>.

within the public and public sector, having as purpose the procurance of personal advantages or advantages for another.”<sup>10</sup>

Accordingly, corruption is an illegal and immoral phenomenon, committed out of greed, through abuse of the public function, position, influence or institutions, having as purpose the procurance of profit or of political, economic powers or the attainment of another interest. It represents an instrument for the achievement of certain objectives and as essence includes bribery, nepotism and abuse of power having as purpose the achievement of some personal interests.

Corrupting the public administration, politicians<sup>11</sup>, police, judiciary or mass-media, represents a powerful “weapon” in the hands of organized crime. „Corruption is an instrument used by organized crime for its most efficient and profitable functioning.”<sup>12</sup>

The relation between organized crime and corruption is manifested by the use of different forms of corruption by the organized crimes heads, having as purpose to ascertain and maintain some relationships with the state authorities and other officials, and from the point of view of the bilateral relationship it is not important if these forms of corruption are seen as crimes.

Next to corruption that is usually used by bribing organized crime is using other methods as well, like extortion, blackmail, different services, prostitution and others. Through these, the group succeeds to attain political, economic and financial power and to insure adequate social positions, different benefits, concessions and protections for their illegal activities. In any case, the “classic” relationship of corruption between organized crime and the state representatives is the most enduring and efficient, because it’s based on common interests bringing in such a way high profits to both sides. This is one of the causes of the very high social danger of organized crime.

At first or on a short term, corruption represents expenses for the organized crime, but taking in consideration that, throughout corruption positions for the next illegal activities are being assured, and insure “immunity” from prosecution for the committed acts, the payed money for corruption represent a “good investment” for the organized crime.

From the above mentioned the following conclusions can be drawn. Corruption is the *modus operandi* of organized crime but not the form of organized crime, and as without corruption there is no organized crime, it can be ascertained that corruption is as well a *modus vivendi* specific for organized crime and it could be said that, crimes of corruption can take the form of organized crime when they are being committed by an organised criminal group.

#### **2.4. Transnational (organized) crime and organized crime**

Transnational crime is a criminological term under which several by national law envisaged crimes, can be included, that have a common attribute – they exceed the jurisdiction of a state.

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<sup>10</sup> Zakon o Agenciji za borbu protiv korupcije, „Sl. glasnik RS” no. 97/2008, 53/2010, 66/2011 – dec. Constitutional Court, 67/2013 – dec. Constitutional Court, 112/2013 – authentic interpretation and 8/2015 – dec. Constitutional Court, [art. 2, al. (1), pt. (1)].

<sup>11</sup> See: Viorel Pașca, *Political corruption and the funding of political parties*, in “Journal of Eastern-European Criminal Law”, Law Faculties of the West University of Timișoara and the University of Pécs, Edited by Universul Juridic Publishing House, 2014, p. 18-24.

<sup>12</sup> Darko Marinković, *Suzbijanje organizovanog kriminala – specijalne istražne metode*, Novi Sad, Prometej, 2010, p. 50.

The term of transnational crime is known within specialized literature for over three decades. It has been used for the first time by the U.N. Department for the prevention and combating criminality and penal justice, while preparing the 5th United Nation Congress in Geneva in 1975<sup>13</sup>, having as purpose to give an adequate notion to a form of criminality that trespasses national borders and threaten juridical systems of many countries.<sup>14</sup>

Actual organized criminality does not know borders, and criminal groups easily establish relationships in a country with other similar groups and associations from other countries, sometimes with country very far away, even on other continents.

This term was introduced because the association and criminal organization's and groups structures are not always at a homogeneity national level nor is their activity orientated towards the territory of their own country.

In conformity with the United Nations Convention against Transnational Organized Crime and the Protocols Thereto from Palermo 2000, transnational crime signifies a "(a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State."<sup>15</sup>

These are the characteristics of the transnational crimes. The followings need to be fulfilled, as well: it is necessary that antisocial behaviour is being envisaged by the national legislation as a crime (*nullum crimen sine lege nulla poena sine lege* principle), and on international level, that the activity is being considered as a criminal act by at least two states.<sup>16</sup>

In other words, the totality of criminal type acts that somehow intrude or defy the laws of several countries, are being considered transnational crimes. The transnational character can be achieved by all or almost all crimes, considering the circumstances within they were committed.

As such, transnational crime can be at the same time, but not always organized crime and vice versa. Transnational crimes can be, throughout its proprieties, organized crime and it could be said that it is a form of organized crime. On the other hand, organized crime is not by itself transnational crime. In case, organized crimes expends over one territory, and obtains a transnational character the organized crime concept will "expend" and becomes *transnational organized crime*.

Easier said, the essential difference between organized crime and transnational organized crimes is being reflected by the fact that, in comparison with transnational organized crime, where some forms on trans-border activities of organised criminal groups represent a compulsory constituent element, for the existence of organized crime such acts with international character are just something that the organisation sometimes strives to. When this is achieved, organized crime becomes transnational organized crime.

<sup>13</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders.

<sup>14</sup> See: Mueller Gerhard, *Transnational Crime: Definitions and Concept*, in Phil Williams, Dimitri Vlassis (eds.), "Combating Transnational Crime – Concept, Activites and Response", London – Portland, Franc Cass, 2001, p. 9.

<sup>15</sup> United Nations Convention against Transnational Organized Crime and the Protocols Thereto from Palermo 2000, [art. 3, al. (2)].

<sup>16</sup> See: Andre Bossard, *Transnational Crime and Criminal Law*, Chicago, Office of International Criminal Justice, 1990.

### **2.5. International crimes and organized crime**

The term of international crimes is very often used as a synonym for transnational organized crime, but within criminal law and criminological signification, these two notions do not have the same meaning.

International crimes signify all those acts considered to be breaches of customary international criminal law or contract.

As such, under international crimes it's being understood those criminal activities that breach the common interest of several states or of the international community as such, but that is being fulfilled on the territory of several states.

The sources of international criminal law are those juridical international acts and national criminal laws that envisage international crimes. Their characteristic is based in the infringement or international regulations

The international crimes are those crimes of which the international community is especially interested in and theoretically, generally, are divided in international crimes in a restrictive sense and international crimes in a large sense.<sup>17</sup>

International crimes in the narrow way are composed of those acts that infringe war law norms and humanitarian law and these include crimes against peace, war crimes, crimes against humanity and genocide. The other group of international crimes concern acts that infringe norms of international law that the international community has the intention to incriminate and sanction throughout national criminal legislation, including but not restrictive to, illegal arms and drugs traffic, trafficking of persons, aggression, naval and airplane hijacking, assassinations, crimes against persons that have international protection, and others.<sup>18</sup>

In conclusion, all or almost all crimes could acquire a transnational character, while only some of them are envisaged (as well) by international law.

Taking in account that international crimes are committed under a joint enterprise or co-perpetration, acting in an organised manner under usually unique control and supervision, circumstances that make it similar to organized crime, but due to their international character it could be confused with the notion of (transnational) organized crime, with which it overlaps sometimes.

### **2.6. Cross-border crimes and organized crime**

Even though in theory the notions of cross-border crimes and transnational crimes are sometimes used as synonyms<sup>19</sup> there are certain differences between the two notions that separate them. The most significant differences are the qualifying elements of the terms.

When determining the concept of transnational criminality it has being stated that this represents the totality of transnational crimes. A transnational crime is committed as stated above when we discussed transnational criminality.<sup>20</sup> A such if a crime is not

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<sup>17</sup> The XIV Congress of the International Penal Law Association, Vienna 1989, accepted for the first time this systematisation.

<sup>18</sup> See: Souheil El Zein, *What is international crime?*, in "Interpol: 75 years of international police cooperation", Lyon, Kensington Publications, Interpol, 1998, p. 27-30.

<sup>19</sup> John McFarlane, *Transnational crime: corruption, crony capitalism and nepotism in the twenty-first century*, in Peter Larmour, Nick Wolanin (eds.), "Corruption and anti-corruption", Asia Pacific Press and the Australian Institute of Criminology, 1997.

<sup>20</sup> United Nations Convention against Transnational Organized Crime and the Protocols Thereto from Palermo 2000, [art. 3, alin. (2)]: "(a) It is committed in more than one State; (b) It is committed

committed in more than one state, for it to fall under transnational crimes it is required that a substantial part of the preparation, planning, supervision or control to take place in another state than where it was planned, prepared etc., or that in the commission of the crime an organised criminal group is engaged that is committing criminal activities in more than one state; respectively, the crime committed in one state to have substantial effects in another one.

None of the above mentioned is necessary for the existence of cross-border crimes. This latter notion, includes those crimes specific for the manner they are committed, like all those acts that have somehow an “affinity” with more states, but this “liaison” shall not attain the transnational criminality level

In case, a crime is not committed in more than one state, for it to be considered to be a cross-border crime it is sufficient that any part of the preparation, planning, supervision or control to take place in one state or that a crime committed in one state to have an effect in another.

It is absolutely sufficient for a crime to be considered a cross-border crime if, a foreigner commits a crime in one country or if the by the commission of the crime illegally obtained earnings or any object is being transferred over the border, or if the objects used for the commission of the crime are hidden abroad, or if finally after the commission of the crime the author runs and hides in another country.

More, it should be considered that the term “state” or “abroad” could be extended to a specific land/zone that does not fall under the sovereignty of any state, taking in account the fact that, for cross-border crimes only crossing the border is sufficient, meaning it is enough for the border of a state to be passed and it is not necessary that the frontier of another state to be passed and to enter in that state. Based on the above mentioned no parallel can be drawn between organized crime and cross-border crimes. Respectively, we consider that “organized cross-border criminality” cannot exist, and that, each organized crime act, that is being internationalized in any way is going to be considered to be a *transnational organized crime* or eventually an *act of international organized crime*. In other words, if a crime is committed by an organised criminal group, and if it contains all the necessary elements in order for it to be considered a crime that falls under organized criminality, it is going to be considered such a crime and not a cross-border crime. A crime belonging to the group of organized crimes/criminality is an act that belongs to the transnational organized crimes, or international crimes.

As a conclusion, “conventional crime” could, if certain conditions are fulfilled be considered cross-border crime, transnational or international crime, while organized crime can be transformed only in its two distinct forms – organized transnational crimes or organized international crimes.

### **2.7. Professional crime and organized crime**

There is no easy way to draw a border between professional crime and organized crime. As the special literature underlines, the relation between these two types of criminality has changed in some historical periods, fact that complicates even more this distinction.<sup>21</sup>

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

<sup>21</sup> See: Howard Abadinsky, *op. cit.*, p. 13.



In this case we are talking about a person usually commits crimes, a recidivist, with distinct preferences and whose developed habits are towards a certain type of crimes. His or hers criminal activity is of a continuous manner and is specialized in the commission of certain types of crimes.

Professional crime is a type of delinquency and typology of the criminogenic phenomena that deals with professional criminals. The professional criminal is a person for which committing crimes is the main activity, being his or hers main and predominant source of income.

As it is being asserted by Dick Hobbs, most of the organized crime members belong to the professional criminal category that while committing certain crimes apply certain well established special abilities like any other “workers”<sup>22</sup>. As such Hobbs talks in the same time about professional crimes and organized crime.

Sue Titus Reid thinks in a similar manner, asserting that in many countries these two criminal types are synonyms and that organized crime is usually a professional crime.<sup>23</sup>

As we already mentioned, the main objective of organized crime is obtaining income and that its exponents are continuously committing crimes in order to obtain capital, representing in fact their only and main source of income, and that their speciality is an important characteristic of this notion. Even so, even if these two types of crimes could be easily confused, there is one simple fact that needs to be taken in account – not all the members of criminogenic associations are professional criminals, as not all the professional criminals are part of a criminal organisation.

Certainly, some forms on professional crimes could be part of organized crimes.

## **2.8. “White collar” crimes and organized crime**

Edwin H. Sutherland introduced the “white collar” crime notion in criminology in 1939, defining it as being “a crime committed by a person of respectability and high social status in the course of his occupation.”<sup>24</sup>

Many criminologists have tried to define this term, but as in the case of the concept organized crime, there is no unanimously accepted universal definition. In this case, the following definition given by Herbert Edelhertz is being mostly applied – “an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage”.<sup>25</sup>

The essential characteristics of this type of criminality are “the area in which it is being committed, (field of *business*, insurance, banking *etc.*), the criminal’s status (they belong to the highest social covers) and protection against criminal prosecution”<sup>26</sup>. In conclusion we are talking about an economical segment of a criminogenic phenomenon, whose protagonists are authorised to carry out, control or to decide on the official

<sup>22</sup> See: Dick Hobbs, *Professional and Organized Crime in Britain*, in Mike Maguire, Robert Morgan, Robert Reiner (eds.), “The Oxford Handbook of Criminology”, Oxford, Clarendon Press, 1994.

<sup>23</sup> See: Sue Titus Reid, *Crime and Criminology*, Holt, Rinehart and Winston, 1991, p. 393.

<sup>24</sup> Edwin H. Sutherland, *White Collar Crime: The Uncut Version*, New Haven, Yale University, Press, 1983, p. 7.

<sup>25</sup> Herbert Edelhertz, *The Nature, Impact, and Prosecution of White Collar Crime*, Washington, National Institute of Law Enforcement and Criminal Justice, U.S. Government Printing Office, 1970, p. 3.

<sup>26</sup> Đorđe Ignjatović, *Kriminologija*, Nomos, Beograd, 1996, p. 207.

operations of the business and/or financial operations within the organisations they are employed by. These illegal acts committed by the criminals while exercising their professions, without applying violence, mostly applying abuse of trust, having as purpose to obtain illegal material gains, power or privileged positions.

“White collar” criminality is a phenomenon spread within every society, its presence being actually vaster than it is being shown by statistics on detected and prosecuted (“the black number of criminality”). Because of their influence, prestige and social position, the criminals are most of the times “outside the coverage of law” and spared of criminal liability, fact totally unacceptable taking in account the by the commission of these crimes created enormous material damages to the citizens, society and state.

Crimes that fall under this criminal phenomenon are generally classified as: abuse of the detained function of those who make themselves responsible, unlawful competition, abuse of monopoly, misappropriation, falsifying and abuse of credit titles and other instruments of payment, fiscal evasion, simple or bankruptcy fraud, insurance fraud, public auction defalcation, false/ illegal procurement and abuse of credits and other benefits, different forms of corruption and others. As such, “white collar” criminality could be a form of organized crime.

As it can be observed, there are substantial similitudes and coincidences between “white collar” crimes and organized crimes, in such a way that even the “white collar” concept’s creator, Sutherland, considers that practically there is no difference between the two notions. Other theoreticians like, Mark Haller<sup>27</sup>, Frank Schmalleger<sup>28</sup>, or Larry Siegel, are joining Sutherland’s opinion, putting both types of crimes in the same group, considering that the unique difference between the two is that, in the case of “White collar” crimes the individuals and institutions are, initially, entering in this business having as primary purpose to obtain legal gains, while under organized crime it is being understood those illegal activities with the main and initial purpose has been the acquisition of material gains in an illegal manner.<sup>29</sup>

On the other hand, there are authors that consider that we are talking about two different types of crimes. The essential base for their distinction is being found in the fact that, legally established companies do not use violence as a *modus operandi* in the procurement of the gains.<sup>30</sup>

On the other hand, Hazel Croall considers that, for its maintenance, organized crime desires that through the illegal acts to create for itself sort of a cover for the illegal business and this is not the case only for “money laundering”. It is difficult in such cases to make a distinction between what is “above” and what is “underground”<sup>31</sup> and because of this, most criminologists consider that theoretically and empirically it is very hard for a clear distinction to be established between organized crime and “white collar” crime.<sup>32</sup>

<sup>27</sup> Mark Haller, *Illegal Enterprise: A Theoretical and Historical Interpretation*, in “Criminology”, vol. 28, Issue 2, 1990.

<sup>28</sup> Frank Schmalleger, *Criminology Today*, Englewood Cliffs, Prentice Hall, 1996, p. 338.

<sup>29</sup> See: Larry Siegel, *Criminology*, St. Paul, West Publishing Company, 1995, p. 351.

<sup>30</sup> See: Jay Livingston, *Crime and Criminology*, second ed., Upper Saddle River, Prentice Hall, 1996, p. 251.

<sup>31</sup> See: Hazel Croall, *White Collar Crime: Criminal Justice and Criminology*, Buckingham, 1994, p. 16.

<sup>32</sup> Nikos Passas, David Nelken, *The Thin Line between Legitimate and Criminal Enterprises: Subsidy Frauds in the European Community*, in “Crime, Law and Social Change”, vol. 19, Issue 3, Netherlands, Kluwer Academic Publishers, 1993.

We are agreeing with the authors that consider that organized crime and “white collar” crimes are two different aspects of criminality, but as well that is very difficult to make a clear and precise distinction between the two notions. In this way, we consider that, organized crime is a larger notion than the one of “white collar” crime and this is why, if, in a special case, the substantial elements of organized crime are fulfilled, the former could encompass the later. In other words, “white collar” crimes could, but not necessarily, be committed in such a manner to receive the characteristics of organized crime. In this sense, the two types of crimes could coexist, independently one of another but can as well be combined.

### **2.9. Crimes of abuse of power, political crimes and organized crime**

The purpose of organized crime is not only to accumulate profit, but to obtain power in general.

For the existence of the crimes of abuse of power it is necessary that the person or persons hold a certain power or function within the system. Taking in account that holding these specific functions are the manner in which power is being assured, aka, institutional powers – their specific being reflected on the base of a relationship where one of the parts has the right to order the other, which is obliged to subordinate – it is justified to ask, which is the relationship between organized crime and political crimes, respectively crime of abuse of powers.

First of all, it must be accentuated on the fact that, the notion of *crimes of abuse of power* is not the same with that of *political crime*, as wrongly considered by many, but it could be treated as a special form of political crimes. *Political crime* and *crimes of abuse of power*, as a special form of the former, are different from other forms of crimes due to their active subject – the former can be committed only by those belonging to political and social dominant layers, respectively by those who hold political authority given by society.

In any case, between “classical” political crimes and abuse of power crimes there is a significant difference. The latter (as an organized crime) is a form of crimes against patrimony, in contrast with political crimes whose main purpose is not the procurance of profit.

Political crimes is established by those belonging to the high social class of a society that are using their political power in order to get rid of their political or ideological adversaries while through abuse of power crimes the criminals are abusing their powers for illegal gain of financial means. In our opinion, political crimes in their narrow notion, encompasses only those crimes committed by the political active officials, having as main purpose the achievement of political or ideological objectives and this, while recurring to violence. On the other hand, in comparison with those mentioned above, the political crimes in a larger sense include the crimes of abuse of power, exercised by the former’s representatives, through abuse of authorisation or other public authorisations, but only with the purpose in obtaining illegal revenues and without applying to violence.

Political crimes in a narrow sense can be classified in crimes committed out of political motives, like political assassinations, terrorism, sabotage, spying, while the notion in a larger sense, respectively crimes of abuse of power (and) activity related crimes, abuse of activities, abuse, crimes of corruption, and others.

It can be observed that, the crimes of abuse of powers and “white collar” crimes are practically identical. It can be said that, the crime of abuse of power is in fact “white

collar” crimes within state institutions. In other words, all we have discussed “white collar” crimes refers as well to the crime of abuse of power. The only difference between the two of them is that the former is being committed, said in a conditional manner, by business man, while the latter is being committed by the representatives of the public and state authorities. It must be underlined that, because of the above mentioned, the crime of abuse of power is a more dangerous and harmful crime than the one of “white collar”.

In any case, it is certain, that the crime of abuse of power through its nature is part of political crimes, and the reciprocal relation between organized crime and political crimes can be best explained through the notion of terrorism, as a typical form of political crimes.

### **2.10. Terrorism and organized crime**

Not wanting to repeat ourselves, but unfortunately, there is no general consensus between the theoreticians neither on the term of terrorism.

For the present study the *United States Federal Birou of Investigations* definition is going to be applied that envisages that terrorism is „The unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”<sup>33</sup>

So, in the most general sense, terrorism is a classical political crime, characterised through specific forms of political violence.

In many cases, public opinion but as well experts' opinion talk about terrorism as being an organized crime, but this attitude is wrong.

Certainly these two types of crimes have some common characteristics. As such, neither of the two cannot be envisaged without the existence of the association in a group (there are rare cases where acts of terrorism are committed by persons acting individually). Similarly, their activities are resembling, because terrorists finance some specific criminal activities of the organized crime, as trafficking of drugs and human beings, money laundering, kidnappings etc. The used instruments – violence and threatening with violent acts, are of the essence of terrorism, but many times these are used by the organized crime exponents. Both types of organisations are aiming to perpetuate the existence of the organisation and to grow as much as possible its power.

Irrelevant of these resemblances and of the fact that lately organised criminal groups and terrorist groups are “getting together” more frequent, in order for their purposes to be achieved in an easier way, we are talking about two distinct and different types of crimes. Terrorism is a form of political crimes, while organized crime is a form of a patrimonial crime. Organized crimes usually, have no special ideology and their main purpose is the procurance of material gain and financial power. On the other hand, terrorism has a main characteristic the ideology and orientation that should bring to political changes or the realisation other ideological purposes (religious, extremists, fascists, etc.)

“For organized crimes, the crime represents the end of a criminal cycle that has as purpose the material gain, while for terrorist groups, the crime is a financing manner for the terrorist attacks.”<sup>34</sup>

<sup>33</sup> FBI's definition, <http://www.fbi.gov/stats-services/publications/terrorism-2002-2005>.

<sup>34</sup> Florin Daniel Cășuneanu, *op. cit.*, p. 120.

In other words, for terrorists, making profit is not their purpose but the manner in which they can realise it.

There are differences between the two terms as well form the *modus operandum* way. Both use violence but the level and importance is differently perceived. Criminal associations use violence as a way to obtain profit or to eliminate the competition, respectively as a mean to bend the police, prosecution or justice. On the other hand, the terrorist acts abound with violence of high intensity that is usually directed against completely innocent persons, having as final purpose the creation of panic, unsafe environment, state of terror, fear or collective horror.

And, here is where the answer hides why terrorism is not enclosed in the violent criminality but taking in account that applying violence and/or degradation of goods, on a higher measure in the case of terrorism it is the only mean that the ideological or political purposes are realized. As such, the above mentioned cannot lead to an integration.

Terrorist acts are usually being committed in public. Their purpose is for these to be observed by a high number of social and state subjects, as, as many persons have knowledge of their commission, as much panic and fear they produce, reaching the desired results. On the other hand, hiding their criminal activities is an essential characteristic of organized crim. The committed crimes are being hidden, and their purpose is for them to remain "in the shadow", away from the public's opinion eyes and those of the state authority.

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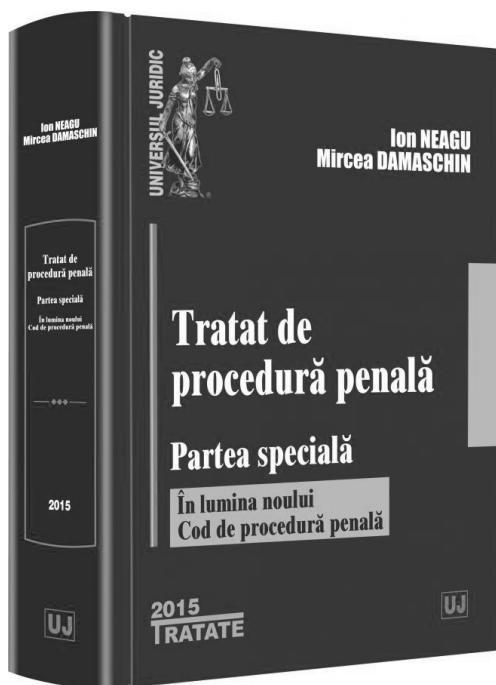
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