

(RE)DEFINITION OF A CRIMINAL GROUP IN SLOVAK LEGISLATION AS A MEANS OF A MORE EFFECTIVE FIGHT AGAINST ORGANISED CRIME

JUDr. Karin Vrtíková, PhD.
Assistant Professor
Trnava University, Faculty of Law
Department of Criminal Law
and Criminology
Hornopotočná 23
918 43 Trnava, Slovakia
kvrtikova@gmail.com
ORCID: 0000-0001-9951-6426

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Abstract: *We consider organised crime to be one of the most dangerous types of criminal activity. At the same time, it is one of the most significant problems in the globalised world, in which this phenomenon took root in people's consciousness hand in hand with progress. Organised crime significantly threatens a democratic society and violates the basic human rights and freedoms of its inhabitants. The main motive for committing organised criminal activity is a deliberate, long-term and purposeful effort to achieve maximum profit or other benefit, regardless of the means used. Committing a criminal activity is therefore not a goal, but a means to achieve the set goal. Organised crime is classified as a type of crime characterised by a more sophisticated way of committing criminal activity than other types of crime. With the above in mind, we believe that ensuring protection against organised crime is currently one of the biggest challenges both from a social and legal point of view.*

Key words: *Organised Crime; Criminal Activity; Human Rights; Organised Criminal Group; Criminal Group; Structured Group*

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1. INTRODUCTION

The main goal of submitted academic paper is an unbiased evaluation of the legal regulation of the organised crime, *de lege lata*. In order to reach the primary goal of the submitted academic paper, several partial objectives had to be defined right from the start of writing the paper. The partial objective of the introductory part of the text is to present several definitions of an organised crime so that this phenomenon is clearly defined and thus allowing us to work with it, afterwards. A partial objective shall be to map whether the theoretical definition of organised crime in question by legislator leaves sufficient space to punish it and/or whether there exist problems in the application practice that need to be legally resolved. In the presented text, the reader shall also be informed about the issue of organised crime regulated under the Italian legislation, and from the information obtained in this way, such amendments shall be highlighted that could serve as a basis for national legislation. The author is convinced that such a thorough analysis shall provide not only the reader, but we believe that also the academic community with proper findings that shall serve beneficial for the legal order of the Slovak Republic and create opportunity for further discussion. Last but not least, we add that more clarity and legal certainty shall be brought to the examined issue through legislative motions, *de lege ferenda*.

2. THEORETICAL DEFINITION OF BASIC TERMINOLOGY ASSOCIATED WITH ORGANISED CRIME

For the purposes of the presented academic text, the author shall apply the terms organised criminality and organised crime as identical ones. We share the opinion that these terms are identical in content, and/or they express identical activity. But for the sake of order, we present that, especially in American literature, the term organised crime has a narrower meaning, since it includes only highly structured forms of crime committed by mafia groups (Ivor, 2012).

As the Slovak Republic is aware of danger connected with organised crime, it actively participates in bilateral and multilateral cooperations of various international institutions. The result of one of such cooperation was the formulation of the definition of a criminal group pursuant to model of the UN Convention against Transnational Organised Crime: *"Organised criminal group" is a structured group of three and more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention in order to obtain, directly or indirectly, a financial or other material benefit*".

Proceeding from the specialised literature, it is clear to us that the fight against organised crime is an extremely complex phenomenon, demanding both in the personal staff, the professional qualification of investigators, as well as in terms of the funds spent.

We believe that at the moment our society is in a crisis of terminology related to the subject of our work, that is, organised crime. Definitions of organised crime are different. Organised crime is by some people perceived as: *"A unique and dynamic phenomenon that spreads through all areas of the society. It is a serious problem primarily due to the enormous social and economic consequences, as well as political consequences, since organised groups of perpetrators can infiltrate into various state and political structures through corruption and thus directly or indirectly affect democratic development in individual countries."* (Dianiška et al., 2016, p. 405). Others characterise it as a very complex phenomenon, affecting social, economic, political and legal sphere of life in the society. Others, in turn, define it through the characteristics of its activities, that, in our opinion, is not correct, since organised crime has been extremely flexible, that is, it has adapted to the current circumstances in society without any problems and on this basis develops or otherwise changes the types of activities that are being dealt with.¹ Attempts to create a unified definition, initiated a discussion both on academic and legislative grounds, resulting in more than two hundred definitions of organised crime that can be found in specialised legal literature (Souleimanov, 2012, p. 18).

In order to present given issue meaningfully, it is inevitable to endeavour to define it theoretically, which from the academic point of view we regard as – *conditio sine qua non* – of the presented academic text.

The primary objective being followed by organised crime today is primarily to **obtain financial gains** or other benefits, regardless of the means used to achieve them. These facts, together with other factors, make organised crime an exceptionally dangerous phenomenon, which is a global threat for the whole society. The dominant areas of organised crime include, in particular, crimes related to trafficking in human beings, trafficking in weapons and drugs, money laundering, smuggling, corruption, cybercrime, financial crime and many others.

¹ Available at: <https://euractiv.cz/section/vnitro-a-spravedlnost/news/organizovany-zlocin-a-terorismus-se-v-dobe-pandemie-meni-varuje-europol/> (accessed on 16.03.2024).

We shall point out the principal elements of organised crime through the definition of terms such as group structure, consistency, planning, hierarchical structure of the group, division of tasks, striving for maximum profit, infiltration into official social structures, protective measures against disclosure and punishment, the subsidiary role of violence, internationalisation of the organised group, flexibility and the use of modern infrastructure. Also, on the basis of them, a comprehensive view of the issue of organised crime through the partial elements of its criminal activity shall be presented.

The paper demonstrates that organised crime is not a new phenomenon. Since the early nineties of the 20th century, it can be observed how it has become more changeable and sophisticated. This is happening as a result of taking advantage of new communication technologies, but also as a result of political and economic changes in Europe and the world. The opening of borders has led to an almost pandemic spread of organised crime and its export to the whole world. Thus, global trade has been expanded with the possibility of world economic activity and the free movement of people, goods and services. However, hand in hand with this progress, new opportunities for the operation of organised criminal groups have also opened up. There can be found the reason of simplification of cross-border cooperation itself within the framework of the criminal activities carried out.

Organised crime threatens politics, political parties and politicians as well. The bosses of criminal groups strive to abuse public officials, influence their strategic decision-making and thus directly or indirectly influence their key decision-making in their favour. Organised crime also threatens the economy, in particular by introducing illegal practices into the economic system. It successfully succeeds in infiltration into the financial circles in individual economic systems under the disguise of legal entrepreneurship, thereby trying to legalise the proceeds of crime. Last but not least, the economy is weakened by the fact that society spends a considerable amount of money to fight against organised crime (Smolík et al., 2010, p. 259).

For the complexity of presented academic paper, we shall also point out the definition of organised crime in the legal order of the Slovak Republic referring to possible shortcomings in its regulation and we shall try to bring more clarity to the issue through legislative motions *de lege ferenda*. Foreign legislation, namely that of the Italian Republic, shall help us in this regard. The percipient shall also be provided with a comparison of legal definitions of the terms, organised group and criminal group, and that is on the basis of the case-law of the Supreme Court of the Slovak Republic.

2.1 Introduction and Historical Context of Organised Crime

As far as the formation of organised crime is concerned, historians date it to the 19th century. However, in this connection, the 17th century can be considered a real breakthrough. This is a period when the Thirty Years' War raged in Europe, in Southern Europe (namely in Italy) foreigners from Spain and France took turns and exploited this Southern people. In China, the Manchu Qing Dynasty replaced the ancient Chinese Ming Dynasty, and in Japan, a period of peace followed after the Civil War (Nemec, 1995, p. 13). It was during this period that various groupings and groups began to be formed to support and protect individuals exploited by the dominance of foreigners. These secret organisations, and/or secret syndicates were formed either by uniting families in consanguineously bound "big family – clan", or by uniting individuals without blood ties who made a blood oath to the head of such a family. These clans were built on a hierarchical structure, they had their own principles of behaviour, but also sanctioning mechanisms to punish possible indiscipline of their members. It would be naive to

assume that in these early days these secret organisations or clans were formed for the purpose of committing criminal offenses. The truth is that **the original idea of their founders was the establishment of social justice and the elimination of foreign dominance from their country.**

The development of society slowly but surely changed the original idea of the founders of the organisations. From the mid-19th century until the first World War, after political changes, several of the organisations began to focus on criminal activities, in an attempt to increase their capital, but especially with the vision of gaining power. On the basis of the above-mentioned, it may be concluded that although the original idea of the founders of secret organisations was, one might say, good-natured, its subsequent transfer into criminal organisations is a proof of a rapid idea's change for which they were founded.

2.2 Formation and Development of Organised Crime in the Slovak Republic

Following available sources, it may be noted, that the organised crime was not identified in the territory of the Slovak Republic until 1989, which does not mean that it did not exist in the former Czechoslovakia. On the contrary, its existential manifestations, however, were different, therefore, big changes occurred after the socio-political changes in 1989. Significant activity was the distribution of goods in short supply, illegal exchange of currency (illegal money changing), thefts or sale of real estates. The economic crisis was culminating in the eighties of the last century, and it was during this period when a parallel, the so-called informal economy largely flourished, which provided citizens with what the state could not arrange, i.e. goods in short supply and services were acquired on the black market by people. In this period, corruption, reaching to the highest political and state spheres, developed considerably.

The real problem came into existence after the collapse of the totalitarian regime, the subsequent manifestation of which in our society was the boom of a group of entrepreneurs for whom the rate of profit was decisive, regardless of the means used. These people often used harsh practices to achieve their goal, and their lack of interest in legalizing their business connected them with an organised crime. Since the Slovak Republic was going through a process of transformation at that time, it did not have a sufficiently developed legal system and was not ready to face the danger of organised crime. Thus, it may be concluded that **organised crime is a reaction to a weak society and a weak state.** Weakening of state power and social institutions, caused by for example revolutionary social changes tends to be an opportunity for criminal organisations to assert themselves in an uncontrolled space. These factors instigated organised criminal groups from abroad to choose the Slovak Republic as the environment for their illegal activities.

The fact is that modern forms of illegal business were imported into our territory from foreign states, for example, the States of the former Soviet Union, Yugoslavia or the Balkans. All these are territories where organised crime has had its marked pathway for years and therefore the opportunity provided by the Slovak Republic, with insufficient laws, legal order, but especially with insufficient experience of the police on this issue, was unrepeatable and immediately taken advantage of. The truth remains that after mapping the terrain by Slovak organised groups, even they also joined International Organised Crime, or their activities began to intersect.

At present, Slovakia is a long-established transit country for people smuggling. The most frequently smuggled nationalities include people from Serbia, Syria, Afghanistan, Somalia, Ukraine, Bosnia and Herzegovina, Bangladesh and Pakistan. This

criminal market was aggravated by the war in Ukraine. It is reported that smugglers and traffickers were waiting at the Slovak-Ukrainian border for Ukrainians leaving their country during the first stages of the war. In the second half of 2022, the situation began to deteriorate even on the Slovak-Hungarian border, many illegal migrants were passing through Slovakia towards the west. A tenfold increase in the use of false travel, residence and other documents for the purpose of people smuggling has been documented. Both local and transnational criminal networks are heavily involved in people smuggling in Slovakia.²

Slovakia also serves as a source country for illegal firearms, especially those that can be easily reactivated or converted for smuggling to other EU states. The war in Ukraine has brought new problems associated with the export of weapons from Slovakia and through Slovakia. This market is an important source of income for people from the lower layers of organised crime. In addition, transnational groups, mainly from the Eastern Europe and the Western Balkans, have increased their presence in the country. Illegal trade with goods subjected to consumption tax, specifically, tobacco products has been present on the Slovak market for several decades. Recent raids have uncovered illegal cigarette factories in Eastern Slovakia run by organised criminal groups with elements from Ukraine and Belarus. Despite the existence of a black market, the country still has one of the lowest rates of intentional counterfeit purchases in Europe.³ However, with rising inflation and expected rise in tobacco prices, changeover to illegal alternatives such as smuggled or illegally manufactured cigarettes can be expected.

Slovakia, within the drug industry, serves as a transit and destination country for heroin, which comes mainly from Afghanistan and comes to the country through Hungary along the Balkan route. Several gangs operate in the trade, especially from Balkan countries such as North Macedonia, Kosovo and Serbia. Drugs smuggling is generally considered as one of the most important sources of income for organised criminal groups in Slovakia, many of which are involved in smuggling heroin shipments from Asia. Slovakia is also a transit and destination country for cocaine. Cocaine trafficking in Slovakia is the main activity of organised groups, as well as smaller groups of individuals using the drug. Most of the cocaine comes from the Netherlands or Belgium. Organised criminal groups involved in the trafficking of cocaine and the transport of this drug through Slovakia include groups of Balkan and Italian origin. Slovakia is also a source and destination country for cannabis trafficking. Cannabis is domestically produced and is also imported from the Czech Republic. Cannabis produced for local consumption is widely distributed without the involvement of organised criminal groups. Cannabis is the most sought-after drug in Slovakia and more and more addicts are trying to get treatment. In the field of synthetic drugs, Slovakia is a source, destination and transit country. Synthetic drugs such as methamphetamine have been largely produced domestically in Slovakia in recent years. It is known that criminal groups are involved into extensive procurement of precursors and the production of methamphetamine. Ecstasy and methamphetamine are the most commonly consumed synthetic drugs in Slovakia. In addition, there emerges a problem in Slovakia that new psychoactive substances are sold to consumers under the general name "Ecstasy" or as legal alternatives to cocaine and methamphetamine. These have become very popular,

² Global Organized Crime Index, 2023. Available at: <https://ocindex.net/country/slovakia> (accessed on 10.07.2024).

³ Global Organized Crime Index, 2023. Available at: <https://ocindex.net/country/slovakia> (accessed on 10.07.2024).

as well as synthetic cannabinoids, which simulate the effects of marijuana, but with a significantly stronger effect.⁴

3. LEGAL DEFINITION OF ORGANISED CRIME

The definition of organised crime is a Sisyphean task. Since this is a heterogeneous phenomenon, involving many types of crime, the subsequent part of the work shall present a legal excursus of the organised crime concept both at the International and European level, and at the national level as well. After analysing the national legislation, we shall present to the reader how organised crime is defined in the legislation of the Italian Republic, and after its evaluation, we shall introduce whether the national legislation shows application problems and, in case of their identification, we shall propose solutions which shall result in *de lege ferenda* considerations.

3.1 Definition of Organised Crime at the International Level

We consider the classification of the concept of organised crime to be extremely purposeful and necessary, especially with regard to the spreading of this phenomenon. Although this phenomenon has been encountered for a considerable time, its international definition has occurred relatively recently. The need to highlight this phenomenon at the international level was enormous. The international legislative framework establishing the boundaries and limits of national cooperation was needed. In 1994, an international conference was convened in Naples, Italy, at which for the first time a strong voice was proclaimed to create a convention on the effective fight against organised crime. In 1998, an *ad hoc* committee was formed which was charged with preparation of comprehensive legislative framework of the UN Convention against Transnational Organised Crime. Since that moment, work has begun to create such treaty. Considering the fact that the final phase of the document was completed only in the year 2000, it can be concluded that the drafting of the convention itself was not easy at all, and throughout the period of its preparation, the group of experts preparing the treaty faced a number of problems. The most urgent problems included the necessity to overcome issues related to the principles of state sovereignty of individual UN states and the problems associated with the various legislative and judicial systems of the future signatory countries.

The signing⁵ of the Convention was therefore accompanied by a ceremony, which, typically, took place in the capital city of Sicily. We remind that this period can be described as particularly turbulent, as *the Cosa Nostra* criminal organisation was gaining considerable influence in Sicily. Thus, it can be concluded that the organisers of the conference decided to sign the Convention against Transnational Organised Crime in Palermo⁶ to declare to the local mafia that the times when organised crime flourished and grew in power are gone for good. After more than twenty years, ask a question whether this is so. To answer this partial question, we leave it to the consideration of each percipient.

⁴ Global Organized Crime Index, 2023. Available at: <https://ocindex.net/country/slovakia> (accessed on 10.07.2024).

⁵ The Convention on combating organised crime was approved on 17 June 2003 without comments by the Legislative Council of the Government of the Slovak Republic and consequently on 16 September 2003 by the Resolution of the Government N° 870/2003. The Convention entered into force for Slovak Republic on **2 January 2004**.

⁶ Convention against Transnational Organised Crime was signed in Palermo, Italy, on 12-15 December 2000.

At this point, it can be noted that the **Convention on Transnational Organised Crime**⁷ is to date the only and the most comprehensive treaty dealing with the **fight against organised crime**. After more than twenty years, it can be summarised that no other treaty or convention has exceeded the legal framework of the Convention in question and due to this reason, it is referred to as the most comprehensive document providing a legal basis to the international fight against organised crime.

However, on the other hand, it is required to take a very critical approach to the Convention in question, on the grounds that **it does not contain a legal definition of organised crime**. With respect to above-mentioned, we insist that the determination of organised crime is not easy and the phenomenon of organised crime itself cannot, in layman's terms, be categorised. As a result, no national or international document contains a legal definition of organised crime.

On the other hand, in its initial provisions, the Convention contains a legal definition of the concept of an **organised criminal group**, which is: *"Structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."*⁸ On the basis of the foregoing, it can be concluded that the Convention in question does not, *expressis verbis*, define a legal definition of an organised crime, but, on the contrary, it indicates the elements of an organised group, from which it can be concluded that it defines an organised crime indirectly, through the definition of a group of an organised crime. Further in the text we shall prove that the Slovak Republic has taken over this legal wording and transformed it into a lawful definition of a criminal group.

3.2 Definition of Organised Crime in the European Union

It is assumed that a key task of each state is to guarantee the security of its country. The security of the Slovak Republic is also based on the European security core, and from this point of view it was important to participate as an independent country in the integration processes of the European Union.

One of the primary problems both on the ground of international community as well as on the ground of the European Union was the issue of the very definition of organised crime. The first step towards solving this problem was the *Joint Action on making it a criminal offence to participate of criminal organisation in the Member States of the European Union – 98/233 JHA* (hereinafter referred to as the **"Joint Action"**), an agreement on joint action, which aim was to unite the States of the European Union on the issue of criminal prosecution of members of criminal groups.

⁷ Slovak Republic signed the Convention against Transnational Organised Crime in Palermo. The Convention also included three additional protocols.

Namely:

- *Protocol against the Smuggling of Migrants by Land, Sea and Air* – document was signed by Slovak Republic on 15 November 2001;
- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* – document was signed by Slovak Republic on 15 November 2001;
- *Protocol against Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* – document was signed by Slovak Republic on 26 August 2002.

The above protocols were signed and declared within the framework of our legal order within the meaning of Article 7 Par. 4 of the Constitution of the Slovak Republic, thus these do not take precedence over the laws of the Slovak Republic.

⁸ Article 2 Letter a) Convention against Transnational Organised Crime.

However, neither this document nor the Convention against Transnational Organised Crime legally defines organised crime or organised felony and defines “only” a **criminal group** by which it is: “*Structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.*”⁹ On the basis of the above, it may be concluded that organised crime is defined both at international and European level only **indirectly**, and that is through the definition of an organised group and/or criminal group.

It is true that said Joint Action was replaced due to insufficiency, and that is namely by Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime¹⁰ (hereinafter referred to as only “**Council Framework Decision**”). As in the previous document, even within this one, different terms were defined right at the beginning whose categorisation is important from the point of view of legal theory. One of these concepts is a **criminal organisation**, which is “*Structured group, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.*” On the basis of the previous definitions, it is possible to draw a considerable symbiosis of the definition of a criminal organisation in the framework of the Joint Action and the newly adopted Council Framework Decision. In spite of the fact, the more comprehensive processing of organised crime-related issues in the framework of the Council Framework Decision, specifically the recommendations on the approximation of organised crime-related offences, can be positively perceived. Thus, in the definition of crimes being committed by organised criminal groups, there is an obvious interest in capturing the widest possible spectrum of crime.

Withing the meaning of the said Council Framework Decision, each Member State shall take measures necessary to ensure that acting related to a criminal organisation is considered to constitute a criminal offence. It is the action of persons who:

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

Organised crime poses a significant threat to the European Union. Problematic is the growing dependence of individual states on a criminal way of life, on the perception

⁹ Article 1 of Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (98/733/SVV). Published in the Official Journal of the European Union on 29 December 1998.

¹⁰ Council Framework Decision 2008/841/SVV of 24 October 2008 on the fight against organised crime. Available at: <https://eur-lex.europa.eu/legalcontent/SK/TXT/PDF/?uri=CELEX:32008F0841&from=SK> (accessed on 14.04.2024).

of a criminal organisation as anti-riot forces or as a bearer of charity in some regions of the world. Last but not least, this fight is complicated by the still existing gaps in international cooperation to combat organised crime. Therefore, we view very positively the European Union's years lasting initiative for an effective and efficient fight against organised crime.

With regard to above-mentioned, the European Platform Against Organised Crime, **the European Multidisciplinary Platform Against Criminal Threats (EMPACT)** shall be presented on the following lines. This European platform introduces an integrated approach to the EU internal security, involving measures that range from external border controls, police, judicial and customs cooperation, prevention and other measures suitable for effective combating organised criminal groups. EMPACT is also represented within the EU as a European Union policy cycle for organised and serious international crime. It was first introduced between 2012 and 2013 and, following particularly successful results, it has been **included as one of the main instruments in the fight against organised crime at European Union level**. Its clear methodology and consistent way of dealing with the most important threats, strengthening cooperation among the relevant divisions of the Member States, make it one of the most effective tools of the European Union in the fight against organised crime. On the basis of the results achieved, the Council of the European Union decided on the permanent continuation of the EMPACT policy cycle and set out ten clear EU priorities in the fight against serious and organised crime.

EMPACT is the EU's permanent instrument for structured multidisciplinary cooperation in the fight against organised and serious international crime. It is managed by the Member States and supported by the EU institutions, bodies and agencies in accordance with their mandates. EMPACT has a four-year cycle and consists of four steps:

1. **Serious and Organised Crime Threat Assessment in the European Union (EU SOCTA)** – EU SOCTA provides a complete and thorough picture of criminal threats affecting the European Union to ensure that major criminal problems are addressed through an intelligence-based approach. EU SOCTA was prepared by Europol and at the same time identified a set of key threats based on a detailed analysis of the main problems the EU is dealing with. It is on this basis that the Council of the European Union defines priorities for the fight against organised crime. It is therefore appropriate to say that SOCTA has a key role in EMPACT.
2. **Priorities of the European Union in the field of crime and MASP** – the second step is the determination of policy and decision-making through the identification of the limited number of priorities by the Council. A general Multi-Annual Strategic Plan (G-MASP) with common strategic objectives is also elaborated in order to finally achieve an effective approach to addressing priority hazards.
3. **Operational Action Plans (OAP)** – the third step is the elaboration, implementation and monitoring of the annual operational action plans, which contain measures to combat crime in 10 areas, corresponding to the priorities of the EU in the area of crime for EMPACT and at the same time it is necessary to adjust them to the General Strategic Plan G-MASP. Each such operational action plan contains a set of operational activities that contribute to the accomplishment of the objectives. However, it should be noted that during the implementation of operational actions in the OAP, the exchange of information related to criminal investigations reaches Europol through its *Secure*

Information Exchange Network (SIENA) application for analysis. The analysed information is integrated into the system and thus a review of the priorities and strategic objectives of new, evolving threats can be launched.

4. **Independent Assessment** – at the end of each EMPACT cycle, an independent assessment is carried out to review the implementation of EMPACT and its results. Such an assessment will be followed by an informed political decision that serves as guidance for the next cycle of EMPACT.¹¹

Based on Serious and Organised Crime Threat Assessment in the EU of the year 2021, submitted by Europol, the Member States have identified **10 priorities in the fight against crime**:

1. **Identify and disrupt high-risk criminal networks active in the EU**, such as mafia-type, ethnic and family-based organisations and other structured networks of individuals with a special emphasis on those criminal networks which undermine the rule of law by using corruption. Also, groups committing acts of violence including intimidation and use of firearms to enforce their criminal goals. Last but not least, to identify and disrupt groups which launder their criminal proceeds through a parallel financial system;
2. **Target the criminal offenders orchestrating cyber-attacks**, particularly those offering specialised criminal services online;
3. **Disrupt criminal networks engaged in trafficking in human beings** and all forms of exploitation including labour and sexual exploitation, and with a special focus on those who exploit minors for forced criminality; those who use or threaten with violence against victims and their families, or mislead victims by simulating to officialise the exploitation;
4. **Combat child abuse online and offline**, including production and dissemination of child abuse material as well as online child sexual exploitation;
5. **Fight against criminal networks involved in migrant smuggling**, in particular those providing facilitation services to irregular migrants along the main migratory routes crossing the external border of the EU and those involved in facilitation of secondary movements and legalisation of residence status within the EU, particularly focussing on those whose methods endanger people's lives;
6. **Identify and target criminal networks involved in the wholesale trafficking of:**
 - a) cannabis, cocaine and heroin;
 - b) synthetic drugs and new psychoactive substances (NPS);
7. **Target individual criminals and criminal networks orchestrating large-scale fraud schemes online**. These include excise fraud, intellectual property crime, counterfeiting of goods and currencies, money laundering and asset recovery;
8. **Disrupt criminal networks involved in organised burglaries and thefts**, organised robberies, motor vehicle crime and illegal trade in cultural goods, with a special focus on those that are highly mobile and operating across the EU;
9. **Disrupt criminal networks involved in all forms of environmental crime**, with a specific focus on waste and wildlife trafficking, as well as on criminal networks and individual criminal entrepreneurs with a capability to infiltrate legal business structures at high level or set up own companies in order to facilitate their crimes;

¹¹ Empact, Fighting crime together, Available at: https://ec.europa.eu/home-affairs/policies/law-enforcement-cooperation/operational-cooperation/empact-fighting-crime-together_en (accessed on 14.04.2024).

10. **Target criminal networks and individual criminals involved in the illicit trafficking, distribution and used of firearms.**¹²

The importance of the platform in question and its considerable importance are clearly indicated by the latest available published data from 2022, in terms of which the following results were obtained:

- arrest of 9 922 persons;
- victims identified 4 019;
- arrest of 3 646 migrants' smugglers;
- seizures more than € 180 000 000 cash;
- seizures more than 62 tonnes of drugs;
- investigation initiated 9 262.¹³

3.2.1 Definition of Organised Crime in the Legal Order of the Italian Republic

The focus on the legal order of the Italian Republic and its legislative definition of organised crime is mainly justified by the historical interconnection and its roots date back to the 19th century. Italy had to deal with the mafia very early on, so we assume that the legislative framework it offers could, *pro futuro*, also inspire national legislation.

The basis of the following text shall therefore be a motion to improve the legal order of the Slovak Republic on the basis of the Italian Republic. The fact is that Italy has been struggling with the problem of organised crime for many years, and that is what motivated us to take a closer look at its legal nature.

Gambetta in his monography poses a question why the south of Italy shows a persistent inability to develop socially and economically. In the south of Italy, in the regions of Campania, Calabria and Sicily, three unfortunate states of issues have coexisted for a long time:

- people often do not cooperate even if it would be convenient for them;
- people compete by using wrong methods and they never consider the violence to be too distant possibility to settle their disputes;
- they do not engage in such type of competition from which everyone could benefit from (*Gambetta*, 2011, pp. 1-2).

The evidence of the infamous phenomenon of the mafia¹⁴ is the fact that already in the year 1963, a commission was established in Italy as an investigative body charged with clarifying the circumstances relating to the "phenomenon of the Sicilian Mafia." Over the years, the commissions have been expanded to be able to investigate other organised criminal groups, the so-called "mafia-type" (specifically the groups *Cosa Nostra*, *Camorra*, *Ndrangheta*, *Sacra Corona Unita*). The aim of the Antimafia Commission is to investigate the phenomenon of organised crime in all its forms and to focus on legislative, anti-corruption and administrative measures. Its importance can also be seen in the area that

¹² Europol. *European Union serious and organised crime threat assessment, A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime*. Luxembourg. 2021.

¹³ EMPACT, Fighting crime together, EMPACT 2022 Results. Available at: https://www.consilium.europa.eu/media/65450/2023_225_empact-factsheets-2022_web-final.pdf (accessed on 10.06.2024).

¹⁴ In case-law Italy, Supreme Court of Cassation of the Italian Republic, the word mafia appears only in the Decision of 12 November 1974, in which the mafia is defined as: "Any group of persons intending by criminal means to take power or maintain control of sites, groups or production activities through systematic intimidation and infiltration of members in an effort to create a state of subjugation and secrecy (*omerta*) that makes it impossible or extremely difficult to use standard means of criminal intervention by the state."

enables the judicial police to order an investigation or require any form of cooperation, on the basis of which it can be concluded that it also has judicial powers.¹⁵

In 1984, the redoubtable Italian mafioso *Tommaso Buscetta* was included in the list of so-called *pentiti*,¹⁶ thereby violating the rules of *Omerta*¹⁷ and decided to cooperate with the justice. *Tommaso Buscetta* was the central figure of the so-called Maxi Trials in Sicily,¹⁸ which are also known in legal circles, especially due to judges *Giovanni Falcone* and *Paolo Borsellino*. These two were leading judges of the entire Maxi Trial, a memento of the passionate struggle against the Mafia who subordinated their whole lives to it and in the end, they paid for it with their lives. Based on the testimony of witnesses *Tommaso Buscetta*¹⁹ and *Salvatore Contorno*,²⁰ more than three hundred and fifty mafiosi were sentenced. This fact shook the organisation *Cosa Nostra*, and at the same time the Italian justice earned its respect for quite a few years of protracted struggle. An unforgettable proof of this process was also the fact that *Cosa Nostra*, a dreaded criminal organisation, operates and is not just a figment of the imagination of writers and guides of the village of *Corleone* (Vrtíková, 2021, p. 129).

The recent convictions of up to 207 people on charges related to membership in an organised criminal group of mafia-type, the 'Ndrangheta, also speak in our favour. We consider this fact to be extremely positive and demonstrating that the legislative system of Italy is successfully fighting this undesirable phenomenon and trying to deal with it

Despite the considerable success of judges *Falcone* and *Borsellino*, the fight against octopus, organised crime, continued further. One of the next steps of the Italian legislature was the incorporation of a new crime, **a Mafia conspiracy**, into the legal order. Italian criminal code (*Codice penale*)²¹ in its provisions, in the section "*Crimes against public order*" contains two articles about "*Criminal Association*" (Article 416), and "*Mafia-type Association*" (Article 416-bis), whereas each of mentioned groups is defined by its own specific elements.

¹⁵ Antimafia Commission.

¹⁶ Penitent, falsely remorseful.

¹⁷ **Omerta**, which means /manhood/ in Sicilian, is a code of conduct that goes beyond the traditional way of silence with which Mafia members, their victims, and **witnesses to crime** face questions from investigators and lawyers. A true *mafioso* speaks a little, considers every word and behaves seriously all the time and with dignity, even during extraordinary provocations. It can be compared to the Mediterranean ideal of manhood, returning to the stoic tradition of ancient Greece and Rome. Last but not least, this code requires that even the least significant member or his/her family and friends, no matter how unimportant, were avenged. The status of a man depends on his readiness to use violence to defend his honour. A man who defends his honour this way acquires the most valuable thing – respect. Respect creates authority and authority means power. With power comes duties. The real *mafioso* takes care of his criminal family like a father, he is often the godfather of the children of his subordinates, takes part in their weddings and funerals and often organises almost ritual celebrations at which sitting order itself reflects position of persons in the family. Sicilian Mafia is known as *onorata società* (The Honoured Society) and considers its members to be men of honour.

¹⁸ The Maxi Trial (Italian *Maxiprocesso*) was a criminal trial against the Sicilian mafia that took place in Palermo, Sicily. The trial lasted from 10 February 1986 to 30 January 1992 at the Supreme Court of Cassation and was held in the Ucciardone prison. It is considered to be the most significant trial ever against the Sicilian Mafia, as well as the largest trial in the world history.

¹⁹ *Tommaso Buscetta* disclosed to the judge *Falcone* internal functioning and structure of *Cosa Nostra*, process of recruiting new members to the organisation and functions within it. His testimony lasted for 45 days.

²⁰ He began to testify only after *Tommaso Buscetta*.

²¹ Legge 19 ottobre 1930 n. 1398 (Act No.1398/1930 Criminal Code).

3.2.2 Elements of Criminal Association

From Article 416 of the Italian criminal code, the following elements can be deduced, which, at the level of substantive criminal law, are connected with the “*criminal association*”:

- a) from the point of view of the basic characteristic, this is an association of three or more persons with the intention of committing more than one crime, while persons who promote, constitute or organise the association shall be liable to a term of imprisonment of three to seven years;
- b) for the sole fact participating in the association, the offenders shall be liable to a term of imprisonment of one to five years;
- c) leaders of the group and/or association shall be subject to the same punishment prescribed for the promoters;
- d) if members organise campaigns or public gatherings with weapons, shall be liable to a term of imprisonment of five to fifteen years;
- e) the imprisonment shall be increased if the number of associates is ten or more;
- f) in the event that organised group commits any of other crimes such as production of child pornography or child prostitution, members of organisation shall be liable to a term of imprisonment of five to fifteen years.

A certain subcategory of the criminal group of “*ordinary type*” can be considered criminal groups aimed at drug trafficking and human trafficking, which are directly aimed at committing a specific activity characterised by the legislator as criminal.

From the aforesaid it follows that in the event that there is evidence that three or more persons have associated to form a group of a permanent nature with a hierarchical structure, the members of which agreed on an indefinite number of crimes, it can be concluded that this is the formation of an organised group of an ordinary type (Vrtíková, 2020, p. 240).

3.2.3 Elements of “Mafia-type association”

Article 416-bis of the Italian Criminal Code defines a criminal group of so-called “*Mafia -type*” which is characterised by organised structure, but in particular by mafia practices, such as intimidation, violence and benefiting thereof, especially the state of subjugation. Another example of the practices of this group is adhering to the rules of “*omertà*”, so-called law of silence.²²

Article 416-bis *Codice penale* defines group of a **Mafia type**, as an association in which:

- a) any person belonging to a Mafia-type organisation of three or more persons shall be liable to a term of imprisonment of nine to fifteen years;
- b) persons who further the activities of or manage the organisation shall be liable to a term of imprisonment of twelve to eighteen years;
- c) members of a Mafia-type organisation benefit from intimidation, the state of subjugation and conspiracy by committing criminal activities, thereby they acquire direct or indirect control of economic activities, concessions, licenses, public procurement contracts and public services. They obtain unjust profits or advantages for themselves or others, prevent from free exercise of vote, or procure votes for themselves or others at elections;

²² For more on this, see footnote No. 32.

- d) if the organisation under Article 1 is armed, imprisonment is increased between twelve to twenty years, if it refers to the cases described in the second section, the imprisonment is increased between fifteen to twenty-six years;
- e) the organisation shall be deemed to be armed if its members have access to weapons or explosives for the purposes of furthering the aims of the organisation, even if hidden or stored;
- f) if the economic activities which the members intend to acquire or maintain control over are financed in whole or in part by the proceeds of crime, the penalties set out above shall be increased by one-third to one-half;
- g) in the event of a conviction, instruments or means which were used or intended to be used to commit the offence and the proceeds thereof shall be forfeited.²³

As a specific example of groups to which provisions set out above apply, one can mention the criminal group *Camorra*, *Ndrangheta* and any other organisation whose goals correspond to Mafia-type organisation.

Article 416-bis of the Italian criminal code was introduced by the legislator in the year 1982 as a new provision, considering the increasing danger in society caused by organisations with specific elements. Just defining the difference between a criminal group of the ordinary type and a mafia type is a significant milestone of Italian law by which the legislator pointed out the specifics of these concepts and through which it tries to react with stricter sanctions to the phenomenon of the mafia.

By Law Decree No. 21 GU, of 1st March 2018, were, *inter alia*, the provisions of the Italian *Codice penale* amended. In particular, the provision of the Article 416-bis 1 named ***"Aggravating circumstances for offences related to the use of mafia methods or crimes for the purpose of terrorism"*** was supplemented. Referring to above-mentioned, those criminal offences were punishable for which life imprisonment may be imposed and which were also committed under the conditions referred to in Article 416-bis or with the objective to facilitate the activity of the associations indicated in that same article. For such crimes, the imprisonment shall be increased from one third to one half.²⁴

For the offences under Article 416-bis and those committed under the conditions indicated in that article or with the objective to facilitate the activity of mafia-type association, against the accused, who, after opting out of the associations, endeavours to avoid any further consequences of the criminal activity, including by effectively providing assistance to police or judicial authority in collecting conclusive evidence with a view to identify and arrest perpetrators, life imprisonment sentence shall be replaced by a term of imprisonment of twelve to twenty years and other penalties shall be reduced from one third to one half.²⁵

By following provisions of Article 416-ter, a political mafia shall be punished, namely:

- a) any person who accepts a promise to procure votes through procedures referred to in Article 416-bis, in exchange for money or the promise thereof or other reward, shall be liable to a term of imprisonment of six to twelve years;
- b) the same punishment shall be imposed on those who promise to procure votes in the manner referred to in the first paragraph.²⁶

²³ It was *Pio La Torre*, who initiated draft bill in 1980 introducing a new offence in the Italian legal system, mafia conspiracy and the possibility of courts to seize the goods of persons belonging to a mafia conspiracy.

²⁴ Law Decree No. 21 GU of 1 March 2018. Available at: <https://www.altalex.com/documents/leggi/2017/10/04/riforma-penale-attuato-il-principio-di-riserva-di-codice> (accessed on 20 April 2024)

²⁵ Italian Criminal Code, Article 416-bis.1.

²⁶ *Ibid.*, Article 416-ter.

Another related article in the Italian *Codice penale* is Article 418, which is dealing with help to members of criminal organisations. It clearly states that: *"Who, except in cases of complicity, assists in criminal activities by providing shelter, or by providing food, hospitality, means of transport, or means of communication to the persons involved in criminal activities or are members of a criminal group, shall be liable to a term of imprisonment of two to four years."*²⁷ In the event of continuous assistance, the penalty is doubled. At the last point of the article in question, the legislator also thought of persons who provide such assistance to their loved ones. In such event, the persons concerned are not prosecuted.

In other words, **the legislator does not punish persons who assist members of the group in case it concerns persons close to them, i.e. given case constitutes the ground of inadmissibility of criminal prosecution, which means that such persons will not be criminally punishable for their actions.**²⁸

For the completeness of the above interpretation, it is still necessary to explain that the term mafia represents different types of groups that differ from each other by the place of execution of crime, as well as by other elements that characterise individual criminal organisations of *"mafia type"*. For example, *the Mafia* in Sicily is called the *'Ndrangheta* in Calabria, *Camorra* in Naples and in the region of Calabria and *Sacra Corona Unita* in Apulia. These criminal organisations known for decades have been controlling not only the regions in which they came into being but also other parts of the Italian peninsula. More specifically, they have already infiltrated almost into all parts of Italy and, unfortunately, extend beyond the borders of their state. Undisputed fact remains that they are always tied to their home country, or their region.

At this point, we consider it important to mention the recent Judgment of the Supreme Court of Cassation of Italy, which, taking into account the expansiveness of individual mafia groups, also draws attention to minor assimilations, the so-called non-traditional mafias. Thus, it opened the issue of all other organisations that in each case use methods and techniques of traditional, mafia groupings, however, they consist of small organisations with a small number of members. In this connection, the Supreme Court of Cassation of Italy stated that: *"The crime referred to in Art. 416-bis. of the Penal Code can be applied not only in relation to traditional mafias consisting of associations with a high number of members and huge funds, but also in relation to atypical mafias consisting of small organisations with a smaller number of members, subject to a limited territory or a certain branch of activity, while using mafia methods from which comes subjugation and secrecy."*²⁹

On the basis of the aforementioned, it can be concluded that the Italian legislator does not distinguish whether the group has fewer members or whether it is classified among the non-traditional types of mafia. **The element of mafia grouping is met in any case, if mafia methods and practices are used.**

We consider the introduction of specific provisions in the Criminal Code to be a characteristic element of Italian legislation against organised crime. Article 416-bis defines very precisely the nature of a Mafia-type organisation in an effort of undistorted differentiation from "ordinary" criminal groups. Peculiarities of Mafia-type organisations, help to distinguish them from ordinary organised criminal group, *in concreto*:

- **hierarchical organisational structure** – this point of differentiation is, in principle, the same for both ordinary criminal organisation as well as for

²⁷ *Ibid.*, Article 418.

²⁸ *Ibid.*, Article 418.

²⁹ Cass. Pen., Section V, No.44156 of 13 June 2018, Rv. 274120.

criminal organisation of Mafia type. Thus, it can be concluded that the difference between an ordinary criminal organisation and a Mafia-type organisation lies neither in the number of members of such organisation nor in the existence of the structure. As a matter of fact, both types of organisations are established by a minimum number of three members and they are hierarchically organised. However, it can be stated that in terms of researches of Italian Mafia-type organisation, it is obvious, that these exist in a hierarchical model of organisation with clearly defined functions.

- **the use of power and intimidation**, i.e. the use of so-called mafia practices – this element is the most significant differentiating aspect between ordinary criminal organisation and a Mafia-type organisation. It is also reflected by the provision of the Italian Criminal Code, namely Article 416-bis. Members of Mafia-type organisations use the power of intimidation to reach their goals. Italian judge *Piero Leanza* expressly states, that: *“Common awareness that a specific organisation or family clan is powerful and ready to use violence to achieve its criminal goals is enough to create and spread the feeling of fear, intimidation and subjugation always being accompanied by the law of secrecy.”* (Paoli, 2004). He considers for common practice that victims of crimes committed by Mafia-type organisations, e.g. protection money, are so afraid of possible repressions, that they refuse to testify during investigations and court proceedings, thereby strengthening an organisation that may feel untouchable in certain sense.³⁰
- **criminal program of the group** – it includes activities of Mafia-type organisations and especially those which under the guise of lawfulness, e.g. by using nominated persons to carry out legal activities, gain power and control over economic activities, thereby making it difficult for investigators to arrest real offenders.

4. DEFINITION OF ORGANISED CRIME IN THE LEGAL ORDER OF THE SLOVAK REPUBLIC

According to Ivor, Klimek and Záhora, until the eighties of the last century, the organised criminal activity was considered to be a problem of a specific number of countries, in particular the United States and Italy (Ivor et al., 2013, p. 123).

The legal regulation of organised crime in our territory in that period was based on the Act No. 86/1950 Coll. of the Criminal Code, Act No. 87/1950 Coll. of the Criminal Procedure Code and also the Act No. 88/1950 Coll. of the Criminal Administrative Act, which meant for the then Czechoslovakia, codes of criminal law. At that time organised crime was not numerous and the criminal codes only partially regulated this issue.³¹ More

³⁰ To this, see also the Italy, Supreme Court of Cassation, Section II, File No.11118, of 20 December 2022. Legal sentence: *“Considering associations of mafia-type, the silence, correlated in the relation of a cause-consequence with the power of intimidation of criminal group, must be sufficiently spread, even if it is not generalised in the reference territory and can follow not only from fear of personal injury but also from the threat of potentially serious harmful consequences, so there must exist persuasion that cooperation with a judicial authority shall not prevent from retaliatory measures against the complainant due to the branching of the organisation, its effectiveness and existence of subjects with power to hurt anyone who dared to oppose them.”*

³¹ Within the framework of the Criminal Code of 1950, the issue of organised crime was regulated in the Section 166 Par. 1 **“Association”**, with following meaning: *“Any person who associates with somebody to commit a criminal offense shall be liable to a term of temporary imprisonment of at least three years and maximum five years, or any person who supports such association or its members, shall be liable to a term of imprisonment of one year.”*

specific legal regulation of the organised crime within our legal order was introduced by the amendment to the criminal codes, namely, amendment to the Act No. 140/1961 Coll., the Criminal Code and amendment to the Act No. 141/1961 Coll., Criminal Procedure Code. Despite this, said legal regulation did not contain a legal definition of an organised group, this was included in our legal order only by a subsequent amendment to the Act No. 183/1999 effective of 1 September 1999. From that moment on, our legal order contains the legal definition of an organised group and a criminal group, as well as the wording of the facts of the crime of Establishing, Masterminding and Supporting a criminal group, in the then provision of Section 185a, with special provisions of Section 185b and Section 185c of the Criminal Code.

Previous legal regulation of an organised crime has created difficulties in proving it. The disadvantage was also the fact that the legislation was adopted prior to the implementation of the UN Convention on Transnational Organised Crime. This shortcoming was modified by the Act No. 403/2004 Coll. on the European Arrest Warrant, as amended by later regulations through which a definition of a criminal group was amended, following the model of the UN Convention against Transnational Organised Crime. The fact that the commission of an organised form of crime required more adequate instruments for its disclosure was also confirmed by the adoption of the Amendment No. 457/2003 Coll., through which a new institute in the form of Cooperating Accused was supplemented into the Act No. 141/1961 Coll. Criminal Procedure Code (Mokrá, 2022, p. 173). We believe that in order to clarify this issue, it is appropriate to define the difference between commonly committed crime and organised crime.

We agree with Chmelík that there is no unified definition of an organised crime and our words are confirmed by a wide range of specialised literature (Chmelík, 2004, p. 94). The unravelling of the problem of non-existence of a unified definition of organised crime is a challenging discipline. We assert that organised crime is the most often derived from the legal system and criminal law of individual countries, that is, from this perspective one can perceive significant politico-economic and legal criminogenic factors,³² that is, aspects such as politics, economics and law that fundamentally influence the entire social life.

Also, important criminogenic factors of organised crime are socio-cultural criminogenic factors, i.e. factors acting on the individual starting with educational activities in the family and at school, among which we subsume e.g., religion, education and mass media.

On the other hand, organised crime is the most often defined through its activities.

Considering the above-mentioned, we agree with the definition that describes organised crime as: *"A continuous and planned criminal activity committed by a hierarchically structured group of persons among whom there is a division of tasks. Its primary objective is to achieve maximum profit or gain influence on public life while minimising the risks of its disclosure from the Criminal Procedure Code."* (Polák, 2015, p. 85).

Organised crime as a notion is not explicitly defined in the Criminal Code, but its nature can be deduced from the title of an organised and criminal group. For this reason, just mentioned legal names shall be the subject of the analysis in the next part of the work.

³² The criminogenic factors mentioned in the presented paper are risk factors which provoke, facilitate or support commission of criminal offences.

For the purposes of the Criminal Code pursuant to Section 129, an organised group shall mean: *"Association of at least three persons grouped together with the objective of committing a criminal offence and using a certain division of tasks among individual members of the group; as a result, the activities of the group have a planned and coordinated character which increases the likelihood of a successful commission of the criminal offence."*

The basic element of organised group and/or group as such is the number of persons acting within it, specifically it relates to at least three persons. Qualified elements of this group which differentiate it from other less serious forms of cooperation of offenders, in particular, complicity and participation, are:

- a predetermined purpose which is to commit a crime;
- division of predetermined tasks among individual members of the group;
- activity planned and coordinated to such an extent which increases the likelihood of a successful commission of the criminal offence.

With the objective of sufficient understanding of examined concept, it is appropriate to give an explanation of another element, namely the concept of **association**. According to Professor Čentěš, an association shall mean: *"The mutual agreement of at least three persons concerning the determining, though only, the general features of future criminal activity. For this purpose, there is a certain division of tasks among its members in an organised group, their planning and coordination in the form of harmonisation and harmonisation of activities."* (Čentěš J. et al., 2015, p. 247). But it is necessary to point out that the coordination about which Professor Čentěš discusses in the commentary does not mean that the division of tasks and related activities create a more solid organisational scheme, and certainly not a structured group. It does not even require a longer duration of a group. Concerning the relations of superiority and subjugation, it can be said that the members of the organised group are not at a substantial implementation level and operate without a more specific determination of these relations. It is in this heterogeneity; the diversity of tasks and activities aimed at the successful commission of crime can be seen. Individual tasks within an organised group are first planned by the members of the group, then distributed, and finally coordinated.

To join an organised group, neither formal nor explicit acceptance for a member of the group is required. The act of incorporation itself, e.g. through the procurement of some of the activities of the group is satisfactory enough.

A typical example of an organised group is an association of manufacturers and distributors of drugs, precursors and other substances. Some produce them and others sell and distribute them. Examples can be the sexual exploitation of women for the purpose of prostitution, trafficking in weapons, trafficking in stolen cars, smuggling cigarettes and others.

The legislator within the provisions of Section 138 letter i) of the Criminal Code, as one of the alternative options for meeting **the qualifying element of the crime**, embodied its commission by an organised group. For the attribution of the qualifying element in question, as well as in connection with the qualifying element "as a member of a dangerous grouping", Section 18 of the Criminal Code shall have a decisive meaning from the point of view of the subjective side, as for another fact (while membership in an organised, criminal or terrorist group is such another fact) shall be taken into account as an aggravating circumstance *"...even if the offender was not aware of it although, considering the circumstance and his personal situation, he should and could have known it, unless this Act explicitly requires that the offender be aware of such a circumstance."* It means that in relation to a qualifying element, in general, the causation from unconscious negligence is sufficient, unless the Criminal Code provides otherwise (or, if the latter does

not require something else). In the event given, however, it is inadmissible by the nature of the matter that a person is a member of an organised group or a dangerous grouping only by negligence, therefore, for the attribution of the qualifying element, it shall always be necessary to prove at least an indirect intention (Blažo and Mihálik, 2021, p. 547).

Subsequently, the Criminal Code in Section 129 par. 4 defines criminal group as: *"Structured criminal association of at least three persons, existing for a certain period, acting in a co-ordinated manner with the objective of committing one or more felonies, the criminal offence of legalisation of proceeds of crime pursuant to Section § 233, or any of the corruption criminal offences referred to under the Chapter Eight, Title Three of the Special Part of this Act, for the purposes of obtaining, directly or indirectly, a financial benefit or other advantage."*

Just right after the preliminary definition of a criminal group within the meaning of the Criminal Code, the primary difference between an organised group and a criminal group can be observed, specifically that **a criminal group is a structured group** of at least three persons existing for a certain period of time, acting in a co-ordinated manner with the objective of committing one or more felonies. Thus, *a priori*, it can be purposefully defined that **a criminal group is a special form of an organised group**.

The basic defining element of a criminal group is the determination of the purpose, to obtain directly or indirectly, a financial benefit or other advantage (Čentěš J. et al., 2015, p. 248). Unlike an organised group, which is characterised by a certain division of tasks among its members, for a criminal group only such a division is not enough, but also a certain internal organisational **structure** is required. This structure is characterised by stably arranged relationships among individual components out of which a given group is formed.

Having learnt previous aspects, it is possible to determine that a criminal group is established in case of cumulative meeting the following elements:

- consists of at least three persons;
- exists for a certain period of time (as a rule multi-month);
- in committing criminal activity, members of the group act in co-ordinated manner;
- its objective is committing one or more criminal offences, in the event it demonstrates the elements of a felony, legalisation of the proceeds of crime under Section 233 or any of the crimes of corruption under Chapter Eight, Title Three, Special Part (example; Section 328 Passive Bribery, Section 332 Active Bribery, Section 336 Trading in Influence, Section 336a Election corruption, Section 336b Sport corruption, Acceptance and granting of undue benefit Sections 336c and 336d);
- the purpose of obtaining, directly or indirectly, a financial benefit or other advantage.

This statement is also confirmed by several resolutions of the Supreme Court of the Slovak Republic, which contributed to the improvement in the practical application of the concept and elements of an organised group in practice. One of them is the Resolution of the Supreme Court of the Slovak Republic, File No. R 51/2013 according to which a criminal group is a relatively stable group of at least three persons in terms of time and organisation and its objective is to commit crimes in a co-ordinated manner, in the form of felonies and criminal offences defined in Section 129 par. 4 of the Criminal Code. The criminal group is also limited by formal elements of superiority and subjugation, and last but not least, it is distinguished by a vertical organisational structure. These elements must be the subject of examination of evidence in criminal proceedings, with the burden of evidence to be proved by the prosecutor.

Another example is the Judgment of the Criminal Division of the Supreme Court of the Slovak Republic,³³ in which both an organised group and a criminal group were defined by means of comparison. *“The fundamental difference between an organised group and a criminal group, as it follows from the designation itself and partly from their definitions, which, however, overlap in many aspects (division of tasks, planning, coordination in order to commit crimes), is (interpretatively) the circumstance that an organised group is established spontaneously, in order to facilitate and simplify the commission of a crime, which could be committed by one offender or two accomplices, but more complicated than a group of offenders who divide tasks among themselves and act in co-ordinated manner. However, an organised group, unlike a criminal group, is not established professionally and deliberately in advance at its formation for the purpose of committing the most serious crime, while a criminal group is even structured and managed, including the immanent attribute of such management – relationships of superiority and subjugation, the non-observance of which is sanctioned by the means of the group within its internal structure. The organised group uses and gradually involves in its activities the offenders or other persons who perform activities necessary to facilitate the commission of a crime, but without the above-described institutional expression. An organised group is an association of persons for the purpose of committing a crime - any. A criminal group is a structured group established in order to commit the most serious forms of crime. Whereas an association shall mean more or less randomly or event-shaped grouping of people suitable for a particular activity, e.g. because they occupy a certain position or have a certain job title, a structured group shall mean a group of people who are selected, prepared, predetermined for a certain mission and position, aware of their position at a certain level and tasks in the group.”*

Following above-mentioned lawful defining elements, certain discrepancies come into existence, especially those concerning uncertain legal notions contained therein. In particular, it can be pointed out:

- a) **interpretation of the concept of structured group,**
- b) **the duration of the organised group.**

Ad a) primarily, it is important to say that the Criminal Code does not explicitly define what is meant by a structured group. Despite the fact that the meaning of structuredness has been searched for in several legally relevant sources, it must be concluded that the concept of structuredness derives both from the Council Framework Decision on the fight against organised crime and from an international legal document, namely the United Nations Convention Against Transnational Organised Crime.

Framework Decision in Article 1, *Definitions*, under **structured association** means: *“an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.”* It was the Council Framework Decision which was adopted into the legal order of the Slovak Republic to the date of 11 November 2008. It is debatable whether this as an act of law does have or not direct effect in the national legal order of the Member States of the European Union. Associate professor Klimek comments on the effectiveness of this legal instrument, pointing out the fact that: *“The definition of organised crime in the Council Framework Decision is undefined and vague. In principle, it is a weak instrument in the fight against organised crime with little added value. Although the EU requirements resulting from the Council Framework Decision have been*

³³ Slovakia, Supreme Court of the Slovak Republic, 2Ndt/27/2015 (11. January 2016).

introduced in the EU Member States, but the legal regulation itself is not sufficient to achieve the objectives of the Council Framework Decision.” (Klimek, 2017, p. 110).

The objective of the EU and its Member States within the politics in the field of judicial cooperation is an effort to cooperate in criminal matters through approximation of legislation. The scope of powers of this instrument includes crimes that are usually committed by criminal organisations. The main objective of the Council Framework Decision is the criminalisation of crimes related to participation in a criminal organisation.³⁴

In relation to the above-mentioned, we consider it appropriate to introduce also a definition of the structured group stipulated in the UN Convention Against Transnational Organised Crime. This Convention defines in Article 2, *Use of Terms*, **structured group** as: “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”³⁵ Thus, in order to be able to say about any criminal group that it meets the attribute of structuredness, the following aspects must be cumulatively met:

- there is an objective behind formation of a group – group is not randomly formed;
- immediate commission of a crime – it is sufficient to commit only one crime;
- tasks of the members of such group do not have to be formally defined – thus, relations of superiority and subjugation do not have to be defined;
- the personnel apparatus of the group does not have to consist of only permanent members;
- it does not have to have a developed structure – it can be concluded that such a group must have a partial structure.

The Convention in question is a part of the legal order of the Slovak Republic, therefore the above definition is undoubtedly binding for the competent authorities concerned. On the other hand, its current wording in the context of the legal regulation of organised and criminal groups in the Slovak Criminal Code does not, in our opinion, reflect adequate legal regulation or the needs of application practice. Therefore, we cannot consider a possible unanimous adoption of the definition of a structured group from the UN Convention as appropriate and we take the liberty of proposing our own definition that reflects the needs of application practice. We believe that the legal regulation of the Slovak Republic, in the context of organised crime, requires a more consistent legal definition and strict definition of the differences between an organised and a criminal group. In this regard, we are of the opinion that it is necessary to add the feature of structuring to the Criminal Code for the sake of clarity of the legal regulation. The legal regulation *de lege lata* and the subsequent decisions of application practice, which are mentioned above in the text, define an organised group as a group established by an association of at least three persons, with a certain division of tasks, which is manifested in the planning and coordination of the actions of this group. At the same time, this group is considered to be a less serious form of organised crime in Slovakia, from which it is necessary to strictly separate the criminal group.

A criminal group, *de lege lata*, a structured group, we consider structure to be the basic distinguishing feature of this group, must, as a special form of an organised group, contain special features as an organised group. Therefore, we argue that a criminal group, as a more serious form of an organised group, must also meet the features of an

³⁴ Council Framework Decision 2008/841/SVV of 24 October 2008 on the fight against organised crime.

³⁵ UN Convention against Transnational Organised Crime.

organised group, but these must be accompanied by additional criteria. In this regard, we propose the feature of superiority and subordination as the key distinguishing attributes between an organised and a criminal group. We consider this to be a cardinal distinguishing attribute between an organised group, whose members have divided tasks and a certain division of tasks, but the structuring of the group present within a criminal group is limited by clear formal features of superiority and subordination.

There is inconsistency of opinion in the legal community regarding the structure of a criminal group. According to Burda, the structuredness of a criminal group means division and arrangement of the group. Classical organisational structure of a criminal group is usually vertically hierarchical, i.e. consisting of two, more often three levels, which form executive and management branches, however, it can also have a different structure in which a horizontal division prevails (Burda et al., 2010, pp. 925-926). The team of authors under the guidance of Professor Záhora argues that the structure of a criminal group, as a rule, consists of: the highest centre, the middle level and the executive branch. *The highest centre* consists of a boss, advisers and bodyguards. At the same time, the highest centre determines the rules of organisation, hierarchy of individual ranks, selection of people, use of profits and more. *The middle level* includes the heads of individual groups with their guards and financial personnel. They manage relatively independently the actions of their group and control discipline within their group. However, they are obliged to respect the opinions of the big boss. *The executive branch* consists of persons who mostly arrange specific specialised activities, it can be couriers, counterfeiters, tipsters, etc. (Ivor et al., 2017, pp. 39-40).

We do agree with this division and add that also the case-law of the Supreme Court of the Slovak Republic proclaims the professional **internal division of a criminal group**. In one of its decisions, the Supreme Court of the Slovak Republic stated that: *"This internal organisational structure (meaning a criminal group - author's note) is characterised by steadily arranged relationships among individual branches that form this group. Mutual relationships are defined, in particular, in terms of which branch is superior and represents the control centre, which branch is subordinate and represents the middle level ensuring compliance with the rules according to which individual branches cooperate with each other. It is this organisational structure, together with sophisticated management, that result in the criminal group being able to achieve its objectives more effectively."*³⁶ At this point, we therefore add that this well-thought-out organisational structure, together with stable ordered relationships that are in the relationship of superiority and subordination, define a criminal group, while it is true that such sophisticated management results in a more efficient achievement of the goal of the criminal group, and at the same time, this stable internal organisation of the group and the relationships between the individual components of the group are also the ideal distinguishing criterion between an organised group that does not achieve such a structure and a criminal group, the structure of which must also be understood in the context of the selection of people as members of the group, since they are selected and prepared for a certain activity and are aware of their position at a given level within the group. Failure to respect this position is punished within the internal structure of the group by the means designated for this. This fact does not apply at all within an organised group, to which persons are selected more or less randomly, or by the development of events in the group.

On the other hand, Associate Professor Deset claims that within the meaning of the interpretation of a structured group under the Convention against Transnational

³⁶ For more information, see Slovakia, Supreme Court of the Slovak Republic, 5Ndt 18/2012, (6 December 2012).

Organised Crime and even the Council Framework Decision on the fight against organised crime, a criminal group does not need to have an established organisational structure with defined relationships of superiority and subjugation, nor a fixed membership and the activities of its members can be divided even for the commission of a specific crime. This means that members of the group do not have to fulfil the assigned tasks or functions professionally (Deset, 2014, p. 41).

Following the legal definitions set out above, we claim that a criminal group requires a structure, but this structure is not defined in the legal framework *de lege lata*, it requires this definition, as we propose below, based on the in-depth analysis carried out in the text presented.

On the basis of the above-mentioned, it can be concluded that criminal groups have an established structure, and it is the structure that provides them with considerable protection. The truth is that the lowest executive branches often do not know who they work for (meaning the person or persons, within the highest centre) and know only the person in the direct level of superiority, but not the boss of the criminal group himself. Thus, we assume that the structuredness of a criminal group is its essential defining element and, at the same time, a concealing manoeuvre of the top representatives of such an organisation before the judicial authorities.

On this basis, we would like to conclude that, within the framework of our legal order, it would be purposeful to legally define a structured group within the Criminal Code, and that is for one simple reason, so as not to tighten the conditions for meeting the element of "structuredness" of a criminal group, in contrast to its legal definition in the Convention and the Council Framework Decision, because within the meaning of the Convention, it is possible to subsume a wider range of criminal groups under the term of structured group, than within a national legal regulation which exactly requires structuredness of a group.

Our words are clearly supported by the legislation of the Italian Republic, as per the above text, under Italian law the difference between an ordinary criminal group and a mafia-type criminal group does not lie in the number of members of the group, nor in the existence of a structure, as the Italian legislation requires both groups to be structured.

Also, in view of this fact, we believe that the definition of this elementary feature, which is one of the main distinguishing features between an organised group and a criminal group under domestic law, is a necessary step towards ensuring a higher standard of the legal certainty in the context of punishing members of organised and criminal groups.

We are also convinced that defining such an explicit distinction between an organised group and a criminal group will deepen the principle of legal certainty in our society, as it will no longer be possible to classify those criminal groups that do not achieve the structure of the proposed definition. We consider this step to be one of the key ones, since *de lege lata*. The Slovak legislator assumes that the structuring of the group in the case of criminal groups, of this defining feature, is not present in the case of organised groups. It follows explicitly from the above that one of the cardinal differences between an organised group and a criminal group is already in the current structure, which is absent in an organised group. For the sake of legal certainty, we propose that this definition be adopted into the legislation of the Criminal Code, as proposed, because of the strict separation between an organised group and a criminal group.

After analysing the application problems, the solutions *pro future* can be proposed. As one of partial motion *de lege ferenda*, we would like to introduce the definition of a structured group within our Criminal Code, and that is on the basis of the analysis resulting from the analysis of the UN Convention against Transnational

Organised Crime and the Council Framework Decision, but also based on the needs of application practice.

"A structured group is a group based on relationships of superiority and subordination, which has been created for the purpose of committing one or more criminal acts, has formally distributed tasks among its members and a developed structure."

Ad b) Disputation in the definition of an organised group or criminal group is also stirred up by the time period of its action. The question as to the duration of an organised group is answered neither by the Criminal Code nor by the Council Framework Decision, not even by the Convention. None of the listed legal regulations defines what time period corresponds to the fulfilment of this requirement. The situation is slightly different in the case of a criminal group, since the duration, based on legal practice, must be a ***period of several months***. It can be added that the stabilisation of this defining element is left by the legislator to the decision-making practice of the courts. However, in respect of this, we also feel that more clarity and legal certainty is in order on the issue under review. It does not seem appropriate to us to leave the creation of the duration of an organised or criminal group to application practice. Therefore, we state the following, considering definition of an organised group under Section 129 of the Criminal Code: The legislator allows for association into an organised group, even for the purpose of committing a single criminal offence. It is implicit from the foregoing that the actual operation of an organised group doesn't need to last several months, but as well may be. We also consider the length of time the group has been in operation to be an appropriate distinguishing feature between an organised group and a criminal group, but only to the extent that the unlawful activities in which one or the other group engages are not completed. The fact remaining is that in the case of an organised group, its activities are planned and coordinated to such an extent as to increase the likelihood of the successful commission of a crime, whereas in the case of a criminal group, one of the distinguishing attributes is the criminal activity itself, since the legislature has limited this to crimes only, respectively. In contrast to the organised group, which is set more broadly, as it speaks of crimes, which include both misdemeanours and felonies in terms of seriousness. The criminal activity envisaged by the legislator, which is intertwined with the criminal groups defined in Section 129(4) of the Criminal Code, reflects a more time-consuming period. The existence of a criminal group is therefore tied to a certain period, but an organised group is not tied to any period of time envisaged by the legislator.

We are persuaded that we have unambiguously demonstrated the necessity to distinguish between a criminal group and an organised group. For the purposes of the Criminal Code, an organised group shall mean an association of at least three persons grouped together with the objective of committing a criminal offence and using a certain division of tasks among individual members of the group; as a result, the activities of the group have a planned and coordinated character which increases the likelihood of a successful commission of the criminal offence. Comparing both groups, it can be concluded that a criminal group is more serious than an organised one. While the activity of a criminal group is aimed at committing a crime enumeratively defined by scope of crimes, what concerns an organised group, it is the commission of a crime as such. In addition, while a criminal group is defined by its purpose, i.e. to obtain, directly or indirectly, a financial benefit or other advantage, for an organised group, the purpose is not defined and therefore it is not necessary to prove it for the fulfilment of criminal responsibility.

Last but not least, with regard to the temporal definition of the duration of the individual groups, we consider that a criminal group, based on the legal regulation, requires a longer period of time for its fulfilment, which the case law has set at several months, whereas an organised group does not contain such a definitional criterion, from which it can be implicitly concluded that it is not necessary to prove its longer duration for its fulfilment.

On the basis of the above-mentioned facts, it can be noted that **a criminal group is the highest form of criminal cooperation, the most important aspect of which is structuredness.** In the criminal group, the relationships of superiority and subjugation dominate, so it can be understood as a group with a solid organisational structure. The tasks are determined, and the functions are distributed from the highest organisational and managerial through the middle level of planning and coordination to the lowest level of execution of criminal activities within the meaning of the Criminal Code.

5. CONCLUSION

Solving the issue of fight against organised crime should be one of the long-term challenges of the society as a whole. The fight against organised crime must be developed by states through mutual assistance and cooperation. The paper presents a detailed specification of seriousness of the phenomenon in the form of organised crime, while in several parts, it was pointed out that the fight against it cannot be accomplished by standard means. The clear evidence is the fact that we perceive across society that organised crime is always one step ahead. Non-observance of the rules and principles of democracy in order to fulfil their objective, maximising proceeds, using illegal procedures and means. On the contrary, the state must always act within the limits of law, so as not to violate human rights, freedoms and democratic principles. These attributes can create the impression that the fight against organised crime is an unbeatable fight.

In our opinion, the Italian legislation, which is used in the present text as a comparator, can be inspiring for the Slovak legislator in many aspects. The Italian legislation on organised crime shows signs of sophistication, which is understandable since Italy has a long history with organised crime. We consider that the knowledge and understanding of the limits of the phenomenon of organised crime and the necessity of its innovation, taking into account the historical and cultural development of the country being compared and the investigation of the knowledge of foreign law for finding solutions to the problems of one's own law, can be considered as a sufficient reason for the choice of a given country for comparison. In this respect, we conclude that the Slovak legislator has considerable possibilities of inspiration *pro futuro* through the special features of a mafia-type criminal group in the Italian Criminal Code.

This academic paper has therefore defined as its general goal, the ambition of an unbiased assessment of the legal regulation of an organised crime *de lege lata*. In order to achieve this goal, the substantive attributes of an organised crime linked to the fight against organised crime were analysed. Identified application problems were analysed and subsequently, in individual parts of the work, *pro futuro* motions were drafted, which, we hope, shall bring more clarity to the examined issue.

Based on the above, it can be unambiguously stated that organised crime is present almost in all parts of the world. Thus, it is a huge challenge for all judicial branches within the country. Apart from international terrorism, no criminal group threatens internal security and stability to such extent as an organised crime. In principle, it does not matter how individual criminal organisations are called or what rules they create and respect. What matters is that proceeds obtained by criminal organisations

from illegal business are invested in legal business thereby creating a shield of legality around themselves. The illegal assets of organised criminal groups constitute the core of organised crime, which is why the fight against money laundering and its legalisation should remain at the forefront of the interests of the judicial authorities.

There is any single definition of organised crime neither at international nor European level. The European legislation can represent the guiding tool that declares that it is possible to win fight against organised crime only through breaking down criminal networks and disrupting high-risk criminal organisations.

We consider the fact that the legal order of the Slovak Republic does not define the concept of **structuredness** of a criminal group to be a legal deficiency. Proceeding from legal definitions set out in the second chapter, it can be concluded that structuredness as a defining element is not present within an organised group. In this group, it is an association that is more or less random, and the grouping of people in the organisation is formed by the development necessary for a certain action, which is to be the activity of this group. On the contrary, structuredness is the defining element of a criminal group, which means that its members are chosen thoughtfully and have their own status and mission within the group. From the analysis of the opinions reigning in the national legal theory, it can be concluded that the structuredness of the group shall mean a formal understanding of the group with stable relationships within the group hierarchy. *Vice versa*, the Council Framework Decision, which is a part of the national legal order, the element of structuredness as a defining criterion **does not explicitly define**. Our words are also confirmed by the fact that neither the organisational structure for which the relations of superiority and subjugation are typical, nor the recruitment of group members according to their professions, both within the meaning of decision of the Council are not mandatory attributes for demonstrating the element of structuredness. In this regard, however, we must clearly state that the definition of a structured group in question, which is the defining criterion for a criminal group within the meaning of the Council Framework Decision, is insufficient and is not legally applicable to Slovak conditions. The Slovak legislator assumes that a group is structured only in relation to a criminal group, not also in relation to an organised group. If the definition of structuredness were unanimously adopted into domestic legislation (a group does not have to have formally divided roles for its members, continued membership or a developed structure), the above would cause, first of all, a discrepancy with the definition of an organised group in the legislation of the Slovak Republic, which would, secondly, create a collision in application practice between punishment for membership in an organised group or a criminal group. In this regard, we therefore clearly conclude that the Slovak legislator should define structuring, among other things, to ensure a higher standard of legal certainty in the context of punishing members of organised and criminal groups.

The above shows an apparent discrepancy in the legal regulation which we do not consider to be demonstrating legal certainty and predictability of decision-making. In order to avoid possible application problems, *pro futuro* we propose to define a structured group for two reasons. *The first* is the fact that the legal status *de lege lata* in the framework of national legal regulation causes tightening of the conditions for meeting the element of the structuredness of a criminal group, in contrast to the legal wording in the Convention, or the Council Framework Decision. *The second* reason is that it is just the structuredness as an element of a criminal group, that distinguishes it diametrically from an organised group and is an expression of considerable sophistication of the group, which, we are of the opinion, provides its concealment and makes it difficult for bodies involved in criminal proceedings to prove a person's connection to a criminal

group. The lowest executive branches often know only the person who is superior in the direct line, not the boss of the criminal group itself. Therefore, proving of a person's connection to a criminal group remains to be a still discussed problem. With respect to above-mentioned, as one of the partial motion *de lege ferenda*, we recommend a legislative definition of the concept of a structured group within our Criminal Code.

"A structured group is a group based on relationships of superiority and subordination, which has been created for the purpose of committing one or more criminal acts, has formally distributed tasks among its members and a developed structure."

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