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Countering Organised Crime

in Bulgaria

Study on the Legal Framework

26

COUNTERING ORGANISED CRIME IN BULGARIA

STUDY ON THE LEGAL FRAMEWORK

The present publication analyses and assesses the legal framework on countering organised crime and examines the problems, which arise in its practical application. On this basis, recommendations are made to improve the legislation and bring it into conformity with international standards and the existing good practices, as well as to overcome the weaknesses in the application of law which impede the detection and punishment of organised criminal activity or infringe fundamental principles of criminal procedure and the rights of the participants in it.

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TABLE OF CONTENTS

INTRODUCTION	5
1. PRINCIPAL PROBLEMS IN CRIMINAL LEGISLATION VIS-À-VIS THE EFFECTIVENESS OF THE PRE-TRIAL AUTHORITIES AND THE COURT IN ORGANISED CRIME CASES	7
1.1. DEFINITIONS	7
1.1.1. DEFINITION OF ORGANISED CRIMINAL GROUP	7
1.1.2. ORGANISED CRIMINAL GROUP AND PARTNERSHIP	13
1.1.3. ORGANISED CRIMINAL GROUP AND PRELIMINARY CONSPIRACY	15
1.1.4. ORGANISED CRIMINAL GROUP AND JOINING TOGETHER FOR A CRIMINAL PURPOSE	17
1.1.5. NOTION OF ORGANISED CRIME.	18
1.2. FORMING, DIRECTING AND PARTICIPATION IN AN ORGANISED CRIMINAL GROUP	21
1.2.1. TYPES OF CRIMINAL BEHAVIOUR.	21
1.2.2. VOLUNTARY RENOUNCEMENT	24
1.2.3. AGGRAVATED CIRCUMSTANCES.	29
1.3. AGGRAVATED CASES OF OTHER OFFENCES COMMITTED UPON ASSIGNMENT BY OR IN EXECUTION OF A DECISION OF AN ORGANISED CRIMINAL GROUP	31
1.4. PENALTIES FOR OFFENCES RELATED TO ORGANISED CRIMINAL GROUP	33
1.4.1. PENALTIES FOR NATURAL PERSONS	33
1.4.2. PENALTIES FOR LEGAL PERSONS	39
1.5. OTHER CRIMINAL GROUPS	42
1.5.1. TERMINOLOGICAL PROBLEMS	42
1.5.2. CORRELATION BETWEEN THE PROVISIONS ON THE VARIOUS CRIMINAL ASSOCIATIONS	43
1.5.3. ORGANISATION OR GROUP AGAINST NATIONAL, RACIAL AND ETHNIC EQUALITY AND RELIGIOUS AND POLITICAL TOLERANCE	44
1.5.4. ORGANISATION OR GROUP FOR SUBVERSIVE ACTIVITY	46
1.5.5. GROUP FOR COMMISSION OF OFFENCES AGAINST CITIZENS' POLITICAL RIGHTS.	47
1.5.6. GROUP FOR CONCLUSION OF TRANSACTIONS OR DERIVING BENEFITS BY USE OF FORCE OR INTIMIDATION	48
1.5.7. ORGANISED CRIMINAL GROUP FOR THE GROWING OF OPIUM POPPY AND COCA BUSH PLANTS OR PLANTS OF THE GENUS CANNABIS OR FOR THE MANUFACTURE, PRODUCTION OR PROCESSING OF NARCOTIC DRUGS	50
1.5.8. GROUP FOR UNLAWFULLY TAKING PERSONS ACROSS THE BORDER	51
1.5.9. GROUP FOR BLACKMAIL	52

1.5.10. ORGANISATION OR GROUP FOR TAKING MOTOR VEHICLES WITHOUT LAWFUL AUTHORITY	54
1.5.11. ORGANISATION OR GROUP UNDER ARTICLE 356B OF THE CRIMINAL CODE	54
2. COLLECTING EVIDENCE OF ORGANISED CRIMINAL ACTIVITY	57
2.1. INTERROGATION OF PROTECTED WITNESSES AND EXPERT WITNESSES. TYPES OF PROTECTION	58
2.1.1. WITNESS PROTECTION UNDER THE CRIMINAL PROCEDURE CODE	60
2.1.2. INTERROGATION OF EXPERT WITNESSES. EXPERT EXAMINATION AS A MEANS OF PROOF	72
2.1.3. PROTECTION OF PERSONS AT RISK IN RELATION TO CRIMINAL PROCEEDINGS.	74
2.1.4. PROTECTION IN CONNECTION WITH TRAFFICKING IN HUMAN BEINGS	79
2.1.5. PRACTICAL PROBLEMS	82
2.2. SPECIAL INTELLIGENCE MEANS	89
2.2.1. DEFINITION AND SCOPE OF APPLICATION OF SPECIAL INTELLIGENCE MEANS	90
2.2.2. PROCEDURE FOR USE OF SPECIAL INTELLIGENCE MEANS	92
2.2.3. PHYSICAL MEANS OF PROOF AND EVIDENTIAL VALUE OF DATA OBTAINED USING SPECIAL INTELLIGENCE MEANS	97
2.2.4. PROBLEMS IN THE PRACTICE OF APPLICATION OF SPECIAL INTELLIGENCE MEANS	104
3. OTHER SPECIAL METHODS AND LEGAL CONCEPTS APPLICABLE IN THE CRIMINAL PROSECUTION OF ORGANISED CRIME.	113
3.1. ACCESS TO TRAFFIC DATA UNDER THE LAW ON THE ELECTRONIC COMMUNICATIONS.	113
3.2. PLEA BARGAIN AGREEMENT IN CASES OF ORGANISED CRIMINAL GROUP	116
3.3. SUMMARY JUDICIAL ENQUIRY	118
3.4. MEASURES FOR REMAND IN CASES OF ORGANISED CRIMINAL GROUPS	120
4. SPECIALISED CRIMINAL COURT	123
CONCLUSION	133
REFERENCES AND FURTHER READING.	137

INTRODUCTION

The phenomenon of organised crime with its increasingly complicated national and transnational manifestations puts to a test the policies, legislations and law-enforcement capacities of the individual States. The intensifying transnational nature of the offences related to organised crime faces both the international community and the regional unions with a serious challenge.

The national diversity and the internationalisation of organised crime require vigorous development of the legal regulation of this phenomenon at the national and international level, so as to cover all possible manifestations of this type of criminal behaviour.

The adequate legal framework and its effective implementation are crucial for the achievement of satisfactory results in countering organised crime.

The subject of the present publication is an assessment of the criminal legislation in Bulgaria, as well as of legislative provisions beyond criminal law, which are relevant to the fight against organised crime.

The first part explores the substantive law on the organised criminal group and the main problems in connection with its definition and its differentiation from other forms of concerted criminal activity. The analysis covers the acts of forming, directing and participating in an organised criminal group as well as the provisions outlining other offences committed upon assignment by or in execution of a decision of such a group. The envisaged penalties and the provisions allowing for more favourable consequences in exchange for voluntary cooperation in the course of the investigation are examined as well. The study focuses on Bulgarian legislation and, at the same time, assesses the conformity of the national legal framework to international standards.

The second part discusses the fundamental rules and concepts of criminal procedure law and of other relevant laws, as well as the problems posed by their implementation which impact the effectiveness of the pre-trial authorities and of the court in handling cases of organised criminal groups. The analysis and assessment cover the general legal framework of evidence, means of proof and methods of collecting evidence, the regulation of specific means of proof and methods of collecting evidence, the applicability of special legal concepts (plea bargain agreement, summary procedure etc.) and methods (access to traffic data, measures for remand in organised crime cases etc.). Within this range of issues, prominence is also given to the debate regarding the establishment of a specialised criminal court and prosecutor's office.

The study takes into consideration the opinions and views of judges, prosecutors, investigating magistrates, investigating police officers, lawyers and members of the academic community shared in a number of interviews conducted by the authors of the study. Data in the public domain, information provided by the criminal justice authorities, as well as the available trial and interpretative case law have been used as well. Account is furthermore taken of the positions expressed by other authors in the existing albeit still scanty research papers and publications on the subject.

The purpose of this publication is to catalyse a further discussion on improving the legal framework and bringing it into conformity with international standards, as well as taking measures for its more effective implementation while complying with the fundamental principles of criminal procedure and respecting human rights.

1. PRINCIPAL PROBLEMS IN CRIMINAL LEGISLATION VIS-À-VIS THE EFFECTIVENESS OF THE PRE-TRIAL AUTHORITIES AND THE COURT IN ORGANISED CRIME CASES

1.1. DEFINITIONS

A definition of the notion of “organised crime” does not exist in Bulgarian criminal law. In principle, notions like “crime” and “organised crime” are notions of criminology and most national penal laws do not use them and do not define them. Views regarding the definition of “organised crime” diverge in theoretical criminology. There are numerous definitions, which vary widely in their scope, the broadest of them covering both the illegal markets (such as distribution of narcotics and prostitution) and other illegal activities (such as financial and tax fraud).¹

The *Criminal Code* limits itself to a legal definition of “organised criminal group” which, according to the majority of judges, prosecutors and members of the investigating authorities, differs in content from the notion of “organised crime”. The definition of organised criminal group itself is fundamentally flawed, which makes it unclear and hardly distinguishable from similar notions and creates prerequisites for conflicting interpretation and application of the law. This definition furthermore departs from the international standards in the field of countering organised crime, formulated in the *United Nations Convention against Transnational Organised Crime* and *Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime*.

1.1.1. Definition of organised criminal group

The legal definition of “organised criminal group” is formulated in Item 20 of Article 93 of the *Criminal Code*. According to that provision, “organised criminal group” is “a permanent structured association of three or more persons formed with a view to committing, acting in concert, in Bulgaria or abroad, any criminal offences punishable by deprivation of liberty for a term exceeding three years. An association shall be structured even without formally defined functions for the participants, continuity of participation or a developed structure”.

The definition of “organised criminal group” under Item 20 of Article 93 is of key importance in practice because it delineates the scope of application of almost all provisions of the Special Part of the *Criminal Code*, which criminalise acts

¹ Examining the Links between Organised Crime and Corruption, Sofia, Center for the Study of Democracy, 2010, p. 27.

related to organised crime. The content of this definition also reflects the way the Bulgarian legislator conceptualises organised crime.

In its present form, **the definition of “organised criminal group” exhibits a number of weaknesses**, which cause problems in the interpretation and application of a series of provisions of the Special Part of the *Criminal Code* and have a negative impact on the effectiveness of the criminal prosecution of organised crime.

On the one hand, **the definition is too broad** and makes it possible to classify as organised criminal group a number of concerted criminal activities, which are unrelated to organised crime. In this way, conditions are created **to direct the penal repression to criminal associations of a relatively low degree of social danger at the expense of the larger and more ramified criminal structures.**

On the other hand, most of the elements of the definition are **unclearly formulated**, which makes possible disparate and often conflicting interpretations. This creates prerequisites for **conflicting case law** and possibilities for the **imposition of penalties of different severity** on the perpetrators of similar acts.

The definition formulated in Item 20 of Article 93 also preconditions **the jurisdiction of organised crime cases**. This is particularly important within the context of the newly established **specialised criminal court**, whose main intended purpose is to examine cases related to organised crime. Whether the criminal offence concerned has been committed upon assignment by or in execution of a decision of an organised criminal group is a crucial criterion for the examination of the case by that court. In this sense, a rather loosely defined notion would refer to that court a needlessly large number of cases which, in reality, are not concerned with organised crime, whereas the potential variations in interpretations would make it possible for complicated cases tangibly related to organised crime to fall out of its jurisdiction and be examined by the regular courts.

According to Item 20 of Article 93, an organised criminal group is an association of **not fewer than three persons**.² In this it differs from the other types of groups described in the Special Part of the *Criminal Code*, for which no provisions are made about a minimum number of members. The lack of an expressly specified minimum number of members implies, according to case law, that as few as two persons are sufficient to form such a group.³ An association of two persons, however, cannot be classified as an organised criminal group even if all other elements of the definition under Item 20 of Article 93 are satisfied.

² According to the theory, the participation of not fewer than three persons implies that the organised criminal group is a form of concerted criminal activity and more specifically of the so-called “necessary plurality of parties”. A necessary plurality of parties applies where, by its nature, the offence can only be committed if a plurality of persons participates in the actual criminal act, with the conduct of each person being a necessary condition for the effectuation of the conduct of the rest. Стойнов, А., Наказателно право: обща част [Stoynov, A., Criminal Law: General Part], Ciela, Sofia, 1999, pp. 309-310.

³ Interpretative Judgment No. 23 of 15 December 1977 in Criminal Case No. 21 of the General Assembly of the Criminal Colleges of the Supreme Court for the Year 1977.

In this part, the definition is borrowed from the *UN Convention* and the *Framework Decision of the European Union*. The introduction of a minimum number of participants is intended to differentiate organised crime from the other forms of concerted criminal activity, and the underlying idea of the legislator is apparently that organised crime is a complex phenomenon involving multiple persons, which also preconditions its higher social danger.

Some authors see certain inherent risks in the legislative definition of a minimum number of members because the dynamism of organised crime is ignored and it remains unclear “to what extent those persons should number three and more during all the time and, given this, how it will be established that they are associated precisely in numerical terms, so as to be able to prove this type of criminal offence”.⁴

Not fixing a minimum number of members is an approach that has been adopted and is successfully applied by a number of European countries without this leading to a conflict with the international instruments.

Even more problems are posed by the requirement that the association should be **structured and permanent**. This part of the definition is fully consistent with the UN Convention and the EU Framework Decision, but the wording is nevertheless unclear and may cause difficulties in practice.⁵

Certain authors argue that permanence and structuredness are characteristic of all groups and are not a distinguishing feature of the organised criminal group alone. Their express mention in the definition is seen as an indication that an organised criminal group is “relatively more permanent and highly structured compared to the conventional criminal group and the criminal organisation”.⁶

The association is permanent when it exists for a definite period of time. This period is not expressly provided for in the law, which is a correct solution because the introduction of such limitation would unjustifiably narrow the scope of application of the provisions regarding the organised criminal group.

From a practical point of view, it is important to emphasise that **permanence characterises the association itself rather than the participation of each of its members**. This means that the association may be permanent even when its participants vary. A variation in the membership of the organised criminal group (recruiting a new participant, replacing or dropping a participant) does not lead to the formation of a new group. An interpretation to the contrary may lead to bringing several charges against one and the same person of participation in

⁴ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 70-71.

⁵ According to Article 2 of the UN Convention, the group must be “structured” and must be “existing for a period of time”, whereas under the EU Framework Decision the association must be “structured” and “established over a period of time”.

⁶ Пушкарлова, И., Форми на организирана престъпна дейност по Наказателния кодекс на Република България, [Pushkarova, I., Forms of Organised Criminal Activity under the Criminal Code of the Republic of Bulgaria], St Kliment Ohridski University Press, Sofia, 2011, pp. 245-246.

different groups that in reality are not different but it is one and the same group with varying membership.

Regarding structuredness, following the pattern of the UN Convention and of the EU Framework Decision, the Bulgarian *Criminal Code* expressly specifies that **the association is structured even without formally defined functions for the participants, continuity of participation or a developed structure**. A further specification must be added, however, as formulated in the international instruments, that the association is structured where it is not randomly formed for the immediate commission of an offence.

In theory, the requirement for structuredness draws criticism above all precisely because of the **lack of clear criteria** to determine when an association of persons becomes a **structured association**. Thus, according to certain authors it is difficult to talk of a structured association without formally defined functions for the members; it is not clear how the association can be considered structured without having a developed structure, or how it can be permanent if the continuity of participation of the persons in it is legally irrelevant. On the whole, a literal interpretation of the definition invites the conclusion that “if this structure does not exist or is not developed, if each participant does whatever he wishes in an organised criminal group, is not permanently linked with it and the functions are not at all defined, it could still be assumed that this is a case of an organised criminal group”.⁷ Thus, the structuredness defined in this way “supersedes any concepts of organisation” and prerequisites are created for “equalisation to a conventional criminal group”.⁸

The aim of the participants in an organised criminal group as formulated in the law, **“to commit, acting in concert, in Bulgaria or abroad, any criminal offences punishable by deprivation of liberty for a term exceeding three years”**, is also a target of criticism.

In this part the definition diverges from the definitions in the UN Convention and the EU Framework Decision which provide that the offences which the group aims to commit must be punishable by at least four years of imprisonment or a more serious penalty and must be committed in order to obtain, directly or indirectly, a financial or other material **benefit**.

Despite the divergence from the international instruments, the Bulgarian law is not inconsistent with them.⁹ The less stringent criteria it provides for, however, unjustifiably enhance the penal repression by extending the scope of application of the provisions on organised criminal group to a broader range of associations.

The main problem in formulating the aim of an organised criminal group arises from the **scope of criminal offences for the commission of which the group has**

⁷ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 70, 73.

⁸ Ibid., pp. 70, 73.

⁹ Article 34, paragraph 3 of the UN Convention expressly enables each State Party to the Convention to adopt more strict or severe measures than those provided for by the Convention for preventing and combating transnational organised crime.

been formed.¹⁰ The reference is to offences punishable by imprisonment of more than three years, i.e. **a penal sanction of imprisonment with a maximum term exceeding three years** must be provided for the relevant offence in the Special Part of the *Criminal Code*.¹¹

Apart from diverging from the provisions of the international instruments, the Bulgarian law excessively broadens without justification the scope of application of the definition of an organised criminal group. Imprisonment for a term exceeding three years is provided for an exceedingly large number of offences in the Special Part of the *Criminal Code*, and quite a few of them hardly qualify as organised crime. Moreover, the broad scope of the definition to a certain extent comes into conflict with the traditional perception of organised crime as a phenomenon of exceedingly high degree of social danger.

It is not clear why the Bulgarian legislator set three years of imprisonment as the threshold criterion for the offences, which an organised criminal group aims to commit. The UN Convention provides that, in order to be classified as an organised criminal group, an association must aim to commit serious offences, and “serious offence” means an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. In defining the aim of the organised criminal group, the Bulgarian legislator did not use either of the two criteria stated in the UN Convention. The requirement that the group should aim to commit offences punishable by imprisonment of more than three years means that the offences planned by the group may include offences which are not serious offences either within the meaning of the UN Convention (punishable by a maximum imprisonment of at least four years or a more serious penalty) or within the meaning of Item 7 of Article 93 of the *Criminal Code* (punishable by deprivation of liberty for a term exceeding five years, life imprisonment or life imprisonment without commutation).

According to Item 20 of Article 93, an organised criminal group must aim to commit **multiple criminal offences**. In this part, the Bulgarian law corresponds to the EU Framework Decision, whereas the UN Convention provides that an organised criminal group exists even when the aim is the commission of a single offence. The requirement that the group should aim to commit more than one serious offence may create certain difficulties in practice, especially where the group has been detected before committing its first offence. In such cases the outcome of the criminal prosecution will depend crucially on a successful proving of the aim of the group, i.e. on establishing not only the type of offences for the commission of which the group has been formed (considering the requirement that such offences must be punishable by imprisonment of more than three years), but also the number of these offences (considering the requirement that such offences must be more than one). To facilitate proving, it is recommended to drop the multiple offences requirement. Such an amendment would not come

¹⁰ The aim of committing offences means that the organised crime group is a peculiar form of inchoate criminal activity, similar to preparation under Article 17 (1) of the Criminal Code. Preparation, however, is punishable only in the cases expressly provided for by the law, while the various forms of participation in an organised criminal group are offences in themselves.

¹¹ Had the legislator used the expression “at least three years”, the definition would have covered offences punishable by a minimum term of imprisonment exceeding three years.

into conflict with the international instruments but would facilitate the collection of evidence and the bringing of charges because it would be sufficient to prove that the group aims to commit offences regardless of their number.

For the existence of an organised criminal group, the offences for which it has been formed need not necessarily have been committed or even attempted. The opposite view is also espoused in theory and practice, but it cannot be endorsed. Despite the difficulties in proving, an organised criminal group can exist even without any of its members having committed another offence. Moreover, if a member of the group has already committed another offence, he or she will be liable both for the act committed and for participation in the group.

The worst weakness of the definition under Item 20 of Article 93 is **that it does not provide for obtaining a benefit as a criminal aim**. The only aim that classifies the act as a statutory offence according to the current provision of Item 20 of Article 93 of the *Criminal Code* is the commission of specified offences in Bulgaria and abroad. Both the UN Convention and the EU Framework Decision require, as a specific aim, the obtaining, directly or indirectly, of a financial or other material benefit. The aim of obtaining a benefit is a logical element of the definition of an organised criminal group because deriving income from the activity performed is one of the essential characteristics of organised crime.

An aim of obtaining a benefit was part of the legal definition when it was introduced in 2002 but was dropped by the amendment of 2009.¹² Thus, at present, for the existence of an organised criminal group it would suffice that the offences for which it has been formed should be punishable by more than three years of imprisonment. The aim of obtaining a benefit was turned from an element of the definition into a circumstance conditioning the imposition of a severer penalty on those who have formed, direct or participate in the group.

Until the amendment of 2009, obtaining a benefit as an aim of an organised criminal group also drew criticism, but it focused on the manner in which that aim was formulated rather than on its very presence in the definition. The objections concerned the use “property benefit” instead of “financial or other material benefit”, as suggested by the international instruments, as well as the lack of an express specification that obtaining the benefit should be pursued not only directly but indirectly as well. Instead of solving the problems, the elimination of the aim of obtaining a benefit from the definition even deepened them.

As a consequence of dropping the aim of obtaining a benefit, the definition diverged materially from the universally accepted understanding of organised

¹² In its original version, the Draft Law Amending and Supplementing the Criminal Code, as presented to Parliament by the Council of Ministers in April 2002, provided that an organised criminal group be defined as a “structured permanent association of three or more persons with a view to committing, acting in concert, in Bulgaria or abroad, any criminal offences punishable by deprivation of liberty for a term exceeding three years and the aim of which is to obtain a property benefit or to exert illegal influence on the activity of a body of power or of local self-government.” In the course of work on the draft, the aim “to exert illegal influence on the activity of a body of power or of local self-government” was dropped from the proposed definition.

crime, which underlies the international instruments in this sphere. According to the Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto, the definition of organised criminal group does not include groups that do not seek to obtain any financial or other material benefit such as terrorist or insurgent groups with political or other non-material motives.¹³

Without the aim of obtaining a benefit in the definition, the focus of proving shifts, and the investigating authorities tend to concentrate on the collection of evidence on the continuity of relations among the persons instead of on their common purpose. This makes it possible to bring charges of organised criminal group even in cases of conventional partnership on the mere basis of the continuity of relations among the accused.

In its present form, the definition ignores the fundamental distinguishing feature of an organised criminal group: obtaining a material benefit. Combined with the broad range of offences which the group could have as an aim (all acts punishable by imprisonment of more than three years), this leads to a definition with an excessively broad scope of application which does not reflect realistically the organised crime phenomenon and, according to certain authors, even makes it “inapplicable and opens its application to utter and multi-faceted anarchy.”¹⁴

1.1.2. *Organised criminal group and partnership*

The broad scope of the definition of an organised criminal group under Item 20 of Article 93 creates prerequisites for confusing this notion with the classical forms of partnership under Article 20 of the *Criminal Code*: **abetting** (intentionally inducing another person to commit the offence), **aiding** (intentionally facilitating the commission of the offence by means of advice, clarifications, a promise to provide help after the act, removal of obstacles, procuring instrumentalities of crime or in another manner) and **joint participation** (participation in the actual execution of the offence).

Despite the substantial differences between an organised criminal group and conventional partnership, **the two notions are often confused in practice**. In most cases of concerted criminal activity involving three or more persons, organised criminal group charges tend to be brought even where the circumstances in the case suggest that conventional partnership applies. In the opinion of lawyers handling organised crime cases, conventional partnership has been almost abandoned in practice and whenever three or more persons are involved, charges of an organised criminal group are brought. This tendency has gradually intensified both after the aim of obtaining a benefit was dropped from the definition of an organised criminal group under Item 20 of Article 93 (which until then was a clear criterion differentiating an organised criminal group from

¹³ Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto, UNODC, New York, 2004, p. 13.

¹⁴ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, p. 71.

conventional partnership) and after the establishment of the specialised criminal court.

An organised criminal group is distinguished from conventional partnership on the basis of several criteria, which, however, are not clearly defined in the law and cause difficulties in its application.

- **Continuity of the criminal activity.** The law expressly states that the organised criminal group is a permanent association. This criterion is the easiest to apply because the continuity of the relations among the accused is relatively easy to establish. Even though this is not mentioned in the definition under Item 20 of Article 93 (unlike the international instruments), the permanence of the association excludes all other cases of criminal association with a view to incidentally committing an offence. There is no room for disparate interpretations on this issue but, nevertheless, for the sake of a precise framework, it is recommended to amplify the definition of an organised criminal group by the clarification that this is an association, which is not randomly formed for the immediate commission of an offence.
- **Structuredness of the association.** An organised criminal group is a structured association, whereas partnership in principle is not structured. The application of this criterion gives rise to serious problems owing to the difficulties in determining when structuredness applies, especially considering the second sentence of Item 20 of Article 93 which specifies that the association is structured even without formally defined functions for the participants, continuity of participation or a developed structure. The precise determination of the degree of structuredness is of particular importance for the correct classification of the offence committed. In practice, however, this criterion is often ignored or is misapplied, which is why organised criminal group charges are brought but subsequently the lack of organisation of the persons leads to complications and reclassification owing to an impossibility to rationalise and prove the initial case for the prosecution.¹⁵
- **Aim of the association.** The aim of an organised criminal group is to commit, in Bulgaria and abroad, criminal offences punishable by imprisonment of more than three years. According to theory, an organised criminal group implies a common will to commit multiple offences and, unlike conventional partnership, the persons need not necessarily have particularised these offences.

The organised criminal group and the partnership are **treated in a different way in criminal law**, which is why their correct differentiation is extremely important for the practice of the courts. From the point of view of **the moment when criminal responsibility arises**, conventional partnership is not punishable before the start of the commission of the planned offence, whereas the participation in an organised criminal group is in itself a criminal offence and is punishable irrespective of the commission of another offence. Different conditions also apply to the **release from criminal responsibility by reason of voluntary renouncement**. Partners are not punished if, acting of their own accord, they relinquish a further participation and impede the commission of the act or prevent the occurrence

¹⁵ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 76-77.

of the criminal consequences, whereas the participants in an organised criminal group are released from criminal responsibility if they voluntarily surrender to the respective authorities and reveal everything they know about the group before an offence is committed by them or by the group.

The difficulties in using structuredness and aim as distinguishing features practically leave the permanence of the association as the key criterion for differentiating an organised criminal group from conventional partnership. Thus, if the evidence collected shows that the activity continued over a relatively long period of time, a charge of organised criminal group is brought. Conversely, if there is a particular isolated offence without the evidence inferring that the group has existed for a long time, it is assumed that conventional partnership applies.

1.1.3. *Organised criminal group and preliminary conspiracy*

An organised criminal group is often confused with preliminary conspiracy as well. To involve a preliminary conspiracy, **two or more persons who conspired in advance must commit the act**. According to theory, preliminary conspiracy requires that the perpetrators have made the decision to commit the offence and have coordinated their criminal intent some time prior to the act, in a relatively composed state of mind and weighing the pros and cons, and each of the joint participants must have been aware of the participation of the rest.¹⁶

Preliminary conspiracy is provided for as an aggravating circumstance of a number of offences in the Special Part of the *Criminal Code*, including for acts which are punishable by imprisonment of more than three years and which are typical of organised crime, such as theft [Article 195 (1)], robbery [Article 199 (1)] etc. For some offences, such as cross-border smuggling of goods [Article 242 (1)], the law envisages as separate aggravating circumstances the preliminary conspiracy and the commission of the act upon assignment by or in execution of a decision of an organised criminal group.

From a practical point of view, the main problems stem from determining the **correlation between preliminary conspiracy and organised criminal group**. This is particularly valid for specific offences for which both the preliminary conspiracy and the commission of the act upon assignment by or in execution of a decision of an organised criminal group are included as aggravating circumstances. Thus, participants in an organised criminal group may commit cross-border smuggling of goods in execution of the group's decision. In this case, the question arises as to whether the perpetrators will incur criminal responsibility only for cross-border smuggling upon assignment or in execution of a decision of an organised criminal group [Article 242 (1) (g)] or the act will also be classified as having been committed in a preliminary conspiracy [Article 242 (1) (f)].

The prevalent view in theory is that, unlike an organised criminal group, in a preliminary conspiracy the persons agree on the commission of a particular

¹⁶ Стойнов, А., Наказателно право: особена част. Престъпления против собствеността [Stoynov, A., Criminal Law: Special Part. Offences against Property], Ciela, Sofia, 1997, pp. 34-35.

offence. This means that participation in an organised criminal group in itself would be insufficient to apply the severer penalties for preliminary conspiracy. The act would be classified as having been committed in a preliminary conspiracy only if the perpetrators have **conspired specifically to commit the particular offence**.

The most complicated problem is presented by the provision of Item 2 of Article 199 (1) of the *Criminal Code*, which envisages a severer penalty for robbery committed by two or more persons who conspired in advance to perpetrate thefts or robberies. Unlike the rest of the cases of a preliminary conspiracy, provided for in the Special Part of the *Criminal Code*, the reference here is not to committing a particular crime but to two or more persons agreeing to commit offences of a particular category: thefts and robberies. Both theft and robbery are offences punishable by imprisonment of more than three years and, therefore, the preliminary conspiracy to commit them often satisfies the requirements for an organised criminal group.

The question raised in such cases is how to determine the criminal responsibility of the perpetrators if they are participants in an organised criminal group, i.e. which is applicable: the provision on robbery committed upon assignment by or in execution of a decision of organised criminal group [Item 9 of Article 195 (1) and Item 5 of Article 199 (1)] and/or the provision on robbery committed by two or more persons who conspired in advance to perpetrate thefts or robberies [Item 2 of Article 199 (1)].

A specific form of a preliminary conspiracy, which borders on an organised criminal group, is outlined in the provision of Article 321 (6) of the *Criminal Code*. According to this provision, criminal responsibility is incurred by anyone “who agrees with one or more persons to perpetrate, in Bulgaria or abroad, any criminal offences punishable by deprivation of liberty exceeding three years and the aim of which is to obtain a property benefit or to exert illegal influence on the activity of a body of power or local self-government”.

Even though this provision is systemically positioned as the last paragraph of Article 321, this is not a case of an organised criminal group but of a mere preliminary conspiracy, i.e. advance coordination of the will of two and more persons to perpetrate offences punishable by imprisonment of more than three years.

Undoubtedly, **preliminary conspiracy** under Article 321 (6) is **a criminal offence in its own right, distinct from forming, directing and participation in an organised criminal group**. There are several substantial differences between the two offences:

- **minimum number of persons:** a preliminary conspiracy is possible between two or more persons, whereas an organised criminal group requires not fewer than three persons;
- **permanence and structuredness:** a preliminary conspiracy does not require permanence and structuredness, which are a necessary condition for the existence of an organised criminal group;
- **aim:** unlike an organised criminal group, in a preliminary conspiracy the persons pursue a specific aim with the offences they plan to commit: obtaining

a property benefit or exerting illegal influence on the activity of a body of power or local self-government.

The question that gives rise to serious difficulties is **how the organised criminal group under Item 20 of Article 93 of the *Criminal Code* correlates with the preliminary conspiracy under Article 321 (6) of the *Criminal Code***. When only two persons are involved in a preliminary conspiracy, the provisions on an organised criminal group cannot be applied and the perpetrators will incur responsibility under Article 321 (6) only. If, however, such persons are three or more, the applicable provision will, in practice, be determined depending on whether the association is permanent and structured (if it is permanent and structured, it will be a case of an organised criminal group, and if it is not but the special aims under Article 321 (6) apply, it will be a case of a preliminary conspiracy). Such differentiation is theoretically tenable, but the lack of clear criteria to determine the distinguishing features of permanence and structuredness makes its practical application exceedingly subjective. In practice, whether the act will be classified as an organised criminal group or as a preliminary conspiracy will depend solely on the subjective discretion of the prosecutor and the judge as to the extent to which the criminal association is permanent and structured.

In principle, **the provision about the preliminary conspiracy under Article 321 (6) is superfluous** and creates unnecessary confusion. It applies only when the act cannot be classified as an organised criminal group, i.e. where only two persons are involved or where three or more persons are involved but the association is not permanent and structured. These are relatively few hypotheticals and most of them are difficult to prove considering the need to prove the special aim as well (obtaining a property benefit or exerting illegal influence on the activity of a state body). Moreover, in many of these cases the perpetrators can be indicted under other provisions of the Special Part of the *Criminal Code*.

1.1.4. Organised criminal group and joining together for a criminal purpose

Several provisions of the Special Part of the *Criminal Code* deal with **joining together to commit a particular offence**, such as kidnapping [Article 142 (5)], counterfeiting of currency or forgery of other instruments or means of payment [Article 246 (1)], money laundering [Article 253a (1)] and documentary offences [Article 308 (5)]. All offences listed are punishable by imprisonment of more than three years, which means that any joining together for the purpose of committing these offences if involving three or more persons and if permanent and structured would constitute an organised criminal group within the meaning of Item 20 of Article 90.

In the opinion of some experts, there is a difference between joining together for a criminal purpose and criminal association, with joining together being a broader term and comprehending the formation of associations as well as other forms of concerted criminal activity.¹⁷ Such differentiation is rather academic

¹⁷ Пушкарлова, И., *Форми на организирана престъпна дейност по Наказателния кодекс на Република България* [Pushkarova, I., *Forms of Organised Criminal Activity under the Penal Code of the Republic of Bulgaria*], St Kliment Ohridski University Press, Sofia, 2011, p. 31.

and can lead to serious difficulties in practice. Moreover, the length and the amount of the penalties provided for joining together for a criminal purpose is considerably smaller than the sanction for forming an organised criminal group. Thus, if three persons form an association for the purpose of money laundering, the perpetrators are liable to imprisonment of up to two years or to a fine ranging from BGN 5,000 to BGN 10,000. If, however, the same persons are charged with forming an organised criminal group for money laundering, the penalty provided for in this case is imprisonment of five to fifteen years.

The existence of provisions envisaging different penalties for similar acts is not justified. A legislative amendment is needed to delineate clearly the scope of application of the various provisions or to equalise the penalties, which are provided for.

1.1.5. Notion of organised crime

The notion of “organised crime” is a notion of criminology, which is why it is not legally defined in Bulgarian legislation, similar to most penal laws around the world. Instead, the Bulgarian legislator has opted to provide a legal definition of “organised criminal group”, to criminalise the forming, directing and participation in such a group, and to add more severely punishable cases for particular offences where committed upon assignment by or in execution of a decision of such a group.

This is a widespread manner of regulating offences related to an organised criminal group. It underlies most national legislations, as well as the most important international instruments in the sphere of countering organised crime. The UN Convention and the EU Framework Decision define the notions of “organized criminal group” and “criminal organisation”, respectively, and specify the conduct (organising, directing, participation etc.) that should be criminalised.

According to a number of legal practitioners, organised crime is a broader notion than organised criminal group and covers both the group itself and the various manifestations of its activity, including the legalisation of the assets unlawfully acquired by the group. Regarding the specific content of “organised crime”, opinions are divided. According to some extreme views, almost any crime is organised because, with the exception of negligent offences and some intentional offences committed under the influence of sudden passion, all other criminal offences reveal a certain degree of organisation (preparation, procurement of instrumentalities, planning, arrangements etc.).

The only characteristic of organised crime on which experts are unanimous is **the aim of obtaining a benefit**. According to judges, prosecutors, investigating magistrates and lawyers, organised crime always has the aim of obtaining a material benefit. This does not mean that each offence committed by the participants in the group must necessarily have such an aim. In addition to offences from which material benefits are derived directly (such as trafficking in human beings and in narcotics, procuring prostitutes, blackmail etc.), the activity of the group may also include offences which create favourable conditions for obtaining a benefit from another unlawful activity (such as bribery), as well as

offences intended to legalise income generated by another unlawful activity (such as money laundering).

According to some legal practitioners, the notion of organised crime is broader than the forming, directing and participation in an organised criminal group and the offences committed upon assignment by and in execution of a decision of such a group. Certain experts are inclined to treat particular types of partnership as forms of organised crime as well because partnership involves a joint intent, which presupposes a certain degree of organisation. Of the various forms of partnership, preliminary conspiracy is most often cited as the form closest to organised crime.

The diverging views regarding the content of the notion of “organised crime” are also evidenced by the results of a survey of the conceptualisation of the nature of organised crime by judges, prosecutors and officers of the specialised services for combating organised crime of the Ministry of Interior, conducted by the Centre for Liberal Strategies in October 2004 – February 2005. The survey found that even the institutions, which are most closely concerned with the prevention and suppression of crime, are divided in their opinions regarding the content of “organised crime”.

- **The authorities of the Ministry of Interior** understand organised crime as a network for organised criminal activity incorporating both “rank-and-file order-takers” and “owners” and organisers who most often remain invisible to society and its institutions. The economic and financial dimensions of the problem are particularly important, as is the involvement of politicians and civil servants in the criminal networks.
- **Prosecutors** adhere to the provisions of organised criminal group under Article 321 of the *Criminal Code*, taking into account the scale of the criminal activity (the quantity and quality of the offences committed) and the involvement of representatives of government institutions.
- **Judges** strictly adhere to the legal definition of an organised criminal group under Item 20 of Article 93 of the *Criminal Code* and the provisions of organised criminal group under Article 321 of the *Criminal Code* and have the narrowest understanding of the nature of organised crime.¹⁸

The survey found that, according to judges, prosecutors and officers of the Ministry of Interior, the main characteristics of organised crime which are missing from the legal definition of an organised criminal group under Item 20 of Article 93 are the aim of obtaining a benefit and the involvement of representatives of government institutions.

The concept of **the legislator** about organised crime can be judged from the range of offences included in the jurisdiction of the newly established specialised criminal court. The main reason for the establishment of this court is to achieve better results in the fight against organised crime and corruption. According to Article 411a (1) and (2) of the *Criminal Procedure Code*, the following cases fall within the jurisdiction of the specialised criminal court:

¹⁸ Smilov, D. The Fight against Organised Crime in Bulgaria: Review of Institutional Concepts and Strategies (Preliminary Report), Centre for Liberal Strategies, Sofia, 2005.

- all cases of forming, directing and participation in an organised criminal group (Article 321 of the *Criminal Code*), an organisation or group for racketeering (Article 321a of the *Criminal Code*), an organised criminal group for the growing of opium poppy and coca bush plants and plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs (Article 354c (2) to (4) of the *Criminal Code*), and an organisation or group against national, racial and ethnic equality and religious and political tolerance (Article 162 (3) and (4) of the *Criminal Code*);
- the cases of offences for which a severer penalty is envisaged if the offender has acted upon assignment by or in execution of a decision of an organised criminal group or a group for racketeering, including abuse of official status by an office holder, if such offender has been involved in the criminal act;
- the cases of offences for which a severer penalty is envisaged if committed by a person engaged in security business, by an employee in an organisation carrying on security business or insurance business, by a person contracted by such an organisation or purporting to be so contracted, by a personnel member of the Ministry of Interior or by a person purporting to be such a personnel member, including abuse of official status by an office holder, if committed with the participation of such a person;
- blackmail committed by an organisation or group or contracted by a person, organisation or group [Item 3 of Article 213a (3) of the *Criminal Code*] and some other, more severely punishable cases of blackmail [Items 1 and 2 of Article 214a (2) of the *Criminal Code*];
- unlawfully taking persons across the border of Bulgaria, organised by a group or organisation or committed with the participation of a public official who took advantage of his or her official status [Item 5 of Article 280 (2) of the *Criminal Code*];
- certain more severely punishable cases of offences involving explosives, weapons and munitions [Article 337 (2) and (3) and Article 338 (2) and (3) of the *Criminal Code*];
- certain more severely punishable cases of offences involving narcotic drugs [Article 354b (2) to (4) of the *Criminal Code*];
- preparation by a foreign national within the territory of Bulgaria for the commission abroad of cross-border smuggling of narcotic drugs or an offence endangering the general public under Article 356a of the *Criminal Code*, as well as forming an organisation or group for the same purpose [Article 356b of the *Criminal Code*].

The jurisdiction of the specialised criminal court, outlined above, indicates that, according to the Bulgarian legislator, organised crime comprehends, in most general terms, the offences related to an organised criminal group or a group for racketeering, certain more severely punishable cases of blackmail and offences involving weapons and narcotics, as well as the offences for which severer penal sanctions are envisaged if committed by personnel members of the Ministry of Interior or persons engaged in security business.

The listing is based on the principle that the offences typical of organised crime are those for which the legislator has envisaged more severely punishable elements when committed upon assignment by or in execution of a decision of an organised criminal group or a group for racketeering.

1.2. FORMING, DIRECTING AND PARTICIPATION IN AN ORGANISED CRIMINAL GROUP

1.2.1. Types of criminal behaviour

The forming, directing and participation in an organised criminal group are regulated in Article 321 (1) and (2) of the *Criminal Code*. Article 321 (1) criminalises the forming and directing, whereas Article 321 (2) criminalises the participation in an organised criminal group.

The provision is systemically positioned in the chapter on offences against public order and public peace (Chapter Ten of the Special Part of the *Criminal Code*), which invites the conclusion that forming, directing and participation in an organised criminal group harm and endanger above all the social relations associated with the normal life of citizens.¹⁹

All three offences belong to the category of the so-called “conduct offences” (of which the *actus reus* is limited to criminal conduct on the part of the perpetrator). Conduct offences are considered completed by the effectuation of the actual criminal act without producing any particular result.²⁰ The practical aspect of this division is that forming, directing and participation in an organised criminal group applies regardless of whether any of the offences planned by the group has been committed or even attempted. In practice, forming, directing and participation are often regarded not as offences in their own right but necessarily in connection with another offence committed. This approach is incorrect and often impedes the application of the law because it unjustifiably makes the investigation and proving of the participation in the group contingent on the investigation and proving of another offence.

If the group has already committed one or more offences, the perpetrators of those offences will incur criminal responsibility both for their participation in the organised criminal group and for the other offences committed by them under the terms of the so-called “real aggregation”.²¹

In terms of *mens rea*, the offence is intentional in all three forms of the actual criminal act. The acts are only possible provided there is **direct intent**: the offender is aware and desires that the organised criminal group pursue the intended purpose of committing a definite category of criminal offences.²²

¹⁹ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, p. 75.

²⁰ Стойнов, А., Наказателно право: обща част [Stoynov, A., Criminal Law: General Part], Ciela, Sofia, 1999, pp. 282-283.

²¹ Real aggregation applies where a person has committed several separate criminal offences before being convicted by an enforceable sentence of any of the said offences (Article 23 (1) of the Criminal Code).

²² Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, p. 80.

Defining the criminal acts of forming, directing and participation poses the most serious problems to the interpretation and application of the provisions of Article 321 (1) and (2).

- **Forming an organised criminal group.** Forming is defined as an activity of coordinating the will of two or more persons (in the case of an organised criminal group, the will of three or more persons) for the achievement of a specific goal.²³ Activities such as locating and recruiting participants, inducing them to participate, structuring them organisationally etc. can be classified as forming. The provision raises two main problems: whether forming necessarily presupposes participation in the group formed as well, and whether the act should result in the establishment of a group. Regarding the first problem, it can be assumed that **a person can form an organised criminal group without necessarily participating in it.** Regarding the second problem, however – **whether the act should have resulted in the forming of a new organised criminal group as evidence of a criminal offence** (i.e. whether the offence is a conduct offence or a result offence), opinions are divided.
- **Directing an organised criminal group.** According to case law, directing finds expression in setting general or specific tasks, whether orally or in writing, in working out a plan or other directions for achievement of the goal set.²⁴ Directing differs from forming, but if a person forms and subsequently directs such a group, he or she would incur responsibility for only one offence.
- **Participation in an organised criminal group.** Participation is the least severely punishable act. It finds expression in consent to enter into a definite relationship with the other persons in the group. The main problem stemming from this provision is its correlation with the provision on forming and directing an organised criminal group and more specifically whether the less severely punishable act is subsumed within the more severely punishable one and whether **a person who has formed and participated or who has directed and participated** in an organised criminal group would incur **criminal responsibility only for forming or directing.**

In formulating the acts related to an organised criminal group, the Bulgarian law does not follow strictly the provisions of the international instruments but, on the whole, covers their basic requirements. Both the UN Convention and the EU Framework Decision describe in great detail the types of conduct, which should be criminalised in the domestic legislation of the respective States.

Article 5 of the UN Convention requires from the States Parties to the Convention to criminalise the following two groups of intentional acts:

- either or both of the following acts: (1) agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in

²³ Interpretative Judgment No. 23 of 15 December 1977 in Criminal Case No. 21 of the General Assembly of the Criminal Colleges of the Supreme Court for the Year 1977.

²⁴ Interpretative Judgment No. 23 of 15 December 1977 in Criminal Case No. 21 of the General Assembly of the Criminal Colleges of the Supreme Court for the Year 1977.

furtherance of the agreement or involving an organised criminal group; and/or (2) conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, has taken an active part in criminal activities of the organised criminal group or other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim; and

- organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organised criminal group.

Article 2 of the EU Framework Decision describes in even greater detail the conduct subject to criminalisation, requiring from each Member State to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:

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

The question, which can give rise to problems in practice, is whether the provisions of Article 321 of the *Criminal Code* cover **the financing of an organised criminal group**. Article 321 does not specify financing expressly among the types of criminal behaviour, which raises the question as to whether the provision of financial resources can be classified as participation in the group and whether it is possible for a person to finance the group without participating in it.

According to the EU Framework Decision, financing is a form of actively taking part in an organised criminal group alongside the provision of information or material means, the recruitment of new members etc. On the other hand, however, according to Article 354c (2) of the *Criminal Code*, which deals with an organised criminal group for the growing of opium poppy and coca bush plants and plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs, participation and financing are two different criminal acts. Moreover, even if it is assumed that financing can be regarded as a form of participation, the person who finances the group will incur responsibility as a mere participant. Such person will not be liable to the severer penalties provided for those who form and direct the group, as provided for the group for the growing of opium poppy and coca bush plants and plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs under Article 354c.

The terminological discrepancies between the provisions of Article 321 and Article 354c (2) must be eliminated by a legislative amendment. At the same time,

the financing of an organised criminal group must be expressly added as a separate type of criminal behaviour in Article 321, and similarly to Article 354c (2) the persons financing the activity of the group must be liable to the same penalties as the persons who have formed or who direct the group.

1.2.2. *Voluntary renouncement*

Article 321 (4) and (5) of the *Criminal Code* envisage more favourable consequences for those participants in an organised criminal group who voluntarily surrender and cooperate with the respective authorities in the conduct of the investigation. Legal theory calls this “voluntary renouncement” of participation in an organised criminal group. According to Article 321a (4) of the *Criminal Code*, the provisions furthermore apply in respect of a group for racketeering under Article 321a (1) and (2) of the *Criminal Code*.²⁵

The provisions on voluntary renouncement are intended to encourage the persons participating in the criminal group to cooperate in the course of the investigation. In exchange, the persons who provide such cooperation are released entirely from criminal responsibility or receive a less severe penalty. Such an approach is familiar and is applied in a number of countries to increase the effectiveness of preventing and countering organised crime.

A possibility to take measures to encourage cooperation with the law-enforcement authorities is also provided for in the international instruments.

- Article 26 of the UN Convention states that each State Party to the Convention may provide for the possibility of mitigating punishment of and/or granting immunity from prosecution to persons who provide substantial cooperation in the investigation or prosecution. Such cooperation can take two forms: **supplying information** useful to competent authorities for investigative and evidentiary purposes (on the identity, nature, composition, structure, location or activities of organised criminal groups, on links, including international links, with other organised criminal groups, and on offences that organised criminal groups have committed or may commit), and **providing factual, concrete help** to competent authorities that may contribute to depriving organised criminal groups of their resources or of the proceeds of crime.
- Article 4 of the EU Framework Decision provides that each Member State may take the necessary measures to ensure that the penalties may be reduced or that the offender may be exempted from penalties if he **renounces criminal**

²⁵ More favourable consequences upon voluntary renouncement, albeit under different conditions, are provided for almost all criminal associations. Such provisions apply to the group for subversive activity [Article 109 (4) of the Criminal Code], the group for kidnapping [Article 142 (6) of the Criminal Code], the group for commission of offences against citizens' electoral rights [Article 169d (3) and (4) of the Criminal Code], the association for counterfeiting of currency or forgery of other instruments or means of payment [Article 246 (2) of the Criminal Code], the association for money laundering [Article 253a (4) of the Criminal Code], the association for documentary offences [Article 308 (6) of the Criminal Code] and the organised criminal group for the growing of opium poppy and coca bush plants of the genus Cannabis or for the manufacture, production or processing of narcotic drugs [Article 354c (4) of the Criminal Code].

activity and provides the administrative or judicial authorities with **information**, which they would not otherwise have been able to obtain. The information must help the competent authorities to prevent, end or mitigate the effects of the offence, to identify or bring to justice the other offenders, to find evidence, to deprive the criminal organisation of illicit resources or of the proceeds of its criminal activities, or to prevent further offences from being committed.

The provision of more favourable legal consequences with a view to encouraging the participants in an organised criminal group to cooperate with the investigation is supported by a number of judges, prosecutors and investigating police officers. They are not unanimous, however, regarding the scope of these more favourable consequences and especially regarding the full release from criminal responsibility which, some argue, infringes the principle of equity, undermines the concept of unavailability of the sanction and creates conditions for discriminatory treatment because it is not available for the cases of conventional partnership. According to the opponents of the full release from criminal responsibility, the contribution to the detection of the offence should not palliate the degree of participation in that offence, which must be the foremost priority in assigning the penal sanction. The opponents also argue that there are other mechanisms for release from criminal responsibility that are common to all offences, e.g. owing to the triviality of the act under Article 9 (2) of the *Criminal Code*.

According to Article 321 (4) and (5) of the *Criminal Code*, the application of the favourable consequences for voluntary renouncement is subject to certain conditions. The law requires that the participant in the group **surrender voluntarily to the respective authorities and reveal everything that he or she knows about the group**.

The *Criminal Code* provides for **different consequences depending on the moment of the voluntary renouncement**.

- If until that moment the person or the group **has not committed another offence**, the participant who has surrendered **is not punished**. According to some judges and prosecutors, this hypothetical is rather academic because in practice it is very difficult to detect and prove the existence of an organised criminal group, which has not committed even a single offence.
- If by his or her surrender and by the information revealed the participant substantially facilitates the detection and proving of offences committed by the group, his or her penalty is determined according to the procedure under Article 55 of the *Criminal Code*, i.e. according to the rules for **assignment of a less severe penalty than the one provided for in the law** due to exceptional or multiple mitigating circumstances.

The provisions on voluntary renouncement exhibit serious weaknesses, which may create problems in their interpretation and application.

Above all, the law **limits the applicability** of the provisions on voluntary renouncement to **the participants in the group**. A literal interpretation of the wording invites the conclusion that the favourable legal consequences will be inapplicable if the person who surrenders has formed or directs the group.

The exclusion of the persons who have formed or who direct an organised criminal group from the lenient treatment applicable to voluntary renouncement was probably prompted by the higher degree of social danger of these acts compared to ordinary participation. Logical as it is, such an argument is hardly consistent with the overall intended purpose of the provision, which is to increase the effectiveness in countering organised crime. On the one hand, the persons who have formed and who direct the organised criminal group usually have much more information than the ordinary participants and their voluntary cooperation would contribute to a far greater extent to the detection of previously committed offences as well as to the prevention of new criminal acts. On the other hand, quite often at the moment of surrender of the person it is still too early to determine the specific function of that person in the group. In this sense, the participant who has surrendered will hardly be persuaded to provide full cooperation if applicability of the favourable treatment is considered at a later stage and largely depends on the information, which that same person will reveal.

With a view to increase the effectiveness of countering organised crime, it is recommended **to extend the scope of application of these provisions, adding the persons who have formed or who direct the group**. Such an approach is applied in a number of countries and its adoption will offer higher-ranking participants in organised criminal groups more incentives to cooperate voluntarily with the law-enforcement authorities.

Another problem in the interpretation and application of the provisions on voluntary renouncement is related to **determining the moment of the renouncement**, which the law formulates as “prior to the commission of an offence by the participant or by the group”. The pinpointing of the moment of renouncement is particularly important because it determines whether the participant who has surrendered will be released from criminal responsibility.

The formulation used exhibits some very serious flaws that need to be remedied.

- It is not clear **what kind of offence the participant should not have committed** before surrendering. Obviously, to qualify as a “participant” by the moment of the renouncement, the person will have already committed at least one offence: participation in an organised criminal group under Article 321 (2) of the *Criminal Code*. Even if this offence is ignored, which undoubtedly was the will of the legislator, the more important question remains unanswered: will the rules for release from criminal responsibility apply if the participant has committed an offence which is not related to the activity of the organised criminal group? A literal interpretation of the provision invites the conclusion that each and any offence committed by the participant, even such committed negligently, will disqualify him or her from release from criminal responsibility for his or her participation in the group. Such an interpretation is devoid of logic because the idea of the provision is to exercise prevention in respect of the activity of the group and not in respect of the legally non-conforming behaviour of the participant concerned in general. From this point of view, the wording of Article 321 (4) must be amended to specify the kind of offence, which the participant or the group should not have committed. The amendment can be modelled on the analogous provision on renouncement

of participation in a group for the commission of offences against citizens' political rights under Article 169d (4) of the *Criminal Code*, according to which "any participant, who voluntarily surrenders to the authorities and reveals the group prior to the commission by the group or by the participant of any other offence under this Section, shall not be punished."

- It is debatable **what is meant by the requirement** that the renouncement must precede **the commission of an offence by the group**. It is a fundamental principle in Bulgarian law that criminal responsibility is personal, i.e. the group as such is incapable of committing an offence. It remains absolutely unclear what the legislator implied by the condition that the group should not have committed an offence by the moment of surrender of the participant, i.e. whether the reference is to an offence committed by another participant, to an offence committed upon assignment by or in execution of a decision of the group etc.
- The provision does not answer the question as to whether a participant who surrenders to the authorities prior to committing another offence **will be released from criminal responsibility** if **another participant in the group had committed an offence before the participant who has surrendered joined the group**.
- The legal relevance of **the awareness of the participant who has surrendered of other offences** committed by participants in the group is not regulated. A literal interpretation of the provision invites the conclusion that release from criminal responsibility will not apply if another participant in the group has already committed an offence, regardless of whether the participant who has surrendered was aware of this or not. Such an interpretation would lessen the encouraging effect of the provision because no participant would ever surrender if it turns out subsequently that he or she will not be released from criminal responsibility because an offence has been committed of which the participant concerned was unaware by the moment of his or her surrender.

Apart from the debatable issues related to interpretation, the provision of Article 321 (4) gives rise to other practical problems as well because **there is no procedural mechanism for its application**. It is not clear which one of the respective authorities, at which stage of the procedure, on what grounds and by what procedural act can release the person who has surrendered from criminal responsibility.

Release from criminal responsibility by reason of voluntary renouncement is not expressly provided for as a ground for termination of the criminal proceeding under Article 24 (1) of the *Criminal Procedure Code*, which is why a proceeding must mandatorily be instituted and neither the prosecutor nor the reporting judge can terminate it.

In the pre-trial phase, if the investigating authority fails to bring a charge this authority will breach his or her duty under Article 219 (1) of the *Criminal Procedure Code* to report to the prosecutor and to constitute the person as an accused when sufficient evidence is collected of the person's culpability of the commission of an indictable offence and there are no grounds for termination of the criminal proceeding. If, after the completion of the investigation, the prosecutor fails to submit an indictment, the prosecutor will breach his or her duty under Article

246 (1) of the *Criminal Procedure Code* to draw up an indictment when he or she is convinced that the evidence necessary for establishing the objective truth and for bringing a charge before the court has been collected, there are no grounds for termination or for suspension of the criminal proceeding, and a remediable material breach of the rules of procedure has not been committed.

In the trial phase, too, there is no procedural mechanism for non-punishment of the participant who has surrendered. The court is duty-bound to sentence the defendant if the charge has been proved beyond a doubt. A sentence of acquittal cannot be rendered because the conditions for this according to Article 304 of the *Criminal Procedure Code* are not fulfilled: a failure to establish that the act was committed, that the act was committed by the defendant, or that the act was committed by the defendant culpably, as well as where the act does not constitute a criminal offence.

The provisions on release from criminal responsibility with imposition of an administrative sanction under Article 78a of the *Criminal Code* cannot be applied, either, because participation in an organised criminal group is punishable by imprisonment of one to six years, whereas Article 78a (1) (a) of the *Criminal Code* requires that the offence be punishable by imprisonment of up to three years or by a less severe penalty. Nor is it possible to dispose of the case by a plea bargain agreement because, according to Item 2 of Article 381 (5) of the *Criminal Procedure Code*, the type and the length and amount of the penalty imposed is a mandatory element of the plea bargain agreement.

The provision on reduction of criminal responsibility under Article 321 (5) of the *Criminal Code* creates problems, too, even though it is more clearly formulated. According to that provision, any participant in the group, who voluntarily surrenders, reveals everything which he or she knows about the group and thereby substantially facilitates the detection and proving of offences committed by the group, is punished under the terms established by Article 55 of the *Criminal Code*, i.e. the court assigns a penalty below the threshold of the range provided for or replaces the sanction by a sanction of a less severe type.

The wording does not make it clear **whether, in order to qualify for the imposition of a less severe penalty, the participant who has surrendered must not have committed another offence** prior to his or her surrender. The provision requires that by his or her surrender and by the information revealed, the participant in the group should have substantially facilitated “the detection and proving of offences committed by the group”, but there is no indication of the legal relevance of his or her own participation in those offences. If the person who has surrendered has participated in the commission of another offence as well, it is not clear whether the reduction of the criminal responsibility, if at all admissible, applies only to his or her participation in the group or to the other offence as well.

The debatable issues, which the provisions on voluntary renouncement raise, necessitate a thorough revision of the formulations. A more accurate wording is all the more indispensable considering the major significance of these provisions in the fight against organised crime, because the successful detection and investigation

of this type of crime often depends crucially on the voluntary cooperation by persons belonging to the organised criminal groups themselves.

1.2.3. *Aggravated circumstances*

Article 321 (3) of the *Criminal Code* provides for four groups of more severely punishable cases of forming, directing or participation in an organised criminal group.

In the first place, forming, directing and participation in an organised criminal group are more severely punishable where **the group is armed**. According to certain authors, the group is armed where some of its members have access to weapons, which they can use, “weapon” referring to any object, which, according to its customary or specifically assigned intended purpose, is capable of taking human life or of harming human health.²⁶

An armed organised criminal group does not necessarily presuppose that all or most participants should have weapons. Nor is it mandatory that these weapons should have been used for the commission of another offence within the specialisation of the group. It would suffice to prove that one or more of the participants have access to weapons and can use them for the commission of an offence.

It remains debatable, however, whether the severer penalties should be imposed as well on those participants who are not armed, especially if they were unaware that other participants have weapons at their disposal. It is recommended to streamline the provision, limiting the application of the severer penalties to the armed participants only.

In the second place, forming, directing and participation in an organised criminal group is more severely punishable where **the group has been formed with the aim of obtaining a benefit**. According to the international instruments, the aim of obtaining a benefit is an element of the definition of an organised criminal group, which is only logical considering that organised crime has, as its prime objective, the generation of income. Initially, the Bulgarian legislator also followed this approach, but the amendments to the *Criminal Code* of April 2009 adopted a different solution, making the aim of obtaining a benefit an aggravating circumstance and dropping it from the definition of an organised criminal group.

An aim of obtaining a benefit applies when the offender desires to obtain a property benefit for himself/herself or for another through the offence. The property benefit may constitute an increase in the assets in the property of the offender or of some third party (e.g. receiving money), as well as a reduction in the liabilities (e.g. non-payment of an obligation).²⁷

²⁶ Стойнов, А., Наказателно право: особена част. Престъпления против собствеността [Stoynov, A., Criminal Law: Special Part. Offences against Property], Ciela, Sofia, 1997, p. 53.

²⁷ Стойнов, А., Наказателно право: особена част. Престъпления против правата на човека [Stoynov, A., Criminal Law: Special Part. Offences against Human Rights]. Ciela, Sofia, 1997, pp. 51-52.

As noted above in the analysis of the definition of an organised criminal group, the aim of obtaining a benefit should be incorporated into the definition rather than be defined as an aggravating circumstance. An essential characteristic of organised crime is its aspiration to generate profits from the unlawful activity, which is carried out, which is why it is illogical to limit the aim of obtaining a benefit to an aggravating circumstance.

In the third place, forming, directing and participation in an organised criminal group is more severely punishable where the group is formed **for the purpose of perpetrating specific offences listed in the law**. The legislator has determined that these offences are of a higher degree of social danger, which is why the participants in a group, which pursues the aim of committing them, deserve a severer sanction. The offences, which, in the legislator's judgment, qualify as aggravating circumstances, are listed exhaustively and comprise:

- kidnapping, illegal restraint and holding a person hostage (Articles 142, 142a and 143a of the *Criminal Code*);
- cross-border smuggling of goods and narcotic drugs (Article 242 of the *Criminal Code*);
- counterfeiting of currency or forgery of other instruments or means of payments and offences involving counterfeit currency or forged other instruments or means of payment (Articles 243 and 244 of the *Criminal Code*);
- money laundering (Article 253 of the *Criminal Code*);
- unlawfully taking persons across the border of Bulgaria (Article 280 of the *Criminal Code*);
- offences related to explosives, firearms, weapons other than firearms, chemical, biological or nuclear weapons, munitions and pyrotechnic articles (Articles 337 and 339 of the *Criminal Code*);
- offences related to distribution of narcotic drugs, inducing another person to use narcotic drugs and other offences related to facilitating the use of such substances (Article 354a (1) and (2) and Article 354b (1) to (4) of the *Criminal Code*).

It is not clear what logic the legislator followed when selecting the offences classifying an organised criminal group as more socially dangerous and as a more severely punishable offence. The list of offences under Article 321 (3) **omits acts of exceedingly high degree of social danger which are particularly characteristic of organised crime**, such as, for example, inducement to prostitution (Article 155 of the *Criminal Code*), kidnapping for the purpose of procuring for lewd and lascivious acts (Article 156 of the *Criminal Code*), trafficking in human beings (Articles 159a to 159d of the *Criminal Code*) etc. With a view to adequately punishing the manifestations of organised crime, the provision of Article 321 (3) should be reviewed and revised so as to cover, to the fullest extent possible, the offences typical of organised crime.

Finally, forming, directing and participation in an organised criminal group is more severely punishable where **the group includes a public official**. According to Item 1 of Article 93 of the *Criminal Code*, a public official is a person who is assigned to perform, whether salaried or unsalaried, temporarily or permanently: service at an institution of State (with the exception of those performing an

activity materially limited to order-taking) or administrating work or work related to safeguarding and managing another's property in a state-owned enterprise, a cooperative, a public organisation, another legal person or at a sole trader, as well as of a notary and assistant notary, a private enforcement agent and assistant private enforcement agent.

The participation of a public official heightens the social danger of the entire group. The provision reflects the risk of organised crime infiltrating State and public structures, which is one of the most dangerous manifestations of organised crime. Therefore, not only the official but all the rest of the participants as well are liable to a severer penal sanction. Still, those participants who were unaware of the participation of an official in the group should be excluded from the application of the provision.

1.3. AGGRAVATED CASES OF OTHER OFFENCES COMMITTED UPON ASSIGNMENT BY OR IN EXECUTION OF A DECISION OF AN ORGANISED CRIMINAL GROUP

The Special Part of the *Criminal Code* covers a number of offences in respect of which **severer penalties are provided for where the act has been committed upon assignment by or in execution of a decision of an organised criminal group.**

The commission of the act upon assignment by or in execution of a decision of an organised criminal group is an aggravated circumstance for the following offences listed in the *Criminal Code*: murder [Item 10 of Article 116], causing bodily injury [Item 8 of Article 131 (1)], kidnapping [Item 8 of Article 142 (2)], illegal restraint [Article 142a (2)], coercion [Article 143 (2)], holding a person hostage [Article 143a (3)], threatening with a criminal offence [Article 144 (3)], inducement to prostitution, procuring for molestation or copulation and providing premises for lewd and lascivious acts [Item 1 of Article 155 (5)], kidnapping for the purpose of procuring for lewd and lascivious acts [Item 1 of Article 156 (3)], creating, supplying and distributing works having a pornographic content [Article 159 (5)], trafficking in human beings [Article 159d], theft [Item 9 of Article 195 (1)], robbery [Item 5 of Article 199 (1)], treasure hunting [Article 208 (5)], blackmail [Item 5 of Article 213a (2) and Article 214 (2)], destroying and damaging another's property [Article 216 (5)], unlawful logging and unlawful concealment, loading, transporting, unloading, storing or processing of timber [Article 235 (4)], cross-border smuggling of goods [Article 242 (1) (g)], money laundering [Item 1 of Article 253 (3)], illicit trade in cultural property [Article 278a (3)], taking a motor vehicle without lawful authority [Article 346 (6)], unlawfully obtaining a large amount of resources from the State budget [Article 256 (2)], wrongfully influencing the development or the result of a sporting competition [Item 1 of Article 307d (2)], arson [Item 4 of Article 330 (2)], and offences related to distribution of narcotic drugs [Item 1 of Article 354a (2)].

From a practical point of view, the main question which these aggravated cases raise is **how to differentiate between participation in an organised criminal**

group and commission of an offence upon assignment by or in execution of a decision of the same group. Neither the law nor the theory and practice, however, give a clear answer to this question, which confronts the application of the law with a number of problems.

Legal scholars' views vary in this respect. According to one school of thought, participation in an organised criminal group and commission of an offence upon assignment by or in execution of a decision of that group are separate offences in their own right and the offender acting upon assignment by or in execution of a decision of the organised criminal group can be both a member and a non-member of the group.²⁸ Another school reasons that if the offence has been committed upon assignment by an organised criminal group, the offender cannot be a participant in the same group, but if the offence has been committed in execution of a decision of a group, the offender should be a member of that group.²⁹

Legal practitioners are also divided in their opinions. Some argue that a person can commit an offence upon assignment by or in execution of a decision of an organised criminal group regardless of whether he or she is a member of that group. If the offender is concurrently a participant in the group, he or she will incur criminal responsibility for both offences, and if he or she is a non-member, his or her responsibility will be limited to the act committed by him or her upon assignment by or in execution of a decision of the group.

Where a participant in an organised criminal group commits any of the listed offences, he or she will incur responsibility for his or her participation in the group according to Article 321 (2) of the *Criminal Code* and for the offence committed according to the relevant aggravated provision under the terms of real aggregation.

The other hypothetical presents a more complicated issue: when the participant is not a member of the group but commits an offence upon assignment by or in execution of a decision of that group. In any case, intent would apply if the offender was aware that he or she was acting upon assignment by or in execution of a decision of the group, i.e. he or she must be clear that a group of persons pursuing the commission of offences is behind the assignment. Participation in the group and acting upon its assignment or in execution of its decision remains to be distinguished by case law.

²⁸ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 86-87.

²⁹ Пушкарлова, И., Форми на организирана престъпна дейност по Наказателния кодекс на Република България [Pushkarova, I., Forms of Organised Criminal Activity under the Penal Code of the Republic of Bulgaria], St Kliment Ohridski University Press, Sofia, 2011, pp. 59-60.

1.4. PENALTIES FOR OFFENCES RELATED TO ORGANISED CRIMINAL GROUP

1.4.1. Penalties for natural persons

According to Article 321 of the *Criminal Code*, forming and directing an organised criminal group is punishable by **imprisonment** for a term of three to ten years or for a term of five to fifteen years in aggravated cases. The participation in such a group is punishable by imprisonment for a term of one to six years or for a term of three to ten years in aggravated cases. A preliminary conspiracy to commit, in Bulgaria or abroad, offences punishable by imprisonment of more than three years with the aim to obtain a property benefit or to exert illegal influence on the activity of a body of power or local self-government is punishable by imprisonment for a term of up to six years. Participation in the management of an organisation or group for racketeering under Article 321a of the *Criminal Code* is punishable by imprisonment for a term of three to eight years, and participation in such a group is punishable by imprisonment for a term of up to five years.

More varied penalties apply to the offences for which there are aggravated cases when committed upon assignment by or in execution of a decision of an organised criminal group because they have to correspond to the penalties provided for the main offence.

Table 1. Penalties for offences committed upon assignment by or in execution of a decision of an organised criminal group provided for in the Criminal Code

Offence	Penalty for the main crime	Penalty for the aggravated cases when the act was committed upon assignment by or in execution of a decision of an organised criminal group
Murder [Item 10 of Article 116 (1)]	Imprisonment for a term from 10 to 20 years	Imprisonment for a term of 15 to 20 years, life imprisonment or life imprisonment without commutation
Causing bodily injury [Item 8 of Article 131 (1)]	Imprisonment for a term of 3 to 10 years for severe bodily injury, imprisonment for a term of up to 6 years for medium bodily injury, imprisonment for a term of up to 2 years or probation for trivial bodily injury with impairment of health and imprisonment for a term of up to 6 months or probation, or a fine ranging from BGN 100 to BGN 300 for trivial bodily injury without impairment of health	Imprisonment for a term of 3 to 15 years for severe bodily injury, imprisonment for a term of 2 to 10 years for medium bodily injury, imprisonment for a term of up to 3 years for trivial bodily injury with impairment of health and imprisonment for a term of up to 1 year or probation for trivial bodily injury without impairment of health

Table 1. Penalties for offences committed upon assignment by or in execution of a decision of an organised criminal group provided for in the Criminal Code (Continued)

Offence	Penalty for the main crime	Penalty for the aggravated cases when the act was committed upon assignment by or in execution of a decision of an organised criminal group
Kidnapping [Item 8 of Article 142 (2)]	Imprisonment for a term of 3 to 10 years	Imprisonment for a term of 7 to 15 years
Illegal restraint [Article 142a (2)]	Imprisonment for a term of up to 6 years	Imprisonment for a term of 2 to 8 years
Coercion [Article 143 (2)]	Imprisonment for a term of up to 6 years	Imprisonment for a term of 3 to 10 years
Holding a person hostage [Article 143a (3)]	Imprisonment for a term of 1 to 8 years; imprisonment for a term of 2 to 10 years for threatening the hostage with infliction of death or severe or medium bodily injury	Imprisonment for a term of 2 to 10 years; imprisonment for a term of 5 to 12 years for threatening the hostage with death or infliction of severe or medium bodily injury
Threatening with a criminal offence [Article 144 (3)]	Imprisonment for a term of up to 3 years	Imprisonment for a term of up to 6 years
Inducement to prostitution, procuring for molestation or copulation and providing premises for lewd and lascivious acts [Item 1 of Article 155 (5)]	Imprisonment for a term of up to 3 years or a fine ranging from BGN 1,000 to BGN 3,000 for inducement to prostitution and procurement for molestation; imprisonment for a period of up to 5 years and a fine ranging from BGN 1,000 to BGN 5,000 for providing premises for lewd and lascivious acts; imprisonment for a term of 1 to 6 years and a fine ranging from BGN 5,000 to BGN 15,000 for an act committed with the aim of obtaining a benefit; imprisonment for a term of 5 to 15 years and a fine ranging from BGN 10,000 to BGN 50,000 for inducing or forcing another person to use narcotic drugs for the purpose of lewd and lascivious acts	Imprisonment for a term of 2 to 8 years and a fine ranging from BGN 5,000 to BGN 15,000 for inducement to prostitution, procuring for molestation and providing premises for lewd and lascivious acts; imprisonment for a term of 3 to 10 years and a fine ranging from BGN 10,000 to BGN 25,000 for an act committed with the aim of obtaining a benefit; imprisonment for a term of 10 to 20 years and a fine ranging from BGN 100,000 to BGN 300,000 for inducing or forcing another person to use narcotic drugs for the purpose of lewd and lascivious acts

Table 1. Penalties for offences committed upon assignment by or in execution of a decision of an organised criminal group provided for in the Criminal Code (Continued)

Offence	Penalty for the main crime	Penalty for the aggravated cases when the act was committed upon assignment by or in execution of a decision of an organised criminal group
Kidnapping for the purpose of procuring for lewd and lascivious acts [Item 1 of Article 156 (3)]	Imprisonment for a term of 3 to 10 years and a fine of up to BGN 1,000	Imprisonment for a term of 5 to 15 years and a fine ranging from BGN 5,000 to BGN 20,000
Creating, supplying and distributing works having a pornographic content [Article 159 (5)]	Imprisonment for a term of up to 1 year and a fine ranging from BGN 1,000 to BGN 3,000; imprisonment for a term of up to 2 years and a fine ranging from BGN 1,000 to BGN 3,000 for distribution through the Internet or in a similar manner; imprisonment for a term of up to 3 years and a fine of up to BGN 5,000 for distribution to a person under 16, and imprisonment for a term of up to 6 years and a fine of up to BGN 8,000 if a person under 18 or appearing to be under 18 has been used for the creation of the material	Imprisonment for a term of 2 to 8 years and a fine of up to BGN 10,000, the court having an option to impose confiscation of all or part of the offender's property
Trafficking in human beings [Article 159d]	Imprisonment for a term of 2 to 8 years and a fine ranging from BGN 3,000 to BGN 12,000 for trafficking in human beings without taking across the border; imprisonment for a term of 3 to 12 years and a fine ranging from BGN 10,000 to BGN 20,000 for trafficking with taking across the border; imprisonment for a term of 3 to 10 years and a fine ranging from BGN 10,000 to BGN 20,000 for use of the victim	Imprisonment for a term of 5 to 15 years and a fine ranging from BGN 20,000 to BGN 100,000, the court having an option to impose confiscation of all or part of the offender's property
Theft [Item 9 of Article 195 (1)]	Imprisonment for a term of up to 8 years	Imprisonment for a term of 1 to 10 years
Robbery [Item 5 of Article 199 (1)]	Imprisonment for a term of 3 to 10 years	Imprisonment for a term of 5 to 15 years, the court having an option to impose confiscation of up to one-half of the offender's property

Table 1. Penalties for offences committed upon assignment by or in execution of a decision of an organised criminal group provided for in the Criminal Code (Continued)

Offence	Penalty for the main crime	Penalty for the aggravated cases when the act was committed upon assignment by or in execution of a decision of an organised criminal group
Treasure hunting [Article 208 (5)]	Imprisonment for a term of up to 3 years or a fine ranging from BGN 1,000 to BGN 5,000	Imprisonment for a term of 2 to 8 years and a fine ranging from BGN 10,000 to BGN 30,000
Blackmail for the purpose of coercing the victim to dispose of a thing or a right or to assume a property obligation [Item 5 of Article 213a (2)]	Imprisonment for a term of 1 to 6 years and a fine ranging from BGN 1,000 to BGN 3,000	Imprisonment for a term of 5 to 15 years and a fine ranging from BGN 5,000 to BGN 10,000, the court having an option to impose confiscation of up to one-half of the offender's property
Blackmail through coercing the victim by force or threat to do, to omit or to suffer something against his or her will [Item 1 of Article 214 (2)]	Imprisonment for a term of 1 to 6 years and a fine ranging from BGN 1,000 to BGN 3,000, the court having an option to impose confiscation of up to one-half of the offender's property	Imprisonment for a term of 5 to 15 years, a fine ranging from BGN 5,000 to 10,000 and confiscation of up to one-half of the offender's property
Destroying and damaging another's property [Article 216 (5)]	Imprisonment for a term of up to 5 years	Imprisonment for a term of up to 10 years, the court having an option to order disqualification cumulated to this penalty
Unlawful logging and unlawful handling of timber [Article 235 (4)]	Imprisonment for a term of up to 6 years and a fine ranging from BGN 1,000 to BGN 20,000	Imprisonment for a term of 3 to 10 years and a fine ranging from BGN 10,000 to BGN 100,000
Cross-border smuggling of goods [Article 242 (1) (g)]	Administrative violation	Imprisonment for a term of 3 to 10 years and a fine ranging from BGN 20,000 to BGN 100,000
Money laundering [Item 1 of Article 253 (3)]	Imprisonment for a term of 1 to 6 years and a fine ranging from BGN 3,000 to BGN 5,000	Imprisonment for a term of 1 to 8 years and a fine ranging from BGN 5,000 to BGN 20,000

Table 1. Penalties for offences committed upon assignment by or in execution of a decision of an organised criminal group provided for in the Criminal Code (Continued)

Offence	Penalty for the main crime	Penalty for the aggravated cases when the act was committed upon assignment by or in execution of a decision of an organised criminal group
Unlawfully obtaining a large amount of resources from the State budget [Article 256 (2)]	Imprisonment for a term of 2 to 8 years and a fine ranging from BGN 1,000 to BGN 5,000	Imprisonment for a term of 3 to 10 years and confiscation of part or all of the offender's property, as well as disqualification
Official malfeasance [Article 282 (4)]	Imprisonment for a term of up to 5 years, the court having an option to order disqualification cumulated to this penalty, or probation	Imprisonment for a term of 3 to 10 years and disqualification (the penalty is imposed on the official if the offence was committed with the participation of a person acting upon assignment by or in execution of a decision of an organised criminal group)
Illicit trade in cultural property [Article 278a (3)]	Imprisonment for a term of 1 to 6 years and a fine ranging from BGN 1,000 to BGN 20,000	Imprisonment for a term of 3 to 10 years and a fine ranging from BGN 5,000 to BGN 50,000
Taking a motor vehicle without lawful authority [Article 346 (6)]	Imprisonment for a term of 1 to 8 years	Imprisonment for a term of 3 to 12 years, deprivation of driving privileges and confiscation of not less than one-half of the offender's property
Wrongfully influencing the development or the result of a sporting competition [Item 1 of Article 307d (2)]	Imprisonment for a term of 1 to 6 years and a fine ranging from BGN 1,000 to BGN 10,000 for inducement; imprisonment for a term of 1 to 6 years and a fine ranging from BGN 5,000 to BGN 15,000 for offering, giving, asking and accepting an undue property benefit; imprisonment for a term of up to 3 years and a fine of up to BGN 5,000 for intermediation	Imprisonment for a term of 2 to 8 years and a fine ranging from BGN 10,000 to BGN 20,000
Arson [Item 4 of Article 330 (2)]	Imprisonment for a term of 1 to 8 years	Imprisonment for a term of 3 to 10 years

Table 1. Penalties for offences committed upon assignment by or in execution of a decision of an organised criminal group provided for in the Criminal Code (Continued)

Offence	Penalty for the main crime	Penalty for the aggravated cases when the act was committed upon assignment by or in execution of a decision of an organised criminal group
Production and distribution of narcotics [Item 1 of Article 354a (2)]	Imprisonment for a term of 2 to 8 years and a fine ranging from BGN 5,000 to BGN 20,000 for high-risk narcotic drugs; imprisonment for a term of 1 to 6 years and a fine ranging from BGN 2,000 to BGN 10,000 for risk narcotic drugs; imprisonment for a term of 3 to 12 years and a fine ranging from BGN 20,000 to BGN 100,000 for precursors or facilities or materials for the production of narcotic drugs	Imprisonment for a term of 5 to 15 years and a fine ranging from BGN 20,000 to BGN 100,000

Source: *Criminal Code*.

Forming, directing and participation in an organised criminal group, forming and directing a group for racketeering and almost all offences committed upon assignment by or in execution of a decision of an organised criminal group are **serious offences** within the meaning of Item 7 of Article 93 of the *Criminal Code*. The only offences, which are not serious offences, are participation in a group for racketeering and infliction of trivial bodily injury committed upon assignment by or in execution of a decision of an organised criminal group.

The type and the length and amount of the penalties provided for in the *Criminal Code* **conform to the standards laid down in the international instruments**. The UN Convention does not state a specific type and length and amount of the penalties which the States Parties to the Convention are supposed to provide for the offences related to participation in an organised criminal group but requires that the sanctions for these offences take into account their gravity and that the sanctions be imposed with a view to maximising the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences. The EU Framework Decision requires from the Member States to ensure that all forms of actively taking part in a criminal organisation with knowledge of its aim and general activity or its intention to commit the relevant offences are punishable by a maximum term of imprisonment of at least between two and five years.

In the opinion of representatives of the law-enforcement authorities, the penalties, which are provided for at present, are adequate to the social danger of the offences related to organised crime and there is no need to change the type and the length and amount of the sanctions. The judicial community also shares this opinion. The penalties are relatively severe, but this is perceived as peculiar to a number of countries of South-eastern Europe. The penalties under Bulgarian legislation are commensurate with the sanctions provided for in the legislation of Greece, Romania and Serbia but are considerably severer than the sanctions provided for in richer countries, such as those in Scandinavia.

In the opinion of judges, prosecutors and investigating police officers, apart from the severity of the penalty, which is provided for, its unavoidability is of great importance as well, especially from the point of view of the so-called “general deterrence”, i.e. of the correctional and preventive effect of the sanctions on the rest of the members of society. Regardless of their severity, sanctions would not have a deterrent effect if they were not perceived by society as unavoidable.

Even though the penalties are seen as adequate, many of the offences are notably punishable by imprisonment only. Insofar as organised crime is traditionally associated with the generation of substantial income from its unlawful activity, it is recommended to expand the applicability of the financial sanctions of fine and confiscation. Depending on the social danger of the particular offences, financial sanctions can be provided for either cumulatively or as an alternative to imprisonment. Even though fine and confiscation in principle do not have a restitution effect, their provision for a larger number of offences related to organised crime would generate more revenue for the Exchequer and would further weaken organised crime, depriving it of the financial resources it needs.

1.4.2. Penalties for legal persons

In conformity with the requirements of the international instruments, the *Law on the Administrative Violations and Sanctions* was amended in October 2005 to introduce pecuniary **sanctions for legal persons, which have enriched themselves or would enrich themselves from specific criminal offences**. The offences are exhaustively listed in Article 83a (1) of the law and include certain offences against the Republic (including an organisation or group for subversive activity), kidnapping, illegal restraint, coercion, inducement to prostitution, distribution of materials having a pornographic content, trafficking in human beings, propagation of hatred (with the exception of the organisation and group against national, racial and ethnic equality and religious and political tolerance), offences against intellectual property, fraud, blackmail, handling stolen goods, cross-border smuggling of goods and narcotics, money laundering, misuse of EU funds, tax evasion, unlawfully taking persons across the border, bribery, certain offences against sports, computer offences, unlawful gambling, offences involving narcotic drugs etc.

The group of offences for which a pecuniary sanction can be imposed on the legal persons which have enriched themselves or would enrich themselves from these offences also includes **all offences related to organised crime**: forming,

directing and participation in an organised criminal group or an organisation or group for racketeering, preliminary conspiracy to perpetrate, in Bulgaria or abroad, offences punishable by imprisonment exceeding three years with the aim to obtain a property benefit or to exert illegal influence on the activity of a body of power or local self-government, as well as all offences committed upon assignment by or in execution of a decision of an organised criminal group.

A pecuniary sanction is imposed where the offence has been committed by: a person empowered to form the will of the legal person; a person representing the legal person; a person elected to a control or supervisory body of the legal person; or a factory or office worker to whom the legal person has assigned a particular work, where the offence has been committed in the course of, or in connection with, the performance of this work. According to Article 83a (2) of the *Law on the Administrative Violations and Sanctions*, the pecuniary sanction is also imposed where a person empowered to form the will of the legal person, a person representing the legal person or a person elected to a control or supervisory body of the legal person has abetted or aided the commission of the offence, as well as where the act did not proceed further than the stage of the attempt.

The amount of the pecuniary sanction depends on the type and amount of the benefit by which the legal person has enriched or would enrich itself. If the benefit is a property benefit, the maximum amount of the pecuniary sanction is BGN 1,000,000 and the minimum amount is the equivalent of the benefit. If the benefit is not of a property nature or its amount cannot be established, the sanction ranges from BGN 5,000 to BGN 100,000. In all cases, the benefit or its equivalent is forfeited to the Exchequer, unless subject to restitution or recovery or to confiscation according to the procedure established by the *Criminal Code* (Article 83a (4) of the *Law on the Administrative Violations and Sanctions*).

The imposition of a **pecuniary sanction on the legal person does not depend on the incurrence of the criminal responsibility of the natural person** who performed the criminal act (Article 83a (3) of the *Law on the Administrative Violations and Sanctions*).

According to Article 83a (5) of the *Law on the Administrative Violations and Sanctions*, a pecuniary sanction may not be imposed on the State, the State bodies and the bodies of local self-government, as well as on the international organisations.

The legal framework of the pecuniary sanctions for legal persons is harmonised with the international instruments on countering organised crime.

The UN Convention, which is relatively liberal with regard to the manner of regulating the liability of legal persons, requires from each State Party to the Convention to adopt measures to establish the liability of legal persons for participation in serious crimes involving an organised criminal group. Each State, guided by its legal principles, has discretion to determine whether this liability would be criminal, civil or administrative. The States Parties to the Convention are furthermore required to adopt appropriate legislative, administrative or other measures which should focus on the prevention of the misuse of legal persons by organised criminal groups, including the introduction of the possibility of

disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by the Convention from acting as directors of legal persons incorporated within the jurisdiction of the State Party concerned, as well as the establishment of national records of persons disqualified from acting as directors of legal persons.

The EU Framework Decision regulates in even greater detail the liability of legal persons.³⁰ The Decision requires from Member States to take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in the Framework Decision and committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person. Member States are furthermore required to take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by persons having leading positions within those legal persons has made possible the commission, by a person under its authority, of any of the offences referred to in the Framework Decision for the benefit of those legal persons. It is also expressly specified that the liability of legal persons is without prejudice to criminal proceedings against natural persons who are perpetrators of, or accessories to, any such offences.

The EU Framework Decision envisages a broader range of sanctions, providing that each Member State must take the necessary measures to ensure that a legal person held liable is punishable by effective, proportionate and dissuasive penalties, which include criminal or non-criminal fines and may include other penalties, for example exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision, judicial winding-up and temporary or permanent closure of establishments which have been used for committing the offence.

Articles 83b to 83f of the *Law on the Administrative Violations and Sanctions* regulate **the rules of procedure** for imposition of pecuniary sanctions on legal persons. The proceeding is instituted upon a reasoned proposal by the prosecutor to the administrative court after submission of the indictment or where the penal proceeding cannot be instituted or a penal proceeding instituted was terminated by reason of the exemption from criminal responsibility through amnesty, extinguishment of the criminal responsibility through expiry of the prescription provided for in the law, death of the person, or lapse of the person, after commission of the offence, into a persistent disorder of consciousness which precludes sanity.

The prosecutor may approach the court with a motion to take **measures to secure the pecuniary sanction** of the legal person according to the procedure established by the *Civil Procedure Code*.

³⁰ For the purposes of the Framework Decision, “legal person” means any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations (Article 5, paragraph 4 of the EU Framework Decision).

The court examines the proposal in **public session** with the participation of the prosecutor. The case is examined within the framework of the circumstances specified in the proposal. On the basis of the collected evidence the court determines whether the legal person has obtained any undue benefit, is there a connection between the perpetrator of the criminal act and the legal person and between the criminal act and the benefit for the legal person, and what is the amount of the benefit, if it is a property benefit.

The court renders judgment on imposition of a pecuniary sanction after a sentence of conviction or a judgment on an action to establish a criminal circumstance according to the rules of the *Civil Procedure Code* becomes enforceable.³¹ The defence and the prosecution may lodge an **intermediate appellate review appeal** against the judgment with the competent intermediate appellate review court, and the intermediate appellate review court examines the appeal according to the procedure established by the *Criminal Procedure Code* and its judgment is final.

1.5. OTHER CRIMINAL GROUPS

1.5.1. Terminological problems

Apart from the organised criminal group under Item 20 of Article 93 of the *Criminal Code*, Bulgarian criminal law provides for **other types of criminal associations** as well. The *Criminal Code*, however, is inconsistent in the terminology employed and uses different notions. With the exception of the organised criminal group, the other criminal associations do not have a legal definition. This poses problems both in differentiating the separate types of associations and in assessing the correlation between the different provisions. In this way, prerequisites are created for conflicting case law and for different punishment of one and the same criminal conduct.

In addition to the notion of “organised criminal group”, legally defined in Item 20 of Article 93, the *Criminal Code* also uses the notions of “group” and “organisation”. Neither of these notions is legally defined, and their content is determined by case law.

According to case law, a **group** exists where two or more persons coordinate their will for the effectuation of one or more criminal offences, whereas **organisation** is in evidence where two or more persons unite for permanent and sustained criminal activity. Unlike a group, an organisation is characterised by a higher degree of organisation and sustainment. It can have a larger membership and comprise structural units or divisions. Permanence and sustainment distinguish the organisation and the group from mere partnership, which emerges incidentally.³²

³¹ According to Article 124 (5) of the Civil Procedure Code, an action to establish a criminal circumstance relevant to a civil legal relation is granted solely in the cases where criminal prosecution may not be instituted or has been terminated or suspended, and in the cases where the perpetrator of the act has remained undetected.

³² Interpretative Judgment No. 23 of 15 December 1977 in Criminal Case No. 21 of the General Assembly of the Criminal Colleges of the Supreme Court for the Year 1977.

The use of the notion of “organisation” is unnecessary and creates confusion. This notion does not appear individually in even a single provision of the *Criminal Code* but is always used in collocation with the term “group”, the two notions being in a relationship of alternativeness and carrying identical sanctions.³³ Although legal doctrine and case law draw a distinction between “group” and “organisation”, such differentiation is unnecessary, especially considering the absence of legal definitions for either. Worse yet, a comparison of the notions makes it clear that the legislator and case law perceive an organised criminal group as a more complicated association than a criminal organisation (with a larger minimum number of participants, requirements for permanence and structuredness etc.), which is illogical. Therefore, the **notion of “organisation” should be dropped** from the respective provisions and **only the notion of “group” should be left and be legally defined** on the basis of existing case law. Thus, the differentiation between the notions will be more or less clarified, with a conventional criminal group referring to the coordination of the will of two or more persons, and an organised criminal group referring to a permanent and structured association of three or more persons.

The differences between an organised criminal group and a conventional group are also debatable. The only specific difference is in the required minimum number of participants: three for the organised and two for the conventional criminal group. The rest of the differences, such as permanence and structuredness, are difficult to establish in practice because of the lack of clear objective criteria. This confronts the application of the law with problems, especially where the type and the length and amount of the penalty for one and the same offence depend on a choice between the two notions. One case in point is blackmail, which is less severely punishable where committed upon assignment by or in execution of a decision of an organised criminal group and is more severely punishable where committed upon assignment by an organisation or group.³⁴ The existence of such provisions with close content but without objective differentiation criteria is undesirable because it creates prerequisites for the imposition of penalties varying in severity for one and the same criminal conduct.

1.5.2. Correlation between the provisions on the various criminal associations

The provision for different types of criminal associations in combination with the inconsistent use of different notions, part of which are not legally defined,

³³ In the Criminal Code, the notion of “organisation” is used in the provisions of Article 109 (organisation or group for subversive activity), Article 162 (organisation or group for offences against national, racial and ethnic equality and religious and political tolerance), Article 213a (organisation or group for blackmail), Article 280 (organisation or group for unlawfully taking persons across the border), Article 321a (organisation or group for racketeering), Article 346 (organisation or group for taking a motor vehicle without lawful authority) and Article 356b (organisation or group for offences endangering the general public).

³⁴ Where blackmail is committed upon assignment by or in execution of an organised criminal group, the penalty is imprisonment for a term of two to eight years and a fine ranging from BGN 3,000 to BGN 5,000 [Item 5 of Article 213a (2) of the Criminal Code], and where committed upon assignment by an organisation or group, the penalty is imprisonment for a term of five to fifteen years and a fine ranging from BGN 5,000 to BGN 10,000, the court having an option to impose confiscation of up to one-half of the offender’s property [Item 3 of Article 213a (3) of the Criminal Code].

creates problems with the establishment of the correlation between the separate provisions and, hence, with the determination of the criminal responsibility of the offenders. Owing to the too general definition of the notion of organised criminal group and the lack of legal definitions for the remaining types of organisations and groups, it is often possible to classify one and the same criminal association as more than one type of criminal group.

Legal scholars argue that the provisions on the organised criminal group are general whereas the provisions on the remaining types of criminal associations are special.³⁵ This means that the provisions on the organised criminal group should be applied only where the criminal association concerned cannot be classified as another type of criminal group or organisation.³⁶ If, on the other hand, the participants in the criminal association pursue the commission of offences characteristic of the special group as well as other acts punishable by more than three years of imprisonment, this will be a case of aggregation. The majority of judges and prosecutors also share this view.

Despite this distinction, cases may emerge in practice where such an approach is either difficult to apply or would lead to the imposition of a penalty that does not correspond to the social danger of the act committed. That is why all provisions applying to the different types of criminal associations and groups need to be reviewed, particularising the differences between them and synchronising the penalties so as to correspond to their social danger.

1.5.3. Organisation or group against national, racial and ethnic equality and religious and political tolerance

According to Article 162 (3) and (4) of the *Criminal Code*, criminal responsibility is incurred by anyone who **forms, directs or participates in an organisation or group, which aims to commit offences against national, racial and ethnic equality, and religious and political tolerance.**³⁷

The offences for the commission of which the group or organisation under Article 162 (3) and (4) is formed are punishable by imprisonment for a term exceeding

³⁵ Пушкарлова, И., *Форми на организирана престъпна дейност по Наказателния кодекс на Република България* [Pushkarova, I., *Forms of Organised Criminal Activity under the Penal Code of the Republic of Bulgaria*], St Kliment Ohridski University Press, Sofia, 2011, p. 53.

³⁶ This view is not indisputable and other views are possible as well. Thus, according to another school, the perpetrator should arguably incur responsibility for his participation in each group under the terms of ideal aggregation [several offences committed by a single act within the meaning of Article 23 (1) of the Criminal Code] because the different criminal associations usually violate different social relations, as evident from the systemic position of the provisions in the law. Alternatively, it could be argued that the less severely punishable group is subsumed within the more severely punishable one, i.e. the perpetrator is supposed to incur criminal liability only for the more severely punishable group.

³⁷ Offences against national, racial and ethnic equality and religious and political tolerance are propagation of or incitement to discrimination, violence or hatred based on race, nationality or ethnicity by means of speech, press or other mass communication media, through electronic information systems or in another manner [Article 162 (1) of the Criminal Code] and using violence against another or damaging the property of another by reason of his race, nationality, ethnicity, religion or political persuasions [Article 162 (2) of the Criminal Code].

three years (from one to four years) and, therefore, from the point of view of its specialisation, the **group falls within the scope of the definition under Item 20 of Article 93**. This means that if the rest of the criteria under Item 20 of Article 93 also apply (three or more persons, permanence and structuredness), it is a type of organised criminal group. This is also the source of the principal problems confronting the application of the law, because the law does not provide a clear indication of the correlation between the separate provisions.

If a person forms, directs or participates in a group against national, racial and ethnic equality and religious and political tolerance, which is permanent and structured and consists of three or more persons, such person automatically forms, directs or, respectively, participates in an organised criminal group. One and the same act satisfies the criteria of both offences. The question is **what criminal responsibility the perpetrator would incur** in such case because the penal sanctions provided for a group against national, racial and ethnic equality and religious and political tolerance are considerably less severe than those provided for an organised criminal group.

If one subscribes to the view that the provisions on organised criminal group are general in respect of all other provisions concerning criminal associations, the persons who form, direct and participate in an organisation or group against national, racial and ethnic equality and religious and political tolerance should incur responsibility only under Article 162 (3) or (4).

Adopting this approach creates problems where any of the circumstances provided for in Article 321 (3) of the *Criminal Code* apply as they condition the imposition of a severer penalty in the cases of an organised criminal group. An example of such a case would be a group against national, racial and ethnic equality and religious and political tolerance, which is permanent and structured, consists of three or more persons and is armed. If membership of such a group is classified as an offence under Article 162 (4), the offender will be liable to a penalty of **imprisonment for a term not exceeding three years and public censure**. If, however, the same act is classified as an offence under Item 2 of Article 321 (3), the penalty would be **imprisonment for a term of three to ten years**.

The lack of clear criteria to determine the correlation between the provisions also gives rise to **problems in connection with voluntary renouncement**. Release from criminal responsibility or reduction of criminal responsibility upon voluntary surrender to the authorities is available as an option only to the participants in an organised criminal group but is not available to the members of an organisation or group against national, racial and ethnic equality and religious and political tolerance. This means that if a participant in the group surrenders voluntarily and reveals the information at his or her disposal, his or her release from criminal responsibility or a reduction of his or her criminal responsibility, as the case may be, will depend on the type of offence with which he or she will be charged. If a charge is brought of membership in a group against national, racial and ethnic equality and religious and political tolerance, the person who has surrendered will not be eligible for the privileged treatment.

The debatable issues in connection with the correlation between the provisions on an organised criminal group and on an organisation or group against national, racial and ethnic equality and religious and political tolerance can lead to different treatment and imposition of different penalties for one and the same criminal conduct. To avoid possible abuse, the legislation needs to be amended, drawing a clear line between the two offences and specifying the correlation between them.

1.5.4. Organisation or group for subversive activity

Article 109 (1) and (2) of the *Criminal Code* criminalise the forming, directing and participation in an organisation or group, which aims to commit offences against the Republic.³⁸

An organisation and group for subversive activity differ from an organised criminal group in the required minimum number of participants, the type of offences, which they aim to commit, the requirement for permanence and structuredness etc. The problem, just as with the organisation and group for offences against national, racial and ethnic equality and religious and political tolerance, consists in the **lack of clear rules for the correlation between the provisions** and for the type of criminal responsibility in the cases where one and the same criminal association is classified as both an organisation or group for subversive activity and as an organised criminal group.

If the provisions on organised criminal group are indeed general, the persons who form, direct and participate in a group for subversive activity will incur responsibility only under Article 109. This will apply even where the group is permanent and structured and consist of three or more persons, i.e. when it entirely fits the definition of an organised criminal group.

It remains debatable what criminal responsibility will be incurred if a group for subversive activity also commits other offences punishable by imprisonment of more than three years. The question is of great practical relevance above all in connection with the terrorist groups, which usually engage in other criminal activity as well (trafficking in human beings, cross-border smuggling, production and distribution of narcotics etc.), through which they raise funds or otherwise facilitate the commission of subversive activities.

The Bulgarian legislator does not seem to have a clear and consistent concept regarding the distinctions between an organisation and group for subversive activity and an organised criminal group, which is evident from the conflicting amendments of Article 109 in recent years. As a result of these revisions, over a period of four years (from September 2002 to September 2006), the group for subversive activity was defined as an organised criminal group, which aims to commit offences against the Republic.

³⁸ The offences against the Republic are regulated in Chapter One of the Special Part of the Penal Code and include treason, treachery, spying, diversion, sabotage etc.

The differentiation between the two types of groups is also important in connection with **jurisdiction**, because the cases of forming, directing and participation in a group for subversive activity are heard by the district courts acting as courts of first instance and the courts of appeal acting as courts of second instance, whereas the cases of forming, directing and participation in an organised criminal group are heard by the specialised criminal court and the specialised criminal court of appeal, respectively.

To prevent the appearance of conflicting case law and to facilitate the competent authorities in classifying the act committed, it is recommended to amend legislation so as **to draw a clear distinction between the organisation and group for subversive activity and the organised criminal group**.

1.5.5. Group for commission of offences against citizens' political rights

The group for commission of offences against citizens' political rights is described in Article 169d of the *Criminal Code*. According to Article 169d (1) and (2), criminal responsibility is incurred by anyone who forms, directs or participates in a group, which aims to commit offences against citizens' political rights.³⁹

Unlike the subversive group and the group against national, racial and ethnic equality and religious and political tolerance, **most of the offences**, which are aimed by the group under Article 169d, **are not punishable by imprisonment of more than three years**. This excludes application of the provisions on an organised criminal group because in these cases the group under Article 169d does not fall within the scope of the definition of an organised criminal group under Item 20 of Article 93.

Some of the offences against citizens' political rights, however, are punishable by imprisonment for a term exceeding three years. These are the various forms of vote buying [Article 167 (2) to (4) of the *Criminal Code*] and some acts committed by a public official in the course of, or in connection with, the discharge of his or her official duties (Article 169c of the *Criminal Code*). In these cases, if the group meets the criteria for an organised criminal group under Item 20 of Article 93, the question will arise about the correlation between the provisions and, respectively, about the manner of determination of criminal responsibility.

If one subscribes to the view that the provisions on organised criminal group are general and do not apply in respect of the groups with specifically defined specialisation, then the persons who form, direct and participate in a group for offences against citizens' political rights will incur responsibility only under Article 169d even where the group meets the criteria for an organised criminal group (permanence, structuredness, three or more persons etc.).

³⁹ The offences against citizens' political rights are regulated in Section III of Chapter One of the Special Part of the Criminal Code and include impeding the exercise of one's right to vote, inducing to exercise one's right to vote in favour of a particular candidate, political party or coalition, exercising one's right to vote on two or more occasions in one and the same election, breaching the secrecy of the ballot etc.

This solution, however, poses several problems, which are not expressly addressed by the law. One such problem is **jurisdiction**, because the cases of forming, directing and participation in a group for commission of offences against citizens' rights are heard by the regional courts acting as courts of first instance, whereas the cases of organised criminal groups are examined by the specialised criminal court acting as a court of first instance.

Nor is it clear what criminal responsibility the offender will incur where any of the **aggravating circumstances** under Article 321 (3) of the *Criminal Code* apply. Thus, if there is a group for vote buying that is permanent and structured and involves three or more persons, which is formed with the aim of obtaining a benefit (which, in principle, is typical of vote buying), the participants in such a group will be liable to a penalty of imprisonment for a term of up to six years if the act is classified as an offence under Article 169d (2) and to imprisonment for a term from three to ten years if Item 2 of Article 321 (3) is applied.

1.5.6. *Group for conclusion of transactions or deriving benefits by use of force or intimidation*

Article 321a of the *Criminal Code* criminalises the **participation in and the directing of an organisation or group, which concludes transactions or derives benefits by use of force or intimidation**. The offence in question has become popularly known as "racketeering". In it, the perpetrators force or intimidate the victims in order to conclude transactions with them or to derive benefits from them.

The group for racketeering has a lot in common with the organised criminal group as defined in Item 20 of Article 93. In respect of a group for racketeering, however, the law requires an active conduct defined as conclusion of transactions or deriving benefits. A literal interpretation of the provision invites the conclusion that this conduct is not just an aim of the group but its objective characteristic, i.e. to have committed the offence, the group must have concluded at least one transaction or must have derived at least one benefit.

The Special Part of the *Criminal Code* provides for offences, which are more severely punishable when committed upon assignment by or in execution of a decision of an organisation or group for racketeering, which is a clear indication that the legislator draws a **distinction between an organised criminal group and a group for racketeering**.⁴⁰

⁴⁰ According to the provisions of the Criminal Code, the offences for which a severer penal sanction is envisaged where committed upon assignment by or in execution of a decision of a racketeering organisation or group are: kidnapping [Item 8 of Article 142 (2)]; illegal restraint [Article 142a (2)]; coercion [Article 143 (2)]; holding a person hostage [Article 143a (3)]; threatening with a criminal offence [Article 144 (3)]; theft [Item 9 of Article 195 (1)]; blackmail for the purpose of coercing the victim to dispose of a thing or a right or to assume a property obligation [Item 5 of Article 213a (2)]; blackmail through coercing the victim by force or threat to do, to omit or to suffer something against his or her will [Item 1 of Article 214 (2)]; destroying and damaging another's property [Article 216 (5)]; official malfeasance with the participation of a person acting upon assignment by or in execution of a decision of a racketeering organization or group [Article 282 (4)]; arson [Item 4 of Article 330 (2)]; and taking a motor vehicle without lawful authority [Article 346 (6)].

The difference between an organised criminal group and a group for racketeering raises the question about the correlation between the two provisions, where the group for racketeering meets the criteria for an organised criminal group as well. Even though the conclusion of transactions and the deriving of benefits by use of force or intimidation is not an offence in its own right, such conduct in most cases will be classifiable as another offence under the *Criminal Code* (coercion under Article 143, threatening under Article 144 or blackmail under Article 214). With minor exceptions, most of these offences are punishable by imprisonment for a term exceeding three years and, therefore, the forming, directing or participation in a group of three or more persons, which aims to commit these offences, will be classifiable as an organised criminal group.

A comparison of the penalties provided for invites the conclusion that the legislator regards the **group for racketeering as a less dangerous offence than the organised criminal group**. By comparison, participation in a group for racketeering is punishable by imprisonment for a term of up to five years, whereas participation in an organised criminal group is punishable by imprisonment for a term of one to six years, and participation in an organised criminal group formed with the aim of obtaining a benefit (which is the aim for which, in practice, a group for racketeering is formed) is punishable by imprisonment for a term of three to ten years.

If it is assumed that the provisions on a group for racketeering are special in relation to the provisions on an organised criminal group, then in the case of a group for racketeering the act will be classified only under Article 321a even where the group meets the criteria for an organised criminal group as well. This means that, contrary to all logic, the legislator regards the participation in a group for racketeering as a considerably less dangerous act than an organised criminal group formed with the aim of obtaining a benefit.

Additional problems stem from the very wording of the provision of Article 321a (1) because it limits the incurrance of criminal responsibility to the persons who participate in the management of a group for racketeering and makes no mention of the persons who have formed such a group. This inconsistency in the formulation of the provisions can lead to an absurd situation in which a person participating in the management of a group for racketeering would incur responsibility under Article 321a (1) (imprisonment for a term of three to eight years), whereas the person who has formed the group would be liable under Item 1 of Article 321 (3) (imprisonment for a term of five to fifteen years).

Worse yet, it is not clear what motivated the legislator to extend a different, more lenient treatment to the group for racketeering compared to the organised criminal group. There are no serious grounds for such discrimination because the group for racketeering is by no means less dangerous than the organised criminal group. Therefore, it is recommended **to repeal entirely the provision on the group for racketeering** and to add the conclusion of transactions and the deriving of benefits by use of force or intimidation to the provision of Article 321 (3) as a circumstance aggravating the forming, directing and participation in an organised criminal group as more severely punishable acts.

1.5.7. *Organised criminal group for the growing of opium poppy and coca bush plants or plants of the genus Cannabis or for the manufacture, production or processing of narcotic drugs*

Article 354c of the *Criminal Code* criminalises the forming, directing, financing and participation in an organised criminal group for the growing of opium poppy and coca bush plants or plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs. The provision raises a number of questions related to its correlation with the provisions on the organised criminal group proper, which causes serious difficulties in their interpretation and application in practice.

The planting and growing of opium poppy and coca bush plants or plants of the genus *Cannabis* in breach of the rules established in the *Law on the Narcotic Substances and Precursors Control* is an offence in its own right under Article 354c (1) of the *Criminal Code*, which carries a penalty of imprisonment for a term of two to five years, i.e. exceeding three years. This immediately means that **where any person forms, directs or participates in a group for planting and growing such plants, he or she automatically forms, directs or participates in an organised criminal group**. The same applies to the manufacture, production and processing of narcotic drugs. These acts are criminalised under Article 354a (1) of the *Criminal Code* and the least severe penalty provided for them is imprisonment for a term of one to six years.⁴¹

The differentiation becomes nearly impossible, considering the provision of Article 321 (3) of the *Criminal Code*, which defines as a more severely punishable offence the forming, directing and participation in an organised criminal group formed with the aim of committing offences under Article 354a (1) and (2) of the *Criminal Code*, i.e. formed for the purpose of production, processing, acquisition or holding of narcotic drugs or analogues thereof without due authorisation and for the purpose of distribution, or formed for the purpose of distribution of narcotic drugs or analogues thereof.

Despite certain purely theoretical differences, the provisions on an organised criminal group for the growing of narcotic plants and production of narcotic drugs and the ones on an organised criminal group proper practically overlap. The type and the length and amount of the **penalties provided for, however, differ substantially**. Thus, if directing a group for the production of narcotic drugs is classified under Article 354c (2), the penalty provided for is imprisonment for a term of ten to twenty years and a fine ranging from BGN 50,000 to BGN 200,000, and if it is classified under Item 1 of Article 321 (3), the penalty is deprivation of liberty for a term of five to fifteen years. It remains absolutely unclear which of the two provisions should be applied and, respectively, what sanction should be

⁴¹ There are certain terminological discrepancies between the provisions of Article 354a (1) and Article 354c (2) of the Criminal Code. Article 354a (1) mentions production, processing, acquisition and holding, whereas Article 354c (2) applies to manufacture, production and processing. Besides this, Article 359c (2) of the Criminal Code – unlike Article 354a (1) – does not state expressly that the acts are committed without due authorisation and for the purpose of distribution. Despite these discrepancies, though, there can hardly be any doubt that the acts for which the group under Article 354c (2) is formed are offences under Article 354a (1).

imposed. The non-conformity is material because the two provisions not only lay down a different length of the penalty of imprisonment but one of the provisions carries, as a cumulated sanction, a fine (of a substantial amount), whereas the other provision does not envisage any financial sanction whatsoever.

The provisions regulating the consequences of **voluntary renouncement** also show substantial **differences**. A participant in an organised criminal group under Article 321 is not punished if he or she voluntarily surrenders to the authorities and reveals everything which he or she knows about the group before the participant or the group have committed an offence; or is liable to a less severe penalty if he or she voluntarily surrenders, reveals everything which he or she knows about the group and thereby substantially facilitates the detection and proving of offences committed by the group. A participant in an organised criminal group under Article 354c is not punished if he or she voluntarily reports to the authorities all facts and circumstances of which he or she is aware about the activity of the criminal group. The conditions for release from criminal responsibility with an organised criminal group for the growing of opium poppy and coca bush plants or plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs are considerably more liberal because there is no requirement that the participant or the group should not have committed another offence nor it is necessary for the information revealed to substantially facilitate the detection and proving of offences committed by the group.

The exiting framework practically provides for two alternative treatments applicable to one and the same criminal conduct. This may lead to conflicting case law and to different treatment of persons who have committed identical offences. This situation is inappropriate and should be remedied by suitable **legislative amendments**, the recommendation being to repeal the provisions regulating the organised criminal group for the growing of opium poppy and coca bush plants or plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs [Article 354c (2) to (4)] and to add the offences under Article 354c (1) (planting or growing of opium poppy and coca bush plants or plants of the genus *Cannabis* in breach of the rules established in the *Law on the Narcotic Substances and Precursors Control*) to the aggravating circumstances on the organised criminal group proper under Article 321 (3). In this way, the contradictions in the existing framework will be reconciled, and the standard of Article 321 (3) will be the only provision applicable in respect of all organised criminal groups formed with the aim of committing drug-related offences.

1.5.8. Group for unlawfully taking persons across the border

According to Item 5 of Article 280 (2) of the *Criminal Code*, taking individual persons or groups of people across the border of Bulgaria without an authorisation by the respective authorities or with an authorisation but not through the designated places is more severely punishable where organised by a group or an organisation.

At the same time, Article 321 (3) of the *Criminal Code* defines as a more severely punishable offence the forming, directing and participation in an organised criminal

group where such a group has been formed with the aim of committing offences under Article 280, i.e. to unlawfully take persons across the border.

The two provisions are **terminologically inconsistent**, which can give rise to problems with their interpretation and, hence, with their practical application. The difficulties basically stem from the fact that Item 5 of Article 280 (2) applies to an organisation or group, whereas Article 321 (3) applies to an organised criminal group.

The notion of “group or organisation” is broader than the notion of “organised criminal group” because it is not limited by the criteria under Item 20 of Article 93 (minimum three persons, structuredness, permanence etc.). This means that if the taking across the border is organised by a group or an organisation which does not meet the criteria for an organised criminal group (say, it is not sufficiently structured), the act will still be a criminal offence, the offenders will incur responsibility for the aggravated case under Item 5 of Article 280 (2), but the members of the group or organisation which organised the offence cannot be charged with participation in an organised criminal group. The opposite, however, would not be true. If an organised criminal group has been formed with the aim of committing and commits unlawfully taking persons across the border, the persons who form, direct and participate in such a group would incur responsibility both under the provisions on an organised criminal group and under the aggravated provision of taking across the border organised by a group or organisation because an organised criminal group is a type of group or organisation.

It is recommended to amend the provision of Item 5 of Article 280 (2), defining as more severely punishable the cases where the act has been committed upon assignment by or in execution of a decision of an organised criminal group. In this way, the wording will be standardised with the rest of the aggravated cases of offences committed upon assignment by or in execution of a decision an organised criminal group, and potential problems in the practical application will be prevented.

1.5.9. Group for blackmail

Item 3 of Article 213a (3) and Item 2 of Article 214 (2) of the *Criminal Code* provide for severer penal sanctions for **blackmail**, which is **committed by an organisation or group or upon assignment by an organisation, a person or a group**.⁴²

The two provisions are **imprecisely formulated** and can give rise to a number of problems. Considering that criminal responsibility is personal under Bulgarian

⁴² The Special Part of the Criminal Code provides for two forms of the offence of blackmail: threatening a person with violence, with making public disgraceful circumstances, with damaging the property or other illegal action of grave consequences for the victim or for his or her next of kin for the purpose of coercing the victim to dispose of a thing or a right or to assume a property obligation [Article 213a (1)] and coercing the victim by force or threat to do, to omit or to suffer something against his or her will and thereby inflicting a pecuniary damage on the victim or on another person for the purpose of the offender procuring a property benefit for himself or for another [Article 214 (1)].

law, it is not clear how an organisation or a group can commit an offence. Nor is it clear what exactly the legislator meant by “organisation or group”. A literal interpretation of the text invites the conclusion that this organisation or group does not necessarily have to be of a criminal nature, as long as it has incidentally made a decision or has assigned someone to commit the offence.

The ambiguities and **problems get even more complicated** when the provisions in question are **compared to the other aggravated cases** of blackmail. Separate aggravated case in both forms of blackmail is the commission of the offence by two or more persons [Item 4 of Article 213a (2) and Item 1 of Article 214 (2) of the *Criminal Code*] and upon assignment by or in execution of a decision of a group for racketeering or an organised criminal group [Item 5 of Article 213a (2) and Item 1 of Article 214 (2) of the *Criminal Code*].

Despite certain differences at a theoretical level, in practice it is very difficult to differentiate, on the one hand, blackmail committed by two or more persons and blackmail committed by an organisation or group and, on the other hand, blackmail committed upon assignment by an organisation or group and blackmail committed upon assignment by or in execution of a decision of an organised criminal group.

At the same time, however, **the penalties** for blackmail committed by an organisation or group or upon assignment by an organisation, person or group (imprisonment for a term from five to fifteen years and a fine ranging from BGN 5,000 to BGN 10,000, the court having an option to order confiscation of up to one-half of the offender's property) are **considerably severer** than the penalties for blackmail committed by two or more persons or upon assignment by or in execution of a decision of a group for racketeering or an organised criminal group (imprisonment for a term of two to eight years and a fine ranging from BGN 3,000 to BGN 5,000).

It appears from the comparison of the sanctions under the various aggravated provisions that the organisation or group under Item 3 of Article 213a (3) poses a considerably higher degree of social danger than the group for racketeering or the organised criminal group. It is not clear, however, what kind of organisation or group would, on the one hand, be not a group for racketeering or an organised criminal group and, on the other hand, the acts committed by its members or upon its assignment would pose a greater danger to society.

The multiple possible interpretations and the unclear correlation between the different provisions create prerequisites for conflicting and inconsistent case law and imposition of inadequate penalties. Such ambiguous provisions should be remedied, and in this particular case it is recommended to keep only the aggravated cases where the act has been committed upon assignment by or in execution of a decision of a group for racketeering or an organised criminal group.

1.5.10. Organisation or group for taking motor vehicles without lawful authority

According to Article 346 (6) of the *Criminal Code*, the taking of a motor vehicle without lawful authority is more severely punishable if committed upon assignment by an organisation or group. The same severer penalty, however, also applies to the cases where the taking is committed upon assignment by or in execution of a decision of an organisation or group for racketeering or an organised criminal group.

The difference between organisation, group and organised criminal group is unclear. Unlike other similar provisions in the Special Part of the *Criminal Code*, the penalty provided for under the two aggravated provisions for the taking of a motor vehicle without lawful authority is one and the same, and the terminological imprecision does not create prerequisites for different punishment of one and the same criminal conduct.

Nevertheless, with a view to achieving terminological consistency, it is recommended to revise the provision and to leave only the aggravated cases for an offence committed upon assignment by or in execution of a decision of an organised criminal group.

1.5.11. Organisation or group under Article 356b of the Criminal Code

According to Article 356b (2) of the *Criminal Code*, if an organisation or group has been formed with the aim under Article 356b (1), the penalty is imprisonment for a term of one to six years, and the persons who form and direct such an organisation or group are liable to imprisonment for a term of three to eight years but not longer than the penalty provided for the relevant offence. The aim of the organisation or group, however, is not quite clear because Article 356b (1) provides for a penalty for a foreign national who prepares, within the territory of the Republic of Bulgaria, to commit abroad any of the offences listed in the provision (trafficking in narcotics and certain offences endangering the general public). A literal interpretation of the wording invites the conclusion that the aim of the group is to commit abroad any of these offences.

Nor is it clear who is liable under the first proposition of Article 356b (2). The penalty under the second proposition applies to the persons who form and direct the organisation or group, but a subject of the sanction under the first proposition is not specified. Since the penalty under the first proposition is less severe, it is logically to apply to the rank-and-file participants in the group.

More favourable consequences upon voluntary renouncement are not provided for in respect of the organisation or group under Article 356b (2).

Most of the offences provided for in Article 356b (1) are punishable by imprisonment for a term exceeding three years or by a severer penal sanction, i.e. the forming of an organisation or group with the aim of preparing for the commission of such offences abroad, if that organisation or group consists of three or more persons,

will meet the criteria for an organised criminal group. The penalty under Article 356b (2) are identical with those for an organised criminal group in respect of the participants (imprisonment for a term of one to six years), but they are slightly less severe in respect of the persons who form and direct the organisation or group (imprisonment for a term of three to eight years regarding the group under Article 356b (2) and imprisonment for a term of three to ten years regarding the organised criminal group). Unlike the organised criminal group, however, the penalty in the case of an organisation or group under Article 356b (2) is subject to an additional limitation: it may not exceed the sanction provided for the particular offence which the organisation or group intends to commit.

Additional problems arise from the fact that the offences which the group under Article 356b (2) prepares to commit include the production and distribution of narcotic drugs and even the forming, directing and participation in a group for the growing of opium poppy and coca bush plants or plants of the genus *Cannabis* or for the manufacture, production or processing of narcotic drugs. The forming, directing and participation in such a group is covered in other provisions of the Special Part of the *Criminal Code* and their inclusion in Article 356b (2) is unnecessary.

The entire wording of Article 356b (2) is not quite clear, there is no case law on it, and it should be revised or right away repealed because a large part of the acts it describes are covered by other provisions of the Special Part of the *Criminal Code*.

2. COLLECTING EVIDENCE OF ORGANISED CRIMINAL ACTIVITY

All means and methods provided for in the *Criminal Procedure Code* are employed to prove an organised criminal group and its activity, as are the provisions of the *Law on the Special Intelligence Means*, which regulate the application of specific operational techniques (surveillance, wiretapping, following, penetration, marking and monitoring correspondence and computerised information, controlled delivery, trusted transaction and investigation through an undercover officer) and the respective technical devices. The provisions of the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*, the *Law on Combating Trafficking in Human Beings*, the *Law on the Electronic Communications*, the *Law on the Protection of Classified Information*,⁴³ the *Law on the Forfeiture to the State of Assets Acquired from Criminal Activity*, the *Convention for the Protection of Human Rights and Fundamental Freedoms* etc. are also relevant to the process of gathering evidence.

The **general provisions** on criminal procedure (Articles 104 to 107 of the *Criminal Procedure Code*) are applicable to organised criminal activity regardless of its specificity. These provisions cover the subject and burden of proof, the evidence, the means of proof, the methods of proving, the rules for collecting and verifying evidence etc.⁴⁴ They are binding on the pre-trial authorities and the court, which collect and evaluate the evidence necessary for establishing the objective truth using all means of proof provided for in the law: physical, oral and written (Articles 114 to 135 of the *Criminal Procedure Code*), as well as the traditional methods of proving (Articles 136 to 171 of the *Criminal Procedure Code*). Along with that, the

⁴³ The law exempts from the conduct of background investigation judges, prosecutors, lawyers and investigating magistrates, who have access by right to classified information of all levels for the duration of holding office respecting the “need to know” principle, where the information is for the purposes of the case concerned only (Item 7 of Article 39 (1) and Item 3 of Article 39 (3) of the *Law on the Special Intelligence Means*). In Judgment No. 6 of 18 November 2004 in Constitutional Case No. 7 of 2004 (promulgated in the State Gazette No. 104 of 26 November 2004), the Constitutional Court called attention to the fact that court is best positioned to verify the need of such access and the scope of information that should be accessible and decreed: “Upon the exercise of public powers conferred for the protection of rights, there is also a risk of abuse. The judicial discretion as to whether access should be granted to information, which constitutes an official secret and contains personal data ensures that the law will not be violated. In order for the court to make a decision, the request for access to an official secret by an investigating magistrate or a prosecutor must be reasoned.”

All persons, in the course of or in connection with the exercise of their constitutional right to defence, are granted access to classified information of all levels for the time needed for the exercise of their right to defence and respecting the “need to know” principle (Article 39a of the *Law on the Special Intelligence Means*).

⁴⁴ Chapter Eleven “General Provisions” in Part Two “Establishment of Evidence” of the *Criminal Procedure Code* reproduces fundamental principles of criminal procedure, and these general provisions are characterised by certainty and stability and, in formally legal terms, satisfy the requirements for a fair trial. They apply to the subject and burden of proof and define evidence, means of proof and methods of proving, the procedure for collecting and verifying evidence and the actions performed by delegation or in another geographical jurisdiction.

peculiarities of the organised criminal group and of other related criminal acts: organisation, structuredness, availability of resources, application of methods to neutralise the law-enforcement authorities, a transnational element, witnesses fearing retribution – impede the investigation and necessitate the use of specific means of proof and methods of proving as well.⁴⁵ This raises the question about the adequacy of the applicable legal framework and the effectiveness of the means of proof and methods of proving applied to collect evidence in organised crime cases.

The legal framework of the specific means of proof and methods of proving for the collection of evidence in Bulgarian criminal procedure law has been evolving since the 1990s (the first *Law on the Special Intelligence Means* was adopted in 1994, and in 1997 it was superseded by a second law, which is still in force; the new *Criminal Procedure Code* entered into force on 29 April 2006; and further important legislative amendments were undertaken in the period 2008-2011). The reforms have led to progress in certain areas, but in other they did not achieve the expected results. Some researchers and legal practitioners argue that the current framework is more or less adequate, provides guarantees of the right to a fair trial and conforms to the principal international and European standards. However, sufficient professional skills for its application are not available and there is no effective control over the use of individual procedural techniques (above all of special intelligence means). In the opinion of others, the legal framework on collecting evidence is out-dated, does not meet the requirements, and needs an overhaul.

Regardless of the mixed assessments of its quality, the current framework on the means of proof and methods of proving under the new *Criminal Procedure Code* (amended and supplemented in 2008, 2010 and 2011) is rather detailed. It covers the main means of proof used for establishing oral, physical and written evidence (Articles 115 to 135 of the *Criminal Procedure Code*). The methods of proving in criminal procedure are also described in detail: interrogation of witnesses and expert witnesses, inspection, search, seizure, investigative reconstruction, identification of persons and objects, and special intelligence means (Articles 136 to 177 of the *Criminal Procedure Code* and the provisions of the *Law on the Special Intelligence Means*). Considering the focus of this study on proving an organised criminal group, the framework of the most frequently used instruments in this sphere will be discussed below: **interrogation of protected witnesses and expert witnesses** and **special intelligence means**.

2.1. INTERROGATION OF PROTECTED WITNESSES AND EXPERT WITNESSES. TYPES OF PROTECTION

Witness testimony figures prominently within the framework of oral means of proof. The law provides that all facts, which the witness has perceived and which contribute to establishing the objective truth, may be ascertained by testimony. Considering the specificity of organised crime, the testimony of the

⁴⁵ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 108-109.

so-called protected witnesses merits special attention.⁴⁶ In theory and practice, the “protected witness” is viewed as a key procedural instrument in proving an organised criminal group.⁴⁷ Witness protection is also an important element of combating transnational organised crime and is provided for in international legal instruments such as the UN Convention against Transnational Organized Crime, in force for Bulgaria as from 29 September 2003,⁴⁸ European Union legislation, including Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organized crime⁴⁹ and Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime, as well by a number of instruments of the Council of Europe, etc.⁵⁰

The *Criminal Procedure Code* provides for the protection of two groups of witnesses: one group protected by **personal physical guarding** by the authorities of the Ministry of Interior and another group protected through **non-disclosure of the witnesses’ identity** [Items 1 and 2 of Article 123 (2)], called in practice ‘anonymous witnesses’. The protection of the second group, together with some additional elements, is furthermore applicable to an undercover officer where questioned in a witness capacity. A number of special laws provide for additional witness protection for specified categories of persons: persons at risk in relation to criminal proceedings (*Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*) and persons who have agreed to cooperate for the detection of

⁴⁶ Witness protection was first regulated in 1997 by the insertion of a new Article 97a in the old Criminal Procedure Code. Subsequently, this regulation was elaborated in the new Criminal Procedure Code and in some special laws.

⁴⁷ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 110 ff.

⁴⁸ “Article 24

Protection of witnesses

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.
2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
 - (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
 - (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.
3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.
4. The provisions of this article shall also apply to victims insofar as they are witnesses.”

⁴⁹ For the purposes of the Resolution, “witness” means any person who possesses intelligence or information regarded by the competent authority as being material to criminal proceedings and liable to endanger that person if divulged.

⁵⁰ For further details, see Резюме на законодателно проучване на тема: Защита на свидетеля в законодателството на европейските страни и САЩ (януари, 2004) [Summary of Legislative Research on the Subject of Witness Protection in the Legislation of the European Countries and the US (January 2004)], <http://parliament.bg/students/index.php?action=displays&id=148>

perpetrators of trafficking in human beings (*Law on Combating Trafficking in Human Beings*).

The wording of the current framework invites the conclusion that the so-called “protected witness” is a witness who enjoys either or both types of protection under the *Criminal Procedure Code* or protection provided by virtue of a special law.

2.1.1. Witness protection under the Criminal Procedure Code

The legal status of the protected witness combines the general provisions outlining the legal status of the witness in general and the special rules whose application is limited to protected witnesses. The general rules define the persons who cannot be witnesses or who can refuse to testify, the rights and duties of the witnesses and the circumstances on which the witness is not obliged to give evidence. These rules apply to the extent that their application is not excluded or modified by the special provisions.

On the basis of this understanding, several key premises can be formulated in connection with the applicability of the general rules.

First, the persons who cannot be witnesses cannot be protected witnesses, either:

- the persons who have participated in the same criminal proceeding in another procedural capacity with the exception of the accused in respect of whom the proceeding has been terminated or has ended with an enforceable sentence; the victim, the private accuser, the civil plaintiff, the civil respondent, the certifying witnesses, as well as personnel of the Ministry of Interior or of the Military Police who were present when the main investigative procedural actions were performed (including the persons who performed actions during the investigation and the judicial inquiry, even in the cases where the reports on the actions taken by such personnel have not been drawn up under the terms and according to the procedure provided for in the *Criminal Procedure Code*);
- the persons who, owing to physical or mental deficiencies, are incapable of perceiving correctly the facts relevant to the case or to testify truthfully about these facts.

Secondly, the possibility to refuse to testify nominally applies to a protected witness as well, if he or she is a spouse, an ascendant, a descendant, or a sibling of the accused or is a *de facto* cohabitee with the accused. At the same time, it is logical to assume that the refusal to testify excludes the protection measures. The scope of application of the possible refusal to testify is furthermore modified considering the type of special protection. Both forms of protection apply when the person has already accepted the role of a witness. This means that either there is no ground to refuse to testify or that the witness has decided to waive that ground. In case the person refuses to testify on any of the grounds listed above, the protection measures should be cancelled. In the second form of

protection, in the cases when the witness whose identity is concealed is an undercover officer, the law prohibits his or her interrogation if there are sufficient grounds to assume that a credible risk to the life and health of the officer and of a specified circle of persons close to him or her has arisen or is likely to arise as a result of the testifying, as well as where this would impede the performance of his or her functions [Article 123a (1) of the *Criminal Procedure Code*]. For this group of protected witnesses, the mandatory rule prohibiting their interrogation where the abovementioned grounds apply deprives them of their right to decide whether or not to refuse to testify. In this case, the need to protect the witness at risk whose identity is concealed comes to the fore.

Thirdly, the protected witness enjoys all rights available to any other witness: right to refuse to testify on any questions the answers to which would incriminate himself or herself, his or her ascendants, descendants, siblings or spouse or a person with whom the witness is a *de facto* cohabitee, combined with a prohibition to be questioned regarding any circumstances, which have been confided to him or her in his or her capacity as defence counsel or representing counsel; a right to consult notes in respect of numbers, dates etc. which the witness carries with him or her and which concern his or her testimony; right to receive compensation for the loss of a working day and to be reimbursed for all expenses incurred, to seek revocation of any acts which infringe his or her rights and legitimate interests, to consult a lawyer if the witness assumes that an answer to a question affects his or her rights in connection with the circumstances on which the witness is not obligated to testify.

Fourthly, the duties of the witness under Article 120 of the *Criminal Procedure Code* in connection with his or her appearance and testifying are duties of the protected witness as well. However, they undergo a number of modifications due to the special protection to which such a witness is entitled and the specific form of this protection: personal physical guarding or non-disclosure of his or her identity. A special procedure for summoning and questioning applies to witnesses whose identity is concealed.

The special rules in the *Criminal Procedure Code* apply also to the grounds and the procedural prerequisites for application of the witness protection measures, the procedure according to which these measures are taken and arranged, as well as the special procedure for the participation of a protected witness in a criminal proceeding.

- **Grounds for application of witness protection measures**

Witness protection measures in a criminal proceeding may be resorted to only if specified circumstances apply. Article 123 (1) of the *Criminal Procedure Code* requires **sufficient grounds** to assume that a credible risk to the life and health of the witness, of his or her ascendants, descendants, siblings, spouse or persons with whom the witness is in a particularly close relationship, has arisen or is likely to arise as a result of the testifying. Regarding the last-mentioned category of persons, it is held that these are the persons with whom the witness lives in the same household. For lack of a legal definition, however, the assessment is on a case-by-case basis.

For the granting of protection, it must be established that **the risk is tangible, objectively existing, or there is an immediate possibility for it to arise and it is related to the participation of the witness in the criminal proceeding.** Providing protection to witnesses exposed to an actual or potential risk is intended to ensure the personal security, health and life of such witnesses and of the persons close to them and in this way to afford them an opportunity to testify freely and impartially, without feeling endangered or compelled to act in one way or another (to testify inaccurately, to alter or withdraw their testimony etc.) due to pressure or fear. Along with that, securing reliable and truthful witness testimony contributes to an effective and fair criminal procedure and is often decisive for proving criminal activity and for punishing the offenders.

Considering the importance of the problems and the need to develop a common policy in relation to witness protection, the Committee of Ministers of the Council of Europe adopted *Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence* in which it defined a list of general principles by which member states should be guided (Section II). Considering the increasing risks that witnesses will be intimidated in the area of organised crime and the special role of witness testimony in detecting and proving this type of criminal activity, the Committee of Ministers also recommends measures which member states should take in relation to organised crime (Section III). For the purposes of the Recommendation, definitions are formulated for **“witness”, “intimidation”, “anonymity” and “collaborator of justice”**.⁵¹

In connection with the need to provide protection to a witness at risk, legal doctrine recommends to verify all allegations of the person regarding the existence of a risk, which should be supported and confirmed by data collected through other means of proof, so as to arrive at a reasoned conclusion about the need to decree a protection measure.⁵²

⁵¹ Witness: any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition also includes experts as well as interpreters.

Intimidation: any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever. This includes intimidation resulting either from the mere existence of a criminal organisation having a strong reputation of violence and reprisal, or from the mere fact that the witness belongs to a closed social group and is in a position of weakness therein.

Anonymity: the identifying particulars of the witness remain totally unknown to the defendant.

Collaborator of justice: any person who faces criminal charges, or was convicted, of having taken part in an association of criminals or other criminal organisation of any kind, or in organised crime offences but agrees to co-operate with criminal justice authorities, particularly by giving information about the criminal association or organisation or any criminal offence connected with organised crime.

⁵² Недялкова, Е., Правна регламентация на защитата на свидетеля според българския НПК, законодателствата на САЩ, европейски и други държави [Nedyalkova, E., Legal Regulation of Witness Protection according to the Bulgarian Criminal Procedure Code, the Legislation of the US, European and Other States], in: *Law Journal of NBU*, Year III, 2008, № 4, available at: http://www.nbu.bg/PUBLIC/IMAGES/File/departments/law/Spisanie/4_2008/Zashtita_SVIDET_ENredakcia_10_2009.pdf

Along with the assessment of the circumstances warranting the risk to which the witness is exposed, some authors argue that consideration should also be given to whether the testimony of the witness refers to **significant facts classifying the act as a criminal offence and whether it contributes to the clarification of the circumstances in the case.**⁵³

A similar opinion is also found in Interpretative Judgment No. 2 of 16 July 2009 in Interpretative Case No. 2 of the General Assembly of the Criminal College of the Supreme Court of Cassation for the Year 2009. The Court invokes *Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe concerning intimidation of witnesses and the rights of the defence* and holds that “the competent national authority should admit a witness whose identity is concealed after hearing the parties and if it is found that the life and freedom of the person involved or of the persons close to him or her are seriously threatened, as well as that the witness appears to be credible and **his or her evidence is likely to be significant for the case**”.

Even though the assessment of this circumstance is not formulated as an express requirement in the *Criminal Procedure Code*, it is necessary when warranting protection measures since the latter often result in complication of the procedure for gathering evidence, restricting certain rights and freedoms of the witness and, where necessary, of persons close to him or her, as well as various expenses. Arguments in favour of such an approach can also be derived from the fact that the protection of a witness with concealed identity restricts the rights of the accused and his or her defence counsel. Neither the accused nor his or her defence counsel can participate directly in the collection and verification of evidence and above all in the verification of the testimony of the anonymous witness. They do not have information about the protected witness's identity and cannot ask questions about that identity or questions that would disclose that identity etc. This constitutes a departure from the principle of equal procedural rights of the parties in the criminal proceeding [Article 12 (2) of the *Criminal Procedure Code*]. There is also a departure from the fundamental constitutional principles of administration of justice, according to which “the courts shall ensure equality and adversarial conditions to the parties in a judicial procedure” and “judicial proceedings shall ensure the establishment of the truth” [Article 121 (1) and (2) of the Constitution of the Republic of Bulgaria]. In connection with the safeguarding of these principles, the Constitutional Court held that “the Constitution admits only such limitations to constitutionally recognised rights as are warranted from the point of view of particularly significant public interests: Judgment No. 5 of 1992 in Constitutional Case No. 11 of 1992, Judgment No. 7 of 1996 in Constitutional Case No. 1 of 1996, Judgment No. 18 of 1997 in Constitutional Case No. 12 of 1997, Judgment No. 12 of 2003 in Constitutional Case No. 3 of 2003.”⁵⁴

By virtue of the constitutional provisions and the international commitments of Bulgaria, legislation should take account of the need to balance the public interest

⁵³ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, p. 120.

⁵⁴ Judgment No. 6 of 18 November 2004 in Constitutional Case No. 7 of 2004 (promulgated in the State Gazette No. 104 of 26 November 2004).

in countering crime and the rights of the accused, including the right to a fair trial. Lest the non-discrimination and the rights of the participants in the procedure be violated, the protection of a witness and in particular of a witness whose identity is concealed is granted only as a **provisional measure** and as an exception in the process of gathering evidence regarding the investigated criminal activity. Judging from case law, however, there is a trend to increasingly apply witness protection measures by non-disclosing the witnesses' identity.

- **Types of protection under the Criminal Procedure Code**

The two main types of protection under the *Criminal Procedure Code* are personal physical guarding by the authorities of the Ministry of Interior and non-disclosure of the witness's identity. They can be applied separately and jointly. Protection through non-disclosure of the witness's identity is applied only to the witness, whereas personal physical guarding may also be applied to the persons close to the witness, which are listed in the law [Article 123 (3) of the *Criminal Procedure Code*]. A necessary prerequisite is the consent of the persons to be protected or of their legitimate representatives.

The law also provides for additional protection measures. With the consent of the protected witness (in both types of protection), special intelligence means may be used for protecting the health and life of the witness and of the persons close to him or her. The protected witness or the persons close to him or her who are listed in the law may be included in the protection programme in line with the terms and procedure established by the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*. The prosecutor or the reporting judge may propose this within 30 days after the protection measure is taken [Article 123 (8) of the *Criminal Procedure Code*].

The access to the witness is also regulated in connection with his or her protection. The *Criminal Procedure Code* **restricts the direct access to the protected witness**. The right to direct access is limited to the respective pre-trial authorities and the court. The defence counsel and the representing counsel have such a right only if they have called the witness [Article 123 (5) of the *Criminal Procedure Code*].

The access to the protected witness is not described with sufficient precision. The content of the notion of "direct access" is not specified and the scope of application of the provision is not defined, which may lead to disparate interpretation and practical application. It is logical to conclude that this provision applies to all types of protected witnesses. At the same time, the general rules for interrogating witnesses protected by physical guarding do not automatically provide for restricting the access to them unless, according to the pre-trial authorities and the court, such restriction is necessary to ensure their protection.

The analysis of the legal framework of protected witnesses in the *Criminal Procedure Code* invites the conclusion that the provisions on the restricted access represent **an additional safeguard ensuring the protection of the witness** and are applicable *vis-à-vis* both types of protected witnesses. However, their scope of application nevertheless needs to be particularised.

- **Procedure for taking and arranging protection measures**

Witness protection measures may be undertaken in each phase of the criminal proceeding, where circumstances warranting the presumption of the existence of an actual or impending credible risk arise. These measures are taken by the prosecutor, the reporting judge or the court on their initiative or on a motion by the witness. The consent of the witness to whom the protection is to be applied is an unconditionally required procedural prerequisite. According to the opinion expressed above, the adjudicating authority must also determine whether the circumstances in the case can or cannot be clarified without the testimony of the witness. The act on the provision of protection to the witness must state: the issuing authority, the date, time and place of issue, the circumstances which warrant the provision of protection, the type of the measure taken and, in the cases of non-disclosure of the identity of the witness, also his or her personal data, the identification number assigned, as well as the signatures of the person and the respective authority. In all cases, if the grounds for protection apply, the law requires that the measures be taken **immediately**.

The amendments of the *Criminal Procedure Code* of 2010 detailed the rules on the procedure for **protection of an undercover officer through non-disclosure of his or her identity**. In this case, the investigation through an undercover officer as a special intelligence means must have been authorised in advance by the president of the competent court (district court, military court or the specialised criminal court) or by a vice president expressly empowered by the president. The Minister of Interior or a deputy minister empowered in writing by the Minister, or, respectively, the Chairperson of the State Agency for National Security or a deputy chairperson empowered in writing by the Chairperson have a leading role in the implementation of the investigation through an undercover officer. Pursuant to the authorisation of the competent court, this official orders in writing the implementation of investigation through an undercover officer. The head of the entity, which arranges and implements the investigation through an undercover officer, or a person authorised by him or her determines the possibility of a risk arising that warrants a prohibition of questioning of the officer (under Article 123a (1) of the *Criminal Procedure Code*) and notifies in writing the supervising prosecutor and the court. In this case the prosecutor and the court are not vested with any discretionary power whatsoever. They do not have at their disposal any personal data of the undercover officer and can obtain them only after a reasoned written request to the head of the entity, which arranges and implements the investigation through an undercover officer. In response to the request, a written authorisation for disclosure of the identity is granted but only after establishing that no risk under Article 123a (1) of the *Criminal Procedure Code* will arise. In such case, the supervising prosecutor and the court should take all possible measures not to disclose the undercover officer's identity. Under the current framework of enhanced protection of the identify of the undercover officer, however, the entities which arrange and implement this operational technique have at their disposal the entire information and a discretionary power as to whether to provide it to the supervising prosecutor and the court. Although this arrangement is motivated by the need to guarantee the officer's safety and the confidentiality of the investigation, it seriously impairs the independence of the judiciary and leaves the impression that the legislator places greater trust in the specialised entities than in the judicial authorities.

- **Specific procedural rules ensuring the attendance and interrogation of anonymous witnesses**

The *Criminal Procedure Code* provides for a **special procedure for interrogating witnesses whose identity is concealed and undercover officers in their witness capacity**. This procedure does not apply to witnesses whose protection is limited to personal physical guarding. Such witnesses are interrogated according to the standard procedure. The provisions describing the standard procedure also apply to witnesses whose identity is concealed and to undercover officers, but only in compliance with the special rules or in cases, which are not covered by the special procedure. The applicable general rules include: the duty of the interrogating authority to invite the witness to testify in good faith, to warn him or her of the responsibility for refusing to do so, for giving false testimony or withholding any circumstances, as well as to clarify to the witness the circumstances under which he or she is not obliged to testify according to Article 121 of the *Criminal Procedure Code*; the right of the witness to refuse to testify; the duty of the witness to promise to set forth everything he or she knows in connection with the case in good faith and accurately and to set it forth speaking freely; the possibility for the witness to be asked questions so as to amplify his or her explanations or to eliminate any omissions, ambiguities and contradictions; the requirement that the questions must be clear, to-the-point, relevant to the circumstances in the case and not to imply the answer or to lead to a particular answer (Article 139 of the *Criminal Procedure Code*).

Because of the concealed identity, which these two types of witnesses share in their status, they are called **anonymous witnesses** in literature and in practice, and this also conditions the similarity in the rules for their interrogation. Despite the numerous common features, the interrogation of the witness whose identity is concealed and the one of the undercover officer are regulated separately. The distinctions arise from the specificities in the procedure for the use, arrangement and implementation of special intelligence means and in particular of the investigation through an undercover officer as one of the available operational techniques. This gives grounds to recommend that the rules on the interrogation of witnesses with concealed identity be applied, *mutatis mutandis*, to all matters related to the interrogation of undercover officers that are not covered by special provisions.

By virtue of Article 178 (9) of the *Criminal Procedure Code*, anonymous witnesses are summoned for interrogation according to a special procedure: the attendance of witnesses with concealed identity is ensured by the prosecutor, whereas the attendance of an undercover officer is ensured by the head of the entity implementing the investigation through an undercover officer or by a person duly authorised by the head of this entity.

The rules applicable to the interrogation of anonymous witnesses, intended to conceal their identity, require: (1) that the identification number of the witness with concealed identity and of the undercover officer be entered in the interrogation record *in lieu* of the respective person's personal data [sentence two of Article 139 (1) of the *Criminal Procedure Code*]; (2) that the questioning of such witnesses be conducted in a manner precluding the disclosure of their identity [Article 280 (5)

Box 1. Secondary legislation on ensuring the attendance of a witness whose identity is concealed

The procedure to be followed by the prosecutor to ensure (through the chief of the respective police department of the Ministry of Interior and the operative officers designated by him) the attendance of a witness whose identity is concealed is described in detail in a special instruction.⁵⁵ According to the instruction the president of the district court should provide the respective authorities of the Ministry of Interior with special premises for technical equipment and guarding of the protected witness (Article 12). The instruction covers other important matters as well, such as: modification of the protection measure with the consent of the protected person by the authority, which has ordered the measure (where the identity of the protected witness is disclosed – Article 9); revocation of the measure (at the request of the protected person or when it is no longer necessary); procedure applicable to the Ministry of Interior, the prosecution service, the investigating magistracy and the court as regards the keeping of special registers in which all documents received and drawn up on the occasion of and in connection with the taking and implementing a witness protection measure should be filed; delivery of the original records of the interrogation of a protected witness from one authority to another personally by the authority who keeps them in a separate sealed envelope etc. The instruction was issued while the old *Criminal Procedure Code* was in effect and although it is in force, it needs updating and synchronising.

Another instruction, also issued before the adoption of the new *Criminal Procedure Code*, regulates witness protection. It replicates some provisions of the first instruction cited above, including the ensuring of the attendance of a protected witness, the special registers for cases involving protected witnesses and for cases related to organised criminal groups⁵⁶ etc.

The review of the secondary legislation shows that it needs to be standardised, brought into conformity with the provisions of the new *Criminal Procedure Code*, and updated and detailed taking into account the positive and negative experience from its application so far, the foreign good practices and the evolution of legislation.

⁵⁵ Instruction on the Interaction among the Authorities of the Ministry of Interior, the Investigating Magistracy, the Prosecutor's Office and the Court for the Implementation of Witness Protection under Article 97a and Preparation and Safekeeping of Physical Means of Proof under Article 111 (2) and Article 191 (3) of the Criminal Procedure Code, issued by the Ministry of Justice and Legal European Integration, the Ministry of Interior, the Prosecutor General's Office of the Republic of Bulgaria and the National Investigation Service. (The Instruction was issued in pursuance of § 74 of the Transitional and Final Provisions of the Law amending and supplementing the old Criminal Procedure Code, adopted in 1997).

⁵⁶ Instruction No. 1 of 22 March 2004 on the Work and Interaction of the Preliminary Investigation Authorities, issued by the Prosecutor's Office of the Republic of Bulgaria, the Ministry of Interior and the National Investigation Service (promulgated in State Gazette No. 30 of 13 April 2004, corrected in State Gazette No. 37 of 4 May 2004, amended in State Gazette No. 63 of 4 August 2006) governs the keeping on special record of the cases with protected witnesses and the organised criminal group cases, with the regional prosecution offices keeping a special record of the cases with witnesses in respect of whom protection measures have been taken, and the district prosecutor's offices and the Sofia City Prosecutor's Office keeping a special record of the cases with witnesses protected under the Criminal Procedure Code and the cases instituted against organised criminal groups.

of the *Criminal Procedure Code*], thus excluding the application of the rules for confrontation in respect of the witnesses with concealed identity [Article 143 (4) of the *Criminal Procedure Code*]; (3) that anonymous witnesses remain at the disposal of the court on suitable premises outside the courtroom⁵⁷ [Article 280 (3) of the *Criminal Procedure Code*], meaning that **the parties in the trial may not be present at the interrogation**,⁵⁸ which is conducted by the court *in camera*.

The special rules of the *Criminal Procedure Code* obligate the pre-trial authorities and the court, when questioning a witness whose identity is concealed, to take **all possible measures** for non-disclosure of his or her identity, including when the witness is questioned by videoconference or telephone conference [Article 141 (1) of the *Criminal Procedure Code*].

With the progress of technologies, interrogation by videoconference and telephone conference has become an up-to-date method of collecting and verifying evidence and is successfully used in the technologically advanced countries, including a number of EU Member States. These telecommunication means are particularly appropriate for interrogating anonymous witnesses because they enable an easier concealment of their identity. In most general terms, videoconference is defined as “two-way interactive virtual communication using electronic equipment and

⁵⁷ This is a departure from the standard procedure for interrogating witnesses during the judicial inquiry, whereupon the witnesses questioned may not leave the courtroom prior to the completion of the judicial inquiry without the permission of the court granted after a hearing of the parties.

⁵⁸ This understanding prevails in case law. Judgment No. 234 of 4 August 2011 in Cassation Criminal Case No. 1314 of the Criminal College, Second Criminal Department of the Supreme Court of Cassation, for the Year 2011 holds as well-founded an objection (found to be well-founded by the court of intermediate appellate review instance as well) alleging a breach of the rule of Article 142 (2) in conjunction with Article 142 (1) of the Criminal Procedure Code, which found expression in the interrogation of the protected witness during the trial with the participation of the prosecutor. The reasons of the Court read: “Unlike pre-trial proceedings, where the prosecutor is a central investigating authority and is accordingly vested with powers to exercise guidance and control, which enable him or her to participate or even personally to conduct the interrogation of the protected witnesses in the absence of the defence, during the trial the prosecutor has the capacity of a party enjoying rights equal to the rights of the defence. Beside this, the important intended purposes of the trial include offsetting the limitations which the defence sustained in the pre-trial phase for the purpose of guaranteeing a fair trial, considered in the aspect of equality of the parties under Article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms as well as especially in the aspect under Article 6, paragraph 3 (d) of the Convention for the Protection of Human Rights and Fundamental Freedoms, related to ensuring an adequate possibility to verify witness testimony in conformity with adversarial rules. This is particularly relevant to the cases concerning the testimony of anonymous witnesses or absent witnesses, as well as explanations of defendants on the basis of which – solely or decisively – a sentence of conviction is rendered. This standard, developed in the case law of the European Court of Human Rights (see development of the case-law of the European Court of Human Rights in five cases against the Netherlands: Kostovski (10 November 1989), Doorson (25 March 1996), Van Mechelen and Others (23 April 1997), Kok (1990), Visser (14 February 2002), as well as in *Isgro v. Italy* (19 February 1991), *Ludi v. Switzerland* (15 June 1992), *Biritus v. Lithuania* (28 March 2002), *P.S. v. Germany*, *Luca v. Italy* (2001), *Krasniki v. the Czech Republic* (28 February 2006), *Al-Khawaja and Tahery v. UK* (20 January 2009) etc.), should be strictly observed with a view to honouring the obligations of Bulgaria as a Contracting Party to the Convention for the Protection of Human Rights and Fundamental Freedoms to ensure an effective remedy under Article 13 in conjunction with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms considering the specificity under the instant case.”

network systems for the transmission of audio, video and data between remote end users”.⁵⁹

Insofar as the protection measures substantially limit the rights of the parties in the procedure and above all the rights of the defendant and, respectively, the accused in respect of collecting and verifying evidence, possibilities offsetting these limitations have been introduced. A special rule (Article 141 (2) of the *Criminal Procedure Code*) provides that copies of the records of the interrogation of the witness, without the witness's signature, should be presented immediately to the accused and to his or her defence counsel (in the pre-trial proceeding) and to the parties (during the trial), who can pose questions in writing to the witness.

Such special provisions are missing from the procedure for the interrogation of an undercover officer. However, the commonality in the status of the two categories of witnesses, highlighted above, gives grounds to recommend that the applicability of these provisions be extended to the undercover officers as well, which should be legislated accordingly.

The amendments to the *Criminal Procedure Code* effective 28 May 2010 made it possible to interrogate a witness who is in Bulgaria, too, by **videoconference and telephone conference** [Article 139 (8) and (9)]. Until the entry into force of these amendments, the *Criminal Procedure Code* provided for the interrogation by videoconference or telephone conference only within the context of the mutual legal assistance in criminal matters: interrogation by videoconference or telephone conference of a witness or an expert witness in a criminal proceeding whose whereabouts are in the Republic of Bulgaria, interrogation with the participation of the accused, as well as of a person who is abroad (Article 474); the procedure for the submission of a request from another State or international court (Article 475) and for granting the request of another State or international court (Article 476). The international cooperation for the interrogation by videoconference or telephone conference is described in detail in the *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters* (Articles 9 and 10).

Presently, according to the special procedural rules of Articles 141 and 141a, both types of anonymous witnesses are questioned by video conference and telephone conference through voice alteration and by videoconference through alteration of the witness's image as well [Article 141 (3)]. Prior to the interrogation of a witness whose identity is concealed, a judge of the first-instance court exercising jurisdiction over the whereabouts of the witness certifies that the person to be interrogated is the one who has been assigned the identification number by the act on witness protection [under Item 6 of Article 123 (4)]. In the case of an undercover officer, the head of the entity which arranges and implements the investigation through an undercover officer or a person empowered by that head

⁵⁹ Наръчник относно разработване и въвеждане на механизми за координация и взаимодействие в и между органите на съдебната власт във връзка с делата от особен обществен интерес [Handbook on the development and implementation of mechanisms for coordination and interaction within and between the bodies of the judiciary in relation to the cases of high public interest], Supreme Judicial Council, Sofia, 2010, p. 12.

attests that the person to be interrogated is the one who has been assigned the relevant identification number [under Article 174 (6)]. In the latter case, the request for the use of the undercover officer and the orders for investigation through an undercover officer and for implementation of special intelligence means by the respective entities of the Ministry of Interior or of the State Agency for National Security [under Article 174 (6) and Article 175 (2)] are attached to the interrogation record.

The procedure for the interrogation of an undercover officer is not described exhaustively. A reading of Article 141a (1) may leave the wrong impression that the undercover officer is interrogated as a witness only according to the procedure established by Article 139 (8), i.e. only by video conference or telephone conference during the trial. This impression is disproved by the provision of Article 280 (3), according to which the interrogated anonymous witnesses of both categories remain at the disposal of the court on suitable premises. Things being so, it is logical to assume that the rules of Article 141 (1) and (2) apply in respect to the questioning of an undercover officer as well.

The amendments of the *Criminal Procedure Code*, effective as from 28 May 2010, introduced a **prohibition of interrogating an undercover officer in a witness capacity** where there are sufficient grounds to assume that a credible risk to the life and health of the officer and of a specified circle of persons close to him or her is likely to arise as a result of the testifying, as well as if this would impede the performance of his or her functions [Article 123a (1)].

The evidential value of the testimony of a witness whose identity is concealed is limited by the principle that the charge and the sentence cannot be based solely on their testimony. The purpose is to offset the limitations of the rights of the participants in the criminal proceeding imposed due to the need to protect the witness whose identity is concealed. After the amendments to the *Criminal Procedure Code*, effective as from 28 May 2010, this principle applies to the testimony of an undercover officer as well (Article 124). This solution, similar to the constitutional principle that no one may be convicted solely on the basis of their confession [Article 31 (2)], elaborated in the *Criminal Procedure Code*, according to which the sentence and the charge cannot be based solely on the confession of the accused (Article 116), implies that the authorities **are bound to collect other evidence as well**. Considered *per se*, these amendments may be seen as enhancing the protection of the rights of the accused and a guarantee for establishing the objective truth. They, however, should also be considered within the context of the amendments to Article 177, concerning the evidential value of the data obtained through the use of special intelligence means. According to the previous version of Article 177 (1), the charge and the sentence could not be based solely on the data obtained through special intelligence means and solely on these data and the testimony of a witness whose identity is concealed. The amendments deleted the last part, and according to the current framework the charge and the sentence cannot be based solely on the testimony of a witness whose identity is concealed or of an undercover officer, as the case may be, nor solely on the data obtained through special intelligence means, but it is admissible to **combine** the two techniques. This solution gave rise to a contest of its constitutionality. Notwithstanding the position of the Constitutional

Court,⁶⁰ that the amendment is not in conflict with the *Constitution* and the international treaties, it continues to lay itself open to criticism regarding the risks of infringements of the principles of adversarial conditions and equality of the parties and of the right to a fair trial and defence. The principal argument against the possibility of the charge and the sentence being based on a combination of the testimony of witnesses with concealed identity and data obtained through special intelligence means is the secrecy of both methods. Because of this secrecy, the remedies and guarantees for establishing the objective truth and the ability of the court to verify the evidence are all limited (the extensive use of secret sources of evidence only also increases the risk of miscarriage of justice). Passing sentences based solely on secret evidence whose source may even be one and the same poses a serious threat to human rights. In case of violation of fundamental rights, there is a possibility of lodging an application with the European Court of Human Rights and obtaining a judgment against the State. The potential negative effects of the new legislative solution, outlined above, may also have an adverse impact on the effective fight and punishment of organised crime. All this necessitates a reconsideration of this solution, including by reverting to the original version of this provision or by obliging authorities to collect further evidence corroborating the charge other than the evidence collected by the two secret methods.

⁶⁰ See Judgment No. 10 of 28 September 2010 in Constitutional Case No. 10 of 2010. The Constitutional Court cites as reasons of its judgment the guarantees of a fair trial and everyone's right to defence, the independence of the judiciary and the fundamental principles of the judicial procedure: the objective truth, the equality of the parties, public examination of the case and the obligation that the acts of the administration of justice should be reasoned. The Constitutional Court does not find any justification based on the Constitution for imparting a different value or a pre-determined value to the separate types of evidence and means of proof, other than in the exception applicable to confession. It is held that the risk of tampering with physical evidence (a video recording, an audio recording, a photograph etc.) prepared according to the procedure established by the Law on the Special Intelligence Means is similar to the risk of tampering with any other physical evidence of analogous nature. The same line of reasoning is followed in respect of witness testimony "because a different degree of truthfulness of the witness whose identity is concealed compared to all other witnesses cannot be presumed without a comprehensive analysis of the evidentiary material collected." The Constitutional Court holds that the contested amendments are consistent with the international treaties to which Bulgaria is a party, viz. Article 6, paragraph 1, sentence 1, paragraph 3 (d) of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14, paragraph 1, sentence 1 and paragraph 3 of the International Covenant on Civil and Political Rights and are in the spirit of the case law of the European Court of Human Rights. Examples of the case law of the European Court of Human Rights are cited to argue that the admissibility and the assessment of evidence should be solved by national legislation and the domestic judicial authorities of the State concerned. The requirement of the Criminal Procedure Code that the testimony of witnesses whose identity is concealed be corroborated by other evidence of a different type is held as sufficient to ensure a balance of the interests of the defence with the rights of the other participants in the proceeding (including the protected witnesses). Regarding the case in which the prosecution may have invoked only a combination of the testimony of a witness (or witnesses) whose identity is concealed and the data obtained through special intelligence means from absolutely the same source of information (e.g. when the statements of persons known to the parties are wiretapped, those persons, being questioned as witnesses whose identity is concealed, prove to be the only ones relevant to the subject of proving), it is held that, in the spirit of the case law of the European Court of Human Rights the court is not supposed to pass a sentence of conviction without other evidence corroborating the charge (certainly, if the defendant is convicted, there is also the possibility of taking the case to the European Court of Human Rights). The Constitutional Court views such a development as an exception, which does not necessitate the imposition of an absolute prohibition on conviction on the basis of the combination of witnesses whose identity is concealed with special intelligence means.

2.1.2. *Interrogation of expert witnesses. Expert examination as a means of proof*

The expert examination and the interrogation of expert witnesses play an important role in the process of proving at large and in particular in the process of proving organised criminal activity. Legal doctrine abounds in views and theories about the procedural nature of expert examination. According to the prevalent opinion in Bulgarian legal doctrine, expert examination cannot be considered as evidence or means of proof but belongs to the methods of collecting and verifying evidence. Expert examination is defined as a system of steps (requiring specialised knowledge and skills) for the preparation of means of proof, for augmenting the criminal proceeding by new material, perpetuating the newly discovered material etc. The legislator has taken this approach, too: in the *Criminal Procedure Code* expert examination is defined as one of the methods of proving [Article 136 (1)] and is described in a separate Section III in Chapter Fourteen “Methods of Proving”.

Regarding the **procedural nature of the expert conclusion**, it is maintained that this conclusion is of a specific nature and is a component in its own right within the system of law of evidence in criminal procedure. This view rejects attempts to treat the expert conclusion as a type of evidence or means of proof.⁶¹ The expert conclusion is defined as “inference about unknown facts drawn from known facts on the basis of specialised knowledge”; the assessments contained in such a conclusion refer to matters of facts but not to an interpretation of legal provisions, they are not binding on the investigating authorities and the court but merely assist the establishing of the objective truth.⁶² According to doctrine, the specific nature of the expert examination explains the specific nature of the **procedural status of the expert witness**, who is not a party to the proceeding but a participant different from all other participants, called to perform a particular work.⁶³

The legal framework takes account of the above specificities of the expert examination and lays down rules for the ordering, preparation and conduct of the examination, the cases where it is mandatory, the persons to whom it is assigned and the persons who cannot act as expert witnesses (they are recused on the same grounds as the professional and lay judges but, along with that, incompatibility furthermore applies to the witnesses in the case; the persons who are dependent by reason of their official status or by other reason upon the accused or upon his or her defence counsel, upon the victim, the private complainant, the civil plaintiff, the civil respondent or upon their representing counsel; the persons who conducted the audit whose materials prompted the commencement of the investigation; the persons who do not possess the requisite

⁶¹ ПАВЛОВ, С., Наказателен процес на Република България, обща част [Pavlov, S., Criminal Procedure of the Republic of Bulgaria: General Part], Sibi, Sofia, 1996, pp. 384 ff.

⁶² Ibid., pp. 386-388.

⁶³ Ibid., p. 402. Although the procedural status is close to that of the witness, the expert witness is a different type of participant in the proceeding. Thus, unlike the witness, the expert witness is not subject to compelled attendance and is liable to a fine of up to BGN 500 for non-appearance or for a refusal to give a conclusion without reasonable excuse, and the fine is revoked if valid reasons for the non-appearance are cited [Article 149 (5) of the Criminal Procedure Code].

professional licensed capacity), the duties and rights of expert witnesses, the requirements to the expert conclusion and its evidential value etc.

The *Criminal Procedure Code* expressly establishes that the expert conclusion is not binding upon the court and upon the pre-trial authorities. However, the respective authority is obliged to cite reasons when dissenting with the conclusion (Article 154).

The use of expert examination in proving an organised criminal group is subject to a number of modifications necessitated by the characteristics of this type of criminal activity, discussed above, and its investigation. Thus, the expert witness could not avail himself or herself of certain rights, including the right to require additional materials and to participate in the performance of particular investigative actions if this would lead to the disclosure of the identity of an anonymous witness. On the other hand, the expert witness may be exposed to a risk similar to the risk to the witness, and thus may need protection for the same reasons as the witness. Moreover, the definition of “witness” in the above-mentioned *Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe concerning intimidation of witnesses and the rights of the defence* also includes experts, respectively, expert witnesses. Such protection is also provided for in the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*.

Article 149 (6) of the *Criminal Procedure Code* allows for the interrogation of an expert witness who is abroad by videoconference or by telephone conference, where so necessitated by the circumstances of the case. There is good reason to ask why the law only provides for this option when the expert witness is abroad. The broadening of this provision to cases where the expert witness is in Bulgaria would lead to an acceleration of the proceeding and to saving of time and money. All the more so since this opportunity is available to witnesses whose identity is concealed regardless of their whereabouts. In either case, the more serious and practical problem is the unavailability of the requisite technical equipment at the courts, and this problem must be urgently addressed alongside the change in the legal regulation.

A study of the practical application of expert examinations identifies several problematic areas.

The first problematic area concerns the **technical expert examinations**, whose significance is growing due to the fact that computers and smartphones are used on an increasingly massive scale for all types of criminal activity. Evidence is often found in such devices. The technical expert examination of this type of equipment entails substantial costs and at present is carried out mainly by the Research Institute of Forensic Science and Criminology of the Ministry of Interior. For this reason and because of the growing number of technical devices, such expert examination now takes about nine months, which leads to a delay of the investigation.

Expert examinations are assigned to two more institutes of the Ministry of Interior – the Special Technology Institute and Computer Technologies Institute, but their resources are also limited. External experts are appointed less often,

either when the institutes of the Ministry of Interior do not possess the necessary expertise or the defence has so requested.

An option for overcoming the difficulties in this area would be the creation of appropriate conditions for conducting expert examinations by a higher number of independent centres.

The other expert examinations also pose problems with the **relatively high price** paid to various financial and other technical experts. With DNA expert examinations, apart from the prices, **deadlines** are also a problem.

One substantial problem is **the lack of sufficient methodological guidelines** on the collection of physical evidence in the investigation of more complicated financial offences, as well as the lack of specialised knowledge and skills of the investigating authorities. That is why usually only a fraction of the numerous financial documents seized can serve as admissible evidence in court.

Along with the problems emphasised, in order to avoid any bias whatsoever or doubts about the impartiality of the expert witness, both parties in the proceeding should be guaranteed a right to designate experts, and equal conditions for the interrogation of the experts designated by the prosecution and by the defence under should be ensured. The lack of such equal treatment is regarded by the European Court of Human Rights as a violation of the right to a fair trial (Article 6, paragraph 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*) and of the principle of equality of the parties [Article 6, paragraph 3 (d)] as its integral part, requiring that the witnesses for the defence be called and questioned under the same conditions as the witnesses for the prosecution.⁶⁴

2.1.3. *Protection of persons at risk in relation to criminal proceedings*

The purpose of the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*, declared in its Article 2, is to assist in countering **serious intentional offences and organised crime** by ensuring the safety of persons whose testimony, explanations or information are of material relevance to criminal proceedings. The terms and procedure for ensuring special protection of persons at risk in relation to criminal proceedings and of persons directly related to them are provided for in a separate law because in certain cases **these persons cannot be protected by the means provided for in the *Criminal Procedure Code***.

The list of persons who qualify for special protection under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings* is exhaustively defined in the law and is considerably broader than the one under the *Criminal Procedure Code*. It includes, apart from the witnesses, all other principal participants in the criminal proceeding: **private accuser, civil plaintiff, accused, defendant, expert**

⁶⁴ See Case of Bönisch v. Austria (Application no. 8658/79), Judgment of 6 May 1985, European Court of Human Rights: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=bonisch&sessionid=93408759&skin=hudoc-en>

witness, certifying witness, as well as the sentenced person. The protection measures may furthermore be applied in respect of persons directly related to the persons at risk listed above: ascendants, descendants, siblings, spouse or persons with whom they are in a particularly close relationship (Article 3).

At the same time, the mere exposure to risk of a person of the categories listed above is not a sufficient prerequisite for the provision of special protection. Unlike the prerequisites for the provision of protection under the *Criminal Procedure Code*, persons at risk may be provided with special protection under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings* only where their testimony, explanations or information ensure **evidence of significant relevance**⁶⁵ in criminal proceedings for exhaustively listed **serious intentional indictable offences**, as well as for **all offences committed upon assignment by or in execution of a decision of an organised criminal group**.

It could be summed up that for the provision of protection under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*, four conditions must be simultaneously fulfilled:

- the person should be exposed to a risk in relation to a criminal proceeding;
- the person cannot be protected under the *Criminal Procedure Code*;
- the criminal proceeding should be for any of the listed serious intentional indictable offences or for an offence committed upon assignment by or in execution of a decision of an organised criminal group;
- the person's testimony, explanations or information should ensure evidence of significant relevance to the case.

A set of measures envisaged in the *Programme for Protection of Persons at Risk* (The Protection Programme) is undertaken in respect of the persons who are granted status of persons protected under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*. These measures are mandatory for all state bodies and officials, as well as for all legal and natural persons (Article 5). The Protection Programme is **broadier in scope** than the witness protection under the *Criminal Procedure Code* and comprises five measures:

- personal physical guarding: arrangements for the protection of the bodily integrity of a person against assaults;
- guarding of property: arrangements for the physical protection of property against infringement;
- temporary accommodation in a safe location: immediate relocation of the protected person for a short period of time to a new address other than his or her permanent place of residence;
- change of the place of residence, place of work or educational establishment, or transfer to another place for the service of a sentence;
- complete change of identity.

⁶⁵ Assessing the relevance of the witness's testimony to the clarification of the circumstances of the case is also important in justifying the need of protection under the Criminal Procedure Code, but this requirement is theoretically inferred rather than expressly formulated as a legal prerequisite.

All measures listed above can be applied **jointly or separately** and are accompanied by arrangements providing **social assistance, medical care, psychological counselling, legal or financial assistance**.

Unlike the measures under the *Criminal Procedure Code*, which are only provisional, the measures under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings* may be applied both **temporarily** (as long as the reasons for their application exist) and **permanently**.

The processing of personal data of persons protected under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings* constitutes a state secret, i.e. such data benefit from a **stronger protection** than under the *Criminal Procedure Code*, according to which only the pre-trial authorities and the court are obliged to keep this information confidential.

When the measures of “temporary accommodation in a safe location” and “change of the place of residence, place of work or educational establishment, or transfer to another place for service of a penal sanction” are applied, new basic data are temporarily generated for the protected person with his or her express written consent, and these data are destroyed after their processing is no longer necessary [Article 6 (3)]. Since the measure of “complete change of identity” may affect to the largest extent the rights of the protected person as well as of third parties, the law lays down stricter requirements and limitative conditions for its implementation. It is applied only as an **exceptional measure**, where protection cannot be ensured through any of the other measures [Article 6 (4)] and does not relieve the protected person from the performance of his or her obligations to the State or to third parties [Article 12 (1)]. The complete change of identity includes the issuance of a new identity document. The personal data in this document may not be identical to the personal data of another person [Article 12 (3)]. The complete change of identity may also be implemented through a change of the physical appearance of the protected person [Article 12 (4)]. The arrangements for the measures are described in greater detail by secondary legislation.

The law provides for the establishment of bodies for its implementation, which are described in greater detail by the Regulations for its application.

- **Board for Protection of Persons at Risk** (Protection Board) under the Minister of Justice, responsible for the implementation of the Protection Programme. The Board is chaired by a Deputy Minister of Justice, and its members are the Head of the Bureau for Protection of Persons at Risk, a judge from the Supreme Court of Cassation, a prosecutor from the Supreme Prosecutor's Office of Cassation, an investigating magistrate from the National Investigation Service, a representative of the Ministry of Interior occupying the position of head of directorate and a representative of the State Agency for National Security, also occupying the position of head of directorate.
- **Bureau for Protection of Persons at Risks** (Protection Bureau), established for the implementation of the measures under the programme. The Bureau is a specialised department of the Security Directorate General of the Ministry of Justice. The Head of the Bureau is the Director General of the Security Directorate General.

According to the procedure defined in the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings* (Articles 15 to 17), a person is included in the Protection Programme upon a proposal to the Protection Board submitted by the district prosecutor or, during the trial, by the reporting judge. The proposal is made *ex officio* or upon request of the person at risk, the investigating authority, the supervising prosecutor or the chief of the penitentiary institution, where the proposal refers to a person serving prison sentence. In the cases where the request does not originate from the person at risk, the express written consent of this person is required as well. The district prosecutor or the reporting judge examines the request within three days after receipt and approaches the Protection Board with a reasoned proposal for inclusion in the Protection Programme or refuses to submit a proposal. The proposal must be in writing and have the content prescribed by the law (Article 16). The legislator's decision not to allow the refusal of the prosecutor or the reporting judge to be appealed is debatable and should be discussed and reviewed with a view to guaranteeing the protection to the person at risk and his or her potential participation in the trial as a witness.

Acquiring a status of a person protected under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings* require:

- **a proposal** by the district prosecutor or by the reporting judge;
- **a decision of the Protection Board** to provide protection based on an assessment whether the testimony, explanations and information of the person at risk are of significant relevance to the criminal proceeding, as well as an assessment of the objectivity and gravity of the risk;
- **an agreement** concluded between the Protection Bureau and the person at risk or his or her guardian or curator, if the person lacks full legal capacity to act.

The law lists the mandatory information to be included in the agreement, which includes the type of the protection measure and the assistance to be provided, the duration of the protection, the rights and obligations of the parties under the Protection Programme, and the conditions for withdrawal from the agreement [Article 19 (1)]. The moment of signature is indicated in the agreement, which is exceedingly important because the **status of protected person** is acquired as from that moment.

The legal nature of the agreement is not specified. The law merely states that the agreement is not civil law contract within the meaning of the *Law on the Obligations and Contracts*. Consequently, the agreement is a specific type of contract governed by the provisions of a special law, namely the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*. The agreement sets forth the rights and obligations of the parties to it: the protected person and the Protection Bureau.

The protected person is under certain obligations for the duration of the protection: to avoid contacts with persons with a criminal record; to refrain from acts which may endanger his or her safety or hinder the implementation of the Protection Programme; to comply with the protection measures; to communicate to the Protection Bureau through the contact officer any information, which has come to

his or her knowledge regarding the subject of the criminal proceeding in relation to which he or she has acquired a protected person status; to perform his or her obligations to natural and legal persons, which have arisen prior to his or her inclusion in the Protection Programme and which are not performed by the State; to inform immediately the Protection Bureau through the contact officer of all changes in his or her situation and of the activities carried out by him or her during the implementation of the Protection Programme; and not to disclose his or her inclusion in the Protection Programme.

For its part, the Protection Bureau is obliged to implement the protection measures under the agreement, to ensure the attendance of the protected person in the criminal proceeding, and not to disclose the information, which has come to its knowledge in connection with the implementation of the Protection Programme.

The agreement is entered into a **special register**, which is maintained and kept electronically and on paper by the Protection Bureau. When processing the data subject to entry into the register the Bureau is bound to ensure the protection measures provided for in the *Law on the Protection of Classified Information* [Article 25 (2) and (6) of the *Regulations on the Implementation of the Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*].

According to Article 141 (4) of the *Criminal Procedure Code* (a new paragraph, added by the amendments of 2010), the **rules for the interrogation of a witness whose identity is concealed** apply upon the interrogation of persons protected under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings* in respect of whom the protection measure taken is temporary accommodation in a safe location or change of the place of residence, place of work or educational establishment, or transfer to another place for service of a penal sanction or complete change of identity. In this way, the departures from the fundamental principles of criminal procedure are extended to a very broad circle of protected persons, including such in respect of whom a measure to conceal the identity has not been taken, without providing for the necessary guarantees to offset the limitations of the rights of the parties in the proceeding.

Due to the nature of the protection measures under the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*, accurate and publicly accessible information and statistics about their implementation is not available, say, disaggregated by type of offences and number of cases under which such measures have been undertaken, by number of protected persons and their status in the criminal procedure, by type of measures etc. This impedes the study and evaluation of the employment and efficiency of this important instrument of proving organised crime. According to data made public by the Protection Bureau for the period from the entry into force of the law and the Protection Programme in 2005 until the end of 2011, a total of some 30 protected persons testified against perpetrators of serious offences; immediately after the launch of the Programme, as early as in 2005, two witnesses in key cases were taken out of the country and continue to reside abroad, under a changed identity and with strictly controlled movements and contacts; at present, protection is provided to witnesses in the high-profile trials dubbed by the media “The Impudent”,

“Octopus”, “The Killers” and “Zlatko the Beret”, as well as to witnesses in a number of other court cases.⁶⁶

In the opinion of the investigating authorities, thanks to the testimony of protected persons some of the most powerful criminal groups have been dismantled and many of the defendants have been punished in recent years. At the same time, some of the protected persons admittedly prove unable to adapt to their new life and recant their testimony and relinquish the protection provided to them. These problems call for specialised research with a view to improving the legal framework and reducing the problems with its application, as well as institution building of the competent authorities, regulating their responsibility for failing to exercise or for exceeding their powers, and introduction of independent control over their operation with strict observance of secrecy rules.

International cooperation is of growing importance for the application of some of the protection measures. According to the current legal framework, the Protection Bureau may request and provide assistance in the implementation of protection on conditions of reciprocity or on the basis of an international treaty to which Bulgaria is a party. The conclusion of international treaties is a matter of **State policy**, which should take account of the opinions of the authorities responsible for ensuring protection, which are directly familiar with the problems and needs, as well as the results of various analyses of the issues and studies of Bulgarian and foreign experience.

2.1.4. Protection in connection with trafficking in human beings

Trafficking in human beings is a dangerous offence against the person and against citizens' rights, which is most often associated with **transnational organised crime** and, therefore, is subject to regulation by a number of international instruments and treaties of which a large part are in force for Bulgaria. The *Law on Combating Trafficking in Human Beings* declares as its purpose to ensure the interaction and coordination among the State bodies and the municipal bodies, as well as between them and the non-governmental organisations, for the prevention and counteraction of trafficking in human beings and for the development of the national policy in this field. A National Commission and local commissions for combating trafficking in human beings, shelters for temporary accommodation and centres for protection and support of victims of trafficking have been established for the implementation of the law.

The law defines “victim” as any person who has been subjected to trafficking in human beings. It also establishes the procedure for the provision of **protection and support** to trafficking victims, as well as the responsibilities of the respective authorities. The victims of trafficking enjoy all the rights available to crime victims,⁶⁷ as well as additional rights under the *Law on Combating Trafficking in*

⁶⁶ See: Гурмева, С., ‘20 защитени свидетели, скрити от мафията в чужбина’ [Gurmeva, S., ‘20 Protected Witnesses Hidden Abroad from the Mob’], 24 Chasa, 22 December 2011, <http://www.24chasa.bg/Article.asp?ArticleId=1159398>

⁶⁷ The Law on the Assistance and Financial Compensation to Victims of Crime describes the procedure for informing crime victims of their rights (Article 6). The information is contained

Human Beings: to use the shelters for temporary accommodation and the centres for protection and support, to receive assistance and support from the Bulgarian diplomatic missions and consular offices abroad and to receive **special protection** (e.g. an extension of their stay at the shelters for temporary accommodation and granting a long-term residence permit for Bulgaria).

The pre-trial authorities are obliged, after identifying victims of trafficking, to inform them immediately of the possibility to receive **special protection** if they declare, within one month, their consent to **cooperate** for the detection of the offence. This time limit may be extended to up to two months where the victim is a child (Article 26).

A **special protection status** is granted at the request of the victim of trafficking by a prosecutor's warrant within three days after receipt of the request. A refusal by the prosecutor to grant such a status can be appealed within three days before the superior prosecutor, who is obliged to decide on the appeal immediately (Article 27).

For the purposes of proving an organised criminal group, this law is important in that it provides protection to the persons who are victims of trafficking and have expressed consent to **cooperate** for the detection of the offenders. This cooperation differs from the cooperation of persons who have participated in the commission of an offence or in an organised criminal group, defined by Recommendation No. R (97) 13 as "collaborators of justice". In the former case, the person is a crime victim, and in the latter case, the person is a repentant offender who is interested in having his or her penalty reduced as a result of his or her statement. In the former case, the person is most often questioned as a witness and his or her testimony is equivalent to all other evidence, whereas in the latter case the court must carefully evaluate the statement of the accused because they it is very likely to be untruthful.⁶⁸

The **special protection** status is granted **for the duration of the criminal proceeding**. According to the law, this special protection includes: granting foreign nationals a long-term residence permit for Bulgaria and extending the stay in the shelters (Article 25). The long-term residence permit is issued according to the procedure described in the *Law on the Foreigners in the Republic of Bulgaria* by the respective administrative control services of the Ministry of Interior on the basis of the prosecutor's warrant. A necessary condition for the issuing of a permit is that the person should hold identity documents or should cooperate for the establishment of his or her identity. The stay in the shelters is extended according to the period indicated in the prosecutor's warrant and may not exceed the time limit for completion of the criminal proceeding.

in a brochure available in Bulgarian, English, German and French, which is published and distributed by the National Council for the Assistance and Compensation to Victims of Crime. The information is published on the Internet sites of the National Council for the Assistance and Compensation to Victims of Crime, the Ministry of Interior, the victim support organisations, as well as of the authorities responsible for receiving alerts about offences committed and providing legal assistance, protection and financial compensation.

⁶⁸ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 131-132.

The law defines three cases in which the prosecutor can terminate the special protection status prior to the expiry of the period fixed by him or her: where the person has renewed his or her contacts with the perpetrators of the offence for the detection of which the person has declared his or her cooperation, as well as if the prosecutor decides that the declared cooperation is spurious or public order and national security are at risk [Article 30 (1) of the *Law on Combating Trafficking in Human Beings*]. The prosecutor's warrant terminating the status can be appealed within three days before the superior prosecutor, who must decide on the appeal immediately.

The persons who are granted special protection status also benefit from the protection provided to all victims of trafficking: **anonymity and protection of the identity** (Article 20).

The law expressly states that a protected witness status granted according to the procedure established by the *Criminal Procedure Code* is no impediment to acquiring a special protection status as a victim of trafficking as well (Article 31 of the *Law on Combating Trafficking in Human Beings*). Similarly, a victim of trafficking under special protection can be granted witness protection as well. The *Criminal Procedure Code* admits the possibility of the crime victim being interrogated in a witness capacity even where he or she has been constituted as a private accuser and/or a civil plaintiff during the trial [Item 2 of Article 118 (1) of the *Criminal Procedure Code*]. It is possible and very often imperative to interrogate such a crime victim as a **witness whose identity is concealed**.⁶⁹ The Supreme Court of Cassation upholds this understanding and, calling attention to the right of the accused/defendant to receive the fullest possible information on the factual circumstances of the charge, including identification of the victim, holds that where the victim is a protected witness whose identity is concealed, "the individualisation of the offence is formulated by indicating the time, place and the manner in which it was committed, as well as a description of the individualising characteristics of the victim like sex, age, special qualities (pregnant woman) etc. which are relevant to the elements of the offence".⁷⁰

The legislative approach to allow the capacity of a protected person who is a victim of trafficking and who has been granted special protection status to be combined with a protected witness status under the *Criminal Procedure Code* is **useful in practice** because the victim of trafficking may often be an important witness for proving the criminal activity and must be provided with adequate protection. At the same time the granting and terminating of the special protection status under the *Law on Combating Trafficking in Human Beings* lies entirely within the powers of the prosecutor's office. Appellate review of the prosecutor's decisions falls within the exclusive competence of the superior prosecutor. **The court is excluded** from this procedure. The reporting judge or the court is competent only in the cases where the person enjoying special protection status under the *Law on Combating Trafficking in Human Beings* also benefits from witness protection under the *Criminal*

⁶⁹ In more general terms, too, as indicated above, legislation admits the participation of one and the same person in different procedural capacities [Items 1, 2 and 3 of Article 118 (1) of the *Criminal Procedure Code*].

⁷⁰ See Interpretative Judgment No. 2 of 16 July 2009 in Interpretative Case No. 2 of the General Assembly of the Criminal College of the Supreme Court of Cassation for the Year 2009.

Procedure Code. In such cases, the rules provided for in the Code apply, and the reporting judge or the court, depending on the phase of the criminal proceeding, plays a decisive part in the procedure.

2.1.5. *Practical problems*

In connection with the interrogation of witnesses and the collecting of oral means of proof, practical problems can be outlined in several groups.

- **Problems of logistics**

The pre-trial authorities encounter great difficulties due to the lack of **specialised questioning rooms** and **specialised identification rooms** (equipped with one-way mirror) in most police departments. Representatives of the pre-trial authorities say that the suspects are quite often lined up in the yard of the respective building and the witness identifies them from a distance, which, apart from being ineffective and unreliable, is also procedurally inadmissible, and vitiates the proving. The need of specially equipped questioning rooms is also stressed in connection with the creation of better opportunities for the preparation of audio recordings and video recordings of the interrogation of witnesses. These are important methods, which can be used during the trial, especially when contradictions are found in the testimony, when the witness alleges that he or she cannot remember something, when he or she recants his or her testimony given to the pre-trial authorities and etc. However, these methods by themselves **lack evidential value**, as does any witness testimony given in the pre-trial proceeding.

The lack of **sufficient and modern forensic laboratories** impedes the timely conduct of the complicated expert examinations required. In some cases, within the framework of international legal assistance, expert examinations are conducted abroad, which is also time-consuming and moreover adds to the costs of investigation. This makes it imperative to invest in the establishment and development of such laboratories, as well as in the initial and continuous training of experts.

The main problems of logistics confronted by the pre-trial authorities and the courts also include a **lack of videoconference equipment of the courts and secure communications** for the conduct of interrogations. For this reason, Bulgaria is unable to provide information within the European Judicial Network on available equipment of its courts, which is important for the communication among the EU Member States in their cooperation on transnational organised crime cases. Where necessary, if a foreign court makes a request for such a communication link, equipment has to be rented.

This state of affairs is likely to change with the pilot implementation of a videoconference link between the Supreme Judicial Council, the Sofia City Court and Sofia Prison.⁷¹ The indicative budget programme (2010 – 2012) for the

⁷¹ For further details, see Стратегически насоки за използването на видеоконферентните връзки в съдебната система за разпити, експертизи, свидетелстване и представяне на веществени

development of videoconference links, prepared by the Supreme Judicial Council, sets the stages, the timescales and the budget required for the purchase of stationary videoconference system to be installed in the courts of appeal (five courtrooms), in the Supreme Judicial Council, in the Supreme Administrative Court and, within the first three months of 2012, in district courts (14 courtrooms). The indicative budget programme also envisages the purchase of three mobile stations (the mobile equipment can be used when necessary by various courts, which do not have stationary equipment; it is suitable for use in other places where the person interrogated may be located: a hospital, a prison etc.), the ensuring of interoperability with other videoconference systems and sufficient connectivity etc.⁷² The need to train personnel in handling the videoconference systems should not be neglected, either.

The timely addressing of the problems outlined above, which also requires the commitment of financial resources on the part of the executive branch of government, would lead to an acceleration of criminal proceedings, to saving of funds spent to ensure the attendance of witnesses and expert witnesses, to avoiding security risks to witnesses whose identity is concealed as a result of their movement, as well as to a more effective participation of Bulgarian criminal justice in proceedings on transnational organised crime cases.

- Problems in connection with the **evidential value of witness testimony and guaranteeing the anonymity of witnesses**

The *Criminal Procedure Code* provides for preparing audio recordings and video recordings of the interrogation in the pre-trial proceeding according to a specified procedure but retains the requirement to draw up a written record of the interrogation to which the respective recording is attached. The preparation of recordings does not change the evidential value of witness testimony given in the pre-trial proceeding. Witness testimony from the pre-trial proceeding is admissible in court only where the witness has been interrogated before a judge (the case of Article 223 of the *Criminal Procedure Code*⁷³), and the testimony is read out

доказателства [Strategic Guidelines for Use of Video Conference Links in the Judicial System for Interrogations, Expert Examinations, Testifying and Presentation of Physical Evidence], Програма и бюджет за развитието на видеоконферентните връзки в съдебната система [Programme and Budget for the Development of Videoconference Links in the Judicial System] and Насоки за промяна на нормативната уредба [Guidelines for Amendment of the Statutory Framework], Supreme Judicial Council, Sofia, 2010.

⁷² Ibid.

⁷³ "Article 223. (1) Where there is a risk of the witness being unable to appear before the court by reason of a serious illness, prolonged absence from the country or for other reasons which preclude the appearance thereof in a court hearing, as well as where it is necessary to perpetuate the testimony of a witness which is exceedingly important for establishing the objective truth, the interrogation shall be conducted before a judge of the respective first-instance court or of the first-instance court within the geographical jurisdiction whereof the action is performed. In such case, the case shall not be made available to the judge.

(2) The pre-trial authority shall ensure the appearance of the witness and shall afford the accused party and his or her defence counsel, if any, an opportunity to participate upon the conduct of the interrogation.

(3) Save insofar as there are any special rules, the interrogation referred to in Paragraph (1) shall be conducted according to the rules of judicial inquiry.

according to the terms and procedure established by the law (Article 281 of the *Criminal Procedure Code*⁷⁴). When conducting an interrogation before a judge, the pre-trial authority must ensure the appearance of the witness as well as afford an opportunity to the accused and his or her defence counsel, if any, to participate in the interrogation. While this procedure does not pose any special problems

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- (4) The accused party or his or her defence counsel may approach the pre-trial authority with a request for interrogation of a witness under Paragraph (1). A refusal to grant any such request shall be entered on a record signed by the authority concerned, the accused party and the defence counsel."

⁷⁴ "Article 281. (Amended, SG No. 32/2010, effective 28.05.2010) (1) The testimony of a witness given in the same case before a judge during the pre-trial proceeding or before another panel of the court shall be read out where:

1. there is a material contradiction between the said testimony and the testimony given during the judicial inquiry;
 2. the witness refuses to testify or asserts that he or she cannot remember something;
 3. the witness, even though duly summoned, is unable to appear before the court for a prolonged or indefinite period of time and interrogating the said witness by delegation is unnecessary or impossible;
 4. the witness cannot be found to be summoned or is deceased;
 5. the witness fails to appear and the parties do not object to this;
 6. the witness is aged between 14 and 18 years and the accused party and his or her defence counsel were present at the interrogation of the said witness.
- (2) The explanations given in the same case by an accused party, who is interrogated in pursuance of Item 1 of Article 118 (1) herein, may be read out according to the procedure established by Paragraph (1).
- (3) Under the terms established by Items 1 to 6 of Paragraph (1), the testimony of a witness given before a pre-trial authority shall be read out where the accused party and his or her defence counsel, should any such have been authorised or assigned, were present at the interrogation. Where there are multiple defendants, the reading out of the testimony shall require the consent of those of the said defendants who were not summoned for the interrogation or who cited valid reasons for the non-appearance thereof, and the testimony read out concerns the charge brought against the said defendants.
- (4) Where it cannot be read out according to the procedure established by Paragraph (3), the testimony of a witness given before a pre-trial authority shall be read out if the conditions under Item 1 or 2 of Paragraph (1) apply.
- (5) Under the terms established by Items 1 to 6 of Paragraph (1), the testimony of a witness given before a pre-trial authority may be read out with the consent of the defendant and his or her defence counsel, the civil plaintiff, the private accuser and the representing counsel thereof.
- (6) Under the terms established by Items 1 to 6 of Paragraph (1), the testimony of a witness given before a pre-trial authority may be read out on a motion by the defendant or by his or her defence counsel where the motion thereof under Article 223 (4) herein has not been granted.
- (7) In the cases referred to in Paragraphs (3) and (5), prior to obtaining a consent from the defendant to the reading out of the testimony, the court shall explain to the defendant that the testimony read out may be used upon the passing of the sentence. For this judicial-inquiry action, the court, acting on a motion by the defendant, shall assign thereto counsel if the defendant is not represented.
- (8) A sentence of conviction may not be based solely on testimony read out according to the procedure established by Paragraph (4).
- (9) It shall be inadmissible to use audio recording and video recording prior to the reading out of the testimony of the witness.
- (10) Where the witness has been interrogated by delegation, the record of the interrogation shall be read out."

in proving conventional offences, in the cases of organised crime the situation is more complicated because of the larger number of accused and defence counsel. This prompts the representatives of the investigating authorities to advocate legislative amendments broadening the admissibility of testimonies given in the pre-trial proceeding. A further argument in favour of this opinion is the need to reduce the risk of the witness being exposed to subsequent pressure, but it ignores the risks of manipulation and pressure during the pre-trial proceeding, which may lead to a violation of the right to a fair trial and the principle of equality of the parties.

Under the current legislation, in order to avoid “face to face” meetings of crime victims or witnesses with the accused, as well as the risks of witnesses being threatened or pressured, these persons are most often interrogated as witnesses whose identity is concealed and, where necessary, they are provided with special protection as well.

Witness protection alone, however, is not a solution because, judging from practice, the anonymity of a witness and the independence of the witness testimony are very difficult to guarantee. Judges and prosecutors, despite the different focus of their opinions, are unanimous about the difficulties in safeguarding a concealed identity. They argue that in practice the identity of the protected witness may be disclosed by his or her testimony itself. Anonymous witnesses usually testify to facts from which the accused or the defendants and their defence counsel can easily surmise whose identity is concealed (for instance, when a description is given of a meeting between the anonymous witness and the accused at which no other person was present, from the information on the professional qualification, the type of occupation or other characteristics of the person, which are disclosed). Besides this, anonymous witnesses are often accused in another case in which everybody knows their identity. The representatives mainly of the defence in criminal proceedings note that the latter case furthermore raises doubts about the circumstances under which the anonymous witness agreed to testify, as well as about the lawfulness of the actions taken to convince him or her (say, is it possible that the person agreed to testify in exchange for a relaxation of the measure to secure his or her appearance in the case, is it possible that the person has been subjected to pressure and various forms of coercion etc.).

Possibilities to exert pressure and to manipulate witnesses also exist after the submission of the indictment to court and during the trial. When receiving a copy of the indictment, the defence and the accused familiarise themselves with the list of the witnesses who will be summoned. This provides an opportunity to attempt to manipulate them and the certifying witnesses (most often through bribe, pressure and threat) before the witnesses actually appear in court.

Despite the difficulties in guaranteeing a concealed identity, the use of anonymous witnesses is increasing and is turning into an established practice rather than an exception provided for in the law. This is confirmed by the opinions of various participants in the criminal proceedings, according to whom the increase in the cases in which anonymous witnesses are used is neither necessary nor produces the expected results. Isolated statistics, however, cannot lead to an indisputable conclusion either about that or about the productivity of that method. According

to figures released by the prosecutor's office, **witness protection** was applied in 101 proceedings in 2010 (compared to 84 proceedings in 2009 and 86 in 2008). Prosecutors warranted 224 protection measures in 2010 (up from 158 in 2009 and 136 in 2008), including 217 measures for non-disclosure of the identity and only seven cases of provision of personal physical guarding.⁷⁵

Considering the difficulties in guaranteeing the anonymity of witnesses, Bulgaria, as a State Party to the *UN Convention against Transnational Organized Crime*, can make more extensive use of the possibilities of entering into agreements or arrangements with other States for the relocation of protected witnesses and persons close to them [Article 24 (3)], but the main obstacle to this is the scarcity of financial resources.

The problems listed: the costly and difficult guaranteeing of anonymity, as well as the sometimes questionable effectiveness, bear out the conclusion that questioning of protected witnesses should be resorted to only as an exception in strict compliance with the requirements of the law, especially considering the departures from the principles of equality of the parties and other fundamental principles of criminal procedure that arise from this method.

- Problems in connection with **certifying witnesses**

In the Bulgarian criminal procedure, **certifying witnesses** are used when collecting evidence in the pre-trial proceeding. Section I "General Provisions" of Chapter Fourteen "Means of Proof" of the *Criminal Procedure Code* describes the status and the procedure for selection of certifying witnesses, as well as their presence at the investigative procedural actions specified in the law, viz. inspection, search, seizure, investigative reconstruction, and identification of persons and objects [Article 137 (1)]. Even though these actions are not discussed in this presentation, the concept of certifying witnesses is analysed because of some common problems of investigation and proving associated with it. The existence of this concept has its opponents and proponents.

The proponents of keeping this concept assume that the presence of certifying witnesses guarantee the legal conformity of the investigative procedural actions performed, the authenticity of the evidentiary material recovered, and non-admission of violations of human rights. The opponents emphasise that the requirement to have certifying witnesses impedes the process of investigation and proving, inspires mistrust of the pre-trial authorities etc.

Some peculiarities of the legal framework have to be taken into account in order to understand the practical problems that arise in connection with the certifying witnesses. Above all, the presence of certifying witnesses during the performance of the investigative procedural actions in **the pre-trial proceeding** is mandatory. Otherwise, an irremediable breach of procedure would be committed, which would result in inadmissibility of the investigative procedural actions concerned

⁷⁵ See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Application of the Law and on the Operation of the Prosecutor's Office and of the Investigating Authorities in 2010], <http://www.prb.bg/main/bg/Information/2076/>

and of the evidence collected (the report on any such action is excluded from the evidentiary material). The idea of having certifying witnesses is that they should observe the finding of the physical evidence during the inspection, search and seizure, as well as during the identification, and should certify this by signing the report. To this end, the law requires the certifying witnesses “to present themselves after being invited and to remain available for as long as they are needed,” and for non-fulfilment of these obligations they incur liability **as witnesses** (Article 137 (3) of the *Criminal Procedure Code*). The law grants a number of rights to the certifying witnesses: to make comments about, and to raise objections to, any omissions and violations of the law committed; to demand that the report be corrected, amended and supplemented; to sign the report with a dissenting opinion, setting forth in writing their considerations for doing so; to move for revocation of the acts which impair their rights and legitimate interests; to receive adequate remuneration and to be reimbursed for the costs incurred [Article 137 (4)]. The authority performing the relevant investigative action is obliged to select the certifying witnesses from among the persons who do not possess another procedural capacity and are not interested in the outcome of the case and to explain to them their rights.

With this framework, the investigating authorities find it really difficult to select certifying witnesses, especially when the investigative actions are performed at night, in bad weather or in remote locations. They say that most citizens are reluctant to accept this role and very rarely take it seriously or perceive it as a civic duty. Apart from being unmotivated, most of them are completely untrained and even though they receive explanations about what exactly they should watch and what procedure they should follow, they do not always understand and many of them refuse to serve as certifying witnesses. Another problem is the fact that certifying witnesses often assume their role only after the scene has been secured, i.e. if there has been armed resistance or coercive apprehension involving the use of force, they arrive only after that and in practice are not in a position to guarantee credibly that the police have not tampered with the evidentiary material (say, that drugs have not been planted).

The behaviour of the certifying witnesses may be influenced by the stress caused by the evidence collected: drugs, weapons and, in some cases, blood, dead bodies, etc. The option to summon the certifying witnesses to testify has a positive effect but also poses some risks common to all witnesses, which affect adversely the proving process. Thus, in a number of cases, due to the slow progress of the cases the certifying witnesses summoned to testify are unable to recall details of the action they have attended and to give testimony about important facts and procedures they have participated in. In some cases the prosecution or the defence try to influence the certifying witnesses. Since these persons are totally unmotivated to cooperate, this is not particularly difficult.

Certainly, there are numerous cases in which certifying witnesses prevent police misconduct by their testimony.

Quite often, however, in order to avert the risk of their actions being vitiated and challenged or their violations being detected, the investigating authorities routinely use their colleagues or persons close to them as certifying witnesses. There are

reports that private security firm personnel are used as certifying witnesses “on stand-by” (most probably in exchange for informal services rendered to them by the police).

A police officer who is not an investigating police officer, a civil plaintiff, a victim or an expert in the case, does not possess another procedural capacity and may therefore serve as a certifying witness. Case law adheres to this understanding, too, and shows that the court considers, *inter alia*, whether the police officers who participated as certifying witnesses are interested in the outcome of the case.⁷⁶ Nevertheless, in the course of the criminal procedure, the defendants and their defence often refer to the participation of police officers as certifying witnesses when contesting the admissibility of the report as means of proof. To avoid this, some investigating authorities refrain from designating police officers as certifying witnesses, which in turn leads to other difficulties.

In other cases, the use of certifying witnesses tends to be extended to methods such as expert examination,⁷⁷ as well as to other actions beyond those provided for in the *Criminal Procedure Code*. This practice slows down the procedure because it provides grounds for objections and appeals. The case law of the court of cassation instance is unambiguous in this respect. The Supreme Court of Cassation holds that the police officers who participate in the arrest of a person are not investigating authorities within the meaning of the *Criminal Procedure Code*, do not possess another procedural capacity and are not interested in the outcome of the case; therefore, they may serve as certifying witnesses.⁷⁸

In a vast number of cases, certifying witnesses would appear at the court hearing to be interrogated as witnesses but would earnestly declare that they signed the report without being present at the investigative action described therein, that they do not remember anything etc.

For the reasons emphasised above, investigative actions are often performed in the presence of a single certifying witness or even without any certifying witnesses. The consequences of such defects, however, are irreparable.

⁷⁶ See Judgment No. 389 of 14 October 2009 in Criminal Case No. 403 of the Criminal College, Second Criminal Department of the Supreme Court of Cassation, for the Year 2009; Judgment No. 517 of 27 October 2010 in Criminal Case No. 514 of the Criminal College, Third Criminal Department of the Supreme Court of Cassation, for the Year 2010.

⁷⁷ Regarding expert examination, see Judgment No. 570 of 23 December 2009 in Criminal Case No. 554 of the Criminal College, Third Criminal Department of the Supreme Court of Cassation, for the Year 2009.

⁷⁸ See Judgment No. 517 of 27 October 2010 in Criminal Case No. 514 of the Criminal College, Third Criminal Department of the Supreme Court of Cassation, for the Year 2010: “The arrest of a person under Item 1 of Article 63 (1) of the Law on the Ministry of Interior, about whom there is information that he or she has committed a criminal offence, is not a means of proof. The police officers who participated in such an arrest are not investigating authorities within the meaning of Chapter Six of the Criminal Procedure Code. They did not possess a procedural capacity in the procedure. On the other hand, the discharge of official duties upon the arrest does not make them interested in the outcome of the case so as to disqualify them from participating as certifying witnesses. This is also the tenor of the reasoning of the regional court on the same objections, in which the court of intermediate appellate review instance concurs as well”.

After the unsuccessful attempt of the 2010 amendments to the *Criminal Procedure Code* to abolish this concept or at least to limit it to the presence of a single certifying witness, the issue of its reconsideration needs to be raised yet again. In any case, however, it is necessary to guarantee that the investigating authorities apply this concept in compliance with the law, that certifying witnesses perform their duties in good faith, and that the court has an objective assessment in line with the case law described above.

2.2. SPECIAL INTELLIGENCE MEANS

Special intelligence means can play an important part in the investigation and proving of crime and **above all of organised crime** considering its specificities outlined above. Unlike traditional investigative methods, special intelligence means are applied without the subjects' knowledge and involve an interference with their private life.⁷⁹ Considering these circumstances, effective safeguards are needed against turning them into an instrument of arbitrary interference and abuse.

In the *Criminal Procedure Code* (Section VIII of Chapter Fourteen), special intelligence means are described as **a method of collecting evidence in its own right in the pre-trial proceeding**. A detailed framework of the use, arrangements and application of special intelligence means as a method for "the prevention and detection of serious offences according to the procedure established by the *Criminal Procedure Code*" is provided for in the *Law on the Special Intelligence Means* and, at the level of secondary legislation, in *Instruction No. 1 of 22 March 2004 on the Work and Interaction of the Preliminary Investigation Authorities*.

The variations in the framework under the *Criminal Procedure Code* and under the *Law on the Special Intelligence Means* are usually attributed to the diverging intended purposes and scopes of application of the two laws.⁸⁰ The regime under the *Criminal Procedure Code* serves the purposes of pre-trial proceedings and is applied by the pre-trial authorities. The pre-trial authorities apply the regime under the *Law on the Special Intelligence Means* as well, but the latter also serves a specified circle of special services, which apply it for prevention and other operational purposes. This approach of the legislator, however, hardly merits uncritical acceptance. Considering that the subject matter of regulation restricts important constitutional rights of citizens and other rights of the parties to the procedure, the approach should be exceedingly careful, accurate, rational, and precluding the risk of disparate interpretations and abuse.

The risks discussed above materialise in the framework outside the *Criminal Procedure Code*. Regardless of whether and how far it serves its declared purpose: prevention and detection of serious offences, this framework not always can simultaneously serve the purposes of collecting evidence in a criminal proceeding.

⁷⁹ For further details in this respect, see Judgment No. 528 of 29 January 2010 in Criminal Case No. 585 of the Criminal College, Third Criminal Department of the Supreme Court of Cassation, for the Year 2009.

⁸⁰ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 150 ff.

Therefore, if it comes to the institution of a criminal proceeding, the data collected could not be used as admissible evidence (apart from several exceptional cases expressly provided for in the law) while the collection of new data may have become impossible. Along with that, there are other variations due to non-synchronisation of the provisions in the statutory instruments, which differ in rank and were adopted at different points of time.

2.2.1. Definition and scope of application of special intelligence means

The different statutory instruments define special intelligence means in a similar way. The existing definitions, however, display certain nuances, which do not reflect the objective divergence in their intended purpose.

According to the *Criminal Procedure Code*, special intelligence means are **technical devices**: electronic and mechanical facilities and substances serving to document controlled persons and sites, and **operational techniques**: surveillance, wiretapping, following, penetration, marking and monitoring correspondence and computerised information, controlled delivery, trusted transaction and investigation through an undercover officer [Article 172 (1)].

According to the *Law on the Special Intelligence Means* (Article 2), special intelligence means are **technical devices and operational techniques for their deployment**, which are defined in a way identical to the *Criminal Procedure Code*. The general definition of special intelligence means, however, is also bound to the preparation of **physical means of proof**: film recordings, video recordings, audio recordings, photographs and marked objects. Along with that, the *Law on the Special Intelligence Means* briefly defines each one of the operational techniques, whereas they are merely listed in the *Criminal Procedure Code*. Besides this, the *Law on the Special Intelligence Means* expressly states that the deployment of the operational techniques must be documented by means of photographing, video recording, audio recording and filming on **physical storage media** (Article 11).

Instruction No. 1 on the Work and Interaction of the Preliminary Investigation Authorities refers to the *Law on the Special Intelligence Means*, but its definition of special intelligence means departs to a certain extent from the definition contained in the law. The variation is in the list of physical means of proofs that are prepared: in addition to the ones listed in the law, the Instruction includes presentation slides [Article 160 (1)]. The provision defining the operational techniques [Article 160 (3)], too, has not been brought into conformity with the version of the law effective as from 29 April 2006 and, respectively, with the new *Criminal Procedure Code* and does not include the three new techniques added there: **controlled delivery, trusted transaction, and investigation through an undercover officer**.

In defining the scope of special intelligence means, the various statutory instruments also exhibit certain variations other than those attributable to their diverging intended use. The *Criminal Procedure Code* admits the use of special intelligence means by the pre-trial authorities during the investigation of **serious intentional offences** expressly specified in the *Criminal Procedure Code*, including offences

related to an organised criminal group, provided the relevant circumstances cannot be **established** in another manner or their establishment involves excessive difficulties. The *Law on the Special Intelligence Means* expressly specifies the cases in which special intelligence means can be used: only where this is necessary for the prevention and detection of serious intentional offences according to the procedure established by the *Criminal Procedure Code* and the requisite data cannot be **collected** in another manner. Apart from the insignificant terminological disparity, the scope of application under the *Law on the Special Intelligence Means* does not include the cases where the establishment of the circumstances involves excessive difficulties. On this point, there is no reason why the framework should take a different approach and it should be aligned.

As the Constitutional Court notes in its position, when special intelligence means are used, the privacy of the persons under surveillance is invaded by technical devices and operational techniques, thereby affecting citizens' rights enjoying constitutional protection (Articles 32 to 34 of the *Constitution*) and international recognition (Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* and Article 17 of the *International Covenant of Civil and Political Rights*), which necessitates the use of special intelligence means only as a subsidiary method to the other methods of proving "if the relevant circumstances cannot be established in another manner or their establishment involves excessive difficulties".⁸¹ The Supreme Court of Cassation, too, consistently upholds such a position, as it invokes the requirement of the law that special intelligence means be applied when the other traditional investigative methods have been exhausted or have failed to produce a result. A breach of this requirement is defined as a substantial breach of procedure and a ground for reversal. Some of the cases considered give the Supreme Court of Cassation grounds to conclude that the authority, which requested the deployment of special intelligence means, is unfamiliar with the requirements of the law and misleads the controlling authority.⁸²

In line with its purpose, the *Law on the Special Intelligence Means* provides for a scope of application of special intelligence means beyond pre-trial proceedings: for the prevention and detection of serious intentional offences and in respect of **activities related to the protection of national security**.

In this connection, Article 12 of the *Law on the Special Intelligence Means* specifies the scope of application of special intelligence means both in terms of persons and sites. These are:

- persons about whom data have been received and in respect of whom a reasonable presumption can be made that they are preparing to commit, are committing, or have committed serious offences;
- persons about whose actions data have been received and in respect of whom a reasonable presumption can be made that they are used by the persons of

⁸¹ Judgment No. 10 of 28 September 2010 in Constitutional Case No. 10 of 2010. Promulgated in the State Gazette No. 80 of 12 October 2010.

⁸² Judgment No. 528 of 29 January 2010 in Criminal Case No. 585 of the Criminal College, Third Criminal Department of the Supreme Court of Cassation, for the Year 2009.

the above group without being aware of the criminal nature of the activity carried out;

- sites for establishment of the identity of the persons belonging to the groups referred to above;
- persons and sites related to national security;
- persons who have consented in writing to the use of special intelligence means for the protection of their life or property.

Instruction No. 1 departs from the framework of the law and admits the application of special intelligence means in respect of persons about whose actions data have been received or in respect of whom a reasonable presumption can be made that they are used by any **other persons** without being aware of the criminal nature of the activity carried out (i.e. not only by the persons about whom data have been received and in respect of whom a reasonable presumption can be made that they are preparing to commit, are committing or have committed serious offences, as is the case in the law). This provision expands the scope of application of special intelligence means in conflict with the law and should not be applied.

The cited discrepancies justify the need to align the secondary legislation with the provisions of the special law, and the provisions of the special law with the provisions of the *Criminal Procedure Code*. Moreover, a **uniform regime for use of special intelligence means** has to be adopted, with all matters of principle being laid down in the *Criminal Procedure Code* with a reference (which is not in place at present) to the special law, which should further elaborate these matters of principle and describe in detail the individual cases.

2.2.2. Procedure for use of special intelligence means

The *Criminal Procedure Code* defines in general terms the procedure for the submission of a request for use of special intelligence means, the authorisation to use such means, and the procedure and period for their deployment for the **needs of criminal proceedings**. For use of special intelligence means in pre-trial proceedings, the supervising prosecutor must submit a **reasoned request in writing** to the court [Article 173 (1)].

Article 13 of the *Law on the Special Intelligence Means* thoroughly amended and supplemented in 2008 and partially revised in 2009, specifies the persons who, acting within their authority, may request the use of special intelligence means and use the data and physical evidence collected by such means:

- Directorate General for Combating Organised Crime, Criminal Police Directorate General, Security Police Directorate General, Border Police Directorate General, Internal Security Directorate, regional directorates of the Ministry of Interior, and specialised directorates (with the exception of the Technical Operations Directorate), territorial directorates and stand-alone territorial departments of the State Agency for National Security;
- Defence Information Service and Military Police Service under the Minister of Defence;

- National Intelligence Service;
- the supervising prosecutor, who must submit a reasoned written request to the court for the use of special intelligence means in a pre-trial proceeding [Article 13 (2)].

After the revisions of the *Law on the Special Intelligence Means*, several institutions were excluded from the list of authorities authorised to request the use of special intelligence means. These include the Prosecutor General, the Supreme Prosecutor's Office of Cassation, the Supreme Administrative Prosecutor's Office, the Military Prosecutor's Office of Appeal, the prosecutor's offices of appeal, the Sofia City Prosecutor's Office, the district and military district prosecutor's offices, the National Investigation Service and the respective investigation services (the new version of the provision reflects the changes in the structure of the police and the Ministry of Defence, as well as in pre-trial proceedings). With good reason, the right of the prosecutor's office to request use of special intelligence means is limited to the supervising prosecutor considering his or her role in the pre-trial proceedings, which is consistent with the *Criminal Procedure Code*.

Authorities other than those listed above may neither request nor use special intelligence means (Article 13 (3) of the *Law on the Special Intelligence Means*). Instruction No. 1 reproduces an older version of Article 13, which is why the list of these authorities does not correspond to the one defined in the law. This provision is illegal and should not be applied. Its retention, however, albeit hypothetically, may cause confusion which could slow down the granting of authorisation for use of special intelligence means, which in turn could delay or frustrate the investigation.

The mandatory information to be included in the request for use of special intelligence means is provided for in the statutory instruments, but the provisions of the *Criminal Procedure Code* and the *Law on the Special Intelligence Means* are not completely identical in this respect. The *Law on the Special Intelligence Means* enumerates the mandatory items in greater detail:

- complete and exhaustive indication of the facts and circumstances warranting a presumption that a serious offence is being prepared, is being committed or has been committed which necessitate the use of special intelligence means;
- full description of the actions taken so far and of the results of the preliminary check or the investigation;
- data identifying the persons or sites in respect of whom or which the special intelligence means are to be used;
- period of use;
- operational techniques, which are to be deployed;
- authorised official who is to be informed of the results of the use of special intelligence means [Article 14 (1)].

According to Article 173 (1) and (2) of the *Criminal Procedure Code*, the request of the supervising prosecutor must contain the same mandatory items, which are described in more general terms. Due to the fact that only the supervising prosecutor may request the use of special intelligence means in the pre-trial

proceeding, the mandatory items in his or her request do not include data about the authorised official who is to be informed of the results of the use of special intelligence means.

The *Criminal Procedure Code* requires **additional mandatory information** to be included in the request in two cases. Where an investigation through an undercover officer is requested, the head of the entity which arranges and implements this investigation or a person authorised by this head must present to the authorising authority **a declaration in writing by the officer** that he or she is familiar with his or her duties and tasks under the specific investigation. The declaration is kept by the authorising authority and, instead of personal data of the officer, it states his or her personal identification number assigned by the entity which arranges and implements the investigation through an undercover officer (Article 173 (3)). Where the special intelligence means are used with the consent of the person in respect of whom they are used, the **written consent** of that person must also be attached to the reasoned request [Article 173 (5) and Article 14 (2) of the *Law on the Special Intelligence Means*].

The authorisation to use special intelligence means is granted **in advance** and **the court is the only authority authorised to grant it**. The legislator specifies the judicial authority to which the request must be addressed depending on the jurisdiction in terms of the investigated offence and, in certain cases, depending on the profession of the accused. The general rule is that the request should be addressed to the president of the district court or to a vice president expressly authorised by that president (in the case of Sofia City this would be the Sofia City Court). In cases to be heard by the **specialised criminal court**, the authorisation is granted in advance by the president of that court or by a vice president authorised by that president [Article 174 (3) of the *Criminal Procedure Code*]. Authorisation to use special intelligence means in respect of members of the armed forces is granted by the president of the respective district military court or a vice president authorised by that president.

Where deployment of special intelligence means is requested in respect of a **judge or the administrative head or the deputy administrative heads of a district court**, the authorisation is granted by the president of the competent appellate court or a vice president expressly authorised by that president.

The court, which has been approached with the request, must decide immediately after receipt of the request, and the court's act together with the request are handed back to the requesting authority [Article 174 (1) to (5) of the *Criminal Procedure Code* and Article 15 of the *Law on the Special Intelligence Means*]. The *Criminal Procedure Code* provides for the keeping of a **register** of the requests submitted and the authorisations granted.

The use of special intelligence means itself is **arranged and implemented** only by the respective entities: the Specialised Directorate "Operational technical operations, specialised unit for arrangement and implementation of investigations through an undercover officer" of the Ministry of Interior, or the Specialised Technical Operations Directorate of the State Agency for National Security [Article 175 (1) of the *Criminal Procedure Code* и Article 20 (1) of the *Law on the Special*

Intelligence Means]. The Minister of Interior or a deputy minister authorised in writing by that Minister and, respectively, the Chairperson of the State Agency for National Security or a deputy chairperson designated in writing by that Chairperson, acting on the basis of a written authorisation received from the respective court, is supposed to issue a **written order** for the deployment of the special intelligence means by the relevant entity. Depending on which directorate deploys the special intelligence means, orders down the chain of command are given by the head of the relevant directorate or a deputy head authorised by that head. A simplified procedure is provided for as an exception, where a request for use of wiretapping has been submitted by the Internal Security Directorate of the Ministry of Interior in respect of an employee of the Ministry: the Minister of Interior may propose to the Chairperson of the State Agency for National Security to issue a written order for deployment of this operational technique by the Agency's Specialised Technical Operations Directorate after obtaining the written authorisation of the court.

Unlike the above, in connection with the option to use special intelligence means for activities related to national security, the National Intelligence Service and the intelligence services of the Ministry of Defence may possess and deploy special intelligence means within the limits of their powers [Article 20 (2) of the *Law on the Special Intelligence Means*].

Legislation provides for exceptions from the standard procedure for use of special intelligence means in a situation of **urgency**. In the *Criminal Procedure Code*, such option is provided for only in respect of a single technique: **investigation through an undercover officer** [Article 173 (4)]. Such an officer may be used in urgent cases by an order of the supervising prosecutor, where this is the only possibility to perform the investigation. The supervising prosecutor has discretionary powers to determine whether the situation is urgent and whether other options to perform the investigation are available. The prosecutor's decision is subject to validation by the respective court within 24 hours. The activity of the undercover officer is discontinued unless the court grants authorisation within 24 hours. The court must also rule on whether the information collected should be retained or destroyed.

The *Law on the Special Intelligence Means* provides for possibilities to deploy **all types special surveillance means** in urgent cases, and their deployment may commence immediately after obtaining the written authorisation from the court, without complying with the ensuing ordering procedure described above. The *Law on the Special Intelligence Means* lacks a definition of "urgent case", and discretion is vested in the **authorised heads of the respective directorate**. The only requirement set by the law is that the Minister of Interior or the deputy minister authorised in writing by that Minister or, respectively, the Chairperson of the State Agency for National Security or the deputy chairperson authorised in writing by that Chairperson, **be notified immediately**.

It is recommended to further elaborate the framework, establishing clear criteria as to which situations can be treated as urgent cases and introducing a requirement that the notification should provide reasons justifying the urgency of the case.

In cases of an **imminent risk** of intentional offences being committed or a **threat to national security**, according to Article 18 of the *Law on the Special Intelligence Means*, the special intelligence means may be used even without authorisation from the court, only on the basis of an order of the Minister of Interior or of a deputy minister authorised in writing by that Minister or, respectively, of the Chairperson of the State Agency for National Security or a deputy chairperson authorised in writing by that Chairperson. Such use is discontinued unless validated by the court within 24 hours. With the granting of authorisation, the court also validates the actions taken so far and rules on the retention or destruction of the information collected.

The special intelligence means may be used **within up to two months** after the authorisation is granted. Where necessary, this **period** may be extended by not more than four months following the same procedure applicable for obtaining the initial authorisation. Thus, the overall period may not exceed six months [Article 175 (3) and (4) of the *Criminal Procedure Code* and Article 21 of the *Law on the Special Intelligence Means*]. Upon expiry of the authorised period, the use of special intelligence means is discontinued *ex officio* by the entities authorised to apply them.

Apart from this case, the *Law on the Special Intelligence Means* provides for other grounds for discontinuing the deployment of special intelligence means. These grounds fall into two groups. The first group covers the cases in which the objective has not been achieved or the use of special intelligence means does not produce results. In such cases the authorities that have requested authorisation approach the entities deploying the special intelligence means with a written request to discontinue the use. The second group includes three cases in which the use of special intelligence means may not commence or may be aborted by the deploying entity: first, when there is a risk of exposure of the operational techniques; secondly, where the application of special intelligence means becomes impossible; and thirdly, where the tasks assigned pose a risk to the life or health of the undercover officer or of his or her ascendants, descendants, siblings, spouse or persons with whom the officer is in a particularly close relationship [Article 22 (1) to (3)]. Regardless of the grounds for discontinuing, the specialised entity applying the special intelligence means is obliged, immediately after discontinuing the use, to notify in writing the court, which granted the authorisation, and the authority that requested the authorisation and issued the order for the use of the relevant special intelligence means. For the second group of grounds, the notification must be **reasoned**. The logic behind the last-mentioned requirement is that the deploying specialised entity has discretion to decide whether to discontinue the use or not to use special intelligence means.

The *Criminal Procedure Code* lists the same grounds for discontinuing the use of special intelligence means [Article 175 (5)] without dividing them into groups. Provisions are also made for a written notification to the authority, which granted the authorisation. The latter, in the cases where the information collected is not used for the preparation of physical means of proof, must order its destruction [Article 175 (6)]. By virtue of the *Criminal Procedure Code*, in all cases in which the application of special intelligence means is discontinued, the notification must be

reasoned. It is recommended that the requirement of the *Criminal Procedure Code* for a reasoned notification be introduced for all grounds under the *Law on the Special Intelligence Means*.

The authorities, which requested authorisation for the use of special intelligence means, are obliged to assist the entities deploying these means with up-to-date information concerning the identity of the persons and sites subjected to the special intelligence means [Article 23 *Law on the Special Intelligence Means*].

2.2.3. Physical means of proof and evidential value of data obtained using special intelligence means

The *Criminal Procedure Code* lays down the procedural rules for investigation using special intelligence means. What matters most to proving in the criminal procedure are the **results** of the deployment of special intelligence means and their use. They are subject to some of the general rules of the *Criminal Procedure Code* for the preparation of physical means of proof and their attachment to the case and the special provisions of the *Criminal Procedure Code* and the *Law on the Special Intelligence Means*. The court and the pre-trial authorities are bound to collect and verify, *inter alia*, the physical means of proof prepared using special intelligence means in the cases provided for by the Code [Article 125 (2) of the *Criminal Procedure Code*].

Under the *Criminal Procedure Code*, two of the operational techniques: controlled delivery and trusted transaction, serve to collect physical evidence, while in an investigation through an undercover officer the officer is interrogated as a witness [Article 172 (4)]. Apart from the general rules for the preparation of physical means of proof, the *Criminal Procedure Code* does not make any express provisions on the way of preparing means of proof using the rest of the operational techniques. The *Law on the Special Intelligence Means* lists the physical means of proof, which are prepared using special intelligence means: **film recordings, video recordings, audio recordings, photographs and marked objects** [Article 2 (1)]. These are in fact different types of documenting depending on the technical device used.⁸³

New types of physical means of proof will probably emerge as a result of technological advances. Due to the fact that the use of special intelligence means usually violates certain personal rights [e.g. a temporary restriction of the inviolability of the home and the confidentiality of correspondence and of other communications – Article 1 (2) of the *Law on the Special Intelligence Means*] and there is a risk of interference with private life, **legislation in this sphere must be exhaustive and consistent and, moreover, must be regularly updated.**

⁸³ The Constitutional Court holds that most of the operational techniques, and in particular surveillance, wiretapping, following, penetration, marking and monitoring correspondence and computerised information, are associated with direct preparation of physical means of proof such as film recordings, video recordings, audio recordings, photographs and marked objects (See Judgment No. 10 of 28 September 2010 in Constitutional Court No. 10 of 2010, promulgated in the State Gazette No. 80 of 12 October 2010).

As a rule, physical means of proof obtained using special intelligence means are prepared in duplicate and within 24 hours after their preparation are sent sealed to the prosecutor who requested and the court which granted the authorisation [Article 176 (1) of the *Criminal Procedure Code*]. By way of exception (introduced by the *Law Amending and Supplementing the Criminal Procedure Code* effective as from 28 May 2010), the prosecutor who requested the authorisation may warrant the preparation of the physical means of proof **in more than two copies** [Article 176 (2)]. This is possible only where the data obtained using special intelligence means in another criminal proceeding or at the request of some of the specialised authorities authorised to request deployment of special intelligence means under the *Law on the Special Intelligence Means* are also used for proving. In this case, too, a sealed copy of the physical means of proof must be sent within 24 hours after their preparation to the court, which granted the authorisation, and the rest of the copies must be sent to the prosecutor so as to be attached to the relevant criminal proceedings.

The physical means of proof obtained using special intelligence means are recorded in a report drawn up according to the terms and procedure established by the *Criminal Procedure Code*. Taking into consideration the principle that reports drawn up in this manner constitute written means of proof of the performance of the relevant actions, of the procedure according to which these actions were performed and of the evidence collected (Article 131 of the *Criminal Procedure Code*), the legislator establishes **special requirements for the report of the physical means of proof** obtained using special intelligence means.

Firstly, the report must be signed by the head of the entity which prepared the physical means of evidence and must contain specified mandatory information: an indication of the time and place of deployment of the special intelligence means and the preparation of the relevant physical means of proof, the identity of the person under surveillance, the operational techniques and technical devices used; a transcript of the content of the physical means of proof [Article 132 (2) of the *Criminal Procedure Code*]; and the conditions under which the results of the use have been perceived [Item 5 of Article 29 (4) of the *Law on the Special Intelligence Means*].

Secondly, the request for use of the special surveillance means, the written consent of the persons to use such means for the protection of their life, health and property in the cases provided for in the law, the authorisation for use of the special intelligence means and the order of the competent authority according to the procedure established by the *Law on the Special Intelligence Means* must be attached to the report [Article 132 (3) of the *Criminal Procedure Code*].

Thirdly, **the physical means of proof attached to the case** [Article 132 (4) of the *Criminal Procedure Code*] constitute an integral part of the report and are retained according to the established procedure [Article 29 (5) of the *Law on the Special Intelligence Means*]. Sketches, layouts, schemes and other graphic representations may also be attached to the report [Article 29 (6) of the *Law on the Special Intelligence Means*].

To be valid, the report must conform to these requirements. Along with them, a separate provision of the *Criminal Procedure Code* [Article 172 (5)] requires that all materials prepared using special intelligence means, including computerised data, collected and recorded by special technical devices, **be attached to the case**.

The legal rules governing the evidential value of the data obtained through special intelligence means is very important for the effectiveness of justice as well as for the balance of the rights and interests of the parties in the procedure. The general rule is that only results obtained within the limits of the submitted request for the use of special intelligence means are admissible in the criminal proceeding. There are two exceptions to this rule. One of the exceptions applies to the cases where in the course of the deployment of the special intelligence means data are found concerning another serious intentional offence, the investigation of which allows for the use of such means as well [Article 177 (2) of the *Criminal Procedure Code*]. The other exception permits the use of the data obtained through special intelligence means in another criminal proceeding or at the request of some of the specialised authorities authorised under the *Law on the Special Intelligence Means* for proving a serious intentional offence (the investigation of which also allows for the use of such means) [Article 177 (3) of the *Criminal Procedure Code*]. The appropriate and lawful use of these exceptions may be very productive when investigating offences committed by an organised criminal group, which are usually closely linked both in terms of the members of the group and the acts committed by them.

The procedure for the preparation of physical means of proof in the course of deployment of special intelligence means is described in detail in Chapter Four of the *Law on the Special Intelligence Means*. The framework takes into consideration the specificities of the broader scope of application of the law. The results of the use of special intelligence means are documented on paper or on another data medium by the respective authority of the specialised entity of the Ministry of Interior or the State Agency for National Security immediately after these results are obtained [Article 25 (1)]. This medium, immediately after its preparation, is sent to the authority that requested the use of special intelligence means accompanied by the items received during the controlled delivery or trusted transaction. The authority that requested the use of special intelligence means may also receive, upon request, the prepared photographs, recordings, sketches and layouts. The specialised entities, which implement and arrange the special intelligence means, are bound to keep the physical medium within the period of use of the special intelligence means and to prepare the physical means of proof.

The *Criminal Procedure Code* obliges **computer information service providers** to assist the court and the pre-trial authorities in the collection and recording of **computerised data** through deployment of special technical devices. However, this obligation applies only when it is necessary for the detection of the offences listed in the Code and the requirements for the deployment of special intelligence means are met. The request for assistance must be reasoned and conform to these requirements of the law. Otherwise, providers may refuse to provide assistance.

In order to be incorporated as evidence in the case and to be admissible in the procedure, the means of proof must be prepared in compliance with the rules for their preparation. This compliance is checked during the **verification and assessment** of the evidentiary material, which are pivotal in the proving process.⁸⁴ Due to the specificity of the special intelligence means, the pre-trial authorities and the court, while verifying the evidence collected by such means, have to perform all necessary actions to verify the truthfulness of the evidentiary materials (and, respectively, of the means of proof) and the compliance with the established procedure for their collection.⁸⁵ Any breach of this procedure, as listed below, would render the results of the deployment of special intelligence means inadmissible in the procedure and may frustrate the criminal prosecution:

- the use of special intelligence means was not requested by the respective authority;
- the request was inadmissible;
- the authorisation granted by the court exceeded the limits of the request submitted;
- the order of the respective authority for the deployment of special intelligence means did not correspond to the authorisation granted by the court;
- the special intelligence means were deployed after the authorisation's period of validity had expired;
- the special intelligence means were deployed without authorisation, and an authorisation was not granted within the established 24-hour time limit;
- the physical means of proof were not prepared according to the procedure established in the law;
- the report on the preparation of the physical means of proof does not comply with the requirements provided for in the law;
- the physical means of proof were not sent within 24 hours to the prosecutor who requested and the court, which granted the authorisation for the use of special intelligence means.

Non-compliance with the procedure and the manner for the collection of physical means of proof by special intelligence means has serious negative consequences.

In the first place, such non-compliance may lead to infringement of fundamental personal rights and freedoms and of the fundamental principles of criminal procedure, which has an adverse impact on the collection of evidence as well. Such would be the case if the physical means of proof prepared using special intelligence means do not cover the entire period during which these means were deployed or the entire information collected (e.g. wiretapping in which separate phrases are taken out of the overall context of the conversation).

In the second place, such non-compliance may directly impede the proving of the criminal offence. In such cases the criticism is often levelled at the court without

⁸⁴ For details see Павлов, С., Наказателен процес на Република България, обща част [Pavlov, S., Criminal Procedure of the Republic of Bulgaria: General Part], Sibi, Sofia, 1996, pp. 343-348.

⁸⁵ According to an express provision of the Criminal Procedure Code [Article 125 (2)], the court and the pre-trial authorities must collect and verify, inter alia, the physical means of proof prepared using special intelligence means.

taking account of the specific reasons for presenting inadmissible evidence and for failing to prove the charge.

Insofar as the preparation of physical means of proof is an exclusive responsibility of the respective specialised entities and is implemented secretly, the actions of these entities have to be strictly regulated and to be subject to control by the heads of these entities and the authority that requested the use of special intelligence means. Responsibility should also be sought in cases of violations, which lead to compromised evidence or allow for the use of these instruments for inappropriate pressure. Concrete proposals for legislative amendments include the introduction of:

- time limits for the preparation of the physical means of proof;
- requirement that all results obtained during the entire period of the use of special intelligence means be transformed into physical means of proof;
- absolute prohibition to use the original information recorded on the physical medium under Article 24 of the *Law on the Special Intelligence Means* in the criminal proceeding.⁸⁶

According to the *Law on the Special Intelligence Means* the presidents of the district courts or of the courts of appeal who granted authorisations for use of special intelligence means must include in their annual reports to “data about the number of authorisations granted and physical means of proof prepared” [Article 29 (8)]. A review of these data in recent years shows that **the requests submitted and the authorisations granted for application of special intelligence means tend to increase**.⁸⁷ At the same time, the use of such means in more than half of the cases is **unproductive**. This conclusion is based on a comparison between the number of authorised special intelligence means and the number of physical means of proof prepared after their use. Summarised information on the same issues can also be found in the first annual report for 2010 of the **parliamentary subcommittee** for oversight and monitoring of the procedures for the use of special intelligence means and for access to traffic data under Article 250a (1) of the Law on the Electronic Communications. According to that report, in 2010 the Bulgarian courts granted 15,864 authorisations for the use of special intelligence means, issued 134 refusals, and 3,388 physical means of proof were prepared.⁸⁸

⁸⁶ The current version of the Law on the Special Intelligence Means also provides that this information be recorded on paper or on another data medium and that it must correspond to the information contained in the physical medium under Article 24, which must be kept by the specialised entities deploying the special intelligence means, but no sanctions are provided for non-compliance with this requirement.

⁸⁷ The number of requests and the number of authorisations granted do not correspond to the number of pre-trial proceedings because in many cases one request is submitted for the deployment of multiple operational techniques.

⁸⁸ According to the data released in the same report, special intelligence means were deployed in respect of 5,763 persons, and the Minister of Interior personally authorised special intelligence means in 142 urgent cases of a threat to national security. However, not a single Bulgarian citizen was notified according to the procedure established by Article 34h of the Law on the Special Intelligence Means that his or her communications and movements had been unlawfully monitored.

The information from the biggest courts, where the majority of cases related to organised criminal groups are also concentrated, illustrates this trend even more convincingly.⁸⁹ Thus, in 2010 the Sofia City Court⁹⁰ granted a total of **6,213 authorisations** under the *Law on the Special Intelligence Means*, issued **15 refusals**, and received **709 physical means of proof**. Until 10 May 2010, when the *Law Amending and Supplementing the Law on the Electronic Communications* entered into force, vesting competence to authorise access to data in the president of the regional court or a judge authorised by that president, the authorisations numbered 4,942. By comparison, in 2009 the same court granted 3,662 authorisations under the *Law on the Special Intelligence Means* and 5,449 authorisations under the *Law on the Special Intelligence Means* and the *Law on the Electronic Communications*, issued 15 refusals, and received 329 physical means of proof.⁹¹ Things are similar at the Plovdiv District Court, which has the country's second heaviest caseload after the Sofia City Court. According to the 2010 activity report of the Plovdiv District Court, it was approached with a total of **1,761** requests for use of special intelligence means (936 by the prosecutor's office and 815 by the Ministry of Interior and the State Agency for National Security), granted **1,751** authorisations, and received **197** physical means of proof. This means that in the predominant number of cases the application of special intelligence means did not contribute to prove the case during the trial.

In 2010, the Burgas District Court, which has the country's fourth largest number of magistrates and the fourth heaviest caseload after the Sofia City Court and the Varna and Plovdiv district courts, granted **697** authorisations for use of special intelligence means, of which **399** were requested by prosecutors and **298** were requested by heads of the authorities referred to in Item 1 of Article 13 (1) of the *Law on the Special Intelligence Means* (regional directorates of the Ministry of Interior, Directorate General for Combating Organised Crime, Criminal Police Directorate General, Border Police Directorate General and the State Agency for National Security).⁹² In the preceding two years, 466 special intelligence means were

⁸⁹ According to the Report on the Application of the Law and on the Operation of the Prosecutor's Office and of the Investigating Authorities in 2010 (<http://www.prb.bg/main/bg/Information/2076/>), the largest number of pre-trial proceedings of significant public interest in connection with organised crime in 2010 (two-thirds of all pre-trial proceedings) were supervised at the Sofia City Prosecutor's Office, the Plovdiv District Prosecutor's Office, the Varna District Prosecutor's Office and the Burgas District Prosecutor's Office, and the largest number of indictments in connection with organised crime were submitted to the court by the Sofia City Prosecutor's Office (35), the Plovdiv District Prosecutor's Office (10) and the Varna District Prosecutor's Office (10).

⁹⁰ In 2010, a General Assembly of the Criminal Department of the Sofia City Court discussed whether the use of special intelligence means gives the court grounds to examine the case behind closed doors under the terms established by Article 263 (1) of the Criminal Procedure Code. The deliberations resulted in the conclusion that if the data obtained as a result of the use of special intelligence means do not constitute a state secret because they do not pose a threat to national security or to the sovereignty of the country, the publicity of the court hearing should not be restricted. See 2010 Annual Activity Report, General Assembly of Judges of the Sofia City Court, 14 March 2011.

⁹¹ After the amendments to the Law on the Electronic Communications (effective as from 10 May 2010), the Sofia Regional Court was approached with 5,121 requests under Article 250a (1) of the Law on the Electronic Communications, on which 1,114 refusals were issued.

⁹² Wiretapping is the most widespread technique, with 384 authorisations granted (55 % of the total number of authorisations).

authorised for 2009 and 236 for 2008. At the same time, a total of **131** physical means of proof were received for 2010. A total of **24** pre-trial proceedings involving physical means of proof were submitted to the Burgas District Court in 2010 with an indictment or a plea bargain agreement. The court's annual activity report concludes that the "effectiveness" of the use of special intelligence means for the court's geographical jurisdiction was **18.8 %** as a proportion of the total number of authorisations and **49.8 %** as a proportion of the number of persons.⁹³ As few as 41 authorisations, or 5.88 % of their total number, were issued for the protection of national security.

The report concludes with good reason that the numerous requests for special intelligence means deployed when the traditional investigative methods have not produced a result **prove just as unproductive for the detection of the offences within the court's geographical jurisdiction.**

For the same period (2010), the Haskovo District Court granted **657** authorisations for application of special intelligence means, and as few as **53** physical means of proof were prepared.⁹⁴

The reports of the prosecutor's office also note a steep upward trend in the requests for use of special intelligence means. In 2010 such requests increased by 31.4 % compared to 2009 and about two and a half fold compared to 2008. According to consolidated statistics for 2010, requests were submitted for deployment of 11,618 techniques (up from 8,843 for 2009 and 4,690 for 2008), of which the courts granted 11,402 (98.1 %). Prosecutors drew up 3,427 requests for information, on which 3,104 responses were provided or 90.6 %. These trends are attributed to various factors: the 22 % increase from 2009 of the number of newly instituted cases of significant public interest; the invigoration of the activity of the law-enforcement authorities in countering organised crime; or the increased complexity of serious crime (increased number of participants, higher degree of organisation and more sophisticated means used by offenders to impede and neutralise their detection).⁹⁵

⁹³ See Годишен доклад за дейността на Окръжен съд – Бургас, и районните съдилища от Бургаски съдебен район за 2010 г. [2010 Annual Activity Report of the Burgas District Court and the Regional Courts within its Geographical Jurisdiction]. According to the report, 255 of the requests were for natural persons and eight requests were for sites for the purpose of establishing the identity of persons engaged in criminal activity. Special intelligence means were deployed in respect of 263 persons, of whom 16 requested to be wiretapped because of threats against their life and property giving their consent in writing in line with Article 12 (2) of the Law on the Special Intelligence Means. Of the 697 authorisations granted, most were requested for detection of the following offences: organised criminal group (Article 321 of the Criminal Procedure Code); offences against the monetary and credit system; robbery, theft, blackmail; Article 308 (2) of the Criminal Code; fraud; money laundering; cross-border smuggling; offences against the administration of government; bribery etc.).

⁹⁴ Отчетен доклад за работата на Окръжен съд – Хасково – 2010 г. [2010 Activity Report of the Haskovo District Court].

⁹⁵ See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Application of the Law and on the Operation of the Prosecutor's Office and of the Investigating Authorities in 2010], (<http://www.prb.bg/main/bg/Information/2076/>).

Along with these objective reasons, however, one cannot ignore the temptation of the investigating authorities to resort more frequently to collection of evidence by special rather than by conventional means of proving.

Box 2. Risks of the growing use of special intelligence means

“The figures for 2010 and the tendency of a substantial increase in the special intelligence means used invite the alarming conclusion that this method of proving is used all too often in the practice of investigation rather than as an exception as provided for in the law. Due to the excessive use of special intelligence means, the investigating authorities may lose interest in performing other investigative actions and prerequisites emerge for abuse of the data collected by special intelligence means. Therefore, it is imperative to review the legislation in terms of the list of offences in respect of which it is admissible to collect evidence by special intelligence means. A legislative revision is needed to tighten the control over the use of special intelligence means, including a restriction of their use through economic levers (imposing a limit on the number of special intelligence means and levying a fee on the use of such means) and to improve the effectiveness of the control, including the control exercised by the court, over the destruction of the physical means of proof prepared if they cannot be used in the investigation.”

Source: Report on the Application of the Law and on the Operation of the Prosecution Service and of the Investigating Authorities in 2010.

The lack of consolidated statistics based on uniform criteria and covering criminal proceedings in their entirety makes it impossible to arrive at an exact figure for the success rate of the application of special intelligence means.

2.2.4. Problems in the practice of application of special intelligence means

The low productivity of the use of special intelligence means, as well as the numerous abuses and violations, are due to problems of various nature: flaws in the legal framework and its synchronisation, exceedingly broad range of offences to which special intelligence means are applicable, the behaviour and the insufficient professional qualification of some of the participants in the special intelligence means deployment procedure, lack of reliable safeguards against abuses and violations of fundamental human rights and of a comprehensive and effective system of independent control over the use of special intelligence means.

- **Problems in connection with the operational techniques used as special intelligence means**

The current version of the law provides for several operational techniques that can be used as special intelligence means: surveillance, wiretapping, following, penetration, marking and monitoring correspondence and computerised information, controlled delivery, trusted transaction, and investigation through an undercover officer.

The most frequently used technique is **wiretapping**,⁹⁶ defined as “aural or another manner of acquisition of oral, telephone or electronic communication of persons under surveillance through the use of technical devices” (Article 6 of the *Law on the Special Intelligence Means*). As evident from the definition, wiretapping may be implemented using **various technical devices**, whereas the authorisation is granted only for the operational technique and not for the technical device. This circumstance, however, is not always taken into consideration by the courts and some courts **do not admit as evidence** the information, which was collected through the authorised operational technique but without indicating the technical devices to be used. The Supreme Court of Cassation does not share this approach to the assessment of the evidence, describing it as not conforming to the effective legal framework and denying the prosecutor’s office the opportunity to argue the case for the prosecution.⁹⁷ The future legal framework, however, should require that the request and the authorisation for the use of special intelligence means must specify both the operational technique and the possible technical devices because the latter are also part of the special intelligence means and they, too, restrict rights and are susceptible to abuse.

Wiretapping is an important technique for the detection of the criminal activity and the participants in the group. The application of this technique, however, involves a number of risks. Firstly, not all recordings but only those pointing to the commission of an offence may be presented before the court. Secondly, the court cannot determine whether an offence has been committed only on the basis of the transcripts outside the overall context. Thirdly, the recordings of intercepted conversations can often create a wrong impression because they are taken out of context: it is not known what the persons discussed before the recorded portion, the intonation is difficult to apprehend etc. The court must require and listen to the full recordings instead of reading the transcripts submitted by the prosecution, but even in this case some of the risks cannot be avoided. In reality, there are also problems with proving the actual identity of the party talking on the telephone because mobile phone SIM cards often cannot be linked directly to the accused parties, the accused cannot be induced to talk so as a voice identification expert examination could be performed, etc. That is why wiretapping should rather provide the investigating authorities with clues to the collection of other evidence and not be used as a principal method, as is the prevailing practice at present.

The *UN Convention against Transnational Organized Crime* recommends the use of special investigative techniques, such as controlled delivery, electronic and other forms of surveillance, as well as undercover operations. Other international instruments and acts of the EU also call attention to the significance of these methods for the collection of evidence. In a number of countries, their deployment produces good results in the detection of organised criminal groups and their leaders. In

⁹⁶ According to the prosecutor’s office, the operational techniques most frequently used in 2010 were wiretapping (58.1 %), surveillance (20.7 %) and following (19.7 %). See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Application of the Law and on the Operation of the Prosecutor’s Office and of the Investigating Authorities in 2010] (<http://www.prb.bg/main/bg/Information/2076/>).

⁹⁷ Judgment No. 516 of 16 December 2009 in Criminal Case No. 539 of the Criminal College, Third Criminal Department of the Supreme Court of Cassation, for the Year 2009.

Bulgaria, the new operational techniques and types of special intelligence means: **investigation through an undercover officer, controlled delivery and trusted transaction**, introduced for the first time in the new *Criminal Procedure Code* and defined in the *Law on the Special Intelligence Means*, still lack a detailed and systematic regulation and are not used sufficiently.

The *Law on the Special Intelligence Means* (Article 10c) defines an undercover officer as “an officer of the respective services under the Law on the Ministry of Interior or the Law on the Defence and Armed Forces, or an officer of the National Intelligence Service, who has been empowered to establish or to maintain contacts with a person under surveillance in order to obtain or to discover information about the commission of a serious intentional offence and about the manner in which the criminal activity is organised”. The *Law on the Ministry of Interior* and the *Law on the State Agency for National Security* state that only officers designated by the heads of the respective agencies may perform the functions of undercover officers.

The use of undercover officers by the Ministry of Interior is described in greater detail in a *Council of Ministers Ordinance on the Arrangements for the Use of Undercover Officers by the Ministry of Interior*. The Ordinance formulates the purposes of this technique in broader terms than the definition in the *Law on the Special Intelligence Means*, viz. use not only for the purposes of collecting evidence in criminal procedure but also for prevention, as well as for activities related to national security. The Ordinance also describes the functions of the officer for the achievement of these purposes which, in most general terms, boil down to “infiltrating the entourage or the circle of persons who present a lawfully established interest to the authorities of the Ministry of Interior, using their cover to implement surveillance of such persons, to obtain data about planned, prepared, committed or completed serious intentional offences and for the purposes of protection of national security” [Article 5 (1) of the Ordinance].

The still scanty publications on this subjects⁹⁸ call attention to the insufficient and incomplete framework of the investigation through an undercover officer: the lack of rules governing the powers of the officers, the authorised and unauthorised activity, the grounds for release from criminal responsibility for an offence committed upon deployment of this operational technique, the express prohibition of the provocation to commit an offence, the link with the operational technique of trusted transaction and the consequences of this etc.

Statistics show that, albeit on an incomparably smaller scale than the rest of the special intelligence means, investigation through an undercover officer together with trusted transaction is already applied. The official data, as far as available, vary but a study conducted by the RiskMonitor Foundation found that the district courts countrywide granted a total of 35 authorisations for 2009, of which 15 were granted by the Plovdiv District Court and 14 by the Sofia City Court,

⁹⁸ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, pp. 170-185; Смедовска-Тонева, Р., Специални методи за борба с организираната престъпност – агенти под прикритие [Smedovska-Toneva, R., Special Methods to Combat Organized Crime – Undercover Agents], RiskMonitor Foundation, Sofia, 2011.

whereas the number reached 63 in 2010, including 47 granted by the Sofia City Court.⁹⁹

Since its introduction, the deployment of the operational technique of “investigation through an undercover officer” has given rise to controversy. According to one school of thought, this is an extraordinary means, which must be resorted to only as an exception, either to complement other means of proof or when proving by other means is impossible,¹⁰⁰ but it is nevertheless a suitable instrument for the detection and prevention of serious offences and for the collection of inside information admissible in the criminal procedure. According to the opposite views, this figure of undisclosed identity, transplanted from the criminal procedure of other countries, does not conform to the Bulgarian context and its use in this country leads to the collection of inadmissible evidence instead of facilitating the collection of evidence.

Because of the still rare use of this instrument in practice, however, the legal framework is the main target of criticism for the time being. Part of this criticism concerns Article 173 (3) of the *Criminal Procedure Code* which, as amended in 2010, provides that the declaration of the undercover officer must state the personal identification number assigned to him or her by the entity which arranges and implements the investigation through an undercover officer. The unavailability of personal data makes it impossible for the court, which authorises the use of this operational technique, to establish that the declaration originates precisely from the person who signed it. To this end, it is proposed that data identifying the person be included in the declaration, while only the identification code be entered into the register of requests and authorisations, which is not open to public inspection. At present the information identifying the undercover officer may be provided to the supervising prosecutor and to the court only after a reasoned written request to the Minister of Interior or the Chairperson of the State Agency for National Security or, respectively, their empowered deputies [Article 123a (3) of the *Criminal Procedure Code*].

Another shortcoming of the current legal framework is the short period for deployment of special intelligence means, which applies to this technique as well. Due to its specificity, however, a longer period needs to be provided for, so that this technique could achieve its intended purpose. At present the undercover officers, if at all used, are often withdrawn at a very early stage of the investigation. As soon as a charge is initially brought, the officer is practically withdrawn because otherwise he or she, too, will have to be arrested. And once withdrawn, the undercover officer becomes practically unusable because his or her participation is already exposed. On the other hand, if not withdrawn without being charged or arrested together with the rest of the participants, the risk of his or her exposure is heightened considerably because suspicions arise why his or her conduct was left without consequences. In principle, when a decision is

⁹⁹ See Смедовска-Тонева, Р., Специални методи за борба с организираната престъпност – агенти под прикритие [Smedovska-Toneva, R., Special Methods to Combat Organized Crime – Undercover Agents], RiskMonitor Foundation, Sofia, 2011. p. 25.

¹⁰⁰ Паунова, Л. и П. Дацов, Организирана престъпна група [Paunova, L. and P. Datsov, Organised Criminal Group], Ciela, Sofia, 2010, p. 170.

made to use an undercover officer in a particular investigation, this officer must be left until the end, until the detection of the entire group. This may sometimes take a long time, and if bringing charges is rushed, as is the practice in Bulgaria, the chances of the investigation getting to the rest of the participants recede.

Some operational techniques are used without a clear idea about their essence and how to distinguish them from the physical means of proof prepared upon their deployment. Usually, case law helps overcome this tendency, reconcile the conflicting case law of the lower courts, and close gaps in the operation of the authorities deploying the special intelligence means with a view to collecting admissible evidence. Thus, Judgment No. 809 of 7 January 2010 in Civil Case No. 15538 of the Civil College, First Civil Department of the Supreme Court of Cassation, for the Year 2008, confirms that marked money is not special intelligence means. Referring to Article 2 (1) and (3) of the *Law on the Special Intelligence Means*, the Court emphasises that “the marking of the money is an operational technique employed as a special intelligence means”, whereas the money itself is physical evidence prepared through the use of this technique. Therefore, the Court holds that the use of marked money in a police operation is not subject to the rules applicable to the special intelligence means.

On the other hand, the case law of the Supreme Court of Cassation contains some debatable solutions to the problems arising from the disparate interpretation and application of the legal framework of special intelligence means. Judgment No. 504 of 22 November 2005 in Criminal Case No. 1072 of the Third Criminal Department of the Supreme Court of Cassation for the Year 2004 calls attention to the two categories of written authorisations by the respective authorities regarding the procedure, manner and modalities of the use of special intelligence means, whose obtaining is mandatory but which arguably have different legal relevance to the valid collection of evidence. The Supreme Court of Cassation confirms that the availability of an authorisation from the court at the time of collection of physical means of proof through special intelligence means makes this evidence absolutely valid. At the same time, while emphasising that to be legally conforming, the collection of physical evidence by special intelligence means must have its logistical support ordered before the commencement of their use, the Court admits a departure from this requirement. The Supreme Court of Cassation holds that if an authorisation of the Minister of Interior, “which has the sole objective of ensuring the technical execution of the first authorisation”, was issued after the commencement of the use of special intelligence means, the breach is insignificant provided that the use conforms to the period and type of special intelligence means determined in the court authorisation. “Whether this authorisation will coincide in time or will succeed the authorisation by the authority under Article 111a of the Criminal Procedure Code, this will not vitiate the validity of the action itself: the collection of physical means of proof through special intelligence means, as long as this authorisation is available, has been granted by the Minister of Interior, and the step was performed by the technical directorates of the Ministry of Interior provided for in Article 20 of the Law on the Special Intelligence Means” An argument supporting this reasoning is found in Article 17 of the *Law on the Special Intelligence Means*, which allows for the commencement of the deployment of special intelligence means in urgent cases immediately after obtaining the written authorisation from the court, of which the

Minister of Interior or the deputy minister authorised in writing by that Minister must be notified immediately. This position, expressed on a specific case, rejects the thesis that the lack of a preceding order by the Minister vitiates the evidence. This position, however, should not be made universally applicable, thus asserting a practice of non-compliance with the law. The urgent case is an exception, which must not become a rule. Besides this, even in an urgent case validation by the court is required within 24 hours, whereas the interpretation of the Supreme Court of Cassation does not impose such a restriction. Once the law obliges the court to decide on the request immediately, it would be justified that the Minister of Interior (or the deputy minister authorised by that Minister) and the Chairperson of the State Agency for National Security (or the deputy chairperson authorised in writing by that Chairperson) should also issue an order with the least possible delay after the authorisation is obtained. The exception, which the law admits, applies only to the urgent cases and the imminent risks discussed above.

Achieving better results in the investigation and collection of evidence of organised criminal groups requires more sophisticated methods, including the introduction of new techniques using technological advances, such as GPS tracking.

- **Problems in connection with the control over the use of special intelligence means**

The cases of abuse of special intelligence means and the rows surrounding these cases, which have recently become public, as well as the broad-scale use of such means even when this is not necessary, brings to the fore the problem of control over their application.

In a new Chapter Four A, the *Law on the Special Intelligence Means* describes the control and monitoring of special intelligence means. The control as to the lawful use of special intelligence means is a responsibility of by the heads of the competent entities, which deploy them (Article 34a), i.e. the control is internal rather than independent.

Since the end of 2009,¹⁰¹ amendments entrusted monitoring to a committee of the National Assembly. This is a standing subcommittee with the Legal Affairs Committee and is supposed to implement the parliamentary oversight and monitoring provided for in Article 34b of the *Law on the Special Intelligence Means* and Article 261b of the *Law on the Electronic Communications*. The parliamentary oversight includes the procedures for the authorisation, deployment and use of special intelligence means, the retention and destruction of the information obtained by such means, as well as the protection of citizens' rights and freedoms against unlawful use of special intelligence means. The committee was elected by the National Assembly on 22 December 2009 and operates according to internal rules adopted by the National Assembly on 11 February 2010. Annually, on or before 30 April, the subcommittee presents an activity report to the Legal Affairs Committee, which must consider the report and lay it before the National Assembly not later than 31 May. Although the subcommittee has been operating for a relatively short period of time and

¹⁰¹ The amendments repealed the provisions inserted in 2008, which entrusted monitoring to a National Bureau for Control over the Special Intelligence Means.

in almost complete secrecy, usually meeting behind closed doors, the prevalent opinion is that it lacks the capacity to perform the duties assigned to it by the law. The subcommittee members themselves also share this opinion. At the same time, the discussion about the need to set up effective mechanisms for tightened control has not yet produced tangible solutions.¹⁰²

As the sole authority empowered to grant authorisations, the court determines whether the legal prerequisites apply and whether the request for the use of special intelligence means in respect of particular person(s) suspected of the commission of an offence is well founded. The court must ascertain that the relevant circumstances cannot be established in another manner or their establishment involves excessive difficulties. Deployment of special intelligence means is inadmissible without such an examination. In most cases, however, the court is not familiar with the case in detail, does not have the operational file at its disposal, and its assessment is based only on the facts and circumstances stated by the specialised services or by the prosecutor and on their conclusion that another technique is impossible to deploy. This may affect the objectivity of the court's judgement. This is probably the reason for the small number of refused authorisations.¹⁰³ There is a widespread opinion among judges that the reasoning of the requests is very often perfunctory, which impedes the examination. The rules of jurisdiction are also often circumvented in order to secure an "amenable" court or judge to grant the authorisation. Since no other control mechanism exists, it is within the powers of each court to reject requests submitted in breach of the rules of jurisdiction.¹⁰⁴ The court may also be misled – either because of the ignorance of those services and authorities or deliberately, in a bid to gain easier access to the use of special intelligence means or even to use them for a purpose other than intended. The rows in 2011 alone (over the unauthorised wiretapping of the Director of the National Customs Agency and the cases of massive-scale wiretapping without confirmation that deployment of this operational technique was warranted and necessary) are symptomatic in this respect.

To have an impartial and effective *ex ante* control by the court, the authorities empowered to request authorisation must act responsibly, professionally and under an enhanced internal control system. This is all the more imperative considering that the court is excluded from the subsequent control over the deployment of

¹⁰² The amendments to the Law on the Special Intelligence Means regarding the control over the use of special intelligence means, moved by opposition parties (the Bulgarian Socialist Party and the Movement for Rights and Freedoms), were voted down on 1 June 2011 by the government majority, which pledged to come up with a draft of its own. The rejected motion provided for the establishment of a seven-member public council with the Minister of Justice to control the retention and destruction of information obtained by special intelligence means, exclusion of the supervising prosecutors from the range of authorities authorised to request special intelligence means etc.

¹⁰³ According to the 2010 Annual Activity Report of the Burgas District Court, the refusals to deploy special intelligence means, including the refusals of requests to extend the period for their use, are most often due to unjustified necessity.

¹⁰⁴ Statement of Daniela Dokovska at a Round Table on Legislative Amendments Needed in the Statutory Framework of Special Intelligence Means, in: Веселинова, М. България още не е изпълнила решението на Страсбург за СПС [Veselinova, M. Bulgaria has not yet implemented the decision of Strasbourg on special intelligence means], *Praven Svyat online*, 21 February 2011 (<http://www.legalworld.bg/show.php?storyid=22619>).

special intelligence means and their use for the preparation of physical evidence. The court does not need to be charged with the overall control, but once it has granted authorisation for the use of special intelligence means, it must be afforded access to the information about the particular case, so that it would be clear at any time thereafter what has been requested and what has been used. In this connection, it is necessary to develop further the keeping of a **register of the requests submitted and the authorisations granted**, describing in detail the circumstances to be recorded in the register, the time limits, the responsibility for keeping and maintaining this register, as well as safeguards for its *bona fide* handling. This is all the more necessary because, according to the current framework, the request itself is sent back to the requesting authority,¹⁰⁵ and the register is not open to public inspection. This necessity is obvious in respect of discontinuing the deployment of special intelligence means. In such case, the law provides that the court, which granted the authorisation, be given an immediate reasoned notice in writing and order the destruction of the information gathered unless it will be used for the preparation of physical means of proof [Article 175 (6) of the *Criminal Procedure Code*]. The court, however, is not vested with powers to exercise subsequent control over compliance with the order issued and cannot impede a possible misuse of undestroyed information.

The shortcomings of the Bulgarian model of using special intelligence means, and especially those affecting human rights, have prompted the lodging of applications against Bulgaria at the European Court of Human Rights and obtaining judgments against the State. These defects are systematised in the Judgment delivered on 28 June 2007 in a case, which originated in application no. 62540/00 lodged by the Association for European Integration and Human Rights and Mihail Ekimdzhiev. The Court held that Bulgaria had violated Article 8, Article 13 and Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁶ The Judgment found that the persons subjected to surveillance are not notified of this fact at any point of time and under any circumstances and the lack of information (after the Supreme Administrative Court held that the information is classified) prevents them from seeking redress for unlawful interferences with their rights. The Court concludes that **Bulgarian law does not provide sufficient guarantees against the risk of abuse** in the use of special intelligence means and does not provide effective remedies against their improper use and for redress for unlawful interference with human rights. Such mechanism of apprising persons where their communications and movements have been unlawfully monitored exists in a number of other European countries. The other important conclusion is that Bulgarian law **does not contain a sufficiently effective apparatus for controlling** the use of special intelligence means. The European Court of Human Rights sees a risk of abuse of authority if the overall control is entrusted solely to the Minister of Interior, who not only is a political appointee but is directly involved in the commissioning of special intelligence means, and neither the Minister nor any other official is required to regularly report to an independent body or to the general public of the overall operation of the system or on the

¹⁰⁵ It is also debatable whether this provision should be revised as well and that the court should keep a copy of the request in compliance with the appropriate confidentiality arrangements.

¹⁰⁶ See Case of Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria (Application no. 62540/00), Judgment of 28 June 2007, European Court of Human Rights.

measures applied in individual cases. In its Judgment (paragraph 87), the Court, referring to some of its earlier judgments, cites the example of independent control bodies existing in other countries: a special board elected by the Parliament, an independent commission or a special commissioner holding or qualified to hold high judicial office, or a control committee consisting of persons having qualifications equivalent to those of a Supreme Court judge. The court argues for the need of independent external control. Executing the Judgment of the Court, legislative amendments were undertaken and led to the establishment of the parliamentary subcommittee. Its brief practice demonstrates, however, that this solution does not adequately address the deficiencies discussed.¹⁰⁷

The need of enhanced safeguards against the use of special intelligence means as an instrument of arbitrary interference and abuse is shared by the defence lawyers, judges and the public. Various solutions are possible in organisational terms, but in adopting any such solution the requirements specified in the Judgment of the European Court of Human Rights in the case discussed above must be taken into consideration. It is particularly important that the authorities implementing operational guidance and control report regularly to an independent body and to the general public on their operation. It is imperative to broaden the powers of the court with a view to exercising current and subsequent control.

¹⁰⁷ The subcommittee's first report does not provide information about the number of citizens who have been notified that they had been unlawfully subjected to special intelligence means. The members of the subcommittee admit that it does not have the capacity to verify the lawful deployment of special intelligence means or to inform the citizens (for further details, see Веселинова, М. 15864 разрешения за СПС през 2010 г., всичките правомерни [Veselinova, M. 15,864 authorisations for the use of special intelligence means in 2010, all regular], in: *Praven Svyat online*, 12 May 2011, <http://www.legalworld.bg/show.php?storyid=23327>).

3. OTHER SPECIAL METHODS AND LEGAL CONCEPTS APPLICABLE IN THE CRIMINAL PROSECUTION OF ORGANISED CRIME

3.1. ACCESS TO TRAFFIC DATA UNDER THE LAW ON THE ELECTRONIC COMMUNICATIONS

New technological advances diversify the opportunities for investigation and proving in criminal procedure. Certainly, their use should be subject of legal regulation and sufficient guarantees should be provided against violation of the citizens' constitutional rights and freedoms as well as of public security. One such opportunity is provided by the legal framework of access to traffic data in the *Law on the Electronic Communications*. The amendments to the *Law on the Electronic Communications*, effective as from May 2010, imposed an obligation on the providers of public electronic communications networks and/or services to retain, for a period of 12 months, specified data¹⁰⁸ generated or processed in the process of their activity, which are necessary **for the needs of detecting and investigating serious criminal offences and computer offences** (covered under Articles 319a to 319f of the *Criminal Code*), as well as for **the tracing of persons** (Article 250a of the *Law on the Electronic Communications*). Consequently, granting access to these data as an exception from the procedure established in the law is limited only to these purposes.

In its essence, gaining access to these data, as a method for the detection and proving of criminal offences, is similar to the operational techniques used for special intelligence means. This access also involves invasion of protected privacy and should be described with greater precision. All the more so that the circle of persons who have the right to request information about the data specified in the law is far larger than the one authorised to request deployment of special intelligence means. This right is conferred (each acting within his or her respective authority) on the heads of:

- the specialised directorates, the territorial directorates and the stand-alone territorial departments of the State Agency for National Security;
- the Criminal Police Directorate General, the Directorate General for Combating Organised Crime and its territorial units, the Security Police General Directorate, the Border Police Chief Directorate, the Internal Security Directorate, the Sofia Directorate of the Interior, and the regional directorates of the Ministry of Interior;

¹⁰⁸ These are data necessary to trace and identify: the source of the communication; the destination of the communication; the date, time and duration of the communication; the type of the communication; the communications terminal equipment of the user or what purports to be a communications terminal equipment of the user; the location label (Cell ID).

- the Defence Information Service and the Military Police Service under the Minister of Defence;
- the National Intelligence Service;
- the respective authority of another State, where so provided for in an international treaty in force for the Republic of Bulgaria.¹⁰⁹

The mandatory items of the request are listed in the law: legal basis and purpose of the requested access; registration number of the case file for which the information is necessary; data which must be collected; period of time to be covered; designated official to whom the data are to be made available [Article 250b (2) of the *Law on the Electronic Communications*].

Under the *Law on the Electronic Communications* as amended in 2010, access to the specified data is provided after **authorisation by the president or by a judge authorised by the president of the regional court**, which exercise jurisdiction over the head office of the requesting authority,¹¹⁰ whereupon an **order** to provide access to the data is issued.¹¹¹ A **special register, which is not open to public inspection**, is kept at the respective regional courts for the authorisations granted or refused [Article 250c (3) of the *Law on the Electronic Communications*]. The providers of public electronic communications networks and/or services must make sure they can receive such orders 24 hours a day, seven days a week. They are also obliged to prepare the information within the shortest possible period of time but in any case not later than 72 hours after receipt of the order. Even though authorisation from the court is required for the provision of access, the law allows the Minister of Interior or officials authorised in writing by the Minister to determine a specific time limit for the transmission of the requested data [Article 250e (2) of the *Law on the Electronic Communications*].

The legal framework governing the control over this method and the guarantees against abuse is unsystematic and raises questions. In connection with their obligation to provide access in the cases specified by the law, the providers of public electronic communications networks and/or services have general and specific obligations to various authorities and institutions, but the sanctions for non-compliance with these obligations are not clearly described. Another question that is not consistently addressed is the liability of the authorities and institutions authorised to receive the information or to perform monitoring, supervising or control functions and the independent external control over their operation.

¹⁰⁹ In this case, a written authorisation has to be obtained from the president of the Sofia City Court or by a judge authorised by that president, whereupon an order to provide access to the data is issued. A special register, which is not open to public inspection, is kept at the Sofia City Court for the authorisations granted or refused. The respective authority of the other State is informed of the collected information according to the procedure provided for in the international treaty.

¹¹⁰ Data concerning a president of a regional court, an ascendant, descendant, sibling, spouse or de facto cohabitee of such president are accessed after authorisation by the president of the competent district court.

¹¹¹ The order mandatorily contains: 1. the data which must be entered in the information; 2. the period of time which the information should cover; 3. the designated official to whom the data are to be made available; 4. name, position and signature of the judge.

In the first place, the heads of the providers of public electronic communications networks and/or services are obliged to transmit to the **Communications Regulation Commission** a list indicating an address for the receipt orders, the full name and position of the officials authorised to receive orders for access, and phone numbers for contacting them. Upon any change in the data, the Communications Regulation Commission must be notified in writing within 24 hours, and the Chairperson of the Commission makes the lists immediately available to the heads of the authorities authorised to request access.

In the second place, the file containing the data is recorded in a special register and is transmitted to the **official** designated in the order as the recipient of the data.

In the third place, the data are made available **to the court and to the pre-trial authorities** for the needs of criminal proceedings according to the terms and procedure established by the *Criminal Procedure Code* [Article 250c (4) of the *Law on the Electronic Communications*]. At the same time, the *Criminal Procedure Code* makes an express provision according to which, when requested to do so by the court or by the pre-trial authorities, all institutions, legal persons, officials and citizens are obliged to retain and deliver any objects, papers, computerised data, including traffic data, in their possession which may be relevant to the case [Article 159 (1)]. The two last mentioned provisions leave the impression that it is possible to grant access at the request of the pre-trial authorities even without a court order. This impression is reinforced by the data cited in the first report of the parliamentary subcommittee on the control of special intelligence means. According to the report, in the period 10 May – 31 December 2010, 29,688 requests for access to traffic data had been submitted according to the procedure established by Article 159 of the *Criminal Procedure Code*, i.e. without court authorisation (by the Defence Information Service and the Military Police Service under the Minister of Defence and by the National Intelligence Service) and about 1,000 refusals had been issued.¹¹²

In the fourth place, the **Commission for Personal Data Protection** is vested with powers as a supervisory authority regarding the security of the data. The Commission exercises supervision over the operation of the providers of public electronic communications networks and/or services so as to ensure that the latter respect the legal rules on the retention of the data to which access is provided and guarantee the protection and security of these data. To this end, a broad range of powers is conferred on the Commission for Personal Data Protection (Article 261a of the *Law on the Electronic Communications*). Annually, not later than 31 March, the providers of public electronic communications networks and/or services are obliged to provide the Commission for Personal Data Protection with statistical information specified in the law. For its part, the Commission for Personal Data Protection is obliged to summarise this information and to provide it annually to the National Assembly and to the European Commission within two months after its receipt.

In the fifth place, provisions are also made for **parliamentary oversight and monitoring** of the procedures for authorisation and implementation of access

¹¹² For further details, see Веселинова, М. 15864 разрешения за CPC през 2010 г., всичките правомерни [Veselinova, M. 15,864 authorisations for the use of special intelligence means in 2010, all regular], in: *Praven Svyat online*, 12 May 2011, <http://www.legalworld.bg/show.php?storyid=23327>

to the data specified in the *Law on the Electronic Communications*, as well as for the protection of citizens' rights and freedoms against unlawful access to any such data. Parliamentary oversight is organised in a similar manner as the control over the special intelligence means and is assigned to the same National Assembly subcommittee (Article 261b of the *Law on the Electronic Communications*). The subcommittee has the right to request information from: the authorities authorised to request information about traffic data, the providers of electronic communications networks and/or services; and the Commission for Personal Data Protection. The subcommittee can also check the procedure and manner for the retention of the data to which access is provided, the requests and the orders, as well as the procedure for destruction of the respective data etc. Annually, not later than 31 March, the Ministry of Interior, the Ministry of Defence, the State Agency for National Security, the National Intelligence Service and the Prosecutor General are obliged to prepare and submit to the parliamentary subcommittee summarised statistical information on the requests made, the court orders issued, the data to which access is provided as received and destroyed. The committee is vested with a number of powers in cases of unlawful use, retention or destruction of the data to which access is provided. It is also obliged (similar to the obligation under the *Law on the Special Intelligence Means*) to *ex officio* inform the citizens where any data concerning them have been unlawfully requested or accessed. By way of exception, the law states that citizens are not informed where this will pose a risk to the attainment of the objectives for which access to the data is provided.

In the sixth place, rules against unlawful interference are laid down, e.g. a requirement that the files should be generated solely by officials authorised in writing by the respective head of the service provider [Article 250e (3) of the *Law on the Electronic Communications*] and a requirement that any information which is not used upon the institution of a pre-trial proceeding, regardless of whether this information constitutes classified information, should be destroyed within six months after the date of its receipt [Article 250f of the *Law on the Electronic Communications*]. However, there are no guarantees for compliance with these rules, and no control over their implementation.

3.2. PLEA BARGAIN AGREEMENT IN CASES OF ORGANISED CRIMINAL GROUP

The plea bargain is provided for in the *Criminal Procedure Code* as a method of disposing of the case in **the pre-trial or the trial proceeding** with the exception of the cases of serious intentional offences listed in the law [Article 381 (2)].¹¹³

In the pre-trial proceeding, a plea bargain agreement may be resorted to on a motion by the prosecutor or the defence counsel after completion of the investigation provided that specified conditions apply: the pecuniary damage

¹¹³ Chapter Nine of Instruction No. 1 of 22 March 2004 on the Work and Interaction of the Preliminary Investigation Authorities, issued by the Prosecutor's Office of the Republic of Bulgaria, the Ministry of Interior and the National Investigation Service, based on the old Criminal Procedure Code, contains a general characteristic of the plea bargain agreement and describes in greater detail the prerequisites established by substantive and procedural law for disposing of the case by a plea bargain agreement.

inflicted by the offence, if any, must have been recovered or secured; the agreement must be reduced to writing and must be signed by the prosecutor, the defence counsel and the accused; the accused must declare that he or she waives an examination of the case by the court according to the standard procedure. The agreement must set out consent on all essential matters related to the act committed and its legal classification, the guilt, the type, length and amount of the penalty and its enforcement, the manner of disposal of the physical evidence where the latter is not needed for criminal proceedings in respect of other persons or other offences, and award of the court costs [Article 381 (5) of the *Criminal Procedure Code*]. Once the plea bargain agreement is drafted, the prosecutor submits it immediately together with the case to the first-instance court. The court schedules a hearing within seven days after the receipt of the case file and examines the case sitting in a single-judge panel. The prosecutor, the defence counsel and the accused participate in the court hearing. The court has the right to propose changes in the agreement. Proposed changes are discussed with the prosecutor and the defence counsel, after which the accused is heard.

If the court approves the agreement, the prosecutor, the defence counsel and the accused sign the document and its content is included in the judicial record of the court hearing. If the court does not approve the agreement, it sends back the case to the prosecutor. In this case, the evidentiary value of the accused's confession is no longer valid.

The court delivers a ruling, which is final and cannot be appealed. A plea bargain agreement whereby the case is disposed of has the consequences of an enforceable sentence [Article 383 (1) of the *Criminal Procedure Code*].

The case may also be disposed of by a plea bargain agreement during the trial: the first-instance court may approve an agreement reached after the institution of the trial proceeding but before conclusion of the judicial inquiry [Article 384 (1) of the *Criminal Procedure Code*]. The agreement is approved only after all parties have consented to it.

Considering the practical application of the plea bargain agreement, it should be borne in mind that sufficient evidence should have been collected in order to reach agreement and procure the consent of the accused. It is wrong to assume that the agreement relieves the prosecutor's office and the investigating authorities from their obligation to collect evidence.

Plea bargain agreement can successfully be used in cases of organised criminal groups because, in case the proceeding is conducted against several persons or in connection with several offences, the law permits the conclusion of an agreement in respect of some of the persons or of some of the offences [Article 381 (7) of the *Criminal Procedure Code*].

Public opinion, however, tends to underrate the severity of the penalties imposed upon conclusion of a plea bargain agreement.

Judges and prosecutors also express the view that a severer penalty should better be imposed for the serious offences committed but admit that in most cases,

where a sentence of conviction can be secured far more slowly and difficultly, the plea bargain agreement is a useful instrument for a prompt punishment of crime.¹¹⁴ The imposition of a penalty, albeit by virtue of an agreement concluded, is in the public interest, especially considering that, as a condition for approval of the agreement by the court, the accused must have repaired the damage inflicted. Therefore, the existing misconception of the plea bargain agreement must be overcome and it must be applied in practice on a broadening scale.¹¹⁵

Defence lawyers take a positive view of the plea bargain agreement and argue that it helps achieve the purpose of the criminal procedure with procedural economy and within reasonable time. They note, however, that in the practice of applying a plea bargain agreement in the cases of an organised criminal group, the charge against an accused is sometimes inadmissibly modified so as to procure his testimony against the rest of the participants. In this connection, measures must be taken to prevent breaches of procedure and to ensure that all legal prerequisites for the conclusion of a plea bargain agreement are complied with.

The annual reports of the courts usually provide data about the number of plea bargain agreements submitted by the prosecutors and, in some cases, also about the agreements reached during the trial, but not about the number of cases of organised criminal groups disposed of by such agreements.

3.3. SUMMARY JUDICIAL ENQUIRY

Summary judicial enquiry is an option provided for in the *Criminal Procedure Code* with a view to accelerating the criminal procedure. It is applicable without restraint to all types of offences (after the repeal of the grounds on which it was inadmissible: for intentional homicide or grievous bodily injury, or where the offender was under the influence of alcohol).¹¹⁶ Summary judicial enquiry can be implemented only during the trial at the court of first instance. It commences by a decision of the court, made *ex officio* or on a motion by the defendant, to hold a preliminary hearing of the parties. The preliminary hearing may pursue two possible avenues of action:

- First, the court may decide not to interrogate all or some of the witnesses and expert witnesses and to pass the sentence using directly the content of the respective records and expert conclusions from the pre-trial proceeding. The defendant and his or her defence counsel, the civil plaintiff, the private accuser and their representing counsel must give their consent (Item 1 of Article 371 of the *Criminal Procedure Code*). In such case, the court approves the consent

¹¹⁴ According to other opinions, albeit as an exception, the broad-scale application of the plea bargain agreement supplants the functions of the court and turns it into a mere recorder of the dealings between the parties.

¹¹⁵ Paragraph 7.1 of Resolution 1787 (2011) of the Parliamentary Assembly of the Council of Europe expressly insists that "Bulgaria must also pursue its efforts to solve the problem of excessive length of court proceedings", see Council of Europe Parliamentary Assembly, Resolution 1787 (2011) Implementation of judgments of the European Court of Human Rights (<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1787.htm>).

¹¹⁶ Article 369a. (New, SG No. 27/2009, repealed, SG No. 32/2010, effective 28.05.2010).

by a ruling if the relevant investigative actions have been performed according to the terms and procedure established by the *Criminal Procedure Code* [Article 372 (3)].

- Second, the defendant may entirely confess the facts described in the justification of the indictment, agreeing that no evidence of these facts would be collected (Item 2 of Article 371 of the *Criminal Procedure Code*). After ascertaining that the confession is supported by the evidence collected in the pre-trial proceeding, the court declares by a ruling that it will pass the sentence using the confession, without collecting evidence of the facts described in the justification of the indictment [Article 372 (4) of the *Criminal Procedure Code*]. If it delivers a sentence of conviction, the court imposes the penalty of imprisonment in line with the provisions of the General Part of the *Criminal Code* but reduces its length by one-third. In the justification of the sentence, the court admits as established the circumstances set forth in the indictment and refers to the confession and the evidence collected in the pre-trial proceeding that supports it [Article 373 (4) of the *Criminal Procedure Code*].

Unlike the plea bargain agreement, the application of summary judicial enquiry to multiple defendants is legislatively restricted: it is admissible only if all defendants meet the conditions provided for in the law [Article 370 (3) of the *Criminal Procedure Code*]. This restriction may be an obstacle to the use of summary judicial enquiry in proceedings for organised criminal group. On the other hand, however, the application of this concept, unlike the plea bargain agreement, is not bound to the recovery of the damage inflicted. This is an option favourable to the defendants but draws criticism, mainly on the part of the prosecution, about the inconsistency of the legal rules on the plea bargain agreement and the summary judicial enquiry.

According to the Supreme Court of Cassation the summary judicial enquiry is a special procedure intended to serve the public interest by speeding up the criminal procedure on the basis of a reasonable balance between the prosecution and the defence. The Supreme Court of Cassation explains how the summary judicial enquiry benefits and burdens the parties to the procedure: "The prosecutor is facilitated in proving the case for the prosecution, secures a quick conviction and sanctioning of the offences, but is bound by the law to accept a greater leniency in the individualisation of the criminal responsibility. The defendant receives a less severe penalty but agrees to certain procedural restrictions related to the possibility of contesting the facts claimed by the prosecutor and, in this connection, of participating directly and personally in the collection and verification of the evidence supporting or refuting the charge before the court."¹¹⁷

The participants in the criminal procedure, however, are divided about the effectiveness and practical application of the **summary judicial enquiry**. Some of them acknowledge that it is a useful method of achieving celerity of the procedure because it shortens substantially the trial phase. At the same time, even though a less severe penalty is imposed compared to the sanction according to the standard procedure, the defendant still receives a penalty and his or her

¹¹⁷ Interpretative Judgment No. 1 of 6 April 2009 in Interpretative Case No. 1 of the General Assembly of the Criminal College of the Supreme Court of Cassation for the Year 2008.

deed is required. To others, the concept is ineffective and is almost never applied, especially in cases of organised criminal groups.

Due to the lack of disaggregated official statistics about the number of cases of organised criminal groups disposed of according to the summary judicial enquiry procedure, it is difficult to reach a definite conclusion.

The statistics of the prosecutor's office include data about the total number of indictments submitted and sentences delivered. The consolidated data for 2010 show an increase compared to the preceding years in the number of criminal cases examined and concluded through a summary judicial enquiry.¹¹⁸ This trend is attributed to the legislative amendments, which lifted of the restrictions on the application of this concept (the repeal of Article 369a of the *Criminal Procedure Code*), to the efforts to eliminate conflicting case law etc. Despite this trend, a comparison with the data about the cases concluded in 2010 after submission of an indictment to court invites the conclusion that "the proportion of cases concluded by a plea bargain in a court hearing remains higher compared to the cases concluded through summary judicial enquiry," with "11,167 cases or 36.8 % of the total number of cases concluded by a plea bargain agreement under Article 384 of the Criminal Procedure Code, and 4,869 cases or 16.0 % concluded according to the procedure established by Article 373 (3) of the Criminal Procedure Code".¹¹⁹

3.4. MEASURES FOR REMAND IN CASES OF ORGANISED CRIMINAL GROUPS

The purposes of the measures for remand, as defined in the *Criminal Procedure Code*, are: to prevent the accused from absconding, from reoffending or from frustrating the execution of an enforceable sentence (Article 57). In principle, the measures for remand do not depend on the gravity of the offence committed. The only criterion under which the specific measure is selected is to achieve the purposes specified in the law, and the court exercises discretion on the basis of the information in the case file.

Of all types of measures for remand, provided for in Article 58 of the *Criminal Procedure Code* (recognizance not to leave, bail, house arrest and detention in custody), the one that is most frequently taken is detention in custody, and when

¹¹⁸ "In cases examined and disposed of, instituted under 30,367 indictments submitted, the court passed 14,858 sentences, of which 4,869 sentences were passed according to the procedure established by Article 373 (3) in conjunction with Article 372 (4) in conjunction with Item 2 of Article 371 of the Criminal Procedure Code, accounting for 32.8 % of the cases concluded by a sentence. The 4,253 sentences passed according to the summary judicial enquiry procedure in 2009 represent 26.3 % of the total number of cases". See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Application of the Law and on the Operation of the Prosecutor's Office and of the Investigating Authorities in 2010] (<http://www.prb.bg/main/bg/Information/2076/>).

¹¹⁹ See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Application of the Law and on the Operation of the Prosecutor's Office and of the Investigating Authorities in 2010] (<http://www.prb.bg/main/bg/Information/2076/>).

charges for organised criminal group are brought, this is almost always the case. The explanation lies largely in the specificities of organised criminal activity. An analysis of the application of this measure, however, reveals the existence of a vicious practice to rush the charging before sufficient evidence has been collected or to request such a measure in order to facilitate the collection of evidence. Such a purpose, however, is not provided for in the law.

In the opinion of judges examining requests for measures for remand, the prosecutor's office often hastens to bring a charge **without sufficient evidence having been collected** and asks the court to impose detention in custody. This creates problems in two aspects. First, due to the fact that no sufficient evidence is available, the court is unable to make a "reasonable presumption" that the person committed the offence, which is required by the law. Secondly, in most cases, because of the lack of sufficient evidence the court is unable to conclude whether there is actually a risk for the person to abscond or to reoffend (especially if the accused has a clear criminal record and the case is not of a very serious offence like homicide). Thus, in practice the prosecutor's office often moves for detention in custody only on the basis of information collected through special intelligence means (most often transcripts of wiretapping). Such information cannot support a reasonable presumption that the person committed an offence punishable by imprisonment or another severer penalty and it is uncertain whether the person will abscond or reoffend, i.e. whether the requirements of the law to impose detention in custody set in Article 63 (1) of the *Criminal Procedure Code* are satisfied. Along with that, prosecutors often request this measure for persons who have never been convicted and in respect of whom the case file does not contain any indication that they will abscond or reoffend.

The opinions mainly of judges and defence counsel in criminal cases leave the prevailing impression that in some cases the measure for remand is requested before authorising the use of special intelligence means, the special intelligence means are then applied in respect of the already detained persons, and evidence is "collected" in this way. The prosecutor's office usually takes this course of action when the investigating police officers have not collected in advance the evidence necessary to corroborate the charge. As a result, evidence is sought afterwards in support of a preconceived case for the prosecution. This practice distorts the procedure and impedes the establishing of the objective truth. It is also the reason why quite a few of the charges supported by evidence collected in this way do not stand up in court. The correct approach, therefore, is to collect the evidence first and to bring a charge and request the appropriate measure later and not to request the measure in order to collect evidence.

The **length of detention** in custody shows another negative tendency at the pre-trial phase. First, a person is usually detained for 24 hours under the *Law on the Ministry of Interior*. Then the detention is extended to up to 72 hours by order of the prosecutor. As a result, a person may be detained for up to four days without a court-ordered measure for remand. The prosecutor's order extending the detention to up to 72 hours is illegal when not issued with a view to securing the appearance of the accused before the court (this is the only case in which such extension is possible according to the *Criminal Procedure Code*). In most cases in which the prosecutor orders detention for 72 hours, however, the accused

has already spent 24 hours in custody, and the extension is intended to ensure more time for the collection of evidence necessary to support the request for the imposition of a measure for remand.

The application of detention in custody in charges of organised criminal group for purposes other than those provided for in the law, say, for the collection of evidence, may frustrate the process of proving instead of facilitating it. Judicial review of detention in custody in the pre-trial proceeding (Article 65 of the *Criminal Procedure Code*) and the right of the accused to request an alteration of the measure at any time during the pre-trial proceeding in practice very often leads to a revocation or alteration of the measure. The issue of alteration of the measure may also be raised at any time during the trial (Article 270 of the *Criminal Procedure Code*). Unlawful or excessively long detention is a serious violation of human rights and may result in judgments against Bulgaria in the European Court of Human Rights.

In order to be used successfully for the investigation and punishment of organised criminal activity, the measures for remand should be applied in compliance with the purposes specified in the law and taking into consideration the circumstances in each particular case and each individual person. The specific measure to be applied should also depend on this. The latter raises the need to improve the legal framework of the types of measures and possibly to introduce new measures such as attaching a tracking device to the person.

4. SPECIALISED CRIMINAL COURT

In 2010, the National Assembly passed legislative amendments providing for the establishment of a **specialised criminal court** with a jurisdiction to examine organised criminal group cases and an **specialised court of appeal** acting as a court of second instance. The status of these courts is described in Section VI of Chapter Four “Courts” of the *Law on the Judiciary*. Since, according to the *Constitution* [Article 126 (1)], the structure of the prosecutor’s office corresponds to that of the courts, the same *Law Amending and Supplementing the Law on the Judiciary* provided for the establishment of new units within the prosecution system: **a specialised prosecutor’s office of appeal and a specialised prosecutor’s office**, with an **investigation department** as a constituent element of the specialised prosecutor’s office.

By virtue of the new provisions in the *Law on the Judiciary*, the specialised criminal court enjoys a status coequal to that of a district court and has its seat in Sofia. According to the general rule, the specialised criminal court examines cases sitting in a panel of one professional judge and two lay judges, unless otherwise provided for in a law. The law lists the cases and the conditions under which the office of judge at the specialised criminal court may be executed by another judge of the same court or in compliance with the general conditions for secondment (Article 227), or by a judge of the specialised criminal court of appeal seconded in his or her place or by a judge of a district court or a court of appeal of the appropriate rank seconded by the President of the Supreme Court of Cassation.

The specialised criminal court of appeal acts as a court of intermediate appellate review instance for the cases disposed of by the specialised criminal court, and the Supreme Court of Cassation acts as a court of cassation instance and is also competent to examine motions for reopening of the cases of the specialised criminal court.

Pre-trial authorities in cases to be heard by the specialised criminal court are the prosecutor of the specialised prosecutor’s office and the investigating authorities – in this case the investigating magistrates at the investigation department of the specialised prosecutor’s office and the investigating police officers designated by an order of the Minister of Interior (Article 411c of the *Criminal Procedure Code*).

A *Law Amending and Supplementing the Criminal Procedure Code* determines the jurisdiction of and the special rules for examination of cases by the specialised criminal courts. A procedure for the adoption of further amendments is in progress.¹²⁰

¹²⁰ Draft Law Amending and Supplementing the Criminal Procedure Code, adopted on first reading on 9 February 2012.

According to the newly adopted legal framework, the jurisdiction of the specialised criminal court includes the cases of forming, directing and participation in an organised criminal group (Article 321 of the *Criminal Code*) and of participation in directing an organisation or group which concludes transactions or derives benefit by use of force or intimidation (Article 321a of the *Criminal Code*). Along with that, this court is authorised to examine cases of other offences committed **upon assignment by or in execution of a decision of an organised criminal group**, including cases of specified offences against the person (homicide, bodily injury, kidnapping and illegal restraint, theft, robbery, coercion, sexual offences), offences against property (theft, robbery, official embezzlement, destroying and damaging another's property, blackmail), customs offences (cross-border smuggling), documentary and financial offences, trafficking in cultural goods, trafficking in human beings, arson and a number of other offences endangering the general public (offences against transport and communications, against public health and the environment, including such related to the production and distribution of explosives and narcotics) etc. The cases of offences committed abroad also fall within the jurisdiction of the specialised criminal court.

The proponents and the opponents of a specialised criminal court first clashed back when the government unveiled its idea on its establishment, even though it was never submitted to a broad expert and public discussion. Despite the doubts about the need of this new instrument and opinions against this idea expressed by legal practitioners and experts, the parliamentary majority pushed through the amendments. By a subsequent legislative act, their entry into force was postponed until 1 January 2012, and constituting the specialised courts and prosecutor's offices proved a difficult and slow process. Along with that, a large part of the amendments were challenged before the Constitutional Court, which delivered judgment on 15 November 2011.¹²¹ The Constitutional Court confirmed the constitutionality of all contested provisions with the exception of two, which were declared unconstitutional. One of these provisions was Article 411a (4) of the *Criminal Procedure Code* regarding jurisdiction. It provided that, where a charge of several offences has been brought against one and the same person and one of these offences falls within the jurisdiction of the specialised criminal court, that court shall hear the case of all offences. The other provision was Article 411e (3) of the *Criminal Procedure Code*, which provided for a mandatory appearance before the specialised criminal court of the participants in the procedure regardless of their summoning before other courts or pre-trial authorities.

Regardless of this outcome of the constitutional case and even though case law has not yet built up, a number of comments can be made on the legal framework as adopted, summarised in several areas.

- The first group of problems concerns **the jurisdiction of the court**.

The specialised court and prosecutor's office (and, respectively, the specialised court of appeal and the specialised prosecutor's office of appeal) have their seat in Sofia but are authorised to examine cases of offences committed anywhere

¹²¹ Judgment No. 10 of 15 November 2011 in Constitutional Case No. 6 of 2011 (promulgated in the State Gazette No. 93 of 25 November 2011).

within the country and abroad. Cases of a broad range of offences of diverse nature from the entire Special Part of the *Criminal Code* fall within the jurisdiction of the specialised court. The only condition is that these offences have been committed **upon assignment by or in execution of a decision of an organised criminal group**. Under this common criterion, a broad range of cases is subsumed within a single category conditioning the special jurisdiction.

With the jurisdiction outlined above, the specialised court will obviously not administer justice in a particular branch of law (e.g. labour law, commercial law, family law) or in a distinct part of the social relations regulated within a single branch of law (e.g. juvenile delinquency),¹²² which is in principle the idea of specialisation. The prevailing practice in the EU Member States is based on this concept of specialisation with very few exceptions, moreover in different conditions (the specialised court handling cases against terrorism in Spain, cases against the mafia in Italy, and the experience of Slovakia, which practically ended in a failure as the specialised court established there was declared unconstitutional).¹²³ Thus, paradoxically, a new court designated as specialised is set up without genuine specialisation and with centralised and universal jurisdiction.

Without a specified territorial jurisdiction, the pre-trial and trial proceeding for each offence falling within the jurisdiction of the specialised court will be conducted in Sofia, regardless of where this offence has been committed: anywhere within Bulgaria or abroad. This evidently involves a number of risks and inconveniences related to all aspects of the collection of evidence, to the actual physical conduct of the pre-trial and trial proceeding which, ultimately, leads to a waste of financial, human and time resources and moreover may affect the quality and celerity of the procedure and may compromise its objectives.

At the same time, the **special jurisdiction** of the specialised court, **defined expansively without applying clear and justified criteria**, makes it possible to circumvent, deliberately or not, the general jurisdiction and to refer to the specialised court cases of offences falling within the jurisdiction of the general criminal courts, with all ramifications for the procedure. This problem was noticed even before the legislative amendments were passed. However, the arguments about the risk of the specialised court examining cases of offences that do not fall within its jurisdiction (e.g. cases of mere partnership in the commission of offences which, by accident of design, are misclassified in the indictment as offences committed by an organised criminal group)¹²⁴ were ignored. The opposite

¹²² Such specialisation exists in Germany, but special rules operate in Bulgaria, with the provisions in this sphere systematised in separate chapters of the Criminal Code, the Criminal Procedure Code and of the Law on the Execution of Penalties and Detention in Custody.

¹²³ See also Гяурова-Вегертседер, Б., 'Специално за специализираните съдилища' [Gyurova-Wegertseder, B., 'Especially about the Specialised Courts'], in: *Praven Svyat*, No. 4, 2010, p. 26-28.

¹²⁴ For further details, see Становище на Даниела Доковска във: Специализирани съдилища за организираната престъпност, Кръгла маса на тема "Необходими законодателни промени за противодействие на организираната престъпност и корупцията" (стенографски запис) [Opinion of Daniela Dokovska in: "Specialised Courts for Organised Crime. Round Table on Legislative Amendments Needed to Counter Organised Crime and Corruption" (verbatim transcript)], Sofia, 3 May 2010, in: *Advokatski Pregled*, No. 4-5, 2010, p. 30.

scenario is also possible, in which the special jurisdiction would be unwittingly circumvented or, under particular circumstances, deliberately avoided.

The Constitutional Court does not share the view that the prosecutor may apply the provision of Article 411a (5) of the *Criminal Procedure Code* in bad faith. “The good faith of the authorities, including the judicial authorities, must be presumed. The Constitutional Court has already pronounced by Judgment No. 1 of 2005 in Constitutional Case No. 8 of 2004 that it finds unacceptable a construct, which admits the hypothetical possibility of the prosecutor acting in bad faith and selectively including or not including one act or another in the indictment, as well as that the correct application of the law is a matter of lawful, professional and conscientious execution of the powers conferred”.¹²⁵

Even though the Constitutional Court declared unconstitutional the jurisdiction by reason of a link between the cases, provided for in Paragraph (4) of Article 411a of the *Criminal Procedure Code*, it left in force Paragraph (5) of the same article. According to that paragraph, when cases of different offences against different persons are joined and there is a link between the cases, if any of these cases falls within the jurisdiction of the specialised criminal court, that court must examine the joined case.¹²⁶ With the lack of clear distinctions between the various types of offences and especially between the various forms of mere partnership and organised criminal group, the possibilities for prosecutorial discretion in the classification and for a switch of jurisdiction cannot be ruled out.

- Another group of problems stems from the **special rules** for the examination of cases by the specialised court.

Some of the special rules that are laid down place the specialised court in a privileged position compared to the other courts. The Constitutional Court declared unconstitutional one such rule, obliging the participants in the procedure to appear in the hearing of the specialised court regardless of being summoned

¹²⁵ See Judgment No. 10 of 15 November 2011 in Constitutional Case No, 6 of 2011 (promulgated in the State Gazette No. 93 of 25 November 2011).

¹²⁶ “Article 411a (5) of the Criminal Procedure Code does not abridge the rights of the accused and, therefore, does not violate Article 31 (4) of the Constitution. The principle of proportionality requires that the perpetrators of criminal acts should be tried by a specific court established by law – in this case, the court established by the contested provision is the specialised criminal court. This court, assessed against the abstract background of the legal framework, in its characteristics is of a coequal rank with the district courts within the system of general courts. Therefore, assigning it to examine, in pursuance of the contested provision, cases of offences other than those enumerated in Article 411a (1) and (2) of the Criminal Procedure Code, provided that the cases are objectively linked, does not lead to narrowing of the rights of the accused parties. On the contrary, conditions are created for a comprehensive and fair conduct of the trial, and the legal certainty is guaranteed as well.

The provision of Article 411a (5) of the Criminal Procedure Code is furthermore consistent with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms because it creates prerequisites for the case against any person charged with the commission of a criminal offence to be examined in a fair hearing by an independent and impartial tribunal pre-established by law and, according to its legal regulation, the specialised criminal court qualifies as such a tribunal.” Judgment No. 10 of 15 November 2011 in Constitutional Case No, 6 of 2011 (promulgated in the State Gazette No. 93 of 25 November 2011).

by other courts or pre-trial authorities.¹²⁷ At the same time, the Constitutional Court held that the contested provision of Article 411e (4) of the *Criminal Procedure Code*, according to which if a witness or an expert witness fails to appear without reasonable excuse, his or her attendance at the next succeeding hearing as scheduled by the court must be compelled, does not conflict with the *Constitution*.¹²⁸

The Constitutional Court argues that the duly summoned witnesses and expert witnesses are in principle bound to appear in the court hearing lest they become a reason for a groundless and causeless adjournment of the case and for its non-disposal within a reasonable time. Arguments supporting this reasoning are found in the fact that both witnesses and expert witnesses are liable to a fine for non-appearance. In the cases examined by the rest of the courts, however, compelled attendance upon non-appearance without reasonable excuse applies only to witnesses and not to expert witnesses [Article 120 (3), respectively Article 149 of the *Criminal Procedure Code*]. The Constitutional Court holds that the non-appearance of the witnesses and the expert witnesses in a court hearing without reasonable excuse poses, in an identical manner, insurmountable obstacles to the examination of the cases; that their obligations to justice are identical (Article 120 and Article 149 of the *Criminal Procedure Code*) and involve their appearance before the respective judicial authority, which has summoned them, which necessitates their attendance to be compelled. Arguing why the contested provision should be retained, the Court furthermore points to the fact that the cases in the specialised criminal court will have a large number of defendants and witnesses considering the nature of organised criminal activity which, according to the constitutional judges, justifies the compelled attendance of both witnesses and expert witnesses

¹²⁷ “The priority appearance before the specialised court, provided for in Article 411e (3) of the Criminal Procedure Code, will inevitably lead to difficulties in the operation of other courts and of the pre-trial authorities, as well as to adjournment of cases on these grounds, as a result of which cases will be unjustifiably delayed. These cases may involve a large variety of parties: accused, including detainees, crime victims, plaintiffs or respondents in civil and commercial cases, appellants in administrative cases etc. There is no legitimate reason why the examination of all these cases should be delayed, despite the efforts made by the adjudicating court, and why they should not be concluded within a reasonable time, nor why the effective exercise of the right to defence under Article 122 (1) of the Constitution should be impeded.

On the above considerations, it is the opinion of the Constitutional Court that the contested Article 411e (3) of the Criminal Procedure Code is unconstitutional because it places a single court in a privileged position at the expense of restricting the right and, in some cases, also the obligation, of the parties to appear before the other judicial authorities. The abridgment of rights in this case, correlated to the achievement of another purpose consistent with the Constitution, is not proportionate because the public interest in a timely disposal of the cases of offences committed by organised criminal groups not always overrides the public interest in the disposal of other cases. The contested provision indirectly creates prerequisites for violation of the right to remedy under Article 56 of the Constitution and of the procedure for its effective exercise under Article 122 (2) of the Constitution in respect of the persons charged with the commission of offences falling within the jurisdiction of the general and the military courts.

The provision of Article 411e (3) of the Criminal Procedure Code is inconsistent with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms because it will lead to a delayed examination of other cases in the rest of the general and specialised courts and in the pre-trial authorities and to their non-disposal within a reasonable time within the meaning of the cited provision of the international treaty.”

¹²⁸ See Judgment No. 10 of 15 November 2011 in Constitutional Case No. 6 of 2011 (promulgated in the State Gazette No. 93 of 25 November 2011).

and the abridgement of their rights for the sake of a legitimate purpose: disposal of the case within a reasonable time.

Thus, leaving this contested provision in force the Constitutional Court supports a deviation from the standard procedure, whereby the specialised criminal court is placed in a privileged position and the balance of rights and interests of the participants in criminal procedure is upset.

The peculiarities of the proceeding apply above all to the **shortened timeframes** for performance of specified procedural steps: once the investigation is concluded, the prosecutor has to act within 15 days after receipt of the case, whereas this period is twice as long according to the standard rules.

Shortened timeframes also apply to the trial proceedings in cases falling within the jurisdiction of the specialised criminal court. The reporting judge, designated by the president of the court after the institution of the case, must schedule a hearing of the case in public session or must exercise his or her powers to terminate the trial proceeding or, respectively, to terminate or suspend the entire criminal proceeding, within 15 days (unlike the general rules, according to which a hearing must be scheduled within two months and if the case is factually and legally complicated and in other exceptional cases this deadline may be extended to up to three months with the authorisation of the president of the court).

Ensuring celerity of the proceeding in the cases falling within the jurisdiction of the specialised court is one of its principal *raisons d'être*. The introduction of shortened timeframes, however, raises several questions.

First, what are the guarantees that the timeframes will be complied with, given that the personnel of the newly established court and prosecutor's office, investigation department and investigating police officers will be recruited from among the same people who work in the existing courts, prosecutor's offices, investigation services and police? How will be they incentivised or induced to perform the relevant procedural steps, moreover in respect of offences committed throughout the territory of the country and abroad, within timeframes far shorter than the ones they have often failed to comply with for reasons beyond or within their control? Secondly, what will happen if the shortened timeframes are exceeded or if they are complied with to the detriment of the quality of the procedure and the rights of the rest of the participants in it?

At this stage, it is difficult to say how these questions will be answered because case law does not exist and the legal framework does not offer ready-to-use solutions. Hypothetically, assuming that the prosecutor's office exercises good faith and high professionalism in the performance of its accusatorial function and brings well-founded charges only for the offences falling within the jurisdiction of the specialised court, the court will not have an excessively heavy caseload and will comply with the shortened timeframes. In fact, National Statistical Institute figures about the years preceding the passage of the legislative amendments on the establishment of the specialised court show that an exceedingly small number of persons were sentenced for offences committed "upon assignment by or in execution of a decision of an organised criminal group", as well as for forming,

directing or participation in an organised criminal group (Articles 321 and 321a of the Criminal Code). According to these figures,¹²⁹ 39 persons were sentenced for such offences in 2007, accounting for 0.13 % of the total number of persons sentenced that year, 77 in 2008 (0.21 %), and 45 in the period January – September 2009 (0.19 %). These figures, as well as a breakdown of statistics by offence, invite the conclusion that “the proportion (just as the number) of persons whose criminal acts are classified by an enforceable sentence... is statistically negligible: under 0.5 %”.¹³⁰

Even though the prosecutor’s office reported an increase in the number of newly instituted, supervised and disposed of pre-trial proceedings, prosecutorial acts submitted to the court and persons sentenced for offences related to organised crime in 2010 compared to 2008 and 2009, it admitted that a relatively limited number of cases were for offences proved to be related to organised crime.¹³¹ In October 2011, a total of six pre-trial proceedings were instituted in connection with organised crime, representing 0.7 % of all pre-trial proceedings instituted in connection with offences of significant public interest,¹³² and the information on the progress of cases between May and October 2011 showed similar results.¹³³

Even though the number of organised criminal group cases increase in some courts, their total number remains small compared to the cases of other offences, which, too, is an argument against the need of a specialised court. Thus, the Burgas District Court reported that the cases of offences under Articles 321 and 321a of the *Criminal Court* (forming and directing a criminal group) increased two-fold, from five in 2006 to ten in 2010 (three more than the seven in 2009). In 2008, however, they numbered twelve. Of this group of cases, a total of 12 were

¹²⁹ Криминологично изследване – осъдени лица за 2007 – деветмесечие на 2009 г. за престъпления, представляващи проявни форми на организираната престъпност, и за корупционни престъпления [Criminological study: persons sentenced for offences manifesting forms of organised crime and for corruption offences, January 2007 – September 2009], in: *Advokatski Pregled*, No. 4-5, April-May 2010, Sofia, pp. 62-64.

¹³⁰ *Ibid.*, p. 63.

¹³¹ See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Application of the Law and on the Operation of the Prosecutor’s Office and of the Investigating Authorities in 2010] (<http://www.prb.bg/main/bg/Information/2076/>), which concludes: “It should be borne in mind that, in principle, there are relatively few cases of offences, which are proved to be related to organised crime. The criteria for a juridical link of acts of this type to a criminal organisation or group are rather restrictive and do not indicate the actual state of the intricate relationships and dependences between the perpetrators and the persons with a criminal record. Such a link, albeit existing, is usually difficult to prove because the overt investigation practically commences with insufficient operational information for the prosecutor’s office and sometimes the cases are suspended owing to non-detection of all or part of the perpetrators.”

¹³² The Supreme Judicial Council defined as cases of significant public interest (Minutes of Proceedings No. 39 of 8 October 2008) the cases of the following offences: organised crime, aggravated homicide, money laundering, offences affecting resources from funds and assets of the European Union, corruption, financial fraud of a particularly large amount constituting a particularly grave case.

¹³³ See Обобщена информация относно наказателни производства, образувани за престъпления от особен обществен интерес за месец октомври 2011 г. [Summary Information Regarding Criminal Proceedings Instituted in Connection with Offences of Great Public Interest for October 2011] (http://www.prb.bg/uploads/documents/docs_2475.pdf).

examined in 2010 (two were left over from the preceding year because they were received at the end of 2009), including some that have gained media publicity: Indictable Criminal Case No. 132/2009 (also known as the “Crazy Stoycho Group Case”), which was concluded by a conviction in 2010, Indictable Criminal Case No. 767/2010 (also known as the “Pickaxe Gang Case”), Indictable Criminal Case No. 189/2010 (the “Loan Sharks Group Case”), and Indictable Criminal Case No. 691/2010 (the “Boxer Diyan Case”, which was returned twice to the prosecutor’s office for further investigation).¹³⁴

Still, it remains doubtful that the timeframes for the pre-trial proceedings will be complied with, considering the fact that authorities seated in Sofia will need to collect and assess evidence from throughout the country and from abroad. There is also a risk of a vicious practice of instituting proceedings in order to perfunctorily meet the deadline and collect evidence after that. Even if the timeframe is complied with at the cost of increasing the staff and, accordingly, the budget, it is not clear whether this will lead to a faster and better quality performance of the work, which is now done according to the general rules of jurisdiction. Many of these questions should have been answered before the adoption of the amendments – after an empirical study and analysis and after weighing the pros and cons of the innovation. With such an approach, it would have been possible to explore in advance, within the general jurisdiction, the possibility of introducing shortened timeframes for the cases to be assigned to the specialised court, as well as other special procedures whose application would be imperative considering the specificity of these cases. All the more so that the *Criminal Procedure Code* contains special rules within the overall framework of general jurisdiction, e.g. special rules for the examination of cases of offences committed by juveniles. Similarly, separate rules could have been laid down for the examination of cases of offences related to organised crime.

- Another group of problems emerges in connection with the **constituting** of the new structures and their staffing.

The law does not provide for any special requirements, more rigorous criteria or special performance appraisals for the judges and prosecutors in the newly established courts and prosecutor’s offices and for their heads. They are elected and appointed by the incumbent Supreme Judicial Council, whose latest appointments to senior positions even in the regular courts have raised serious doubts about the impartiality and transparency of the election, but nevertheless enjoyed unabashed political support. It is probably for this reason that, when the new bodies were being constituted, magistrates whose career and accomplishments give rise to public controversy took the liberty of seeking an appointment, whereas proven professionals, experienced in organised crime cases, did not apply. Thus, the omission of the law to set special eligibility requirements and a special selection procedure will influence the staffing of the court in addition to the already compromised practice of the Supreme Judicial Council.

¹³⁴ Годишен доклад за дейността на Окръжен съд – Бургас, и районните съдилища от Бургаски съдебен район за 2010 г. [2010 Annual Activity Report of the Burgas District Court and the Regional Courts within its Geographical Jurisdiction].

As a court of first instance, the specialised court includes lay judges, who were supposed to be elected according to the standard procedure provided for in *Ministry of Justice Ordinance No. 2 of 8 January 2008 on the Lay Judges*. The Sofia Municipal Council elected 70 lay judges, the majority of whom were nominated and backed by the government majority.¹³⁵ Inevitably, such an election is politically tinged, but this, combined with the lack of objective selection criteria for the candidates and of specific eligibility requirements, cannot guarantee the impartiality and qualification of those elected to perform the function of lay judges having equal voting power with the professional judges.

The possibilities to exert political influence in the selection of investigating police officers, too, are postulated in the legislative framework, which provides that they be appointed by an order of the Minister of Interior and be under his or her direct orders.

The secondment mechanism, provided for in the law, is a sensible solution to prevent the operation of the new institutions being blocked by understaffing. However, it heightens the risk of the system of specialised criminal justice being staffed by odd magistrates lacking adequate qualification in this sphere.

Along with that, as admitted by representatives of the pre-trial authorities, the rules of procedure of the specialised court and prosecutor's office on the eve of their going into operation were totally unknown to the investigating police officers and to a substantial part of the judges and prosecutors. The future specialised prosecutor's offices are likely to encounter two principal problems in their work.

The first problem concerns **logistics**. Due to the need of rapid reaction and frequent communication between investigating officers and prosecutors, the question arises as to whether investigating police officers and prosecutors would be able to communicate adequately unless prosecutors are permanently seconded at the local level, and whether the prosecutors would be able to match the pace of work of the investigating police officers.

The second problem concerns the specialised prosecutors' unfamiliarity with the local crime situation and the persons with a criminal record. The same problem may arise for the specialised investigating police officers as well. If they are appointed mainly from Sofia, their work with local operative police officers will be impeded by the lack of effective communication channels.

The judicial community takes a negative view of the establishment of the specialised courts and prosecutor's offices. Some of the judges experienced in examining organised crime cases argue that the existing courts can successfully perform these functions, given a more consistent internal specialisation. In their opinion, the main problem lies in the collection of evidence in the pre-trial proceeding. To some of them, the specialised court is an "absurd" figure, set up to handle a type of offences designated by the prosecutor's office.

¹³⁵ For further details, see Веселинова, М., 'Изборът на съдебни заседатели за спецсъдилищата май е незаконен' [Veselinova, M., 'The Election of Lay Judges for the Special Courts May Prove Unlawful'], *Praven Svyat online*, 15 January 2012.

The majority of defence lawyers are also sceptical about the likelihood of the specialised court administering justice more efficiently in organised crime cases as long as the weaknesses in the pre-trial proceeding remain unaddressed. One such weakness is said to be the prosecutors' practice to keep modifying the charge without citing evidence and the lack of control over this practice.¹³⁶

The new institutions stand no chance of success in the fight against organised crime without a solution to the common problems of the pre-trial proceeding and a judicial reform that never happened.¹³⁷ Regardless of the opinion that a specialised court is not necessary and that the existing courts, with appropriate internal specialisation, can fulfil the tasks assigned to it, priority should be given to addressing the problems facing the law-enforcement and the judiciary. Compromising the already established institutions would deal a blow at justice, at public trust of justice, and would yield ground to unpunished crime.

¹³⁶ This practice continues to be based on a conclusion adopted in Interpretative Judgment No. 2 of 2002 of the General Assembly of the Criminal College of the Supreme Court of Cassation, according to which the charge brought in the preliminary proceeding is intended to define a most general, initial, "working" subject of proving in the case. This charge may be modified depending on the evidence, which is collected and verified in the course of the investigation. Essentially, this implements the concept of variation of the charge in the preliminary proceeding, in which the case continues to make progress according to the latest charge. In the opinion of the Supreme Court of Cassation, there exists just a single charge – the one that is formulated last and on which the prosecutor may decide to submit an indictment without being bound to decide on the preceding charges.

¹³⁷ With good reason, attention is yet again called to the need to address important issues which have become proverbial and symptomatic of the reluctance of all governments so far to complete this process, such as building the Uniform Information System against Crime. See Ненов, Ст., 'Новата правозащитна институция: специализиран наказателен съд' [Nenov, S. 'The New Justice-Administering Institution: Specialised Criminal Court'], in: *Obshtestvo i Pravo*, No. 8, 2011, pp. 81-82.

CONCLUSION

One of the main prerequisites for effective countering of organised crime is the existence of effective legislation describing the types of offences, the penalties provided for them and the rules for their investigation and criminal prosecution. The shortcomings of the legislative framework (ambiguous or conflicting provisions, inconsistent terminology, lack of rules for specific cases etc.) impede the work of the courts and the law-enforcement authorities, delay criminal proceedings and create preconditions for violation of the rights of the participants in the procedure and for inadequate punishment of the offenders.

The problems in connection with the legislative regulation of the organised criminal group and above all the dropping of the aim of obtaining a benefit from the definition of an organised criminal group hamper the differentiation of such groups from the other criminal associations and from mere partnership. This makes it difficult to classify the acts and prevents a concentration of the efforts of the State on the persecution of serious offences committed upon assignment by or in execution of a decision of an organised criminal group. To this end, the legislative framework needs to be amended in line with the international standards and the best practices in other countries. At the same time, providing for more and severer financial sanctions for the offences related to organised crime would further weaken organised crime, depriving it of the financial resources it needs, and would generate more revenue for the Exchequer.

Organised criminal activity includes offences, which are more complicated, involve a larger number of participants, participants have various roles etc. This specificity has an impact on the process of investigation and proving and usually requires more time and resources than conventional crime. Apart from the adequacy of the legal framework, the success of proving such criminal activity also depends on a whole range of interconnected factors: professionally knowledgeable and experienced investigating authorities, skilled in collecting relevant and admissible evidence, the professionalism and integrity of judges, prosecutors and defence counsel, the guaranteeing of the fundamental principles of criminal procedure and ensuring the right to defence, as well as the availability of up-to-date and sufficient technical equipment and logistics for the entire process.

The case law of organised criminal group cases built up in Bulgaria so far, still scanty as it is, creates the impression that the evidence collected is quite often not convincing and sufficient enough to support sentences of conviction corresponding to the case for the prosecution. The detection and proving of the criminal activity of organised criminal groups reveal a number of problems.

Special intelligence means, interrogation of protected witnesses, search and seizure etc. are the methods for the collection of evidence most often used in organised crime cases. The pre-trial authorities do not employ each and all envisaged

procedural methods for collecting evidence. The most commonly used methods are wiretapping, as well as surveillance and following. Investigation through an undercover officer and controlled delivery are resorted to much more rarely. At the same time, the lack of independent control over the deployment of special methods spells risks of unlawful application of these methods and use of the information collected.

The specificities of organised criminal activity objectively influence the length of organised criminal group cases. Considering that more than three persons are often accused in such cases, this usually has an impact on celerity. One alarming prerequisite for a delay of the pre-trial proceeding is the eliminated option of the accused to move for an examination of his or her case by the court if more than two years have expired since he or she has been constituted as a party accused of a serious offence. This development is seen as a relapse to the concept of the “perpetual accused” and as a possibility of the pre-trial proceeding being dragged on until expiry of the prescription period. A large part of the organised criminal group trials are still in progress, and it is difficult to say how long they tend to last in general.

The practice of joining cases and conducting mega trials proves to be costly and ineffective, complicating further both the investigation and the trial. The number of defendants and witnesses, who are anyway numerous in organised criminal group cases, increases even more in such trials. Besides this, cases are not always split even when the organised criminal activity does not involve all defendants. On other occasions, when the charges cannot be proved, the cases are split and the separate cases go to different courts, which protracts and impedes the process. Most judges and defence counsel handling such cases are critical of this practice. The criticism that this practice draws should also be borne in mind considering the newly established specialised prosecutor’s office and court.

The professional qualification of the judges and especially of the pre-trial authorities in the sphere of organised criminal activity is insufficient and brings to the fore the need of additional training, studying the successful foreign experience, exchanging good practices and encouraging scientific analysis, studies and applied research and methodologies. In the long term, a consolidation of the case law and the interpretative jurisprudence of the Supreme Court of Cassation will be of key importance for the uniform application of the law. The scarcity or unavailability of state-of-the-art technical devices and equipment to be used in organised crime cases requires an active financial commitment of the executive branch of government.

Last but not least, a uniform and centralised system is needed to keep detailed and publicly accessible statistics on the basis of standardised criteria, which should cover all relevant data concerning the investigation and punishment of offences related to organised crime. The availability of objective and comprehensive information will make it possible to monitor the variation of organised crime, to analyse the performance of the law-enforcement authorities and to act promptly to address problems as they arise.

Organised criminal activity often has a transnational nature, which is why its effective investigation and punishment are impossible without international cooperation.

International cooperation is a very important and vast area, which requires separate studies and analyses. It covers bilateral and multilateral cooperation in connection with the adoption and implementation of international instruments, as well as interaction of the national investigating and judicial authorities with similar authorities of other countries and with international institutions such as Europol, Interpol etc.

The international nature of proceedings for organised criminal groups may be due to various circumstances: commission of the offence abroad (e.g. trafficking in human beings and narcotics), a defendant or a witness residing abroad etc.

In the period before Bulgaria's accession to the EU, extradition was the most commonly used instrument of international cooperation against crime at large and against organised criminal activity in particular. Extradition retains its significance at present in the cases where the offender is abroad and legal assistance is sought for the purpose of putting him or her on trial in Bulgaria or, where a sentence has already been passed, for the purpose of serving the penalty in this country. At the same time, extradition is seen as insufficiently effective because of the lengthy procedure it requires.

Since 2007, the European Arrest Warrant has been most often employed in relations with the other EU Member States, and cooperation in this area is seen as very good. The direct contact between the judicial institutions contributes to the speed and effectiveness of this instrument. Along with that, however, the lack of command of foreign languages in a large part of the Bulgarian representatives is a serious shortcoming, which must be overcome by intensified language training.

Cooperation for collection of evidence through interrogation of witnesses is less common, and interrogation of defendants is resorted to even more rarely. Interrogation of witnesses by videoconference is often preferred to delegating the performance of the interrogation to a foreign authority. There are very few cases where Bulgaria has sought injunction for confiscation but albeit rarely, Bulgaria has been approached with requests for such legal assistance.

The need to translate the documents into Bulgarian and the time-consuming implementation of legal assistance are problems often encountered in international cooperation. If a document is not translated or is translated badly, translation has to be requested again or arranged by the Bulgarian authority. This delays the proceedings, which, as a rule, must meet a tight schedule.

The departures of the Bulgarian criminal law from the international standards, including in the definition of an organised criminal group, can have an adverse impact on international cooperation as well. Bulgarian judges do take into consideration the *UN Convention against Transnational Organized Crime*, but the non-conformities must nevertheless be remedied.

Account should also be taken of the fact that with the present-day technological progress the new technologies are increasingly used in the commission of criminal offences. Criminal groups ever more often employ technological advances, moreover often ahead of the law-enforcement authorities. This is typical of organised crime, too, in both its national and transnational dimensions.

The analysis of criminal legislation and its application in Bulgaria is intended to present an objective picture of their current state, while the recommendations are aimed to contribute to the improvement of the effectiveness of criminal justice for the detection and punishment of organised criminal activity. Along with the problems in criminal law, which need to be addressed through adequate and modern solutions, there is also a need to streamline a number of other laws, which can be instrumental in the prevention and suppression of the offences related to organised crime: the tax laws, the *Law on the Forfeiture to the State of Assets Acquired from Criminal Activity*, the *Law on the Protection of Classified Information*, the *Law on the Protection of Persons at Risk in Relation to Criminal Proceedings*, the *Law on Combating Trafficking in Human Beings*.

The lack of effective penalties is a reason for the low public trust in criminal justice. This conclusion is confirmed by studies of public perceptions and attitudes to the institutions of the criminal justice system in Bulgaria.¹³⁸ Apart from the low public trust in these institutions and the prevailing opinion about impunity of organised and serious crime, the studies conducted found that the larger part of society is unfamiliar with criminal procedure and credits the one-sided presentation of the facts by individual institutions or the media.¹³⁹ To this end, public awareness needs to be raised steadily, including of the risks of all forms of organised crime, as well as of the possibilities for support and protection of the victims and the cooperation that citizens can provide in the detection of criminal activity and punishment of offenders. On the other hand, it is imperative to build the capacity of the respective law-enforcement authorities, to familiarise them with the good practices of combating organised crime, as well as to pursue further international cooperation.

¹³⁸ For further details, see *Crime and Punishment: Studying Justice System for Shaping Criminal Policy*, Center for the Study of Democracy, Sofia, 2011, p. 25 ff.

¹³⁹ *Ibid.*, pp. 35 ff.

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