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# Organised Crime and Corruption

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## Cost of Non-Europe Report

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IN-DEPTH ANALYSIS

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EPRS | European Parliamentary Research Service

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**European Added Value Unit**

PE 558.779 - March 2016



# The Cost of Non-Europe in the area of Organised Crime and Corruption

## In-Depth Analysis

On 7 September 2015, the Coordinators of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested the Directorate-General for Parliamentary Research Services (EPRS) to prepare a 'Cost of Non Europe Report' on the subject of organised crime and corruption to support work on the own-initiative report on 'the fight against corruption and follow up of the CRIM committee<sup>1</sup> resolution', 2015/2110(INI) (rapporteur Laura Ferrara, EFDD, Italy).

In response to that request, this paper has been drawn up by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value within DG EPRS. Its aim is to help improve understanding of the subject matter by providing evidence of the specific benefits that could be achieved through European action to fight organised crime and corruption.

This assessment builds on expert research commissioned specifically for the purpose, provided by:

- RAND Europe, [research paper on the costs of non-Europe in the area of corruption](#);
- Centre for European Policy Studies (CEPS) & Optimity Advisors, [research paper on the costs of non-Europe in the area of organised crime](#); and
- Prof. Federico Varese, [Briefing paper providing an overall assessment of organised crime and corruption](#).

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<sup>1</sup> Special committee on organised crime, corruption and money laundering.

## **Abstract**

This study demonstrates the need to tackle organised crime and corruption together as the two are in a mutually reinforcing relationship. Organised crime groups attempt to regulate and control the production and distribution of a given commodity or service unlawfully. In so doing, their aim is to bend the rules in their favour by corrupting officials. Corruption undermines the rule of law, which in turn provides more opportunities for organised criminals to expand their control over the legal economy and politics or even to take over governance tasks in regions and communities.

Given their illicit nature and the need to interpret the available criminal justice data within a broader setting, the impact of organised crime and corruption is hard to measure. Within this context it is difficult to estimate with a sufficient degree of certainty an overall Cost of Non-Europe in this policy field. This study does, however, provide scenarios showing the cost of corruption to the European economy. The scenario deemed most feasible by us points to an economic loss in terms of GDP of between 218 and 282 billion euro annually. The study also builds on existing estimates of the size of illicit markets representing a value of around 110 billion euro and points to the significant social and political costs of organised crime and corruption.

The study seeks to establish the potential benefits of addressing the gaps and barriers that hinder a more effective fight against organised crime and corruption within the European Union. As combatting organised crime and corruption is a shared competence of the EU and its Member States, our estimates show the potential that could be achieved together by better transposition and enforcement of international and EU norms, filling the outstanding legislative gaps and improving the policy making process and operational cooperation between authorities. Where possible, the benefits of specific policy options to overcome gaps and barriers in the current framework have been quantified. The study demonstrates, based on quantified building blocks, that the Cost of Non-Europe in the field of organised crime and corruption is at least 71 billion euro annually.

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## **ABOUT THE PUBLISHER**

This paper has been drawn up by the **European Added Value Unit** of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament.

## **LANGUAGE VERSIONS**

Original: EN

Translations: DE, FR, IT

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Manuscript completed in March 2016. Brussels © European Union, 2016.

PE 558.779

ISBN 978-92-823-8822-8

doi: 10.2861/239695

QA-04-16-190-EN-N

## **Note on methodology**

The concept of the 'Cost of non-Europe' can be traced back to 1988, and the study carried out for the European Commission by the Italian economist Paolo Cecchini on the cost of non-Europe in the single market.

Cost of Non-Europe (CoNE) reports are designed to study the possibilities for gains and/or the realisation of a 'public good' through common action at EU level in specific policy areas and sectors. They attempt to identify areas that are expected to benefit most from deeper EU integration, where the EU's added value is potentially significant.

The specific aim of this Cost of Non-Europe report is to identify the costs of organised crime and corruption in social, political and economic terms at aggregate European Union level and examines the potential benefits of more concerted action at EU-level compared to the lack of action or action by Member States alone.

Wherever possible, it identifies the root cause of the gaps and barriers that hinder a more effective fight against Organised Crime and Corruption and classifies them according to their nature and relevance. Moreover, it examines different EU policy options and ascertains the extent to which those recommendations could help to overcome the identified gaps and barriers.

It also examines the other, non-economic benefits that further EU action could deliver in these areas. Where it was not possible to quantify all the costs and effects, a qualitative, complementary approach was used.

This Cost of Non-Europe report focuses on the Cost of Non-Europe in the policies covered by the Area of Freedom, Security and Justice.

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## Executive summary

Given their illicit nature, organised crime and corruption are hard to detect and measure. The availability of information is uneven across the Member States. And when it is available it is often not coherent. Furthermore, criminal justice statistics may be interpreted in different ways depending on whose perspective one takes and whose 'costs' are measured. This is of particular importance given the close relationship this area has with the protection of individual rights. Within this context, it is particularly difficult to estimate an overall Cost of Non-Europe in this policy field. This study therefore provides scenarios showing the extent of organised crime and corruption in the European Union, and the potential benefits of decreasing their impact. As combatting organised crime and corruption is a shared competence between the EU and its Member States, our estimates show the potential that could be achieved together. Where possible, the impact of specific EU measures to overcome gaps and barriers in the current framework has been quantified.

The European Commission has estimated that corruption costs the European economy 120 billion euro per year.<sup>2</sup> However, the Commission only included lost tax revenue and investments in its estimations, not counting further indirect cost components. This study builds on research which demonstrates that the loss to the European economy due to corruption ranges between 179 and 990 billion euro annually in GDP based on three different scenarios:<sup>3</sup>

- The 'magnificent seven' scenario calculates how much countries lose relatively in economic terms by not reaching the corruption level of the seven best performing Member States (economic loss: 870 to 990 billion euro);
- The 'catch me if you can' scenario calculates how much countries lose relatively in economic terms by not reaching the EU average corruption level (economic loss: 179 to 256 billion euro); and
- The 'goodfellas' scenario divides Member States into four different groups with similar institutional characteristics and levels of corruption. The scenario analyses how much countries lose relatively in economic terms by not reaching the level of the best performer within the corresponding peer group (economic loss: 218 to 282 billion euro).

This analysis considers the 'goodfellas' scenario to be the most feasible as it takes into account the difference in corruption levels between Member States. The scenario analyses how much countries lose relatively in economic terms by not reaching the level of the best performer within the corresponding peer group (economic loss 218 to 282 billion euro). In addition, corruption also has significant social and political costs. It is associated with more unequal societies, higher levels of organised crime, weaker rule of law,

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<sup>2</sup> COM(2014) 38, p. 3, footnote 3, see [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm).

<sup>3</sup> RAND (2016), executive summary and Chapter 2.



reduced voters turnout in national parliamentary elections and lower trust in EU institutions.

Estimating the costs of organised crime is especially difficult, particularly due to the absence of data collected independently from the serious crimes committed. A study conducted for the European Parliament in 2013, came up with figures for specific crimes.<sup>4</sup> More recently in a study conducted for the European Commission it has been estimated that the size of the illicit markets in the EU is around 1% of EU GDP, representing a value of around 110 billion euro.<sup>5</sup> Alternatively one may measure the impact of serious crimes in terms of their 'social harm', leading to an emphasis on the fight against white collar and environmental crimes.<sup>6</sup>

This study finds that the lack of ratification, transposition, implementation and enforcement of international and EU norms poses one of the main barriers in the European fight against organised crime and corruption. A number of gaps in the current legal framework can also be identified, such as the lack of a proper EU definition of organised crime, the absence of an EU directive approximating corruption in the public sector, the lack of an EU-wide system of whistle-blower protection and the fact that there is no consolidated framework for police and judicial cooperation. Corruption within EU institutions and fraud affecting the EU budget are investigated by the European Anti-Fraud Office (OLAF). However, OLAF relies on Member States to initiate prosecutions regarding the use of EU funds. Its referrals lead to very low conviction rates. In some instances, Member States have little interest in taking cases forward. This is due to a variety of reasons including an insufficient sense of ownership, conflicts of interest and lack of resources.

EU criminal policy preparation is still very much in the hands of the Member States' representatives, which raises issues in terms of prioritisation, effectiveness, proportionality and accountability. The criminal justice and fundamental rights dimension remains under-represented both in terms of actors involved and substantive considerations. Despite recent effort to involve more academic experts, there is also a lack of scientific control over threat assessments and their underlying methodology. The enhanced role of the European Parliament has so far not translated into practical and effective involvement in the development of EU criminal policy. Though the EU can take measures to promote and support the actions of the Member States in the field of crime prevention, there is no clear linkage between prevention and repression in the policy cycle.

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<sup>4</sup> Levi et al., 'The economic, financial and social impacts of organised crime in the European Union', PE 493.018, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN\\_ET\(2013\)493018\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN_ET(2013)493018_EN.pdf).

<sup>5</sup> Savona and Ricciardi (2015).

<sup>6</sup> CEPS (2016), p. 76; J. Sheptycki et al, 'International organised crime in the European Union', PE 462.420, paragraph 2.3, available at <http://www.europarl.europa.eu/document/activities/cont/201206/20120627ATT47775/20120627ATT47775EN.pdf>.

Efforts also need to be stepped up to make sure that crime does not pay by properly implementing and further improving EU measures and operational cooperation on the tracing, freezing and confiscation of criminal proceeds. Furthermore, a number of EU coordinated networks have so far escaped full scrutiny in terms of their effectiveness and compliance with fundamental rights.

Finally, there is an urgent need to improve the efficiency and quality of justice and for the establishment of a European professional culture of cooperation.

These gaps and barriers identified in an effective fight against organised crime and corruption cannot be overcome by a top down approach. Successful action depends on the commitment of local, regional and national authorities to contribute to and implement EU action in this area. A more sustainable inter-institutional dialogue among the different tiers of government has to be established. It also needs to be understood that the EU is not the only actor in the field. Duplication with efforts made at UN, Council of Europe and OECD (including Financial Action Task Force) level should be avoided. Furthermore, use should be made of the expertise of bodies such as the European Economic and Social Committee and the Committee of the Regions as well as civil society.

The study demonstrates that there is a need for a comprehensive and coherent EU Security and Justice framework which could contain the following building blocks:

1. A comprehensive evaluation system ensuring independent and objective assessment of the ratification, transposition, implementation and enforcement of the Security and Justice *acquis* based on the procedure provided for in Article 70 TFEU.
2. Improvements to address limitations of various monitoring mechanisms (the EU Anti-Corruption Report, the EU Justice Scoreboard and the Cooperation and Verification Mechanism) and possibly integrating them in a broader rule of law monitoring framework resulting in cost savings of 70 billion euro annually;<sup>7</sup> Inclusion of EU institutions in the EU Anti-Corruption Report and EU accession to GRECO to improve the monitoring of EU institutions.
3. Further approximation of definitions of and sanctions for (serious and) organised crime and corruption (both in the private and public sector) taking into account Parliament's demands on an EU approach on criminal law.
4. Measures providing protection to whistle-blowers ensuring more effective prevention and detection of corruption both within EU institutions and the Member States.
5. The establishment of an effective and truly independent European Public Prosecutor's Office fully integrated into the work of Europol and Eurojust and

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<sup>7</sup> RAND (2016), p. 109. The cost savings are based on estimation of the potential gains in terms of GDP from expanding a CVM-like mechanism to five other Member States (Croatia, Greece, Italy, Latvia and Lithuania) with the highest level of corruption within the European Union according to the International Country Risk Guide Corruption Index.

based on adequate procedural rights and data protection standards resulting in savings to the EU-Budget amounting to 200 million euro annually.<sup>8</sup>

6. The development of future and improvement of existing mutual recognition instruments such as the mutual recognition of freezing and confiscation orders and the European Arrest Warrant based on the benchmark provided by the European Investigation Order.
7. An EU Security and Justice policy cycle, building on and improving the current EU policy cycle on serious and organised crime through an in-depth review and audit by the European Court of Auditors; better integration of the European Parliament and national parliaments; ensuring that the intelligence led policing approach is brought under the remits of a criminal justice approach; the creation and involvement of a permanent group of academic experts on criminal law and policing in Europe ensuring the scientific quality of assessments of criminality; and the creation of a clear link with EU crime prevention, economic, social, employment and education policies.
8. The improvement and further development of police and judicial cooperation at operational level, including budgetary and training measures aimed at improving the efficiency and quality of justice and at developing knowledge of European laws and co-operation procedures.
9. The implementation of a full EU-wide e-procurement system, reducing the cost of corruption risk in public procurement by 920 million euro each year.<sup>9</sup>
10. Making sure that crime does not pay by properly implementing and further improving EU measures on the tracing, freezing and confiscation of criminal proceeds.

Based on the building blocks which could be quantified, the Cost of Non-Europe in the field of organised crime and corruption would be at least 71 billion euro annually.

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<sup>8</sup> RAND (2016), p. 110-112. If all Member States established a European Public Prosecutor's Office around 200 million euros of the EU budget could be recuperated per year. It is based on a predicted increase in prosecution and conviction rates.

<sup>9</sup> RAND (2016), p. 115. RAND predicts that the implementation of a full e-procurement system could reduce the costs of corruption risk in public procurement by around 924 million euros annually which corresponds to a reduction of almost 20% of the current costs.

## 1. The Cost of Non-Europe in the Area of Organised Crime and Corruption

With the entry into force of the Lisbon Treaty, the European Parliament obtained ordinary legislative powers in the area of internal security. In 2012, it set up a special committee on Organised Crime, Corruption and Money Laundering (CRIM), which in 2013 made a number of recommendations on the way forward, most of which remain relevant today.<sup>10</sup> The latest policy programme covering the area is the European Agenda on Security, on which Parliament adopted a resolution in July 2015. Parliament seeks full involvement in the EU policy cycle for organised and serious international crime. In particular, it stresses the need for the proper implementation and evaluation of the security *acquis*, the assessment of common and new security threats requiring further action, and compliance with the rule of law and fundamental rights of measures proposed, as well as their consistency with justice policies.<sup>11</sup> The own-initiative report on the fight against corruption and follow up of the CRIM committee resolution, which is currently in preparation in the LIBE committee, underlines Parliament's enduring commitment to the fight against organised crime and corruption.

This study highlights the need to tackle organised crime and corruption together as the two are in a mutually reinforcing relationship. As Varese explains further in his briefing paper, corruption is a form of exchange that takes place between two actors, the *corrupter* and an official. The official is an *agent* employed by a *principal* to implement its actions. The corrupter can be a member of the public or an organisation which wants to bend the rules laid down by the principal in their favour.<sup>12</sup> Organised crime groups attempt to regulate and control the production and distribution of a given commodity or service unlawfully. In so doing, they will wish to bend the rules in their favour by corrupting officials. Corruption undermines the rule of law, which in turn provides more opportunities for organised criminals to expand their control over the legal economy or politics or even take over governance tasks in regions and communities.

Given their illicit nature, organised crime and corruption are hard to detect and measure. The availability of information is uneven across the Member States. And when it is available it is often not coherent. Furthermore, criminal justice statistics may be interpreted in different ways depending on whose perspective one takes and whose 'costs' are measured. Within this context it is not easy to estimate an overall Cost of Non-Europe in this policy field. This study therefore provides scenarios showing the extent of organised crime and corruption and the potential benefits for the public good if the impact of organised crime and corruption were to be reduced in the Europe Union. As combatting organised crime and corruption is a shared competence of the EU and Member States, these scenarios show the potential gains that could be achieved together.

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<sup>10</sup> European Parliament resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report), P7\_TA(2013)0444.

<sup>11</sup> COM(2015) 185; European Parliament resolution of 9 July 2015 on the European Agenda on Security, P8\_TA-PROV (2015) 0269.

<sup>12</sup> Varese (2016); Corruption may be distinguished from fraud as the latter involves a misrepresentation, whereas corruption is about collusion for gain.

Where it has been possible to single out specific EU measures to overcome gaps and barriers in the current framework, an attempt has been made to quantify their impact.

### 1.1. The costs of corruption

The European Commission has estimated that corruption costs the European economy 120 billion euro per year based on estimates by specialised institutions and bodies, such as the International Chamber of Commerce, Transparency International, the UN and the World Economic Forum, which suggest that corruption amounts to 5% of GDP at world level.<sup>13</sup> However, the Commission only included lost tax revenue and investments in its estimations, not counting further indirect cost components.

This study builds on research that estimates the loss to the European economy due to corruption at between 179 and 990 billion euro in GDP annually. These figures are based on three different scenarios:<sup>14</sup>

- The '*magnificent seven*' scenario calculates how much countries lose relatively in economic terms by not reaching the corruption level of the seven best performing Member States (economic loss: 870 - 990 billion euro);
- The '*catch me if you can*' scenario calculates how much countries lose relatively in economic terms by not reaching the EU average corruption level (economic loss: 179 - 256 billion euro); and
- The '*goodfellas*' scenario divides Member States into four different groups with similar institutional characteristics and levels of corruption. The scenario analyses how much countries lose relatively in economic terms by not reaching the level of the best performing within the corresponding peer group (economic loss: 218 to 282 billion euro).

Public procurement is an element of the public sector which is particularly vulnerable to corruption. Decentralisation of procurement procedures particularly increases the risk of corruption. It is estimated that the costs of corruption risk in EU public procurement are around 5.33 billion euro annually.<sup>15</sup>

The three scenarios described above show the overall loss to the European economy and make no distinction between EU and national measures to reach the benchmark level used. However, they show the potential of combatting corruption. Corruption also has significant social and political costs. It is associated with more unequal societies, higher levels of organised crime, weaker rule of law, reduced voter turnout in national parliamentary elections and lower trust in institutions. Corrupt and inefficient governments negatively affect electoral participation at national and regional level, by disrupting the legislative process and by affecting the principles of legality and legal

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<sup>13</sup> COM(2014) 38, p. 3, footnote 3, see [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm).

<sup>14</sup> RAND (2016), executive summary and chapter 2.

<sup>15</sup> RAND (2016).

certainty. Corruption can hence corrode the institutions and foundations of democracy by producing inefficient delivery of public services, while 'graft' and bribes, erode the fundamental principles of democracy. Once it has taken root, corruption is likely to spread among institutions.<sup>16</sup>

## 1.2. The costs of organised crime

The costs of organised crime at EU level as such are hard to measure, also due to the difficulty to collect data independently from the crimes committed.<sup>17</sup>

U.N. figures point to a cost of 1.5% of GDP at world level.<sup>18</sup> Figures have been mentioned by the European Commission and House of Lords for specific crimes, such as fraud, ranging from 500 million euro to 5 billion euro<sup>19</sup> (see also the Cost of Non-Europe Report on Value Added Tax,<sup>20</sup> which in part goes to the EU budget). A study conducted for the European Parliament in 2013, came up with figures for specific crimes.<sup>21</sup> More recently, in a study conducted for the European Commission, it has been estimated that the size of the illicit markets in the EU is around 1% of EU GDP, representing a value of around 110 billion euro.<sup>22</sup> A note delivered in 2011 on request of the European Parliament proposed, however, to measure the impact of crimes in terms of 'social harm', leading to an emphasis on the fight against white collar and environmental crimes.<sup>23</sup> The more recent focus on corruption and the fight against tax havens at the EU level are to be seen as welcome steps in that regard. The issue of environmental crime has been another under-treated aspect of criminal activities at the EU level, which strongly affects EU citizens. Environmental crime is currently not a priority, despite growing concerns and very recent acknowledgement of the issue in Europol threat assessments.<sup>24</sup>

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<sup>16</sup> RAND (2016), p. 30.

<sup>17</sup> For an example from one of the Member States see H. Mills et al, 'Understanding organised crime: estimating the scale and the social and economic costs, UK Home Office Research Report 73, October 2013, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/246390/horr73.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246390/horr73.pdf).

<sup>18</sup> [http://www.unodc.org/documents/toc/factsheets/TOC12\\_fs\\_general\\_EN\\_HIRES.pdf](http://www.unodc.org/documents/toc/factsheets/TOC12_fs_general_EN_HIRES.pdf).

<sup>19</sup> [http://europa.eu/rapid/press-release\\_IP-13-709\\_en.htm](http://europa.eu/rapid/press-release_IP-13-709_en.htm) and <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldecom/158/158.pdf>.

<sup>20</sup> [http://www.europarl.europa.eu/EPRS/EPRS\\_Mapping\\_the\\_Cost\\_of\\_Non-Europe-June%202014.pdf](http://www.europarl.europa.eu/EPRS/EPRS_Mapping_the_Cost_of_Non-Europe-June%202014.pdf).

<sup>21</sup> M. Levi et al., 'The economic, financial and social impacts of organised crime in the European Union', PE 493.018, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN\\_ET\(2013\)493018\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN_ET(2013)493018_EN.pdf).

<sup>22</sup> Savona and Ricciardi (2015).

<sup>23</sup> J. Sheptycki et al, 'International organised crime in the European Union', PE 462.420, paragraph 2.3, available at <http://www.europarl.europa.eu/document/activities/cont/201206/20120627ATT47775/20120627ATT47775EN.pdf>; on organised crime and environmental crime see <http://efface.eu/research>.

<sup>24</sup> CEPS (2016), p. 32.

### 1.3. Barriers and gaps identified in an effective fight against organised crime and corruption

In the following section, the gaps and barriers that hinder a more effective fight against organised crime and corruption will be identified. Where possible, the root causes of these gaps and barriers will be explored as well. The main gaps and barriers consist of a lack of transposition, implementation and enforcement of international and EU norms, outstanding legislative gaps, a lack of accountability over policy making process and shortcomings in the operational cooperation between authorities.

#### 1.3.1. Transposition, implementation and enforcement

Despite international standards and EU measures, this study demonstrates that the lack of ratification, transposition, implementation and enforcement poses one of the main barriers in the European fight against organised crime and corruption. The various international and EU monitoring mechanisms are generally considered to have contributed to the compliance at Member State level. However there is a lack of horizontal and vertical integration in terms of consistency with related monitoring mechanisms and areas, for instance as regards criminal law and the rule of law more generally, as well as between international, EU, national, regional and local governance levels. The lack of implementation of standards and recommendations may be a reflection of different factors such as political will or administrative capacity. In some Member States, anti-corruption agencies, police and judicial authorities are hampered in their activities due to politicisation or insufficient resources.<sup>25</sup> It should be understood in this context that this area remains a shared competence between the EU and its Member States.<sup>26</sup> Member States remain ultimately responsible for the law enforcement and judicial measures taken on the ground<sup>27</sup> and for the budgetary resources they allocate to policing and the administration of justice.<sup>28</sup>

Member States are subject to a number of criminal law and anti-corruption measures stemming from EU and international law, including those agreed under the auspices of different institutions such as the UN,<sup>29</sup> Council of Europe<sup>30</sup> and OECD,<sup>31</sup> which also have

<sup>25</sup> RAND (2016), p. 79.

<sup>26</sup> Article 4(1) j TFEU.

<sup>27</sup> Article 85 (2), 87, 88(3), 86.

<sup>28</sup> CEPEJ Report on 'European judicial systems - Edition 2014, available at [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport\\_2014\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf).

<sup>29</sup> UN Convention on Corruption (UN General Assembly Resolution 58/4 of 31 October 2003). The UNCAC also includes a review mechanism, intended to assess the progress in its implementation. The EU acceded in 2008; United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25 of 15 November 2000).

<sup>30</sup> Criminal Law Convention on Corruption (STE 173, adopted in 1999) and its additional protocol adopted in 2003; Civil Law Convention on Corruption (STE 174, adopted in 1999); Resolution (97) 24 on the twenty guiding principles for the fight against corruption (1997); Recommendation No. R (2000) 10 on codes of conduct for public officials; Recommendation No. R (2003) 4 on common rules against corruption in the funding of political parties and electoral campaign.

<sup>31</sup> Convention on Combatting Bribery of Foreign Officials in International Business Transactions, OECD, 17 December 1997.

their own monitoring mechanisms. These international instruments are however subject to reservations and have not been ratified by all Member States as further detailed in the footnote.<sup>32</sup>

In the area of corruption, the most well-known monitoring body is the the Group of States against Corruption (GRECO). GRECO oversees members' compliance with existing Council of Europe anti-corruption standards. The overarching objective of GRECO's work is to generate pressure on its Member States to improve their fight against corruption. The mechanism to do so is through the identification of gaps in national policies and through the promotion of adequate reforms. GRECO can mobilise 'soft' enforcement levers and, together with the UN and OECD, it benefits from open channels of communication among entities that undertake similar activities. It nevertheless lacks 'hard' enforcement mechanisms and it only has limited resources. The EU and its institutions are subject to external review due to EU membership of the UN Convention on Corruption. However, such a review has not yet been completed. Similar scrutiny would be applied to the EU and its institutions should it accede to GRECO.<sup>33</sup>

The 2000 United Nations Convention against Transnational Crime is the main international instrument in the fight against transnational organised crime.<sup>34</sup> It criminalises participation in an organised criminal group or an agreement (conspiracy) to commit a crime (article 5) and corruption (article 8). The Convention also provides a framework for police and judicial cooperation. The 'double model' of criminalising either participation in a criminal organisation or conspiracy was inspired by – and is still maintained in – EU legislation, as will be discussed further in section 1.3.2. below.<sup>35</sup> The EU is a party to the Convention in accordance with article 36. All Member States have ratified it as well.<sup>36</sup> The United Nations Office on Drugs and Crime (UNODC) assists States in fighting transnational crime in all its dimensions, notably through capacity building.<sup>37</sup>

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<sup>32</sup> Germany has not ratified the Council of Europe's Criminal Law Convention. Four Member States have not ratified its Additional Protocol (Czech Republic, Estonia, Germany, Italy). The Civil Law Convention still awaits ratification in six Member States (Denmark, Germany, Ireland, Luxembourg, Portugal, United Kingdom). The OECD Anti-Bribery Convention has not been ratified by five EU Member States (none of the non-ratifying MS is a member of the OECD: Croatia, Cyprus, Lithuania, Malta, Romania (OECD, 2014a).

<sup>33</sup> [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/1\\_act\\_part1\\_v715\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/1_act_part1_v715_en.pdf).

<sup>34</sup> United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25 of 15 November 2000).

<sup>35</sup> For a more detailed background see EP Library Briefing, The EU response to organised crime, [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM\\_BRI\(2013\)130625\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf).

<sup>36</sup> See Status of ratification by Council of Europe Member States to the United Nations Convention against transnational organized crime, [http://www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-COT/UN%20convention\\_status%20of%20ratifications.pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-COT/UN%20convention_status%20of%20ratifications.pdf).

<sup>37</sup> UNODC annual report:

[https://www.unodc.org/documents/AnnualReport2014/Annual\\_Report\\_2014\\_WEB.pdf](https://www.unodc.org/documents/AnnualReport2014/Annual_Report_2014_WEB.pdf).



### *EU measures on monitoring and evaluation*

The European integration process brought new challenges and opportunities for those in charge of combatting organised crime and corruption. On the one hand, the EU can be affected directly by these phenomena through the misappropriation of EU funding. On the other hand, individual Member States are increasingly reliant on cross-border and EU level cooperation to support their law enforcement activities on the ground. This is especially the case for the 'Schengen Member States' that have lifted border controls among each other.<sup>38</sup>

Since December 2014, the European Commission is allowed to bring infringement proceedings against Member States for failing to (correctly) implement EU legislation in the area of police and judicial cooperation in criminal matters.<sup>39</sup> The increased enforcement powers of the Commission since December 2014 still need to translate into better implementation. A peer review system has been provided for by Article 70 TFEU:

*'Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.'*

Parliament has called for its use to comprehensively evaluate the implementation of the measures adopted in the area of internal security before the entry into force of the Lisbon Treaty.<sup>40</sup>

The EU also has its own monitoring mechanisms, such as the EU Anti-Corruption Report (ACR) and the Justice Scoreboard. Even though they joined the EU on 1 January 2007, Romania and Bulgaria still have a special position as their progress in combatting organised crime and corruption is monitored by the Commission in accordance with the Cooperation and Verification Mechanism (CVM).<sup>41</sup> Some more details on gaps and barriers are provided in the following paragraphs.

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<sup>37</sup> Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) O.J. L 105, 13.4.2006, p.1; for a consolidated version including subsequent amendments see <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1414687415278&uri=CELEX:02006R0562-20131126>.

<sup>39</sup> Protocol (No 36) on transitional provisions, O.J. C83/355 of 30.03.2010.

<sup>40</sup> European Parliament resolution of 9 July 2015 on the European Agenda on Security, P8\_TA-PROV (2015) 0269, paragraph 13.

<sup>41</sup> European Commission website, mechanism for cooperation and verification for Romania and Bulgaria, available at [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm).

### ***Anti-Corruption Report***

The Commission has set up a biennial EU Anti-Corruption Report to assess the fight against corruption in the Member States. A first report was published in 2014.<sup>42</sup> The report draws on existing datasets to monitor trends and to identify weaknesses. It consists of 28 country-specific reports and a summary report that offers thematic analyses. The preparation of the second edition of the ACR is in progress.<sup>43</sup> The ACR has raised the profile of the fight against corruption in the EU. It brings together a range of indicators relevant to corruption. It produces tailored country reports and is complemented by an anti-corruption experience sharing programme. However, the ACR includes little new data and there is no formal assessment procedure in terms of follow-up on country-specific recommendations. Nor does corruption at EU level fall within its scope. Monitoring and assessment at EU level therefore appear to be weaker than at Member State level.<sup>44</sup>

### ***Justice Scoreboard***

The Justice Scoreboard is an annual assessment of Member States' justice systems based on three types of parameters that are understood to define the effectiveness of a given judicial system: a) efficiency, b) quality and c) independence. In developing the scorecard, particularly in the areas of efficiency and quality, the EC built primarily on work done by the Council of Europe's Commission for the Efficiency of Justice (CEPEJ). Since effective justice systems are seen as an integral part of economic development, the results of the scoreboard feed into the European Semester of Economic Governance, a coordinating mechanism for economic policy within the EU, where a set of country-specific recommendations are formulated.<sup>45</sup> The Justice Scoreboard however does not have enforcement mechanisms and it is currently limited to civil, commercial and administrative justice.<sup>46</sup> The possible inclusion of criminal law is hampered due to a lack of available comparative data.<sup>47</sup>

### ***Cooperation and verification mechanism***

Cooperation and verification reports assess progress under the Cooperation and Verification Mechanism, with regard to judicial reform, the fight against corruption and, in Bulgaria's case, the fight against organised crime. They find their basis in the Act of Accession of the Member States concerned, implemented by two Commission

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<sup>42</sup> COM (2014) 38, available at [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf).

<sup>43</sup> RAND (2016), p. 71.

<sup>44</sup> RAND (2016), p. 84.

<sup>45</sup> For background see the EPRS in depth analysis European economic governance State of play and reform proposals, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571319/EPRS\\_IDA\(2015\)571319\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571319/EPRS_IDA(2015)571319_EN.pdf).

<sup>46</sup> See European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law, P7\_TA-PROV(2014)0231.

<sup>47</sup> RAND (2016), p. 87.

decisions.<sup>48</sup> The Cooperation and Verification Mechanism has been an important lever to push for reform in Bulgaria and Romania. It has proven to be a capacity-building tool which has been integrated in wider reforms and is supported by domestic authorities. Furthermore, the CVM reports are evidence-based and detailed. However, evidence of actual change is mixed, particularly as regards actual behavioural change as opposed to formal legislative compliance. The CVM is also seen as difficult to transfer given its specific context. It has been technical and costly to implement and it is seen as perhaps hampering the development of internal control mechanisms.<sup>49</sup>

### 1.3.2. Outstanding legislative gaps

The EU has the competence to establish minimum rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension.<sup>50</sup> A number of gaps in the current legal framework can be identified, such as the lack of a common EU definition of organised crime, the absence of an EU directive approximating corruption in the public sector and the lack of an EU-wide system of whistle-blower protection and of a consolidated framework for police and judicial cooperation. The specific gaps and barriers regarding these mechanisms will be discussed in more detail below.

#### *Organised crime*

The 2008 Framework decision on the fight against organised crime<sup>51</sup> retains the 'double model' of criminalizing either participation in a criminal organisation or conspiracy, taking into account the underlying differences between civil law and common law jurisdictions. All Member States except Denmark and Sweden have introduced the key elements of the Framework Decision. Denmark and Sweden have other alternative legal instruments to tackle criminal organisations (also known as the Scandinavian approach).<sup>52</sup>

Beyond maintaining the 'double model', the Framework decision has not resolved open issues as regards what constitutes a 'criminal organisation', including the actual degree of 'organisation' or 'association' required, the structure and exact number of persons involved, the actual level of knowledge of intention (in order to determine 'conspiracy'); and the actual degree of participation.<sup>53</sup> Even within the civil law jurisdictions there are important differences, notably as regards the incrimination of mafia-type associations.<sup>54</sup>

<sup>48</sup> C(2006) 6570 final (Bulgaria); C(2006) 6569 final (Romania); All progress reports are available at [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm).

<sup>49</sup> RAND (2016), p. 84-87.

<sup>50</sup> Article 83 TFEU.

<sup>51</sup> Council framework decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, O.J. L 300/42 of 11.11.2008.

<sup>52</sup> Varese (2016); Di Nicola et al. (2015); For an overview of the implementation of the Framework Decision by the Member States see Appendix I.

<sup>53</sup> CEPS (2016), p. 24.

<sup>54</sup> See Europol threat assessment, Italian Organised Crime [https://www.europol.europa.eu/sites/default/files/publications/italian\\_organised\\_crime\\_threat\\_assessment\\_0.pdf](https://www.europol.europa.eu/sites/default/files/publications/italian_organised_crime_threat_assessment_0.pdf).

The need for a 'Lisbonisation' of the Framework Decision has been analysed in several studies, but there is no consensus on the feasibility of capturing the different national traditions in a common legal definition.<sup>55</sup> The upcoming implementation report of the European Commission on the Framework Decision on organised crime will reveal its position on the matter.

These conceptual differences cannot be overcome through a simple 'legal check' of transposition of the Framework Decision in national law. One needs to take into account the definition of organised crime by courts and the use of the concept in terms of prosecutions and convictions.<sup>56</sup> In addition, there is a need to review the EU's approach to organised crime in view of societal and technological changes.<sup>57</sup> Technological changes present new risks, but also offer opportunities to protect oneself better against criminality, for instance by moving to online business, thereby escaping the organised crime group controlling the local economy<sup>58</sup>, or to e-procurement, limiting the possibility for fraud and corruption.<sup>59</sup>

The question is whether legal definitions should not be supplemented by practical guidelines based on criminological and forensic expertise. An example is provided by the briefing paper of Professor Varese which has fed into this Cost of Non-Europe Report. Professor Varese argues in favour of addressing governance issues related to organised crime and mafia associations through interventions going beyond the application of criminal law. He contends that a one size fits all approach does not work. Legislation on organised crime should reflect the domestic threat and nature of the activities. Judicial cooperation based on mutual recognition might to a certain extent solve the problem of differences in definition at national level.<sup>60</sup>

Organised crime groups are very diverse as regards their actual level of organisation.<sup>61</sup> However, among them we do find groups with a high degree of organisation which attempt to regulate and control the production and distribution of a given commodity or service unlawfully. Mafias are one such type of organised crime group attempting to control a special type of 'commodity', namely protection, in a given context. Together with the attempt to 'govern', the 'production' and 'trade' of illegal goods are activities

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<sup>55</sup> V. Mitsilegas, 'The Council framework decision on organised crime, what can be done to strengthen EU legislation in the field', Note written for DG IPOL, European Parliament, 2011, PE.453.195.

<http://www.europarl.europa.eu/document/activities/cont/201206/20120627ATT47779/20120627ATT47779EN.pdf> ; A. di Nicola et al., 'Study on paving the way for future policy initiatives in the

field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime', Study written for the European Commission, DG HOME, February 2015, [http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312\\_1\\_amoc\\_report\\_020315\\_0\\_220\\_part\\_1\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312_1_amoc_report_020315_0_220_part_1_en.pdf) and

[http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312\\_1\\_amoc\\_report\\_020315\\_0\\_220\\_part\\_2\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312_1_amoc_report_020315_0_220_part_2_en.pdf) ; CEPS (2016); Varese (2016).

<sup>56</sup> CEPS (2016), p. 24.

<sup>57</sup> <https://www.europol.europa.eu/content/exploring-tomorrow%E2%80%99s-organised-crime> .

<sup>58</sup> Varese (2016).

<sup>59</sup> RAND (2016), p. 115.

<sup>60</sup> Varese (2016).

<sup>61</sup> <https://www.europol.europa.eu/content/exploring-tomorrow%E2%80%99s-organised-crime> .

from which a theoretical framework for the understanding of mafia style organised crime can be built.<sup>62</sup>

Another key point to understand is that organised crime groups which 'govern' in certain areas, such as southern Italy, adopt a form of functional diversification allowing them to 'trade' in illegal goods or invest in other Member States without seeking to govern there. Therefore, these groups operate very much like businesses, seeking out opportunities in other Member States, without necessarily migrating there or aiming to govern. Conversely, repression in one Member State might lead to a displacement effect on other Member States. Hence the need for an EU and global approach to the fight against organised crime.

### ***Corruption***

The first EU legislation related to corruption dates from the 1990s, notably with regard to the protection of the EU's financial interests.<sup>63</sup> A proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law is currently under negotiation. This draft Directive also shows the link between fraud and active or passive corruption of public officials (defined in article 4 of the proposal).<sup>64</sup>

The EU has also adopted a framework decision on combatting corruption in the private sector.<sup>65</sup> The quality of transposition has been uneven across Member States and in some cases incomplete, with some articles having been transposed correctly only by a minority of Member States.<sup>66</sup> Furthermore, in 2008 the Council decided to establish a contact-point network against corruption, which would serve as a forum for exchanging information on measures and experience in the fight against corruption.<sup>67</sup> Some gaps in legislation can still be identified, such as the absence of a harmonised definition of a public official. This also presents a barrier to the adoption of a comprehensive EU instrument on corruption in the public sector.<sup>68</sup>

### ***Whistle-blower protection***

Another gap to be highlighted is the lack of an EU-wide system of whistle-blower protection. Protection for such individuals is internationally recognised as essential to fight corruption and is already featured in a number of international instruments

<sup>62</sup> Varese (2016).

<sup>63</sup> Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, Official Journal C 316, 27/11/1995, p. 48-57.

<sup>64</sup> [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0193\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0193(COD)&l=en); on the link between organised crime and corruption more generally see Center for the study of democracy, examining the links between organised crime and corruption, study produced for the European Commission, DG Justice, Freedom and Security, 2010.

<sup>65</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combatting corruption in the private sector.

O.J. L 192/54 of 31.07.2003; Implementation reports COM(2007) 328, COM(2011) 309.

<sup>66</sup> Implementation report COM(2011) 309.

<sup>67</sup> Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption, O.J. L 301/38 of 12.11.2008.

<sup>68</sup> RAND (2016).

(UNCAC, OECD and Council of Europe). The UNCAC requests that Member States consider whistle-blower protections in their domestic legal systems.<sup>69</sup> A similar recommendation to introduce whistle-blower protection measures is made in the OECD's 1997 Convention on Combatting Bribery of Foreign Public Officials and in the Council of Europe's Twenty Guiding Principles for the Fight Against Corruption and Civil Law Convention on Corruption.<sup>70</sup> The Committee of Ministers of the Council of Europe issued a Recommendation on the Protection of Whistle-blowers in 2014.<sup>71</sup>

Such a system has also been called for by the European Parliament in its resolution of 8 September 2015 on the situation of fundamental rights in the European Union.<sup>72</sup> Whistle-blower protection in EU Member States remains patchy, however.<sup>73</sup> It has also been argued that there are insufficient provisions for the protection of whistle-blowers seeking to report on serious irregularities in EU institutions.<sup>74</sup>

### **OLAF**

Corruption within EU institutions and fraud affecting the EU budget are investigated by the European Anti-Fraud Office (OLAF). However, OLAF relies on Member States to initiate prosecutions regarding the use of EU funds. Its referrals lead to very low conviction rates.<sup>75</sup> In some instances, Member States have little interest in taking cases forward, due to a variety of reasons, including a lack of a sense of ownership, conflicts of interest, or lack of resources.<sup>76</sup>

### ***Mutual recognition instruments***

The current framework for judicial cooperation is governed by a combination of Council of Europe and EU instruments on mutual legal assistance and a number of EU instruments based on the principle of mutual recognition. The latter instruments depart

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<sup>69</sup> UNCAC, Article 33.

<sup>70</sup> Article 9: 'Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.'

<sup>71</sup> Recommendation CM/Rec(2014)7

[http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf).

<sup>72</sup> European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), P8\_TA-PROV(2015)0286: '163. Calls on the EU and the Member States to provide for measures to support and protect whistle-blowers who denounce illegal actions'.

<sup>73</sup> For an overview, see European University Institute, Whistleblowing Protection Laws – EU Member States Laws <http://journalism.cmpf.eui.eu/maps/whistleblowing/>.

<sup>74</sup> See also 2015/2041(INI): Transparency, accountability and integrity in the EU institutions; the European Parliament has new whistle-blower rules in place since 1 January 2016, see [http://www.transparencyinternational.eu/wp-content/uploads/2016/01/ri\\_artil22quater\\_whistleblowing\\_en.pdf](http://www.transparencyinternational.eu/wp-content/uploads/2016/01/ri_artil22quater_whistleblowing_en.pdf).

<sup>75</sup> [OLAF report 2014](#), pp 23–24; COM (2015) 0386; Protection of the European Union's financial interests-Fight against fraud-2014 Annual Report; 2015/2128 (INI) on the Annual Report 2014 on the Protection of the EU's Financial Interests- Fight against fraud.

<sup>76</sup> RAND (2016).

from the idea of assistance toward automatic enforcement of the decision in the other Member State, subject to grounds for non-execution and wider Treaty obligations. However, as illustrated by the European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant,<sup>77</sup> the lack of a comprehensive approximation of the area of mutual legal assistance and extradition, substantive criminal law, as well as procedural safeguards and human rights clauses, has frustrated judicial cooperation and opened the door for abuses such as the disproportionate issuing of European Arrest Warrants.

Directive 2014/41/EU on the European Investigation Order<sup>78</sup> is a key measure to overcome delays in the gathering and transfer of evidence from another Member State, while maintaining a number of safeguards, including a fundamental rights ground for non-execution.<sup>79</sup> It also seeks to establish the principle that its use should be considered before issuing a European Arrest Warrant.<sup>80</sup> Member States need to take the necessary measures to comply with this Directive by 22 May 2017.<sup>81</sup> With the European Investigation Order, the co-legislators have set a benchmark for future mutual recognition instruments. The challenge will be to make sure that all such instruments work together in a coherent way ensuring effective and proportionate cooperation.

### 1.3.3. Gaps in accountability of the policy making process

The main forum for discussion of criminal intelligence and operational law enforcement cooperation between Member States, known as the EU policy cycle for serious and organised international crime, remains the Council committee on internal security (COSI).<sup>82</sup> This lack of conceptual clarity concerning organised crime has a knock-on effect on EU criminal policy preparation, which in addition is still very much in the hands of the Member States representatives, raising issues in terms of prioritisation, effectiveness, proportionality and accountability. The criminal justice and fundamental rights dimension remains under-represented, both in terms of actors involved and substantive considerations. There is also a lack of scientific control over threat assessments produced

<sup>77</sup> P7\_TA-PROV(2014)0174, paragraph 5 calling for a 'horizontal measure establishing principles applicable to all mutual recognition instruments' in particular.

<sup>78</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J. L 130*, 1.5.2014, p. 1-36; Wouter van Ballegooij, *The Nature of mutual recognition in European law, re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia, Antwerpen, 2015, chapter 5.2.

<sup>79</sup> Article 11 (f) there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter.

<sup>80</sup> Recital 26: 'With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.'

<sup>81</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J. L 130*, 1.5.2014, p. 1-36.

<sup>82</sup> Article 71 TFEU.

by Europol, whose methodology remains contested despite recent efforts to involve academics. The enhanced role of the European Parliament has so far not translated into a practical and effective involvement in the development of the EU policy cycle.<sup>83</sup> Though the EU can take measures to promote and support the actions of the Member States in the field of crime prevention, these exclude harmonisation.<sup>84</sup> There is no clear linkage between prevention and repression in the policy cycle.

#### **1.3.4. Shortcomings in operational cooperation between authorities**

The EU also supports and strengthens police and judicial cooperation between Member State law enforcement authorities, including through its agencies, notably Europol, Eurojust and CEPOL.<sup>85</sup> This cooperation includes the setting up of Joint Investigation Teams, the exchange of information, resolving procedural and practical difficulties resulting from differences in the legal systems and the facilitation of mutual recognition of judicial decisions (regarding freezing and confiscation of criminal assets, arrest for prosecution and execution of sentences, investigative measures etc.). However, the assistance and expertise of the EU's agencies and possibilities for police and judicial cooperation are currently not used by national authorities to their full potential.<sup>86</sup> These problems have been exacerbated by the patchy implementation of 'pre-Lisbon' EU legislation by the Member States.<sup>87</sup>

Recognising the generally positive effect of police and judicial cooperation at an operational level on the investigative capabilities of the EU, the papers produced for this study have highlighted the need to improve and further develop such cooperation in the future.<sup>88</sup> Evidence shows that EU tools are used more often once practitioners become more familiarised with them through training.

Joint Investigation Teams (JITs) are a crucial tool for cross-border cooperation in terms of investigation but also exchange of information on particular cases. Though used more often over the recent years, JITs have faced operational and legal obstacles related to their legal bases and their transposition by Member States, lack of familiarity with the organisational structure and proceedings in the other Member State, and lack of trust between participants. There is a need to further facilitate and clarify the rules surrounding the use of JITs, including as regards the responsibilities of participants.

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<sup>83</sup> M. Busuioc and D. Curtin, 'The EU Internal Security Strategy, The EU Policy Cycle and The Role of (AFSJ) Agencies, Promise, Perils and Pre-requisites, PE 453.185, section 5.3, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453185/IPOL-LIBE\\_ET\(2011\)453185\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453185/IPOL-LIBE_ET(2011)453185_EN.pdf).

<sup>84</sup> Article 84 TFEU.

<sup>85</sup> Articles 82, 85, 87, 88.

<sup>86</sup> Eurojust, *evaluation of the Eurojust Council Decision and the activities carried out by Eurojust*, EY, 2015, Council document 11260/15.

<sup>87</sup> *Implementing the Lisbon Treaty, Improving the functioning of the EU on Justice and Home Affairs*, Study for the AFCO committee, PE 519.225, 2015.

<sup>88</sup> CEPS (2016), chapter 4.



### *Making sure that crime does not pay*

The main motive for organised crime, including mafia-type criminal organisation, is financial gain. The tracing, freezing and confiscation of criminal proceeds are therefore key in fighting organised crime. Beyond depriving criminals of their financial gain, the recovered proceeds may also be used by the state to compensate victims, invest in projects aimed at crime prevention or to strengthen communities heavily affected by organised crime. However, the obstacles to cooperation remain formidable, notably due to the outstanding differences in approach between the various legal systems of the Member States.

The detection of illicit financial flows is facilitated by the EU's Anti-Money Laundering *acquis*.<sup>89</sup> Financial Intelligence Units (FIUs) and Asset Recovery Offices<sup>90</sup> contribute to tracing and identifying proceeds from crime. EU coordinated networks in the area of financial intelligence and anti-money laundering have, however, so far escaped full scrutiny in terms of their effectiveness and compliance with fundamental rights.

A number of EU instruments have also been adopted to facilitate the freezing and confiscation of criminal proceeds.<sup>91</sup> The last one was Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.<sup>92</sup> This Directive contains new rules as regards confiscation in cases where a final conviction was not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person (non-conviction based confiscation).<sup>93</sup> It also allows for confiscation of property derived from criminal conduct not directly related to the crime for which the individual has been convicted (extended confiscation). Furthermore, it allows for confiscation of proceeds, or other property transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew, or ought to have known, that the purpose of the transfer or acquisition was to avoid third party confiscation.<sup>94</sup> The

<sup>89</sup> Most recently Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, *O.J. L* 141, 5.6.2015, p. 73-117.

<sup>90</sup> Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, *O.J. L* 332/103 of 18.07.2007.

<sup>91</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *O.J. L* 196, 2.8.2003, p. 45-55; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, *O.J. L* 68, 15.3.2005, p. 49-51; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *O.J. L* 328, 24.11.2006, p. 59-78.

<sup>92</sup> Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, *O.J. L* 127, 29.4.2014, p. 39-50.

<sup>93</sup> Article 4.

<sup>94</sup> Article 6.

Directive also contains provisions on the management of frozen and confiscated property,<sup>95</sup> reference to possibilities for social re-use of assets,<sup>96</sup> and provisions on safeguards.<sup>97</sup> Even so, this Directive has not created a level playing field. Significant differences remain at national level regarding third party and non-conviction based confiscation in particular.

#### **1.4. Possible options for action at EU level**

The gaps and barriers identified in an effective fight against organised crime and corruption cannot be overcome by a top down approach. Successful action depends on the commitment of local, regional and national authorities to contribute to and implement EU action in this area. It also needs to be understood that the EU is not the only actor in the field. Duplication with efforts made at UN, Council of Europe and OECD level should be avoided. Furthermore, use should be made of the expertise of bodies such as the European Economic and Social Committee and the Committee of the Regions as well as civil society.

The study demonstrates that there is a need for a comprehensive and coherent EU Security and Justice framework which could contain the following building blocks:

1. A comprehensive evaluation system ensuring independent and objective assessment of the ratification, transposition, implementation and enforcement of the Security and Justice *acquis* based on the procedure provided for in Article 70 TFEU.

Action to enforce the Union *acquis* should not only lead to more effective cooperation but ensure that this cooperation complies with fundamental rights safeguards. The EU should use its enforcement powers in such a way that they complement the soft powers of international organisations such as the UN and Council of Europe. Article 70 TFEU should be used to develop a permanent and regular (objective and impartial) evaluation system. The evaluation method should start by setting up a permanent group of academic experts on criminal law and policing in Europe.<sup>98</sup>

2. Improvements to address limitations of various monitoring mechanisms (the EU Anti-Corruption Report, the EU Justice Scoreboard and the Cooperation and

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<sup>95</sup> Article 10.

<sup>96</sup> Recital 35: 'Member States should consider taking measures allowing confiscated property to be used for public interest or social purposes. Such measures could, inter alia, comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility. That obligation to consider taking measures entails a procedural obligation for Member States, such as conducting a legal analysis or discussing the advantages and disadvantages of introducing measures. When managing frozen property and when taking measures concerning the use of confiscated property, Member States should take appropriate action to prevent criminal or illegal infiltration.'

<sup>97</sup> Article 8.

<sup>98</sup> CEPS (2016), p. 81.

Verification Mechanism<sup>99</sup>) and possibly their integration into a broader rule of law monitoring framework; inclusion of EU institutions in the EU Anti-Corruption Report and EU accession to GRECO to improve the monitoring of EU institutions.

The inclusion of the EU in the ACR would not, however, result in an independent, external review. Expanding a CVM-like mechanism to other Member States could extend monitoring programmes to those Member States that fare poorly in the ACR reports or GRECO assessments. According to RAND, this could reduce the cost of corruption by around 70 billion euro.<sup>100</sup> Even though the CVM was part of the accession treaties, Member States are likely to raise subsidiarity concerns.

The EU would strongly benefit from an external review conducted according to GRECO standards, and in line with its principle of equal treatment of members. It would also have positive spill over effect at the level of individual Member States in the form of better coordination of anti-corruption policies and monitoring of the state of play. The question that needs to be answered is to what extent accession to GRECO is a legal issue tied up with EU accession to the European Convention for the Protection of Human Rights and the objections raised in the relevant ruling on the draft accession agreement by the Court of Justice,<sup>101</sup> or a matter where there are outstanding political sensitivities.

3. Further approximation of definitions of and sanctions for (serious and) organised crime and corruption (both in the private and public sector) taking into account Parliament's demands on an EU approach on criminal law<sup>102</sup>.

As regards organised crime the case for 'Lisbonisation' would need to be further discussed based on the upcoming implementation report of the European Commission on the Framework Decision on organised crime, taking into account the difficulty to overcome the differences between legal approaches so far and potential alternatives offered by focusing on operational aspects.

As regards corruption, the case for this would need to be further assessed based on the outcome of the negotiations on the proposal for a Directive on criminal law protection from fraud and related offences to the EU financial interests (COM(2012) 363) which includes a definition of public official.

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<sup>99</sup> Potentially reducing the cost of corruption by around 70 billion euro (RAND).

<sup>100</sup> RAND (2016), p. 109. The cost savings are based on estimation of the potential gains in terms of GDP from expanding a CVM-like mechanism to five other Member States (Croatia, Greece, Italy, Latvia and Lithuania) with the highest level of corruption within the European Union according to the International Country Risk Guide Corruption Index.

<sup>101</sup> Court of Justice of the European Union, Opinion 2/13 of 18 December 2014, not yet published. Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties.

CEPS (2016), p. 76<sup>102</sup> European Parliament resolution of 9 July 2015 on the European Agenda on Security, P8\_TA-PROV(2015)14 (2015).

<sup>102</sup> European Parliament resolution of 22 May 2012 on an EU approach to criminal law, P7\_TA(2012)0208.

4. Measures providing protection to whistle-blowers ensuring more effective prevention and detection of corruption both within EU institutions and the Member States. Subject to the determination of the existence of an appropriate legal basis, sectorial legislation could be developed particularly to cover whistle-blowing on corrupt practices in the area of public procurement. Another option would be for companies providing services to EU institutions to demonstrate whistle-blowing protection. This would be somewhat akin to the approach taken in the US in accordance with the Sarbanes Oxley Act.<sup>103</sup> Non-legislative options include the development of a whistle-blowing pact among Member States similar to Member States' agreements in other policy areas such as the area of economic governance.<sup>104</sup>
5. The establishment of an effective and truly independent European Public Prosecutor's Office fully integrated into the work of Europol and Eurojust and based on adequate procedural rights and data protection standards resulting in cost savings of 200 million euro annually.<sup>105</sup>

The negotiations in Council have led to some changes to the Commission proposal which risk weakening its effectiveness, notably the introduction of the collegiate structure with permanent chambers at the central level. However, the appointment procedure might allay such concerns. Its integration in the work of Europol and, notably, Eurojust, will also depend on the reform of the latter's mandate.<sup>106</sup>

6. The development of future and improvement of existing mutual recognition instruments such as the mutual recognition of freezing and confiscation orders and the European Arrest Warrant based on the benchmark provided by the European Investigation Order.<sup>107</sup>
7. An EU Security and Justice policy cycle building on and improving the current EU policy cycle on serious and organised crime by:

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<sup>103</sup> RAND (2016), p. 96. The Sarbanes Oxley Act (L. 107-204, 116 Stat. 745), was enacted in 2002, following the scandals of Enron and WorldCom, as an effort to reform corporate governance and improve financial regulation in the United States. The act expanded the protection of private-sector whistle-blowers, who until then were largely protected only if reporting concerns related to public health and safety, and broadened the scope of protected disclosures. The act also introduced stronger penalties and corrective measures (both civil and criminal) for any reprisals against whistle-blowers and made the burden of proof favourable to employees.

<sup>104</sup> RAND (2016), p. 91.

<sup>105</sup> RAND (2016), p. 110-112. If all Member States established a European Public Prosecutor's Office around 200 million euros of the EU budget could be recuperated per year. The estimate is based on a predicted increase in prosecution and conviction rates.

<sup>106</sup> 2013/0265 (COD) EU Agency for Criminal Justice Cooperation (Eurojust), rapporteur Axel Voss, EPP, Germany.

<sup>107</sup> This has already been called for in the European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant P7\_TA-PROV(2014)0174, paragraph 5 calling for a 'horizontal measure establishing principles applicable to all mutual recognition instruments' in particular.

- an in-depth review and audit by the European Court of Auditors of all the funding which has been spent in the context of the EU policy cycle and EMPACT projects aimed at combatting priority threats;
  - better integration of the European Parliament and national parliaments in policy preparation, prioritisation and implementation, making full use of the joint parliamentary scrutiny powers over Europol;
  - ensuring that the intelligence led policing approach is brought under the remit of a criminal justice approach, both in terms of actors shaping the policy cycle on serious and organised crime and the policies and actions resulting from it;
  - ensuring the scientific quality of assessments of criminality;<sup>108</sup> and
  - the creation of a clear link with EU crime prevention, economic, social, employment and education policies.
8. The improvement and further development of police and judicial cooperation at operational level, including budgetary and training measures aimed at improving the efficiency and quality of justice and the establishment of a European professional culture; the use of Joint Investigation Teams should be further promoted through simplifying the procedure for setting them up and a revised Model Agreement which has clearer rules regarding leadership, responsibility, accountability and liability issues, as well as reporting mechanisms. Further training by the European Police College (CEPOL) and the European Judicial Training Network is supported. This includes measures aimed at improving the efficiency and quality of justice.<sup>109</sup>
9. The implementation of a full EU wide e-procurement system reducing the cost of corruption risk in public procurement by around 920 million euro each year.<sup>110</sup>
10. Making sure that crime does not pay by properly implementing and further improving EU measures on the tracing, freezing and confiscation of criminal proceeds. This should start with an assessment of the compliance of EU coordinated networks with their relevant frameworks. There also needs to be a proper check of the transposition of Directive 2014/42 on Confiscation, particularly as regards extended confiscation, non-conviction based confiscation, third party confiscation, the management of frozen and confiscated property, possibilities for social reuse of assets, and the applicable safeguards.<sup>111</sup> Further steps to increase effectiveness in this area should go hand in hand with meeting fair trial principles,

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<sup>108</sup> CEPS (2016), p. 81.

<sup>109</sup> RAND (2016); CEPS (2016); Varese (2016).

<sup>110</sup> RAND (2016), p. 115. RAND predicts that the implementation of a full e-procurement system could reduce the costs of corruption risk in public procurement by around 924 million euros annually which corresponds to a reduction of almost 20% of the current costs.

<sup>111</sup> The transposition deadline was 4 October 2015.

including the presumption of innocence and the rights to an effective remedy, including through explicit grounds for non-execution for fundamental rights in line with the EIO benchmark.

## **2. Recommendations**







Significant benefits could be achieved by the EU and its Member States addressing the gaps and barriers that hinder a more effective fight against organised crime and corruption within the European Union. These benefits could be achieved by better transposition and enforcement of international and EU norms, filling the outstanding legislative gaps, improving the policy making process and operational cooperation between authorities.

## APPENDIX I – Implementation of Framework Decision 2008/841/JHA on Organised Crime

Member State	Implementation date	National legislation
 <a href="#">Austria</a>	✓	-
 <a href="#">Belgium</a>	✓	-
 <a href="#">Bulgaria</a>	✓	-
 <a href="#">Croatia</a>	✓ 1 January 2013	Criminal code (Official Gazette No 125/11); Act on the Responsibility of Legal Persons for Criminal Offences (Official Gazette No 151/03, 110/07, 45/11, 143/12 ).
 <a href="#">Cyprus</a>	✗	-
 <a href="#">Czech Republic</a>	✓ 1 January 2014	Currently this problematic is covered mainly by the Criminal Code no. 40/2009 (entry into force on 1 January 2010) and the Act on criminal liability of legal persons no. 418/2011 (entry into force on 1 January 2012), the Act of 20 March 2013 on International Judicial Cooperation in Criminal Matters (came into force on 1 January 2014) and the Code on criminal procedure no. 141/1961.
 <a href="#">Denmark</a>	✓	-
 <a href="#">Estonia</a>	✓	-
 <a href="#">Finland</a>	✓	-
 <a href="#">France</a>	✓	-

Member State	Implementation date	National legislation
 <a href="#">Germany</a>	✓	Partial implementation
 <a href="#">Greece</a>	🔄 process ongoing	Partial implementation
 <a href="#">Hungary</a>	✓	-
 <a href="#">Ireland</a>	✓	-
 <a href="#">Italy</a>	✗	-
 <a href="#">Latvia</a>	✓	-
 <a href="#">Lithuania</a>	✓	-
 <a href="#">Luxembourg</a>	✗	Transposition unnecessary as the compulsory regulations already exist in national law.
 <a href="#">Malta</a>	✓	<a href="#">Article 83A of the Criminal Code, Cap.9</a>
 <a href="#">Netherlands</a>	✓	-
 <a href="#">Poland</a>	✓	-
 <a href="#">Portugal</a>	✓	-



Member State	Implementation date	National legislation
 <a href="#">Romania</a>	✗ -	-
 <a href="#">Slovakia</a>	✓ 1 September 2010	Act no 300/2005 Coll. of 20/05/2005, Criminal Code as amended by the Act no 224/2010 Coll.
 <a href="#">Slovenia</a>	✗ -	-
 <a href="#">Spain</a>	✓	-
 <a href="#">Sweden</a>	✓ 1 July 2011	-
 <a href="#">United Kingdom</a>	✗ -	-

Source: [European Judicial Network](#).





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This study identifies the costs of organised crime and corruption in social, political and economic terms for European Union Member States and examines the potential benefits of more concerted action at EU level compared to lack of action, or action by Member States alone.

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This is a publication of the European Added Value Unit  
EPRS | European Parliamentary Research Service  
European Parliament

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PE 558.779

ISBN 978-92-823-8822-8

doi: 10.2861/239695

QA-04-16-190-EN-N